2-26-2008

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife,

Plaintiffs/Appellants,

vs.

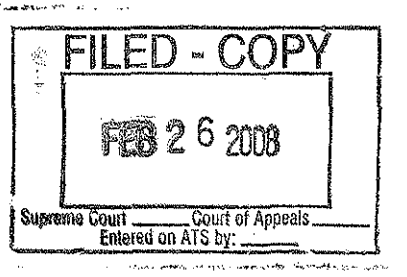
FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation; CORPORATE DOES 1 - X; whose true names are unknown,

Defendants/Respondents.

Supreme Court No. 34250

Case No. CV-03-9214

RESPONDENT'S BRIEF



RESPONDENT'S BRIEF

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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A. STATEMENT OF THE CASE

1. Nature of the Case

The underlying case asked the trial court to interpret a homeowner's policy (hereinafter the "Policy") issued by Farmers Insurance Company (hereinafter "Farmers"), and whether that Policy provided coverage for damage caused when Plaintiffs' above ground swimming pool collapsed and flooded their home. Farmers denied the claim because the loss was not covered under the terms of their Policy. Shortly thereafter, Plaintiffs filed suit. Plaintiffs now appeal the trial court's order declaring the Policy unambiguous and upholding Farmers' denial of coverage.

2. Course of Proceedings

Brian and Glenda Armstrong filed suit against Farmers on December 23, 2003 alleging breach of contract, unfair trade practices, constructive fraud, negligent investigation and claim adjustment, and breach of the covenant of good faith and fair dealing. Farmers timely answered the Complaint.

On January 5, 2005, Plaintiffs filed a Memorandum in Support of Motion for Partial Summary Judgment together with an affidavit from Plaintiffs' counsel with exhibits attached thereto. [R. 078-087; 022-077.] Among the exhibits submitted by Plaintiffs' counsel was a copy of the Policy and excerpts from the deposition transcripts of Brian Armstrong apparently offered to show that an independent insurance agent had told Mr. Armstrong that losses caused by an above ground pool would be covered under the Policy in the event of flooding. [R. 025-042.] Subsequently, in an effort to comply with I.R.C.P. 7 (b), Plaintiffs filed a Motion for Partial Summary Judgment.

Plaintiffs' motion asked the trial court to rule as a matter of law that they were entitled to coverage under the Policy for the damages caused by the above ground swimming pool. [R. 142.] During argument, Plaintiffs' counsel presented the issue as: "The only issue really for the Court to decide is whether the Farmers policy covers the type of loss suffered by the Armstrongs." [Tr., Feb. 1, 2005, p.6, ll.22-23.] Farmers timely responded that Plaintiffs' motion effectively sought declaratory relief not otherwise pled in the Complaint; that the Policy was not ambiguous; that denial of coverage was proper; and that conversations with independent insurance agent, David Nipp, did not trigger an alternative basis for coverage.

On March 21, 2005, after oral argument, the trial court issued a Memorandum Opinion and Order declaring the Policy unambiguous and upholding Farmers denial of coverage.

On February 2, 2007, Farmers moved for summary judgment premised, in part, on the trial court's March Order. [R. 187-188.] Defendant submitted a Memorandum of Points and Authorities in support of its motion. [R. 189-192.] Plaintiffs responded with a "Memorandum In Response to Defendant's Motion for Summary Judgment." [R. 193-194.] While stylized a "memorandum," Plaintiffs' two-page response did not rely upon any substantive responsive briefing. Instead, Plaintiffs relied exclusively upon their prior briefing to the trial court in support of their Motion for Partial Summary Judgment.

On March 27, 2007, the trial court heard argument on Farmers' Motion for Summary Judgment. [Tr., March 27, 2007, p. 2.] Judgment was entered on April 16, 2007 in favor of Farmers. [R. 195-196.]

B. CONCISE STATEMENT OF RELEVANT FACTS

In 1997, Brian Armstrong, prior to his marriage to Glenda, purchased an above ground swimming pool from K-Mart. [R. 119, ll.18-24.] In 1999, after the Armstrongs were married, the couple purchased their residence. [R. 119, ll.6-12.] The Armstrongs set up the pool in 2000, 2001, and 2002 without any reported problems. [R. 120, ll.14-22; R. 077, ll.17-18.]

In 1999, Mrs. Armstrong contacted David Nipp about insuring their home. [R. 128, ll.19-25.] David Nipp owns and operates his own independent insurance agency. [Nipp Affidavit, p. 2, Exhibit to Affidavit of Linscott in Support of Motion to Augment.] David Nipp was neither an employee nor general agent of Farmers Insurance Company of Idaho. [Nipp Affidavit, p. 2, Exhibit to Affidavit of Linscott in Support of Motion to Augment.] At all times, David Nipp acted as an independent insurance agent and placed a homeowner's insurance policy for the Armstrongs. [Nipp Affidavit, p. 2, Exhibit to Affidavit of Linscott in Support of Motion to Augment.] After issuance, the Armstrongs received a copy of the Policy. [R. 072, ll.21-24.] The Armstrongs renewed the Policy each year after 1999 through Mr. Nipp's office. [R. 122, L.25; 123, ll.1-7.]

On July 2, 2003, Mr. Armstrong discovered that the pool had collapsed and that water had flooded the lower level of their home. [R. 073, ll.19-25; 074, ll.1-9.] The Armstrongs subsequently filed a claim with Farmers. Farmers declined the claim because the terms of the Policy excluded water damage caused from swimming pools.

C. ISSUES PRESENTED ON APPEAL

1. Whether the trial court erred in ruling that the Policy unambiguously excluded water damage resulting from Plaintiffs' swimming pool collapse.

2. Whether the trial court properly granted Defendant's Motion for Summary Judgment.

D. STANDARD OF REVIEW

In an appeal from an order of summary judgment, the appellate court's standard of review is the same as the standard used by the trial court. Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The court exercises free review over questions of law. *Dorea Enterprises, Inc. v. City of Blackfoot*, 144 Idaho 422, 163 P.3d 211, (S.Ct. 2007); *Chapin v. Linden*, 144 Idaho 393, 162 P.3d 772 (S.Ct. 2007).

E. ARGUMENT

1. The Policy Unambiguously Excluded Plaintiffs' Claim.

a. Consistent with case authority, the trial court properly evaluated the Policy as a whole.

Plaintiffs seek to have this Court adopt a piecemeal review of the Policy. This is not what case authority dictates. Instead, legal precedent requires the Court to construe the Policy as a whole – just as the trial court did.

A policy of insurance is a contract and the parties' rights and obligations are primarily set forth within the four corners of the policy. *Bantz v. Mutual of Enumclaw Ins.*, 124 Idaho 780, 864 P.2d 618 (S.Ct. 1993). When interpreting an insurance policy the court applies the general rules of contract law, subject to certain special rules of construction. *Gravatt v. Regence Blue Shield of Idaho*, 136 Idaho 899, 42 P.3d 692 (S.Ct. 2002); *Clark v. Prudential Property and Casualty Insurance*, 138 Idaho 538, 66 P.3d 242 (S.Ct. 2003).

Absent an ambiguity, the policy is construed according to the plain and ordinary meaning of the words used, and coverage is determined from that construction. *Clark v. Prudential Property Casualty Ins., supra, Mutual of Enumclaw Ins. Co. v. Roberts*, 128 Idaho 232, 912 P.2d 119 (S.Ct. 1996); *Thomas v. Farm Bureau Mutual Ins. Co. of Idaho, Inc.*, 82 Idaho 314, 353 P.2d 776 (S.Ct. 1960). In construing an insurance policy, the court is required to construe the policy as a whole and not by an isolated phrase. *Cascade Auto Glass v. Idaho Farm Bureau*, 141 Idaho 660, 115 P.3d 751 (S.Ct. 2005); *Miller v. Farmers Insurance Co. of Idaho*, 108 Idaho 896, 702 P.2d 1356 (S.Ct. 1985).

Plaintiffs argue that the trial court was limited to reviewing the isolated provisions of the Policy identified in Plaintiffs' Motion for Partial Summary Judgment. Such a constraint on the trial court's authority contravenes legal precedent. Instead, the trial court was required to construe the entire Policy in order to determine the rights and obligations of the parties. *See Cascade Auto Glass v. Idaho Farm Bureau* and *Miller v. Farmers Insurance Co. of Idaho, supra.* Following its review of the entire Policy, as submitted by Plaintiffs in their briefing to the trial court, the trial court was satisfied, as a matter of law, that the Policy

unambiguously excluded the damages claimed. The trial court's review of the entire Policy was not only proper but required by case authority, and should not be disturbed on appeal.

b. The Policy reference to the term "Household Appliance" does not create an ambiguity.

The trial court correctly determined, as a matter of law, that the Policy unambiguously excluded Plaintiffs' claim. Specifically, the trial court concluded that the Policy expressly excluded damages caused by Plaintiffs' above ground pool, and that the exception carved out for household appliances did not apply to swimming pools. Plaintiffs' attempt to create an ambiguity in the Policy where none was found by the trial court must fail.

Where a policy of insurance is clear and unambiguous, coverage is determined, as a matter of law, according to the plain meaning of the words used. *Cascade Auto Glass v. Idaho Farm Bureau*, 141 Idaho 660, 662, 115 P.3d 751, 753 (S.Ct. 2005). In its determination of whether or not there is an ambiguity, the court looks to the plain meaning of the words used from construction of the policy as a whole and not based on isolated phrases. *Cascade Auto Glass v. Idaho Farm Bureau*, *supra*, at p. 663. The usual and ordinary meaning is that meaning which the particular language conveys to the popular mind, to the average, ordinary normal man, to a reasonable man. *Thomas v. Farm Bureau Mutual Insurance Co. of Idaho, Inc.*, *supra*, p. 318. (Citing *Couch on Insurance*, 2nd Ed., Vol. I, pp. 678-679). In the construction of a policy, common, non-technical words are given the meaning applied by laymen in daily usage. *Mutual of Enumclaw Insurance Co. v. Pedersen*, 133 Idaho 135, 138, 983 P.2d 208 (S.Ct. 1999). An insurance policy provision is ambiguous

only if it is reasonably subject to conflicting interpretation. *Cascade Auto Glass v. Idaho Farm Bureau, supra*, p. 663. In order to assess the existence of an ambiguity, there is no obligation on the part of the court to countenance a tortured construction of the policy language in order to create an ambiguity and thus provide an avenue for coverage where none otherwise exists. *Armstrong v. Farmers Insurance Co. of Idaho*, 143 Idaho 135, 138, 139 P.3d 737, 740, (S.Ct. 2006).

Here, under the Policy, Coverage A (Section I) relates to the dwelling and Coverage C (Section I) relates to personal property. [Marfice Affidavit, Ex. A, pp. 4-5, Exhibit to Affidavit of Linscott in Support of Motion to Augment.] Section I, entitled "Losses Not Insured", expressly applies to the terms used in Coverages A, B, and C. [Marfice Affidavit, Ex. A, pp. 9-10, Exhibit to Affidavit of Linscott in Support of Motion to Augment.] This portion of the Policy provides "we do not insure for loss either consisting of, or caused directly or indirectly by: "... 2. Water Damage." [Marfice Affidavit, Ex. A, p. 9, Exhibit to Affidavit of Linscott in Support of Motion to Augment.] The Policy contains an endorsement to Section I, which replaced paragraph 2, with the following language:

> **ENDORSEMENT AMENDING SECTION I**
> **LOSSES NOT INSURED - WATER DAMAGE**
>
> Under Section I - Losses Not Insured, item 2. Water damage, the first paragraph is replaced by the following:
>
> **2. Water Damage**
>
> Acts of 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 **water damage** occurs, the resulting loss is always excluded under the policy, however caused; except we do cover:
>
> 1. direct physical loss to the dwelling, mobile home or separate structures caused by water damage resulting from build-up of ice on portions of the roof or roof gutters.
>
> 2. loss or damage to the interior of any dwelling, **mobile home** or separate structures, or to personal property inside the dwelling, **mobile home** or separate structures caused by **water damage** if the dwelling, **mobile home** or separate structures first sustain loss or damage caused by a peril described under Section I - Losses Insured - Coverage C.
>
> 3. direct loss to the dwelling, mobile home, separate structures, or personal property if caused by fire or explosion resulting from water damage.
>
> This endorsement is part of your policy. It supersedes and controls anything to the contrary. It is otherwise subject to all other terms of the policy.

H6104, 1st Edition, [Marfice Affidavit, Ex. A, Endorsement H6104, Exhibit to Affidavit of Linscott in Support of Motion to Augment.]

Defined terms appear in the Policy in bold type. [Marfice Affidavit, Ex. A, pp. 3-4, Exhibit to Affidavit of Linscott in Support of Motion to Augment.] The term "water damage"appears in bold type and is defined within the definitions section. [Marfice Affidavit, Ex. A, p. 3, Exhibit to Affidavit of Linscott in Support of Motion to Augment.]

> 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 from the dwelling or **residence premises**, including but not limited to roof gutters, downspouts, sump-pumps, sump-pump wells, leach fields seepage pits, septic tanks or drainage channels;

d. **Water** below ground level whether occurring naturally or not, including **water** which exerts pressure on, or seeps or leaks through a building, sidewalk, driveway, wall, foundation, swimming pool or any portion of the **residence premises**.

[Marfice Affidavit, Ex. A, p. 3, Exhibit to Affidavit of Linscott in Support of Motion to Augment.]

Under the endorsement, the Policy provides that "water damage" is always excluded, save three exceptions. [Marfice Affidavit, Ex. A, Endorsement H6104, Exhibit to Affidavit of Linscott in Support of Motion to Augment.] The first exception relates to roof ice build up; the second exception provides that the Policy covers loss or damage to the dwelling interior, or to personal property inside the dwelling caused by water damage if "...the dwelling...first [sustains] loss or damage caused by a peril described under Section I - Losses Insured - Coverage C; the third exception is triggered when water damage may cause a fire. [Marfice Affidavit, Ex. A, Endorsement H6104, Exhibit to Affidavit of Linscott in Support

of Motion to Augment.] Plaintiffs argue that the second exception, particularly paragraph 13, provides coverage for their claim.

> 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.
>
> This peril does not include loss:
> a. to the system or appliance from which the **water** or steam escaped;
> b. caused by or resulting from freezing;
> c. to personal property on the **residence premises** when the sudden and accidental discharge or overflow occurs away from the **residence premises**;
> d. caused by sudden and accidental discharge or overflow from roof gutters, downspouts, sump-pumps, sump-pump wells, leach fields, seepage pits, septic tanks, drainage channels or any other device used to drain **water** away from the **residence premises**.

[Marfice Affidavit, Ex. A, p. 8, Exhibit to Affidavit of Linscott in Support of Motion to Augment.]

A loss, as covered by paragraph 13, is the result of a sudden and accidental "...discharge or overflow of water...from within a household appliance...". [Marfice Affidavit, Ex. A, p. 8, Exhibit to Affidavit of Linscott in Support of Motion to Augment.] Even if Plaintiffs' claim was the result of a sudden or accidental overflow, their above ground pool does not constitute a "household appliance" and, as such, does not entitle them to coverage.

This Court has previously held that an insurance policy is not ambiguous merely because it does not contain a definition. *State Farm Fire & Casualty Co. v. Doe*, 130 Idaho

693, 946 P.2d 1333 (S.Ct., 1997). Common, non-technical terms are given the meaning applied by laymen in daily usage. *Mutual of Enumclaw Insurance Co. v. Pedersen, supra.* The reference within the Policy is to a "household appliance." The word "appliance" is defined within the American Heritage Dictionary of the English Language, Fourth Edition, 2006 as:

> a device or instrument designed to perform a specific function, especially an electrical device, such as a toaster, for household use. See synonyms at tool.

Within that same dictionary the synonyms at the word "tool" provides the following reference:

> *Appliance* most frequently denotes a power driven device that performs a specific function: a store selling toasters and other *appliances*.

The word "device" is defined by the same dictionary as:

> A contrivance or an invention serving a particular purpose especially a machine used to perform one or more relatively simply tasks.

The word "instrument" by the same dictionary is defined, among its definitions as:

> An implement used to facilitate work.

The term "swimming pool" is defined as:

> A structure, often a concrete lined excavation of rectangular shape that is filled with water and used for swimming.

The word "appliance" is defined within Webster's Third International Dictionary of the English Language, Unabridged, 2002 as:

> A piece of equipment for adapting a tool or machine to a special purpose: accessory, fixture, attachment...a tool, instrument or device specially designed for a particular use; apparatus <fire-fighting>...a household or office utensil, apparatus, instrument, or machine that utilizes a power supply, esp. electric current (as a vacuum cleaner, a refrigerator, a toaster, an air conditioner).

These multiple definitions reflect that neither the word "appliance" nor the term "household appliance" has any ordinary use, meaning, or application that would include a swimming pool. Moreover, as the trial court correctly noted, the term "water damage" is defined by the Policy as an "overflow or escape of a body of water." The term "body of water" has been used by the courts when discussing ponds, pools, and other bodies of water, including manmade dams or artificial enclosures. *Bicandi v. Boise Payette Lumber Co.*, 55 Idaho 543, 44 P.2d 1103 (S.Ct. 1935); *Stott By and Through Dougall v. Finney*, 130 Idaho 894, 950 P.2d 709 (S.Ct. 1997). As determined by the trial court, the common usage of the term "body of water" includes a swimming pool. The trial court determined as a matter of law that the term is unambiguous; therefore, the escape or overflow from the swimming pool is within the "water damage" exclusion. Accordingly, the exception to the water damage exclusion does not apply.

2. Plaintiffs Are Not Entitled to Appeal Denial of Their Motion for Partial Summary Judgment.

Plaintiffs argue that the analysis undertaken by the trial court went beyond their initial motion and precluded them from an opportunity to argue other theories. This argument is inconsistent with their motion and their briefing to the trial court. Moreover, their argument ignores the procedural history of this matter.

Plaintiffs' motion asked the trial court to "...rule as a matter of law that Plaintiffs are entitled to coverage under their homeowner's insurance policy for the loss and damage at issue here." [R. 142.] Plaintiffs placed before the trial court all pled theories for coverage, as evidenced by the language of their motion and the fact that Plaintiffs supported their motion with exhibits that included a copy of the entire Policy and excerpts from the depositions of Mr. and Mrs. Armstrong. [R. 022-077.] The Plaintiffs' statement of undisputed facts included assertions about coverage based upon conversations with the asserted agent. [R. 079.] Farmers responded with a memorandum and exhibits attacking all of Plaintiffs' theories of recovery. [R. 088-133.] Plaintiffs then filed a reply brief and additional exhibits. [R.144-170.]

On March 21, 2005 the trial court issued its memorandum decision based upon its examination of the entire Policy and the exhibits submitted by the parties. [R. 171-182.] After conducting the proper review of the Policy, the trial court ruled that the Policy was not ambiguous and that the damages claimed by Plaintiffs were not covered.

Plaintiffs have subtly argued on appeal that the trial court erred when it denied their Motion for Partial Summary Judgment, effectively asking this Court to overturn the trial court's review of the entire Policy and find coverage. Plaintiffs' argument is misplaced, as an order denying a motion for summary judgment is an interlocutory order from which no direct appeal may be taken and is not subject to review even after entry of an appealable final judgment. *Dominguez v. Evergreen Resources, Inc.*, 142 Idaho 7, 121 P.3d. 938 (S.Ct. 2005). Accordingly, Plaintiffs' argument that they were not given sufficient opportunity by the trial court to present additional argument is moot.

The real issue before this Court is whether Defendant's Motion for Summary Judgment was properly granted. The evidence undisputably shows that it was.

On February 2, 2007, Defendant moved for summary judgment on all of Plaintiffs' claims. [R. 187-188.] Plaintiffs filed a "memorandum" in response on February 16, 2007 incorporating their earlier filings submitted in support of their motion for partial summary judgment [R. 193-194], stating:

> Armstrongs acknowledge that the Court's ruling on their summary judgment was, for all intents and purposes, dispositive of their claims including the claim of bad faith, unreasonable denial and unreasonable delay in the adjustment of insurance claims.
>
> Armstrongs assert that the District Court was in error in its interpretation of the subject policy, however, and intend to take an appeal once the Court's Order is deemed final. To the extent the District Court did not intend its Order on Armstrongs' summary judgment motion to be dispositive of their claims, the Order nevertheless appears to be so.

[R. 194]

Plaintiffs' two-page memorandum in response clearly indicates that they understood the trial court's order to dispose of all of their claims and highlights a fundamental misunderstanding of the rules of procedure: denial of a motion for summary judgment is not an appealable order. Plaintiffs now urge this Court to relitigate the issue of coverage, and argue that there are additional theories for coverage which should be addressed but which they did not present or argue to the trial court. In *Kirkman v. Stoker*, 134 Idaho 541, 544, 6 P.3d 397, 400, (S.Ct. 2000) this Court held that plaintiffs' failure to timely object during trial constituted a failure to bring the issue before the district court and thus a failure to preserve

the issue for appeal. *Kirkman v. Stoker, supra* p. 544. Plaintiffs now urge this Court to set aside a long line of appellate decisions holding that appellate courts cannot and will not decide issues raised for the first time on appeal. *D.A.R., Inc. v. Sheffer*, 134 Idaho 141, 997 P.2d 602 (S.Ct. 2000); *Meyers v. Lott*, 133 Idaho 846, 993 P.2d 609 (S.Ct. 2000); *Lankford v. Nicholson Mfg. Co.*, 126 Idaho 187, 879 P.2d 1120 (S.Ct. 1994).

3. Defendant's Motion for Summary Judgment Was Properly Granted.

Plaintiffs' Memorandum in Response to Defendant's Motion for Summary Judgment expressly stated that they would seek appeal of the trial court's order denying their Motion for Partial Summary Judgment. Judgment was subsequently entered in favor of Defendant based upon Plaintiffs' failure to oppose the summary judgment motion.

Under I.R.C.P. 56(e), the non-moving party is tasked with an affirmative duty to come forward with evidence to show that there is a genuine issue for trial once the moving party has presented evidence that there are no genuine issues of material fact. Here, Defendant brought a Motion for Summary Judgment seeking dismissal of claims pled by Plaintiffs predicated, in part, on the trial court's Memorandum Opinion and Order. Plaintiffs elected not to respond with substantive briefing, relying instead upon their prior briefing to the trial court in support of their partial summary judgment motion. Simultaneously, Plaintiffs expressed an intention to appeal the trial court's interlocutory order upon judgment being entered. Plaintiffs took this position at their peril.

Once the moving party has presented evidence establishing the absence of a genuine issue of material fact, the burden shifts to the non-moving party to respond with supporting evidence. *Thompson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 531, 887 P.2d 1034, 1038

(1994); I.R.C.P. 56(e). Here, it cannot be said that Plaintiffs took no action to oppose Defendant's motion, but rather, Plaintiffs simply relied upon their prior briefing to the trial court to create a genuine issue of material fact. This briefing failed to persuade the trial court that the claim was covered. The trial court's order did not address Plaintiffs' cursory argument offered in support of their other causes of action, and Plaintiffs did not attempt to address this deficiency in their response. They should have. When a non-moving party fails to make a showing sufficient to establish the existence of an essential element of that party's case on which that party will bear the burden of proof at trial, the moving party is entitled to judgment. I.R.C.P. 56(c); *Crowley v. Critchfield*, 2007 WL 4245905 at * 3 (Idaho, Dec. 5, 2007). Judgment was properly entered by the trial court, and Plaintiffs have not offered a valid basis for disturbing the trial court's order granting Defendant's Motion for Summary Judgment.

F. CONCLUSION

Plaintiffs moved the trial court to find coverage for their claim. The trial court, after proper review of the Policy, concluded that the Policy unambiguously excluded Plaintiffs' claim and upheld Farmers' denial of coverage. Plaintiffs attempt to relitigate the basis for the trial court's denial of Plaintiffs' motion only wastes judicial resources, as it ignores legal precedent which forbids direct appeal of an interlocutory order.

The proper issue before this Court is not whether Plaintiffs' motion should have been denied, but rather, whether the trial court properly granted Defendant's Motion for Summary Judgment. As the record demonstrates, Plaintiffs failed to respond to a properly brought motion, and did so at their peril. Plaintiffs now ask this Court to indulge argument on issues

not properly raised at the trial court level. Well-established case authority does not support their indulgence. Because Plaintiffs failed to substantively respond to Defendant's Motion for Summary Judgment, they cannot now be heard to complain for their own neglect.

DATED this 20th day of February, 2008.

PATRICK E. MILLER
Attorney for Defendant/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of February, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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April M. Linscott
Ramsden & Lyons
618 North 4th Street
P. O. Box 1336
Coeur d'Alene, ID 83816-1336

☐ U.S. MAIL
☒ HAND DELIVERED
☐ OVERNIGHT MAIL
☐ TELECOPY (FAX) to: 664-5884

Patrick E. Miller