10-24-2007

Armstrong v. Farmers Ins. Co. of Idaho Clerk's Record v. 1 Dckt. 34250

LAW CLERK

Vol. 1083

IN THE SUPREME COURT
OF THE STATE OF IDAHO

BRIAN ARMSTRONG and
GLENDA ARMSTRONG,
husband and wife
Plaintiff/ Appellant,

vs

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

Defendant/Respondent

CLERK'S RECORD
APPEAL FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF IDAHO, IN AND
FOR THE COUNTY OF KOOTENAI

ATTORNEY FOR APPELLANT
Douglas Marfice

ATTORNEY FOR RESPONDENTS
Patrick E Miller, Esq

SUPREME COURT DOCKET 34250

SEE AUGMENTATION RECORD

IN THE SUPPREME COURT OF THE STATE OF IDAHO

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife, Plaintiff/Appellant, vs FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation; CORPORATE DOES I-X, whose true names are unknown, Defendants/Respondents	SUPREME COURT NO. 34250

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

HONORABLE CHARLES W HOSACK
District Judge

Douglas S Marfice PO Box 1336 Coeur d'Alene ID 83816-1336	Patrick E Miller, Esq. PO Box E Coeur d'Alene ID 83816-0328
Attorney for Appellant	Attorney for Respondent

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DOUGLAS S. MARFICE, ISB #4072
MICHAEL A. EALY, ISB #5619
RAMSDEN & LYONS
618 North 4th Street
Post Office Box 1336
Coeur d'Alene, Idaho 83816-1336
Telephone: (208) 664-5818
Facsimile: (208) 664-5884

Attorneys for Plaintiffs

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:
391257
2003 DEC 23 AM 11: 35
CLERK DISTRICT COURT
DEPUTY

SUMMONS ISSUED

DEC 23 2003

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BRIAN L. ARMSTRONG and GLENDA A. ARMSTRONG, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV- 03 9214

COMPLAINT AND DEMAND FOR JURY TRIAL

Fee Category: A1.
Fee: $77.00

COMES NOW the above-entitled Defendants, Brian L. Armstrong and Glenda A. Armstrong, husband and wife, by and through their attorney of record, Douglas S. Marfice, of Ramsden & Lyons, and for a cause of action, state and allege as follows:

PARTIES

1. Plaintiffs, Brian L. and Glenda A. Armstrong (herein "Armstrongs") are, and at all times relevant to this action, were residents of Kootenai County, State of Idaho.

2. Defendant, Farmers Insurance Company of Idaho ("Farmers") is, and at all times

01

ASSIGNED TO
JUDGE HOSACK

relevant to this action was, a corporation duly organized and existing under the laws of the State of Idaho with its principal place of business is located in the City of Pocatello, Bannock County, State of Idaho. Farmers now is, and at all times material hereto was, conducting the business of insurance within the State of Idaho.

3. Corporate Does I through X are corporate entities where true names are unknown. Corporate Does I through X are believed to be corporate entities that breached certain duties to the Plaintiffs and thereby caused the Plaintiffs to suffer damages in an amount to be proven at trial.

4. Jurisdiction is proper pursuant to I.C. § 5-514 and venue is proper pursuant to I.C. § 4-404.

GENERAL ALLEGATIONS

5. The Armstrongs are owners of real property commonly located at 3259 N. 14th Street, Coeur d'Alene, Idaho.

6. The Armstrongs purchased Protector Plus homeowner's insurance policy number 91828-03-27 from Farmers to insure their home located at 3529 N. 14th Street. Farmers policy 91828-03-27 had a stated policy period from March 24, 2003 to March 23, 2004.

7. At all times material hereto, the Armstrongs were the insureds of Farmers. As insureds of Farmers, a special relationship of insurer and insured existed between Farmers and the Armstrongs.

8. Sometime prior to July 2, 2003, the Armstrongs contacted Farmers' general agent, David Nipp and informed him that they were purchasing an above-ground swimming pool. Nipp assured the Armstrongs that the installation of the swimming pool was covered

under their Farmers policy. Based on agent Nipp's representations, the Armstrongs reasonably believed the swimming pool was covered under their Farmers homeowner's policy.

9. On July 2, 2003, the Armstrongs' home was damaged when the swimming pool unexpectedly collapsed and caused water to suddenly flood into their home. Immediately thereafter, the Armstrongs contacted agent Nipp to report that the swimming pool had collapsed causing water to flood into and damage their home. Nipp explained he would report the same to Farmers.

10. Sometime thereafter, agent Nipp contacted the Armstrongs and informed them that he had been informed by Farmers that the collapse of the swimming pool and the resulting damage to their home was not covered under their homeowner's policy. Nipp explained to the Armstrongs that Farmers would deny any claim the Armstrong's made under their homeowner's policy for the damage caused by the collapse of the swimming pool.

11. By letter dated September 17, 2003, Farmers' agent or employee, Joel Burns, wrote the Armstrongs stating "[i]n light of the above, Fire Insurance Exchange respectfully declines coverage for the water damages to your home." By this letter, Farmers claimed that the Armstrongs' reported loss was not covered under their Farmers homeowner's policy.

12. By letter dated September 26, 2003, the Armstrongs responded to Farmers' agent/employee, Joel Burns, and explained their disagreement with Farmers' denial of coverage. The Armstrongs informed Burns that "[w]e advised our Farmers agent of the fact that we had installed an above-ground pool and were assured that we had adequate coverage. Neither our agent nor the company ever informed us that we would not be covered if the pool collapsed and damaged our home." The Armstrongs requested the appropriate form in which

to submit a signed statement (Proof of Loss) as required by their policy ("Your Duties After Loss) and asked that Farmers reconsider its prior denial of claim.

13. By letter dated October 2, 2003, Farmers through its employee/agent Joel Burns, responded to the Armstrongs and again informed them that Farmers was denying coverage under their homeowner's policy. Farmers expressly rejected the Armstrongs' request for proof of loss forms in violation of Idaho law.

14. Despite Farmers' written denial of their claim, on October 24, 2003, the Armstrongs prepared and submitted a sworn statement in Proof of Loss to comply with § 41-1839, Idaho Code, and the policy.

15. By letter dated November 14, 2003, Farmers through its employee/agent, Joel Burns, acknowledged receipt and review of the Armstrongs' Proof of Loss dated October 14, 2003. Burns informed the Armstrongs that Farmers was not changing its earlier position and that Farmers was still denying the Armstrongs claim.

16. At all times material hereto, the Armstrongs have fulfilled all the terms of their homeowner's policy in that all policy premiums were paid and current and that more than thirty (30) days have elapsed since the receipt by Farmers of satisfactory Proof of Loss, in accordance with the terms and conditions of the policy and Idaho law.

COUNT ONE
BREACH OF CONTRACT

17. Plaintiffs reallege the allegations in paragraphs 1-16 as though fully set forth herein.

18. Farmers' failure to take action or otherwise pay against all direct loss and damage to the Armstrongs' home is a breach of Farmers' contract of insurance.

19. As direct and proximate result of Farmers' breach of its contract of insurance, Armstrongs have suffered general and special damages and other expenses incidental to the prosecution of this action.

20. The Armstrongs have been forced to hire an attorney to prosecute this action and is entitled to an award of reasonable attorney fees pursuant to Idaho Code § 41-1839 as well as his costs incurred herein.

21. The Armstrongs are entitled to immediate payment of policy benefits owing in an amount consistent with the Proof of Loss provided to Farmers and in an amount reflecting the costs and attorney fees reasonably incurred to prosecute this action which amounts are greater than $10,000.00.

COUNT TWO
BREACH OF COVENANT OF GOOD FAITH
AND FAIR DEALING

22. Plaintiffs reallege the allegations in paragraphs 1-21 as though fully set forth herein.

23. At all times material hereto, Farmers' agents and employees including, but not limited to, David Nipp and Joes Burns were acting within the scope of their agency and/or employment with Farmers. Thereafter, Farmers ratified and approved the acts and/or omissions of its agents and employees.

24. The acts and omissions of Farmers constitute a breach of Farmers' covenant of good faith and fair dealing owed to the Armstrongs as an insured of Farmers.

25. The acts and omissions of Farmers were done intentionally and with a conscious disregard of the rights of the Armstrongs and in a manner intended to deprive the Armstrongs of their rights under contract of insurance and the intended protections and benefits flowing

therefrom. The conduct of Farmers, its agents and/or employees, was oppressive, fraudulent, wanton, malicious, outrageous and in bad faith.

26. The Armstrongs have been forced to hire an attorney to prosecute this action and is entitled to an award of reasonable attorney fees pursuant to I.C. § 41-1839 and/or I.C. § 12-120 as well as their costs incurred herein.

27. As a direct and proximate result of the aforementioned wrongful conduct of Farmers, the Armstrongs have suffered damages, including costs and attorney fees necessary to prosecute this action, in an amount in excess of $10,000.00.

COUNT THREE
NEGLIGENT INVESTIGATION AND CLAIM ADJUSTMENT

28. Plaintiffs reallege the allegations of paragraphs 1-27 as though fully set forth herein.

29. At all times material hereto, Farmers had a duty to acknowledge and act promptly upon the Armstrongs' claim for insurance benefits. Farmers had a duty to provide the Armstrongs proof of loss forms and to reasonably evaluate the Armstrongs' claim before denying coverage for the same.

30. Farmers breached its duty by failing to accept, acknowledge and act promptly to investigate and adjust the Armstrongs' claim. Farmers breached its duty by failing to conduct a reasonable investigation prior to denying the Armstrongs' claim. Farmers breached its duty by refusing to provide proof of loss forms.

31. As a direct and proximate result of Farmers' breach of duty, the Armstrongs had to undertake to repair and replace the damage to their home without the benefit of insurance proceeds to cover such loss.

32. As a direct and proximate result of Farmers' breach of duty, the Armstrongs have been forced to hire an attorney to prosecute this action and are entitled to recover reasonable attorney fees.

33. As a result of Farmers' breach of duty, the Armstrongs have suffered general and special damages in an amount in excess of $10,000.00. Farmers' breach of duty was oppressive, wanton, malicious and outrageous.

COUNT FOUR
UNFAIR TRADE PRACTICES

34. Plaintiffs reallege the allegations of paragraphs 1-33 as though fully set forth herein.

35. Idaho Code § 41-1329 sets forth unfair claim settlement practices applicable to the insurance claim settlement practices of Farmers and, as such, defines the standard of care for insurers. The acts of Farmers, its agents and/or employees, as described herein, were unfair and deceptive acts and practices in contravention of the standards of care set forth under I.C. §§ 41-1329(1); 41-1329(2); and 41-1329(4). Farmers' actions were also in direct contravention of I.C. § 41-1831.

36. As a direct and proximate result of Farmers' breach of duty, the Armstrongs have been forced to hire an attorney to prosecute this action and are entitled to recover reasonable attorney fees.

37. As a direct and proximate result of Farmers' violations of I.C. §§ 41-1329 and 41-1831, the Armstrongs have suffered and continue to suffer general and specific damages in an amount in excess of $10,000.00 and in an amount to be proven at trial.

COUNT FIVE
CONSTRUCTIVE FRAUD

38. Plaintiffs reallege the allegations of paragraphs 1-37 as though fully set forth herein.

39. A special relationship of insurer and insured existed between the Armstrongs and Farmers. The Armstrongs trusted and relied upon Farmers agent Nipp to provide them with adequate insurance coverage and to provide them with true and correct information regarding the insurance coverage they were purchasing from Farmers. The Armstrongs did inquire and ask agent Nipp as about the status of their insurance coverage under their Farmers homeowner's policy prior to the installation of their swimming pool.

40. Farmers, acting through agent Nipp, did represent and promise the Armstrongs that they would have insurance coverage following the installation of the swimming pool at their home. Farmers' representations and promises were material and Farmers knew it was important to the Armstrongs that they have adequate insurance coverage following the installation of the swimming pool at their home.

41. Farmers' representations and promises were false and made with the knowledge of their falsity or in ignorance of their truth.

42. The Armstrongs trusted Farmers and agent Nipp. The Armstrongs relied on the representations of Farmers and agent Nipp to their detriment. Farmers' representations did deceive and falsely mislead the Armstrongs into a false belief concerning the nature and status of their homeowner's coverage with Farmers.

43. As a result of Farmers' misrepresentation, the Armstrongs have suffered consequent and proximate injury in an amount in excess of $10,000.00 and in an amount to be proven at trial.

WHEREFORE, Plaintiffs pray that:

1. They be awarded those policy benefits pursuant to his contract of insurance with Farmers in an amount in excess of $10,000.00 and in an amount to be proven at trial;

2. They be awarded special and general damages for Farmer's contractual breach, bad faith and other fraudulent conduct in an amount in excess of $10,000.00;

3. They be awarded attorney fees and costs pursuant to I.C. § 41-1839 and/or I.C. § 12-120, including all applicable prejudgment interest and costs; and

4. For such other and further relief that the Court deems proper.

DATED this 22nd day of December 2003.

RAMSDEN & LYONS

By: _____
Douglas S. Marfice, Of the Firm
Attorneys for Plaintiffs

PLAINTIFFS DEMAND A TRIAL BY JURY OF TWELVE PERSONS.

VERIFICATION OF PLAINTIFFS

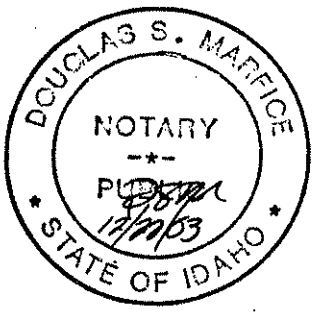
STATE OF IDAHO)
) ss.
County of Kootenai)

GLENDA ARMSTRONG, being first duly sworn on oath, deposes and says:

I am one of the Plaintiffs in the above-entitled action; I have read the foregoing COMPLAINT AND DEMAND FOR JURY TRIAL; I know the contents thereof, and I state the same to be true to the best of my knowledge, information, and belief.

Glenda Armstrong
GLENDA ARMSTRONG

SUBSCRIBED AND SWORN to before me this 22nd day of December 2003.



Douglas S. Marfice
NOTARY PUBLIC for the State of Idaho
Residing at CdA, Idaho
Commission Expires 8/2/07

STATE OF IDAHO)
COUNTY OF KOOTENAI) SS
FILED
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2004 JAN 16 AM 11:19

CLERK DISTRICT COURT
DEPUTY

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PATRICK E. MILLER
Attorney at Law
701 Front Avenue, Suite 101
P.O. Box E
Coeur d'Alene, ID 83816-0328
Telephone: (208) 664-8115
Facsimile: (208) 664-6338
ISBA# 1771

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife,	Case No. CV-03-9214
Plaintiffs,	**NOTICE OF APPEARANCE**
vs.	**FEE CATEGORY: I(1)(a)** **FEE: $47.00**
FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation; CORPORATE DOES I-X, whose true names are unknown,	
Defendants.	

NOTICE IS HEREBY GIVEN that Patrick E. Miller, 701 Front Avenue, Suite 101, Coeur d'Alene, Idaho, appears in the above-entitled matter as attorney of record for defendants.

DATED this 15th day of Jan., 2004

PATRICK E. MILLER
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of Jan., 2004, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Douglas S. Marfice
Michael A. Ealy
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

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PATRICK E. MILLER
Attorney at Law
701 Front Avenue, Suite 101
P.O. Box E
Coeur d'Alene, ID 83816-0328
Telephone: (208) 664-8115
Facsimile: (208) 664-6338
ISBA# 1771

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, *husband and wife,*	Case No. CV-03-9214
Plaintiffs,	**ANSWER**
vs.	
FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation; CORPORATE *DOES I-X, whose true names are unknown,*	
Defendants.	

COMES NOW the defendant, Farmers Insurance Company of Idaho, and admits, denies and alleges as follows:

I.

In answer to Paragraph I, this defendant admits the allegations contained therein.

II.

In answer to Paragraph II, this defendant admits the allegations contained therein.

III.

In answer to Paragraph III, this defendant alleges that the paragraph fails to set forth a justiciable claim as to this defendant; therefore, no response is required of this defendant.

IV.

In answer to Paragraph IV, this defendant alleges that the paragraph sets forth legal conclusions to which no response is required and upon which plaintiff retains the burden of proof.

V.

In answer to Paragraph V, this defendant admits the allegations contained therein.

VI.

In answer to Paragraph VI, this defendant admits that plaintiffs purchased a policy of insurance referred to as a protector plus homeowner's insurance policy, with policy number 91828-03-27, which had a policy period from March 24, 2003, to March 23, 2004. This defendant alleges that any and all obligations pursuant to the terms of the policy of insurance were in accordance with the specific, stated terms and conditions of the policy.

VII.

In answer to Paragraph VII, this defendant alleges that plaintiffs purchased a policy of insurance, policy number 91828-03-27, with a stated policy period of March 24, 2003, to March 23, 2004, and that the terms, conditions and obligations were set forth within the policy of insurance. This defendant denies any and all remaining allegations stated therein.

VIII.

In answer to Paragraph VIII, this defendant denies that David Nipp was a general agent of this defendant. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations stated therein; therefore, this defendant denies said allegations and leaves plaintiffs to their proof.

IX.

In answer to Paragraph IX, this defendant admits, upon information and belief, that the plaintiffs' home was flooded with water from the swimming pool. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of any and all remaining allegations contained therein; therefore, this defendant denies said allegations and leaves plaintiffs to their proof. This defendant specifically denies any allegations intended, by the language of this paragraph, to assert that David Nipp constituted a general agent of the defendant.

X.

In answer to Paragraph X, this defendant denies any and all allegations stated therein that David Nipp was a general agent of this defendant. In answer to any and all remaining allegations stated therein, this defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations; therefore, this defendant denies said allegations and leaves plaintiffs to their proof.

XI.

In answer to Paragraph XI, this defendant admits the allegations stated therein.

XII.

In answer to Paragraph XII, this defendant admits that plaintiffs responded to the coverage denial. This defendant alleges that the paragraph fails to set forth a justiciable claim upon which relief can be granted.

XIII.

In answer to Paragraph XIII, this defendant admits that this defendant responded to the request, and denied coverage. This defendant denies any and all remaining allegations stated therein. This defendant alleges that the paragraph fails to set forth a justiciable claim upon which relief can be granted.

XIV.

In answer to Paragraph XIV, this defendant admits that plaintiffs submitted a document, which plaintiffs asserted constituted a proof of loss. This defendant denies any and all remaining allegations contained therein. This defendant alleges that the paragraph fails to set forth a justiciable claim upon which relief can be granted.

XV.

In answer to Paragraph XV, this defendant admits the allegations contained therein.

XVI.

In answer to Paragraph XVI, this defendant admits that plaintiffs paid their policy premium. This defendant denies any and all remaining allegations contained therein.

XVII.

In answer to Paragraph XVII, this defendant restates and reaffirms its response to all prior paragraphs of plaintiffs' Complaint as though fully set forth herein.

XVIII.

In answer to Paragraph XVIII, this defendant denies the allegations contained therein.

XIX.

In answer to Paragraph XIX, this defendant denies the allegations contained therein.

XX.

In answer to Paragraph XX, this defendant denies the allegations contained therein.

XXI.

In answer to Paragraph XXI, this defendant denies the allegations contained therein.

XXII.

In answer to Paragraph XXII, this defendant restates and reaffirms its response to all prior paragraphs of plaintiffs' Complaint as though fully set forth herein.

XXIII.

In answer to Paragraph XXIII, this defendant denies that David Nipp was an agent or employee of this defendant and that, as alleged by plaintiff, he acted in a manner so as to bind this defendant. This defendant admits that Joel Burn acted within the course and scope of his employment with this defendant. This defendant denies any and all remaining allegations contained therein.

XXIV.

In answer to Paragraph XXIV, this defendant denies the allegations contained therein.

XXV.

In answer to Paragraph XXV, this defendant denies the allegations contained therein.

XXVI.

In answer to Paragraph XXVI, this defendant denies the allegations contained therein.

XXVII.

In answer to Paragraph XXVII, this defendant denies the allegations contained therein.

XXVIII.

In answer to Paragraph XXVIII, this defendant restates and reaffirms its response to all prior paragraphs of plaintiffs' Complaint as though fully set forth herein.

XXIX.

In answer to Paragraph XXIX, this defendant denies the allegations contained therein.

XXX.

In answer to Paragraph XXX, this defendant denies the allegations contained therein.

XXXI.

In answer to Paragraph XXXI, this defendant denies the allegations contained therein.

XXXII.

In answer to Paragraph XXXII, this defendant denies the allegations contained therein.

XXXIII.

In answer to Paragraph XXXIII, this defendant denies the allegations contained therein.

XXXIV.

In answer to Paragraph XXXIV, this defendant restates and reaffirms its response to all prior paragraphs of plaintiffs' Complaint as though fully set forth herein.

XXXV.

In answer to Paragraph XXXV, this defendant denies the allegations contained therein.

XXXVI.

In answer to Paragraph XXXVI, this defendant denies the allegations contained therein.

XXXVII.

In answer to Paragraph XXXVII, this defendant denies the allegations contained therein.

XXXVIII.

In answer to Paragraph XXXVIII, this defendant restates and reaffirms its response to all prior paragraphs of plaintiffs' Complaint as though fully set forth herein.

XXXIX.

In answer to Paragraph XXXIX, this defendant denies the allegations contained therein.

XL.

In answer to Paragraph XL, this defendant denies the allegations contained therein.

XLI.

In answer to Paragraph XLI, this defendant denies the allegations contained therein.

AFFIRMATIVE DEFENSES

COMES NOW the defendant, by way of affirmative defense, alleges as follows:

I.

Plaintiffs' Complaint fails to state a claim against this defendant upon which relief can be granted.

II.

That the terms and conditions of the policy of insurance, policy number 91828-03-27, policy period March 24, 2003, through March 23, 2004, defined the terms, conditions and obligations of this defendant.

III.

That this defendant complied with the terms and conditions of the policy of insurance.

IV.

That the asserted claim by the plaintiffs was not covered by the terms and conditions of the policy of insurance as entered into with this defendant.

WHEREFORE, having answered, this defendant prays that plaintiffs' Complaint be dismissed; that this defendant be awarded its costs and attorney fees occurred herein; for such other and further relief as the court deems just.

Pursuant to Rule 38(b), Idaho Rules of Civil Procedure, this defendant herein demands a trial by a jury of no less than twelve (12) persons in the above-entitled case.

DATED this 18th day of March, 2004.

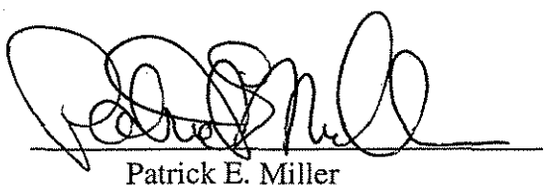
PATRICK E. MILLER
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of March, 2004, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Douglas S. Marfice
Michael A. Ealy
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

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DOUGLAS S. MARFICE, ISB #4072
MICHAEL A. EALY, ISB #5619
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Telephone: (208) 664-5818
Facsimile: (208) 664-5884

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife, Plaintiffs, vs. FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation; CORPORATE DOES I – X, whose true names are unknown, Defendants.	Case No. CV- 03-9214 **AFFIDAVIT OF DOUGLAS S. MARFICE IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

STATE OF IDAHO)
) ss.
County of Kootenai)

Douglas S. Marfice, having been first duly sworn upon oath, deposes and states:

1. I am an attorney for the Plaintiffs herein, and I have personal knowledge of the matters set forth in this affidavit.

2. I make the Affidavit of my own personal knowledge.

3. Attached hereto is a true and accurate photocopy of the following:

Exhibit "A": The Armstrongs' Protector Plus Homeowner's Insurance Policy Number 91828-0327

4. Attached hereto is a true and accurate photocopy of the following:

Exhibit "B": The Armstrongs' sworn statement of Proof of Loss

5. Attached hereto is a true and accurate photocopy of the following:

Exhibit "C": Farmers letter of November 14, 2003 denying the Armstrongs' claim.

6. Exhibit C provides in material part:

> Specifically, coverage afforded is stated as "Sudden and accidental discharge or overflow of water from within a plumbing, heating or air conditioning system, or from within a household appliance." Your swimming pool is not part of a plumbing, heating or air conditioning system, nor is it a household appliance. Therefore, our original decision to decline coverage will remain.

7. Attached hereto is a true and accurate photocopy of the following:

Exhibit "D": excerpts from the deposition transcript of Brian Armstrong and exhibits thereto.

8. Attached hereto is a true and accurate photocopy of the following:

Exhibit "E": excerpts from the deposition transcript of Glenda Armstrong and exhibits thereto.

FURTHER YOUR AFFIANT SAYETH NOT.

Douglas S. Marfice

SUBSCRIBED AND SWORN to me before this 4th day of January 2005.

Lisa D. Pacilio
My Commission Expires
Nov 2 2009
Kootenai County, ID
Notary Public

Notary Public for Idaho
Residing at Coeur d' Alene
My Commission expires: 11-2-09

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of January 2005, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Patrick E. Miller, Esq. 701 Front Avenue, Suite 101 PO Box E Coeur d'Alene ID 83816-0328	____ US Mail ____ Overnight Mail __✓__ Hand Delivered ____ Facsimile (208) 664-6338

Douglas S. Marfice

EXHIBIT "A"

FARMERS®

Non-Assessable

4TH EDITION

YOUR PROTECTOR PLUS PACKAGE POLICY

IDAHO

Farmers Insurance Group of Companies®
4680 Wilshire Boulevard, Los Angeles, California 90010

Dear Customer:

The member Companies and Exchanges of the Farmers Insurance Group of Companies would like to take this opportunity to say "Thank You" for your recent business.

Your needs for insurance protection are very important to us. We are committed to providing you with the best customer service at the lowest cost possible.

If you haven't already done so, please take a moment to review your policy to assure you understand the coverages. This is a very important document that you'll want to keep in a safe place.

If you have any questions regarding your policy or if you would like information about other coverages, feel free to contact me.

Again, thank you for choosing us for your insurance protection. We look forward to serving you.

Sincerely,

David R. Nipp LUTCF

Your Farmers® Agent

(208) 773-8484

http://www.farmersinsurance.com

FARMERS

PROTECTOR PLUS

FARMERS INSURANCE COMPANY OF IDAHO, POCATELLO, IDAHO

DECLARATIONS
HOMEOWNERS
Replaces all prior Declarations, if any

TRANSACTION TYPE: NEW BUSINESS
The Policy Period is effective (not prior to time applied for) at described residence premises.

POLICY NUMBER	POLICY PERIOD			POLICY EDITION
	FROM:	TO:	STANDARD TIME	
91828-03-27	03-23-1999	03-23-2000	12:01 A.M.	04

ISSUING OFFICE:
P.O. BOX 4820
POCATELLO, ID 83205

This policy will continue for successive policy periods, if: (1) we elect to continue this insurance, and (2) if you pay the renewal premium for each successive policy period as required by our premiums, rules and forms then in effect.

INSURED'S NAME & MAILING ADDRESS:

BRIAN L ARMSTRONG AND GLENDA A ARMSTRONG
3259 N 14TH ST
C D ALENE ID

83814-

LOCATION OR DESCRIPTION OF RESIDENCE PREMISES:
(Same as mailing address unless otherwise stated.)

DESCRIPTION OF PROPERTY

YEAR OF CONSTRUCTION	CONSTRUCTION TYPE	ROOF TYPE	NUMBER OF UNITS	OCCUPANCY
1993	FRAME	ASPHALT COMPOSITION	001	OWNER

COVERAGES - We provide insurance only for those coverages indicated by a specific limit or other notation.

SECTION I - PROPERTY				SECTION II - LIABILITY		ANNUAL PREMIUM
A - DWELLING OR MOBILE HOME	B - SEPARATE (OTHER) STRUCTURES	C - PERSONAL PROPERTY	D - LOSS OF USE	E - PERSONAL LIABILITY	F - MEDICAL PAY TO OTHERS	
$112,000	$11,200	$84,000	$56,000	$300,000 Each Occurrence	$1,000 Each Person	$235.52

ENDORSEMENTS

ENDORSEMENT NUMBER	EDITION NUMBER	DESCRIPTION
E6047A	1ED	EXTENDED REPLACEMENT COST & BUILDING ORDINANCE OR LAW
E6008	2ED	AMENDING PERSONAL INJURY - PROTECTOR PLUS
E6018	1ED	AMENDING DEBRIS REMOVAL COVERAGE AND POLLUTION EXCLUSION
E4207	1ED	EXCLUSION AMENDING SECTION II - LIABILITY
E6401	3ED	SEWER AND DRAIN WATER DAMAGE COVERAGE ENDORSEMENT
H6104	1ED	ENDORSEMENT AMENDING SECTION I - WATER DAMAGE
H6106	1ED	SPECIAL LIMITS ON SPORTS CARDS
S7504	1ED	OPTIONAL PAYMENT PLAN ON RENEWAL OF POLICY
S7581	2ED	SPECIAL STATE PROVISIONS - IDAHO
E6154	3ED	RESIDENCE GLASS ENDORSEMENT - WAIVER OF DEDUCTIBLE

DISCOUNTS

NEW HOME, AUTO/HOME, AND NON SMOKER DISCOUNTS HAVE BEEN APPLIED TO YOUR POLICY.

DEDUCTIBLES

$500 Deductible is applicable to covered losses under Coverage A, B, C.

THE FOLLOWING DEDUCTIBLE(S) APPLIES TO THE PERILS NAMED:
GLASS: $500

POLICY ACTIVITY

$	Previous Balance
235.52	Premium
10.00	Fees
245.52CR	Payments or Credits
$ NONE	Total

ANY "TOTAL" BALANCE OR *CREDIT* $7.00 OR LESS WILL BE APPLIED TO YOUR NEXT BILLING. BALANCES OVER $7.00 ARE DUE UPON RECEIPT.

This Declarations page is part of your policy. It supersedes and controls anything to the contrary. It is otherwise subject to all other terms of the policy.

AGENT: David R. Nipp LUTCF
AGENT PHONE: (208) 773-8484 **AGENT NUMBER:** 75 67 330

Countersignature

Authorized Representative

027

FARMERS

Your Protector Plus Homeowners Package Policy

INDEX

This policy is a legal contract between you (the policyholder) and us (the Company).
IT CONTAINS CERTAIN EXCLUSIONS.

READ YOUR POLICY CAREFULLY.

AGREEMENT

We will provide the insurance described in this policy. In return you will pay the premium and comply with all policy conditions.

DEFINITIONS

Throughout this policy, "you" and "your" mean the "named insured" shown in the Declarations and spouse if a resident of the same household. "We," "us" and "our" mean the Company named in the Declarations which provides this insurance. In addition, certain words appear in bold type. They are defined as follows:

1. **Actual Cash Value** - means replacement cost of the property at the time of loss, less depreciation.
2. **Aircraft** - means any device used or designed for flight including self-propelled missiles and spacecraft, except model or hobby aircraft not used or designed to carry people or cargo.
3. **Annual aggregate limit** - means the total amount we will pay for all **occurrences** which happen in each 12 month period, beginning with the inception date of this policy, regardless of the number of such **occurrences.**
4. **Bodily injury** - means bodily harm, sickness or disease, including care, loss of services and death resulting from that injury.
5. **Business** - means any full or part-time trade, profession or occupation.
6. **Business property** - means property pertaining to or intended for use in **business.**
7. **Earthquake** - means shaking or trembling of the earth, whether caused by volcanic activity, tectonic processes or any other cause.
8. **Earth Movement** - means movement of earth, including, but not limited to the following:
   a. **earthquake,** landslide or mudflow, all whether combined with **water** or not.
   b. collapse, settling, cracking, shrinking, bulging, subsidence, erosion, sinking, rising, shifting, expanding, or contracting of earth, all whether combined with **water** or not.
   c. volcanic eruption, including explosion, lava flow and volcanic action.
9. **Insured** - means you and the following **persons** if permanent residents of your household:
   a. your relatives,
   b. anyone under the age of 21,

   Under Section II - Liability, **insured** also means:
   c. any **person** or organization legally responsible for animals or watercraft owned by you, or anyone included in 9a or 9b, and covered by this policy. Any **person** or organization using or having custody of these animals or watercraft in the course of any **business** or without permission of the owner is not an **insured.**
   d. any **person** while employed by you or anyone in 9a or 9b with respect to any vehicle covered by this policy.
10. **Insured location** - means:
    a. the **residence premises;**
    b. any other premises you acquire during the policy period for use as a residence;
    c. that part of any other premises shown in the Declarations which you use as a residence;
    d. any premises you use in connection with the premises included in 10a, 10b or 10c.
    e. that part of a premises not owned by any **insured** but where an **insured** is temporarily residing.
    f. that part of a premises occasionally rented to any **insured** for non-**business** purposes.
    g. vacant land, other than farm land, owned by or rented to any **insured** and shown in the Declarations.
    h. land owned by or rented to you and on which you are building a one or two family dwelling to be used as your residence.
    i. cemetery plots or burial vaults of an **insured.**
11. **Motor vehicle** - means:
    a. a motorized land vehicle, including a trailer, semi-trailer or motorized bicycle, designed for travel on public roads.
    b. any vehicle while being towed or carried on a vehicle described in 11a.
    c. any other motorized land vehicle designed for recreational use off public roads.

Wall-to-wall carpeting attached to the structure is part of the structure.

We do not cover land or the value of land, including land on which the separate structure is located or the cost to restore, replace, repair or rebuild land. If a covered loss causes damage to a separate structure and to the land on the **residence premises,** we do not cover any increased cost to repair or rebuild the separate structure because of damage to the land.

We do not cover separate structures which are intended for use in **business** or which are actually used in whole or in part for **business** purposes.

Coverage C - Personal Property

We cover personal property owned or used by an **insured** while it is anywhere in the world. At your request after a loss we will also cover personal property:

a. owned by others while the property is on the part of the **residence premises** occupied by an **insured.** However, property of tenants not related to the **insured** is not covered.
b. owned by a guest while the property is in any residence occupied by an **insured.**
c. owned by and in the physical custody of a **residence employee** while in the service of an **insured** anywhere in the world.

Special Limits On Certain Personal Property

The limits shown below do not increase the Coverage C limit of insurance shown in the Declarations. The limit for each numbered group is the total limit for any one loss for all property in that group.

1. $1,000 or 10% of Coverage C limit (whichever is greater) on personal property usually located at an **insured's** residence, other than the **residence premises.**

   This limit does not apply to personal property in a newly acquired principal residence for 45 days after moving begins.

2. $100 on money, bank notes, medals, coins, bullion, platinum, gold and silver other than goldware and silverware, and collections of all such property.
3. $1,000 on securities, accounts, deeds, evidences of debt, letters of credit, notes other than bank notes, manuscripts, passports, tickets and stamp collections.
4. $1,000 on watercraft, and windsurfers, including their trailers, furnishings, equipment and outboard motors.
5. $1,000 on trailers not used with watercraft.
6. Jewelry, watches, precious and semi-precious stones, and furs, including articles for which fur represents the principal value, are insured for accidental direct physical loss or damage. The following exclusions and limitations apply:
   a. on loss caused by theft, $1,000 on any one article and $2,500 total limit..
   b. on loss caused by perils named under Coverage C of this policy other than theft, the limit shown in the Declaration for Coverage C will apply.
   c. on loss caused by perils not named and not excluded in this policy, $1,000 on any one article and $2,500 total limit.
   d. We do not cover loss or damage resulting from any process of refinishing, renovating, repairing, restoration or retouching; moths, vermin, insects, wear and tear, deterioration, inherent defects or faulty manufacturing.
7. $2,500 on theft of silverware, goldware and pewterware, including articles for which such metal represents the principal value.
8. firearms are insured for accidental direct physical loss or damage. The following exclusions and limitations apply:
   a. $1,000 on loss caused by theft.
   b. on loss caused by perils named under Coverage C of this policy other than theft, the limit shown in the Declarations for Coverage C will apply.
   c. $1,000 on loss caused by perils not named and not excluded in this policy.
   d. We do not cover loss or damage resulting from any process of refinishing, renovating, repairing, restoration or retouching; dampness or extremes in temperatures; vermin, insects, wear and tear, deterioration, inherent defects, faulty manufacturing, rust, fouling or explosion; marring, scratching, tearing or denting unless caused by fire, thieves or accidents to conveyances.

The limit of insurance, including debris removal, for any one loss will not exceed 5% of the limit applying to the dwelling, nor more than $500 for any one tree, shrub or plant. This coverage is in addition to the limit applying to the dwelling.

4. *Fire Department Service Charge.* We pay up to $500 as an additional amount of insurance for service charges made by a fire department when called to protect covered property from an insured loss. In no event will we pay more than $500 in charges resulting from any one service call. No deductible applies to this coverage.

5. *Emergency Removal of Property.* We pay for direct loss from any cause to covered property:

   a. while being removed from a premises endangered by a loss covered under LOSSES INSURED, and
   b. while removed for not more than 30 days from the date of removal.

   This coverage does not change the amount of insurance applying to the covered property.

6. *Credit Card, Fund Transfer Card, Forgery and Counterfeit Money.* We pay up to $1,500 as an additional amount of insurance for loss to an **insured** caused by:

   a. theft or unauthorized use of credit or fund transfer cards issued to an **insured.**
   b. forgery or alteration of a check or other negotiable instrument.
   c. acceptance in good faith of counterfeit United States or Canadian paper money.

   No deductible applies to a, b or c above.

   We do not cover:

   a. **business** pursuits or dishonest acts of any **insured.**
   b. use of any card by a resident of your household or any **person** entrusted with any card if an **insured** has not met the terms under which such card is issued.

   Defense of a claim or suit against any **insured** or any **insured's** bank for liability under this coverage:

   a. We may investigate and settle any claim or suit we consider proper. Our duty to defend any claim or suit ends when we pay a loss equal to the limit of insurance.
   b. We will defend at our expense and with attorneys of our choice a claim made or suit brought against any **insured** for payment under Credit or Fund Transfer Card Coverage.
   c. At our option and expense we may defend the ***insured*** *or the* ***insured's*** *bank against a suit to enforce* payment under Forgery Coverage.

7. *Collapse of Buildings.* We cover accidental direct physical loss to covered property covered in A and B if caused by collapse which occurs due to:

   a. weight of ice, snow, sleet or rain which collects on a roof;
   b. weight of people, contents or equipment while on a roof.

8. *Freezer Food Spoilage.* We will pay for the cost of loss or damage to food in a freezer on the **residence premises** which thaws due to interruption of power or other utility service which originates off the **residence premises.**

9. *Guaranteed Replacement Cost Coverage - Buildings.* We will settle covered loss to buildings under Coverage A - Dwelling and Coverage B - Separate Structures at replacement cost regardless of the limits of insurance shown on the Declarations Page, subject to the following provisions:

   a. You have insured your dwelling and separate structures to 100% of their replacement cost as determined by our Building Replacement Cost Guide.
   b. You have accepted each annual adjustment in building amounts in accordance with Value Protection Clause in the policy.
   c. You have notified us within 90 days of the start of any physical changes which increase the value of your insured buildings by $5,000 or more, and pay any additional premium. This includes any new structures and any additions to or remodeling of your dwelling or other structures on the **residence premises.**
   d. You have complied with all of the "Loss Settlement" provisions shown in Condition 3 of Section I of the policy applicable to Coverages A and B.

   We do not cover any costs required to replace, rebuild, stabilize or otherwise restore the land.

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.**

14. Sudden and accidental tearing apart, cracking, burning or bulging of a steam, hot water or air conditioning system, or appliance for heating **water.**

    This peril does not include loss caused by or resulting from freezing.

15. Freezing of a plumbing, heating, air conditioning system or household appliance.
    This peril does not include loss on the ***residence premises*** *while the dwelling is unoccupied unless you have* used reasonable care to:

    a. maintain heat in the building, or
    b. shut off the **water** supply and drain the system and appliance of **water.**

16. Sudden and accidental damage from artificially generated electrical current.

    This peril does not include loss to a tube, transistor, microchip or similar electronic component.

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.**

   Acts or omissions of **persons** can cause, contribute to or aggravate **earth movement**. Also, **earth movement** can occur naturally to cause loss, or combine with acts or omissions of **persons** to cause loss. Whenever **earth movement** occurs, the resulting loss is always excluded under this policy, however caused; except we do cover direct loss by fire or explosions resulting from **earth movement.**

   The following examples are set forth to help you understand this exclusion and are not meant to be all-inclusive.

   EXAMPLE 1:

   Rain falls on soil inadequately compacted or maintained by a builder, neighbor or you. As a result, **earth movement** occurs, causing loss to the dwelling or personal property. Such loss is not covered by this policy.

   EXAMPLE 2:

   Cracks occur in your dwelling or separate structure because it is built on natural or fill soil which is expansive and the dwelling or structure is not designed or constructed to withstand the soil movement. Such loss is not covered under this policy.

   EXAMPLE 3:

   Water *leaks from a pipe which causes settling,* and the settling causes loss to the dwelling, separate structure, or personal property. Such loss is not covered by this policy, regardless of the cause or causes of the **water** leak.

2. **Water damage.**

   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 **water damage** occurs, the resulting loss is always excluded under this policy, however caused; except we do cover direct loss to the dwelling, separate structures, or personal property if caused by fire or explosion resulting from **water damage.**

   The following examples are set forth to help you understand this exclusion and are not meant to be all-inclusive.

   EXAMPLE 1:

   Rain **water** collects on or soaks into the ground surface. Because of faulty design, construction or maintenance of the **residence premises,** your neighbor's property or **water** diversion devices, the **water** causes loss to the dwelling, separate structure, or personal property. Such loss is not covered by this policy.

   EXAMPLE 2:

   A pipe under your sink breaks, and **water** damages your wallpaper, carpeting and personal property. The **water** also gets under the dwelling or separate structure causing **earth movement** which results in cracking of the foundation and walls. The loss to the wallpaper, carpeting and personal property is covered, but the loss to the foundation and walls is not covered by this policy.

   EXAMPLE 3:

   Water which has backed up through sewers or drains, or **water** below ground level causes loss to the dwelling, separate structure or personal property. *Such loss is not covered by this policy.*

SECTION I - CONDITIONS

1. *Insurable Interest and Limit of Insurance.*

   Even if more than one **person** has an insurable interest in the covered property, we pay the smallest of the following amounts.

   a. an amount equal to the **insured's** interest, or

   b. the applicable limit of insurance.

2. *Your Duties After Loss.*

   If a covered loss occurs, you will perform the following duties:

   a. give written notice to us or our agent without unnecessary delay. In case of theft, also notify the police. In case of loss under the Credit or Fund Transfer Card Coverage, also notify the issuer of the card.

   b. protect the property from further damage. Make any emergency repairs needed to protect the property from further damage. Keep records of repair costs.

   c. make a list of all damaged or destroyed personal property showing in detail the quantity, description, **actual cash value** and amount of loss. Attach all bills, receipts and related records that support your claim.

   d. as often as we reasonably require:

      (1) exhibit damaged property.

      (2) provide us with records and documents we may request, including banking or other financial records, if obtainable and permit us to make copies.

      (3) submit to examination under oath and sign a transcript of same.

   e. send us within 60 days after our request your signed sworn statement showing:

      (1) time and cause of loss,

      (2) interest of the **insured** and all others in the property involved,

      (3) all legal claims against the property involved,

      (4) other insurance which may cover the loss,

      (5) changes in title or occupancy of the property during the term of the policy,

      (6) specifications and detailed repair estimates of any damaged building,

      (7) a list of damaged or destroyed personal property described in 2c,

      (8) receipts and records that support additional living expenses and loss of rents,

      (9) evidence which states the amount and cause of loss to support a claim under Credit or Fund Transfer Card, Forgery and Counterfeit Money Coverage.

3. *Loss Settlement.*

   Coverage A and B

   Covered loss to Buildings under Coverage A and B will be settled at replacement cost without deduction for depreciation, subject to the following methods:

   (1) Settlement under replacement cost will not be more than the *smallest* of the following:

      (a) the replacement cost of that part of the building damaged for equivalent construction and use on the same premises.

      (b) the amount actually and necessarily spent to repair or replace the building intended for the same occupancy and use.

   (2) When the cost to repair or replace is *more* than $1,000 or *more* than 5% of the limit of insurance in this policy on the damaged or destroyed building, whichever is less, we will pay no more than the **actual cash value** of the damage *until* repair or replacement is completed.

   (3) At your option, you may make a claim under this policy on an **actual cash value basis** for loss or damage to buildings. Within 180 days after loss you may make a claim for any additional amount on a replacement cost basis if the property has been repaired or replaced.

   Coverage C -

   a. The following types of property will be settled at full current cost or repair or replacement at the time of loss, without deduction for depreciation.

      (1) personal property and structures that are not buildings.

      (2) carpeting, domestic appliances, awnings, outdoor equipment and antennas, all whether or not attached to buildings.

12. *Suit Against Us.* We may not be sued unless there has been full compliance with all the terms of this policy. Suit on or arising out of this policy must be brought within one year after the loss occurs.

13. *Our Options.* We may repair or replace the damaged property with equivalent property. We may also take all or part of the damaged property at the agreed or appraised value. We will give you written notice of our intention within 30 days after receipt of your signed sworn statement of loss.

14. *Loss Payment.* We will adjust all losses with you. We will pay you unless another payee is named in the policy. We will pay within 60 days after:

    a. we reach agreement with you, or
    b. a court judgment, or
    c. an appraisal award.

    A loss payment will not reduce the applicable limit of insurance.

15. *Abandoned Property.* We need not accept property abandoned by an **insured.**

16. *Mortgage Clause.* The word "mortgagee" includes trustee or loss payee. If a mortgagee is named in this policy, a covered loss will be paid to the mortgagee and you, as interests appear. If more than one mortgagee is named, the order of payment will be the same as the order of the mortgagees.

    If we deny your claim, such denial will not apply to a mortgagee's valid claim if the mortgagee:

    a. knows and notifies us of any change of ownership, occupancy or substantial change in risk.
    b. pays on demand any premium due if you have failed to do so.
    c. submits a signed, sworn statement of loss within 60 days after we notify the mortgagee of your failure to do so. Policy conditions relating to *Other Insurance, Appraisal, Suit Against Us and Loss Payment* apply to the mortgagee.

    We will give the mortgagee 10 days notice before cancelling this policy.

    If we pay the mortgagee for any loss and deny payment to you:

    a. we have right of recovery against any party responsible for the loss, or
    b. at our option, we may pay off the entire mortgage debt to the mortgagee. In this event, we receive full transfer of the mortgage.

    A mortgagee's claim will not be impaired by transfer of a right of recovery.

17. *No Benefit to Bailee.* This insurance will not benefit any **person** or organization who may be caring for or handling property for a fee.

SECTION II - LIABILITY

Coverages

Coverage E - Personal Liability

We will pay those damages which an **insured** becomes legally obligated to pay because of **bodily injury, property damage** or personal injury resulting from an **occurrence** to which this coverage applies. Personal injury means any injury arising from:

(1) false arrest, imprisonment, malicious prosecution and detention.
(2) wrongful eviction, entry, invasion of rights of privacy.
(3) libel, slander, defamation of character.
(4) discrimination because of race, color, religion or national origin. Liability prohibited by law is excluded. Fines and penalties imposed by law are covered.

At our expense and with attorneys of our choice, we will defend an **insured** against any covered claim or suit. We are not obligated to pay defense costs, including attorneys' fees of any claim or suit where you select an attorney not chosen by us because there is a dispute between you and us over coverage. We may investigate and settle any claim or suit that we consider proper. Our obligation to defend any claim or suit ends once we have paid our limit of liability.

Coverage F - Medical Payments To Others

We will pay the necessary medical expenses for services furnished to a **person** other than you or any resident of your household within 3 years from the date of an **occurrence** causing **bodily injury.** Medical expenses mean reasonable charges for medical, surgical, x-ray and dental services, prosthetic devices, eyeglasses hearing aids, pharmaceuticals, ambulance, hospital, licensed nursing and funeral services.

This coverage applies to:

(a) **persons** on the **insured location** with permission of an **insured**; or

10. Personal injury arising from or during the course of civic or public activities performed for pay by an **insured.**
11. Personal injury to any resident of the **residence premises.**
12. Any loss, cost, or expense resulting from the clean-up, detoxification, or treatment of any site used by you or any **person** acting on your behalf for the disposal, storage, handling, processing or treatment of waste.

Applying To Coverage F - Medical Payments To Others

We do not cover **bodily injury:**

1. *To you or any resident of your* **residence premises** except a **residence employee.**
2. To a **residence employee** who is off the **insured location** and not in the course of employment by an **insured.**
3. To any person eligible to receive benefits provided or mandated under any workers' compensation, occupational disease or non-occupational disability law.
4. Resulting from any **nuclear hazard.**

Applying To Coverage E and F - Personal Liability and Medical Payments To Others

We do not cover **bodily injury, property damage** or personal injury which:

1. arises from or during the course of **business** pursuits of an **insured.**

   But we do cover:

   a. that part of a residence of yours which is rented or available for rent:
      (1) on an occasional basis for sole use as a residence.
      (2) to no more than two roomers or boarders for sole use as a residence.
      (3) as an office, studio or private garage.
   b. part-time services performed directly by an **insured** under age 21 who is a resident of your household. "Part-time" means no more than 20 hours per week.
2. results from the rendering or failure to render **business** or professional services.
3. is either:
   a. caused intentionally by or at the direction of an **insured;** or
   b. results from any **occurrence** caused by an intentional act of any **insured** where the results are reasonably foreseeable.
4. results from the legal liability of any **insured** because of home care services provided to any **person** on a regular basis by or at the direction of:
   a. any **insured;**
   b. any employee of any **insured;**
   c. any other **person** actually or apparently acting on behalf of any **insured.**

   Regular basis means more than 20 hours per week.

   This exclusion does not apply to:
   a. home care services provided to the relatives of any **insured;**
   b. occasional or part time home care services provided by any **insured** under 21 years of age.
5. results from an **insured** transmitting a communicable (including sexually transmitted) disease.
6. results from an existing condition on an uninsured location owned by or rented to an **insured.**
7. *results from the ownership, maintenance, use, loading or unloading of:*
   a. **aircraft**
   b. **motor vehicles**
   c. jet skis and jet sleds or
   d. any other watercraft owned or rented to an **insured** and which:
      (1) has more than 50 horsepower inboard or inboard-outdrive motor power; or
      (2) is powered by one or more outboard motors with more than 25 total horsepower; or
      (3) is a sailing vessel 26 feet or more in length.

c. cooperate with and assist us in any matter relating to a claim or suit.

d. under *Damage to Property of Others Coverage*, send us a sworn statement of loss within 60 days of the loss. Also exhibit any damaged property which is within the **insured's** control.

e. the **insured** will not, except at the **insured's** own cost, voluntarily make any payment, assume any obligation or incur any expense except First Aid Expenses.

4. *Duties of an Injured Person - Coverage F - Medical Payments to Others.* The injured **person** or someone acting on behalf of the injured **person** will:

   a. give us written proof of claim as soon as possible, under oath if required.

   b. authorize us to obtain medical records and reports.

   The injured **person** will submit to physical examination by a doctor we choose as often as we reasonably require.

5. *Payment of Claim - Coverage F - Medical Payments to Others.* Payment under this coverage is not an admission of liability by an **insured** or us.

6. *Suit Against Us.* We may not be sued unless there has been full compliance with the terms of this policy. No one has any right to make us a party to a suit to determine the liability of a **person** we insure. We may not be sued under Coverage E - Personal Liability until the obligation of the **insured** has been determined by final judgment or agreement signed by us.

7. *Bankruptcy of an Insured.* Bankruptcy or insolvency of an **insured** will not relieve us of our duties under this policy.

8. *Other Insurance - Coverage E - Personal Liability.* This insurance is excess over any other valid and collectible insurance. But if other insurance is specifically written as excess coverage over this policy, the limit of this policy applies first.

   If other insurance is written by us, only the highest limit of any one policy applies to the loss.

GENERAL CONDITIONS

Applying To The Entire Policy

1. *Entire Contract.* This policy, the Declarations and any endorsements include all the agreements between you and us relating to this insurance.

2. *Policy Period.* This policy applies only to loss under Section I or **bodily injury, property damage** or personal injury under Section II which occurs during the policy period as shown in the Declarations.

3. *Concealment or Fraud.* This entire policy is void if any **insured** has knowingly and willfully concealed or misrepresented any material fact or circumstance relating to this insurance before or after the loss.

4. *Coverage Changes.* We may change this policy or replace it to conform to coverage currently in use. If we broaden coverages without charge during or within 60 days prior to the policy period, the broadened coverage will apply immediately. If we restrict any coverages, these restrictions will not apply until the next renewal date. The change or new policy will be delivered to you or mailed to you at your mailing address shown on the Declarations at least 30 days before its effective date.

   No other change or waiver in this policy is valid except by endorsement, new Declarations, or new policy issued by us.

   If a premium adjustment is necessary, we will make the adjustment as of the effective date of the change.

5. *Cancellation.*

   a. You may cancel this policy by:

      (1) returning it to us, or

      (2) notifying us in writing when cancellation is to take effect.

   b. We may cancel this policy by mailing or delivering written notice to you, or your representative. Such notice will be mailed or delivered to the last address known to us. The mailing of it will be sufficient proof of notice.

   Cancellation Reasons

   We may cancel this policy only for the following reasons:

   (1) Non-payment of premium, whether payable to us or our agent. We may cancel at any time by notifying you at least 10 days before the date cancellation takes effect.

RECIPROCAL PROVISIONS

(Applicable Only If This Policy Is Issued By The Fire Insurance Exchange Or Farmers Insurance Exchange)

This policy is made and accepted in consideration of your premium payment to us. It is also in consideration of the power of attorney you signed as part of your application and the information you gave to us on your application. Some of your statements actually become a part of the policy which we call "The Declarations."

When you signed the power of attorney authority on your application, you authorized the Underwriters Association to execute interinsurance policies between you and other subscribers.

Nothing in this policy is intended, or shall be construed, to create either:

1. A partnership or mutual insurance association.
2. Any joint liability.

We may sue or be sued in our own name, as though we were an individual, if necessary to enforce any claims which arise under this policy. In any suit against us, service of process shall be upon the Underwriters Association, Attorney-in-Fact.

Membership fees which you pay are not part of the premium. They are fully earned when you are granted membership and coverage is effective. They are not returnable. However, they may be applied as a credit to membership fees required of you for other insurance which we agree to write.

We hold the Annual Meeting of the members of the Fire Insurance Exchange at our Home Office at Los Angeles, California, on the first Monday following the 15th day of March of each year at 10:00 a.m. If this policy is issued by the Farmers Insurance Exchange, we hold such meeting at the same place on the same day each year at 2:00 p.m.

The Board of Governors may elect to change the time and place of the meeting. If they do so, you will be mailed a written or printed notice at your last known address at least ten (10) days before such a time. Otherwise, no notice will be sent to you.

The Board of Governors shall be chosen by subscribers from among yourselves. This will take place at the Annual Meeting or at any special meeting which is held for that purpose. The Board of Governors shall have full power and authority to establish such rules and regulations for our management as are not inconsistent with the subscriber's agreements.

Your premium for this policy and all payment made for its continuance shall be payable to us at our Home Office or such location named by us in your premium invoice.

The funds which you pay shall be placed to your credit on our records. They will be applied to the payment of your proportion of losses and expenses and to the establishment of reserves and general surplus. The Board of Governors or its Executive Committee has the authority to deposit, withdraw, invest, and reinvest such funds. You agree that any amount which the Board of Governors allocates to our surplus fund may be retained by us. Also, after provision is made for all of our liabilities, it may be applied to any purpose deemed proper and advantageous to you and other policyholders.

This policy is non-assessable.

This policy shall not be effective unless countersigned on the Declarations Page by a duly authorized representative of the Company named on the Declarations.

The Company named on the Declarations has caused this policy to be signed by the Officers shown below.

FIRE INSURANCE EXCHANGE®
by Fire Underwriters Association,
Attorney-in-Fact

FARMERS INSURANCE EXCHANGE®
by Farmers Underwriters Association,
Attorney-in-Fact

MID-CENTURY INSURANCE COMPANY®

Farmers Insurance Company of Arizona
Farmers Insurance Company of Idaho
Farmers Insurance Company of Oregon
Illinois Farmers Insurance Company
Farmers Insurance Company, Inc.
Farmers Insurance of Columbus, Inc.

Secretary

Vice President

EXTENDED REPLACEMENT COST AND BUILDING ORDINANCE OR LAW COVERAGE ENDORSEMENT PROTECTOR PLUS POLICY

E6047a 1st Edition

When this endorsement is attached to your policy, the following provisions apply:

Extended Replacement Cost - Coverage A

Under **Section I - Property, Additional Coverages,** Item 9. *Guaranteed Replacement Cost Coverage - Buildings* is deleted and replaced with the following:

9. *Extended Replacement Cost Coverage - Coverage A.* We will pay to repair or replace covered loss under Coverage A - Dwelling up to 125% of the limits of insurance for Coverage A - Dwelling.

   You must agree to and comply with the following additional policy provisions:

   a. You must insure your dwelling to 100% of the replacement cost.

   b. You must accept each annual adjustment in building amounts in accordance with Value Protection Clause in the policy.

   c. You must notify us within 90 days of the start of any physical changes which increase the value of your insured buildings by $5,000 or more, and pay any additional premium. This includes any new structures and any additions to or remodeling of your dwelling on the **residence premises.**

   We do not cover any costs required to repair, replace, rebuild, stabilize or otherwise restore the land.

   This coverage does *not* apply to Coverage B - Separate Structures.

Under **Section I - Property, Conditions,** 3. *Loss Settlement, Coverage A and B* is deleted and replaced with the following:

3. *Loss Settlement.*

   Coverage A and Coverage B

   Covered loss to buildings under Coverage A - Dwelling and Coverage B - Separate Structures will be *settled at replacement cost without deduction for depreciation, subject to the following methods:*

   1. Settlement under replacement cost will not be more than the *smallest* of the following:
      a. the limit of insurance under this policy that applies to the damaged or destroyed dwelling or separate structure.
      b. the replacement cost of that part of the building damaged for equivalent construction and use on the same premises.
      c. the amount actually and necessarily spent to repair or replace the building intended for the same occupancy and use.
   2. When the cost to repair or replace is *more* than $1,000 or *more* than 5% of the limit of insurance in this policy on the damaged or destroyed building, whichever is less, we will pay no more than the **actual cash value** of the damage *until* repair or replacement is completed.
   3. At your option, you may make a claim under this policy on an **actual cash value** basis loss or damage to buildings. Within 180 days after loss you may make a claim for any additional amount on a replacement cost basis if the property has been repaired or replaced.

   This endorsement replaces any Guaranteed Replacement Cost provision which is currently in your policy.

Building Ordinance or Law Coverage

Under **Section I - Property, Losses Not Insured,** Item 5. is deleted.

Enforcement of any ordinance or law regulating construction, repair or demolition of a building or other structure, unless endorsed on this policy.

ENDORSEMENT AMENDING DEBRIS REMOVAL COVERAGE AND POLLUTION EXCLUSION

E6018
1st Edition

When this endorsement is attached to your policy the following provisions apply:

SECTION I - PROPERTY - ADDITIONAL COVERAGES

1. *Debris Removal* is deleted and replaced with the following:

1. *Debris Removal.* We will pay your reasonable expenses to remove debris caused by a covered loss to covered property under SECTION I - PROPERTY. However, we will not pay any expenses incurred by you or anyone acting on your behalf to:
   a. extract **pollutants** from land or water; or
   b. remove, restore or replace polluted land or water.

   If the amount of loss, including debris removal expense exceeds the limit of insurance, we will pay up to an additional 5% of the limit of insurance on the damaged property.

SECTION II - LIABILITY - EXCLUSIONS

Item 8 (Item 12 in Protector Plus) under ***SECTION II - EXCLUSIONS - Applying to Coverage E - Personal Liability*** is deleted and replaced with the following:

8. (12) A. We do not cover **bodily injury** or **property damage** resulting from the actual, alleged or threatened discharge, dispersal, seepage, release, migration or escape of **pollutants:**
   (1) at or from the **insured location;**
   (2) at or from any premises, site or location which is or was at any time owned or occupied by or rented or loaned to you or any **insured;**
   (3) at or from any premises, site or location which is or was at any time used by or for you or any **person** acting on your behalf for the handling, storage, disposal, processing or treatment of any **pollutant;**
   (4) which are or were at any time transported, handled, stored, treated, disposed of or processed as waste by or for you or any **person** or organization for whom you may be legally responsible; or
   (5) at or from any premises, site or location on which you or any **person** or organization acting directly or indirectly on your behalf are performing operations to:
      (a) transport any **pollutant** on or to any site or location used for the disposal, storage, handling, processing or treatment of **pollutants;** or
      (b) test for, monitor, clean up, remove, contain, treat, detoxify or neutralize **pollutants.**

   B. We do not cover any loss, cost or expense arising out of any:
      1. Request, demand, or order that any **insured** or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of **pollutants;**
      2. Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to or assessing the effects of **pollutants.**

   Pollutant or **pollutants** means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste materials. Waste materials include materials which are intended to be or have been recycled, reconditioned or reclaimed.

   Pollutant or **pollutants** does not mean smoke, soot or fumes from a fire caused by one or more of the Section I - Losses Insured.

The following exclusion is added:

We do not cover any claim or suit for actual, alleged, threatened or feared **bodily injury** or **property damage** for which you or any **insured** may be held legally liable because of actual, alleged, threatened or feared **bodily injury** or **property damage** resulting from lead or lead poisoning.

(Continued Next Page)

SPECIAL STATE PROVISIONS ENDORSEMENT - IDAHO

S7581
IDAHO
2nd Edition

Under General Condition 5, *Cancellation,* no notice of cancellation is valid unless we notify you at least 20 days before the date cancellation takes effect.

General Condition 10, *Policy Fees,* (does not apply to Mobile Homeowners Policy) and the fifth paragraph of the Reciprocal Provisions, are deleted and replaced with the following:

Membership or policy fees which you pay are part of the premium but are fully earned when coverage is effective. They are not refundable (except as noted in a. and b. below), but may be applied as a credit to membership or policy fees required for other insurance accepted by us.

a. If we cancel this policy during or at the end of the first policy period, we shall refund all membership or policy fees.

b. If you cancel this policy during or at the end of the first policy period because it does not agree with the application and is not as represented by the agent, we shall refund all membership or policy fees.

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.

SPECIAL LIMITS ON SPORTS CARDS

H6106
1st Edition

The following provisions apply when this endorsement is attached to your policy:

Under SECTION I, Coverage C - Special Limits On Certain Personal Property:

Item 12. is added as follows:

12. $200 per card and $1,000 in the aggregate on sports cards, including but not limited to baseball cards.

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.

040

CHILD MOLESTATION EXCLUSION
SECTION II - LIABILITY

E4207
1st Edition

We do not cover actual or alleged injury or medical expenses caused by or arising out of the actual, alleged, or threatened molestation of a child by:

1. any **insured**; or
2. any employee of any **insured**; or
3. any volunteer, **person** for hire, or any other **person** who is acting or who appears to be acting on behalf of any **insured**.

Molestation includes but is not limited to any act of sexual misconduct, sexual molestation or physical or mental abuse of a minor.

We have no duty to defend or settle any molestation claim or suit against any **insured,** employee of any **insured,** or any other **person.**

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.

OPTIONAL PAYMENT PLAN ON RENEWAL OF POLICY

S7504
IDAHO
1st Edition

If we send you an offer to renew any of all of the coverages in your policy, we will send you a Renewal Premium Notice. You may pay the premium either in full or in two equal installments.

If paid in installments, we will add a service charge when the policy is renewed.

The first premium installment, including the service charge, shall be payable on or before the policy renewal date. The second installment shall be payable not later than 60 days after the renewal date.

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.

FARMERS®

042

T10691O1

EXHIBIT "B"

October 24, 2003

Farmers Insurance Company of Idaho
PO Box 4820
Pocatello ID 83205

Date 10-5-4 Exhibit # 4
Case Armstrong v Farmers
Deponent Armstrong
Reporter Sagot
Naegeli Reporting Corporation
(800) 528-3335 FAX (503) 227-7123

Attached hereto and incorporated herein by reference are :

(i) Policy Declarations;
(ii) Exhibit "1" – Service Master/Merry Maids invoice
(iii) Exhibit "2" – Fairway Floors estimate
(iv) Exhibit "3" – Personal Property Inventory
(v) Exhibit "4" – Modern Glass Company invoice

PROOF OF LOSS TO COMPLY WITH SECTION 41-1839, IDAHO CODE

NAME OF POLICY:	4th Edition, "Your Protection Plus Package Policy" Idaho
DATE ISSUED:	03/24/03 (Initial issue date 12/01/97)
DATE EXPIRED:	03/23/04
DATE OF LOSS:	07/02/03
NAME OF INSUREDS:	Brian L. Armstrong and Glenda A. Armstrong
MORTGAGEE:	GMAC Mortgage Corporation PO Box 10430 Van Nuys CA 91410 **or** Greenpoint Mortgage PO Box 79363 City of Industry CA 91716-9363
NUMBER OF POLICY:	91828-03-27
AGENT ISSUING POLICY:	David R. Nipp
FARMERS CLAIM NO.:	1003763049

PLEASE TAKE NOTICE at the time of the loss hereinafter described, the above policy of insurance was issued by Farmers Insurance Group of Companies (Farmers Insurance Company of Idaho) to Brian and Glenda Armstrong.

COVERAGES:	LIMITS:	
A – Dwelling:	$ 133,000.00	w/Extended Replacement Cost endorsement (E6047a).
B – Separate Structures:	$ 13,300.00	[Not applicable to this loss.]
C – Personal Property:	$ 99,750.00	
D – Loss of Use:	$ 66,500.00	[Not applicable to this loss.]

ADDITIONAL COVERAGES: [Applicable to this Loss]

1.	**Debris Removal:**	$ 5% of Dwelling Limit
2.	**Emergency Repairs:**	$ included in limits
3.	**Emergency Removal of Property:**	$ included in limits

AMOUNT CLAIMED UNDER THE TERMS OF THIS POLICY:

The insureds claim the sum of: [Approximate loss based on estimate]

$ 3,603.83	(Dwelling Repair) Coverage A *See, Exhibit "1," ServiceMaster invoice.*
$ 2,691.00	(Dwelling Repair) Coverage A *See, Exhibit "2," Fairway Floors estimate.*
$ 231.72	(Personal Property) Coverage C *See, Exhibit "1," p. 10*
$ 949.00	(Personal Property) Coverage C *See, Exhibit "3."*
$ 150.00	(Emergency repair) Additional Coverages Included in Dwelling Repair invoice. *See, Exhibit "1," p. 9 as "service call," also Labor Ready labor.*
$ 96.39	(Debris Removal) Additional Coverages Included in Dwelling Repair Invoice, *See, Exhibit "1," p. 9 as "haul debris."*
$ 180.56	Residence Glass – Waiver of Deductible Endorsement (E6154 3rd Ed.) *See, Exhibit "4."*
$ 7,902.50	**Subtotal**
500.00	(Less deductible)
$ 7,402.50	**Total**

The insureds have fulfilled all of the terms of the policy in that all premiums were paid current. No attempt to deceive the underwriter was in any manner made at any time. All information heretofore given by the insured including prior oral and written notice of the loss to the company is a part of this Proof of Loss. Any other information that may be required will be furnished and considered part of this Proof of Loss.

DATED this 24th day of October 2003.

By: _____
BRIAN L. ARMSTRONG

By: Glenda A. Armstrong
GLENDA A. ARMSTRONG

STATE OF IDAHO)
) ss.
County of Kootenai)

The undersigned, being first duly sworn upon oath, deposes and states:

That they are the insureds in the above-entitled matter, that they have read the foregoing document, and based on their information and belief, it contains true and accurate information.

_____
BRIAN L. ARMSTRONG

Glenda A Armstrong
GLENDA A. ARMSTRONG

SUBSCRIBED AND SWORN to before me this 24th day of October 2003.

DOUGLAS S. MAFFICE NOTARY PUBLIC STATE OF IDAHO 1/31/03

_____
Notary Public for Idaho
Residing at: CdA, ID
My commission expires: 2/02/07

FARMERS
75 YEARS SERVING AMERICA

PROTECTOR PLUS

FARMERS INSURANCE COMPANY OF IDAHO, POCATELLO, IDAHO

DECLARATIONS
HOMEOWNERS
Replaces all prior Declarations, if any

TRANSACTION TYPE: CHANGE IN COVERAGE
The Policy Period is effective (not prior to time applied for) at described residence premises.

POLICY NUMBER	POLICY PERIOD FROM:	TO:	STANDARD TIME	POLICY EDITION
91828-03-27	03-24-2003	03-23-2004	12:01 A.M.	04

ISSUING OFFICE:
P.O. BOX 4820
POCATELLO, ID 83205

This policy will continue for successive policy periods, if: (1) we elect to continue this insurance, and (2) if you pay the renewal premium for each successive policy period as required by our premiums, rules and forms then in effect.

INSURED'S NAME & MAILING ADDRESS:
BRIAN L ARMSTRONG AND GLENDA A ARMSTRONG

3259 N 14TH ST
C D ALENE, ID
83814-

LOCATION OR DESCRIPTION OF RESIDENCE PREMISES:
(Same as mailing address unless otherwise stated.)

DESCRIPTION OF PROPERTY

YEAR OF CONSTRUCTION	CONSTRUCTION TYPE	ROOF TYPE	NUMBER OF UNITS	OCCUPANCY
1993	FRAME	ASPHALT COMPOSITION	001	OWNER

COVERAGES - We provide insurance only for those coverages indicated by a specific limit or other notation.

SECTION I - PROPERTY				SECTION II - LIABILITY		ANNUAL PREMIUM
A - DWELLING OR MOBILE HOME	B - SEPARATE (OTHER) STRUCTURES	C - PERSONAL PROPERTY	D - LOSS OF USE	E - PERSONAL LIABILITY	F - MEDICAL PAY TO OTHERS	
$133,000	$13,300	$99,750	$66,500	$300,000 Each Occurrence	$1,000 Each Person	$564.75

ENDORSEMENTS

ENDORSEMENT NUMBER	EDITION NUMBER	DESCRIPTION
E6047A	1ED	EXTENDED REPLACEMENT COST & BUILDING ORDINANCE OR LAW
E6008	2ED	AMENDING PERSONAL INJURY - PROTECTOR PLUS
E6018	1ED	AMENDING DEBRIS REMOVAL COVERAGE AND POLLUTION EXCLUSION
E4207	1ED	EXCLUSION AMENDING SECTION II - LIABILITY
E6154	3ED	RESIDENCE GLASS ENDORSEMENT - WAIVER OF DEDUCTIBLE
E6401	3ED	SEWER AND DRAIN WATER DAMAGE COVERAGE ENDORSEMENT
H6104A	2ED	AMENDING SECTION I LOSSES NOT INSURED - WATER DAMAGE
H6106	1ED	SPECIAL LIMITS ON SPORTS CARDS
J6180A	1ED	ENDORSEMENT AMENDING THE LOSS SETTLEMENT PROVISION
S7504	1ED	OPTIONAL PAYMENT PLAN ON RENEWAL OF POLICY
		IMPORTANT NOTICE - ADDITIONAL ENDORSEMENTS SHOWN ON BACK

DISCOUNTS

AUTO/HOME AND NON SMOKER DISCOUNTS HAVE BEEN APPLIED TO YOUR POLICY.

DEDUCTIBLES

$500 Deductible is applicable to covered losses under Coverage A, B, C.

POLICY ACTIVITY (SUBMIT AMOUNT DUE WITH ENCLOSED INVOICE)

$	823.75	Previous Balance DUE
	258.22CR	Premium
		Fees
		Payments or Credits
$	565.53	Total DUE

ANY "TOTAL" BALANCE OR CREDIT $7.00 OR LESS WILL BE APPLIED TO YOUR NEXT BILLING. BALANCES OVER $7.00 ARE DUE UPON RECEIPT.

This Declarations page is part of your policy. It supersedes and controls anything to the contrary. It is otherwise subject to all other terms of the policy.

Countersignature

Mark Abajian
Authorized Representative

AGENT: David R. Nipp
AGENT PHONE: (208) 773-8484 **AGENT NUMBER:** 75 67 330

EXHIBIT "1"

ServiceMaster/Merry Maids

4921 Duncan Dr.
Coeur d'Alene, ID 83815
(208)-667-6633 (509)-927-9416 Fax (208)667-4746

Tax ID # 82-0503855

Insured:	Ryan Armstrong	Home:	(208) 667-8109
Property:	3259 N. 14th Coeur d'Alene, ID 83815		
Claim Rep.:	Randy Krum	Business: Fax:	(208) 666-2541 (208) 664-1529
Estimator:	Polly Bertram		
Company:	Farmers Insurance	Fax:	(208) 664-1529
Billing:	204 Anton CDA, ID 83814		

Claim Number	Policy Number	Type of Loss	Deductible
0	0	Water Damage	$ 0.00

Dates:

Date of Loss:	07/02/03	Date Received:	07/02/03
Date Inspected:	07/02/03	Date Entered:	07/03/03

Price List: 08-02-03
Restoration/Service/Remodel with Service Charges Factored In

Estimate: ARMSTRONG-2

ServiceMaster/Merry Maids

4921 Duncan Dr.
Coeur d'Alene, ID 83815
(208)-667-6633 (509)-927-9416 Fax (208)667-4746

Tax ID # 82-0503855

ARMSTRONG-2

Main Level

Room: closet

240.00	SF Walls	47.25	SF Ceiling	287.25	SF Walls & Ceiling
47.25	SF Floor	5.25	SY Flooring	30.00	LF Floor Perimeter
0.00	SF Long Wall	0.00	SF Short Wall	30.00	LF Ceil. Perimeter

DESCRIPTION	QNTY	UNIT	TOTAL
Water extraction from floor	47.25 SF	0.36	17.01
Apply anti-microbial agent	47.25 SF	0.16	7.56
Drying fan (per day) - No monitoring	3.00 EA	22.00	66.00
1 Drying fan for 3 days			
Bifold door set (single) - slabs only - Detach & reset	1.00 EA	14.24	14.24
Baseboard - Detach and reset	30.00 LF	1.15	34.50
Room Totals: closet			**139.31**

Room: exercise rm

404.00	SF Walls	154.88	SF Ceiling	558.88	SF Walls & Ceiling
154.88	SF Floor	17.21	SY Flooring	50.50	LF Floor Perimeter
0.00	SF Long Wall	0.00	SF Short Wall	50.50	LF Ceil. Perimeter

DESCRIPTION	QNTY	UNIT	TOTAL
Water extraction from floor	154.88 SF	0.36	55.76
Lift carpet for drying	154.88 SF	0.21	32.52
Tear out wet carpet pad and bag for disposal	154.88 SF	0.25	38.72
Apply anti-microbial agent	309.75 SF	0.16	49.56
Carpet pad	154.88 SF	0.57	88.28
Lay existing carpet - labor only	154.88 SF	0.45	69.69
Clean and deodorize carpet	154.88 SF	0.31	48.01
Drying fan (per day) - No monitoring	3.00 EA	22.00	66.00

ServiceMaster/Merry Maids

4921 Duncan Dr.
Coeur d'Alene, ID 83815
(208)-667-6633 (509)-927-9416 Fax (208)667-4746

Tax ID # 82-0503855

CONTINUED - exercise rm

DESCRIPTION	QNTY	UNIT	TOTAL
1 Drying fan for 3 days			
Seam carpet	4.00 LF	3.29	13.16
Baseboard - 3 1/4" MDF	50.50 LF	1.34	67.67
Paint baseboard - two coats	50.50 LF	0.71	35.86
Room Totals: exercise rm			**565.23**

Room: living room

578.00	SF Walls	431.24	SF Ceiling	1,009.24	SF Walls & Ceiling
431.24	SF Floor	47.92	SY Flooring	72.25	LF Floor Perimeter
0.00	SF Long Wall	0.00	SF Short Wall	72.25	LF Ceil. Perimeter

DESCRIPTION	QNTY	UNIT	TOTAL
Water extraction from floor	431.24 SF	0.36	155.24
Lift carpet for drying	431.24 SF	0.21	90.56
Tear out wet carpet pad and bag for disposal	431.24 SF	0.25	107.81
Apply anti-microbial agent	862.47 SF	0.16	138.00
Carpet pad	431.24 SF	0.57	245.80
Lay existing carpet - labor only	431.24 SF	0.45	194.06
Clean and deodorize carpet	431.24 SF	0.31	133.68
Drying fan (per day) - No monitoring	4.00 EA	22.00	88.00
2 Drying fans for 1 day and 1 for 3 days			
Dehumidifier unit (per day) - No monitoring	3.00 EA	43.45	130.35
1 Dehu for 3 days			
Baseboard - 3 1/4" MDF	72.25 LF	1.34	96.82

ServiceMaster/Merry Maids

4921 Duncan Dr.
Coeur d'Alene, ID 83815
(208)-667-6633 (509)-927-9416 Fax (208)667-4746

Tax ID # 82-0503855

CONTINUED - living room

DESCRIPTION	QNTY	UNIT	TOTAL
Paint baseboard - two coats	72.25 LF	0.71	51.30
Room Totals: living room			**1,431.62**

Room: landing

110.00 SF Walls	22.99 SF Ceiling	132.99 SF Walls & Ceiling
22.99 SF Floor	2.55 SY Flooring	13.75 LF Floor Perimeter
0.00 SF Long Wall	0.00 SF Short Wall	13.75 LF Ceil. Perimeter

DESCRIPTION	QNTY	UNIT	TOTAL
Water extraction from floor	22.99 SF	0.36	8.28
Lift carpet for drying	22.99 SF	0.21	4.83
Tear out wet carpet pad and bag for disposal	22.99 SF	0.25	5.75
Apply anti-microbial agent	45.99 SF	0.16	7.36
Carpet pad	22.99 SF	0.57	13.11
Lay existing carpet - labor only	22.99 SF	0.45	10.35
Clean and deodorize carpet	22.99 SF	0.31	7.13
Baseboard - 3 1/4" MDF	13.75 LF	1.34	18.43
Paint baseboard - two coats	13.75 LF	0.71	9.76
Room Totals: landing			**85.00**

ServiceMaster/Merry Maids

4921 Duncan Dr.
Coeur d'Alene. ID 83815
(208)-667-6633 (509)-927-9416 Fax (208)667-4746

Tax ID # 82-0503855

Room: hall

292.00	SF Walls	78.33	SF Ceiling	370.33	SF Walls & Ceiling
78.33	SF Floor	8.70	SY Flooring	36.50	LF Floor Perimeter
0.00	SF Long Wall	0.00	SF Short Wall	36.50	LF Ceil. Perimeter

DESCRIPTION	QNTY	UNIT	TOTAL
Water extraction from floor	78.33 SF	0.36	28.20
Lift carpet for drying	78.33 SF	0.21	16.45
Tear out wet carpet pad and bag for disposal	78.33 SF	0.25	19.58
Apply anti-microbial agent	156.67 SF	0.16	25.07
Carpet pad	78.33 SF	0.57	44.65
Lay existing carpet - labor only	78.33 SF	0.45	35.25
Clean and deodorize carpet	78.33 SF	0.31	24.28
Baseboard - 3 1/4" MDF	36.50 LF	1.34	48.91
Paint baseboard - two coats	36.50 LF	0.71	25.92
Room Totals: hall			**268.31**

Room: bedroom 1

470.67	SF Walls	166.26	SF Ceiling	636.93	SF Walls & Ceiling
166.26	SF Floor	18.47	SY Flooring	58.83	LF Floor Perimeter
0.00	SF Long Wall	0.00	SF Short Wall	58.83	LF Ceil. Perimeter

DESCRIPTION	QNTY	UNIT	TOTAL
Water extraction from floor	143.94 SF	0.36	51.82
Lift carpet for drying	143.94 SF	0.21	30.23
Tear out wet carpet pad and bag for disposal	143.94 SF	0.25	35.99
Apply anti-microbial agent	287.88 SF	0.16	46.06
Carpet pad	143.94 SF	0.57	82.05
Lay existing carpet - labor only	166.26 SF	0.45	74.82
Clean and deodorize carpet	166.26 SF	0.31	51.54

ServiceMaster/Merry Maids

4921 Duncan Dr.
Coeur d'Alene, ID 83815
(208)-667-6633 (509)-927-9416 Fax (208)667-4746

Tax ID # 82-0503855

CONTINUED - bedroom 1

DESCRIPTION	QNTY	UNIT	TOTAL
Drying fan (per day) - No monitoring	3.00 EA	22.00	66.00
1 Drying fan for 3 days			
Baseboard - Detach and reset	25.00 LF	1.15	28.75
Room Totals: bedroom 1			**467.26**

Room: clst bdrm 1

174.67	SF Walls	21.04	SF Ceiling	195.71	SF Walls & Ceiling
21.04	SF Floor	2.34	SY Flooring	21.83	LF Floor Perimeter
0.00	SF Long Wall	0.00	SF Short Wall	21.83	LF Ceil. Perimeter

DESCRIPTION	QNTY	UNIT	TOTAL
Water extraction from floor	21.04 SF	0.36	7.58
Lift carpet for drying	21.04 SF	0.21	4.42
Tear out wet carpet pad and bag for disposal	21.04 SF	0.25	5.26
Apply anti-microbial agent	42.08 SF	0.16	6.73
Carpet pad	21.04 SF	0.57	11.99
Lay existing carpet - labor only	21.04 SF	0.45	9.47
Clean and deodorize carpet	21.04 SF	0.31	6.52
Baseboard - Detach and reset	16.00 LF	1.15	18.40
Room Totals: clst bdrm 1			**70.37**

ServiceMaster/Merry Maids

4921 Duncan Dr.
Coeur d'Alene, ID 83815
(208)-667-6633 (509)-927-9416 Fax (208)667-4746

Tax ID # 82-0503855

Room: bedroom 2

328.00	SF Walls	85.47	SF Ceiling	413.47	SF Walls & Ceiling
85.47	SF Floor	9.50	SY Flooring	41.00	LF Floor Perimeter
0.00	SF Long Wall	0.00	SF Short Wall	41.00	LF Ceil. Perimeter

DESCRIPTION	QNTY	UNIT	TOTAL
Water extraction from floor	85.47 SF	0.36	30.77
Lift carpet for drying	85.47 SF	0.21	17.95
Tear out wet carpet pad and bag for disposal	85.47 SF	0.25	21.37
Apply anti-microbial agent	170.94 SF	0.16	27.35
Carpet pad	85.47 SF	0.57	48.72
Lay existing carpet - labor only	85.47 SF	0.45	38.46
Clean and deodorize carpet	85.47 SF	0.31	26.50
Drying fan (per day) - No monitoring	3.00 EA	22.00	66.00
1 Drying fan for 3 days			
Baseboard - Detach and reset	41.00 LF	1.15	47.15
Door opening (jamb & casing) - 32"to36"wide - stain grade	1.00 EA	64.33	64.33
Room Totals: bedroom 2			**388.60**

Room: bdrm 2 clst

138.67	SF Walls	14.08	SF Ceiling	152.75	SF Walls & Ceiling
14.08	SF Floor	1.56	SY Flooring	17.33	LF Floor Perimeter
0.00	SF Long Wall	0.00	SF Short Wall	17.33	LF Ceil. Perimeter

DESCRIPTION	QNTY	UNIT	TOTAL
Water extraction from floor	14.08 SF	0.36	5.07
Lift carpet for drying	14.08 SF	0.21	2.96
Tear out wet carpet pad and bag for disposal	14.08 SF	0.25	3.52
Apply anti-microbial agent	28.17 SF	0.16	4.51
Carpet pad	14.08 SF	0.57	8.03

ServiceMaster/Merry Maids

4921 Duncan Dr.
Coeur d'Alene, ID 83815
(208)-667-6633 (509)-927-9416 Fax (208)667-4746

Tax ID # 82-0503855

CONTINUED - bdrm 2 clst

DESCRIPTION	QNTY	UNIT	TOTAL
Lay existing carpet - labor only	14.08 SF	0.45	6.34
Clean and deodorize carpet	14.08 SF	0.31	4.37
Baseboard - Detach and reset	12.00 LF	1.15	13.80
Room Totals: bdrm 2 clst			**48.60**

Room: laundry

349.33	SF Walls	116.92	SF Ceiling	466.26	SF Walls & Ceiling
116.92	SF Floor	12.99	SY Flooring	43.67	LF Floor Perimeter
0.00	SF Long Wall	0.00	SF Short Wall	43.67	LF Ceil. Perimeter

DESCRIPTION	QNTY	UNIT	TOTAL
Drying fan (per day) - No monitoring	1.00 EA	22.00	22.00
1 Drying fan for 1 day			
Carpet - metal transition strip	2.50 LF	1.87	4.68
Door opening (jamb & casing) - 32"to36"wide - stain grade	1.00 EA	64.33	64.33
Room Totals: laundry			**91.01**

ServiceMaster/Merry Maids

4921 Duncan Dr.
Coeur d'Alene, ID 83815
(208)-667-6633 (509)-927-9416 Fax (208)667-4746

Tax ID # 82-0503853

Room: bathroom

237.33	SF Walls	51.01	SF Ceiling	288.34	SF Walls & Ceiling
51.01	SF Floor	5.67	SY Flooring	29.67	LF Floor Perimeter
0.00	SF Long Wall	0.00	SF Short Wall	29.67	LF Ceil. Perimeter

DESCRIPTION	QNTY	UNIT	TOTAL
Water extraction from floor	51.01 SF	0.36	18.36
Apply anti-microbial agent	51.01 SF	0.16	8.16
Drying fan (per day) - No monitoring	1.00 EA	22.00	22.00
1 Drying fan for 1 day			
Room Totals: bathroom			**48.52**

Room: Emergency Services

DESCRIPTION	QNTY	UNIT	TOTAL
Service Call	1.00 EA	90.00	90.00
Haul debris - per pickup truck load - including dump fees	1.00 EA	96.39	96.39
Room Totals: Emergency Services			**186.39**

Room: Personal Property

DESCRIPTION	QNTY	UNIT	TOTAL
Clean & deodorize mattress or box spring - twin	1.00 EA	28.61	28.61
Clean loveseat - plain fabric	5.00 LF	17.41	87.05

ServiceMaster/Merry Maids

4921 Duncan Dr.
Coeur d'Alene, ID 83815
(208)-667-6633 (509)-927-9416 Fax (208)667-4746

Tax ID # 82-0503855

CONTINUED - Personal Property

DESCRIPTION	QNTY	UNIT	TOTAL
Clean sofa	7.00 LF	16.58	116.06
Room Totals: Personal Property			**231.72**
Area Items Total: Main Level			**4,021.94**
Line Item Totals: ARMSTRONG-2			**4,021.94**

Grand Total Areas:

3,552.00	SF Walls	1,226.78	SF Ceiling	4,778.78	SF Walls & Ceiling
1,226.78	SF Floor	136.31	SY Flooring	444.00	LF Floor Perimeter
0.00	SF Long Wall	0.00	SF Short Wall	444.00	LF Ceil. Perimeter
1,226.78	Floor Area	1,364.56	Total Area	3,552.00	Interior Wall Area
1,688.00	Exterior Wall Area	211.00	Exterior Perimeter of Walls		
0.00	Surface Area	0.00	Number of Squares	0.00	Total Perimeter Length
0.00	Total Ridge Length	0.00	Total Hip Length	0.00	Area of Face 1

ServiceMaster/Merry Maids

4921 Duncan Dr.
Coeur d'Alene, ID 83815
(208)-667-6633 (509)-927-9416 Fax (208)667-4746

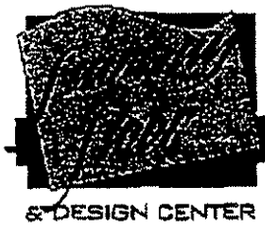
Tax ID # 82-0503855

Summary for Water Damage

Line Item Total				4,021.94
Material Sales Tax	@	5.000% x	685.75	34.29
Subtotal				4,056.23
Grand Total				**4,056.23**

Polly Bertram

EXHIBIT "2"



Carpet • Vinyl • Tile & Wood Flooring • Wall & Window Coverings

Abbey Carpet

& DESIGN CENTER

Glenda Armstrong
Re: Carpet replacement
Due to water damage

Install new carpet over existing pad
Throughout basement Except bedrooms
$1855.00
Install new carpet over existing pad
In bedrooms in basement
$836.00

Any questions please call

Thank you,

Ryan Wells

208/777-7711 FAX 208/777-7722
16th & Hwy 41 • 4065 E. 16th Ave. • Post Falls, ID 83854
P.O. Box 1946 • Hayden Lake, ID 83835

EXHIBIT "3"

EXHIBIT "3"
INVENTORY OF ACTUAL CASH VALUE AND LOSS/DAMAGE TO PERSONAL PROPERTY

QUANTITY	DESCRIPTION	ACTUAL CASH VALUE (estimate)	LOSS AND DAMAGE
1	Antique chair	$ 200.00	Re-upholstery
1	Twin mattress	80.00	Water damaged
1	King-size down comforter	200.00	Water damaged
2	Twin-size down comforters	120.00	Water damaged
1	Coffee table	274.00	Replacement cost
1	Oriental rug	Unknown	Water damaged
1	Television (service call)	75.00	Electrical damage
	TOTAL:	**$ 949.00**	

SCOTTY'S ELECTRIC CO.

5319 Mt. Carroll St.
Coeur d'Alene, ID 83815
(208) 676-8057 Lic. #17114 C
"Beam Me Up Scotty"

CUSTOMER'S ORDER NO. | PHONE | DATE 10-22-03

NAME Glenda

ADDRESS 3259 N 14th

SOLD BY	CASH	C.O.D.	CHARGE	ON ACCT.	MDSE. RET'D.	PAID OUT

QTY.	DESCRIPTION	PRICE	AMOUNT
	Service Call		70
	PAID Check #6665		
		TAX	
		TOTAL	70

RECEIVED BY

B PRODUCT 616 All claims and returned goods must be accompanied by this bill.

Thank You

2219

NEBS To Reorder: 800-225-6380 or nebs.com

ELECTRONIC SERVICE INVOICE

MAKE CHECKS PAYABLE TO:

040995

ESTIMATE ONLY ☐ $	Rons TV 7738570	DATE 7-15-03
ITEMIZED BY:		☐ SHOP JOB ☐ HOME CALL
SERVICED BY		☐ DE-LIVER ☐ PICK UP

CUSTOMER Brian Armstrong		PHONE 6078109	
ADDRESS 3259 14th St	APT.	CITY CDA	
BILL TO:	☐ ABOVE	TYPE OF UNIT	☐ CHARGE ☐ C.O.D. ☐ VHS
MAKE Mits	MODEL 1993	SERIAL NO.	☐ CONTRACT OR WARRANTY SERVICE — PROMISED FOR: ☐ BETA

PERFORMANCE DEFECT:

LINE	QUAN.	PART NUMBER	PARTS DESCRIPTION	PRICE	AMOUNT
1					
2					
3					
4					
5			Paid		
6					
7					
8					
9					

TECHNICAL SERVICE / LABOR

Removed P.I.P Module

TOTAL PARTS MATERIAL	
TECHNICAL SERVICE LABOR	
PICKUP DELIVERY OR SERVICE CALL	
TAX	
TOTAL (C.O.D.)	75.00

...NERS SIGNATURE INDICATES ...TION WITH SET PERFORMANCE AT ...DELIVERY OR COMPLETION OF

SET OWNERS SIGNATURE

...ANTEE: All work performed by qualified technician. All materials used in the repair of this unit are of first quality and ... a period of 90 days after date of repair.

EXHIBIT "4"

Modern Glass Company

P.O. Box 8
311 Coeur d'Alene Ave.
Coeur d'Alene, ID 83814-0878
(208) 664-8163

COMMERCIAL RESIDENTIAL

Window Glass Auto Glass Mirrors Plexiglass
Windows & Doors (Wood-Vinyl-Aluminum)
Insulated Glass Skylights
Commercial Storefronts

VISA MasterCard

FED. I.D. # 82-0293765

INVOICE No. 36322

DATE ORDERED	DATE BILLED	SALESPERSON	TERMS	F.O.B	CUSTOMER ORDER NO.
7/24/07		MM	C.W.O.		

BILL TO: Bryan & Glenda Armstrong
2259 N. 14th
CDA.
667-2109

SHIP TO: (same as sold to unless otherwise indicated)
Col 691-3176

QUANTITY	DESCRIPTION	UNIT PRICE	AMOUNT
1	33 1/2 x 45 3/8 1" DA		61 00
	mit. wood		15 00
			76 00
	tax		4 56
	(6%)		100
			180 56

Paid in full

MANUFACTURER WARRANTY INFORMATION Brand _____ Series _____ Ref. No. _____
Product warranty is subject to manufacturer's terms & conditions.

Signature of this receipt acknowledges material listed above has been received and inspected.

X _____ Print Name _____ Date _____

NOT RESPONSIBLE FOR GOODS DAMAGED ON THE JOB. PRICES SUBJECT TO CHANGE WITHOUT NOTICE.
RECEIPT REQUIRED FOR WARRANTY CLAIMS.

EXTRA INVOICE

FARMERS

National Document Center
P.O. Box 268994
Oklahoma City, OK 73126-8994

November 14, 2003

Brian and Glenda Armstrong
3259 N. 14th St.
Coeur d'Alene, ID 83814

Re: Claim Number: 1003763049
Policy Number: 75-918280327
Date of Loss: 7/2/03

Dear Mr. and Mrs. Armstrong:

This letter is in response to the Proof of Loss you submitted. From our National Document Center, we received notification of your document on November 7, 2003.

After reviewing your information, there is nothing I can see that changes the facts of loss. Please review the letter to you dated October 2, 2003. Without any discrepancies in the factual information, Fire Insurance Exchange is unable to reverse its original decision to decline coverage for your loss.

In summary, your policy provides coverage for water damage that is 1) sudden and accidental and 2) arises from a discharge from a plumbing, heating, air conditioning system, or a household appliance. Items that are considered household appliances include dishwashers, refrigerators and washing machines. Items not considered household appliances include aquariums, waterbeds, flower pots, Christmas tree stands and stand-alone swimming pools. If your swimming pool hooked into your plumbing system, it would trigger coverage under your policy.

Prior to the clean up and repair of your damages, I am not aware of any detrimental reliance provided by anyone associated with Fire Insurance Exchange. Additionally, the facts of your loss were brought to my attention by your agent several weeks prior to your decision to turn in this claim. The information we provided through your agent has not changed. With a written contract of insurance provided to you when your policy was issued, that takes precedent over any lack of oral details provided by any representatives of Fire Insurance Exchange.

If you have any questions, you are welcome to call me collect at (208) 376-9061.

Sincerely,
Fire Insurance Exchange

Joel Burns, GCA
Field Claims Supervisor
Boise & Coeur d'Alene Property

Cc: David Nipp

Encl: Letters dated October 2nd and September 17th, 2003

Date 10-5-4 Exhibit # 5
Case Armstrong v Farmers
Deponent Armstrong
Reporter
Naegeli Reporting Corporation
(800) 528-3335 FAX (503) 227-7123

EXHIBIT "D"

the mortgage.

Q. Do you recall what month that was?

A. I don't.

Q. And did you and your wife actually go to Mr. Nipp's office to meet with him?

A. Yes.

Q. What do you recall you discussed at the time of that meeting?

A. Coverages, liabilities, some what-ifs.

Q. What kinds of what-ifs were referenced in the meeting if you recall?

A. We spoke about the above ground pool where he just basically told us to make sure we had a locked fence, to put a fence around the house, which we had a six foot fence around the house which we had and kept it locked.

Q. Do you recall what you asked him about the pool and coverages of and surrounding the pool?

A. I don't recall.

Q. Prior to the events of July 2, 2003, had you ever submitted any claim under any homeowners policy?

A. One more time with the question.

Q. Sure. Prior to the events of July 2, 2003, had you ever submitted any claims under any

homeowners policies?

A. I don't recall.

Q. What do you recall Mr. Nipp said about or in relation to the pool?

A. It would be covered.

Q. Did he say how?

A. No.

Q. Did you talk to him about different kinds of what-ifs in relation to the pool? The what-if I think was the phrase you used before.

A. Worst case scenario.

Q. What kind of worst case scenario did you talk to him about?

A. I believe as we were leaving I just asked worst case scenario what if it leaked and it caused damage would we have coverage, and his response was sure.

Q. Now as a result of that meeting was a policy of insurance issued?

A. Yes.

Q. And did you get a copy of that policy?

A. Yes.

Q. Did you read it over after you got it?

A. No.

Q. Now I asked your wife about the renewals

insurance discussion.

Q. Was that a separate discussion from renewal of the homeowners policy?

A. Yes.

Q. But with respect to renewal of the homeowners policy did you do the meetings or did your wife, or did you both do the meetings each year?

A. I don't think we had renewal meetings.

Q. Was it just a conversation we want to keep going with the policy?

A. Uh-huh.

Q. Was that by phone if you recall?

A. Payment?

Q. No, just to tell him you wanted to renew that policy or add anything to it. Were those by phone if you recall?

A. I don't recall.

Q. When did you first learn there'd been a problem on July 2?

A. I came home for lunch like I normally do and made myself lunch, was sitting down. The phone rang. It was my wife. She said how's the pool. I thought it was fine. Went and looked out the back window, and it had basically fallen apart or

collapsed which got the memory, the sensories triggering. I thought some windows were open in the house where it smelled kind of fresh, fresh air, and pretty soon realized what the problem was.

Q. This was a lunchtime conversation you had with your wife?

A. Somewhere thereabouts.

Q. What happened next?

A. I got off the phone with my wife, called Shelly, that was a short conversation, and did what I had to do to start cleaning up my house.

Q. You said you called Shelly. What did you say to Shelly in that call? She's with Mr. Nipp's office?

A. Correct.

Q. What did you say to Shelly if you recall?

A. I told her that part of my pool ended up in my basement and part of it in the backyard, and she said sorry Brian, that's not covered, and that was the end of the conversation.

Q. Did she say how she knew it wasn't covered?

A. No.

Q. At that time did you ask to speak to Mr. Nipp or just spoke to her?

A. I asked to speak to Dave.
Q. What did she say about Mr. Nipp coming to the phone?
A. He was not available.
Q. After that did you go downstairs and explore the extent of the damage?
A. You bet I did.
Q. Can you tell me what you saw when you went downstairs?
A. A nightmare. Glass, dirt, flowers. Get a good idea of what 2,000 gallons of water can do in a basement that's 1,500 square feet.
Q. Was there still standing water in the basement at that time?
A. Yes.
Q. About how deep was the water at that time?
A. One to two inches, three inches in spots.
Q. After you went downstairs and looked at the extent of the damage what did you do next?
A. Grabbed a wet vac, grabbed a phone book and the phone, went outside, started sucking up water, and made some phone calls for help.
Q. Who did you call other than Mr. Nipp's office?
A. I called Nipp's office back and asked

EXHIBIT "E"

A. I don't know.
Q. What do you recall of your initial visit in about 1999 with Mr. Nipp in order to acquire insurance?
A. I wanted to know what the complete policy was and if we were to install a pool what was necessary.
Q. You discussed that with Mr. Nipp in 1999?
A. Yes.
Q. When you purchased the house in 1999 was your plan to install a pool?
A. Yes.
Q. When you discussed this pool with Mr. Nipp did you discuss the configuration of the pool as either an above ground or in-ground pool?
A. Above ground.
Q. Just for a time reference when did you install the pool at the property?
A. We install it every spring.
Q. When was the first time you installed it or set it up?
A. I don't know.
Q. Do you remember what time of year in 1999 you took possession of the property?
A. No.

DOUGLAS S. MARFICE, ISB #4072
APRIL M. LINSCOTT, ISB #7036
RAMSDEN & LYONS
618 North 4th Street
Post Office Box 1336
Coeur d'Alene, Idaho 83816-1336
Telephone: (208) 664-5818
Facsimile: (208) 664-5884

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV- 03-9214

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

COME NOW Plaintiffs, Brian and Glenda Armstrong, and submit this Memorandum In Support Of Motion For Partial Summary Judgment.

I. NATURE OF CLAIM

This case concerns the interpretation of a homeowner's insurance policy. Plaintiffs, Brian and Glenda Armstrong (the Armstrongs), insured their home through the Defendant, Farmers Insurance Company of Idaho (Farmers). The Armstrongs' home was damaged on

July 2, 2003 when their above-ground swimming pool suddenly and unexpectedly collapsed. The collapse caused thousands of gallons of water, as well as soil and debris, to flow into the Armstrongs' finished basement. Farmers denied coverage under the Armstrongs' policy. The Armstrongs contend that their policy provides for coverage and, by this motion, they seek partial summary judgment in the form of a declaration interpreting their policy and enforcing their right to coverage.

II. STATEMENT OF UNDISPUTED FACTS

1. The Armstrongs purchased a "Protector Plus" homeowner's insurance policy number 91828-0327 (the "Policy") from Farmers' agent David Nipp. The Policy's stated coverage period was March 24, 2003 to March 23, 2004. *Aff. D. Marfice, Ex. A.*

2. The Armstrongs discussed the Policy coverages with Farmer's agent at the time of purchasing the policy. *Depo. Tr. Brian Armstrong p. 11; Depo. Tr. Glenda Armstrong p. 9.*

3. The Armstrongs informed Farmer's agent that they had an above-ground swimming pool and that they wished to be covered for the swimming pool. *Depo. Tr. Glenda Armstrong p. 9.*

4. Farmers' agent told the Armstrongs that damage from the pool would be covered under the Policy. *Depo. Tr. Brian Armstrong p. 12, ll. 3-17.*

5. The Policy in Section I – Losses Insured – Coverage A – Dwelling provides coverage for "accidental direct physical loss to [the Armstrongs' dwelling] except as provided in Section I – Losses Not Insured." *See, Policy, Ex. A to Aff. D. Marfice.*

6. The Policy in Section I – Losses Insured – Coverage A – Dwelling provides coverage for "the dwelling . . . on the **residence premises** used principally as your private

residence. . . . wall-to-wall carpeting attached to the dwelling is part of the dwelling." *Id.*

7. The Policy in Section I – Losses Insured – Coverage C – Personal Property provides coverage for:

> 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.

Id.

8. The Policy in Section I – Losses Not Insured – paragraph 2 excludes coverage for loss caused by **water damage**. *Id.*

9. The Policy in Definitions defines **water damage**. The express definition does not include damage caused by the sudden or accidental discharge of water from within a household appliance. *Id. (See, also, footnote 1 herein.)*

10. The Policy in Section I – Losses Not Insured – states:

"We do not insured for loss . . . caused . . . by:

* * *

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

* * *

i. . . .

If any of the perils listed in a-i above . . . cause water to escape suddenly and accidentally from a . . . household appliance, we cover loss not otherwise excluded to the dwelling . . . caused by water . . . "

Id.

11. On July 2, 2003, the Armstrongs' home was damaged when their swimming pool suddenly and unexpectedly collapsed causing water to flood into their finished basement. *Depo. Tr. Brian Armstrong, pp.15-17.*

12. The release of water from the pool caused damage to the Armstrongs' dwelling and its contents. *Id., Depo. Tr. B. Armstrong, p. 16, ll.12-20.* Armstrongs immediately notified Farmers of the loss. *Id., ¶ 13.*

13. On September 17, 2003, Farmers wrote to the Armstrongs denying coverage. *See, Depo. Tr. Brian Armstrong, Ex. 3.*

14. On October 2, 2003, Farmers again wrote to the Armstrongs denying coverage for the loss. *See, Depo. Tr. Brian Armstrong, Ex. 2.*

15. 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. *See, Depo. Tr. B. Armstrong, Ex. 4.*

16. By letter dated November 14, 2003, Farmers again informed the Armstrongs that it was denying their claim. *See, Depo. Tr. B. Armstrong, Ex. 6.*

III. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. Rule 56(a) provides that a party, seeking to recover upon a claim or to obtain a declaratory judgment may, move for a summary judgment in that party's favor. Rule 56(c) provides in pertinent part that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

"Whether language contained in an insurance policy is ambiguous is a question of law to be determined by the trial judge." *Gordon v. Three Rivers Agency, Inc.*, 127 Idaho 539, 542, 903 P.2d 128, 131 (Ct. App. 1995); *Clark v. Prudential Property and Casualty Ins. Co.*, 138 Idaho 538, 541, 66 P.3d 242, 245 (2003). "Where the policy language is clear and unambiguous, coverage must be determined, as a matter of law." *Id.*

IV. LEGAL ARGUMENT

Farmer's policy is unambiguous and covers the Armstrong's damages, alternatively, even if Farmer's policy is found to be ambiguous the Armstrongs are still covered for the losses at issue.

A. The Armstrongs' Homeowner's Policy expressly provides coverage for loss caused by the sudden accidental discharge of water from a household appliance.

(i) Where the policy language is clear and unambiguous coverage must be determined in accordance with the plain meaning of the words used. *Nedrow v. Unigard Security Ins. Co.,* 132 Idaho 421, 423, 974 P.2d 67, 69 (1998); *Mutual of Enumclaw Ins. Co.,* 128 Idaho 232, 235, 912 P.2d 119, 122 (1996); *Clark v. Prudential Property and Casualty,* 138 Idaho at 541, 66 P.3d at 245. Under Farmers' Policy, coverage is expressly provided for personal property loss if caused by "sudden and accidental discharge or overflow of **water** ... from within a plumbing, heating or air conditioning system, or from a household appliance..." *See, Aff. D. Marfice, Ex. A. Coverage C, ¶ 13.*

Under the dwelling loss portion of the Policy, Farmers purports to exclude "water damage." However, the Policy definition of the term "water damage" is such that the Armstrongs' loss does not fall within that exclusion.[1] Moreover, the Policy qualifies its

[1] The Policy, Definitions states as follows:

"water damage" exclusion even further making it inoperable to deny coverage here where the loss occurred from a sudden deterioration or break down of the Armstrongs' pool. *See, Aff. D. Marfice, Ex. A., Section I – Losses Not Insured, ¶ 13 ("If any of the perils listed . . . cause **water** to escape suddenly and accidentally from a plumbing, heating, or air conditioning system or household appliance, we cover loss . . . to the dwelling caused by water . . .").* *(underline added)*

The only rationale offered by Farmers for denying the Armstrongs coverage was, *"Your swimming pool is not part of a plumbing, heating or air conditioning system, nor is it ... a household appliance. Therefore, our original decision to decline coverage will remain." See, Depo. Tr. B. Armstrong, Ex. C.* This is an admission by Farmers that the Policy's blanket exclusion for "water damage" is inapplicable. In its October 2, 2003 denial letter, Farmers volunteered as much, stating: "Within the water damage exclusion, some coverage is given back." *See, Depo. Tr. B. Armstrong, Ex. 2.*

(ii) Since loss caused by water which has escaped from an appliance is clearly not excluded and is expressly covered, the question becomes: Was the Armstrongs' pool an appliance under the terms of the policy?

---

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**.

None of the above descriptions apply to the type of damage at issue in the Armstrongs' loss. While their loss was caused by water, it was not "water damage" as defined in the Policy.

The ordinary, dictionary definition of the word "appliance" is: "An instrument or device designed for a particular use." *See,* WEBSTERS, 9TH COLLEGIATE DICTIONARY (1985). A swimming pool certainly fits that definition. The Idaho Code also provides persuasive authority on this point. Under the Property Condition Disclosure Act, the statutorily required Seller Property Disclosure Form 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.).

See, I.C. §55-2508 (emphasis added). 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?

"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)." *Gordon v. Three Rivers Agency, Inc.*, 127 Idaho 539, 903 P.2d 128 (Ct. App. 1995).

"If the language of a policy is susceptible to only one meaning this meaning must be given effect." *Mutual of Enumclaw Ins.* 128 Idaho at 236, 912 P.2d at 123. Under the plain meaning of the words used in the Farmers' Policy, the Armstrongs' swimming pool is a household appliance.

B. Even if the Policy is ambiguous, the Armstrongs are still entitled to coverage for *their loss.*

If the term "household appliance" used by Farmers in the insurance policy purchased by the Armstrongs is subject to more than one reasonable interpretation then, the term is ambiguous, as a matter of law. "[W]here there is an ambiguity in an insurance contract, special rules of construction apply to protect the insured." *Foremost Ins. Co. v. Putzier,* 102 Idaho 138, 142, 627 P.2d 317, 321 (1981). Under these special rules, insurance policies are to be construed most liberally in favor of recovery, with all ambiguities being resolved against the insurer. *Gordon v. Three Rivers Agency, Inc.,* 127 Idaho 539, 903 P.2d 128 (Ct. App. 1985) citing *Foremost Inc. v. Putzier, supra.*

Ambiguity exists only if a policy term is reasonably subject to conflicting interpretation. *Nedrow v. Unigard,,* 132 Idaho at 422, 974 P.2d at 68. The term "household appliance" is not defined in Farmers' Policy (even though the term "water" is!) *See, Aff. D. Marfice, Ex. A.* After the loss, Farmers sought to arbitrarily limit the Policy by manufacturing a self-serving definition of a plain policy term. Writing to the Armstrongs, Farmers stated:

> "Items not considered household appliances include aquariums, waterbeds, flower pots, Christmas tree stands and stand alone swimming pools."

See, Depo. Tr. G. Armstrong, Ex. 5. Where this comes from is a mystery. It is certainly not from the Policy.

The Court in *Foremost* held that where two different meanings can be applied to a term in a contract and one affords coverage and the other does not, the term should be given the meaning that provides for coverage. *Id.* "If a reasonable person under the circumstances would have believed they had coverage under the language of the contract then the test is satisfied." *Id.* The Court must construe the provisions of a policy consistently with what a

reasonable person in the insured's position would have understood the policy language to mean. *Gordon v. Three Rivers Agency*, 127 Idaho at 542. While Farmers may not consider a swimming pool to be an appliance, the Armstrongs do. Moreover, as discussed above, the Armstrongs are not unreasonable in defining a pool as an appliance.

In this case the Armstrongs reasonably believed the language in the Policy gave them coverage for their pool. This was because (1) Farmers' agent told them so and (2) the Policy expressly covers for sudden and accidental discharge or overflow of water from a "household appliance." In the absence of a contractual definition of the term household appliance, a swimming pool falls within the reasonable interpretation of that term. In ordinary usage, an "appliance" is "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 entertainment. As mentioned above the Idaho Property Disclosure Act includes a pool in its litany of an appliances. If the meaning of the term "appliance" includes a swimming pool, then the Armstrongs are entitled to coverage for loss and damage proximately caused by the "sudden and accidental discharge or overflow of water . . . from . . . a swimming pool."

Parties to a contract are free to insure exactness by defining words used in the contract. *Porter v. Farmers Insurance Co.,* 102 Idaho 132, 627 P.2d 311 (1981). If Farmers did not want this type of loss to be covered, it could have expressly excluded it, or it could have clearly defined "household appliance" as the term is used in the context of its Policy. It did not do either and it cannot now "create" a coverage exclusion where one does not exist.

V. CONCLUSION

The Farmers policy is not ambiguous as to the meaning of the word "appliance." The

plain meaning of the term "appliance" includes a swimming pool. The Armstrongs are covered under their homeowner's Policy. However, even if the Court were to find that the term "appliance" is ambiguous the Armstrongs are still covered. Idaho law is clear: Where two different meanings can be applied to a term in an insurance contract and one meaning will afford coverage whereas the other does not, then the term should be given the meaning that provides for coverage. *Foremost v. Putzier, supra; Shields v. Hiram*, 92 Idaho 423, 427, 444 P.2d 38, 43 (1968). The Armstrongs are entitled to partial summary judgment in the form of a declaratory judgment that they are covered under their Farmers Insurance Policy.

DATED this 4th day of January 2005.

RAMSDEN & LYONS

By _____
Douglas S. Marfice, Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January 2005, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Patrick E. Miller, Esq.	___ US Mail
701 Front Avenue, Suite 101	___ Overnight Mail
PO Box E	✓ Hand Delivered
Coeur d'Alene ID 83816-0328	___ Facsimile (208) 664-6338

_____
Douglas S. Marfice

STATE OF IDAHO)
COUNTY OF KOOTENAI) SS
FILED:

2005 JAN 18 PM 4:55

CLERK DISTRICT COURT
DEPUTY

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ISBA# 1771

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife, Plaintiffs, vs. FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation; CORPORATE DOES I-X, whose true names are unknown, Defendants.	Case No. CV-03-9214 **DEFENDANT FARMERS INSURANCE COMPANY OF IDAHO'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

COMES NOW, the Defendant Farmers Insurance Company of Idaho, and submits, pursuant to the Idaho Rules of Civil Procedure, and the rules of this Court, this Brief in Opposition to Plaintiffs' Motion for Partial Summary Judgment.

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I. STATEMENT OF THE CASE

Plaintiffs, by their Complaint, assert damages for an event at their home on July 2, 2003, in which they contend that an above-ground swimming pool collapsed and flooded their home. Plaintiffs have asserted claims of breach of contract, negligent investigation and claim adjustment and unfair trade practices.

Plaintiffs' Complaint does not seek declaratory relief as to interpretation of the applicable insurance policy. Plaintiffs contend by their Motion for Partial Summary Judgment that they seek a declaration of the Court interpreting the insurance policy. The Defendant Farmers Insurance Company of Idaho submits that there is no basis for a declaratory interpretation of the Policy in light of the relief sought; and that there is an inadequate basis and failure of proof to grant the Motion as requested by Plaintiffs.

II.

STATEMENT OF FACTS

As submitted by Defendants herein, the Defendant disputes that Plaintiffs advised any general agent of the Defendant as to the requested coverage: that the Policy of insurance did not provide for the requested coverage; and that interpretation of the Policy reflects that Plaintiffs' proofs are deficient as to the Plaintiffs' claims for relief and enforcement of contractual rights.

As asserted by the Plaintiffs, Plaintiffs purchased a homeowners insurance policy with Farmers Insurance Company of Idaho, Policy No. 91828-03-27.

The Defendants dispute, as submitted herein by argument and/or reflected by the opposing affidavits, that David Nipp was a general agent of Farmers Insurance Company of Idaho; that Plaintiffs informed Mr. Nipp that they intended to install an above-ground swimming pool and that they wished coverage for such a swimming pool. In addition, the Plaintiffs assert interpretations of the Policy of insurance, which the Defendants dispute.

III.

ISSUES BEFORE THE COURT

The Defendants, for purposes of this Motion, acknowledge that Plaintiffs provided advice to the Defendant that their swimming pool collapsed and flooded their basement.

The Defendant has separately submitted an objection to the materials submitted by Plaintiffs, in that Plaintiffs did not serve, and Defendant is unaware if Plaintiffs file, a separate Motion for Partial Summary Judgment.

By Plaintiffs' Brief, Plaintiffs assert that they intend to seek from the Court a declaration interpreting their Policy and enforcing their right under the Policy.

With respect to interpretation under the Policy, the Defendant submits authority as to the Plaintiffs' burden and the Court's actions in interpretation of an insurance policy. This Defendant submits that the denial of coverage was appropriate, and in accordance with the language of the Policy. Moreover, Defendants submit that the company's actions in interpretation of the Policy are not relevant at this point with respect to the Court's determination as to whether or not there exists an ambiguity of the insurance policy and interpretation of the insurance policy in light of such a

determination. This Defendants submits that the issue before the Court is whether or not there exists an ambiguity under the insurance policy. This Defendant submits, in accordance with the issue, that there is no ambiguity within the insurance policy and that there is no coverage for the Plaintiffs' claims.

IV.

STANDARD OF REVIEW

Summary judgment is proper "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 judgment as a matter of law." Rule 56(C), I.R.C.P.

Upon a motion for summary judgment, all facts and inferences must be drawn in favor of the nonmoving party and summary judgment is proper only when no genuine issue of material fact exists and the party is entitled to judgment as a matter of law. Perkins v. Highland Enterprises, Inc., 120 Idaho 511, 817 P.2d. 177 (S.Ct. 1991).

If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment motion must be denied. Ray v. Nampa School District No. 131, 120 Idaho 117, 814 P.2d. 17 (S.Ct. 1991); G & M Farms v. Funk Irrigation Company, 119 Idaho 514, 808 P.2d. 851 (S.Ct. 1991).

In ruling on a motion for summary judgment, all doubts must be resolved against the moving party and a motion must be denied if the evidence is such that conflicting inferences may

be drawn and reasonable persons might reach different conclusions. Olsen v. J.A. Freeman Company, 117 Idaho 706, 791 P.2d. 1285 (S.Ct. 1990).

At all times, the moving party has the burden of establishing the lack of a genuine issue of material fact. Orthman v. Idaho Power Company, 130 Idaho 597, 944 P.2d. 1360 (1997). To meet this burden, the moving party must challenge in its motion and establish through evidence that no issue of material fact exists for an element of the nonmoving party's case. Smith v. Meridian Joint School District No. 2, 128 Idaho 714, 918 P.2d. 583 (1996).

In order to shift the burden such that the nonmoving party may not rely upon a pleading, the moving party must submit, in support of the moving party's motion, a particularized affidavit. Verbillis v. Dependable Appliance Company, 107 Idaho 335, 689 P.2d. 227 (1984).

Rule 56(e), I.R.C.P., requires that supporting affidavits must be made on personal knowledge and must set forth such facts as would be admissible in evidence and shall affirmatively show that the affiant is competent to testify to the matters stated therein.

In State v. Shama Resources Limited Partnership, 127 Idaho 267, 899 P.2d. 977 (S.Ct. 1995), the court held that the requirements of Rule 56(e), I.R.C.P., are not satisfied by an affidavit that is conclusionally based on hearsay and not supported by personal knowledge. The court further stated that only material contained in affidavits that is based upon personal knowledge or that is admissible at trial can be considered by the court on a motion for summary judgment.

In Cates v. Albertson's Inc., 126 Idaho 1030, 895 P.2d. 1223 (S.Ct. 1995), the court rejected an affidavit which was not based on personal knowledge as required by Rule 56(e), I.R.C.P. The court noted that in review of the affidavit, the affidavits submitted were workers compensation records applicable to the plaintiff in the matter. The court noted that nothing within the affidavit established that the affiant had any personal knowledge of either the accidents discussed in the records or the preparation and maintenance of the records themselves. The affidavit failed to establish that the affiant was competent to testify to the matters stated therein; therefore, the court would not consider the contents of the affidavit in relation to the motion for summary judgment.

In Harris v. State Department of Health, 123 Idaho 295, 847 P.2d. 1156 (S.Ct. 1993), the Supreme Court noted that the trial court can only consider material in affidavits which is based on personal knowledge and which would be admissible at trial.

In Resource Engineering v. Nancy Lee Mines, Inc., 110 Idaho 136, 714 P.2d. 526 (Ct. App. 1985), the court there held that where attachments to an affidavit make it clear from their contents that they are not within the affiant's personal knowledge, they may not be considered in support of the affidavit or the motion for summary judgment.

In Sprinkler Irrigation Company v. John Deere Insurance, 139 Idaho 691, 85 P.3d. 667 (S.Ct. 2004), the court there stated that the admissibility of the evidence contained in affidavits in support of a motion for summary judgment is a threshold question to the answer, before applying

the liberal construction and reasonable inferences rules to determine whether the evidence is sufficient to create a genuine issue for trial.

V.

PLAINTIFFS' SUBMISSIONS FAIL TO ESTABLISH UNDISPUTED MATERIAL FACTS.

The only affidavit submitted by Plaintiffs in support of their Motion is that of Plaintiffs' counsel, to which Plaintiffs' counsel attaches a number of documents. Included within those are portions of Plaintiffs' deposition testimony, which do not address the various other attachments submitted by Plaintiffs, including Plaintiffs' "proof of loss." Moreover, the affidavit of Plaintiffs' counsel clearly reflects that he did not prepare the associated documents and that he has no personal knowledge with respect to the losses claimed by Plaintiffs. Further, within Plaintiffs' Brief, Plaintiffs assert various contentions as to expectations by Plaintiffs with respect to the insurance policy interpretation. This Defendant has addressed those in relation to the arguments at law. However, in relation to the proof issues submitted, there are no affidavits or assertions as to how Plaintiffs interpreted the Policy or what Plaintiffs expected by the interpretation of the Policy.

In short, the affidavit by Plaintiffs' counsel is conclusory. It fails to set forth facts admissible at trial; therefore, Plaintiffs' affidavit failed to shift any burden to Defendants with respect to the issues before the Court.

VI.

THE TERMS AND CONDITIONS OF THE INSURANCE POLICY ARE NOT *AMBIGUOUS*

The Idaho courts have repeatedly addressed the question of the construction of an insurance policy. In Miller v. World Insurance Company, 76 Idaho 355, 283 P.2d. 581 (S.Ct. 1955), the Idaho Supreme Court addressed the construction of insurance policies. There the court stated:

> Policies of insurance, as other contracts, are to be construed in their ordinary meaning, and where the language employed is clear and unambiguous, there is no occasion to construe a policy other than the meaning as determined from the plan wording therein.

Miller v. World Insurance Company, *supra*, Page 357.

In accord, Thomas v. Farm Bureau Mutual Insurance Company of Idaho, Inc., 82 Idaho 314, 353 P.2d. 776 (S.Ct. 1960); Anderson v. Title Insurance Company, 103 Idaho 875, 655 P.2d. 822 (S. Ct. 1982).

As to the function of the court, with respect to the construction of an insurance policy, the Supreme Court in Miller v. World Insurance Company, *supra*, stated:

> It is the function of this Court to construe a contract of insurance as it is written, and the court by construction cannot create a liability not assumed by the insurer, nor make a new contract for the parties, or one different from that plainly intended, nor add words to the contract of insurance to either create or avoid liability.

Miller v. World Insurance Company, *supra*, Page 357.

In Anderson v. Title Insurance Company, *supra*, the Supreme Court stated:

> An insurance policy is a contract and must be construed the same way as other contracts.

Anderson v. Title Insurance Company, *supra*, Page 878.

In Clark v. Prudential Property & Casualty Insurance, 138 Idaho 538, 66 P.3d. 242 (S.Ct. 2003), the court, with respect to the construction of a policy of insurance, stated:

> When interpreting insurance policies, this Court applies the general rules of contract law subject to certain special canons of construction. *Brinkman v. Aid Ins. Co.*, 115 Idaho 346, 352, 766 P.2d. 1227, 1233 (1988); *Mutual of Enunclaw Ins. Co. v. Roberts*, 128 Idaho 232, 235, 912 P.2d. 119, 122 (1996). Beginning with the plain language of the insurance policy, the first step is to determine whether or not there is an ambiguity. *Martinez v. Idaho Counties Reciprocal Management Program,* 134 Idaho 247, 250, 999 P.2d. 902, 905 (2000). Determining whether a contract is ambiguous is a question of law upon which this Court exercises free review. *Id.* Where the policy language is clear and unambiguous, coverage must be determined, as a matter of law, according to the plain meaning of the words used. *Mutual of Enumclaw*, 128 Idaho at 235, 912 P.2d. at 122. Where the policy is reasonably subject to differing interpretations the lanugage is ambiguous and its meaning is a question of fact. *Moss v. Mid-America Fire and Marine Ins. Co.*, 103 Idaho 298, 300, 647 P.2d. 754. 756 (1982). To determine the meaning of an ambiguous contract, the trier of fact must determine what a reasonable person would have understood the language to mean and the words used must be construed given their ordinary meaning. *Mutual of Enumclaw*, 128 Idaho at 235, 912 P.2d. at 122.

Clark v. Prudential Property & Casualty Insurance, *supra*, Pages 540-541.

Where the policy language is unambiguous, the insurance coverage must be determined, as a matter of law, according to the plain meaning of the words used. American Foreign Insurance Company v. Reichert, 140 Idaho 394, 94 P.3d. 699 (S.Ct. 2004).

In order to determine whether an ambiguity is present, the court must ask whether the policy is reasonably susceptible to conflicting interpretations. Gravatt v. Regence Blue Shield of Idaho, 136 Idaho 899, 42 P.3d. 692 (S.Ct. 2002).

Absent an ambiguity, an insurance policy is governed by the same rules as applied to contracts generally. Gravatt v. Regence Blue Shield of Idaho, *supra*, Boel v. Stewart Title Guarantee Company, 137 Idaho 9, 43 P.3d. 768 (S.Ct. 2002).

In McGilvray v. Farmers New World Life Insurance Company, 136 Idaho 39, 28 P.3d. 380 (S.Ct. 2001), the court there held that where the language of insurance policy is susceptible to but one meaning, the policy must be given that effect.

In Purdy v. Farmers Insurance Company of Idaho, 138 Idaho 443, 65 P.3d. 184 (S.Ct. 2003), the court there noted that a policy is not ambiguous merely because it is poorly worded. It is further not ambiguous merely because the reader may have to stop and think about what it means.

In interpretation of an insurance policy, the Idaho Supreme Court has held that unless a contrary intent is shown, common, non-technical words are given the meaning applied by laymen in daily usage, as opposed to the meaning derived from legal usage in order to effectuate the intent of the parties. Mutual of Enumclaw Insurance v. Pederson, 133 Idaho 135, 983 P.2d. 208 (S.Ct. 1999), Howard v. Oregon Mutual Insurance Company, 137 Idaho 214, 46 P. 3d. 510 (S.Ct. 2002).

The mere fact that an insurance policy does not contain a definition for a term does not create an ambiguity. State Farm Fire and Casualty Company v. Doe, 130 Idaho 693, 946 P.2d. 1333 (S.Ct. 1997).

In this case, the insurance policy, supplied by Plaintiffs, contains its own index. The Policy is divided into several discrete sections. The section identified as Section I relates to property matters. That section first defines coverages, which are divided among Coverage A - Dwelling;

Coverage B - Separate Structures; and Coverage C - Personal Property. From Plaintiffs' Complaint and argument, it is this Defendant's understanding that issues related to separate structures are not relevant; therefore, this Defendant will not otherwise address those coverages.

With respect to the coverage for personal property under Coverage C, there is a specific section for special limits on certain personal property and personal property not covered.

The Policy then lists losses which are insured as to the three coverages, Coverage A - Dwelling; Coverage B - Separate Structures; and Coverage C - Personal Property. The Policy then lists losses that are not insured, and divides that between Coverages A and B and Coverage C.

The Policy first defines the term "water damage" for the entire policy as follows:

> 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, foundation, swimming pool or any portion of the residence premises.

The Policy then provides in Section I - Losses Not Insured; Coverage C - Personal Property, Section 13, as follows:

> 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.

Section I of the Policy also specifically lists those losses which are not insured. That section states:

> 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 by, water damage.

The Policy's language is then affected by an endorsement which replaces the language at Page 9 of the Policy with the endorsement H6104, 1st Edition, Endorsement Amending Section I Losses Not Insured - Water Damage.

That entire section, commencing at Item 2, is replaced by the endorsement language, which provides:

> 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 water damage occurs, the resulting loss is always excluded under this 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 proeprty inside the dwelling, mobile home or separate structures caused by water damage if the dwelling, motor 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.

Thus, Section I - Losses Not Insured, applies to both structure and personal property. The section states that the Policy does not insure for loss consisting of, caused directly or indirectly by, water damage.

Plaintiffs apparently contend that Section I - Property, Coverage C - Personal Property, Paragraph 13, covers this loss. In first analysis, it should be noted that, even if the Court so finds, the coverage for Dwelling and Separate Structure is different from the coverage for Personal Property. The coverage for the Dwelling is as defined by Section I - Property Coverages, Coverage A - Dwelling. That coverage defines the extent of the "Dwelling" which includes, for example, wall-to-wall carpeting.

Moreover, the Policy definitions reference at Paragraph 19 of that section that the term "water damage", for purposes of the Policy, is defined to include the overflow or escape of a body of water.

As to the personal property claim, the term "water damage" within endorsement H6104 also must reference the definition within Paragraph 19 under the definition section.

It is apparently Plaintiffs' contention that there is coverage for this loss under Coverage C - Personal Property by virtue of the language of Paragraph 13, which provides in pertinent part as follows:

> 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...

The term "household appliance," which relates to coverage for personal property, does not include a swimming pool. It is the Plaintiffs' contention that the pool, which stored water within the back yard, was an appliance. The applicable term under this section of the contract is "household appliance."

As noted above, the Idaho courts have held that non-technical terms are given their ordinary meaning. This Defendant submits that the term "household appliance" does not by its ordinary usage include a reference to a backyard swimming pool.

Plaintiffs propose that the pool must be included, by reference to Idaho Code § 55-2508. This Defendant submits that it is inappropriate to make reference to the outside statute for construction, since the language of the Policy does not, by reference, incorporate by reference the unrelated Idaho Property Condition Disclosure Act at Title 55-2501, *et seq.* In order for the court

to utilize that statute, the court must first ascertain that the Policy of insurance, as a matter of law, is ambiguous. The Defendant submits that the Policy is not ambiguous, a position taken by Plaintiffs in their argument.

The Plaintiffs make reference to the definition of appliance as "an instrument or device designed for particular use." *Webster's 9th Collegiate Dictionary* (1985). This Defendant submits that the proposed definition is an incomplete definition, since the referenced term is "household appliance." Moreover, courts have from time to time construed "appliance."

While Plaintiffs cite a specific portion of available definitions, this Defendant submits that the definition applied is neither the common, complete, or applicable definition. Moreover, the definition proposed does not define the swimming pool in the manner asserted by the Plaintiffs.

The term "appliance" is defined in *Webster's New Collegiate Dictionary* as follows:

> Appliance: 1. An act of applying. 2 a: A Piece of equipment for adapting a tool or machine to a special machine to a special purpose: attachment. b: An instrument or device used for a particular use; specific: a household or office device (as a stove, fan, or refrigerator) operated by gas or electric current.

The term "appliance" has been defined by courts from time to time, including interpretations specific to insurance coverages.

The term is defined at *Black's Law Dictionary*, Revised 4th Edition:

> Appliance. Refers to machinery and all instruments used in operating it, and is to be distinguished from word "materials" which includes everything of which anything is made. Things applied to or used as a means to an end. *Roberts v. City of Los Angeles*, 61 P.2d. 323, 330 7 Cal. 2d. 477. An "appliance" is a mechanical device, a device or an apparatus. *One Black Mule v. State*, 204 Alabama 440, 85 Southern 749.

In Roberts v. City of Los Angeles, 7 Cal. 477, 61 P.2d. 323 (S.Ct. Cal. 1936), the plaintiff brought an action for judgment to cancel assessments levied on certain lots for street lighting purposes.

For purposes of its analysis, the court addressed the definition of the term "appliance." There, the court stated:

> Appliances are things applied to or used as a means to an end. (*Webster's New International Dictionary.*)

Roberts v. City of Los Angeles, *supra*, Page 494.

In the defined case of One Black Mule v. State, 85 Southern 749, the dispute was over the State's attempt to condemn a black mule, a wagon and a set of harness in connection with the illegal manufacturing of alcoholic beverages. The act in question reference that the State's authority related to all appliances used for the purposes of distilling or manufacturing prohibited liquors or beverages. The court, in interpretation of the matter before it, stated that:

> An appliance is a mechanical thing, a device, or apparatus.

One Black Mule v. State, *supra*, Page 440.

In Ross v. Tabor, 200 P. 971 (Ct. App. CA 1921), the court held that it an automobile, under a contract in question, was a "appliance." The court noted that the term "appliances" includes things which are used as a means to an end. Since the automobile was a thing supplied to the defendant to be used as a means for caring for the plaintiff's bees, which was the subject of the lawsuit, and was intended to travel from location to location, it was a means to an end; therefore, an appliance.

In West American Insurance Company v. Lowrie, 600 Southern 2d. 34 (Dis. Ct. App. FL, 1992), the insured brought suit for water damage. While the decision does not quote the policy provision at length, it appears that the policy terms were somewhat similar to the Policy at issue in this case. The court stated:

> The insurer issued a homeowner's insurance policy to the insured. The insurance policy included coverage for "[a] discharge or overflow of water... from within a household appliance."

West American Insurance Company v. Lowrie, *supra*, Page 34.

The insured's waterbed apparently broke while being filled and caused water damage. The question at hand was whether the waterbed was a "household appliance" and whether the damage was thus covered by the policy.

The trial court found for the insured. The appellate court overturned the decision. The appellate court stated:

> In our view, a waterbed is an item of furniture, and is not a "household appliance" within the ordinary meaning of that phrase. In the common understanding, a household appliance is a household device that does work or performs a task, such as a washer, dryer, vacuum cleaner, or toaster. *Cf. Murray v. Royal Indemnity Company*, 247 Iowa 1299, 78 NW 2d. 786, 787 (1956) ('Appliance' is 'a thing used as a means to an end.')

West American Insurance Company v. Lowrie, *supra*, Page 34.

The court held that a waterbed was not within the policy definition and there was no coverage.

Under the language of this Policy, it is clear that the defined swimming pool was not a household appliance, as that term is ordinarily used and within the plain meaning of the term.

Moreover, Plaintiffs' use of the Policy sections is inconsistent with the coverage claims under the Policy, as Plaintiffs assert, to which there is no dispute.

VII.

THE APPLICATION OF THE CONDITION OF SUDDEN OR ACCIDENTAL DISCHARGE OF WATER FROM A HOUSEHOLD APPLIANCE WOULD ONLY APPLY TO COVERAGE C - PERSONAL PROPERTY AND NOT COVERAGE A - DWELLING

As noted above, the Plaintiffs have failed to submit an appropriate affidavit to define their loss and the basis of their monetary claims in this matter. Plaintiffs appear to argue that the condition of sudden accidental discharge of water from a household appliance would relate to all of their losses; however, such is not the case from the clear, unambiguous language of the Policy. The reference to sudden and accidental discharge of water from a household appliance is within Paragraph 13, which relates only to the coverages for personal property. Plaintiffs have failed to establish, by appropriate affidavit and proof, what loss they had which would be within this coverage. The Policy would specify, for example, that items such as "wall-to-wall carpeting," if a claimed loss, are part of the "dwelling," which is within the defined Coverage A - Dwelling.

The Policy provisions within Section I - Losses Not Insured, and specifically water damage related to the dwelling, is governed by Endorsement H6104, which specified that there is no coverage for water damage "however caused."

As defined by the Policy, Plaintiffs reference to a loss occasioned by water leakage from a household appliance would not apply to the entirety of the Plaintiffs' claim, even if it did apply to the swimming pool collapse.

Under the terms of the Policy, there are three separate coverages. Those are Coverage A for the dwelling, Coverage B for the separate structures, and Coverage C for the personal property.

The term "water damage" is defined for the entire Policy. In fact, in reference to Paragraph 19D of the Policy, the Policy there specifically makes reference to a "swimming pool." Therefore, it is not proper to define that the Policy inadvertently intends to reference a household appliance as a swimming pool, and vice versa, since the term "swimming pool" is particularly used at least in one place in the Policy.

Under Section I - Property, with respect to the three coverages, coverages for the dwelling and separate structure are defined by separate paragraphs from Coverage C for personal property. The reference to which Plaintiffs makes as to household appliance is under the section "Losses insured - Coverage C - Personal Property." That provision does not, therefore, apply to either the dwelling or separate structures. The section Coverage C - Personal Property begins with the language: "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:"

Therefore, to the extent that Plaintiffs claim, by this Motion, or this lawsuit, a loss as a result of water from a "household appliance," that would not apply to the loss related to the dwelling or the separate structures.

Moreover, under Section 1 - Losses Not Insured, as to all three coverages, by endorsement, the Policy specifically provides as to "water damage" as a loss not insured: "..whenever water damage occurs, the resulting loss is always excluded under this Policy, however caused; except we do cover..."

A review of those provisions reference no circumstance of coverage in the event of a collapsed swimming pool and the flood of water which would result from that, especially since the term "water damage" is defined to include the overflow or escape of a body of water.

The endorsement H6104, supersedes and controls anything to the contrary, by the specific language of the endorsement.

VIII.

THE TERM "HOUSEHOLD APPLIANCE" DOES NOT CREATE AN AMBIGUITY WITHIN THE POLICY

It appears that the Plaintiffs assert that, if a household appliance does not constitute a swimming pool, the Policy must be ambiguous.

As previously noted, unless a contrary intent is shown, common, nontechnical words applied by laymen in daily usage. Mutual of Enumclaw Insurance v. Pederson, *supra*; Howard v. Oregon Mutual Insurance Company, *supra*. The fact that a term within a policy is not defined does not create an ambiguity. State Farm Fire and Casualty Company v. Doe, *supra*.

Plaintiffs additionally appear to argue a second, partial definition from yet another dictionary that a swimming pool must be an appliance since it is designed for a specific function. As referenced

by this Defendant's request for judicial notice, that definition is a partial definition from the referenced dictionary. *The American Heritage Dictionary of the English Language*, 4th Edition. 2000, defines appliance as a device or instrument designed to perform a specific function, especially an electrical device, such as a toaster, for household use. The referenced definition defines, as a synonym for the word appliance, the word "tool."

This Defendant submits that the term "household appliance" is a common term utilized by laypersons with an understanding that such a reference would not include a swimming pool. Plaintiffs intend to argue that a swimming pool must be an appliance, since it is used for the specific purpose of exercise or recreation. This Defendant submits that such is a reference to two separate references. This Defendant submits that a swimming pool stores a body of water.

As referenced by the courts which have considered the term "appliance," the word references an item that is used as a means to an end. Moreover, examples, within the dictionary definitions, reference specific items such as "dishwashers, etc."

Plaintiffs assert that there are two different meanings for the term "household appliance." This Defendant submits that the question before the Court is whether the term is interpreted to include a swimming pool. As referenced by the definition section, the term "swimming pool," at Paragraph 19, is used. Moreover, as referenced above, Section I - Losses Not Insured, by endorsement excludes water damage "however caused."

Plaintiffs contend by their Brief that they reasonably believed that the term "appliance" included their swimming pool. This Defendant submits that there is no proof before this Court to

support a contention. The excerpted portions of the depositions do not contain any language to indicate the Plaintiffs' understanding of Policy terms.

It appears that Plaintiffs intend to argue that they had the reasonable expectation of coverage.

In K.C. v. Highlands Insurance Company, 100 Idaho 505, 600 P.2d. 1387 (S.Ct. 1979), the Idaho Supreme Court declined to adopt the doctrine of reasonable expectations. As to policies of insurance, the Supreme Court in that case stated:

> Intent is to be determined from the language of the contract itself and 'in the absence of ambiguity, contracts for insurance must be construed as any other and understood in their plain, ordinary, and proper sense, according to the meaning derived from the plain wording of the contract.'

K.C. v. Highlands Insurance Company, *supra*, Page 509.

In Ryals v. State Farm Mutual Auto Insurance Company, 134 Idaho 302, 1 P.3d. 803 (S.Ct. 2000), the Idaho Supreme Court again addressed the doctrine of reasonable expectations. There, the court stated:

> [The plaintiff] invites this Court to overrule precedent and adopt the doctrine of reasonable expectations. This result would preclude any further contract analysis as [plaintiff] certainly expected to be covered while driving in New York. We decline the invitation. We have previously rejected the reasonable expectations doctrine in favor of traditional rules of contract construction. *K.C. v. Highlands Insurance Company*, 100 Idaho 505, 508-509, 600 P.2d. 1387, 1390-91 (1979). The traditional rules of contract construction avoid the danger of a court creating a new contract between the parties by relying on the notion of reasonable expectations. *K.C.*, 100 Idaho at 509, 600 P.2d. at 1391. We find no reason to revisit that holding.

Ryals v. State Farm Mutual Auto Insurance Company, *supra*, Page 304.

As noted above, the Plaintiffs have submitted no affidavit to assert that they had any personal expectations with respect to definitions or coverages.

This Defendant has submitted the affidavit of David Nipp, with respect to asserted conversations. Mr. Nipp, by his affidavit, states that he was neither an agent or employee of this Defendant. Rather, he is an independent contractor, a licensed insurance agent. Mr. Nipp further states that there was no conversation as asserted by the Plaintiffs.

With respect to the question of an ambiguity, the Idaho courts have not held that if a reasonable person would expect coverage, there must be coverage. Such would be the adoption of the reasonable expectation doctrine. Rather, the courts have stated that where a policy may be ambiguous, which a question of law, to determine the meaning of an ambiguous contract, the trier of fact must determine what a reasonable would have understood the language to mean and the words used must be construed giving their ordinary meaning. Clark v. Prudential Property and Casualty Insurance, 138 Idaho 538, 66 P.3d 242 (S.Ct. 2002).

Plaintiffs strain at a meaning of the term "household appliance" with respect to personal property damage as a means of attempting to find coverages which do not exist either as to damage to the dwelling, including all items defined as part of the dwelling, or with respect to damage to the personal property.

IX.

THE ASSERTED CONVERSATION WITH THE INSURANCE AGENT DOES NOT CREATE ADDITIONAL COVERAGE

Plaintiffs contend, by reference of deposition sections, that they purportedly had a conversation with David Nipp, an insurance agent. Plaintiffs' reference to the conversation does not create an undisputed fact as to coverage, or additional coverage, under the policy of insurance. It is Plaintiffs' reference, both by the deposition sections and the language of their Brief, that there was "coverage." Plaintiffs have failed to define with any particularity what was the asserted "coverage" that they sought, intended, or allegedly inquired about. Moreover, Mr. David Nipp has, by affidavit, stated that he is not a general agent or employee of Farmers Insurance Company of Idaho. Mr. Nipp has stated that he is an independent contractor. Mr. Nipp further disputes that there ever was a conversation as asserted by the Plaintiffs.

At a minimum, this creates a dispute of material fact as to conversation. Moreover, the Plaintiffs have failed to define even by this language, if it is properly before this Court, what the extent of coverage was that was the reference.

As reflected by the Plaintiffs' deposition testimony submitted herein, the Plaintiffs received a copy of the insurance policy. The Plaintiffs did not inquire of anyone, following receipt of the Policy, as to means of the terms or the conditions of that contract. From the Plaintiffs' own testimony, it is referenced that their conversation with Mr. Nipp preceded their purchase of the

residential property in 1999. They did not set up the pool until, allegedly, 2000. The events surrounding this matter did not occur until July 2003.

From the case authority, it is clear that even Mr. Nipp's alleged comments cannot add to the language of the Policy, since the Idaho Supreme Court has expressly declined to adopt the doctrine of reasonable expectations. Interpretation of the Policy is based upon the language of the Policy according to the plain and ordinary meaning of the terms, unless those terms are otherwise defined.

X.

CONCLUSION

The Plaintiffs assert by their Brief that they seek a declaratory judgment of coverage. Plaintiffs' Complaint does not, by its language, seek declaratory relief. Plaintiffs assert that they want declaratory judgment that they are "covered" by the Policy. Plaintiffs fail to address the specifics of the Policy. The Policy language divides applicable language between the dwelling and personal property. Under a specific endorsement to the Policy, there was no coverage for damage to the dwelling, or items defined as part of the dwelling. Plaintiffs' argument relates to whether or not a swimming pool is a household appliance. The plain, ordinary meaning of that phrase, consistent with dictionary definitions and normal use, reflects that a swimming pool is not a household appliance. Further, even if the Plaintiffs strained definition were applied to the Policy, the reference to household appliance only relates to coverages for damage to personal property.

The Plaintiffs have failed to adequately submit to this Court a Motion for Summary Judgment supported by particularized affidavits which define a loss of personal property as opposed to any other assertion they may have.

There is no ambiguity within the policy which would permit the Court the strained construction proposed by the Plaintiffs.

DATED 18th day of January, 2005.

PATRICK E. MILLER
Attorney for Defendant Farmers Insurance Company of Idaho

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of January, 2005. I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Douglas S. Marfice
Michael A. Ealy
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

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STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED:

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CLERK DISTRICT COURT

DEPUTY

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ISBA# 1771

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife,	Case No. CV-03-9214
Plaintiffs,	**SUBMISSION OF MATERIALS IN SUPPORT OF DEFENDANT FARMERS INSURANCE COMPANY OF IDAHO'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**
vs.	
FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation; CORPORATE DOES I-X, whose true names are unknown,	
Defendants.	

COME NOW, this Defendant Farmers Insurance Company of Idaho, in support of their in Opposition to Plaintiffs' Motion for Partial Summary Judgment, and submit the following materials in support thereof.

ORIGINAL

115

(A) Excerpts from the Deposition transcripts of Brian Armstrong, taken on October 4, 2004; specifically attached hereto as Exhibit "A":

Page 5, Lines 18-22
Page 7, Lines 14-24
Page 9. Lines 8-15
Page 12, Lines 18-24
Page 13, Lines 18-25
Page 14, Line 1-9
Page 15, Lines 5-9

(B) Excerpts from the Deposition transcripts of Glenda Armstrong, taken on October 4, 2004; specifically attached hereto as Exhibit "B".:

Page 6, Lines 11-13
Page 7, Line 19-25
Page 8, Lines 1-3
Page 10, Lines 1-5
Page 11. Lines 20-24
Page 15, Lines 18-25
Page 16, Line 1-4

DATED this 18th day of January, 2005.

PATRICK E. MILLER

SUBSCRIBED AND SWORN TO before me this 18th day of January, 2005.

(S E A L)

LORI D. RAWSON NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at Coeur d'Alene
My Commission Expires: 6/24/2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of January, 2005, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Douglas S. Marfice
Michael A. Ealy
Ramsden & Lyons
618 North 4th Street
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Patrick E. Miller

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COPY

IN THE DISTRICT COURT OF THE FIRST
JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife,

Plaintiffs,

v. Case No. CV-03-9214

Farmers INSURANCE COMPANY of IDAHO, an Idaho corporation; CORPORATE DOES I-X, whose true names are unknown,

Defendants.

[redacted]

DEPOSITION OF BRIAN ARMSTRONG
Taken on behalf of the Defendants
TUESDAY, OCTOBER 5, 2004

- - -

BE IT REMEMBERED THAT, pursuant to the Idaho Rules of Civil Procedure, the deposition of BRIAN ARMSTRONG was taken before Luke Jagot, Certified Shorthand Reporter for the State of Idaho, on Tuesday, October 5, 2004, commencing at the hour of 3:15 p.m., at 618 Fourth Avenue, Coeur d'Alene, Idaho.

EXHIBIT
witness A

occupation?

A. I'm a supervisor for Verizon.

Q. And what is the particular function of your supervisory role?

A. Customer service.

Q. Your wife indicated that you and she were married in 1998, is that correct, or do I have that wrong?

A. I think September '98. It was a good month.

Q. And that you and she purchased the home at 14th Street in 1999; is that correct?

A. Correct.

Q. Who was living in the home with you at the time of the accident? I don't know that I asked your wife that clearly.

A. My wife and two daughters.

Q. She also indicated that you owned the pool prior to the marriage.

A. Yes.

Q. When did you buy the pool?

A. In '97 I believe.

Q. Who did you buy it from?

A. K-Mart.

Q. And do you recall the brand of the pool?

from ground level?

A. 42 inches.

Q. And how far across, or what was the diameter or radius, either one?

A. I think fifteen feet.

Q. That would be the diameter?

A. Correct.

Q. Did you ever have any information as to the amount of water that the pool held?

A. I think roughly 4,000 to 4,500 gallons.

Q. Did you ever have any problem with the pool prior to these events of July 2, 2003?

A. No.

Q. Now your wife indicated that you purchased the home in 1999. Do you recall if you set the pool up that year?

A. I don't recall.

Q. Did you set it up in 2000?

A. I believe we did.

Q. And then it was set up in 2001 and 2002 and 2003.

A. Uh-huh.

Q. Is that a yes?

A. Yes. Sorry.

Q. That's all right. Were you home at the

the pool is level.

Q. And you mentioned that the cord for the filtration unit is about 20 feet. Was that the distance that the pool was located from the house if you recall?

A. It was about middle. There was some slack in the cord. It wasn't tight.

Q. Your wife mentioned that in 1999 you, she, and Mr. Nipp met to discuss insurance coverages. Had you utilized Mr. Nipp for insurance coverages before that?

A. Automobile.

Q. When did you first purchase automobile insurance from Mr. Nipp?

A. I believe early '98.

Q. And how was it that you met Mr. Nipp or decided to use him?

A. A reference from a friend that I had met in the area, and I had prior experience with Farmers Insurance. That's who I had homeowners with in Montana.

Q. Who was the agent that you utilized in Montana to acquire homeowners insurance?

A. I don't recall.

Q. Do you recall what company you had your

homeowners policies?

A. I don't recall.

Q. What do you recall Mr. Nipp said about or in relation to the pool?

A. It would be covered.

Q. Did he say how?

A. No.

Q. Did you talk to him about different kinds of what-ifs in relation to the pool? The what-if I think was the phrase you used before.

A. Worst case scenario.

Q. What kind of worst case scenario did you talk to him about?

A. I believe as we were leaving I just asked worst case scenario what if it leaked and it caused damage would we have coverage, and his response was sure.

Q. Now as a result of that meeting was a policy of insurance issued?

A. Yes.

Q. And did you get a copy of that policy?

A. Yes.

Q. Did you read it over after you got it?

A. No.

Q. Now I asked your wife about the renewals

of the policy. Did you have conversations with Mr. Nipp in 2000, 2001, or 2002 about the renewals of your policy?

A. I believe we added some endorsements for glass. Again, as our kids grow up and get older they throw a rock, replacement coverage for glass and windows.

Q. Do you remember what year you added that?

A. I don't.

Q. Other than this glass endorsement do you recall if you added or changed anything else with regard to the policies?

A. I do not.

Q. Your wife mentioned a Waverunner and something else. Did you add those to the homeowners policy or to a different policy?

A. I thought they were separate.

Q. After the meeting in 1999 did you again actually meet with Mr. Nipp to discuss policy of insurance, or was this all done by phone?

A. Face-to-face.

Q. Was it a face-to-face meeting each year?

A. I don't think it was each year.

Q. Let's just take 2000. Do you recall if that was a face-to-face meeting?

A. I don't recall.
Q. 2001?
A. I don't recall.
Q. 2002?
A. I don't recall.
Q. Do you recall anything that was said in any of the conversations about renewal of the policies in 2001, 2002, or 2003?
A. No.
Q. In your complaint you had referenced that the term of the policy was from March 24, 2003, to March 23, 2004. I assume that your meetings with Mr. Nipp would have been before this March date. Is that about when you were having your meetings, or was it a different time of year?
A. Again, I don't recall.
Q. Did you ever keep any kind of a Daytimer or personal calendar to show the dates when you were meeting with Mr. Nipp?
A. No.
Q. After the conversation in 1999 about the policy of insurance did both you and your wife meet with Mr. Nipp to discuss the renewals or any changes, either one of you?
A. I think we met with him more on a life

insurance discussion.

Q. Was that a separate discussion from renewal of the homeowners policy?

A. Yes.

Q. But with respect to renewal of the homeowners policy did you do the meetings or did your wife, or did you both do the meetings each year?

A. I don't think we had renewal meetings.

Q. Was it just a conversation we want to keep going with the policy?

A. Uh-huh.

Q. Was that by phone if you recall?

A. Payment?

Q. No, just to tell him you wanted to renew that policy or add anything to it. Were those by phone if you recall?

A. I don't recall.

Q. When did you first learn there'd been a problem on July 2?

A. I came home for lunch like I normally do and made myself lunch. I was sitting down. The phone rang. It was my wife. She said how's the pool. I thought it was fine. Went and looked out the back window, and it had basically fallen apart or

COPY

IN THE DISTRICT COURT OF THE FIRST
JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife,

Plaintiffs,

v. Case No. CV-03-9214

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

Defendants.

DEPOSITION OF GLENDA ARMSTRONG
Taken on behalf of the Defendants
TUESDAY, OCTOBER 5, 2004

- - -

BE IT REMEMBERED THAT, pursuant to the Idaho Rules of Civil Procedure, the deposition of GLENDA ARMSTRONG was taken before Luke Jagot, Certified Shorthand Reporter for the State of Idaho, on Tuesday, October 5, 2004, commencing at the hour of 2:00 p.m. at 618 Fourth Avenue, Coeur d'Alene, Idaho.

EXHIBIT
tabbies B

of occupations or work have you done?

A. Just in the recent years or like --

Q. Just recent years.

A. Teaching.

Q. And how long have you worked for the school district?

A. Five years.

Q. Have you ever worked in the insurance industry at all?

A. No.

Q. Ms. Armstrong, when did you and your husband purchase the home at North 14th Street?

A. '99.

Q. And after you purchased it did you ever remodel the home?

A. Yes.

Q. When did you do any remodeling? A rough year would be fine.

A. Completion was '02.

Q. And who did that remodeling work for you?

A. My husband and myself.

Q. And what in particular did you remodel in that particular project?

A. The entire 1,500 square feet of the basement.

Q. Now when you purchased the home in '99 was the basement unfurnished?

A. Unfinished.

Q. Excuse me, unfinished. So you and your husband did any finish work in the basement that was ever done; is that correct?

A. Yes.

Q. What did the basement consist of after you'd completed the remodeling? What were the rooms used for for example?

A. There are three bedrooms, living room, bathroom, and an unfinished laundry room.

Q. Now was that the configuration of the basement when you completed the remodeling in 2002?

A. Yes.

Q. Is that the same configuration of the basement today?

A. Yes.

Q. When you purchased the home in '99 when did you first acquire or contact anyone about getting insurance for the property?

A. When we first moved in.

Q. And who did you contact about insuring the house?

A. David Nipp.

Q. Now had you and your husband ever owned a home before this?

A. No.

Q. Had you ever acquired any property residential insurance prior to the insurance you got for the house at 14th Street?

A. No.

Q. Why did you contact Mr. Nipp?

A. My husband uses him.

Q. And used him how?

A. Auto insurance.

Q. Where did Mr. Nipp have his office in '99 when you first contacted him?

A. Post Falls

Q. And did you meet with Mr. Nipp, or did you conduct all of your business at that time over the telephone?

A. No, it was an office visit.

Q. Now looking at the complaint it indicates that you acquired a protector plus homeowners insurance policy, and it references a Policy Number 9182803-27. When you and your husband first got insurance through Mr. Nipp was that the type of policy acquired, or did you ever change types of policies you had with him?

Q. Do you recall if you set up the pool in 1999?

A. No.

Q. You don't recall or you didn't set it up?

A. I don't recall.

Q. Do you recall if you -- Or let me just ask the question this way. Did you set up the pool in 2000 then?

A. Yes.

Q. Now you indicated that when you met with Mr. Nipp you asked him something about coverage and the pool, and I didn't write a very good note. What did you ask him about the pool?

A. I wanted to know specifics of what was covered.

Q. And this was a meeting at Mr. Nipp's office?

A. Yes.

Q. And what did Mr. Nipp tell you?

A. That if I upped my policy and had the entire package it would be covered.

Q. Did he indicate what he meant by upped the policy?

A. And I'm sure he didn't use that word, but it just meant I wanted the best policy possible for

our above ground pool.

Q. Did you discuss with him different kinds of risks or problems with pools?

A. No.

Q. After you told him -- First of all, did you tell him you were going to have an above ground pool?

A. Yes.

Q. And did he inquire about location or model or anything of that nature?

A. No.

Q. Other than telling you that, using your words, if you upped the policy it would be covered did he discuss kinds of risks that would be covered?

A. No.

Q. Did you during that conversation ask him about different kinds of concerns you had with the pool?

A. No.

Q. At the time that you talked to Mr. Nipp in 1999 did you and your husband already own the pool?

A. Yes.

Q. When did you purchase the pool?

A. It was my husband's previously.

Q. Had you and your husband ever set it up

do any remodeling of the upper floor or floors?
A. Just painting.
Q. And did you meet with Mr. Nipp on more than one occasion to discuss coverage for the pool as you used the term?
A. No.
Q. This initial meeting you indicated was in 1999. After that did you or your husband principally handle renewal of the insurance policies or coverages for the house?
A. Both.
Q. Did you do that by phone or with an annual meeting or periodic meeting with Mr. Nipp?
A. Both.
Q. Do you recall meeting with him then sometime during 2000 to discuss insurance coverage?
A. No.
Q. Now after the 1999 meeting did you receive a copy of an insurance policy from Farmers Insurance Company of Idaho?
A. Yes.
Q. And after you got a copy of that policy did you read it?
A. I don't recall.
Q. After you got the policy as a result of

the 1999 meeting did you ever call Mr. Nipp up in 1999 to ask him to explain anything or to inquire about the levels or types of coverage?

A. No.

Q. In 2000 do you recall if you made any changes to the insurance policies for the residence?

A. No.

Q. And what about in 2001? Do you recall if you made any changes to the insurance policy or coverage that year?

A. No changes were made.

Q. For reference do you ever recall about what time the renewals of your insurance policy seemed to come up each year?

A. No.

Q. And in 2002 did you make any changes to the policy?

A. No.

Q. And I think if I understand from the complaint in July 2003 that's the year that the pool failed and the house flooded; is that correct?

A. Yes.

Q. In 2003 prior to this July date did you contact Mr. Nipp about insurance coverage on the residence?

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
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DEPUTY

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife, Plaintiffs, vs. FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation; CORPORATE DOES I-X, whose true names are unknown, Defendants.	Case No. CV-03-9214 **DEFENDANT FARMERS INSURANCE COMPANY OF IDAHO'S OBJECTION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

COMES NOW, the Defendant Farmers Insurance Company of Idaho, and objects to the Plaintiffs' Motion for Partial Summary Judgment, pursuant to Rule 56(c), I.R.C.P., upon the grounds that Plaintiffs failed to serve the Motion upon this Defendant, as required by Rule 56(c) and Rule 7(b)(1), I.R.C.P.

ORIGINAL

This Defendant requests oral argument.

DATED 18th day of January, 2005.

PATRICK E. MILLER
Attorney for Defendant Farmers Insurance Company of Idaho

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of January, 2005, 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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PATRICK E. MILLER

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV- 03-9214

AFFIDAVIT OF DOUGLAS S. MARFICE IN SUPPORT OF EX PARTE MOTION TO SHORTEN TIME

STATE OF IDAHO)
) ss.
County of Kootenai)

Douglas S. Marfice, having been first duly sworn upon oath, deposes and states:

1. I am an attorney for the Plaintiffs herein, and I have personal knowledge of the matters set forth in this affidavit.

2. I make the Affidavit of my own personal knowledge.

3. On or about December 8, 2004, my office spoke with Judge Hosack's

and reserved the hearing time of 3:30 p.m. on February 1, 2005 to hear Plaintiffs Motion For Partial Summary Judgment. The availability of counsel for Defendant was also confirmed at that time.

4. Counsel for Defendants was timely served with a Notice of Hearing, Memorandum In Support and Affidavit of Douglas S. Marfice In Support of Motion for Partial Summary Judgment on January 4, 2005.

5. Through an oversight, Affiant neglected to file and serve a separate document "Motion For Summary Judgment" although the grounds, applicable civil rules and time and place of hearing were all adequately set forth in the documents referenced in paragraph 4 above.

6. Defendants' counsel did not notify me until service of the Defendants' response brief of this oversight. Defendants have however filed an objection to Plaintiffs' motion, but have not articulated any prejudice resulting therefrom.

7. In the interests of justice and judicial economy, Plaintiffs' Motion For Partial Summary Judgment should be deemed properly and timely filed so as to permit hearing as scheduled on February 1, 2005.

FURTHER YOUR AFFIANT SAYETH NOT.

Douglas S. Marfice

SUBSCRIBED AND SWORN to me before this 19th day of January 2005.

Notary Public for Idaho
Residing at Coeur d'Alene
My Commission expires: 11-2-09

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January 2005, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Patrick E. Miller, Esq. 701 Front Avenue, Suite 101 PO Box E Coeur d'Alene ID 83816-0328	✓ US Mail ___ Overnight Mail ___ Hand Delivered ✓ Facsimile (208) 664-6338

Douglas S. Marfice

DOUGLAS S. MARFICE, ISB #4072
MICHAEL A. EALY, ISB #5619
APRIL M. LINSCOTT, ISB #7036
RAMSDEN & LYONS
618 North 4th Street
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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV- 03-9214

EX PARTE MOTION TO SHORTEN TIME FOR FILING OF "MOTION"

COME NOW, Plaintiffs BRIAN and GLENDA ARMSTRONG, husband and wife, by and through counsel of record, and hereby move this Court for an *ex parte* order shortening time for hearing of Plaintiffs' Motion For Partial Summary Judgment. Hearing is scheduled to take place on Tuesday, February 1, 2005. That date was reserved for Plaintiffs' Motion For Summary Judgment well in advance, and availability of Farmer's counsel for that date was confirmed in advance. Plaintiffs' Memorandum and Affidavit In Support and Notice of Hearing

were timely served and filed, but Plaintiffs inadvertently failed to timely file/serve a separate motion paper as is customary. Farmers has objected to Plaintiffs' Motion, ostensibly on technical/notice grounds because there was no separate Motion filed with the Memorandum, Affidavit and Notice of Hearing.

Rule 7 requires that an application to the Court for an order shall be made in writing stating the grounds and applicable civil rule. However, "*The requirement of writing is fulfilled if the motion is stated in a written notice of hearing of the motion.*" *See, IRCP 7(b)(1).* Here, Plaintiffs' Notice of Hearing and Memorandum In Support which were timely filed and served (28 days prior to hearing) stated the grounds for the motion and the applicable civil rule. Accordingly, those filings fulfilled the requirements of Rule 56 and Rule 7(b).

Nevertheless, to cure any technical defect in Plaintiffs' Motion For Partial Summary Judgment, Plaintiffs hereby move, *ex parte*, for an order shortening time to permit Plaintiffs' filing of a remedial "Motion For Summary Partial Judgment" document in strict conformity with the Rules of Civil Procedure. This *ex parte* motion is supported by the Affidavit of Douglas S. Marfice filed herewith.

DATED this 19th day of January 2005.

RAMSDEN & LYONS

By _____
Douglas S. Marfice, Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January 2005, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife, Plaintiffs, vs. FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation; CORPORATE DOES I – X, whose true names are unknown, Defendants.	Case No. CV- 03-9214 **MOTION FOR PARTIAL SUMMARY JUDGMENT**

COME NOW, Plaintiffs BRIAN and GLENDA ARMSTRONG, husband and wife, by and through counsel of record, pursuant to Rule 56(c), Idaho Rules of Civil Procedure, and hereby move this Court for entry of partial summary judgment in favor of said Plaintiffs on the grounds that there is no genuine issue of material fact and the Court can 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.

This motion is further based on the documents and pleadings on file herein and upon Plaintiffs' Memorandum In Support and Affidavit was previously filed.

Oral argument is requested.

DATED this 18th day of January 2005.

RAMSDEN & LYONS

By _____
Douglas S. Marfice, Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of January 2005, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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_____
Douglas S. Marfice

SM

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED

2005 JAN 27 AM 10: 12

CLERK DISTRICT COURT
DEPUTY

DOUGLAS S. MARFICE, ISB #4072
MICHAEL A. EALY, ISB #5619
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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV- 03-9214

REPLY TO DEFENDANT'S MOTION IN OPPOSITION TO PARTIAL SUMMARY JUDGMENT

1. Facts claimed by Farmers to be disputed are immaterial.

A. Even resolving all "questions of fact" raised by Farmers in Farmers' favor, the Armstrongs' Motion for Partial Summary Judgment must still be granted.

In a motion for summary judgment, it is the moving party's burden only to establish the lack of genuine issues of material fact. *Orthman v. Idaho Power Co.*, 130 Idaho 597, 944 P.2d 1360 (1997). A nonmoving party cannot create a genuine fact issue by simply listing facts that may be in dispute but that are not material to the motion. The nonmoving party must present

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more than speculation or a mere scintilla of evidence to create a genuine fact issue. *Sprinkler Irrigation Co., Inc. v. John Deere Ins. Co., Inc.*, 139 Idaho 691, 697, 85 P.3d 667, 673 (2004). In its response to Armstrongs' Motion For Partial Summary Judgment, Farmers puts forth a litany of issues upon which it maintains there are genuine factual disputes. Upon scrutiny, however, Farmers' disputed facts are all immaterial to the issue of law before the Court on this motion: to wit, Does Farmers' policy afford coverage for the Armstrongs' loss.

(i) Facts relating to conversations with the insurance agent are immaterial.

Farmers attempts to confuse the narrow issue raised by the Armstrongs' motion by raising superfluous factual disputes. Principal among these is Farmers' evidence regarding the insurance agent who sold Armstrongs their Policy. For purposes of this motion, the Court may accept Farmers' version of any conversation(s) between the Armstrongs and Farmers' insurance agent, David Nip. The Armstrongs testified they discussed coverage with Nipp. Nipp denies those discussions occurred. So be it. The narrow legal issue before the Court does not require reconciling this conflicting affidavit/deposition testimony. The Policy speaks for itself. It is clear and unambiguous.

Whether or not Nipp told the Armstrongs anything need not be determined to interpret the Policy and to find coverage. Only if the Policy is found to be ambiguous, does Nipp's conversation with the Armstrongs become somewhat relevant and even in that event, who-said-what-to-who is not dispositive to the coverage question. Rather, it is merely evidence of the Armstrongs' reasonable understanding of the scope of their policy coverages. A factual question as to whether or not Nipp told the Armstrongs what they claim he told them would be material to whether or not the Armstrongs were abjectly unreasonable in believing that they were covered for losses related to their pool (and again, this is relevant only if the Policy is ambiguous).

The Armstrongs are entitled to coverage under the Policy because the Policy does not

clearly exclude loss for the type of damage they suffered. It is that simple. What their insurance agent did or did not tell them really does not matter in this analysis.

(ii) The facts related to the Armstrongs' proof of loss are immaterial and irrelevant.

The Armstrongs have moved for partial summary judgment on the issue of coverage, only. Deciding coverage bears no relationship to the issue of damages. Farmers' discussion of the Armstrongs' Proof of Loss is a *red-herring* that has nothing to do with coverage. Evidence of the Proof of Loss was only offered in the first instance to demonstrate the Armstrongs have conducted themselves under the belief that they had coverage, which in turn demonstrates the absence of an ambiguity in the Policy. If the Proof of Loss submitted with the Armstrongs' motion is objectionable, it can be ignored without impairing the Court's ability to determine coverage.

(iii) The Armstrongs' understanding, interpretations and expectations under the Policy are immaterial.

Farmers asserts that the Armstrongs' submissions "fail to establish undisputed material facts" in that "*there are no affidavits or assertions as to how Plaintiffs interpreted the policy or what Plaintiffs expected by the interpretation of the policy.*" *See, Farmers' Brief In Opposition, p.7.* However, the Plaintiffs' expectations or interpretation of the Policy are irrelevant if the Policy is, as alleged in the motion, clear and unambiguous. As Farmers correctly points out, Idaho has declined to adopt the doctrine of reasonable expectations. *K.C. v. Highland Ins. Co.,* 100 Idaho 505, 600 P.2d 1387 (1979). Accordingly, what the Armstrongs' expectations were under the Policy is irrelevant to the issue of whether the Policy is ambiguous. Again, the Policy speaks for itself.

(iv) Farmers' "interpretation" of the Policy is immaterial.

Farmers goes a step further in its effort to create a genuine fact issue by offering its own "interpretation" of the Policy. *See, Affidavit of Marti Gunderson.* Just as the Armstrongs' "reading" of the Policy is irrelevant, so too is Gunderson's, or for that matter any one else's; so

long as the Policy is construed in compliance with law. To construe the Policy in compliance with law, the Court simply must determine that it is not ambiguous as to coverage for "*sudden and accidental discharge of water from a household appliance.*" That decision can be reached just by reading the Policy as written. The Court does not need help from the Armstrongs or Farmers (*vis à vis* Gunderson) to do this.

2. The predicate legal issue on this motion is whether the Policy is or is not ambiguous as to coverage for the Armstrongs' loss.

"Where the policy language is clear and unambiguous, coverage must be determined, as a matter of law." *Gordon v. Three Rivers Agency, Inc.*, 127 Idaho 539, 542, 903 P.2d 128, 131 (Ct. App. 1995); *Clark v. Prudential Property and Casualty Ins. Co.*, 138 Idaho 538, 541, 66 P.3d 242, 245 (2003). Here, the Farmers' policy is unambiguous but even if it were ambiguous, coverage would still exist, as a matter of law.

A. Farmers' argument that the Policy term "household appliance" unambiguously excludes swimming pools is unconvincing .

Is a swimming pool a household appliance? Apparently-it depends upon who you ask. The Idaho legislature clearly thinks so. *See, I.C. § 55-2508.* However, Farmers makes the bold assertion that the Court should not consider the Idaho Property Condition Disclosure Act to assist in determining the meaning of the term "appliance." It is the Court's prerogative to consider whatever authority it finds persuasive. Remember, if Farmers wanted a term in its policy to have a particular or limited meaning, all it had to do was define that term in the policy. It did so with the term "water," so it could have done so with "appliance."

Farmers adds that the Property Condition Disclosure Act should not be considered because "*the language of the Policy does not, by reference, incorporate by reference the . . . Act.*" *See, Farmers' Brief in Opposition, p. 14.* But then Farmers turns around and cites to the definition of appliance in *Black's Law Dictionary* when the Policy does not reference or incorporate by reference this source either. Moreover, Defendant's own citation to *Black's*

(unabridged, revised 4th Edition) definition is far from persuasive because it lists numerous items that have or have not been considered to be an "appliance" in various jurisdictions.[1] The time to apply limiting definitions in a policy is when the policy is written, not after a claim arises. In short, Farmers offers no evidence, nor any compelling argument that a swimming pool is anything other than an appliance.

Farmers cites a single Florida case which held that a waterbed was not an appliance. *W. Am. Ins. Co. v. Lowrie,* 600 S.2d 34 (Dist. Ct. App. Fl. 1992). The *Lowrie* Court held that a waterbed is an item of furniture but offered no analysis or rationale whatsoever as to why something that is furniture cannot also be an appliance (*See copy attached).* Conversely, in another waterbed case, a New Jersey Court criticized *Lowrie* and offered a clear explanation. It stated that since a fixture can be an appliance, furniture can also be an appliance (therefore the terms are not mutually exclusive and thus, waterbed *is* an appliance at least in New Jersey). *See, Azze v. Hanover Ins. Co.,* 336 N.J.Super. 630, 644, 765 A.2d 1093, 1102 (Super. Ct. N.J. 2001). Drawing an apropos analogy which seems equally applicable to the facts of this case, the *Azze* Court went on to say:

> Second, waterbeds, like the one involved here, are generally purchased with heating units which plug into the household electric current like washing machines and dishwashers, appliances which also contain water. We draw an analogy to an electric blanket. Few people would consider a regular blanket to be an appliance. However, once one modifies a blanket so that it also provides heat electrically, this new item, an "electric blanket," suddenly takes on the characteristics of a household appliance. Note the certainty in the tone of the U.S. District Court in *Remington Rand, Inc. v. Knapp-Monarch Co.,* 139 F. Supp. 613, 622 (E.D. Pa. 1956), when it proclaims that "A nonexhaustive list of

[1] BLACK'S LAW DICTIONARY 127(Revised 4th ed. 1968) Footnote to Appliance. "The term has been applied to a railroad track, Hines v. Kelley, Tex. Civ. App., 226 S.W. 493, 496; motor tracks in a coal mine, Jaggie v. Davis Colliery Co., 75 W.Va. 370, 84 S.E. 941; an automobile, Ross v. Tabor, 53 Cal.App. 605, 200 P. 971, 973; a telephone lineman's safety belt, Boone v. Lohr, 172 Iowa 440, 154 N.W. 591, 592; and a plank on which a painting foreman was working, Peterson v. Beck, 27 Cal.App. 571, 150 P. 788, 789; but not, however to a station water tank, rope, or scaffold used thereon, by a painter, McFarland v. Chesapeake & O. Ry. Co., 177 Ky. 551, 197 S.W. 944, 947; nor to a moving picture machine, Balcom v. Ellintuch & Yarfitz, 179 App. Div. 548, 166 N.Y.S. 841, 842; nor the steps of a caboose, Cincinnatie, N.O. & T. P. Ry. Co. v. Goldston, 163 Ky. 42, 173 S.W. 161, 162.

> appliances are: Electric blankets, blenders, vacuum type coffee makers, hair dryers, fans, deep fat fryers, frypans, hand irons, food mixers, heating pads, corn poppers, vaporizers, massage vibrators, waffle irons, and electric razors." We find that if a blanket becomes an appliance once it provides heat, so too does a waterbed.

See, Azze v. Hanover, 336 N.J. Super. at 644, 765 A. 2d at 1102 (2001).

If containing water and being plugged "into the household electrical current like washing machines and dishwashers, appliances which also contain water" (*Id. at 645)* was enough to make the *Azze* water bed an appliance, the same considerations apply to the Armstrongs' pool. It too had a pump and filter which operated off of a household electric current. *See, Depo. Tr. Brian Armstrong, p. 8, ll.3-14.*

B. Evidence of the meaning of a word can be considered without first determining that the word is ambiguous.

Farmers' argument implies that unless the term "appliance" is first found to be ambiguous, the Court cannot consider outside evidence of the meaning of the word. This would only be true if Farmers had taken advantage of its right to define the term in the context of its Policy. Since it did not choose to do so, Farmers abdicates the right to complain about the source of definitions used by the Court in deciding (a) what an "appliance" is and (b) whether that term is ambiguous in the context of the Policy.

While Farmers may parse the definition of "appliance" *ad nauseam,* after-the-fact, nothing changes the simple, uncontested reality that the Policy does not offer a definition, whereas the dictionary, common usage and analogous case law all support Armstrongs' position that a pool is a household appliance.

C. The fact that Farmers uses a specific term in one instance and a general term in another does not mean that the general term was meant at the exclusion of the specific term.

Farmers would like the Court to believe that a swimming pool is not a "household appliance" without telling it what, precisely, a swimming pool is. If a swimming pool is not an appliance, then what is it? It is certainly not furniture. It may be a fixture. But, as we have seen, both a fixture and furniture can also be an appliance. *See, Azze, supra.* Farmers suggests that because the Policy refers to an "appliance" in one section and to a "swimming pool" in another, the terms must be mutually exclusive. This argument requires reading things into the Policy which simply are not there. The term "household appliance" is a general description which in ordinary usage includes such things as a swimming pool, 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, hot tub, etc. *See, I.C. § 55-2508.*

In the Policy, the term "swimming pool" is only used in one place. That is in the section of the Policy defining of the term "water damage" under the subsubsection describing" water below ground level . . . or [which] seeps or leaks through a building . . . foundation, swimming pool . . . " Clearly, below ground level seepage or leakage is not what this case is about. As more fully briefed elsewhere, the Armstrongs claim does not even involve "water damage" as that term is defined in the Policy. *See, Memorandum In Support of Plaintiffs' Motion For Partial Summary Judgment, p. 3, Nos. 8-10.* Instead, this case involves a claim arising from the "sudden, accidental discharge of water from a household appliance;" a type of loss which is both expressly covered and expressly excepted from exclusions to coverage, depending on which part of the Policy you look at.

4. **If the Court is unwilling to accept the Armstrongs' definition of "appliance" then it must find that the term is reasonably susceptible to varying interpretation; thus, it is ambiguous. – If the term is ambiguous; the Armstrongs are entitled to**

Summary Judgment.

Insurance contracts are contracts of adhesion, and therefore subject to liberal construction so as to benefit the insured. *Azze, supra.* Ambiguity exists if a policy term is subject to conflicting interpretation. *Nedrow v. Unigard, 1*32 Idaho at 422, 974 P.2d at 68. If the Court does not find as a matter of law that Armstrongs' swimming pool was a "household appliance," it must, at the very least, conclude that the term is subject to conflicting interpretations.

One interpretation is that a swimming pool is a household appliance; another interpretation is that a pool is something else. However, even if the term "household appliance" is ambiguous then the Armstrongs are entitled to a summary judgment on the issue of coverage. "[W]here there is an ambiguity in an insurance contract, special rules of construction apply to protect the insured." *Foremost Ins. Co. v. Putzier,* 102 Idaho 138, 142, 627 P.2d 317, 321 (1981). Under these special rules, insurance policies are to be construed most liberally in favor of recovery, with all ambiguities being resolved against the insurer. *Gordon v. Three Rivers Agency, Inc.,* 127 Idaho 539, 903 P.2d 128 (Ct. App. 1985) citing *Foremost Inc. v. Putzier, supra.* Insurers write the policies, and fairness suggests that insur**eds** should receive the benefit of any ambiguities. *Azze, supra at 644.(emphasis added)* Applying the special rules of construction requires the Court to find coverage even if it determines the Policy is ambiguous.

In this event, Farmers may escape liability to the Armstrongs for bad faith denial of benefits, but it does not avoid responsibility to pay Armstrongs the policy benefits owed.

DATED this 25th day of January 2005.

RAMSDEN & LYONS

By _____
Douglas S. Marfice, Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of January 2005, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Attorneys for Plaintiffs

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BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV- 03-9214

SUPPLEMENTAL AFFIDAVIT OF DOUGLAS S. MARFICE

STATE OF IDAHO)
) ss.
County of Kootenai)

Douglas S. Marfice, having been first duly sworn upon oath, deposes and states:

1. I am an attorney for the Plaintiffs herein, and I have personal knowledge of the matters set forth in this affidavit.

2. I make the Affidavit of my own personal knowledge.

3. Attached hereto are true and accurate photocopies of the following:

Exhibit "A": excerpts from the Deposition transcript of Brian Armstrong;

Exhibit "B": *Azze v. Hanover*, 336 N.J. Super. at 644, 765 A. 2d at 1102 (2001);

Exhibit "C": *W. Am. Ins. Co. v. Lowrie*, 600 S.2d 34 (Dist. Ct. App. Fl. 1992).

FURTHER YOUR AFFIANT SAYETH NOT.

Douglas S. Marfice

SUBSCRIBED AND SWORN to me before this 25th day of January 2005.

Notary Public for Idaho
Residing at Coeur d'Alene
My Commission expires: 11-2-09

[SEAL]

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Douglas S. Marfice

EXHIBIT "A"

time that the pool failed?

A. No.

Q. Now the pool wasn't connected to the house was it?

A. Only through means of electricity.

Q. Was there a pump that worked filtration for that?

A. Yes.

Q. Was that a separate little structure, or did it fit within the pool itself?

A. Just outside the pool.

Q. And this pump, did it just run off of 110 current?

A. Yes.

Q. Just a long extension cord to the house?

A. No extension cord. It had a long cord to the pump, about a 20 foot cord probably.

Q. And how big is the backyard for this residence?

A. Large. It's a big backyard. I can't really give you a good dimension.

Q. Does the backyard slope to, away from, or is it flat? To, away from the house, or is it flat?

A. The backyard tapers away from the house. Where we set the pool I had to do some filling so

EXHIBIT "B"

West Reporter Image (PDF)

600 So.2d 34, 17 Fla. L. Weekly D1451

District Court of Appeal of Florida,
Third District.
WEST AMERICAN INSURANCE COMPANY, Appellant,
v.
Carolyn LOWRIE, Appellee.
No. 91-2975.
June 9, 1992.

Insured whose waterbed broke while being filled brought suit under homeowner's policy for water damage. The Circuit Court, Dade County, Edward S. Klein, J., granted partial summary judgment on liability in favor of insured. Insurer appealed. The District Court of Appeal, Cope, J., held that: (1) waterbed was not "household appliance" under coverage provision of policy, and (2) leak from waterbed did not stem from plumbing system.
Reversed and remanded with directions.

West Headnotes

[1] KeyCite Notes

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and Exclusions
217k2142 Water Damage
217k2142(1) k. In General. Most Cited Cases
(Formerly 217k417.5(1))

Waterbed was not "household appliance" under provision of homeowner's insurance policy providing coverage for accidental discharge or overflow of water since waterbed was item of furniture that did not work or perform task and, thus, no coverage existed for water damage resulting when bed broke while being filled.

[2] KeyCite Notes

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and Exclusions
217k2142 Water Damage
217k2142(1) k. In General. Most Cited Cases
(Formerly 217k417.5(1))

"Household appliance," under terms of homeowner's insurance policy providing coverage for accidental discharge for overflow of water, is household device that does work or performs task.

[3] KeyCite Notes

217 Insurance

⇦217XVI Coverage--Property Insurance
⇦217XVI(A) In General
⇦217k2139 Risks or Losses Covered and Exclusions
⇦217k2142 Water Damage
⇦217k2142(6) k. Sewers and Drains; Plumbing. Most Cited Cases
(Formerly 217k417.5(1))

Leak caused when waterbed broke while being filled did not stem from "plumbing system" under coverage provision of homeowner's policy, even though waterbed was filled by means of plumbing system, since leak emanated from waterbed itself.
***35** Jones and Zaifert and Tami R. Wolfe, Ft. Lauderdale, for appellant.
Marc L. Goldman, Miami, for appellee.

Before COPE, LEVY and GERSTEN, JJ.

COPE, Judge.
Western American Insurance Company appeals a non-final order granting partial summary judgment on liability in favor of its insured, Carolyn Lowrie. We reverse.

[1] The insurer issued a homeowner's insurance policy to the insured. The insurance policy included coverage for "[a]ccidental discharge or overflow of water ... from within a household appliance." The insured's waterbed broke while being filled, and caused water damage. The trial court ruled that the waterbed is a "household appliance" and that the insurer must cover the loss.

[2] In our view, a waterbed is an item of furniture, and is not a "household appliance" within the ordinary meaning of that phrase. In the common understanding, a household appliance is a household device that does work or performs a task, such as a washer, dryer, vacuum cleaner, or toaster. *Cf. Murray v. Royal Indemnity Co.*, 247 Iowa 1299, 78 N.W.2d 786, 787 (1956) ("appliance" is "a thing used as a means to an end"). The waterbed was not within the policy definition and there is no coverage.

[3] The insured argues alternatively that the leak can be deemed to have stemmed from the plumbing system, discharges from which are also covered by the insurance policy. Although it is true that the waterbed was filled by means of the plumbing system, it is undisputed that the leak emanated from the waterbed itself, which is not part of the plumbing system.
The judgment is reversed and the cause remanded with directions to enter judgment for the insurer.
Fla.App. 3 Dist.,1992.
West American Ins. Co. v. Lowrie
600 So.2d 34, 17 Fla. L. Weekly D1451
END OF DOCUMENT

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EXHIBIT "C"

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765 A.2d 1093
336 N.J.Super. 630, 765 A.2d 1093
(Cite as: 336 N.J.Super. 630, 765 A.2d 1093)

H

Superior Court of New Jersey,
Appellate Division.

Joseph B. AZZE and Maureen P. Azze,
Plaintiffs-Appellants/ Cross-Respondents,
v.
HANOVER INSURANCE CO., A Corporation of the State of New Hampshire, Defendant-Respondent/Cross-Appellant.

Submitted Dec. 18, 2000.
Decided Jan. 30, 2001.

Insureds brought action against homeowners' insurer to recover for damage to personal property caused by bursting of waterbed. The Superior Court, Law Division, Middlesex County, entered summary judgment that the suit was time barred. Appeal and cross-appeal were taken. The Superior Court, Appellate Division, Wells, J.A.D., held that: (1) as a matter of first impression, an electrically-heated waterbed was a "household appliance" within the meaning of the coverage for damage to personal property caused by the discharge or overflow of water from within a household appliance, and (2) a letter by the insurer did not halt the tolling of the one-year policy limitations period.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Insurance ⇐3560
217k3560 Most Cited Cases
[1] Insurance ⇐3564(4)
217k3564(4) Most Cited Cases
The six-year statute of limitations for a suit on a contract applies to insurance actions, but may be shortened by the terms of an insurance contract. N.J.S.A. 2A:14-1.

[2] Insurance ⇐3564(8)
217k3564(8) Most Cited Cases
Between the time the insured gives notice of loss and the time that the insurance company formally denies coverage, the limitations period in the policy is tolled.

[3] Insurance ⇐3564(8)
217k3564(8) Most Cited Cases
Letter by insurer could be a formal denial of coverage and could halt the tolling of the one-year policy limitations period, even though it lacked a statement regarding the limitations period or the need for legal counsel; the insurer denied the claim in good faith.

[4] Insurance ⇐3564(8)
217k3564(8) Most Cited Cases
Letter by homeowners' insurer denying coverage for personal property damaged by bursting of waterbed, but inviting additional information and providing address for filing complaint with the Insurance Department, was not an unequivocal, formal denial and, therefore, did not halt the tolling of the one-year policy limitations period; the letter could reasonably lead a person to conclude that contact with the Department was actually a prerequisite to a lawsuit, and the insureds were still negotiating with the insurer on the dwelling claim.

[5] Insurance ⇐2142(1)
217k2142(1) Most Cited Cases
An electrically-heated waterbed was a "household appliance" within the meaning of a homeowners' insurance policy covering damage to personal property caused by the discharge or overflow of water from within a household appliance; the bed could reasonably be considered a tool, instrument, or device adapted for a particular purpose.

[6] Insurance ⇐1715
217k1715 Most Cited Cases
[6] Insurance ⇐1829
217k1829 Most Cited Cases
[6] Insurance ⇐1831
217k1831 Most Cited Cases
Insurance contracts are contracts of adhesion and, therefore, are subject to liberal construction so as to benefit the insured.

****1094 *631** Chazkel & Associates, East Brunswick, attorneys for appellants/cross-respondents (Michael Chazkel, of

counsel, Jeffrey Zajac, on the brief).

*632 Craig M. Terkowitz, Piscataway, attorney for respondent/cross-appellant (Derek A. Ondis, of counsel and on the brief).

Before Judges NEWMAN, BRAITHWAITE and WELLS.

This opinion of the court was delivered by

WELLS, J.A.D.

Plaintiffs Joseph and Maureen Azze appeal from summary judgment dismissing their claim against their homeowners carrier, defendant Hanover Insurance Co. The motion judge determined that the statute of limitations barred the Azzes' claim. Hanover cross-appeals from the judge's ruling that an electrically-heated waterbed is a "household appliance" within the meaning of the policy. We reverse the judgment dismissing the claim and affirm the determination with respect to the waterbed.

**1095 The facts gleaned from the moving and opposing papers submitted to the motion judge are:

In 1995, the Azzes purchased a homeowner's insurance policy from defendant, Hanover Insurance Company. The policy covered the time period between midnight, August 1, 1995, and midnight, August 1, 1996. The policy covered the following six types of loss: (A) Dwelling; (B) Other Structures; (C) Personal Property; (D) Loss of Use; (E) Personal Liability; and (F) Medical Payments to Others. The policy was accompanied by a "Homeowner's Policy Reference Guide," which explained the terms of the Azzes' insurance coverage. The reference guide made the following statement with regard to coverage for loss to personal property:

> We insure for direct physical loss to the property described in Coverages A and C caused by a peril listed below unless the loss is excluded in Section I-- Exclusions.
> 1. Fire or lightning.
> 2. Windstorm or hail.
> ....
> 3. Explosion.
> 4. Riot or civil commotion.
> 5. Aircraft, including self-propelled missiles from spacecraft.
> 6. Vehicles.
> *633 7. Smoke, meaning sudden and accidental damage from smoke.
> ....
> 8. Vandalism or malicious mischief.
> 9. Theft, including attempted theft and loss of property from a known place when it is likely that the property has been stolen.
> ....
> 10. Falling objects.
> ....
> 11. Weight of ice, snow or sleet which causes damage to the inside of a building or property
> ....
> 12. Accidental discharge or overflow of water or steam from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or from within a household appliance.

The "Definitions" section of the homeowner's policy reference guide did not include a definition of the term "household appliance ."

In addition, the reference guide contained the following clause: "8. Suit Against Us. No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss."

On August 15, 1995, in the Azzes' home, an electrically-heated king-sized waterbed burst during routine maintenance. This mishap sparked an extensive flood throughout the home. Because the walls and ceiling of the home were constructed from plaster, water filtered throughout the structure, resulting in substantial damage to both the home and much of its contents.

Following this occurrence, the Azzes retained an insurance adjuster to help them submit their claim to Hanover. They submitted both a structural damage and a personal property loss claim (covered as Loss Types "A" and "C" in the homeowner's policy, respectively).

On September 6, 1995, Jay Vigneaux, a claims adjuster from Hanover, sent the Azzes a letter in response to their claim. The letter referred to an inspection that Mr. Vigneaux had performed on the

residence on August 18, 1995. Mr. Vigneaux informed the *634 Azzes that, in the opinion of Hanover, their homeowner's insurance covered the structural damage (coverage "A") that had occurred as a result of the waterbed accident, but not the personal property damage (coverage "C"). Mr. Vigneaux's letter pointed to the language in the policy, quoted above, which enumerated the twelve "named perils" covered by the coverage "C" property damage section of the policy. The letter stated:

> **1096 In referring to the above-named perils, please address number **12. "Accidental discharge** or **overflow of water or steam** from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or from within a household appliance." Our investigation, through the use of Property Loss Research Bureau, defines a waterbed as a means of supporting the body in a reclining position. Additionally, a waterbed is considered a container. It does not seem that the form writers intended or that the insured could reasonably expect that the term "household appliance" would include such containers.
>
> Since Coverage C--Personal Property is named peril and there are no perils which include the bursting of a waterbed, we will be unable to provide coverage for this portion of the claim.
>
> In specifying these grounds for denial, we do not intend to waive, but rather specifically reserve all our rights under the contract of insurance including, but not limited to, other defenses which may be applicable to your claim. Additionally, we continue to require full and complete compliance with all terms and conditions of the policy.
>
> If you have any questions or further information which may become pertinent, please contact us so that we may consider it.
>
> Should you wish to take this matter up with the New Jersey State Insurance Department, you can write them at State of New Jersey Department of Insurance, Division of Enforcement and Consumer Protection, CN329, Trenton, New Jersey 08625-0329.

The letter did not contain any information regarding the one-year statute of limitations, nor did it suggest that the Azzes should engage the services of an attorney if they were dissatisfied with the defendant's position.

The Azzes took no further action regarding the personal property portion of their claim, focusing instead on performing the structural repairs necessary to collect payments from the defendant on their claim for damage to the home, under Coverage "A" of the policy. The Azzes state that these repairs were completed in 1996, and Hanover paid for the structural repairs.

*635 In January 1997, one year and three months from the date of Hanover's letter, the Azzes sent a letter to Hanover regarding the personal property loss claim. In that letter, they registered their objection to Hanover's position that an electrically-heated waterbed was not a "household appliance" within the meaning of the term as used in the policy, and requested reconsideration of that position. They contended in the letter that, since no definition of "household appliance" was given in the policy terms, an ambiguity therefore existed that must, by New Jersey law, be construed in favor of the insured.

On January 30, 1997, Hanover replied, stating that "We will be standing firm behind our decision." This letter, like its predecessor, did not suggest that the Azzes contact an attorney, nor did it allude to the contractual one-year statute of limitations.

In an attempt to have the personal property claim paid, the Azzes wrote to the New Jersey Department of Insurance, as had been suggested by Hanover in its first letter of September 1995. The Department responded on August 8, 1997, noted that it was not in a position to act as an arbitrator in such a dispute, and suggested that the Azzes consult an attorney.

On October 23, 1997, the Azzes filed a complaint seeking enforcement of insurance coverage under their homeowner's policy. Hanover answered on January 28, 1998.

In July 1999, Hanover filed a motion for summary judgment, asserting that the statute of limitations precluded the Azzes' claim. The Azzes cross-moved for summary judgment on August 10, 1999.

**1097 On August 20, 1999, oral argument on

both motions was heard. The judge entered an order granting Hanover's motion for summary judgment and denying the Azzes' cross-motion. The court determined that the one year statute of limitations contained in the policy barred the Azzes' suit. However, the court also determined that, under the insurance policy in question, an electrically-***636** heated waterbed could be considered an "appliance" for purposes of coverage. The present appeal and cross-appeal followed.

I.

[1] By its terms, the Hanover policy granted the Azzes one year from the date of this loss in which to file suit against the insurer. In New Jersey, the same six-year statute of limitations that applies to contractual actions would ordinarily apply to insurance actions. *Breen v. New Jersey Manufacturers Indemnity Ins. Co.*, 105 *N.J.Super.* 302, 309, 252 *A.*2d 49 (Law Div.1969), *aff'd*, 109 *N.J.Super.* 473, 263 *A.*2d 802 (App.Div.1970); *N.J.S.A.* 2A:14-1. However, that period may be shortened by the terms of an insurance contract. *James v. Fed. Ins. Co.*, 5 *N.J.* 21, 73 *A.*2d 720 (1950). Therefore, as both parties agree, the contractual one-year statute of limitations found in the terms of the Azzes' insurance policy is binding on them.

What is at issue is whether the operation of the "equitable tolling doctrine" allows the plaintiff to bring this suit more than a year after the accrual of the personal property loss.

According to Scott G. Johnson, *The Suit Limitation Provision and the Equitable Tolling Doctrine*, 30 *Tort & Ins. L.J.* 1015 (1995), suit limitation provisions such as the one in the plaintiff's policy are commonly found in property insurance policies. According to Johnson,

> Two divergent interpretations of suit limitation provisions have emerged. Some courts strictly interpret the suit limitation provision, holding that the limitation period begins to run on the date of loss. Other courts have recognized the principal of equitable tolling. Under the most common tolling theory, the suit limitation period is tolled from the time the insured gives notice of the loss to the insurer until the insurer formally denies liability. The New Jersey Supreme Court first recognized the equitable tolling doctrine in *Peloso v. Hartford Fire Insurance Co.*
>
> [Johnson, *supra*, 30 *Tort & Ins. L.J.* at 1017.]

In *Peloso v. Hartford Fire Ins. Co.*, 56 *N.J.* 514, 267 *A.*2d 498 (1970), the Court determined that contractual limitation provisions should not be read literally, with the one-year period running ***637** uninterrupted from the date of the loss. According to the Court, such a reading of these provisions would be unfair, because it would allow, in effect, a ticking away of the limitations period while the insurance company investigated the loss. *Peloso* stated that

> [T]he fair resolution ... is to allow the period of limitation to run from the date of the casualty but to toll it from the time an insured gives notice until liability is formally declined. In this manner, the literal language of the limitation is given effect; the insured is not penalized for the time consumed by the company while it pursues its contractual and statutory rights to have a proof of loss, call the insured in for examination, and consider what amount to pay; and the central idea of the limitation provision is preserved since an insured will have only 12 months to institute suit.
>
> [*Peloso*, 56 *N.J.* at 520, 267 *A.*2d 498.]

[2] From the passage above, it becomes evident that between the time the insured gives notice of loss and the time that the insurance company "formally denies coverage," the statutory period is tolled. *Peloso* does not, however, specifically declare what sort of denial of coverage by the insurer should be considered sufficiently "****1098** formal" to end the tolling period and restart the clock on the one-year period.

The Azzes' argument rests upon the contention that the denial letter sent by defendant in September 1995 did not meet the requirement for "formal" denial under *Peloso*, and that, therefore, the one year limitation should have been tolled from the date of the reporting of the loss, in August 1995, until January 1997, when the defendant unequivocally denied coverage. The motion judge found that "the language of the September 1995 letter was unequivocal and clearly demonstrates a denial."

[3] We disagree. We, however, reject the first

reason the Azzes offer for reversal. They assert that the September 1995 letter does not qualify as a formal denial because it does not conform to requirements set out under *Bowler v. Fidelity & Casualty Co. of New York*, 53 *N.J.* 313, 250 *A.*2d 580 (1969).

In *Bowler*, plaintiff held an accident insurance policy purchased from the defendant insurance company. The terms of the policy ***638** dictated that in case the insured was totally disabled by an injury, the insurer would pay $50 per week, for up to 200 weeks. If, by the 200th week, the insured was found to be permanently and totally disabled, the insurer would pay $50 per week for an additional 600 weeks.

In an accidental fall, plaintiff broke his leg, and subsequently developed a chronic infection, which resulted in total disability. The plaintiff submitted a claim to defendant, who paid $50 weekly, for 199 weeks. The insurance company then did not pay the 200th week, fearing that a payment for that week would amount to an admission that the insured was now entitled to the 600 additional weeks for permanent disability. According to the *Bowler* Court, the insurance company,

> Instead of fulfilling its contractual obligations ... lapsed into silence, and not only failed to pay the 200th week but ignored the practically conclusive proof of [plaintiff's] total and permanent disability ... [P]ayment of benefits was cut off without a word.... [Plaintiff], a layman obviously not versed in insurance law, took no legal action until ... he got into the hands of an attorney, and this suit was brought--more than six years after the end of the 200 week total disability period. When this was done, the insurer pleaded the six-year statute of limitations ... as a bar. We regard such treatment of its policyholder as shocking and unconscionable.
>
> [*Id.* at 326, 250 *A.*2d 580.]

The Court found that the defendant's actions constituted an "obvious breach of its duty of good faith and fairness in the handling of its contractual undertaking." *Id.* at 330, 250 *A.*2d 580. Consequently, the Court found that the defendant was estopped from raising the statute of limitations defense. *Id.* at 337, 250 *A.*2d 580.

The Azzes point to the following language in *Bowler* which, they contend, mandates that certain requirements be fulfilled before an insurance company's denial letter will be considered to be a "true" denial:

> [The insurance company] must notify the insured of its decision not to pay his claim. But mere naked rejection would not be sufficient. The giving of such notice should be accompanied by a full and fair statement of the reasons for its decision not to pay the benefits, and by a clear statement that if the insured wishes to enforce his claim it will be necessary for him to obtain the services of an attorney and institute a court action within an appropriate time. The "appropriate ***639** time" means the time remaining under the policy or the applicable statute of limitations within which the suit must be brought. Failure on the insurer's part to follow such a course, will bar reliance on the statute of limitations or a time restriction on court action expressed in the policy.
>
> [*Id.* at 328, 250 *A.*2d 580.]

****1099** The Azzes assert that, because the denial letter sent in September 1995 lacked a statement regarding the limitations period or the need for legal counsel, the above passage in *Bowler* means that, as a matter of law, the 1995 letter cannot operate as a legal denial of coverage. This passage, taken out of context, might well lead one to believe that the *Bowler* Court did, in fact, announce a sweeping new requirement for all insurance company denials of claims. Hanover, however, argues for another reading of *Bowler*. It asserts that "the *Bowler* Court based [its] decision upon the breach of the duty of fair dealing. In a situation where there has been no breach of the duty, the reasoning behind the *Bowler* decision is not present."

We agree with Hanover's analysis of *Bowler*. When that case is examined as a whole, it becomes clear that its application is not meant to be nearly as sweeping as the Azzes imply. *Bowler* dealt with a situation in which an insurance company, which had every reason to believe that it owed coverage to the insured, avoided its obligation to provide such coverage by literally dropping out of sight. The requirements for denial outlined in the passage above are meant to remedy only that situation and others like it, where the insurer's duty of good faith

and fair dealing are at issue. This becomes much more apparent when one puts the quoted passage into the context of the paragraphs that precede it. Stated the Court in those preceding paragraphs:

> In situations where a layman might give the controlling language of the policy a more restrictive interpretation than the insurer knows the courts have given it and as a result the uninformed insured might be inclined to be quiescent about the disregard or non-payment of his claim and not to press it in a timely fashion, the company cannot ignore its obligation. It cannot hide behind the insured's ignorance of the law; it cannot conceal its liability. In these circumstances it has the duty to speak and disclose, and to act in accordance with its contractual undertaking. The slightest evidence of deception or overreaching will bar reliance upon time limitations for prosecution of the claim.
>
> ***640** More specifically, in a situation such as that present here, if all or part of the benefits provided by the policy clearly is due, the insurer must make the payment. If it fails to do so, and the statute of limitations or a policy limitation intervenes before suit is started, it will be estopped to plead the limitation in avoidance of a trial on the merits of the claim. *Further if the insurèr has factual information in its possession substantially supporting the policyholder's right to benefits, but it has a reasonable doubt* as to whether the evidence is sufficient to require payment, the obligation to exercise good faith, upon which it knows or should know the insured is relying, cannot be satisfied by silence or inaction. [Here the passage quoted in plaintiff's brief beings.]
>
> [*Id.* at 328, 250 *A.*2d 580 (emphasis added).]

Clearly, the stringent notification requirements in *Bowler* are meant to prevent an insurance company from disclosing the likelihood that it will be held liable, when such likelihood exists.

Other sources reinforce our reading of *Bowler*. For example, William T. Barker and Donna J. Vobornik, *The Scope of the Emerging Duty of First-Party Insurers to Inform their Insureds of Rights under the Policy,* 25 *Tort & Ins. L.J.* 749 (1990), analyzes *Bowler* as follows:

> Read broadly, [*Bowler*] could suggest a duty to notify the claimant of many things, including the time period allowed for bringing suit, on every non-frivolous claim that an insurer declines to pay. But the New Jersey courts have not read it so. Indeed, there is hardly any case law citing Bowler for its statute of limitations holding and none relying on a failure of notice to preclude use of the statute of limitations. Thus, *Bowler* ****1100** should be read to require notice only where the insurer has received evidence approximating a prima facie case of entitlement to benefits and, perhaps, only where the insurer is on notice (because of policy language that a layman is likely to misunderstand or otherwise) that notice is necessary for the insured to exercise available rights, including the right to deny the claim.
>
> [*Id.* at 753, 250 *A.*2d 580.]

Hanover's situation here is clearly distinguishable from the facts in *Bowler.* Hanover did not possess any information which substantially supported the Azzes' rights to recover for damages to personal property caused by a burst waterbed. Hanover's letter of September 1995 makes it plain that it knew that the cause of the property damage was the sudden release of water from the electrically-heated waterbed, and that it simply construed the policy to exclude waterbeds from the category of "household appliance." Hanover contends that its research only bolstered this analysis, an assertion not disputed by the Azzes. Furthermore, ***641** the Azzes never contended that Hanover had any legitimate reason to believe that it was more likely than not that the Azzes would prevail at trial in an argument that an electric waterbed is a "household appliance." Therefore the good faith of Hanover in denying the claim is not an issue, making *Bowler* distinguishable, and its requirements do not apply to the defendant's denial letter. [FN1]

> FN1. Plaintiff's brief, on page 23, does assert that "The defendant's conduct clearly breached the principles of good faith and fair dealing required of insurance companies in this State[.]" However, the only proof the plaintiffs offer to show bad faith is the fact that defendant did not follow the *Bowler* requirements. This is a circular argument, since the *Bowler* requirements are clearly limited to situations where the insurance company knows or should know that plaintiff will

> prevail if a suit is initiated. If the *Bowler* requirements do not apply, then failing to follow them is hardly a *per se* showing of bad faith.

[4] During the motion hearing, the motion judge stated that:

> Plaintiff argues that the defendant did not outright reject or deny their claim. I think the ... language of the letter is unequivocal and clearly demonstrates a denial.

It is on this ruling that we part company with the motion judge. We find that the letter is ambiguous. The letter of September 1995 contained the following passage:

> Since Coverage C--Personal Property is named peril and there are no perils which include the bursting of a waterbed, we will be unable to provide coverage for this portion of the claim.
>
> In specifying these grounds for denial, we do not intend to waive, but rather specifically reserve all our rights under the contract of insurance including, but not limited to, other defenses which may be applicable to your claim. Additionally, we continue to require full and complete compliance with all terms and conditions of the policy.
>
> If you have any questions or further information which may become pertinent, please contact us so that we may consider it.
>
> Should you wish to take this matter up with the New Jersey State Insurance Department, you can write them at State of New Jersey Department of Insurance, Division of Enforcement and Consumer Protection, CN329, Trenton, New Jersey 08625-0329.

First, the letter is ambiguous because it refers to the submission of new information. One might reasonably wonder why Hanover would request more information, if coverage has already ***642** been unequivocally denied due to its definition of "household appliance." A very rational conclusion would be that the denial is not, in fact, final, but instead represents a preliminary finding that remains open to revision. A California case supports this very interpretation. In ****1101** *Prudential-LMI Comm. Ins. v. Superior Court,* 51 *Cal.*3d 674, 274 *Cal.Rptr.* 387, 798 *P.*2d 1230 (1990), the California Supreme Court was faced with a situation very similar to the one at hand, where it had to determine how long the suit limitation period on a property insurance policy should be tolled. In that case, the insured plaintiffs had received a letter from the insurer "proposing that coverage would be denied based on the ... exclusion unless the insureds had any additional information that would favor coverage." *Id.* at 692, 274 *Cal.Rptr.* 387, 798 *P.*2d 1230. This letter began a series of negotiations between the insured and insurer, finally resulting in a formal and unequivocal denial some months later. The California Supreme Court elected to toll the running of the limitation period until the unequivocal denial, and not the denial that invited the submission of more information. *Id.* at 693, 274 *Cal.Rptr.* 387, 798 *P.*2d 1230.

Second, the letter also suggests that if the Azzes are unhappy about the decision, they should contact the Department of Insurance (DOI). This language could reasonably lead a person to conclude that contact with DOI was actually a prerequisite to a lawsuit. Similarly, it could also lead the insured to believe such a contact would result in the resolution of the claim, so as to render a lawsuit unnecessary. The suggestion by the insurer that the insured contact DOI gives the distinct impression that the insurer's denial might in some way be influenced by DOI, contributing to the general equivocality of the denial.

Third, the denial letter is not sufficiently unequivocal, because of the special circumstances that surrounded the claim in this case. Here, the Azzes were dealing with Hanover on two separate claims. At the time that the denial letter regarding the personal property claim under Coverage "C," was sent, the Azzes were concurrently dealing with Hanover on payment of the Coverage ***643** "A" structural damage claim, which stemmed from the same waterbed incident. In fact, the record shows that the Azzes' delay in addressing their personal property claim might well have resulted from their attempts to repair their home and obtain reimbursement from Hanover. Clearly, the record shows that the parties were engaged in negotiations regarding the structural damage claim well into 1996. Because both claims stemmed from the same homeowner's policy, and because negotiations regarding a section of that claim were ongoing well

after the September 1995 denial letter, a reasonable insured might well believe that the limitations period would not restart until after the structural damage claim was settled.

We conclude for the above reasons that the September 1995 letter was not an unequivocal denial, and that the tolling of the limitations period begun in August 1995 thus did not stop until January 1997. Accordingly, the present action was timely filed.

II.

[5] Hanover also denied coverage for the personal property portion of the claim, asserting that a waterbed was not a household appliance, and that therefore the accident was not covered. The motion judge determined that a waterbed should be considered a "household appliance" for purposes of the policy. Hanover argues on cross-appeal that the motion judge erred in that finding.

Hanover begins its argument by stating that there is no case law in New Jersey that defines the term "household appliance." But in *Stone v. Royal Ins. Co.*, 211 *N.J.Super.* 246, 249, 511 *A.*2d 717 (App.Div.1986) we held that "An appliance is a tool, instrument or device adapted for a particular use [.]" *Stone* then applies this definition of "appliance" as though it also defines "household appliance." Therefore, we define "household appliance" as a tool, instrument or device adapted for a particular use in a house. *Ibid.* The device in ****1102** *Stone* was a hose connecting a sump pump to a drain in the basement.

***644** Generic description of "household appliance" aside, the fact is that the Hanover policy does not define a "household appliance." The failure to define a term in a policy of insurance has been construed to render it ambiguous. In *Property Cas. Co. of MCA v. Conway*, 147 *N.J.* 322, 326, 687 *A.* 2d 729 (1997) the Court stated:

> One of the most basic precepts governing judicial construction of insurance policies is that courts construe ambiguities liberally in favor of the insured. *Longobardi v. Chubb Ins. Co.*, 121 *N.J.* 530, 537, 582 *A.*2d 1257 (1990). Insurers write the policies, and fairness suggests that insureds should receive the benefit of any ambiguities. By failing to define "accident," PCC has introduced ambiguity into the definition of "occurrence." Consequently, in defining "accident" and "occurrence" we shall construe any ambiguity against the insurer and in favor of the insured.

[6] Furthermore, insurance contracts are contracts of adhesion, and therefore subject to liberal construction so as to benefit the insured. *Meier v. New Jersey Life Ins. Co.*, 101 *N.J.* 597, 611, 503 *A.* 2d 862 (1986). The question, therefore, is whether, using the standard of liberal construction, an electrically-heated waterbed could reasonably be considered a tool, instrument or device adapted for a particular purpose. We concur with the motion judge that it can, for the reasons that follow.

Defendants rest a large portion of their argument on a Florida case, ***West American Ins. Co. v. Lowrie*, 600 *So.*2d 34 (Fla.Dist.Ct.App.**1992), which asserts that a waterbed is furniture, and not an appliance. We are, of course, not bound by the decisions of Florida courts, and our law suggests that we should treat this particular waterbed otherwise.

First, a waterbed in New Jersey could be both furniture *and* a household appliance. We have noted that *Stone v. Royal Ins. Co.*, 211 *N.J.Super.* 246, 249, 511 *A.*2d 717 (App.Div.1986) dealt with the question of whether a sump pump could be considered a "household appliance" for purposes of insurance coverage. The issue in this case was whether the pump was, in fact, a "fixture." The court clearly held that " 'appliance' and 'fixture' are not mutually exclusive terms. An appliance ... can be a fixture." *Id.* at 249, 511 *A.*2d 717. If a fixture can also be an appliance, then ***645** there is no reason that something ordinarily considered furniture cannot also be an appliance.

Second, waterbeds, like the one involved here, are generally purchased with heating units which plug into the household electric current like washing machines and dishwashers, appliances which also contain water. They provide warmth as well as support. We draw an analogy to an electric blanket. Few people would consider a regular blanket to be an appliance. However, once one modifies a blanket so that it also provides heat

electrically, this new item, an "electric blanket," suddenly takes on the characteristics of a household appliance. Note the certainty in the tone of the U.S. District Court in *Remington Rand, Inc. v. Knapp-Monarch Co.*, 139 *F.Supp.* 613, 622 (E.D.Pa.1956), when it proclaims that "A nonexhaustive list of appliances are: Electric blankets, blenders, vacuum type coffee makers, hair dryers, fans, deep fat fryers, frypans, hand irons, food mixers, heating pads, corn poppers, vaporizers, massage vibrators, waffle irons and electric razors." We find that if a blanket becomes an appliance once it provides heat, so too does a waterbed.

For the reasons stated, we hold that a "household appliance" includes an electrically-heated waterbed.

Reversed in part, affirmed in part and remanded to the trial court.

336 N.J.Super. 630, 765 A.2d 1093

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STATE OF IDAHO)
County of Kootenai) ss
FILED 3-21-05
At 11:28 O'clock A .M.
CLERK OF THE DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife,

Plaintiffs,

vs.

FARMERS INSURANCE COMPANY OF IDAHO, and Idaho Corporation; CORPORATE DOES I-X, whose true names are unknown,

Defendants.

Case No. CV-03-9214

MEMORANDUM OPINION AND ORDER DENYING PARTIAL SUMMARY JUDGMENT

Douglas S. Marfice, Coeur d'Alene, for Plaintiffs.

Patrick E. Miller, Coeur d'Alene, for Defendants.

I.
FACTS AND PROCEDURAL HISTORY

On July 2, 2003, Plaintiffs Brian and Glenda Armstrong's, above-ground swimming pool collapsed, causing approximately 2,000 gallons of water to flood the Plaintiffs' 1500 square foot finished basement. No one was present when the collapse occurred. At the time of the pool collapse, Plaintiffs carried a homeowner's insurance

policy with Farmers Insurance Co. of Idaho (hereinafter Farmers). Plaintiffs notified Farmers of their loss, but Farmers denied the Plaintiffs' claim in three letters dated September 17, October 2, and November 14, 2003.

On December 23, 2003, Plaintiffs filed their Complaint in this action, alleging breach of contract, breach of covenant of good faith and fair dealing, negligent investigation and claim adjustment, and unfair trade practices. In their prayer for relief, Plaintiffs sought the policy benefits of their insurance contract, special and general damages, and attorney fees and costs. On January 5, 2005, Plaintiffs filed a notice of hearing on their Motion for Partial Summary Judgment and a memorandum in support of their motion. However, Plaintiffs did not file their Motion for Partial Summary Judgment until January 20, 2005. Over the Defendants' objection, a hearing on Plaintiffs' motion was held on February 1, 2005.

In their summary judgment motion, Plaintiffs seek a declaratory judgment of coverage under their homeowner's policy with Farmers. The Plaintiffs first contend that the release of water from their pool constitutes a "sudden and accidental discharge" of water from a "household appliance," which is a peril expressly covered by their insurance policy. The Plaintiffs argue that the phrase "household appliance" is unambiguous and includes an above-ground swimming pool within its meaning. The Plaintiffs alternatively argue that, if the phrase "household appliance" is ambiguous, the rules of construction nevertheless require all ambiguities to be resolved against the insurer in this instance.

In response, the Defendants contend that the Court may not grant the Plaintiffs' motion for partial summary judgment, because the Plaintiffs are seeking a declaratory judgment, a cause of action not pleaded in their Complaint. The Defendants next assert

that the Plaintiffs' loss is attributable to water damage, as that phrase is defined in the policy, and is therefore a loss expressly excluded from coverage. The Defendants further argue that, because an above-ground swimming pool is not within the plain and ordinary meaning of the phrase "household appliance," the escape of water from the Plaintiffs' pool is not a "sudden and accidental discharge" of water from a "household appliance" that would otherwise be covered under the policy. Like the Plaintiffs, the Defendants claim that the Plaintiffs' insurance policy is unambiguous. However, the Defendants assert that the term "household appliance" unambiguously *excludes* from within its meaning an above-ground swimming pool, rather than includes it.

The relevant portions of the Plaintiffs' insurance contract with Farmers are as follows:

> **[SECTION I –] 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 . . . .

(Policy at 7-8.)

> **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: . . .
> 2. **Water damage.**
> . . . Whenever **water damage** occurs, the resulting loss is always excluded under this policy, however caused; except we do cover: . . .
> 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 property inside the dwelling, mobile home or separate structures first sustain loss or damage caused by a peril described under Section I – Losses Insured – Coverage C.

(Policy at 9 and Policy Endorsement H6104.) Water damage is defined within the policy as:

> . . . 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 . . . .

(Policy at 4 (emphasis omitted).)

II.
STANDARD OF REVIEW

A motion for summary judgment "shall be rendered forthwith 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." I.R.C.P. Rule 56(c). "Generally, when considering a motion for summary judgment, a court 'liberally construes the record in a light most favorable to the party opposing the motion and draws all reasonable inferences and conclusions in that party's favor.'" Drew v. Sorensen 133 Idaho 534, 989 P.2d 276 (1999) (citing Brooks v. Logan, 130 Idaho 574, 576, 944 P.2d 709, 711(1997)).

III.
DISCUSSION

A. Coverage for Some of the Loss Claimed by the Plaintiffs is Expressly Excluded from the Plaintiffs' Insurance Policy, Because the Claimed Loss is the Result of "Water Damage" as Defined Within the Policy.

Plaintiffs claim that the loss they have suffered due to the sudden discharge of water from their swimming pool is not a loss expressly excluded from coverage under

their homeowner's insurance policy, because their loss was not caused by "water damage," as that phrase is defined within the policy. The Defendants disagree, arguing that the type of loss claimed by the Plaintiffs can be called nothing but "water damage," as the source of the loss was, in fact, a large spill of water from a swimming pool that then flooded the Plaintiffs' basement. The Plaintiffs' policy defines water damage in relevant part as "loss caused by, resulting from, contributed to or aggravated by . . . [w]ater from rain or snow, surface water, flood, waves, tidal water, [or an] overflow or escape of a body of water." (Policy at 4 (emphasis omitted).) The parties seem to concede that the only portion of this definition that is at issue is the part pertaining to an "overflow or escape of a body of water." Thus, before the Court is able to determine whether or not the Plaintiffs' loss constitutes water damage, the Court must first determine whether or not the phrase "body of water" is ambiguous, see Clark v. Prudential Prop. and Cas. Ins. Co., 138 Idaho 538, 540, 66 P.3d 242, 244 (2003), an issue not briefed by the parties, but one that nevertheless requires resolution.

When interpreting insurance policies, the Court is to apply the general rules of contract law, subject to certain special canons of construction, Clark, 138 Idaho at 540, 66 P.3d at 244 (citing Brinkman v. Aid Ins. Co., 115 Idaho 346, 352, 766 P.2d 1227, 1233 (1988)). The first step is to determine whether or not the policy contains an ambiguity. Id. A provision in an insurance policy is ambiguous if it is reasonably subject to conflicting interpretations. Allstate Ins. Co. v. Mocaby, 133 Idaho 593, 597, 990 P.2d 1204, 1208 (1999). Where the policy language is clear and unambiguous, coverage must be determined, as a matter of law, according to the plain meaning of the words used. Clark, at 541, 66 P.3d at 245 (citing Mutual of Enumclaw Ins. Co. v. Roberts, 128 Idaho

232, 235, 912 P.2d 119, 122 (1996)). However, where an ambiguity exists, the trier of fact must determine what a reasonable person would have understood the language to mean. Id.; Mocaby, at 597, 990 P.2d at 1208.

Idaho courts have not expressly defined the phrase "body of water" outside the context of a "navigable" body of water. See, e.g., Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Andrus, 127 Idaho 239, 899 P.2d 949 (1995) (discussing whether or not Trapper Creek constituted a navigable body of water for purposes of applying the public trust doctrine); Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085 (1983)(recognizing Lake Coeur d'Alene's status as a navigable lake). Neither is the phrase defined in Black's Law Dictionary. The courts have, however, used the phrase when discussing lakes, rivers, creeks, and ponds. See, e.g., Selkirk-Priest Basin Ass'n, Inc.; Pandandle Yacht Club, Inc.; Rutledge v. State, 94 Idaho 121, 482 P.2d 515 (1981) (discussing the Boise River); Bicandi v. Boise Payette Lumber Co., 55 Idaho 543, 44 P.2d 1103 (1935) (referring to "ponds, pools, and other bodies of water" when discussing whether or not a millpond constituted an attractive nuisance). They have also used the phrase where the water at issue was collected by way of a man-made dam or artificial enclosure. See, e.g., Stott By and Through Dougall v. Finney, 130 Idaho 894, 950 P.2d 709 (1997) (holding that negligence is the proper theory of recovery in tort for damages due to a "discharge from an artificial body of water").

The courts' usage of the phrase "body of water" clearly indicates that it is used to describe some determinable amount of water, standing or flowing, that is somehow enclosed, contained or bounded. In fact, "body" is defined in relevant part as a "bounded aggregate of matter <a *body* of water>." WEBSTER'S II NEW COLLEGE DICTIONARY 124

(1995). Moreover, even without citation to case precedent, one is able to reasonably conclude from the common usage of the phrase that it generally refers to quantifiable amounts of water. Consequently, as there can be no reasonable conflicting interpretations of the phrase, the phrase is not ambiguous.

While the parties would not likely dispute whether or not lakes and rivers and the like are bodies of water – perhaps the parties would even agree that the phrase is unambiguous – the real question in the present case is whether or not a swimming pool also constitutes a body of water, according to the plain meaning of the phrase "body of water," as discussed above. A pool is defined in relevant part as: "1.a. A small body of still water. . . . 3. A deep place in a river or stream. 4. A swimming pool." WEBSTER'S II NEW COLLEGE DICTIONARY 124 (1995). Thus, it is clear that a swimming pool is no less a "body of water" than a small lake or pond.

Since the phrase "body of water" is unambiguous and plainly includes swimming pools within its meaning, the escape or overflow of water from the Plaintiffs' swimming pool constitutes "water damage" as defined by the Plaintiffs' insurance policy and is excluded from coverage. Unless one of the policy's exceptions to this exclusion applies, the Plaintiffs have not shown that, as a matter of law, they are entitled to insurance benefits for the damage caused to their dwelling as a result of the collapse of their swimming pool.

B. Because the Plaintiffs' Swimming Pool is Not a "Household Appliance," the Plaintiffs' Insurance Policy Does Not Otherwise Provide Coverage for the Remaining Loss Claimed by the Plaintiffs.

Plaintiffs argue first that, even if the loss they claim was caused by water damage, the policy nevertheless provides coverage for their loss due to an exception to the water

damage exclusion and a related provision under Section I – Losses Insured - Coverage C – Personal Property, which provides coverage for loss that results from a sudden discharge of water from within a household appliance. The Plaintiffs assert that the term "household appliance" unambiguously includes within its meaning a swimming pool such as the one the Plaintiffs own. Alternatively, Plaintiffs argue that, if the term "household appliance" is ambiguous, a reasonable person would understand it to include within its meaning an above-ground swimming pool, so their policy would provide coverage for the loss they claim. Conversely, the Defendants argue that the term "household appliance" unambiguously excludes from within its meaning swimming pools, thereby making the exception to the water damage exclusion and the related provision in Coverage C inapplicable. If not, the Defendant argues that the term then is ambiguous and a reasonable person would nevertheless understand it as describing things or objects other than swimming pools.

The Plaintiffs' policy provides three express exceptions to its water damage exclusion discussed above. (Policy at 9 and Endorsement H6104.) The only one relevant is the one providing coverage for "loss or damage to the interior of any dwelling, . . . or to personal property inside the dwelling, . . . caused by water damage if the dwelling . . . first sustained loss or damage caused by a peril described under Section I – Losses Insured – Coverage C." (Endorsement H6104.) The only peril that could encompass the pool collapse or overflow at issue in the present case is found in paragraph 13 of Section 1 – Losses Insured – Coverage C: "[s]udden or accidental discharge or overflow of water or steam from within a plumbing, heating or air conditioning system, or from within a

household appliance." (Policy at 8.) The parties do not dispute that the pool may not be considered part of a plumbing, heating, or air conditioning system.

As above, the Court must first determine if the term "household appliance" is ambiguous. Clark v. Prudential Prop. and Cas. Ins. Co., 138 Idaho 538, 540, 66 P.3d 242, 244; Brinkman v. Aid Ins. Co., 115 Idaho 346, 352, 766 P.2d 1227, 1233. The Idaho Supreme Court has previously held that the term "household" is not ambiguous. See Mutual of Enumclaw Ins. Co. v. Roberts, 128 Idaho 232, 235-36, 912 P.2d 119, 122-23 (1996). The adjective "household" is defined by Black's Law Dictionary as "[b]elonging to the house and family; domestic." BLACK'S LAW DICTIONARY 744 (7th ed. 1999).

Both parties offer various dictionary definitions for the term "appliance." An appliance is defined, in turn, as: 1) referring to "machinery and all instruments used in operating it. . . . Things applied to or used as a means to an end. . . . a mechanical thing, a device or apparatus;"[1] 2) a "device, esp. one operated by electricity and designed for household use"[2] 3) a "device or instrument designed to perform a specific function, especially an electrical device, such as a toaster, for household use;"[3] and 4) an "instrument or device designed for a particular use."[4] In addition, the Plaintiffs cite to Idaho's Property Condition Disclosure Act, which requires a seller of residential real property to disclose "[a]ll appliances and service systems included in the sale (such as refrigerator/freezer, range/oven, dishwasher, . . . pool/hot tub, etc.)," as evidence that, as

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[1] Defendants' Brief in Opposition at 15 (citing BLACK'S LAW DICTIONARY 127 (revised 4th ed. ____)).
[2] WEBSTER'S II NEW COLLEGE DICTIONARY 55 (1995).
[3] *Defendants' Brief in Opposition* at 21(citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000), *available at* http://www.bartleby.com/61/99/A0379900.html.
[4] Plaintiffs' Memorandum in Support at 7 (citing WEBSTER'S 9TH COLLEGIATE DICTIONARY (1985)).

a matter of law, Idaho considers a pool to be an appliance. (Plaintiff's Memorandum in Support at 7 (citing Idaho Code § 55-2508).)

While the Plaintiffs' argument is certainly creative and indicative of resourceful and inventive legal skills, the Court nevertheless finds that the term "household appliance" is neither ambiguous, nor commonly understood to include the Plaintiffs' above-ground swimming pool within its meaning. There has been no evidence presented to the Court that the Plaintiffs' pool was somehow operated by electricity. Nor is a swimming pool generally considered a mechanical means to an end. As a result, the discharge or overflow of water from the Plaintiffs' pool is not a discharge or overflow from a household appliance, which means that the policy exception to the water damage exclusion does not apply, and Farmers is not obligated, on these facts, to compensate the Plaintiffs for their claimed loss to their dwelling.

As the "household appliance" language is also used in a provision relating to coverage for loss of personal property, the Court's finding also means that a peril necessary to invoke coverage for loss to the Plaintiffs' personal property has not occurred, and Farmers is not obligated to compensate the Plaintiffs for their claimed loss of personal property.

IV.
CONCLUSION

For the foregoing reasons, the Plaintiffs' motion for partial summary judgment is denied. Although the Plaintiffs request a declaratory judgment in their motion for partial summary judgment without having pleaded such a cause of action in their Complaint, the Court sees no reason to treat the Plaintiffs' motion differently than any other motion for partial summary judgment. It is an essential element of at least the Plaintiffs' breach of

contract cause of action that Farmers had a duty under the Plaintiffs' policy to cover the losses claimed by the Plaintiffs. In seeking a declaratory judgment on the issue of coverage under the policy, the Plaintiffs were effectively seeking a partial summary judgment on the issue of this alleged duty. Moreover, the Court's decision denying Plaintiffs' motion renders the Defendants' argument on this point moot.

The Defendants' objection to the Court hearing the Plaintiffs' motion based on the Plaintiffs' failure to file their motion for summary judgment concurrently with their brief in support is overruled, as the Defendants were given notice of the Plaintiffs' motion when the Plaintiffs filed their brief and both parties were given full opportunity to argue the substantive merits of the Plaintiffs' motion before the Court. It is presumed that the Defendants had ample time to prepare for the scheduled hearing, as they did not request a continuance. As a result, especially in light of the Court's ruling on the Plaintiffs' motion, the Defendants have failed to show how they suffered any prejudice as a result of the Plaintiffs' filing mishap.

Entered this 21 day of March, 2005.

Charles W. Hosack, District Judge

CERTIFICATE OF MAILING/DELIVERY

On this 21 day of March, 2005, a true and correct copy of the foregoing was mailed in the U.S. Mail, postage prepaid, sent via facsimile, or sent via interoffice mail as indicated below to the following counsel:

3-21-05 @ 11:30 AM BP

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Patrick Miller
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DANIEL ENGLISH
CLERK OF THE COURT

By _____

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STATE OF IDAHO }SS
COUNTY OF KOOTENAI
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CLERK DISTRICT COURT
DEPUTY

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife, Plaintiffs, vs. FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation; CORPORATE DOES I – X, whose true names are unknown, Defendants.	Case No. CV 03-9214 **MOTION TO DISQUALIFY ALTERNATE JUDGE**

COME NOW the above-entitled Plaintiffs BRIAN and GLENDA ARMSTRONG, by and through their counsel of record, and hereby move the Court pursuant to I.R.C.P. 40 (d)(1), for its order disqualifying the Honorable John T. Mitchell from the above-captioned matter.

DATED this 26th day of January, 2007.

RAMSDEN & LYONS, LLP

By _____
Douglas S. Marfice, Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of January 2007, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV 03-9214

ORDER TO DISQUALIFY ALTERNATE JUDGE

The foregoing Motion to Disqualify Alternate Judge having duly and regularly come before this Court, and good cause appearing therefore,

IT IS HEREBY ORDERED, that The Honorable John T. Mitchell be disqualified from the above-captioned matter.

DATED this 30th day of January, 2007.

HONORABLE JOHN T. MITCHELL
District Court Judge

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on the 30 day of Jan 2007, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Patrick E. Miller, Esq. 701 Front Avenue, Suite 101 P.O. Box E Coeur d'Alene, ID 83816-0328	___ US Mail ___ Overnight Mail ___ Hand Delivered _✓_ Facsimile (208) 664-6338
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife, Plaintiffs, vs. FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation; CORPORATE DOES I-X, whose true names are unknown, Defendants.	Case No. CV-03-9214 **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW, the defendant, Farmers Insurance Company of Idaho, pursuant to Rule 56(b), I.R.C.P., and moves the Court, for summary judgment in behalf of this defendant, dismissing plaintiffs' claims against this defendant.

This defendant requests oral argument.

DATED this 2nd day of February, 2007.

PATRICK E. MILLER
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of February, 2007, 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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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife, Plaintiffs, vs. FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation; CORPORATE DOES I-X, whose true names are unknown, Defendants.	Case No. CV-03-9214 **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW, the defendant, Farmers Insurance Company of Idaho, pursuant to the Idaho Rules of Civil Procedure and the rules of this Court, and submits this memorandum of points, authorities and argument in support of this defendant's motion for summary judgment.

STATEMENT OF THE CASE

Plaintiffs, by their complaint, asserted that they had purchased a policy of insurance from Defendant; that an above ground pool at their residence had collapsed; that defendant denied the claim by stating that there was no coverage for the claims.

Plaintiffs asserted that defendant's denial constituted a breach of contract, a breach of good faith and fair dealing, negligent investigation and claim adjustment, and unfair trade practices as well as fraud.

Plaintiffs have generally argued in this matter that these constitute a claim of "bad faith".

COURSE OF PROCEEDINGS

Previously, the plaintiffs moved for partial summary judgment asserting that the language of the policy provided coverage of the claim.

This Court issued its Memorandum Decision on March 21, 2005 and by that memorandum decision, construed the policy, according to its language, and determined that there did not exist coverage, for the claimed loss.

STANDARD OF REVIEW

Summary judgment is proper "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 judgment as a matter of law." Rule 56(c), I.R.C.P.

COVERAGE OF THE CLAIM, PURSUANT TO THE POLICY LANGUAGE, IS AN ESSENTIAL REQUIREMENT FOR PLAINTIFFS TO ASSERT CLAIMS ARISING OUT OF BREACH OF CONTRACT, OR BAD FAITH.

This Court has previously addressed the question of coverage, as asserted by the plaintiffs. This Court, by its Memorandum Decision, found that there was no coverage for the events which led then to the plaintiffs' claimed loss.

In Robinson v. State Farm Mutual Automobile Ins. Co., 137 Idaho 173, 45 P.3d 829 (S.Ct. 2002), the court addressed the question of coverage as an element of a claim of bad faith.

The court noted that a plaintiff can bring one of two types of bad faith claims, unreasonable denial or unreasonable delay. The court then stated:

> However, the coverage a plaintiff will have to prove in order to establish a prima facie case is not dependent on the nature of the bad faith claim.

Robinson v. State Farm Mutual Automobile Ins. Co., *supra* at p. 178.

The court then held that fundamental to the claim of bad faith is the requirement that there must be coverage of the claim under the policy. Therefore, without coverage, there cannot be a violation of duties by an insurance carrier, which leads to any variation of a claim asserted as "bad faith".

Moreover, in Robinson v. State Farm Mutual Automobile Ins. Co., *supra*, the court also held that, in order to recover for breach of contract claims, there must be coverage under the policy.

This defendant submits that the matter is straightforward. Without coverage, there cannot be a basis for the plaintiffs' claims. Without coverage, as the court in Robinson noted, the plaintiff cannot establish a prima facie claim asserted as breach of contract, or bad faith, in any variation of the language of those claims.

This defendant submits that without coverage, the plaintiffs' claims must be dismissed and that this court grant this defendant's motion for summary judgment.

DATED this 2nd day of February, 2007.

PATRICK E. MILLER
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of February, 2007, 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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Attorneys for Plaintiffs

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
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CLERK DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV 03-9214

MEMORANDUM IN RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT

COME NOW Plaintiffs, Brian and Glenda Armstrong ("Armstrongs"), and submit this Memorandum in Response to Defendants Motion for Summary Judgment.

Armstrongs incorporate by reference the briefing, proof and argument previously submitted in support of their Motion for Summary Judgment (Argued February 1, 2005). In response to that Motion the Court addressed the question of insurance coverage and ruled as a matter of law that there was no coverage for the events and circumstances which lead to the Armstrongs' loss.

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.

DATED this 15th day of February, 2007.

RAMSDEN & LYONS, LLP

By _____
Douglas S. Marfice, Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of February 2007, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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STATE OF IDAHO } SS
COUNTY OF KOOTENAI
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2007 APR 16 AM 10: 43

CLERK DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife, Plaintiffs, vs. FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation; CORPORATE DOES I-X, whose true names are unknown, Defendants.	Case No. CV-03-9214 **JUDGMENT FOR DEFENDANT FARMERS INSURANCE COMPANY OF IDAHO**

On March 27, 2007, this matter came before the court pursuant to the defendant's motion for summary judgment, and the court having considered its March 21, 2005 memorandum opinion and order, including the Findings of Fact, and Conclusions of Law, as stated therein, and the briefs and arguments of the parties which are hereby incorporated by reference,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that judgment be, and is, entered in favor of the defendant, Farmers Insurance Company of Idaho, and that plaintiffs

Brian Armstrong and Glenda Armstrong, husband and wife, shall have and recover nothing against the defendant Farmers Insurance Company of Idaho in this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant shall recover from the plaintiffs the sum of as determined per memorandum of costs Cwh, as costs and disbursements.

DATED this 12 day of April, 2007.

District Judge

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Not signed because this is a final judgment and 54(b) not apply Cwh

CHARLES W. HOSACK, District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11 day of April, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Douglas S. Marfice
Ramsden & Lyons
618 N. 4th Street
P. O. Box 1336
Coeur d'Alene, ID 83816-1336

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

Patrick E. Miller
Attorney at Law
701 Front Avenue, Suite 101
P.O. Box E
Coeur d'Alene, ID 83816-0328

☐ U.S. Mail
☒ TELECOPY (FAX) to: (208) 664-6338

DANIEL J. ENGLISH
CLERK OF THE DISTRICT COURT

By: Cathie West
DEPUTY

FIRST JUDICIAL DISTRICT KOOTENAI COUNTY STATE OF IDAHO CLERK OF COURT

DOUGLAS S. MARFICE, ISB #4072
APRIL M. LINSCOTT, ISB #7036
RAMSDEN & LYONS, LLP
Attorneys for Plaintiffs/Appellant
618 North 4th Street
Post Office Box 1336
Coeur d'Alene, Idaho 83816-1336
Telephone: (208) 664-5818
Facsimile: (208) 664-5884

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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.	Case No. CV 03-9214 **NOTICE OF APPEAL** Fee Category: T Fee: $101.00

TO: THE ABOVE NAMED DEFENDANTS/RESPONDENTS, FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation; CORPORATE DOES I – X, whose true names are unknown

AND TO: THE DEFENDANTS/RESPONDENTS ATTORNEYS, Patrick E. Miller of the firm Paine Hamblen, LLP, 701 Front Avenue, Suite 101, Post Office Box E, Coeur d'Alene, ID 83816-0328.

AND TO: THE CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above named Plaintiffs/Appellants, Brian and Glenda Armstrong appeal against the above named Defendants/Respondents to the Idaho Supreme Court from the Judgment for Defendant Farmers Insurance Company of Idaho, entered in the above-entitled action on the 12th day of April, 2007, Honorable Judge Charles W. Hosack presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a) I.A.R.

3. Preliminary statement of issues on appeal.

(A) Whether the escape or overflow of water from the Plaintiffs' swimming pool constitutes "water damage" as defined by the Plaintiffs' insurance policy and is excluded from coverage of real and personal property.

(B) Whether the Plaintiffs' insurance policy provides coverage for their loss due to an exception to the water damage exclusion.

4. A reporter's transcript is requested. The appellant requests the preparation of the following portions of the reporter's transcript: Transcripts of Hearing on Plaintiffs' Motion for Partial Summary Judgment February 1, 2005 at 3:30 p.m.; and Transcripts of Hearing on Defendant's Motion for Summary Judgment March 27, 2007.

5. The Plaintiff/Appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.:

(a) Affidavit of Douglas S. Marfice in Support of Plaintiffs' Motion for Partial Summary Judgment

(b) Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment

(c) Submission of Materials in Support of Defendant Farmers Insurance Company of Idaho's Brief in Opposition to Plaintiffs' Motion for Partial Summary Judgment

(d) Defendant Farmers Insurance Company of Idaho's Brief in Opposition To Plaintiffs' Motion for Partial Summary Judgment

(e) Motion for Partial Summary Judgment

(f) Ex Parte Motion to Shorten Time for Filing of "Motion"

(g) Affidavit of Douglas S. Marfice in Support of Ex Parte Motion to Shorten Time

(h) Supplemental Affidavit of Douglas S. Marfice

(i) Reply to Defendant's Motion in Opposition To Partial Summary Judgment

(j) Memorandum in Support of Defendant's Motion for Summary Judgment

(k) Defendant's Motion for Summary Judgment

(l) Memorandum in Response to Defendants Motion for Summary Judgment

6. No order has been entered in this matter sealing all or any part of the record or transcript.

7. I certify:

(a) That a copy of this Notice of Appeal has been served on the reporter;

(b) That arrangements have been made to pay the Clerk of the District the estimated fee for preparation of the reporter's transcript; (I.A.R. 24(b), I.C. § 1-1105)

(c) That the estimated fee for the preparation of the clerk's record has been paid;

(d) That the Appellants' filing fee has been paid; and

(e) That service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED this 24 day of May, 2007.

RAMSDEN & LYONS, LLP

By _____
April M. Linscott, Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 24 day of May 2007, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Patrick E. Miller, Esq.
701 Front Avenue, Suite 101
P.O. Box E
Coeur d'Alene, ID 83816-0328

X US Mail
___ Overnight Mail
___ Hand Delivered
___ Facsimile (208) 664-6338

Joann Schaller
Kootenai County District Court
501 Government Way
PO Box 9000
Coeur d'Alene, ID 83816-900

X US Mail
___ Overnight Mail
___ Hand Delivered
___ Facsimile (208) 446-1138

_____
April M. Linscott

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife, Plaintiff/Appellant, vs FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation; CORPORATE DOES I-X, whose true names are unknown, Defendants/Respondents	SUPREME COURT NO. 34250

CLERK'S CERTIFICATE

I, Daniel J. English, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the above and foregoing record in the above entitled cause was compiled and bound under my direction as, and is a true, full and correct record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules.

I further certify that exhibits were not offered in this case.

I certify that the Attorneys for the Appellant and Respondent were notified that the Clerk's Record was complete and ready to be picked up, or if the attorney is out of town, the copies were mailed by U.S. mail, postage prepaid. on the 19 day of Sept, 2007.

I do further certify that the Clerk's Record will be duly lodged with the Clerk of the Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Kootenai County, Idaho this 19 day Sept, 2007.

DANIEL J. ENGLISH
Clerk of the District Court

By: Cathy Victorino
Deputy Clerk

IN THE SUPPREME COURT OF THE STATE OF IDAHO

BRIAN ARMSTRONG and GLENDA ARMSTRONG, husband and wife, Plaintiff/Appellant, vs FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation; CORPORATE DOES I-X, whose true names are unknown, Defendants/Respondents	SUPREME COURT NO. 34250

CLERK'S CERTIFICATE OF SERVICE

I, Daniel J. English, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that I have personally served or mailed, by United States mail, one copy of the Clerk's Record to each of the Attorneys of record in this cause as follows:

Douglas S Marfice
PO Box 1336
Coeur d'Alene ID 83816-1336

Patrick E Miller, Esq.
PO Box E
Coeur d'Alene ID 83816-0328

IN WITNESS WHEREOF, I have unto set my hand and affixed the seal of the said Court this 19 day of Sept, 2007.

Daniel J. English
Clerk of the District Court
by: Cathy Victorino