

10-28-2009

# Farm Bureau Ins. Co. of Idaho v. Kinsey Respondent's Brief Dckt. 36607

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"Farm Bureau Ins. Co. of Idaho v. Kinsey Respondent's Brief Dckt. 36607" (2009). *Idaho Supreme Court Records & Briefs*. 120.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/120](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/120)

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law.

IN THE SUPREME COURT OF THE STATE OF IDAHO

FARM BUREAU MUTUAL INSURANCE )  
COMPANY OF IDAHO, )

Plaintiff, )

vs. )

JAMEY KINSEY and )  
M. WILMOTH KINSEY, D/B/A KINSEY )  
FAMILY LIMITED PARTNERSHIP, )

Defendants. )

---

MICHAEL BROOKBANK, )

Intervenor/Appellant. )

---

) Docket No. 36607-2009

**RESPONDENT'S BRIEF**

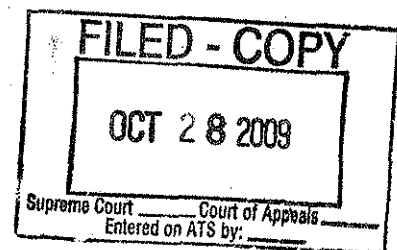
On Appeal from the decision of the District Court of the Fifth Judicial District  
In for the Count of Twin Falls  
Hon. Randy J. Stoker Presiding

Jeffrey J. Hepworth  
JEFFREY J. HEPWORTH & ASSOCIATES  
P.O. Box 1806  
Twin Falls, Idaho 83303-1806

*Attorneys for Intervenor/Appellant*

Kent L. Hawkins  
MERRILL & MERRILL, CHARTERED  
P.O. Box 991  
Pocatello, Idaho 83204-0991

*Attorneys for Plaintiff/Respondent*



**TABLE OF CONTENTS**

TABLE OF CITATIONS AND AUTHORITIES ..... ii

I. STATEMENT OF THE CASE ..... 1

II. ARGUMENT ..... 1

    A. STANDARD OF REVIEW ..... 1

    B. UNDISPUTED FACTS ..... 1

    C. LAW AND ANALYSIS ..... 3

CONCLUSION ..... 8

**TABLE OF CITATIONS AND AUTHORITIES**

<u>CASES</u>	<u>PAGE</u>
<i>Allstate Ins. Co. vs. Mocaby</i> , 133 Idaho 593, 990 P.2d 1204 (1999) .....	4, 5, 7, 8
<i>Aid Ins. Co. vs. Armstrong</i> , 119 Idaho 897, 811 P.2d 507 (1991) .....	6
<i>Hardware Mutual Cas. Co. v. Home Indemnity Co.</i> , 241 Cal.App.2d 303 (1966) .....	7
<i>Hernandez v. Comco Ins. Co.</i> , 357 So. 2d 1368 (La App. 1978) .....	8

## I. STATEMENT OF THE CASE

Farm Bureau (respondent) agrees with Appellant's Statement of the Case, except to point out that the issue is whether Mr. Kinsey was a "resident of your [his grandmother's] household," as required by the specific policy language.

Additionally, the trial court's opinion includes a section entitled the "Nature of Controversy" which contains an accurate and objective statement of the case. R. 127.

## II. ARGUMENT

### A. STANDARD OF REVIEW

Respondent agrees with Appellants statement of the standard of review.

### B. UNDISPUTED FACTS

1. Defendant "M. Wilmoth Kinsey, DBA Kinsey Family Limited Partnership" is the named insured on Farm Bureau insurance policy no. 01-+-095197-01 (the "FB policy"). R. 11.
2. Defendant Jamey Kinsey is the grandson of M. Wilmoth Kinsey.
3. Jamey Kinsey is in his late thirties, and is at least 37 years old. R. 68, 80 (*Jamey Kinsey*, 7:16; *Wilmoth Kinsey*, 15:6).
4. Jamey Kinsey has been sued by Michael Brookbank (the "Brookbank suit.") The Brookbank complaint alleges: "On August 18, 2007, at approximately 5:50 p.m., Plaintiff [Brookbank] was southbound on 3500 East when a medium sized dog ran out from the driveway of the Defendant's residence causing the motorcycle to crash." R. 55.
5. Jamey Kinsey is the owner of the dog that was struck by Brookbank's motorcycle. R. 72 (*Jamey Kinsey*, 21:7-14.) Jamey's grandmother, Wilmoth Kinsey, does not own the dog. R. 85 (*Wilmoth Kinsey*, 53:21-24).
6. Wilmoth Kinsey resides at 3497 East 3000 North, Kimberly, Idaho. Jamey Kinsey was not living with his grandmother on the day of this accident. He had not lived there for many years preceding the accident, and possibly never lived there, although he may have lived in another house near by when he was an adolescent. R. 70, 72, 74, 79, 81-85 (*Jamey Kinsey*,

14:10-22, 33:25-34:23, 36:1-18; *Wilmoth Kinsey*, 9:8-10; 36:8-25, 37:7-11, 48:1-25, 49:1, 49:25-50:8, 55:21-56:14).

7. Jamey Kinsey spent most of his time in recent years traveling from job to job, living at his girlfriend's house in Jerome, or going into the hills and mountains and disappearing for 30 days at a time. R. 69, 70 (*Jamey Kinsey*, 10:12-20, 14:10-16:8, 21:7-14, ).
8. Jamey did not live in the bunkhouse on his grandmother's property, nor did he have a room in her house, although he did store a few belongings there. R. 68-77, 81, 85 (*Jamey Kinsey*, 8:11, 11:8, 14:10-16, 16:9, 17:12-18:1); *Wilmoth Kinsey*, 35:16-22; 55:24-56:14).
9. Jamey used his grandmother's address as a permanent address for convenience and to avoid having mail sent to his girlfriend's house. R. 67, 74, 83 (*Jamey Kinsey*, 4:17, 34:15, 35:2-36:11, *Wilmoth Kinsey*, 48:11. ).
10. Jamey lived with a girlfriend when he was not traveling or in the mountains. R. 67,81(*Jamey Kinsey*, 4:17-25; *Wilmoth Kinsey*, 36:8-37:9).
11. Jamey Kinsey is not a member or partner of the Kinsey Family Limited Partnership. R. 75 (*Jamey Kinsey*, 37:3-9).
12. Jamey Kinsey believes it would be unfair to be considered an insured on his grandmother's policy. R. 62, 74 (*Jamey Kinsey*, 36:12-18; and 37:1-9; Answer to Interrogatory No. 6).
13. The FB policy provides liability coverage as follows:

#### SECTION II-LIABILITY INSURANCE

##### COVERAGE F-1-BODILY INJURY LIABILITY

##### COVERAGE G-PROPERTY DAMAGE

If a claim is made or a suit is brought against any **insured**<sup>1</sup> for damages because of **bodily injury** or **property damage** caused by an **occurrence** to which this coverage applies, we will:

---

<sup>1</sup>In this policy terms that are in **bold** are defined terms under the policy.

1. Pay up to our limit of liability for the damages for which the **insured** is legally liable;
2. Provide a defense at our expense by counsel of our choice....

R. 36.

14. The term “insured,” for Section II–Liability Insurance is defined in the FB policy as:

**Insured** means you or the entity named in the Declarations.

1. If you are an individual, **insured** also means, if residents of your household, your spouse, your **relatives**, or minors in the care of you or your **relatives**.
2. If you are a partnership or joint venture, **insured** also means your members and your partners, but only with respect to your partnership or joint venture.

\* \* \*

4. If you are a limited liability company, **insured** also means your members and managers but only with respect to their duties as members or managers.

R. 18.

### **C. LAW AND ANALYSIS**

When Jamey Kinsey was first sued by Brookbank, there was a question about whether he was staying at his grandmother’s house. This raised a possibility that he could be considered a resident of her household, which might make him an insured on her policy. This possibility triggered Farm Bureau’s duty to defend, so Farm Bureau undertook a defense of Jamey Kinsey in the Brookbank suit until a court could determine whether he was actually an insured. The summary judgment sought a declaratory judgment as to whether Kinsey is an insured in order to determine whether Farm

Bureau must continue providing him a legal defense in the Brookbank suit, and whether it must pay the judgment, if one is obtained against him.

The policy defines the term “insured” in part, as follows:

**Insured** means you or the entity named in the Declarations.

1. If you are an individual, **insured** also means, if residents of your household, your spouse, your **relatives**, or minors in the care of you or your **relatives**. [Bolded words are defined terms.]

R. 18. Thus, the policy only provides liability coverage for Jamey Kinsey if he was a “resident” of his grandmother’s “household” on the day of the Brookbank accident.

A recent Idaho case set forth guidelines for determining whether a grandchild is a resident of his grandparents’ household. In *Allstate Ins. Co. vs. Mocaby*, 133 Idaho 593, 990 P.2d 1204 (1999) the court affirmed the trial court’s summary judgment finding that a minor grandchild was not, under the facts and circumstances, a resident of his grandparents’ household. In making the finding, the court pointed out that, since the term “resident” is not defined in the policy, it is potentially ambiguous. In such a case the court acknowledged the general rule that a court should adopt a definition that “a reasonable person would have understood the term to mean.” *Mocaby*, at 597, 1208. The court recognized that if there is more than one reasonable interpretation of term or phrase, the court must adopt the interpretation that favors coverage for the insured. Based on these rules of construction, the court adopted the rule that whether a person is a “resident” of a “household” is to be determined on a case by case basis, depending on the specific facts and circumstances of each case. *Mocaby*, 598, 1209. Despite acknowledging these rules, and the potential for it to be an issue of fact, the court in *Mocaby* went on to affirm a summary judgment for Allstate and declared that there was no coverage for a minor grandchild under her grandparent’s policy because she was not a resident of the household. The facts that the *Mocaby* court found important were: (1) the grandson had only recently arrived in the Pocatello area, where his



grandparents lived; (2) the grandson had spent only a few night with his grandparents but had also spent nights with friends; (3) the grandson had testified he would soon be moving on to Seattle; (4) the grandson testified that he did not consider himself to be residing with his grandparents, and (5) the grandparents did not consider their grandson to be residing with them because the arrangement was temporary as the grandson had always planned to move on to Seattle. On these facts, the court gave summary judgment for Allstate, ruling that the grandson was not an insured, even though: (1) the grandson received mail at his grandparent's house, (2) received some money from them to help with his support, and (3) had given his grandparent's address to the police as his place of residence. The *Mocaby* court ruled that these facts supported a finding that the grandson had a "close, continuing relationship" with his grandparents, but was not a "resident" of their "household" for insurance purposes.

There are similar facts weighing in favor of a finding that Jamey Kinsey was a resident of his grandmother's household:

1. Jamey was receiving mail at his grandmother's house and his drivers license states his grandmother's address.
2. He was storing some of his belongings at her house.
3. He occasionally slept at his grandmother's house.

Weighing against these facts, there are these factors:

1. Both Jamey and the grandmother agree that he did not live with her and had not stayed at her house in some time. R. 70, 81, 85 (*Jamey Kinsey*, 14:10-16; *Wilmoth Kinsey*, 35:16-22; 55:24-56:14).
2. When Jamey did stay with his grandmother, it was as a guest and on a temporary basis. R. 70 (*Jamey Kinsey*, 14:17-22).
3. Both Jamey and his grandmother have testified that Jamey's lived with his girl friend, not with his grandmother. R. 70, 81 (*Jamey Kinsey*, 16:1-8; *Wilmoth Kinsey*, 36:17-37:1).

4. Jamey spends most of his time traveling from job to job, living in the hills, and, when his is in town, at his girlfriend's house. He estimates he is at the girlfriend's house 98 to 99% of the time and very rarely at his grandmothers. R. 70, 81 (*Wilmoth Kinsey*, 35:19 - 37:9; *Jamey Kinsey*, 15:6-16:8).
5. The personal property Jamey kept at his grandmother's property was merely being "stored" there; he did not live there. R. 71 (*Jamey Kinsey*, 17:12-18:1).
6. Jamey only used his grandmother's address as a permanent address for convenience and to avoid having mail sent to his girlfriend's house. R. 67, 74, 83 (*Jamey Kinsey*, 4:17, 34:15, 35: 2-36:11, *Wilmoth Kinsey*, 48:11. ).
7. Jamey is at least 37 and there is no evidence he is financially dependent on his grandmother. *Wilmoth Kinsey*, 15:6; *Jamey Kinsey*, 7:16.
8. Jamey strongly believes it would be unfair to considered an insured on his grandmother's policy. *Jamey Kinsey*, 36:12-18; and 37:1-9.

These facts far outweigh the facts supporting the position that Jamey Kinsey was a resident of his grandmother's household.

In *Aid Ins. Co. vs. Armstrong*, 119 Idaho 897, 811 P.2d 507 (1991), the court made it clear that the intentions of the insured and the person purported to be an insured a valid consideration in determining whether an accused tortfeasor is an insured. In that case the court found it significant that a step daughter and her step father agreed that she was no longer a resident of his household. Likewise, Jamey has made it clear that he does not think it would be right for his grandmother's policy to cover him:

Q. Is there a reason that you don't want to concede that your address is your grandma's address?

A. That's the truth. Yeah, the Kinsey ranch had nothing to do with this, at all, whatsoever. And I know you're after the insurance out there, so that's just not kosher.

\* \* \*

MR. HEPWORTH: Well, I'm asking questions.

THE WITNESS: No, I'm not going to pawn something like this off. It's not honest. They had nothing to do with it. That was my pup. It was with me. I did not live there. I was not covered. I'm not even a partner out there. I have nothing to do with the ranch, as far as you're concerned.

*Jamey Kinsey*, 36:12-18, 37:1-9. Despite accusations by the appellant's counsel that Jamey Kinsey is attempting to sabotage his own coverage to obtain vengeance for the death of his pup, it seems far more likely that Jamey Kinsey truly believes it is simply not fair for him to be covered under his grandmother's policy. Note that Jamey Kinsey has every reason to bend the facts a little to take advantage of the insurance. If covered he is entitled to a free legal defense, as well as to protection against any judgment Brookbank may obtain against him. Despite this, he insists he did not live with his grandmother and does not believe he is covered by her insurance.

Appellant relies on *Hardware Mutual Cas. Co. V Home Indemnity Co.*, 241 Cal.App.2d 303 (1966). There are a few problems with appellant's reliance on this case. The case is old, written in 1966, (not in 1996, as indicated by a typo in Appellant's brief). The case is not from Idaho and is in direct contradiction to the Idaho *Macoby* case. Most important, the facts are not similar; in *Hardware* there was conflicting evidence about where the alleged insured lived. The court found that the better evidence supported the conclusion that the insured lived with the policy holder. In our case, there is no evidence that Jamey Kinsey lived with his grandmother. Both Jamey Kinsey and his grandmother testified that he lived with his girl friend and did not have a bedroom or a place to stay at his grandmothers home.

Farm Bureau agrees with appellant that a person may have more than one residence. A typical example would be a child of divorced parents who spends time living at each of their residences and is a member of both households, such as in the case cited by appellant. However, Farm Bureau does not agree that the court mistakenly operated under the premise that a person could only have one residence. Rather, the court analyzed the facts in the correct way, as stated in

appellant's brief: "so long as he meets the criteria for being considered a resident." In deed, it is appellant who is mistakenly operating under a false premise. Appellant seems to urge that this case is merely about residence, ignoring the policy language "resident of your household." Being a resident of a household is more than merely residing somewhere. Being a resident of a household, according to Idaho law, carries an implication of being more than a resident, it means being a part of a family or some type of domestic establishment.

Generally, the term "resident" connotes a living arrangement with some degree of permanence, while "household" has been defined as residents who dwell under the same roof and compose a family. [Underlining not in original.]

*Macoby*, at 598. Other states agree. *Hernandez v. Comco Ins. Co.*, 357 So 2d 1368 (La App. 1978) contains a detailed discussion of this issue.

Finally, it seems that appellant's brief dwells far more on the past than it should. The trial court ruled, and all of the case law supports, that it was only whether Jamie Kinsey was an insured on the day of the accident. The notion that he lived either at or near his grandmother's house (the "compound") many years ago cannot support a claim that he resides there now. The idea propounded by appellant seems to be that he must still live there, if he hasn't taken up any other permanent residence. Aside from the uncontroverted fact that he lives with his girl friend when he is not traveling, it is certainly not necessary for Farm Bureau to prove that Jamie Kinsey is not a resident of another household; it is up to the appellant to prove that he is a resident of this insured household. Appellant has not proven that at all.

### **CONCLUSION**

The court should affirm the trial court's finding as a matter of law that Jamey Kinsey was not a resident of the M. Wilmoth Kinsey household and should affirm the declaratory judgment that Kinsey was not an insured on the day of the accident, that he is not entitled to either a legal defense of the underlying Brookbank suit, and that Farm Bureau has no obligation to pay any judgment against Jamey Kinsey in the underlying Brookbank suit.

DATED this 26<sup>th</sup> day of October, 2009.

MERRILL & MERRILL, CHARTERED

By *Kent L. Hawkins*  
Kent L. Hawkins  
Attorneys for Plaintiff/Respondent

**CERTIFICATE OF SERVICE**

I, Kent L. Hawkins, the undersigned, one of the attorneys for the Plaintiff/Respondent, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing Respondent's Brief was this 26<sup>th</sup> day of October, 2009, served upon the following in the manner indicated below:

Jeffrey J. Hepworth  
JEFFREY J. HEPWORTH & ASSOCIATES  
P.O. Box 1806  
Twin Falls, Idaho 83303-1806

- U.S. Mail  
 Hand Delivery  
 Overnight Delivery  
 Telefax

*Kent L. Hawkins*  
Kent L. Hawkins