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Farm Bureau Mutual Insurance Co v. Eisenman Appellant's Reply Brief Dckt. 38703

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IN THE SUPREME COURT OF THE STATE OF IDAHO

FARM BUREAU MUTUAL INSURANCE
COMPANY OF IDAHO,

Appellant,

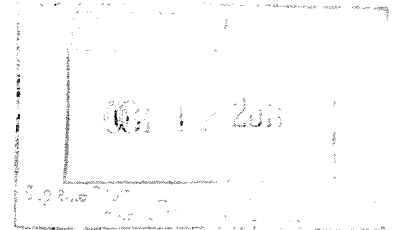
v.

MICHAEL JOHN EISENMAN and KATHRYN
MARIE, individually, and co-personal representatives
of the ESTATE OF PATRICIA EISENMAN;
REBECCA L. McGAVIN AND PETER EISENMAN
individually,

Respondent.

Supreme Court Case No.: 38703

Case No. CV OC 1010533



APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District in and for the County of Ada

HONORABLE MICHAEL MCLAUGHLIN

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I. ARGUMENT

A. Defendants/Respondents' Request for Attorney's Fees is Premature

Defendants have stated that this case was certified for immediate appeal under I.R.C.P. 54(b) before they were given the opportunity to prove the total amount justly due or obtain their award of attorney's fees under Idaho Code § 41-1839. Respondents' Brief p. 6. However, in the Conclusion to the district court's Memorandum Decision, the Court ordered Defendants to prepare a judgment pursuant to I.R.C.P. 54(b). R p. 273. Defendants complied with the district court's order. R p. 275-276. However, the district court did not sign the judgment until March 14, 2011, some 13 days after it was received by the court clerk. R p. 275. There was ample time for Defendants to file their motion for costs and attorney's fees. Also, I.A.R. 13(9) allows the district court to hear such motions even though an appeal has been filed.

The motion for costs and fees would be premature in the district court. Should this Court reverse the district court's Decision and grant Farm Bureau's appeal, there would be no amount justly due, and no attorney's fees would be owed under Idaho Code § 41-1839. Finally, Defendants also filed a counterclaim against Farm Bureau alleging breach of contract which was not decided on summary judgment. R p. 60, 66. *See, e.g., Lexington Heights Development, LLC v. Crandlemire*, 140 Idaho 276, 287, 92 P.3d 526, 537 (2004). If the district court's Decision is upheld by this Court, the district court must still hear evidence on the extent of the damages as well as the contract claim.

B. Idaho's Probate Code Does Not Make Ms. Eisenman's Estate or the Personal Representatives the Same as an Insured as Defined in Farm Bureau's Underinsured Motorist Insuring Agreement

On page 11 of Defendants' brief, they make the statement that,

Under Idaho law, courts are to interpret the rights of the personal representative to be those that the "decedent had immediately prior to death," *Idaho Code* § 15-3-703(c). *See also Idaho Code* § 15-3-715 (enumerating various powers of the personal

representatives). The Estate and its personal representatives “stand in the shoes” of the decedent in prosecuting and defending the decedent’s legal claims, including contractual agreements. *Id.* In other words, the Estate in this case is the “insured” as contemplated in Farm Bureau’s underinsured motorist provision.

Defendants’/Respondents’ Brief p. 11.

The above statement is essentially the heart of Defendants’ argument. It is Defendants’ method of attempting to get around the definition of an insured in Farm Bureau’s underinsured motorist insuring agreement. Initially, personal representatives, in Idaho’s enactment of the Uniform Probate Code, are defined as fiduciaries and are to conduct themselves as trustees of the estate. Idaho Code § 15-3-703(a). “A personal representative is a fiduciary who shall observe the standards of care applicable to trustees as described by section 15-7-302 of this code.” Idaho Code § 15-7-302 is in the trust administration part of the code and describes the standard of skill expected from trustees in handling a trust, or an estate.

Secondly, one must look to the language of the entire paragraph of Idaho Code § 15-3-703(c) to determine its meaning. It reads:

Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent had immediately prior to his death. (Emphasis supplied.)

The Comment to the Official Text of the above-quoted section further explains paragraph (c):

Paragraph (c) is designed to reduce or eliminate differences in the amenability to suit of personal representatives appointed under this Code and under traditional assumptions. Also, the subsection states that so far as the law of the appointing forum is concerned, personal representatives are subject to suit in other jurisdictions. It, together with various provisions of Article IV (Chapter 4), are designed to eliminate many of the present reasons for ancillary administrations.

Idaho Code § 15-3-703(c) and Comment to the Official Text.

The full paragraph and the Comment to the Official Text show that Defendants’ expansive definition of what power a personal representative has is too broad. A personal

representative is a fiduciary, not an insured. In Idaho, a decedent's tort causes of action abate or end at the time of death. *Evans v. Twin Falls County*, 118 Idaho 201, 796 P.2d 87 (1990). This is the reason why Idaho's Wrongful Death Act exists. As Defendants point out in their brief, Idaho's Wrongful Death Act is not a survival statute. The Act in fact creates a new cause of action for the statutorily identified individuals. The cause of action created belongs to the specifically identified heirs, not to decedent. Idaho Code § 5-311. The personal representative does not "stand in the shoes" of decedent as far as filing suit for decedent's wrongful death. The personal representative has the statutory authority to bring suit against the tortfeasor for wrongful death on behalf of the heirs. Or, the heirs themselves may bring suit against the tortfeasor. Whether the personal representative or the heirs bring suit, the wrongful death cause of action belongs to the heirs, not to decedent or the estate. Idaho Code § 5-311.

Ms. Eisenman's estate is not an insured as contemplated by the insuring agreement of the Farm Bureau underinsured motorist policy. The insuring agreement limits those who may submit a claim under the UIM policy language to insureds as defined in the policy, not as defined in Idaho's Uniform Probate Code or Idaho's Wrongful Death Act. Ms. Eisenman's estate is not named or defined as an insured. Her estate's personal representatives are not named or defined as insureds. The estate and personal representatives do not become new insureds by operation of law.

C. If This Court Finds The Issue of Estoppel in his Matter is Appropriate for Argument, then Farm Bureau is Not Estopped From Denying Coverage in This Matter Because Neither Party Has Ever Changed its Basic Position at Any Time During the Claim or During the Proceedings Before the District Court

The estoppel claim raised by Defendants is, of course, not ripe for decision due to the lack of factual findings as to the elements of estoppel in the district court. *See, e.g., Young v. State Farm Mut. Auto Insurance Co.*, 127 Idaho, 122, 126, 898 P.2d 53, 57 (1995); *Foster v.*

Johnstone. 107 Idaho 61, 68, 685 P.2d 802, 809 (1984)(the reasonableness of the insured's reliance presents a question of fact for the jury.) This Court should not rule on Defendants' estoppel claim. However, if it does decide to rule on the estoppel claim, Farm Bureau asserts that the case should be remanded to the district court for findings of fact on the issue. However, Farm Bureau offers the following arguments in reply to Defendants' estoppel claim.

Contrary to Defendants' statement in their brief, Farm Bureau does not agree that Ms. Eisenman's estate and its personal representatives have become the "insured." Defendant's/Respondents' Brief p. 14. The insurance policy provides for payment of medical expenses incurred by Ms. Eisenman prior to her death. It also specifically provides for funeral expenses.

The policy does outline how the medical payments provision and the UIM provisions worked in conjunction with each other. In the case at hand, had Ms. Eisenman incurred \$100,000.00 in medical expenses, then policy would provide payment for all of those medical expenses since she was the insured by definition. When there are funeral expenses on top of the medical expenses, the two provisions working together would provide for payment of the funeral expenses and all remaining expenses would be paid out of medical coverage and the underinsured motorist coverage. The policy does provide, however, that there be no duplicate payments, therefore the UIM policy limits would be decreased by the amount of payments made under medical coverages. The point is that the covered loss of an insured would be paid under the combination of these two provisions. This is not an estoppel issue, this demonstrates that Ms. Eisenman purchased a policy that provided excellent coverage for the identified insureds.

Medical payments are a separate coverage, Coverage Q – Medical Payments. Farm Bureau Farm and Ranch policy, p. 28, R p. 46. The payment of the separate death benefit was

paid to the estate of Ms. Eisenman under Section III Endorsements, Conditions, paragraph 3. Farm Bureau Farm and Ranch policy p. 34, R p. 52.

This was explained to Defendants' attorneys in a May 28, 2010 letter from Plaintiffs' attorneys to Defendants' attorneys. See Exhibit I attached to this Reply Brief. There is no evidence in the record that Farm Bureau has induced Defendants to rely upon payments to the estate and that Defendants have changed their position as a result of their reliance.

In an argument not discussed by the district court in its Memorandum Decision, Defendants are alleging that Farm Bureau is estopped from making its arguments that neither Ms. Eisenman's estate, the personal representatives, or her heirs under the present scenario, fit into the definition of insureds in Farm Bureau's UIM insuring agreement. Farm Bureau has not changed its original position. Defendants are not defined as insureds in the policy. Neither party has changed its original position in this matter. Defendants have always maintained that they are entitled to receive UIM benefits from Ms. Eisenman's policy. Farm Bureau has always maintained that none of the Defendants met the definition of an insured under the policy and could not recover noneconomic losses under UIM coverage. Without a change in position, which procured some advantage to the challenged party or produced some disadvantage to the other, or that the party invoking estoppel proving it was induced to change its position, there can be no estoppel. *Magic Valley Truck Brokers, Inc. v. Meyer*, 133 Idaho 110, 114-115, 982 P.2d 945, 949-950 (Ct. App. 1999).

The payment for \$22,941.40 to Ms. Eisenman's attorney and estate was paid under Coverage Q – Medical Payments section of the policy. The language of this coverage part states as follows:

Coverage Q – Medical Payments

We will pay the reasonable and necessary medical and funeral expenses incurred within 3 years from the date of **occurrence** to each **insured** who sustains **bodily injury** caused by an **occurrence**.

The following are **insureds** under Coverage Q:

1. Any person **occupying** an **insured vehicle** with your permission or the permission of an adult **relative** and sustaining **bodily injury** caused by an **occurrence** resulting from the use of this **insured vehicle**;
2. You or your **relatives** sustaining **bodily injury** caused by an **occurrence** while **occupying** an **insured vehicle** or a **motor vehicle** not owned by any **insured**;
3. Any person sustaining **bodily injury** while **occupying a nonowned vehicle**, if the **bodily injury** results from:
 - a. Its operation by you or on your behalf by a private chauffer or domestic servant;
 - b. Its operation by a **relative**;
4. You or your **relatives** sustaining **bodily injury** while a pedestrian or a bicyclist when struck by a **motor vehicle** or **trailer**.

Any payment under this coverage applies toward settlement of any claim for damages against any **insured**. No payment under this coverage shall be subject to duplicate payment under Coverages P, P-1 or any liability coverage under this policy.

Farm Bureau Farm and Ranch policy p. 28, R p. 46.

Identical language of Coverage Q – Medical Payments, was interpreted by the Idaho Court of Appeals in the case of *Baker v. Farm Bureau Mutual Insurance Co. of Idaho, Inc.*, 130 Idaho 415, 418-419, 941 P.2d 1316, 1319-1320 (Ct. App. 1997). The opinion referred to the declarations page of the policy where it unambiguously stated the medical payments limit. The policy limit for Medical Payments is clearly set out in the declaration pages for Ms. Eisenman's Farm and Ranch policy, under Section III Automobile, R p. 14. The policy limit is \$25,000 for each person. the payments for medical and funeral expenses for Ms. Eisenman were paid from

Coverage Q – Medical Payments rather than the UIM coverage. See Exhibit 1 attached to this Reply Brief.

Counsel for Plaintiff explained the issue of payment from Coverage Q to counsel for Defendants in a letter dated May 28, 2011. See attached Exhibit 1. This occurred prior to suit being filed. The letter explains that the payment came from Coverage Q – Medical Payments. It further explains Farm Bureau’s position that Defendants did not come under the definition of an insured under the UIM coverage part of Ms. Eisenman’s policy. The letter set out the disagreement between the parties which resulted in the filing of the declaratory judgment action and, eventually, this appeal. The May 28, 2011 letter indicates that neither party has ever changed its basic position at any time during the claim or during the proceedings before the district court. Farm Bureau is not estopped from denying coverage in this matter.

D. The UIM Policy Payment of Loss Conditions Are Not Part of the Insuring Clause and Do Not Control Who is Defined as an Insured

Each coverage part of the Farm Bureau insurance policy is split into the insuring agreement, the exclusions, and the conditions. Farm Bureau Farm and Ranch policy, p.1, R p. 18. When examining an insurance policy, one must look first to the insuring clause to determine for which acts the insurer is providing coverage. For UIM coverage, the insured is defined in the UIM part of the policy. Farm Bureau Farm and Ranch policy, p. 26, R p. 44. After determining that the act for which the claim is being made is covered and that the person making the claim is an insured, one looks at the policy exclusions to see if the act is excluded or if there are additional limitations on coverage. *Id.* Only after completion of this analysis, of both the insuring agreement and the exclusions and finding that coverage still exists, do the conditions come into play in determining how the claim is to be paid. Farm Bureau Farm and Ranch policy, p. 27-28, R p. 45-46.

The district court, in its Memorandum Decision, stated that the policy provided that “any amount due under this coverage” may be paid “[t]o a person authorized by law to receive such payment, or to a person who is legally entitled to recover the damages which the payment represents.” R p. 272. This language is contained in the *conditions* section of the UM/UIM coverage part of Ms. Eisenman’s automobile insurance coverage. Farm Bureau Farm and Ranch policy, p. 27, paragraph 4, R p. 45.

The conditions applicable to the UM/UIM coverages in Ms. Eisenman’s policy include limits of liability, nonstacking of limits, reduction of amounts payable, payment of loss, hit-and-run accident, mediation, arbitration, trust agreement, nonbinding judgment, and interest. R p. 45-46. It is paragraph 4., payment of loss, of the conditions applicable to the UM/UIM coverages that includes the above-quoted language upon which the district court relied to show that the policy contemplated payment of UIM benefits to Defendants who are not defined as insureds under the insuring agreement. R p. 272.

The district court, in its analysis, skipped over the first step in the coverage analysis: who is covered in the insuring agreement? The district court should have stopped its analysis after the insuring agreement when it saw that neither Ms. Eisenman’s estate or her nonresident adult children were defined as insureds for whom UIM benefits could be paid.

The district court relied upon *Sprouse v. Hawk*, 574 So.2d 754, 756-57 (Ala. 1990) as authority for its ruling that Defendants were entitled to receive UIM benefits under Ms. Eisenman’s policy. R p. 271. However, the facts of *Sprouse* were that a husband and father received UIM benefits for the death of his wife. His two sons then intervened to obtain their share of the benefits. All of the persons receiving the benefits in *Sprouse* were defined as

insureds under the policy which covered decedent. In the present case, none of Defendants are defined as insureds in Ms. Eisenman's policy.

II. CONCLUSION

Plaintiff/Appellant Farm Bureau Mutual Insurance Company of Idaho respectfully requests this Court reverse the decision of the district court granting summary judgment to Defendants/Respondents and find that Farm Bureau's underinsured motorist policy, as written, shall be upheld.

In the event that there is any issue as to application of estoppel, then Plaintiff requests that this Court remand the matter to the district court for a factual determination of whether estoppel was proven to exist.

If this Court finds that the District Court's decision should be upheld, the matter should be sent to the District Court for a trial on damages.

DATED this 11 day of October 2011.

SAETRUM LAW OFFICES

By



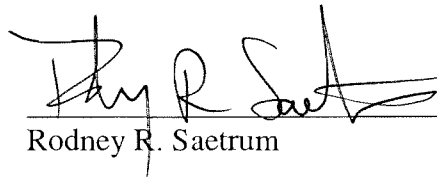
Rodney R. Saetrum
Attorneys for Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11 day of October 2011, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

Michael W. Moore
Brady J. Hall
Moore & Ellia, LLP
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P.O. Box 6756
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- U.S. Mail
- Hand Delivery
- Overnight Mail
- Facsimile



Rodney R. Saetrum

EXHIBIT “1”

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May 28, 2010

Michael W. Moore
Moore & Ellia, LLP
1001 W. Idaho Suite 400
P.O. Box 6756
Boise, Idaho 83707

RE: Insured:	<u>Patricia Eisenman</u>
Claim No.	01097719012007113001
Date of Loss:	November 30, 2007
Claimant:	Michael Eisenman

Dear Mike:

Thank you for your telephone call on the 25th of May. The check which was sent to you for your clients does not require them to sign any form of release. The check represented the undisputed amount owed by Farm Bureau to your clients under Section III –Automobile Insurance, Coverage Q, Medical Payments. As I reflect on our conversation, I do not recall us separating out policy provisions as applied to this payment.

In our opinion, we do not find that your clients come under the definition of an insured under Section III, Coverage P-1 Underinsured Motorist. Your clients are Mrs. Eisenman's relatives, but they did not reside with Mrs. Eisenman on the date of the occurrence. Under the Definitions Applicable to Section III, relative means a person related to the named insured by blood, marriage, or adoption who is a resident of insured's household, including a ward or foster child. Your clients were not residents of Mrs. Eisenman's household at the time of the occurrence. The insuring clause of Coverage P-1-Underinsured Motorist coverage states: "We will pay damages which an **insured** is legally entitled to recover . . . because of a **bodily injury** sustained by an **insured** and caused by an **occurrence**."

Mr. Michael Moore

Page 2

May 28, 2010

As we discussed, there is a basic disagreement over whether your clients can articulate a covered claim by combining the wrongful death statute, estate proceedings, and the policy language addressing damages. Farm Bureau Insurance is struggling with how your clients are insureds, which finding is necessary to determine if there is a grant of coverage.

Again, if you have any case law which supports your clients' position, please forward the same and Farm Bureau would be pleased to reevaluate its position.

Very truly yours,

SAETRUM LAW OFFICES

A handwritten signature in black ink, appearing to read 'R. Saetrum', written over a horizontal line.

Rodney R. Saetrum

c: Steve Johnson