3-5-2009

Villa Highlands, LLC v. Western Community Ins. Co. Appellant's Brief Dckt. 35472

IN THE SUPREME COURT OF THE STATE OF IDAHO

VILLA HIGHLANDS, LLC, an Idaho limited liability company,

Plaintiff-Appellant,

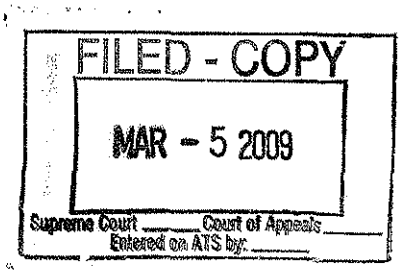
v.

WESTERN COMMUNITY INSURANCE CO., an Idaho corporation; FARM BUREAU INSURANCE COMPANY OF IDAHO, an Idaho corporation; DALE E. ZIMNEY, an individual; and DOES I-V,

Defendants-Respondents.

SUPREME COURT NO. 35472

Ada County Case No. CV OC 0621175



APPELLANT'S OPENING BRIEF

On Appeal from the District Court of the Fourth Judicial District

of the State of Idaho, in and for the County of Ada

The Honorable Darla Williamson, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This case involves a dispute over an insurance claim filed by Appellant Villa Highlands, LLC ("Villa Highlands") in connection with a builder's risk insurance policy. During the course of construction, the structure that Villa Highlands was building was destroyed by fire. Thereafter, a dispute and litigation ensued over the application and interpretation of the underinsurance provision in the builder's risk policy, issued by Western Community Insurance Co. ("Western Community") and Farm Bureau Insurance Company of Idaho ("Farm Bureau"). Villa Highlands appeals the district court's decisions in connection with several pre-trial motions in this case, as well as the district court's erroneous dismissal of Villa Highlands' breach of contract and declaratory judgment claims.

B. Course of Proceedings and Statement of Facts.

Villa Highlands obtained a Western Community builder's risk insurance policy in 2005 to cover its construction of an independent living community for the elderly (the "Villa Highlands building") on the corner of 15th Street and Hill Road in Boise, Idaho. (Certificate of Exhibits ("COE") 6, p. 2). The builder's risk policy was issued through Farm Bureau/Western Community insurance agent, Dale E. Zimney. (*Id.*; *see also* COE 11, Ex. B).

Prior to construction, when Villa Highlands originally sought to obtain the builder's risk policy in April 2005, William Hodges (managing member of Villa Highlands) was advised by Mr. Zimney to rely upon the hard costs contained in his original construction budget to determine the amount of coverage for the policy. (COE 6, p. 2 and also COE 12, Ex. E, p. 2). When Villa Highlands originally constructed the project, the budgets and costs were determined by fixed cost bids, which meant the price for labor and materials for the project were fixed at the beginning of construction. (Augmentation Record ("Aug. R.") Aff. of William Hodges in Supp. of Pl.'s Mot. for Relief from J., p. 3, ¶ 6). Also, when the Villa Highlands building was originally being constructed in 2005 and 2006, Mr. Hodges did not use a third-party contractor, but instead served as the general contractor for the project himself. (*Id.* at p. 3, ¶ 5).

After the above meeting, on June 1, 2005, Mr. Zimney received a facsimile from Villa Highlands' lender, First Horizon, asking for confirmation of builder's risk coverage on the Villa

Highlands building. (COE 17, Ex. G, p. 90, L. 2-5, and COE 12, Ex. I). Mr. Zimney, based on this facsimile, filled out the application for the builder's risk policy requesting that the policy limit be set at $5,645,000, which was the amount of insurance that the policy was issued at. (COE 17, Ex. G, p. 90, L. 2-5; COE 6, Ex. B; COE 17, Ex. L).

1. The Policy Language, the Insurance Claim and Western Community's and Farm Bureau's Handling of the Claim.

On May 21, 2006, the Villa Highlands building, while still under construction, was completely destroyed by fire. (COE 6, p. 4). At the time of the fire, the building was approximately 55% completed. (*Id.*)

After the fire, Mr. Hodges was instructed by Farm Bureau's claims adjuster, Darell Freter, to submit an estimate reflecting the cost to reconstruct the Villa Highlands building so that the insurance company could determine the loss payment. (Aug. R. Aff. of William Hodges in Supp. of Pl.'s Mot. for Relief from J., p. 2, ¶ 3 and Ex. B thereto). Villa Highlands complied with this request and on July 24, 2006, Mr. Hodges submitted an *estimate* which included the cost to reconstruct the Villa Highlands project *at a future point in time in 2006*. (*Id.*, ¶ 4 and Ex. B thereto). The estimate was based on approximating the cost of every single aspect of the construction of the project using a third-party contractor, Petra Construction (the "Petra 2006 Estimate"). (*Id.*)

Because the Petra 2006 Estimate was obtained through a third-party contractor, many of the costs were higher than the original costs of construction when Mr. Hodges budgeted the original project using his services as the contractor for the project. For example, "general conditions," which is the overhead component of a third-party contractor, was much higher in the Petra 2006 Estimate and was a significant number. (Aug. R. Aff. of William Hodges in Supp. of Pl.'s Mot. for Relief from J., p. 3, ¶ 5).

Notably, the Petra 2006 Estimate did not exclude costs or items that were uninsurable or not covered by the builder's risk policy. (*Id.* at ¶ 7). Mr. Hodges was asked to submit an estimate for the total reconstruction costs for the Villa Highlands project. (*Id.*) No one from Western Community or Farm Bureau told Mr. Hodges that this Petra 2006 Estimate would later be used to determine if Villa Highlands was underinsured per the terms of the builder's risk policy. (*Id.*) Additionally, the documentation that was used for the Petra 2006 Estimate that was

submitted to Farm Bureau/Western Community on July 24, 2006 did not contain binding bids, which Villa Highlands used to construct the building in 2005. (*Id.* at ¶ 6).

When Western Community/Farm Bureau received the 2006 Petra Estimate, Darrell Freter noted that "several items" listed in the Petra 2006 Estimate were *not* covered by the builder's risk policy, including such costs as motion sensors and alarms. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. D).

The builder's risk policy insured the following property ("Covered Property"):

> **A. Coverage**
>
> We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.
>
> **1. Covered Property**
>
> *Covered property, as used in this Coverage Part, means the type of property described in this section, A.1.,* and limited by A.2., Property Not Covered, if a Limit of Insurance is shown in the Declarations for that type of property. Building Under Construction, meaning the building or structure described in the Declarations while in the course of construction, including:
>
> a. Foundations;
>
> b. The following property:
>
> 1. Fixtures and machinery;
>
> 2. Equipment used to service the building; and
>
> 3. Your building materials and supplies used for construction;
>
> provided such property is intended to be permanently located in or on the building or structure described in the Declarations or within 100 feet of its premises;
>
> c. If not covered by other insurance, temporary structures built or assembled on site, including cribbing, scaffolding

and construction forms.

(COE 6, Ex. A, p. 1 and also COE 12, Ex. E, p. 1) (emphasis added).

Although the policy does not expressly differentiate between "hard costs" and "soft costs," it is undisputed that soft costs are not covered or insurable under this builder's risk policy.[1] (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Mot. for Relief from J., Ex. A, Zimney Depo., pp. 112, L. 1-25, p. 113, L. 1-25).

Under the builder's risk policy, in the event of loss or damage to the Covered Property, Western Community had *four* different payment options that it could elect in paying a claim:

> **4. Loss Payment**
>
> a. In the event of loss or damage covered by this Coverage Form, at our option, we will either:
>
> (1) Pay the value of lost or damaged property;
>
> (2) Pay the cost of repairing or replacing the lost or damaged property;
>
> (3) Take all or any part of the property at an agreed or appraised value; or
>
> (4) Repair, rebuild or replace the property with other property of like kind and quality, subject to b. below.
>
> We will determine the value of lost or damaged property, or the cost of its repair or replacement, in accordance with the applicable terms of the Valuation Condition in this Coverage Form or any applicable provision which amends or supersedes the Valuation Condition.

(COE 6, Ex. A, p. 5 and also COE 12, Ex. E, p. 5).

On August 18, 2006, counsel for Western Community/Farm Bureau, Rodney Saetrum, subjected Mr. Hodges to an "Examination Under Oath" during which he was asked several questions about the construction of the Villa Highlands building and the fire. (*See e.g.* Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. C).

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[1] Hard costs are those that replace "sticks and bricks," or in other words replace Covered Property. Soft costs include such items as: contractor's overhead and profit, temporary facilities, security, lease-up costs, legal fees, interest or taxes on land, appraisal or consulting fees, etc. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. T, p. 9).

On August 22, 2006, Villa Highlands submitted its "Sworn Proof of Loss" as required under the builder's risk policy. (Aug. R. Aff. of William Hodges in Supp. of Pl.'s Mot. for Relief from J., Ex. C). The sole and total basis submitted in support of the Sworn Proof of Loss was the Petra 2006 Estimate, which was the information requested from Villa Highlands by Western Community/Farm Bureau. (*Id.*)

Thereafter, Mr. Hodges became aware that Western Community/Farm Bureau were engaging an appraisal for purposes of determining whether Villa Highlands was underinsured under the builder's risk policy. (Aug. R. Aff. of William Hodges in Supp. of Pl.'s Mot. for Relief from J., Ex. D). Pursuant to the terms of the builder's risk policy, the insurance company could make a determination as to whether an insured is underinsured pursuant to Paragraph F.2 of the policy:

> **F. Additional Conditions**
>
> **2. Need for Adequate Insurance**
>
> We will not pay a greater share of any loss than the proportion that the limit of insurance bears to the value on the date of completion of the building described in the Declarations.

(COE 6, Ex. A, p. 6 COE 12, Ex. E, p. 6). Thus, the limit of insurance set on the insurance policy must be in accord with the value of the building on the date of completion. The value of the building on the date of completion determines whether an insured is underinsured pursuant to the terms of the policy.

In August of 2006, Western Community's/Farm Bureau's counsel advised Villa Highlands that "a determination of the value of the proposed Villa Highlands project at the time of policy inception is needed to establish the appropriate insurance coverage." (Aug. R. Aff. of William Hodges in Supp. of Pl.'s Mot. for Relief from J., Ex . E) (emphasis added). Western Community/Farm Bureau also informed Villa Highlands that they were "attempting to determine the value of the Villa Highlands project *as originally designed*, based upon previous building dates." (*Id.*) (emphasis added).

Thereafter on September 12, 2006, Western Community's/Farm Bureau's counsel informed Villa Highlands that the Sworn Proof of Loss, and therefore the Petra 2006 Estimate,

included items that were considered consequential damages, which Western Community/Farm Bureau represented were not covered by the builder's risk policy. (Aug. R. Aff. of William Hodges in Supp. of Pl.'s Mot. for Relief from J., Ex. F). The Petra 2006 Estimate included items that had not yet been purchased and items that had not been consumed by the fire, which Western Community/Farm Bureau pointed out and reiterated would not be paid for under the policy. (*Id.*) Western Community/Farm Bureau also informed Villa Highlands that its claim amount was not accepted. (*Id.*)

On October 6, 2006, Western Community's/Farm Bureau's counsel sought to engage Villa Highlands in a discussion regarding which costs and items should be included in establishing the value of the building at issue. (Aug. R. Aff. of William Hodges in Supp. of Pl.'s Mot. for Relief from J., Ex. G). Apparently, Western Community/Farm Bureau were unsure if developer's profit should be included in the valuation, but represented that "architectural costs and expenses" *should* be included in determining the building's value.[2] (*Id.*) (emphasis added). Villa Highlands once again objected to the insurance company's approach and requested to meet with Western Community's/Farm Bureau's representatives to discuss the issue. (Aug. R. Aff. of William Hodges in Supp. of Pl.'s Mot. for Relief from J., Ex. H).

On October 11, 2006, Western Community requested that the parties proceed with an appraisal process to resolve questions *about the loss* claimed by Villa Highlands. (Aug. R. Aff. of William Hodges in Supp. of Pl.'s Mot. for Relief from J., Ex. I). The appraisal process is set forth in Paragraph E.2. of the builder's risk policy and can be used to determine the value of the building upon the date of completion through "appraisals," stating as follows:

> **E. Loss Conditions**
>
> **2. Appraisal**
>
> If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal *of the loss*. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value

[2] Such costs are considered to be soft cots. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. T, p. 9)

> of the property and amount of loss. It they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
>
> a. Pay its chosen appraiser; and
>
> b. Bear the other expenses of the appraisal and umpire equally.
>
> If there is an appraisal, we will still retain our right to deny the claim.

(COE 6, Ex. A, p. 4 and also COE 12, Ex. E, p.).

The terms of the policy do not specifically define what costs or items are to be included in an appraisal conducted pursuant to Paragraph E.2., nor do they reflect which date should be used in the appraisal. (COE 6, Ex. A and also COE 12, Ex. E). In that regard, the policy only describes what is "Covered Property." (*See id.*)

In October of 2006, both parties informed one another who their appraisers would be for the appraisal process. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Exs. E, F). Villa Highlands had consistently maintained the position that any underinsurance determination made pursuant to the appraisal clause set forth above should not include items that are not covered or that are uninsurable under the policy, or in other words, items that are not Covered Property as defined in the policy. (*See* Aug. R. Aff. of William Hodges in Supp. of Pl.'s Mot. for Relief from J. and Exhibits thereto). Villa Highlands voiced this position as early as August of 2006 to Western Community/Farm Bureau. (*See Id.*, Ex. D).

Villa Highlands appointed James Brown, MAI, as its appraiser in the appraisal process. Mr. Brown had previously conducted two separate appraisals for First Horizon Bank, the construction lender for Villa Highlands. (Aug. R. Aff. of William Hodges in Supp. of Pl.'s Mot. for Relief from J., p. 3, ¶ 8). The first appraisal that Mr. Brown submitted to the Bank was conducted as of March 2005, and the second appraisal was conducted in anticipation of a reconstruction of the building after the fire and established a value as of August of 2006. (*Id.*) Neither one of these appraisals were directed or completed for purposes of determining insurance coverage for the Villa Highlands building, nor for purposes of determining underinsurance. (*Id.* at p. 4, ¶ 9). Both appraisals were conducted for lending purposes. (*Id.*) Thus, because these appraisals were not aimed at determining an insurable value of the property at issue, both appraisals included numerous items that were uninsurable and not covered by the builder's risk

policy at issue. (*See* COE 17, Ex. N).

On November 21, 2006, Western Community sent an engagement letter to Joe Corlett, MAI appraiser at Mountain States Appraisal and Consulting Company, who was retained to conduct its appraisal for use in determining underinsurance under the policy through the appraisal process. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. H). In this letter, Western Community stated that certain soft costs, such as developer's profit and architecture and engineering fees, should be included in the appraisal in determining the value of the Villa Highlands building. (*Id.*) Western Community also stated that "additional security," the "contingency fund," the "construction fence," and the "cost of the project manager," which were included in the Petra 2006 Estimate should be *excluded* in determining the value of the property because these items "are not part of the Covered Property" as described in Paragraph A.1. of the policy." (*Id.*) (emphasis added). Western Community also stated that "the focus should be on the policy language" in determining which costs to include in determining the value of the property at issue. (*Id.*) (emphasis added).

Based upon this direction from Western Community, Mr. Corlett did in fact produce an appraisal for the insurance company dated September 18, 2005 (the "Mountain States Appraisal"). (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. N).

The Mountain States Appraisal valued the Villa Highlands property using three different valuation methods:[3] the "Cost Approach," the "Income Approach," and the "Market Data Approach." (*Id.*, pp. 52-53). Each of the three methods outlined in the Mountain States Appraisal included items in the valuation that are not covered or insurable under the builder's risk policy, which allowed Western Community to inflate the value of the building and deem Villa Highlands underinsured. (*See id.*) The Cost Approach included such items as: the value of the land, entrepreneurial incentive (profit which was based at 12%), construction financing, contractor fees, and soft costs such as title insurance and appraisal and architectural fees. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. N, p. 77-80). The

[3] The September 18, 2005 appraisal was aimed at obtaining the current market value of the property at the "original completion date of March 15, 2005, and at the estimated new completion date of June 1, 2007." (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. N).

Income Approach analyzed market rent and income after the Villa Highlands building was completed and operating as a senior living facility, beyond the period of the builder's risk coverage. (*See id.*) The Market Data Approach used comparable sales. (*Id.*)

Additionally, there were a number of incorrect facts and assumptions that were used as the basis for the Mountain States Appraisal, including the estimated date of completion of June 1, 2007 for the building,[4] and a the total square footage of the land for Villa Highlands, which was listed as 71,314 square feet.[5] (*See* Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. N).

2. The Lawsuit and Continuing Debate over the Underinsurance Provision.

In December of 2006, Villa Highlands filed a Complaint against Western Community, Farm Bureau, and Mr. Zimney. (R. Vol. I, p. 74).

In January of 2007, Villa Highlands' counsel asked Mr. Saetrum for a copy of the Mountain States Appraisal in order to verify if the parties disagreed about both the amount of the loss *and* the value of the property at issue. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. I). Western Community failed to accommodate counsel's request for a copy of Joe Corelett's appraisal at that time so Villa Highlands' counsel wrote to Western Community's litigation counsel in an attempt to obtain a copy of Joe Corlett's appraisal and also sent out discovery requests to obtain the same. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. J, K).

On March 6, 2007, Villa Highlands' counsel again informed Western Community that it did not have a copy of Joe Corlett's appraisal and again requested a copy of the same. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. L). On that same date, Western Community delivered a copy of the Mountain States Appraisal to counsel for Villa Highlands. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. M).

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[4] The estimated date of completion was September of 2006. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. C, Hodges Examination Under Oath, p. 44, L. 16-20).

[5] The square footage for the Villa Highlands site was 62,830. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. T; Aug. R. Aff. of William Hodges in Supp. of Pl.'s Mot. for Relief from J., Ex. B).

After reviewing the Mountain States Appraisal, Villa Highlands informed Western Community that it would continue to proceed with the appraisal process, without waiving its right to challenge policy interpretation, the scope of coverage under the policy, and any legal determinations to be made. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. O).

The parties agreed to have the appraisers contact one another and thereafter choose an umpire, which was the next step contemplated by the builder's risk policy. (*See* Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., p. 3-4, ¶ 17; *see also* COE 6, Ex. A, p. 4, and COE 12, Ex. E, p. 4). As of July 9, 2007, the appraisers continued to discuss outstanding issues, but did not select an umpire nor agree on the valuation of the property at issue. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., pp. 3-4, ¶ 17 and Ex. P thereto). Thus, the appraisal process stalled. (*Id.*) The appraisers failed to appoint an umpire and Western Community began its accusations that Villa Highlands was stalling the appraisal process.

On August 8, 2007, Western Community requested a copy of the latest appraisal conducted by James Brown. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. Q). Villa Highlands supplied this appraisal to Western Community the next day. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. R).

On December 12, 2007, Western Community/Farm Bureau filed a Motion to Compel Appraisal. In support of that Motion, Western Community/Farm Bureau did not explain what occurred between the appraisers from August 8, 2007 through the date of its Motion; Defendants simply concluded that Villa Highlands had delayed or failed to cooperate in the appraisal process. (R. Vol. I, pp. 161-163; COE 1).

Western Community/Farm Bureau thereafter misrepresented that Villa Highlands had refused to engage and cooperate in the appraisal process and flip-flopped its position to suit whatever argument they were making at the time. (*See e.g.* COE 4, p. 5). Interestingly, on January 4, 2008, Western Community/Farm Bureau represented that:

> In this case, *both parties have procured the necessary appraisals* and communicated their respective positions. *All that is left to be done under the requirements of the contract is to have both parties*

> *agree to an umpire* who will review the information provided and make a determination....

(COE 4, p. 5) (emphasis added). Thus, as of January 4, 2008, Western Community confirmed that it stood by the Mountain States Appraisal, used this Appraisal as its determination of "value" for purposes of determining underinsurance under the policy, and represented that from its perspective, all that was left to be done in the appraisal process was the selection of an umpire. (*Id.*)

Subsequently on January 8, 2008, Villa Highlands filed its Second Amended Complaint, which all parties stipulated to allow. (R. Vol. I, p. 170; R. Vol. I, p. 164). In addition, the parties entered into the Stipulation Re: Villa Highlands Appraisal, which purported to stipulate to the "fair market value" of the property and the amount of the loss at issue. (COE 7, Ex. C).

On February 29, 2008, Villa Highlands filed its Motion for Summary Judgment seeking partial judgment on the issue of the interpretation of the builder's risk policy at issue. (R. Vol. II, p. 204; COE 5). On March 3, 2008, Defendants Western Community, Farm Bureau, and Mr. Zimney all filed Motions for Summary Judgment seeking the dismissal of all claims pending against them in the Second Amended Complaint. (R. Vol. II, pp. 207, 209; COE 8, 10).

3. Pre-Trial Motions and Davison Copple's Withdrawal.

On March 6, 2008, six days after Villa Highlands filed its Motion for Summary Judgment, through its then counsel Davison, Copple, Copple & Cox ("Davison Copple"), and three days after the Defendants filed their Motions for Summary Judgment, Davison Copple moved to withdraw as counsel of record for Villa Highlands. (R. Vol. II, p. 212; COE 13).

At the March 12, 2008 hearing on Davison Copple's Motion to Withdraw, the district court acknowledged that this was a "complicated" and "complex" case, yet the posture exhibited at the hearing was disregard for Villa Highlands. (Tr. March 12, 2008, p. 2, L. 12-24, p. 8, L. 25). Don Copple, then attorney for Villa Highlands, acknowledged that the "timing" of Davison Copple's withdrawal made it so that no other attorney would even consider taking the case on a substituted basis. (*Id.*, p. 4, L. 1-6). The five-day jury trial was set to commence in approximately seven weeks, on May 5, 2008, with summary judgment motions yet to be fully briefed, much less argued.

The district court acknowledged that withdrawal was difficult given the proximity to the

trial date and in light of the pending motions for summary judgment, however, the court sought guidance from defense counsel as to how to solve the timing issue. Counsel for Western Community/Farm Bureau responded:

> THE COURT: Does defense counsel have a solution?
>
> MR. ANDERSON: Sure.
>
> THE COURT: Okay.
>
> MR. ANDERSON: Let them withdraw. He's got 20 days [referring to Mr. Hodges]. It's his doing. He can go find somebody, or he can come in here and argue it himself.
>
> THE COURT: That is a solution.
>
> MR. ANDERSON: That is a solution of his own creation.
>
> THE COURT: And your position on that?
>
> MS. SHEEHAN: [Counsel for Defendant Mr. Zimney] I'd agree with that position.
>
> * * *
>
> THE COURT: I could live with that, too, but that means your client's going to have to be ready to go to trial May 5.

(Tr. March 12, 2008, p. 5, L. 16-25, p. 6, L. 1-4, 11-14).

The district court thereafter signed the order allowing Davison Copple to withdraw as counsel and reset the hearing date on the summary judgment motions twenty-three (23) days out, on April 9, 2008, which meant that Villa Highlands' reply to the Defendants' motions for summary judgment was due within the 20 day time period set forth in Idaho Rule of Civil Procedure 11(b)(3), on March 26, 2008. (Tr. March 12, 2008, pp. 6-7; R. Vol. II, p. 224). The district court also appeared to deny a motion to vacate the trial filed by Davison Copple. (R. Vol. II, p. 215; *and see* Tr. March 12, 2008).

On March 21, 2008, the firm of Perkins Coie LLP entered its Notice of Appearance for Villa Highlands.[6] (R. Vol. II, p. 228). On March 24, 2008, Perkins Coie LLP, on behalf of Villa

[6] Partner Richard C. Boardman and associate attorney Cynthia L. Yee-Wallace were the two attorneys who agreed to handle the case at Perkins Coie LLP. Ms. Yee-Wallace had been the associate attorney, under partner Terry C. Copple, who had worked on the case while at Davison

Highlands, moved, *ex parte*, for an extension of time to file its opposition and reply briefing in connection with the summary judgment motions. (R. Vol. II, p. 231). The very next day, the district court denied this request. (R. Vol. II, p. 235).

Villa Highlands also filed two other motions to vacate the trial date and extend certain deadlines that had either passed or were approaching since Davison Copple filed its motion to withdraw. (R. Vol. II, pp. 238, 244).

On April 9, 2008, the Court ruled from the bench on all of the pending motions for summary judgment. At that hearing the Court held that for purposes of analyzing underinsurance under Paragraph F.2. of the builder's risk policy, "value" meant "actual cash value," which was to be determined by replacement costs. (Tr. April 9, 2008, p. 73, L. 7-15, pp. 81-83). The district court in this matter also essentially held that fair market value was irrelevant for purposes of determining the value of the building for the underinsurance analysis. (*See id.*) The Court also held that Paragraph 1 of the Stipulation Re: Villa Highlands Appraisal (agreeing to a figure representing the "fair market value") was irrelevant. (*See id.*)

However, the district court *did not* decide which costs should be included as part of the valuation determining the value of the building at issue in the appraisals conducted to determine underinsurance. (*See id.*) The district court also did not decide which date to use for purposes of valuing the Villa Highlands property in an underinsurance analysis nor how "binding" any determination from an umpire would be. (*Id.* at p. 84, L. 14-16). The district court ordered Villa Highlands to complete an appraisal before trial and following discussion took place on April 9, 2008 before the Court:

> MR. BOARDMAN: ...We then move on to still some thorny issues about what goes into an appraisal. The problem with these appraisals that have already been done, Judge, is they include, as I call them, uninsurable items, but I think that is for us to work out with whomever.
>
> THE COURT: Well, you're going to have to get it done before the trial. I'm not going to reset your trial. I know you're asking that.

(Tr. April 9, 2008, p. 83, L. 23-25, p. 84, L. 1-16). The following also took place:

Copple. (COE 14, p. 3). Ms. Yee-Wallace went on maternity leave on September 20, 2008 and thereafter did not return to Davison Copple, but undertook employment at Perkins Coie LLP. (*Id*).

THE COURT: Didn't Mr. Anderson agree on what replacement cost appraisal means? Can you guys agree on that?

MR. BOARDMAN: I would like to think we could.

(*Id.*, p. 84, L. 25, p. 85, L. 1-4). However, when counsel for Villa Highlands engaged in a dialogue with the district court as to which date to use for purposes of the appraisal, counsel for Western Community/Farm Bureau insisted that this issue was not properly before the district court at that time and the discussion about the appraisal process was essentially halted. (*Id.*, p. 85-93).

Also at the April 9, 2008 hearing, Western Community's/Farm Bureau's counsel informed the district court that it may revisit its current appraisal and would have an appraisal, "in short order." (Tr. April 9, 2008, p. 89, L. 5-7). The district court did not have enough time to issue a written decision, but its rulings with respect to Western Community and Farm Bureau were that Farm Bureau was dismissed from the case, the builder's risk policy was unambiguous and that the "value" of the building for use in the appraisals at issue was "actual cash value." (Tr. April 9, 2008). Western Community's motion for summary judgment was denied in all other respects. (Tr. April 9, 2008, pp. 117-124). The district court also denied Villa Highlands' motion to vacate the trial on the grounds that there was still six weeks to prepare for trial and because the associate attorney now working on the case had worked on it at Davison Copple. (Tr. April 9, 2008, pp. 124-125).

On April 16, 2008, the parties were before the district court on Villa Highlands' motion to compel discovery and Western Community's motion for protective order. (Tr. April 16, 2008, April 17, 2008; R. Vol. II, pp. 251, 264). At this hearing, the district court engaged in a discussion regarding what claims and issues were left on for trial. (Tr. April 16, 2008). At this point, approximately two weeks before trial, both Villa Highlands and Western Community disagreed about the claims that were going to be tried before the jury. (*Id*) The district court then engaged in an analysis about whether Western Community had been put on notice of a breach of contract claim under Count Four as well as consequential damages. (*Id.*)

The district court asked the parties to pull all of their discovery and depositions related to damages and return to court the next day, April 17, 2008. (Tr. April 16, 2008, p. 111, L. 7-11). On that date, the district court ruled that, based upon its review of the Second Amended

Complaint, Count Four did not allege a claim for breach of the written insurance contract, but that Defendants were on notice of consequential damages. (Tr. April 17, 2008, pp. 136-137). However, the district court ruled that Villa Highlands had not timely supplemented its discovery regarding consequential damages and thus, would not allow the same to be submitted to the jury. (*Id.*, p. 173-174). The district court also held that the declaratory relief claim went to the written contract (i.e., the builder's risk policy). (*Id.*, p. 137, L. 4-10).

On or about April 24, 2008, Western Community and Farm Bureau submitted its proposed Order on Defendant Western Community and Farm Bureau's Motion for Summary Judgment. (R. Vol. II, pp. 280-284). The proposed order dismissed the relief sought in Count Six, Villa Highlands' claim for declaratory relief. (*Id.*, p. 282, ¶ 4) Villa Highlands objected to this order and the district court crossed out the language dismissing Count Six and instead noted that Count Six was "To be determined after appraisals." (R. Vol. II, pp. 267-269, 282, ¶ 4).

On April 28, 2008, the parties were again before the district court for hearing on Villa Highlands' motion to clarify orders and motions in limine filed by the parties. (Tr. April 28, 2008; R. Vol II, pp. 257-258, 260-262). At that time, the court acknowledged that Villa Highlands' declaratory judgment claim (the appraisal process) was not at issue in the jury trial, but would be decided by the Court. (Tr. April 28, 2008, p. 238, L. 13-24).

Also on that day, the court again held that Villa Highlands was precluded from submitting its evidence regarding consequential damages at trial and refused to hold that such information had been timely supplemented. (*Id.*, pp. 178-193). Villa Highlands had previously moved to extend the date to supplement discovery from March 31, 2008 to April 18, 2008. (R. Vol. II, pp. 244-246). This motion was set for hearing on April 9, 2008 but the district court did not rule on this issue at that time. (*See e.g.* Tr. April 9, 2008). Villa Highlands then supplemented its discovery on the issue of its damages and presented documentation that supported its claim for consequential damages (which were pro forma worksheets supporting Villa Highlands' claim for lost profits) on April 18, 2008 but the court refused to deem this supplementation timely and refused Villa Highlands the opportunity to present this evidence to the jury. (Tr. April 28, 2008, pp. 178-193; *see also* R. Vol. II, pp. 257-258 and COE 38 and 39).

Thereafter, in preparation for trial, Villa Highlands brought to the court's attention that

iterations of the very pro forma worksheets that had been supplemented by Villa Highlands on April 18, 2008 had in fact been attached both to the Mountain States Appraisal and to Mr. Zimney's deposition and moved to reconsider the district court's ruling that Defendants were not on notice of this evidence. (*See* R. Vol. II, pp. 285-286; COE 45 & 46). The court again ruled that this evidence would be prohibited at trial. (Tr. May 5, 2008, p. 31, L. 2-25, pp. 32-42).

4. The Appraisal Process Concludes the Day before Trial.

On April 29, 2008, Villa Highlands submitted its newly obtained Appraisal of Real Property conducted by MAI Appraiser, Brad Janoush, of Integra Realty Sources, Inc. ("Integra Appraisal") to Defendants. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Mot. in Supp. of Pl.'s Mot. for Relief from J., Ex. T). The Integra Appraisal obtained the "Insurable Value" of the Villa Highlands building as of September 2006 using a cost approach and the Marshall Valuation Service. (*Id.*) Insurable value was defined in the Integra Appraisal as:

> 1) The portion of the value of an asset that is acknowledged or recognized under the provisions of an applicable loss policy.
>
> 2) Value used by insurance companies as the basis of insurance. Often considered to be replacement or reproduction cost less deterioration and non-insurable items. Sometimes cash or market value but often entirely a cost concept.

(*Id.*, p. 2). The Integra Appraisal, just like the Mountain States Appraisal, listed the construction quality of the Villa Highlands building as "Average to Good," correctly listed the building square footage, and unlike the Mountain States Appraisal, only included items in the valuation that were covered or insurable under the builder's risk policy. (*Id.*, p. 9). In using the Marshal Valuation Service, the Integra Appraisal backed out uninsurable soft costs and did not include them in the valuation. (*Id.*) After analyzing the items that were properly included in the appraisal pursuant to the builder's risk policy, the insurable value, was listed as $5,819,000.00 or $94.74 per square foot. (*Id.*, p. 10).

On April 30, 2008, Western Community submitted an alleged "Supplemental Addendum to Appraisal Report." (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Mot. in Supp. of Pl.'s Mot. for Relief from J., Ex. U). This Supplemental Addendum to Appraisal Report was again conducted by Joe Corlett of Mountain States on behalf of Western Community and was apparently submitted to "add replacement value to its previous report." (*Id.*) The Supplemental

Addendum to Appraisal Report, however, contradicted the previous Mountain States Appraisal and stated:

> In this case, when the subject is unique in the market and is a special purpose facility, *the most reliable indication of replacement cost would be the actual cost to construct estimates provided by the developer* which gives a detailed description of the estimated cost to rebuild the project. It should also be noted, we consulted the Marshall Valuation Service manual for secondary support of developer's estimated cost, which indicated that the cost estimates by the developer are reasonable.

(*Id.*) (emphasis added). The Supplemental Addendum to Appraisal Report provided no further analysis but instead attached what looked like an Excel spreadsheet to the cover letter, and plugged in the values from the Petra 2006 Estimate submitted by Mr. Hodges nearly one year prior reflecting the estimates to reconstruct the project through a third-party contractor, with various increases. (*See id.*) There were also notes and invoices attached to the Addendum, which were used by Mr. Corlett to obtain the "replacement value set forth therein," some of which were dated in February and March of 2006- prior to the fire of the Villa Highlands building. (*See id.*) The Supplemental Addendum to Appraisal Report then stated that the "Replacement Value" of the Villa Highlands building as of September 24, 2006 was $8,490,836. (*Id.*) No further explanation was given for the "supplement" and there was no explanation or analysis regarding the use of the attached notes and invoices. (*See id.*)

On or about May 1, 2008, the parties retained Sam Langston of Langston & Associates to serve as the "umpire" in the appraisal process. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Mot. in Supp. of Pl.'s Mot. for Relief from J., Ex. V). Mr. Langston was engaged to perform an appraisal review to determine "the reliability of the cost data that each appraiser relied upon in forming their opinions as to the value of the property." (*Id.*) He was not asked to determine the "actual cash value" of the property, nor to verify the information provided by the two appraisers (Corlett and Janoush), but to determine which appraiser used more accurate cost data for determining the value of the property. (*Id.*)

Also on May 1, 2008, the parties met with the appraisers for less than an hour, and then the appraisers (Mr. Janoush via telephone, Mr. Corlett, and Mr. Langston in person) met outside

the presence of counsel to discuss the appraisals. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Mot. in Supp. of Pl.'s Mot. for Relief from J., p. 5, ¶ 24).

On May 2, 2008, Mr. Langston asked counsel for both parties to submit a definition of "cash value" to him so that he could determine how to proceed with the appraisal review. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Mot. in Supp. of Pl.'s Mot. for Relief from J., Ex. W). The parties did not and could not agree on the items that Mr. Langston should consider in determining "cash value." (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Mot. in Supp. of Pl.'s Mot. for Relief from J., Ex. X). In any event, Villa Highlands agreed to submit a joint letter to Mr. Langston directing him to deduct a number of uninsurable soft cost items from the valuation. (*Id.*) However, Villa Highlands expressly stated that in sending this joint-letter, it was not waiving its right to argue that other items should not be included in the valuation reports. (*Id.*)

On May 4, 2008, the day before the jury trial was set to commence in this case, Mr. Langston submitted his Limited Appraisal Review findings. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Mot. in Supp. of Pl.'s Mot. for Relief from J., Ex. Y). The Limited Appraisal Review findings erroneously stated that the Integra Appraisal was based upon the construction quality of "**Average**." (*Id.*) (emphasis added). The Limited Appraisal Review also set forth that the Supplemental Addendum to Appraisal Report submitted by Western Community was based on a valuation that cited that the Villa Highlands building was of "**Good**" construction type and a January 2007 bid by Petra Construction. (*Id.*) (emphasis added). Mr. Langston thereafter concluded that, "The Mountain States appraisal is deemed more reliable based upon the support provided in their determination of **Good** Quality classification provided by Marshall Valuation (See Attachment) when compared to the **Average** Quality classification determined by Integra." (*Id.*)

The jury trial thereafter commenced in this matter beginning on May 5, 2008. Since the declaratory judgment claim was to be decided by the district court, and was the only claim left to address the appraisal process, Villa Highlands reserved its rights to challenge the appraisal process and the "determination" made by the umpire and stated that it would not be challenging the determination at the jury trial. (Tr. May 5, 2008, p. 7, L. 7-12). The only issue that Villa

Highlands was permitted to proceed on against Western Community at trial was for vicarious liability for Mr. Zimney's negligence. (COE 48; R. Vol. II, pp. 288-292).

5. Post-Trial Decisions of the District Court.

After the jury's defense verdict in May of 2008, Western Community submitted its proposed Judgment to be signed by the district court, which set forth that "...all claims against Western Community Insurance Company are dismissed with prejudice." (R. Vol. II, pp. 296-297). On May 22, 2008, Plaintiff filed its Objection to the entry of said Judgment on the grounds and for the reasons including that not all claims pending against Western Community had been dismissed with prejudice, because Count Six for declaratory relief was still pending and was to be decided by the district court. (R. Vol. II, pp. 293-294).

On May 22, 2008, the Court signed Western Community's Judgment, over Plaintiff's objection, dismissing all claims against Western Community with prejudice, which would include Count Six for declaratory judgment and in essence, any and all issues and findings regarding the appraisal process. (R. Vol. II, p. 296-297).

Villa Highlands then filed its Motion for Relief from Judgment to address the Court's entry of the May 27, 2008 Judgment in favor of Western Community. (Aug. R. Mot. for Relief from J. and Mem. in Supp. of Pl.'s Mot. for Relief from J.). The district court denied Villa Highlands' motion holding that Villa Highlands had not put the district court on notice that there was a "justiciable controversy" regarding its claim for declaratory relief prior to the jury trial. (Aug. R. Decision and Order on Pl.'s Mot. for Relief from J., pp. 6-9).

The prosecution of this appeal followed.

II. ISSUES PRESENTED ON APPEAL

Villa Highlands presents the following issues on appeal:

A. Did the district court err in holding that Count Four of Plaintiff's Second Amended Complaint did not state a claim for breach of the insurance contract (i.e., the builder's risk policy);

B. Did the district court err in dismissing Plaintiff's claim for declaratory relief set forth in Count Six of Plaintiff's Second Amended Complaint when it entered the Judgment in favor of Western Community;

C. Did the district court err when it denied Plaintiff's Motion for Relief from Judgment;

D. Did the district court err when it allowed Davison, Copple, Copple & Cox to withdraw and then refused to vacate the trial or extend certain deadlines;

E. Did the district court err in refusing to allow Plaintiff to present evidence in connection with its consequential damages and err in refusing to deem its consequential damage evidence timely disclosed;

F. Did the district court err when it denied, in part, Plaintiff's Motion to Compel;

G. Is Plaintiff entitled to costs and attorney's fees on appeal.

III. COSTS AND ATTORNEY'S FEES ON APPEAL

Villa Highlands respectfully requests its costs and attorney's fees on appeal pursuant to Idaho Appellate Rules 40 and 41 and Idaho Code Sections 10-1210, 41-1829, and alternatively 12-120(3).

IV. ARGUMENT

A. The District Court Erred in Holding that Count Four of Plaintiff's Second Amended Complaint did not State a Claim for Breach of the Insurance Contract.

Idaho is a notice pleading state, and under such standard, "a party is no longer slavishly bound to stating particular theories in its pleadings." *See Seiniger Law Office, P.A. v. North Pacific Ins. Co.*, 145 Idaho 241, 246, 178 P.3d 606, 611 (2008) (citation omitted). The applicable standard against which the sufficiency of a complaint must be measured is set out in Idaho Rule of Civil Procedure 8(a)(1) requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* (citing I.R.C.P. 8(a)(1)) *and see John W. Brown Properties v. Blaine County*, 129 Idaho 740, 744, 932 P.2d 368, 372 (Idaho Ct. App. 1997). A complaint should be "liberally construed to secure a just, speedy, and inexpensive resolution of the case." *See Seiniger Law Office*, 145 Idaho at 246, 178 P.3d at 611. (citations omitted). "The emphasis is to insure that a just result is accomplished, rather than requiring strict adherence to rigid forms of pleading." *Id.* (citation omitted). "The key issue in determining the validity of a complaint is whether the adverse party is put on notice of the claims brought against it." *See id.* at 612-13 (citation omitted). A court will make every intendment to sustain a

complaint that is defective, e.g., wrongly captioned or inartful so long as it contains a short and plain statement of a claim upon which relief may be granted. *See id. and e.g. Youngblood v. Higbee*, 145 Idaho 665, 668, 182 P.3d 1199, 1202 (2008). A court must construe the provisions of the Idaho Rules of Civil Procedure liberally in order to resolve cases on their merits instead of on technicalities. *Seiniger Law Office,* 145 Idaho at 247, 178 P.3d 612 (citation omitted).

1. Count Four itself Contains a Short and Plain Statement of a Breach of Contract Claim upon which Relief May be Granted.

As set forth above, the limit of insurance for the builder's risk policy at issue had to be in accord with the value of the building upon the date of completion, which value can be determined by appraisals used in the appraisal process after a loss or claim. From the outset of Western Community's and Farm Bureau's investigation of Villa Highlands' claim through the date of trial in this case, the insurance companies set out to inflate the appraisal used to determine if Villa Highlands was underinsured under the policy. The insurance companies did this by consistently including items and costs in their appraisal that are per se uninsurable and therefore not covered by the builder's risk policy. Villa Highlands would never be compensated for the loss of uninsurable items in the event of an insurance claim under the policy. Despite this fact, Western Community used uninsurable items to determine the value of the building in order to obtain an uninsurable value that it asserted should set the limit of insurance for coverage under the policy. By doing so, Western Community was able to reduce the amount that Villa Highlands was paid under the policy for its loss. These actions constitute a clear breach of the insurance contract (i.e., the builder's risk policy). Villa Highlands was precluded from making this argument before a jury, because the district court held that Count Four of the Second Amended Complaint did not state a cause of action for breach of the insurance contract. However, the district court's ruling was in error.

The Second Amended Complaint sufficiently alleges a claim for breach of the insurance contract. Looking at Count Four of the Second Amended Complaint, the heading references "the policy" as well as "breach of contract." (R. Vol. I, p. 176). It goes on to state that Mr. Zimney had authority to sell Western Community's and Farm Bureau's insurance policies to consumers, which he did and received a commission from. (*Id.*) It goes on to state that Villa Highlands filled

out an application prepared by Western Community and/or Farm Bureau and received a policy and policy declaration sheet issued by Western Community and/or Farm Bureau. (*Id.*, pp. 176-77). Count Four discusses the policy limits and that Villa Highlands has paid all premiums due under the policy. (*Id.*, p. 177). Villa Highlands further alleged that Western Community and/or Farm Bureau were bound by Zimney's representations concerning the subject policy and that failing to tender the amount due arises to a breach of contract. (*Id.*) Finally, Villa Highlands alleged that it had been damaged in excess of $10,000.00 as a direct result of Western Community's and/or Farm Bureau's breach of contract. (*Id.*) The above language in and of itself clearly sets for a short and plain statement that Villa Highlands is entitled to relief for a breach of the insurance contract.

Count Four discusses, not only that Western Community and/or Farm Bureau are bound by its agent's representations concerning the insurance contract, but that their failure to "tender the amount due" is a breach of that contract. Villa Highlands should not have been prevented from adjudicating its claims that Western Community breached the insurance contract by failing to follow the terms of the policy in determining if Villa Highlands was underinsured, which ultimately led to the insurance company's failure to pay the amount due. This conduct is a breach of the insurance contract for which Western Community was on notice. In addition, in ruling that Count Four did not state a claim for breach of the insurance contract, Villa Highlands was also precluded from adjudicating in such claim that Western Community's and Farm Bureau's conduct also breached the covenant of good faith and fair dealing, implied in all contracts.

In sum, the district court did not liberally construe, but rather strictly construed, Villa Highlands' Second Amended Complaint, running counter to the policy of insuring that a just result is accomplished and instead required strict adherence to rigid forms of pleading. Western Community was on notice of Villa Highlands' breach of the insurance contract claim and as such, the district court's holding that Count Four does not state a claim for this claim should be reversed and remanded.

2. Western Community was on Notice of Villa Highlands' Breach of the Insurance Contract Claim and its Answer Demonstrates and Acknowledges this Notice.

The district court also appeared to have only relied on the language of the Second Amended Complaint itself when it decided that Court Four did not allege a breach of the insurance contract. (Tr. April 17, 2008, p. 136, L. 4-17). However, in addition to the language set forth in the Second Amended Complaint, Western Community's Answer to this Complaint also demonstrates that it was on notice of this claim, as well as a claim for breach of the covenant of good faith and fair dealing. (R. Vol. I, pp. 183-190).

A party's response to a complaint can be sufficient to demonstrate that said party has been put on notice of a plaintiff's claims. *See Seiniger Law Office, P.A.*, 145 Idaho at 247, 178 P.3d at 612 (citing *Vendelin v. Costco Wholesale Corp.,* 140 Idaho 416, 427, 95 P.3d 34, 45 (2004) and *Zattiero v. Homedale Sch. Dist. Number 370,* 137 Idaho 568, 572, 51 P.3d 382, 386 (2002)).

In this case, many of the affirmative defenses in Western Community's Answer to Plaintiff's Second Amended Complaint demonstrate that it was on notice of Villa Highlands' claim for breach of the written contract. The Third Defense states that, "Defendant Farm Bureau did not issue the policy in question and had no role in the evaluation and handling of Plaintiff's claim." (R. Vol. I, p. 186). The Fourth Defense states that Western Community "fully performed each term of the agreement between it and Plaintiff in good faith and Plaintiff has received the full benefits of the agreement and Western Community attempted to carry out its obligations under the agreement in full and in accordance with the terms and conditions of the agreement." (*Id.*) The Ninth Defense states that the damages claimed by Plaintiff "were excepted from coverage under the policy by virtue of an underinsurance condition included in the policy." (R. Vol. I, p. 187). The Twelfth Defense states that "a condition precedent of Defendant Western Community's obligation has not occurred and/or that Plaintiff may have violated or failed to comply with certain conditions of the insuring agreement thereby discharging these Defendants from obligations under the insuring agreement...." (*Id.*, p. 188) The Fourteenth Defense states that "Plaintiff's actions have prevented Defendant Western Community from performing its contractual obligations, if any." (*Id.*) The Fifteenth Defense states that "Plaintiff has breached the contract which forms the basis of its cause if [sic] action."

(*Id.*) And finally, the Sixteenth Defense states that "Plaintiff breached the covenant of good faith and fair dealing by refusing to cooperate in good faith with Defendant Western Community's attempts to adjust and/or settle the insurance claim at issue." (*Id.*)

These affirmative defenses demonstrate and acknowledge that Western Community was on notice of a breach of contract claim concerning the insurance contract, including a claim for breach of the covenant of good faith and fair dealing. Villa Highlands should thus have been permitted by the district court to pursue its claim that Western Community breached the insurance contract by, among other things, failing to follow the terms of the policy when it engaged in the appraisal process and failing to pay Villa Highlands the amount due under the policy.

Moreover, the summary judgment proceedings corroborate that Western Community was on notice of Villa Highlands' breach of contract claim. In Villa Highlands' memorandum in opposition to Western Community's motion for summary judgment, it argued that Western Community was liable to Villa Highlands for the insurance company's own breach of the insurance contract. (COE 15, p. 25). Similarly, at oral argument on the pending motions for summary judgment in this case on April 9, 2008, Villa Highlands confirmed that it did in fact have a pending claim for breach of the insurance contract. (Tr. April 9, 2008, p. 40, L. 12-17; p. 58, L. 14-21).

Based on the foregoing, the district court's holding that Count Four of the Second Amended Complaint did not state such claim should be vacated and remanded for trial on that cause of action.

B. The District Court Erred in Unilaterally Dismissing Count Six of the Second Amended Complaint.

"In evaluating whether the trial court has abused its discretion on any issue, an appellate court must determine (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistent with any applicable legal standards; and (3) whether the trial court reached its decision by an exercise of reason." *Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996) (citations omitted). The district erred when it dismissed Count Six of the Second Amended

Complaint for declaratory relief when it signed the Judgment in favor of Western Community because there was no motion, proceeding or stipulation before the court to allow the dismissal of the claim and the claim had not been fully adjudicated, as set forth below.

In this case, Western Community moved to dismiss Count Six of Villa Highlands' Second Amended Complaint for declaratory relief pursuant to their motion for summary judgment. (COE 10, pp. 18-20). The district court did not dismiss this claim on summary judgment.[7] (Tr. April 9, 2008, p. 123, L 10-25; p. 124, L. 1-9). Following the hearing on all motions for summary judgment, Western Community and Farm Bureau nonetheless submitted a proposed order to the district court proposing to dismiss the relief sought by Villa Highlands' in Count Six of the Second Amended Complaint. (R. Vol. II, p. 282 at ¶ 4). The district court then crossed out the proposed language in the order and indicated that Count Six was "To be determined after appraisals." (*Id.*)

Leading up to the trial, the parties and the district court discussed on more than one occasion that Villa Highlands' declaratory relief claim, including the appraisal process, was a court, rather than an jury, issue. (Tr. April 16, 2008, p. 61, L. 13-25, p. 62, L. 1-6; Tr. April 28, 2008, p. 238, L. 13-25, p. 239, L. 1-2). The district court also acknowledged that Villa Highlands' declaratory relief claim had not been fully adjudicated prior to trial. (Tr. April 16, 2008, p. 61, L. 13-25). The appraisal process was not concluded until the day before trial, leaving the remainder of Villa Highlands' declaratory relief claim to be determined by the district court after the jury trial. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Mot. in Supp. of Pl.'s Mot. for Relief from J., Ex. Y) Accordingly, on the first day of trial, counsel for Villa Highlands specifically reserved its right to challenge the appraisal process on appeal, but stated that it would not contest the appraisal process during the jury trial. (Tr. May 5, 2008, p. 7, L. 7-12). The only claim that Villa Highlands was permitted to pursue against Western Community at trial was one for vicarious liability based upon Mr. Zimney's negligence. (*See* R. Vol. II, pp. 288-292).

Within days after the jury's verdict on May 13, 2008, Western Community submitted a

[7] The district court also acknowledged prior to trial that Villa Highlands' declaratory judgment claim had not been fully decided. (*See* Tr. April 16, 2008, p. 18, L. 2-3; p. 61, L. 13-25; *see also* R. Vol. II, p. 282 at ¶ 4).

proposed judgment to the district court setting forth that *all* of Villa Highlands' claims were dismissed with prejudice. (R. Vol. II, pp. 296-297) (emphasis added). On May 22, 2008, Villa Highlands filed Plaintiff's Objection to Proposed Judgment Submitted by Western Community objecting to the entry of the proposed judgment on the grounds that, among other things, not all claims pending against Western Community had been dismissed with prejudice (i.e., Count Six) and requested that the district court enter a judgment consistent with the state of the proceedings to date. (R. Vol. II, p. 294). The district court signed the proposed judgment that same day, over Villa Highlands' objection, dismissing all of Villa Highlands' claims with prejudice, including Count Six for declaratory judgment. (R. Vol. II, pp. 296-97). As set forth below, the district court's dismissal of this claim was in error.

The Idaho Rules of Civil Procedure set forth how claims can be dismissed. *See e.g.* I.R.C.P. 12, 41, 56. In this case, the district court had no discretion to dismiss Count Six because there was no applicable motion, proceeding, or stipulation before the district court that would enable it to dismiss this claim when it signed the Judgment in favor of Western Community, thereby making it similar to an *ex parte* dismissal of this claim. Additionally, as set forth below, Count Six had not been fully adjudicated and Villa Highlands was thus deprived of an opportunity to be heard and thereafter obtain a determination regarding essential elements of its claim, including the events during the appraisal process. *See e.g. First Security Bank of Idaho v. Stauffer*, 112 Idaho 133, 141-42, 730 P.2d 1053, 1062-63 (Idaho Ct. App. 1986). After the appraisal process concluded, the umpire's determination could be challenged and set aside and Villa Highlands should have been allowed to do so because that determination and the Mountain States Appraisal did not comply with the terms of the builder's risk policy, contained significant mistakes and errors, and did not meet or comply with Uniform Standards of Professional Appraisal Practice. (*See* below). Despite this, the district court erroneously signed Western Community's Judgment days following the jury trial dismissing this claim without any explanation or reasoning for its decision.

Because there was no proceeding before the district court that allowed it to dismiss Count Six of Plaintiff's Second Amended Complaint when it signed the Judgment, and because this claim had not yet been fully adjudicated, the district court's dismissal of this claim should be

reversed and remanded.

C. The District Court Erred when it Denied Villa Highlands' Motion for Relief from Judgment.

A trial court is vested with broad discretion in determining whether to grant or deny a Rule 60(b) motion, and its discretion is limited and may be granted upon a showing of "unique and compelling circumstances" justifying relief. *Miller v. Haller*, 129 Idaho at 349, 924 P.2d at 611. (citations omitted). The standard for determining whether the district court has abused its discretion is set forth above. *See id.* (citations omitted). Villa Highlands filed its Motion for Relief from Judgment pursuant to Idaho Rule of Civil Procedure 60(b)(6), which allows a court to relieve a party from a judgment for "any other reason justifying relief from the operation of the judgment." *See* I.R.C.P. 60(b)(6). Clause 6 of Rule 60(b) is applicable whenever "such action is appropriate to accomplish justice." *First Security Bank of Idaho*, 112 Idaho at 142, 730 P.2d 1062.

The district court partially decided Villa Highlands' claim for declaratory relief on summary judgment when it held that the builder's risk policy was unambiguous and determined what "value" under the policy meant. (*See* Tr. April 9, 2008, R. Vol. II, pp. 296-297). After only partially deciding this claim, the district court dismissed Count Six via the entry of Judgment in favor or Western Community. Villa Highlands moved for relief from said Judgment and the district court denied this motion on the grounds that the "court understood the decision of the umpire [in the appraisal process] to be binding" and Villa Highlands failed to take action in informing the court there was a "justiciable controversy" regarding its claim for declaratory relief, i.e., the appraisal process, prior to trial.[8] (Aug. R. Decision and Order on Pl.'s Mot. for Relief from J., pp. 8-9). As set forth below, the district court's decision should be

[8] The district court also erroneously stated that Villa Highlands "stipulated to the amount of damages" resulting from the appraisal process. (Aug. R. Decision and Order on Pl.'s Mot. for Relief from J, pp. 8-9). However, the stipulated amount of damages at trial had nothing to do with any number that came from the appraisal process. Rather, the damages at trial were determined by the amount of Villa Highlands' loss, $3,967,157, minus the amount that Villa Highlands had been paid to date, $ 3,127,207. (*See* Tr. May 5, 2008, p. 10, L. 9-25, p. 11, L. 1-15; *see also* COE 7, Ex. B and C, p. 2 ¶ 2). Moreover, Villa Highlands was prohibited from offering evidence, argument or inference regarding the appraisal process, other than referencing that it occurred. (Tr. May 5, 2008, pp. 5-24).

reversed and remanded because unique and compelling circumstances existed, justiciable controversies did in fact remain with respect to Villa Highlands' claim for declaratory relief, and this claim had not been fully adjudicated.[9]

1. Unique and Compelling Circumstances Existed to Grant Villa Highlands' Motion for Relief from Judgment.

In denying Villa Highlands' Motion for Relief from Judgment, the district court held that Villa Highlands failed to take action and present a judiciable controversy which it deemed as a lack of unique and compelling circumstances justifying relief. (Aug. R. Decision and Order on Pl.'s Mot. for Relief from J., p. 9). The district court cited the case of *Bagley v. Bagley*, 117 Idaho 1091, 793 P.2d 1263 (Idaho Ct. App. 1990) as support for this conclusion. However, this case is distinguishable from the case at bar. In *Bagley*, the Idaho Court of Appeals held that Rule 60(b)(6) could not be used as a timely motion to amend the judgment or a timely appeal. 117 Idaho at 1094, 793 P.2d at 1266. The movant in that case was seeking to amend an existing judgment awarding attorney's fees, complaining that the amount was in error and the interest was improperly computed. *Id.* 117 Idaho at 1093, 793 P.2d at 1265. However in this case, Villa Highlands was not seeking to amend the judgment, but rather for relief of the improper dismissal of its claim set forth in Count Six. Further, Villa Highlands was not attempting to substitute its 60(b) motion for a timely appeal, which had been filed.

Contrary to the district court's finding, there were unique and compelling circumstances

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[9] The district court also faulted Villa Highlands for not bringing to its attention the fact that it intended to further adjudicate issues involved in the appraisal process. (Aug. R. Mem. Decision and Order on Pl.'s Mot. for Relief from J.) However, the district court completely ignored the fact that Count Six was still pending and the appraisal process concluded the morning of trial, which the court refused on more than one occasion to vacate. Further, in light of the objection filed to Respondent' proposed judgment, as well as statements made in prior pleadings and in communication between counsel prior to and during the appraisal process, it simply cannot be said that neither the Court nor Western Community were aware that Villa Highlands would pursue its claim for declaratory relief and challenge the appraisal process. (*See* R. Vol. II, pp. 293-295; Tr. April 9, 2008; COE 1, p. 6 (Respondents argued that if the issues to be determined in the appraisal process could be determined then the issues of interpreting the policy and the parties' rights and obligations with respect to coverage would still be left to decide); COE 10, p. 20 (Western Community argues that the application of F.2 remains "hotly contested."); and Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. X).

warranting Villa Highlands' relief from the Judgment in favor of Western Community. Villa Highlands was not given the opportunity to be heard on its claim for declaratory relief, including a challenge of the appraisal process. Courts under similar circumstances have held that such situations warrant relief under Rule 60(b)(6). *See e.g. First Security Bank of Idaho*, 112 Idaho at 142, 730 P.2d 1062; *Fleming v. Gulf Oil Corp.*, 547 F.2d 908, 913 (10th Cir. 1977). Again in this case, the district court entered an order stating that Count Six was "To be determined" after the appraisals were completed. (R. Vol. II, p. 282 at ¶ 4). Thereafter, the parties and the district court discussed that Villa Highlands' declaratory judgment claim would be tried before the court, not the jury, and that this claim had not been fully adjudicated. (*See* Tr. April 16, 2008, p. 61, L. 13-25, p. 62, L. 1-6; Tr. April 28, 2008, p. 238, L. 13-25, p. 239, L. 1-2; Tr. April 16, 2008, p. 61, L. 13-25l; R. Vol. II, p. 282, ¶ 4). The appraisal process, left only to be dealt with in Count Six, concluded the day before trial. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Mot. in Supp. of Pl.'s Mot. for Relief from J., Ex. Ex. Y). Days after the jury trial, the district court entered its Judgment in favor of Western Community, over Villa Highlands' objection, dismissing Count Six with no further notice or opportunity to be heard. Such circumstances constitute unique and compelling circumstances warranting relief under Idaho Rule of Civil Procedure 60(b)(6) and the district court's decision to the contrary should be reversed and remanded.

2. Justiciable Controversies Remained with Villa Highlands' Claim for Declaratory Relief and All Issues involved in Connection with this Claim Should have been Adjudicated by the District Court.

It is true that in order for a declaratory judgment claim to be decided, a justiciable controversy must be present. *See Harris v. Cassia County*, 106 Idaho 513, 516, 684 P.2d 988, 991 (1984). A controversy "must be one that is appropriate for judicial determination ....distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot." *Id.* (citing *Aetna Life Ins. v. Haworth*, 300 U.S. 227 (1937). "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests" and be a real and substantial controversy. *Id.* (citing *Aetna Life Ins.*, 300 U.S. at 240-41). The criteria is whether granting declaratory relief will clarify and settle the legal relations at issue, and whether such declaration will afford a leave from uncertainty and

controversy giving rise to the proceeding. *Schneider v. Howe*, 142 Idaho 767, 773, 133 P.3d 1232, 1238 (2006) (citations and internal quotations omitted). Further, where the court takes jurisdiction of the subject matter of a dispute, it will be retained for all purposes, including the settlement of the controversies between the parties with respect thereto. *See Harvey v. Brown*, 80 Idaho 379, 330 P.2d 982, 986 (1958) (citing *Gillette v. Oberholtzer*, 45 Idaho 571, 264 P. 229, 230 (1928)).

The district court relied on *First Bank & Trust of Idaho v. Parker Brothers, Inc.*, 112 Idaho 30, 32, 730 P.2d 950, 952 (1986) and characterized Villa Highlands's Motion for Relief from Judgment as bringing "a new claim" before the court. *Id.* 112 Idaho at 32, 730 P.2d at 952. However, the district court's reliance on this case is misguided. In *First Bank & Trust of Idaho*, the Idaho Supreme Court held that the plaintiff was not entitled to relief under Rule 60(b) because such motion could not be used to allow the court to reconsider the basis for its original decision. *Id.* 112 Idaho at 32, 730 P.2d at 952. The Court in that case also stated that the discovery of new legal theories does not constitute grounds for a Rule 60(b) motion. *Id.* However, in the case at bar, the district court did not give *any* prior legal basis for its decision to dismiss Villa Highlands' claim for declaratory relief and Count Six sufficiently asked the district court to decide the rights and obligations of the parties under the policy, which allowed the court to address the determinations made in the appraisal process. (R. Vol. I, p. 179). It is thus incomprehensible how Villa Highlands would be precluded from addressing the claim.

Further, after the appraisal process took place in this case, the "umpire's" determination could be challenged or set aside and the declaratory judgment statute allows the district court to further determine whether Western Community's appraisal used in the appraisal process, and ultimately relied on by the "umpire," complied with the terms of the builder's risk policy. *See* I.C. § 10-1201. Thus, the district court erred in failing to allow Villa Highlands the ability to have these issues determined in its declaratory relief claim which constituted reversible error.

a. The "Umpire's" Determination Could be Challenged and/or Set Aside.

Appraisal awards do not provide a formal judgment and may be set aside by a court.[10]

[10] *See* 15 Couch on Ins. § 209:16, *Applicability of Arbitration Statutes to Policy Provisions for*

See Central Life Ins. Co. v. Aetna Casualty & Surety Co., 466 N.W.2d 257, 260 (Iowa 1991). In *Wells v. American States Preferred Ins. Co.*, 919 S.W.2d 679, 683 (Tex. Ct. App. 1996), the Texas Court of Appeals held that an appraisal clause in a homeowner's insurance policy, similar to the one at bar, is binding and enforceable. *Id.*. However, an appraisal determination can be disregarded in the following situations: (1) when the award was made without authority; (2) when the award was the result of fraud, accident, or mistake; or (3) when the award was not made in substantial compliance with the terms of the contract. *Id.*. (citations omitted); *see also Quinn v. New York Fire Ins. Co.*, 126 N.W.2d 211, 213-14 (Wis. 1964) (holding appraiser's award had no effect where if failed to determine actual cash value as required by appraisal agreement).

The Texas court went on to state that, "[t]he effect of an appraisal award is to estop one party from contesting the issue of damages in a suit on the insurance contract, leaving only the question of liability for the court. *Wells*, 919 S.W.2d at 683. (citation omitted). The court also held that, consistent with the holdings of several other jurisdictions, "appraisers have no power or authority to determine questions of causation, coverage, or liability." *Id.* at 684. Similarly, the power of an appraiser pursuant to appraisal clauses is limited to the function of determining the money value of damage, and an appraiser's acts in excess of the authority conferred upon him by the appraisal agreement is not binding on the parties. *Id.* at 684-85. Appraisers are not arbitrators. *Id.* at 685.

In this case, the district court should have granted Villa Highlands relief from the May 27, 2008 Judgment entered in favor of Western Community because the Limited Appraisal Review finding by Mr. Langston could be challenged and set aside as it was not made in compliance with the terms of the builder's risk policy, and was based upon significant mistakes and errors.

Appraisals (June 2008). Courts that have dealt with classifying appraisal clauses either construe these provisions as arbitration agreements or contractual conditions or provisions in a policy. In Idaho, the Idaho Supreme Court has briefly discussed this issue, but has not decided on the merits, whether an appraisal clause such as the one in this case is an arbitration clause or a condition or provision of an insurance policy. *See Inland Group of Companies, Inc. v. Providence Washington Ins. Co.*, 133 Idaho 249, 254, 985 P.2d 674, 679 n.1 (1999) (upholding the trial court's finding that the appraisal clause at issue was an arbitration clause but not deciding "what practical distinction, if any, there may be between an appraisal and arbitration").

b. The District Court Should have Determined that Western Community's Appraisal, Relied upon by the "Umpire," did not Comply with the Terms of the Builder's Risk Policy.

The builder's risk policy only insures Covered Property, which again, is the building or structure while in the course of construction, including foundations, fixtures, machinery, equipment used to service the building, and building materials and supplies used for construction. (COE 6, Ex. A and also COE 12, Ex. E). The district court had already essentially found that valuations that include items that are not insurable under the policy, are irrelevant for purposes of determining the value of the building at issue in an underinsurance analysis. (*See* Tr. April 9, 2008, p. 73, L. 7-15, pp. 81-83). Thus, the district court should have granted Villa Highlands relief from the Judgment dismissing Count Six and determined that Western Community's appraisal did not comply with the terms of the policy, setting aside the umpire's determination.

For purposes of an underinsurance determination under Paragraph F.2., any appraisal that establishes a value for the building cannot include uninsurable or non-covered items because to include such would be inconsistent with the terms of the policy. Accordingly, both the Mountain States Appraisal and the Supplemental Addendum to Appraisal Report submitted by Western Community are per se not in compliance with the terms of the builder's risk policy because they undisputedly include items that are not insurable. Under the Cost Approach, the valuation included the land, entrepreneurial incentive (profit which was based at 12%), construction financing, contractor fees, and soft costs such as title insurance, and appraisal and architectural fees. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Mot. for Relief from J., Ex. N, pp. 77-80). The Income Approach analyzed market rent and income after the Villa Highlands building was completed and operating as a senior living facility, beyond the period of the builder's risk coverage. (*See Id.*). The Market Data Approach used comparable sales. (*Id.*)

Similarly, the Supplemental Addendum to Appraisal Report, which was based on the Petra 2006 Estimate, included items that are uninsurable and not covered by the builder's risk policy. Western Community has *admittedly* included items in its "appraisal" and valuation that are neither covered nor insurable under the builder's risk policy. (*See* Aug. R. Aff. of William Hodges in Supp. of Mot. for Relief from J., Ex. F; *and* Aug. R. Aff. of Cynthia Yee-Wallace in

Supp. of Mot. for Relief from J., Ex. H). Western Community has previously asserted that items such as: motion sensors, alarms, consequential damages, additional security, contingency funds, construction fences, and the cost of project managers are not covered in the policy and thus are costs that should be excluded in valuing the building. (*See* Aug. R. Aff. of William Hodges in Supp. of Mot. for Relief from J., Exs. B, F; *and* Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Mot. for Relief from J., Exs. D, H). Nevertheless, these costs were all included in some form in its Supplemental Addendum to Appraisal Report (which was the appraisal selected by the umpire in this matter) because it was based on the Petra 2006 Estimate.

Additional soft costs, which are undisputedly not covered by the builder's risk policy, were also included in the Supplemental Addendum to Appraisal Report. Many (if not most or all) of the items listed under "General Conditions" in the Petra 2006 Estimate include uninsurable costs such as: labor, surveying, inspection fees, rental equipment, contractor's profit, and architectural fees. (*See* Aug. R. Aff. of William Hodges in Supp. of Mot. for Relief from J., Ex. B; *and* Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Mot. for Relief from J., Ex. Y). Other costs, such as sitework and signage[11] were also included in the Petra 2006 Estimate, but are not Covered Property under the policy. The reason these items are included in the Petra 2006 Estimate is because Western Community/Farm Bureau asked Villa Highlands to submit the cost to reconstruct the entire project for purposes of determining the amount of the loss after the fire. This Petra 2006 Estimate was never intended to reflect the value of the building for purposes of an underinsurance determination, much like the James Brown appraisals were not conducted for such determinations.

Western Community simply attached this Petra 2006 Estimate to some sort of spreadsheet and thereafter had it stamped with approval by an appraiser in order to attempt to qualify it as an appraisal under the policy. However, the Supplemental Addendum to Appraisal Report does not comply with the terms of the policy, and thus, was improper to use as the determination for the umpire's findings. Accordingly, the district court's should have granted Villa Highlands relief from the Judgment in favor of Western Community and determined that Western Community's appraisal did not comply with the terms of the policy thereby setting aside

[11] Under Paragraph A.2.b.(3) of the builder's risk policy, signs are expressly excluded from coverage. (COE 6, Ex. A, p. 1 and also COE 12, Ex. E, p. 1)

the umpire's determination.

Furthermore, the Mountain States Appraisal and the Supplemental Addendum to Appraisal Report submitted by Western Community were based upon a number of mistakes and errors, which invalidated the valuations. For instance, the Mountain States Appraisal computes valuations using the square footage of the real property for the Villa Highlands project, using the incorrect figure of 71,308 as the square footage by which to calculate the valuation figures. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J, Ex. N). However, the square footage of the Villa Highlands building was 62,830. (*Id.*, Exs. T, Y). Additionally, the Mountain States Appraisal used a completion date of June 1, 2007, which is unsupported by any evidence in the record.

In addition, although it was quite unclear what "method" the Supplemental Addendum relied on (discussed further below) to determine this new "replacement cost," it appears from Mr. Langston's Limited Appraisal Review that the Addendum referenced the Marshall Valuation based upon "Good Quality" construction. (*See* Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J, Ex. Ex. Y). However, no where in the Mountain States Appraisal does it reflect that "Good Quality" construction was used on the project. Indeed, the Mountain States Appraisal values the building as "average to good" quality construction. (*See* Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J, Ex. N).

Further, the Limited Appraisal Review by Mr. Langston erroneously sets forth that the Integra Appraisal values the Villa Highlands building as "Average Quality" and that the Mountain States Appraisal was supported by "a contractor bid prepared by Petra Construction." (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J, Ex. Y). However, the Integra Appraisal valued the building as "Average to Good," the same as the Mountain States Appraisal. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J, Ex. T). Similarly, the Mountain States Appraisal/Supplemental Addendum to Appraisal Report was not supported by bids, but mere *estimates*. (Aug. R. Aff. of William Hodges in Supp. of Pl.'s Mot. for Relief from J, p. 3, ¶ 6). These errors and mistakes affected the final outcome and determinations made with respect to the value of the property at issue. Because the Limited Appraisal Review Findings was based upon mistakes and errors, the district court should have

granted Villa Highlands relief from the Judgment in favor of Western Community and hold that the umpire's determination did not comply with the terms of the builder's risk policy, thus setting it aside.[12]

c. The District Court Should have Determined that Villa Highlands' Appraisal Complied with the terms of the Policy.

The Integra Appraisal, which again was the appraisal conducted on behalf of Villa Highlands, was the only appraisal that obtained an insurable value that excluded uninsurable items in valuing the Villa Highlands building, consistent with the terms of the builder's risk policy. It correctly listed the building square footage, and only included items in the valuation that are covered or insurable under the builder's risk policy. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J, Ex. T, p. 9). In using the Marshal Valuation Service, the Integra Appraisal backed out soft costs and did not include them in the valuation.

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[12] Further, the Supplemental Addendum to Appraisal Report submitted by Western Community and chosen by Mr. Langston did not meet or comply with Uniform Standards of Professional Appraisal Practice ("USPAP"). *See e.g. Harris v. American Modern Home Ins. Co.*, 571 F.Supp.2d 1066, 1080 (E.D. Mo. 2008) (holding that when an appraiser fails to use the proper method for calculating damages pursuant to an appraisal clause, the appraiser's testimony may be excluded from trial because it is not relevant to prove the amount of loss based upon the correct standard).

The Mountain States Appraisal and the Supplemental Addendum to Appraisal Report submitted by Western Community were subject to USPAP. (*See* Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J., Ex. U). Pursuant to these standards, an appraiser must correctly employ recognized methods and techniques necessary to produce a credible appraisal, the appraisal must not contain a substantial error of omission, and it must identify the type and definition of value. (*See* USPAP 2008-2009; Standards 1.1 and 1.2, http://commerce.appraisalfoundation.org/html/USPAP2008/USPAP_ folder/standards/ std_01_.htm).

In this case, the Supplemental Addendum to Appraisal Report does not set forth what method was employed to determine the "replacement cost" set forth therein. (Aug. R. Aff. of Cynthia Yee-Wallace in Supp. of Pl.'s Mot. for Relief from J, Ex. U). The Supplemental Addendum does not explain why it departs from the methods and findings previously made in the Mountain States Appraisal, and does not set forth what technique or basis that is used. This is because Western Community's appraiser merely cut and pasted the Petra 2006 Estimate into some sort of spreadsheet and then placed a cover letter on it, made a few additions, and then labeled it as an "addendum." The Supplemental Addendum to Appraisal Report is not an appraisal, does not comply with USPAP, and thus, should not have been considered for purposes of the underinsurance analysis determining the value of the property in this matter.

(*Id.*) After analyzing the items that were properly included in the appraisal pursuant to the builder's risk policy, the insurable value, was listed as $5,819,000.00 or $94.74 per square foot. (*Id.*, p. 10). As such, the district court should have held that the Integra Appraisal complied with the terms of the builder's risk policy.

In sum, the district court erroneously entered the May 27, 2008 Judgment in favor of Western Community dismissing Villa Highlands' claim for declaratory relief under Count Six of the Second Amended Complaint, with prejudice. After the appraisal process took place, a justiciable controversy existed as to whether the appraisals used in that process complied with the terms of the builder's risk policy and whether the umpire's determination should have been set aside. The district court failed to allow Villa Highlands to fully adjudicate and address its claim for declaratory relief, unique and compelling circumstances existed, and as such, its decisions to the contrary should be reversed and remanded.

D. The District Court Erred in Allowing Davison Copple Leave to Withdraw and then Refuse to Vacate the Trial or Extend Certain Deadlines in this Case.

The decision to grant a motion for continuance is left to the discretion of the trial court. *See Gubler v. Boe*, 120 Idaho 294, 295, 815 P.2d 1034, 1035 (1991). The decision of the trial court in deciding whether to grant a motion for continuance must not be exercised oppressively, arbitrarily, or capriciously. *Finch v. Wallberg Dredging Co.*, 76 Idaho 246, 250, 281 P.2d 136, 138 (1955) (citations omitted). The Idaho Supreme Court has upheld a trial court's decision to continue a trial where the previous handling attorney on the case had resigned. *See generally Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 24, 105 P.3d 676, 684 (2005). In this case, the district court erred after it allowed Davison Copple leave to withdraw but refused to vacate the trial or extend certain deadlines.

Pursuant to Idaho Rule of Civil Procedure 11(b)(3), once an order granting leave to an attorney to withdraw from an action is entered, no further proceedings can be had which will affect the rights of the party of the withdrawing attorney for a period of 20 days after service or mailing of the order. I.R.C.P. 11(b)(3). Strict compliance with this rule is reasonable and necessary in light of its extraordinary impact. *Rodell v. Nelson*, 113 Idaho 945, 750 P.2d 966 (Idaho Ct. App. 1988). It is unclear when Villa Highlands received notice of the order allowing

Davison Copple to withdraw as counsel. However, what is clear is that the district court allowed proceedings to continue during the 20 day time period following the entry of the order. The district court did not possess discretion to do this. It was obligated to adhere to Rule 11(b)(3) and its failure to do so is grounds for appellate relief.

As previously set forth, Davison Copple moved to withdraw as counsel for Villa Highlands when Villa Highlands' motion, along with Defendants' cross-motions, for summary judgment were pending. (R. Vol. II, p. 212). The motion for leave to withdraw as counsel was granted on March 12, 2008 and Villa Highlands was given 20 days from March 13, 2008 to obtain new counsel. (R. Vol. II, pp. 224-225). Over the next 20 days, the district court did not toll the deadlines for Villa Highlands' opposition to the Defendants' motions for summary judgment, but instead left the time ticking so that when Perkins Coie entered an appearance in the case on March 21, 2008, it had three business days to organize, digest, and analyze the entire case and thereafter draft opposition briefing and affidavits in response to the pending motions. (*See* COE 14). Additionally, the district court failed to toll the pre-trial deadlines in the case that fell within this 20 day time period, including the discovery cutoff on March 31, 2008. (*Id.*) Because no proceedings were permitted to take place in the 20 days following the service of the order allowing the withdrawal, the district court abused its discretion when it denied the March 6, 2008 motion to vacate the trial, the March 24, 2008 *ex parte* motion for extension of time to file opposition and reply briefing, and the April 1, 2008 motion to vacate the trial. (R. Vol. II, pp. 212, 231, 235, 238; COE 14, 19, 20, 21, 22). It also failed to comply with the rules governing withdrawal.

In addition, the circumstances surrounding the timing of Davison Copple's withdrawal also warranted the district court vacating the trial and extending the deadlines in this case and the district court's refusal to do so deprived Villa Highlands of a fundamentally fair trial. *See e.g. Lambert v. Northwestern Nat. Ins. Co.*, 115 Idaho 780, 769 P.2d 1152 (Idaho Ct. App. 1989). The Idaho Supreme Court has reversed a district court's denial of a continuance where the newly obtained counsel is retained on a complex case without sufficient time to prepare for trial in a short period of time. *See Finch v. Wallberg Dredging Co.*, 76 Idaho at 251, 281 P.2d at 138-39. In this case, when Davison Copple withdrew as counsel for Villa Highlands, the district court

was aware that Villa Highlands would have extreme difficulty finding new counsel so close to trial and that this case was complicated and complex. (*See* Tr. March 12, 2008, p. 4, L. 1-6; p. 8, L. 24-25; p. 9, L. 1-23). From the time that Davison Copple moved to withdraw until the time that Perkins Coie entered its appearance on behalf of Villa Highlands, the deadline to disclose rebuttal lay witnesses passed, Mr. Zimney's expert witness opinions were overdue, the deadline to depose lay witnesses had passed, the deadline to supplement discovery was days away, two opposition briefs and opposition affidavits in response to summary judgment motions were due in three business days, and counsel for Villa Highlands did not have sufficient time to prepare this complex case for trial. (COE 14, 19). Given this backdrop, and particularly in light of the district court's order that Villa Highlands obtain an appraisal prior to trial, as well as the numerous pretrial motions that were necessary, the district court abused its discretion when it refused to vacate the trial in this matter or extend the summary judgment deadlines because these decisions affected the determination on other pre-trial motions discussed below, all of which contributed to depriving Villa Highlands of a fundamentally fair trial. The district court's rulings should thus be reversed.

E. The District Court Erred in Refusing to Allow Villa Highlands to Present Evidence in Connection with its Consequential Damages and Erred in Refusing to Deem its Consequential Damage Evidence Timely Disclosed.

A district court's decision to admit or deny evidence is reviewed under an abuse of discretion standard. *Obendorf v. Terra Hug Spray Co., Inc.*, 145 Idaho 892, 897, 188 P.3d 834, 839 (2008) (citations omitted). The abuse of discretion standard is set forth above. *See Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996) (citations omitted). In this case, the district court abused its discretion when it refused Villa Highlands the opportunity to introduce any evidence regarding its consequential damages at trial.

In this case, Villa Highlands moved to extend the deadline to supplement discovery until April 18, 2008 given the circumstances surrounding the timing of Davison Copple's withdrawal. (R. Vol. II, pp. 244-246). Although this motion was noticed for hearing on April 9, 2008 it was not addressed. (Tr. April 9, 2008). On April 16 and 17, 2008, the parties were before the district court on Villa Highlands' motion to compel and Western Community's motion for protective order. (Tr. April 16, 2008 and April 17, 2009). The court engaged in a discussion of what

claims were left on for trial and eventually found that Defendants were on notice of Villa Highlands' claim for consequential damages but that Villa Highlands had not timely supplemented its discovery on this issue. (Tr. April 17, 2008). Thus, as a consequence, the district court refused to allow Villa Highlands to present any evidence on its claim for consequential damages at trial.

The very next day, April 18, 2008, Villa Highlands supplemented its discovery relating to its claim for consequential damages and asked the court to allow the information and deem its supplementation timely in light of its previously filed motion to extend the deadline to supplement discovery. (*See* R. Vol. II, pp. 257-258l; COE 38). However, the district court denied Villa Highlands' motion. (Tr. April 28, 2008, pp. 178-193).

Thereafter, in preparing for trial, counsel for Villa Highlands brought to the attention of the district court that the information disclosed in connection with Villa Highlands' consequential damage claim had previously been disclosed to the Defendants in June of 2007, in a similar form but different iteration, during the deposition of Mr. Zimney and had been used by Western Community through the Mountain States Appraisal. (R. Vol. II, pp. 285-286; COE 46, Exs. A, B, C). The district court, however, refused to allow the evidence in and denied Villa Highlands' motion for reconsideration as untimely and also on the ground that Defendants had not had time to defend on the issue. (Tr. May 5, 2008, p. 31, L. 2-25, p. 32-42).

A court contemplating a discovery sanction should request an explanation for the late disclosure, weigh the importance of the testimony, determine time needed to meet the testimony, and consider the possibility of a continuance. *See Farr v. Mischler*, 129 Idaho 201, 207, 923 P.2d 446, 452 (1996) (citation omitted). In this case, the district court abused its discretion in refusing to allow Villa Highlands the chance to submit its evidence in connection with its consequential damages to the jury because the above factors weigh in favor of disclosure or a continuance.

The district court obtained an explanation for the late disclosure and held that the testimony was important; however, the district court refused to allow a continuance of the trial, which was warranted under the circumstances as set forth in detail above. (Tr. April 28, 2008, pp. 184-194; Tr. May 5, 2008, pp. 31-42). On more than once occasion, counsel for Villa

Highlands informed the district court that it did not have enough time to adequately prepare the case for trial in light of the timing of Davison Copple's withdrawal. (COE 14, 19, Tr. April 28, 2008, p. 181, L. 2-16; Tr. May 5, 2008, p. 35, L. 4-25, p. 36, L. 1-9). This argument was repeatedly disregarded. Thus, because the trial in this matter should have been vacated in light of the circumstances surrounding the withdrawal of Villa Highlands' previous counsel, so too should the district court have granted Villa Highlands' requests to admit evidence on its claim for consequential damages. Accordingly, if this case is remanded, the Court should reverse the district court's decision and allow Villa Highlands to pursue its claim for consequential damages against Western Community.

F. The District Court Erred in Denying, in Part, Villa Highlands' Motion to Compel.

A trial court's decision to grant or deny a motion to compel will not be disturbed by this Court unless there has been a clear abuse of discretion. *Sirius LC v. Erickson*, 144 Idaho 38, 43, 156 P.3d 539, 544 (2007). The abuse of discretion standard is set forth above. *See Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996) (citations omitted). In this case, the district court erred when it denied, in part, Villa Highlands' motion to compel.

The district court refused to allow Villa Highlands to obtain discovery from Western Community and Farm Bureau, including an explanation of the underwriting process in connection with the builder's risk policy at issue and the documents that formed the basis of said explanation. (COE 33; Tr. April 16, 2008, p. 64, L. 11-25, p. 83, L. 2-11). The district court also refused to allow Villa Highlands to depose Clayton Brummet (Western Community's/Farm Bureau's claims adjuster who handled aspects of Villa Highlands' claim), Rodney Saetrum (Western Community's/Farm Bureau's attorney who handled aspects of Villa Highlands' claim), and the 30(b)(6) representative of Western Community, in order to obtain information related to Western Community's and Farm Bureau's underwriting process and claims adjusting process. (COE 33). The district court refused to allow this discovery stating that the same was not "relevant." (Tr. April 16, 2008, pp. 64-95). However, this decision was in error.

Pursuant to Idaho Rule of Civil Procedure 26(b)(1), "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the

claim or defense of any other party...." I.R.C.P. 26(b)(1). The information sought need only be "reasonably calculated to lead to the discovery of admissible evidence." *Id.* In this case, the district court did not apply the standard set forth in Idaho Rule of Civil Procedure 26(b)(1), but instead analyzed whether the requested information was "relevant," and excluded the evidence on that basis. Based on this alone, the district court abused its discretion and its decision should be reversed.

In addition, the information sought by Villa Highlands was clearly reasonably calculated to lead to the discovery of admissible evidence and relates to Count Four and Six of the Second Amended Complaint, as well as the claims that were pending before trial. The way in which Western Community and Farm Bureau investigated, underwrote and processed Villa Highlands' insurance policy and subsequent claim is information that could lead to the discovery of admissible evidence. Thus, because the district court failed to apply the standard set forth in Idaho Rule of Civil Procedure 26(b)(1) and erred in dismissing Counts Four and Six of the Second Amended Complaint, its refusal to allow this discovery was also in err and should be reversed and remanded.

G. Villa Highlands is Entitled to Costs and Attorney's Fees on Appeal.

Idaho Appellate Rule 40 states that costs shall be allowed to the prevailing party as a matter of course. I.A.R. 40. Similarly, Idaho Appellate Rule 41 requires the Idaho Supreme Court to include its determination of a claimed right to attorney's fees on appeal. I.A.R. 41. In this case, Villa Highlands is entitled to its costs and attorney's fees on appeal.

Idaho Code Section 10-1210 allows the Court, as it deems equitable and just, to award costs in cases involving claims for declaratory relief. I.C. § 10-1210. It would be equitable and just to award costs to Villa Highlands in this matter because its claim involves one for declaratory relief and there is no justifying reason as to why said claim was dismissed.

Idaho Code Section 41-1829 allows an insured to recover its attorney's fees against an insurer for claims involving recovery under the terms of an insurance policy or contract where the insured has failed to pay the amount due under the policy longer than 30 days after the proof of loss. I.C. § 41-1839(1). This case directly involves a claim for recovery under the terms of an insurance policy where the insurance company has failed to pay the amount due within 30 days

from the proof of loss and as such, Villa Highlands is entitled to recovery of its attorney's fees under this statute on appeal.

In the alternative, should the Court find that this case does not involve a claim for recovery under an insurance policy, Villa Highlands requests its attorney's fees pursuant to Idaho Code Section 12-120(3).

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on March 5, 2009, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

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