1-10-2008

Armstrong v. Farmers Insurance Co. of Idaho Appellant's Brief Dckt. 34250

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife,

Plaintiffs/Appellants,

vs.

FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation; CORPORATE DOES I – X, whose true names are unknown,

Defendants/Respondents.

Supreme Court No. 34250

Case No. CV 03-9214

APPELLANTS' BRIEF

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Appeal from the District Court of the
First Judicial District for Kootenai County

The Honorable Charles W. Hosack, District Judge, Presiding

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STATEMENT OF THE CASE

i. Nature of the Case

This case concerns the interpretation of a single provision of an insurance policy. The plaintiffs/appellants Brian and Glenda Armstrong (hereinafter "the Armstrongs") purchased a homeowner's policy (hereinafter "the Policy") from the defendant/respondent Farmers Insurance Company of Idaho (hereinafter "Farmers"). The home which the Armstrongs insured under the Policy was damaged when their backyard swimming pool suddenly and unexpectedly collapsed. The collapse caused thousands of gallons of water, mud and debris to flow into their finished basement damaging the residence and personal property in it. Armstrongs tendered a claim under the Policy but Farmers denied coverage. The Armstrongs contend that their Policy provides for coverage for the loss caused by this occurance. The Armstrongs sued Farmers to enforce coverage.

The Armstrongs filed a Motion for Partial Summary Judgment arguing that the Policy provides coverage for their loss under a provision covering damages occasioned by the sudden and accidental discharge or overflow of water from a household appliance.[1] On the Armstongs' motion, the District Court appears to have attempted to interpret the entire Policy, not just the "household appliance" provision. The Court ultimately concluded that the Armstrongs were not covered for their claimed loss because the Policy definition of

[1] This provision in the Policy will be referenced as the "household appliance" provision throughout this brief for ease of reference.

"water damage" includes loss caused by overflow or escape of water from a "body of water," which according to the District Court, would include a swimming pool.

The Armstrongs contend that their swimming pool collapse was covered under the household appliance provision. Alternatively, the Armstrongs argue the loss could be covered under other provisions of the Policy that they did not address below. In either case, the Armstrong's contend the District Court's ruling below was in error.

ii. Course of the Proceedings Below

The Armstrongs filed a Complaint against Farmers on December 23, 2003. *R. p. 1.* In their Complaint the Armstrongs alleged breach of contract, breach of the covenant of good faith and fair dealing, negligence, unfair trade practices and constructive fraud. *R. pp. 2-8.* On or about March 19, 2004 Farmers answered the Complaint generally denying the Armstrongs' allegations. *R. pp. 13-20.* Discovery ensued. On January 5, 2005 the Armstrongs moved for partial summary judgment on the narrow issue of whether the Policy provided for coverage for the damages to the Armstrongs' real and personal property caused by the sudden and unexpected collapse of the Armstrongs' above-ground swimming pool. *R. p. 79.*[2] Specifically, Armstrongs asked the court to interpret the household appliance provision of the Policy. *R. p. 82.*

[2] The Armstrong's Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment was filed on January 5, 2005. The Armstrongs in advertently forgot to file the Motion for Partial Summary Judgment at the same time as the Memorandum. The Armstrongs filed a Motion to Shorten Time and the Motion for Partial Summary Judgment on January 20, 2005.

On February 1, 2005 the District Court for the First District of the State of Idaho heard the Armstrongs' Motion for Partial Summary Judgment. *Tr. p. 2 (2007).* On March 21, 2005, the District Court entered a Memorandum Opinion and Order Denying Partial Summary Judgment. In its Opinion and Order, the District Court addressed not just the household appliance provision of the Policy, argued by the Armstrongs, but other provisions of the Policy as well. It ruled broadly that Farmers was not obligated to cover the Armstrongs' losses under any part of the Policy or under any other theory. *R. p. 180.*

On February 2, 2007 Farmers filed its own Motion for Summary Judgment *R. p. 187.* Farmers asked the District Court to dismiss the Armstrongs claims based on the District Court's previous ruling that Armstrongs were not covered under the Policy for the losses claimed. *R. p. 191.* On March 27, 2007, the Court heard oral argument on Farmers' Motion for Summary Judgment. *Tr. p. 2, ll. 1-3 (2007).* The District Court stated that it could have entered summary judgment for Farmers on Armstrongs' Motion for Partial Summary Judgment but elected not to do so. *Tr. p. 5, ll. 2-12 (2007).* Then, on April 16, 2007 the District Court entered summary judgment in favor of Farmers. *R. pp. 195-196.* The Armstrongs now bring this appeal of the issues stated below.

iii. Concise Statement of Relevant Facts

The Armstrongs purchased "Protector Plus" homeowner's insurance (policy number 91828-0327) from Farmer's agent David Nipp for their residence. The Policy's coverage period was from March 24, 2003 to March 23, 2004. *R. p. 47.* At the time the Armstrongs

purchased the Policy they discussed the Policy coverage with agent Nipp. *R. p. 77, ll. 2-16.* The Armstrong's informed Nipp that they had an above-ground swimming pool and inquired whether they would be covered for the swimming pool. *Id; R. p. 71, ll. 9-16.* Armstrongs contend that Nipp told them that they would be covered for the pool under the Policy. *R. p. 72, ll. 3-5.* Nipp denies that this conversation took place. *Augmented/Corrected Record. Aff. Nipp.*[3]

On July 2, 2003, (within the coverage period of the Policy) the Armstrongs returned home to find that their above-ground swimming pool had collapsed. The water in it flooded into their finished basement together with mud and debris. *R. pp. 73-74, ll. 19-20.* The release of water from the pool caused damage to both the Armstrongs' dwelling and its contents. *R. p. 75, ll. 8-12.* The pool was connected to the house through means of an extension cord to the filtration pump, but not by any piping or plumbing. *R. p. 156, ll. 3-5.*

Armstrongs immediately notified Farmers of the loss. *R. pp. 73-74.* On September 17, 2003, Farmers wrote to the Armstrongs denying coverage. On October 2, 2003, Farmers again wrote to the Armstrongs denying coverage for the loss. On October 24, 2003, the Armstrongs prepared and submitted a Sworn Statement in Proof of Loss to comply with Idaho Code § 41-1839 and the Policy. *R. pp. 44-68.* By letter dated November 14, 2003,

[3] The Armstrongs filed a separate lawsuit against the insurance agent David Nipp alleging negligence, breach of duty, failure to procure coverage and misrepresentation. That suit is being held abeyance pending the disposition of this case. The factual dispute concerning statements by Nipp to the Armstrongs were not considered by the District Court on the Armstongs' Motion for Partial Summary Judgment in this action.

Farmers again informed the Armstrongs that it was denying their claim. *R. p. 69.* The Armstrongs filed suit in District Court, Kootenai County on December 23, 2003. *R. p. 001.*

ISSUES PRESENTED ON APPEAL

I. Whether the District Court erred in denying Armstrongs' Motion for Partial Summary Judgment holding that Farmers was not obligated to compensate the Armstrongs for their alleged loss to their dwelling and personal property.

   (i) Did the sudden, unexpected escape of water from the Armstrongs' pool constitute "water damage" for which coverage is excluded?

   (ii) Did the District Court err in its analysis of what constitutes a "household appliance" under the Policy?

II. Whether the District Court erred in effectively granting summary judgment to the non-moving party (Farmers) on an issue that was not raised or addressed by the moving party (Armstrongs).

   (i) Did the District Court's ruling on summary judgment impermissibly disregard other portions of the Policy under which coverage could be required?

   (ii) Did the District Court's ruling on summary judgment impermissibly disregard evidence that an oral binder of coverage took place?

ARGUMENT

A complete copy of the Policy is found in the Record at 025-041 and as submitted by Appellants with their Motion to Augment/Correct the Record. *See,* FtNt 5 infra, p. 7. The specific portions of the Policy addressed in Armstrongs' Motion for Partial Summary Judgment and are as follows:

DEFINITIONS

* * *

18. **Water** – means water (H_20) alone, whether frozen or not or any liquid or sludge which contains **water**, whether or not combined with other chemicals or impurities.

19. **Water Damage** – means loss caused by, resulting from, contributed to or aggravated by any of the following, whether occurring on or away from the **residence premises:**

    a. **Water** from rain or snow, surface water, flood, waves, tidal **water**, overflow or escape of a body of **water,** or spray from any of these, whether or not driven by wind;
    b. **Water** which backs up through sewers or drains;
    c. **Water** which escapes from any system designed to drain **water** away …;
    d. **Water** below ground level whether occurring naturally or not, including **water** which … seeps or leaks through a building … swimming pool or … the residence premises.

* * *

SECTION 1 – PROPERTY

* * *

LOSSES INSURED
Coverage A – Dwelling

Coverage B – Separate Structures
We insure for accidental direct physical loss to property described in Coverage A and B, except as provided in **Section I – Losses Not Insured.**
Coverage C – Personal Property
We insure for accidental direct physical loss to property described in Coverage C, but only if caused by one or more of the following perils:

* * *

13. Sudden and accidental discharge or overflow of **water** or steam from within a plumbing, heating or air conditioning system, or from within a household appliance, but not for deterioration, rust, mold, wet or dry rot due to the presence of **water** over a period of time.[4]

* * *

SECTION I – LOSSES NOT INSURED

Applying to **Coverage A and B – Dwelling and Separate Structures and Coverage C – Personal Property**

We do not insure for loss either consisting of, or caused directly or indirectly by:

1. Earth Movement.

* * *

2. **Water damage.**[5]
Acts or omissions of **persons** can cause, contribute to or aggravate **water damage**. Also **water damage** can occur naturally to cause loss or combine with acts or omissions of **persons** to cause loss. Whenever

[4] Paragraph 13 is the Policy section referenced in this brief as the "household appliance" provision.
[5] This section of the Policy addressing losses not insured (2. **Water damage**) is the replacement language provided by "Endorsement H6104 1st Edition" located on the very last page of the Policy. Due to a Clerk's error, their endorsement was omitted from the Record on Appeal. *See, Motion to Augment/Correct the Clerk's Record.* The replaced portion of the Policy read:

> 2. Water damage. Acts or omissions of persons can cause, contribute or aggravate water damage ... the resulting loss is always excluded under this policy, however caused; except we do cover direct loss to the dwelling ... or personal property if caused by fire or explosion resulting from water damage.

water damage occurs, the resulting loss is always excluded under this policy, however caused; except we do cover:

* * *

1. … water damage resulting from build-up of ice on … the roof or roof gutters.

2. loss or damage to the interior of any dwelling, … , or to personal property *inside the dwelling … caused by water* damage, if the dwelling first sustain loss or damage caused by a peril described under Section I. Losses Insured – Coverage C. [*underscoring added*]

* * *

4. Faulty, inadequate or defective planning, zoning, development, surveying, siting, design, specifications, workmanship, construction, grading, compaction, maintenance repair materials, construction, remodeling or maintenance of part or all of any property (including land, structures or any improvements) whether on or off the **residence premises.** However, we do cover ensuing loss by fire, explosion or sudden and accidental discharge of **water.** …

* * *

13. a. wear and tear, marring, deterioration;
b. mechanical breakdown;

* * *

g. settling, cracking, shrinking, bulging, or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings.

* * *

If any of the perils listed in a – i above cause **water** to escape suddenly and accidentally from a plumbing, heating, or air conditioning system or household appliance, we cover loss not otherwise excluded to the dwelling or separate structure caused by **water** … We do not cover the system or appliance from which the **water** or steam escaped. [*underscore added*]

R. pp. 26-42, as Augmented/Corrected.

The District Court erred when it decided that the household appliance provision in the Policy did not apply to the Armstrongs claimed losses.

The rules of interpretation of contracts, particularly contracts of insurance, are well settled. Insurance policies are a matter of contract between the insurer and the insured. *Brinkman v. Aid Ins. Co.,* 115 Idaho 346, 352, 766 P.2d 1227, 1233 (1988). In the absence of ambiguity, an insurance policy must be construed as any other contract and understood in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the contract. *Juker v. American Livestock Ins. Co.,* 102 Idaho 644, 645, 637 P.2d 792, 793 (1981); *Bonner County v. Panhandle Rodeo Ass'n, Inc.,* 101 Idaho 772, 776, 620 P.2d 1102, 1106 (1980). However, if there is an ambiguity, special rules of construction apply to insurance contracts to protect the insured. *Casey v. Highlands Ins. Co.,* 100 Idaho 505, 509, 600 P.2d 1387, 1391 (1979). One of these special rules requires that insurance policies are to be construed most liberally in favor of recovery, with all ambiguities being resolved against the insurer. *Foremost Ins. Co. v. Putzier,* 102 Idaho 138, 142, 627 P.2d 317, 321 (1981); *Ryan v. Mountain States Helicopter, Inc.,* 107 Idaho 150, 153, 686 P.2d 95, 98 (Ct.App.1984). Where ambiguity exists, the court must construe the provisions consistently with what a reasonable person in the insured's position would have understood the policy language to mean. *City of Boise v. Planet Ins. Co.,* 126 Idaho 51, 55, 878 P.2d 750, 754 (1994); *Foremost Ins. Co. v. Putzier,* 102 Idaho at 142, 627 P.2d at 321; *Gordon v. Three Rivers Agency, Inc.,* 127 Idaho 539, 542, 903 P.2d 128, 131 (Idaho App., 1995).

The first step in the interpretation of the Policy at issue here is to determine whether there is an ambiguity in the Policy. *Id.* In their Motion for Partial Summary Judgment the Armstrongs argued alternatively that either the Policy provided coverage for their loss because the collapse of their swimming pool constituted a sudden and accidental discharge or overflow of water from within a household appliance, or that the Policy was ambiguous and the ambiguity should be resolved against Farmers because the Policy does not appear to define or limit the scope of what constitutes a "household appliance."

When a contractual provision is reasonably subject to differing interpretations, it is ambiguous and its meaning becomes a question of fact. *Moss v. Mid-America Fire and Marine Insurance Company,* 103 Idaho 298, 300, 647 P.2d 754, 756 (1982). The term "household appliance" is not defined in the Policy even though nineteen other ordinary terms are defined. Farmers as the drafter of the Policy had the opportunity to define the term "household appliance" and apparently chose not to.

Farmers and the District Court contend that reading the undefined Policy term "household appliance" to include a swimming pool is impermissibly broad. However, that analysis begs the question: What would constitute a household appliance under the Policy? The Policy endorsement (H6104) purports to provide coverage for water damage "... caused by a peril described under Section I ... Coverage C." That section, (Coverage C) at paragraph 13, describes the peril "Sudden and accidental discharge ... of water ... from within a plumbing, heating or air conditioning system **or** from within a household

appliance." Use of the disjunctive "OR" in that sentence of the Policy is significant because a household appliance would have to be something from which a sudden and accidental discharge of water could occur, *other than* a plumbing, heating or air conditioning system. Otherwise this provision of the Policy is illusory; it would cover nothing. Those items in and around a household from which water can escape suddenly and unexpectedly, and which are not connected to or part of the household plumbing, heating or air conditioning system are few and far between (hot water tank, bathtub/shower, sink, dishwasher, boiler, humidifier – are all part of the aforementioned systems). A clothes washer would appear to be the only "appliance" that fits this description, at least according to Farmers' interpretation. Why then would the Policy not simply specify clothes washers as covered appliances instead of the more all-encompassing "household appliance?"

An appliance is defined in common vernacular as "a device or instrument designed to perform a specific function." *See,* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). A pool is a device that provides for the specific function of aquatic exercise and recreation. The District Court seemed to place considerable emphasis on the notion that an appliance must be operated by electricity, *R. p. 180*, or be a "mechanical means to an end." *Id.* However, choosing these characteristics to define what is an appliance is simply adding to the Policy that which the drafters of the Policy (Farmers) did not see fit to include, and arguably proves the Armstrongs alternative position that the term "household appliance" is ambiguous, as used in the Policy.

Further, support for Armstongs' contention regarding the possibility of a swimming pool being a household appliance can be found in Idaho statute. Under Idaho's statutory Property Condition Disclosure Act, transferors of residential property are required to produce a Seller Property Disclosure Form. The form proposed in the statute contains the following language:

> 4. All ***appliances*** and service systems included in the sale, (***such as*** refrigerator/freezer, range/oven, dishwasher, disposal, hood/fan, central vacuum, microwave oven, trash compactor, smoke detectors, TV antenna/dish, fireplace/wood stove, water heater, garage door opener, ***pool/*****hot tub**, etc.). [*Emphasis added*]

See, I.C. §55-2508

It therefore appears that Idaho's legislature has considered pools and hot tub to be included in the realm of appliances. If a pool/hot tub is an "appliance" for purposes of a real estate vendor's statutorily mandated disclosure, why would a pool not be an "appliance" for purposes of the Policy? Either the term "household appliance" includes a swimming pool or it is reasonably subject to such an interpretation and the Policy's use of that term, without further definition creates an ambiguity which must, as a matter of law, be construed against Farmers. In either case, the District Court's analysis was erroneous.

The District Court erred when it decided an issue on summary judgment that was not raised by the Armstrongs and that the Armstrongs did not have notice of or opportunity to argue.

The District Court erred in its decision that the Armstrongs' real and personal property losses were not covered under any other part of the Policy. *See, Tr. pp. 4-5 (2007).*

To reach this decision, the District Court myopically focused on the Policy's definitions which refer to "water damage" as including "overflow or escape of a body of water ...." *R. p. 175.* Effectively, what the District Court did was expand the scope of its analysis well beyond the argument presented by the Armstrongs' motion. In doing so, the Court not only declined to properly interpret the "household appliance" provision but also somehow concluded that the "body of water" language in the Policy should "trump" the household appliance provision.

While it is within the court's purview to grant summary judgment to a non-moving party even if that party has not filed its own motion, the court cannot properly decide an issue **not** raised in the moving party's motion. *See, Harwood v. Talbert,* 136 Idaho 672, 677-78, 39 P.3d 612, 617-18 (2001) (*Summary judgment may be rendered for any party, not just the moving party ... However, the court may not decide an issue not raised in the moving party's motion for summary judgment.)* The Armstrongs were the moving party. Their motion only asked the court to interpret a single provision in the Policy; the household appliance provision. However, the court did not limit its interpretation to that single provision but instead interpreted the entire Policy.

The Armstrongs really only addressed one provision of the Policy in their Motion for Partial Summary Judgment. *See, Mem. in Supp. of Pl.['s] Mot. for Partial Summ. J., R. pp. 78-87.* Even in their Reply to Defendant's Motion in Opposition to Partial Summary Judgment the Armstongs again attempted to purposefully focus the court on the narrow issue

of the household appliance provision. *R. p. 145.* During oral argument on the Motion for Partial Summary Judgment, the Armstrongs limited their presentation to arguing for coverage under the household appliance provision. *T. R. pp. 6-7, ll. 22-6 (2005).* Nevertheless, the District Court digressed into an analysis of the "body of water" clause in the Policy's definition section.

Due to this, the Armstrongs were never able to adequately argue that the damage caused by their swimming pool failure did not meet the definition of **water damage** in the Policy and therefore is not excluded.[6] In the Policy, **water damage** is defined in part as meaning "loss caused by, resulting from, contributed to or aggravated by ... a. Water from rain or snow, surface water, flood, waves, tidal water, overflow or escape of a body of water, or spray from any of these, whether or not driven by the wind." [*underscore added*]. The District Court opined that the water from the Armstrongs' swimming pool consisted of an "overflow or escape of a body of water." *R. pp. 175-177.* However, when you closely examine the full context of the portion of the "water damage" definition relied upon by the District Court, it becomes obvious that all of the types of water described in the context of this definition are naturally occurring. Rain is a naturally occurring event. Snow is a naturally occurring event. Surface and flood waters are naturally occurring. Waves and tidal water are also naturally occurring. In this specific context "overflow or escape of a body of

[6] The Armstrongs attempted to address this issue briefly on oral argument only simply to point out that the defendant's raised the issue because a swimming pool is listed in the definition as a source of "water below ground level ... which [can] seep[s] or leak[s] ...." Armstrongs then refocused the court on the relevant issue. *T. R. p. 16, ll. 10-19.*

water" reasonably refers to overflow or escape from natural bodies of water such as lakes, rivers, streams, and oceans. To stretch the context of this definition to include a swimming pool as a "body of water" is unreasonable and again adds a definitional element to the Policy that its drafters didn't see fit to include. The District Court should not re-write the contract of insurance, particularly not for the benefit of Farmers.

The ordinary usage of the term "body of water" generally refers to a naturally occurring bodies. A body of water is "that part of the earth's surface covered with water (such as a river or lake or ocean); 'body of water'." *WordNet® 3.0.* Princeton University. 26 Dec. 2007. Dictionary.com. In any event, this issue should have been allowed to be at least fully briefed and argued by both parties below. Summary judgment was not appropriate.

Even though the District Court has flexibility to craft appropriate forms of relief on a motion for summary judgment, the party against whom judgment is rendered must at least have notice that the court is considering the claim and be afforded an opportunity to defend against it. *Kelly v. Hodges,* 119 Idaho 872, 876, 811 P.2d 48, 52 (Ct. App. 1991). The language of the entire Policy and more specifically the "body of water" definition was not argued by the parties yet it was considered by the court and was apparently dispositive.

If the Armstrongs had the opportunity to address coverage issues other than the household appliance provision raised in their Motion for Partial Summary Judgment, the Armstrongs could, and would, have made several arguments for coverage not related to the household appliance provision.

For example, the Armstrongs are entitled to coverage for their losses on an oral binder or contract made by agent Nipp. This concept of coverage was provided for by the court in *Foremost Insurance Company v. Putzier,* 102 Idaho 138, 143, 627 P.2d 317, 322 (1981). In *Foremost* the purchaser was not challenging the terms of the written policy as being ambiguous but was relying on the fact he was told by his agent, "that he was covered." *Id.* The purchaser, Guanche, paid $300.00 to an insurance agent in return for coverage. The $300.00 was accepted and the agent told Guanche he was covered. Guanche was never provided with any policy form. *Foremost*, 102 Idaho at 140, 627 P.2d at 319. Guanche intended to insure his property against loss caused by theft, the elements or other calamity. *Id.* The issue before the court was whether Guanche had any insurance coverage. *Foremost*, 102 Idaho at 141, 627 P.2d at 320. The *Foremost* court found guidance from *Toevs v. Western Farm Bureau Life Insurance Co.,* 94 Idaho 151, 483 P.2d 682 (1971). *Foremost,* 102 Idaho at 143, 627 P.2d at 322. In *Toevs* the plaintiff paid the initial premium on a life insurance policy but died prior to having the required physical examination. His widow testified that she expected that the insurance coverage was effective immediately. *Id.* "(T)he fact that the agent did not tell the purchaser that he would not be covered until he had undergone the physical exam was one of the factors considered by the Court in holding that the insured was covered in spite of the provision in the policy to the contrary." *Id.* In *Foremost,* just as in *Toevs*, the agent did not tell the purchaser of any limitations in his coverage. *Id.* The *Foremost* Court concluded that "in regard to an oral contract of insurance,

'(i)f insurers desire to incorporate the provisions of their usual policies that are in derogation of the rights of the insured, such provisions must be specifically brought to the attention of the person seeking insurance at the time of the oral agreement.' It is the duty of the insurer to inform the insured of what he is obtaining; it is not the duty of the insured to seek out exclusions and limitations not revealed to him." *Id.*

In this case, just as in *Foremost* and *Toevs*, there was evidence before the District Court that the Armstrongs discussed coverage with their agent. The Armstrongs even specifically asked about coverage related to their swimming pool. The Armstrongs then paid their premium and reasonably believed they were covered. Nipp never brought all the various exclusions (nor exceptions to the exclusions) contained in the Policy concerning water damage to the attention of the Armstrongs. It was not the duty of the Armstrongs to seek out the exclusions and limitations not revealed to them. The Armstrongs should be covered on the oral agreement for coverage. Summary Judgment should not have been granted against them on the issue of coverage. At the very least there is an issue of fact as to whether an oral agreement was made. Summary Judgment against the Armstrongs was not appropriate.

Last, the Armstrongs could argue for coverage provided by an exception to an exclusion in the Policy. **SECTION I – LOSSES NOT INSURED**, item number 4, has an exclusion for "*Faulty, inadequate or defective* ... *design* ... *workmanship*, *construction*, or maintenance of *part or all of any property* (*including land*, *structures, or any improvements*)

whether on or off the residence premises", but has an exception within the exclusion which states: "*However, we do cover loss by* fire, explosion or sudden and *accidental discharge of water.*" *R. pp. 26-42, as Augmented/Corrected.* [*underscore added*] This provision of the Policy appears to exclude coverage for defective construction of an improvement to the property except where the defect causes the accidental discharge of water. It pertains not just to the dwelling construction, but also to "any improvements" on the insured premises. The Armstrongs swimming pool was clearly an improvement on the premises. It was also like faulty, inadequate or defective in its design, workmanship, construction or maintenance; otherwise it would not have collapsed as it did. It is undisputed that what occurred in this case was an accidental discharge of water. This portion of the Policy however does not have any apparent limitation on what the source of that (accidentally discharged) water could be (i.e. – no mention of plumbing, heating, air conditioning systems or household appliances). This provision of the Policy covers the Dwelling, Separate Structures and Personal Property. Again Summary Judgment against coverage for the Armstrongs was inappropriate.

Attorney fees.

When attorney fees are requested by a party in its issues on appeal, the issue must also be addressed in the argument portion of the brief or it will not be considered by the court. *Bouten Constr. Co. v. H.F. Magnuson Co.,* 133 Idaho 756, 768, 992 P.2d 751, 763 (1999).

The Armstrongs' underlying action, and in turn this Appeal, are brought under Idaho Code § 41-1839 which provides for attorneys fees in actions by insureds to compel coverage under policies of insurance. The Armstrongs should not be required to bear the financial burden of litigation costs to secure coverage for which they already paid a policy premium to Farmers.

CONCLUSION

The District Court erred in its ruling on the Armstrongs' Motion for Partial Summary Judgment. The District Court also erred in its ruling on the issue of total coverage provided because that issue was not properly before the Court. The District Court's Memorandum Opinion and Orders should be vacated and the case remanded for further proceedings.

Respectfully submitted this 8th day of January, 2008.

RAMSDEN & LYONS, LLP

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of January 2008, I served two (2) true and correct copies of the foregoing by the method indicated below, and addressed to the following:

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