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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 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. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal by Appellant-Plaintiff-Counterdefendant, Farm Bureau Mutual Insurance Company of Idaho, ["Farm Bureau"], from the district court's grant of summary judgment to Defendants-Counterclaimants-Respondents on an issue of insurance coverage in an underinsured motorist claim ["UIM"]. The claim involved an insured decedent's personal representatives and adult children making an underinsured motorist claim against decedent's auto policy. Farm Bureau denied the claim because Defendants were not defined as insureds in the underinsured motorist part of the policy as they were not named insureds and were not living at decedent's residence. R p. 229.

B. COURSE OF PROCEEDINGS IN THE TRIAL COURT

Plaintiff-Counterdefendant-Appellant, Farm Bureau, filed a Complaint, and then an Amended Complaint for declaratory relief against Defendants-Counterclaimants-Respondents Michael John Eisenman, Kathryn Marie, individually and co-personal representatives of the Estate of Patricia Eisenman, Rebecca L. McGavin and Peter Eisenman, individually ["Defendants"]. R p. 4 and 8. The Amended Complaint asked the district court to determine the issue of claimed coverage of a part of the underinsured motorist coverage in the policy. R p. 11. Defendants then filed an answer and a counterclaim against Farm Bureau for breach of contract. R p. 60.

After a short period of discovery, Defendants filed a motion for summary judgment on the insurance coverage issue. R p. 80. Farm Bureau then filed its motion for summary judgment on the insurance coverage issue. R p. 240. District Judge Michael McLaughlin conducted a

hearing on the motions for summary judgment. Tr p. 5 – 37. Judge McLaughlin took the matter under advisement and filed a Memorandum Decision. R p. 266. Judge McLaughlin ruled in favor of Defendants and against Farm Bureau. R p. 273. From that ruling, Farm Bureau filed its timely notice of appeal to this Court. R p. 278.

C. STATEMENT OF FACTS

Farm Bureau sold a policy of insurance to Insured, decedent Patricia Eisenman. R p. 9. The policy was a Farm and Ranch Squire policy which combined coverage for the farm, home, equipment, and automobiles. R p. 13 – 54. Section III of the policy, the automobile insurance coverage part, included insurance for uninsured and underinsured motorists in Coverage P and P-1. R p. 43 – 46. On November 30, 2007, Mrs. Eisenman was walking to a concert at her church near downtown Boise. As she crossed the street, she was struck by an auto driven by Mary Zahm. R p. 267. Ms. Eisenman died of her injuries. *Id.* The driver was convicted of vehicular manslaughter. *Id.*

Two of Ms. Eisenman's adult children became personal representatives of her estate. R p. 153. A claim was made by the personal representatives of Ms. Eisenman's estate against the auto insurance of the driver. R p. 267. The driver's insurer paid the policy limit of liability insurance, $50,000. Ms. Eisenman's surviving adult children retained counsel who made a claim against Mrs. Eisenman's Farm Bureau policy. Farm Bureau paid an accidental death benefit, pursuant to the policy, to the estate. R p. 222. After some time, Defendant's current counsel was retained. Subsequently, one of Ms. Eisenman's personal representatives, made a claim to Farm Bureau under the underinsured motorist coverage part of Ms. Eisenman's policy. A sworn proof of loss was presented to Farm Bureau. R p. 138. The sworn proof of loss also requested the policy limits of Ms. Eisenman's underinsured motorist coverage which were $500,000. R p. 139. Farm Bureau

paid, in addition to the accidental death benefit, the hospital, medical, and funeral costs for Ms. Eisenman to the personal representative's attorney under a separate coverage part. R p. 224.

The medical and funeral expenses were paid under a separate coverage provision in the policy, Coverage Q – Medical Payments. R p. 46, and p. 70-71. After Farm Bureau made its payments, it denied coverage for the underinsured motorist claim for the reason that neither Mrs. Eisenman's estate, the personal representatives of the estate, nor Ms. Eisenman's adult children were insureds as defined by the policy. R p. 70-71. In fact, Defendant adult children admitted that they were not named insureds and were not living with their mother at the time of her death. R p. 247.

After the motions for summary judgment were filed by the parties, District Judge Michael McLaughlin conducted a hearing on the motions for summary judgment, Tr p. 5 – 37. Judge McLaughlin ruled in his Memorandum Decision that the question, in the case, was a matter of first impression in Idaho. He found the issue to be one of statutory construction of Idaho's Wrongful Death Act, Idaho Code §5-311, and how the insurance policy interacts with the Act. R p. 271.

Judge McLaughlin found that Defendant personal representatives of Ms. Eisenman's estate brought this action on her behalf pursuant to Idaho Code §5-311. R p. 271. The district court' decision then examined the language of the policy to see if Ms. Eisenman's personal representatives were entitled to recover pursuant to Idaho Code §5-311, and the decision determined that they were so entitled. R p. 271. For its controlling authority, the district court relied upon a 1990 Alabama case, *Sprouse v. Hawk,* 574 So.2d 754, 756-57 (Ala. 1990). The district court also relied upon the Alabama Wrongful Death Statute, Ala. Code 1975 § 6-5-410,

which allows only a personal representative to bring a wrongful death action against a negligent tortfeasor. *Id.*; R p. 271.

II. ISSUES PRESENTED ON APPEAL

A. Whether the district court erred as a matter of law in finding that the personal representatives of Ms. Eisenman's estate and her heirs, were entitled to recover damages from the underinsured motorist part of Ms. Eisenman's Farm Bureau automobile insurance policy because her personal representatives and her heirs were authorized by law to recover damages under the policy pursuant to Idaho's Wrongful Death Act.

B. Whether Farm Bureau's uninsured/underinsured ["UM/UIM"] motorist policy provides for the recovery of damages only to persons defined as insureds under the insuring agreement of the underinsured motorist part of Ms. Eisenman's Farm Bureau automobile insurance policy.

C. Whether the district court erred in finding that the personal representatives of Ms. Eisenman's estate and her heirs were entitled to recover damages under the underinsured motorist loss payable clause of Ms. Eisenman's Farm Bureau automobile insurance policy rather than under the insuring clause.

III. ARGUMENT

A. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE PERSONAL REPRESENTATIVES OF MS. EISENMAN'S ESTATE AND HER HEIRS, WERE ENTITLED TO RECOVER DAMAGES FROM THE UNDERINSURED MOTORIST PART OF MS. EISENMAN'S FARM BUREAU AUTOMOBILE INSURANCE POLICY BECAUSE THE PERSONAL REPRESENTATIVES AND HEIRS WERE AUTHORIZED BY LAW TO RECOVER DAMAGES UNDER THE POLICY PURSUANT TO IDAHO'S WRONGFUL DEATH ACT.

1. The Standard of Review and the Standard for Summary Judgment

a. The Standard of Review is Free Review.

Summary judgment under I.R.C.P. 56(c) can be granted by a trial court when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct.App.1986). In ruling on a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. All reasonable inferences of fact must be drawn in favor of the nonmoving party. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994). Additionally,

> The burden of proving the absence of material facts is upon the moving party. Once the moving party establishes the absence of a genuine issue, the burden shifts to the nonmoving party to show that a genuine issue of material fact on the challenged element of the claim does exist. The nonmoving party may not rest upon the mere allegations or denials contained in the pleadings, but must come forward and produce evidence by affidavits or as otherwise provided in the rules to set forth specific facts showing that there is a genuine issue for trial. I.R.C.P. 56(e). (Citations omitted).

Levinger v. Mercy Medical Center, Nampa, 139 Idaho 192, 195, 75 P.3d 1202, 1205 (2003). Finally, this Court has stated: "When questions of law are presented, this Court exercises free review and is not bound by findings of the district court, but is free to draw its own conclusions from the evidence presented." *Mutual of Enumclaw v. Box*, 127 Idaho 851, 852, 908 P.2d 153, 154 (1995).

b. The Standard for Granting Summary Judgment is the Same as That Used by the District Court Under I.R.C.P. 56(c).

When reviewing an order for summary judgment, the standard of review for this Court is the same standard used by the district court in ruling on the motion. *Watson v. Weick*, 141 Idaho

500, 504, 112 P.3d 788, 792 (2005). Summary judgment may be granted when the pleadings, affidavits, and discovery documents before the court indicate no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *Id.*; I.R.C.P. 56(c); *Baxter v. Craney,* 135 Idaho 166, 170, 16 P.3d 263, 267 (2000). The moving party carries the burden of proving the absence of a genuine issue of material fact. *Id.*

When questions of law are presented on a motion for summary judgment, the court must determine, "whether a genuine issue of material fact exists and whether the prevailing party was entitled to judgment as a matter of law." *Doe v. City of Elk River,* 144 Idaho 337, 338, 160 P.3d 1272, 1273 (2007). "If uncontroverted facts exist which lead to a definite disposition as a matter of law, summary judgment is appropriate." *G & M Farms v. Funk Irrigation Co.,* 119 Idaho 514, 524, 808 P.2d 851, 861 (1991).

The district court found that there were no genuine issues of fact, but that the dispute centered on how the language in the Farm Bureau underinsured motorist policy interacted with Idaho's Wrongful Death Act, Idaho Code, § 5-311. R p. 271.

2. The Legal Framework for Reviewing Insurance Policies

This Court follows several well established rules for the interpretation of insurance policies. Insurance policies are interpreted the same as other contracts. If there is no ambiguous language in the policy provisions, applicable to the facts of the case, the rules of contract interpretation are followed. When ambiguous language in the applicable provisions is encountered, special rules of interpretation are followed, and the policy is construed against the insurer. *Arreguin v. Farmers Insurance Co. of Idaho,* 145 Idaho 459, 461, 180 P.3d 489, 500 (2006). If confronted with ambiguous language, the reviewing court must determine what a

reasonable person would understand the language to be. *Allstate Insurance Co. v. Mocaby,* 133 Idaho 593, 597, 990 P.2d 1204, 1208 (1999).

A district court must construe the policy as a whole, not focusing on any isolated phrase. *Cascade Auto Glass, Inc. v. Farm Bureau Insurance Co.,* 141 Idaho 660, 663, 115 P.3d 751, 754 (2005). If the policy language is clear and unambiguous, then its coverage is determined as a matter of law in accordance with the plain meaning of the words used. *Id.* 116 Idaho at 662, 115 P.3d at 753. If two or more reasonable, but conflicting interpretations may be derived from the policy language, the language is ambiguous. *Id.*, 141 Idaho at 663, 115 P.3d at 754.

Furthermore, every word and phrase in an insurance contract does not need to be defined in the contract. *Nat'l Union Fire Insurance Co. of Pittsburgh, PA v. Dixon,* 141 Idaho 537, 540, 112 P.3d 825, 828 (2005). An ambiguity is not established merely because the parties present differing interpretations to the court. *Treasure Valley Transit v. Philadelphia Indem. Insurance Co.,* 139 Idaho 925, 928, 88 P.3d 744, 747 (2004).

Finally, where policy language is found to be unambiguous, the court is to construe the policy as written, since the court will not construct or write a new policy for the parties, nor add words to, "create or avoid liability." *Purvis v. Progressive Casualty Insurance Co.,*142 Idaho 213, 216, 127 P.3d 116, 119 (2005).

The district court did not find that the language in the Farm Bureau underinsured motorist policy was ambiguous. R p. 270-273.

B. FARM BUREAU'S UNINSURED/UNDERINSURED MOTORIST POLICY PROVIDES FOR THE RECOVERY OF DAMAGES ONLY TO PERSONS DEFINED AS INSUREDS UNDER THE INSURING AGREEMENT OF THE UNDERINSURED MOTORIST PART OF MS. EISENMAN'S FARM BUREAU AUTOMOBILE INSURANCE POLICY.

1. This case is governed by the version of the uninsured motorist act, Idaho Code § 41-2502(1), in effect in 2007 and the language of the Farm Bureau Policy.

Farm Bureau's underinsured motorist policy must be interpreted according to the language in the policy and the version of Idaho Code § 41-2502(1) which was in effect at the time of the accident in November 2007. *See Appendix A. for the full text of Idaho Code § 41-2502(1) in effect in November 2007.* In 2007, Idaho required all automobile liability policies to offer only uninsured motorist coverage, subject to written refusal by the named insured. *Id.* This Court has held that there is no public policy governing underinsured motorist coverage, and the provisions of the insurance policy govern when determining coverage. *Erland v. Nationwide Insurance Co.,* 136 Idaho 131, 133, 30 P.3d 803, 288 (2001); *Farmers Ins. Co. of Idaho v. Buffa,* 119 Idaho 345, 347, 806 P.2d 438, 440 (1991) ("Underinsured coverage in this state is a matter of contract law, not public policy.") *Fetherston By and Through Featherston v. Allstate Insurance. Co.,* 125 Idaho 840, 843, 875 P.2d 973, 940 (1987), n. 1., (Idaho's statutory scheme does not mandate underinsured motorist coverage).

Idaho's legislature required underinsured motorist coverage to be offered with uninsured motorist coverage on January 1, 2009. So, the coverage afforded by the Farm Bureau underinsured motorist coverage in Ms. Eisenman's policy in effect on the date of the accident must be determined by rules governing contracts and the language of the policy itself. The district court, in its decision, used the 2009 (current) version of Idaho Code § 41-2502(2) in its decision, not the 2007 version of statute when underinsured motorist coverage was not required to be offered. R p. 270.

As of January 5, 2011 this Court has announced that there is a public policy in favor of underinsured motorist coverage. *Hill v. American Family Mut. Insurance Co.,* 150 Idaho 619,

249 P.3d 812 (2011); *see infra* p. 14,. Farm Bureau had of course offered and Mrs. Eisenman had contracted for underinsured motorist coverage before the effective date of the statute.

2. Only Insureds, as defined in the Policy, can receive benefits under the uninsured motorist coverage provisions.

Farm Bureau's underinsured motorist coverage has the following insuring agreement:

COVERAGE P-1 – UNDERINSURED MOTORIST

We will pay damages which an **insured** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** because of **bodily injury** sustained by an **insured** and caused by an **occurrence**. The owner's or operator's liability for these damages must arise from the ownership, maintenance or use of the **underinsured motor vehicle**.

The following additional definitions apply to Coverages P & P-1:

1. **Insured** means:
   a. You and any **relative**;
   b. Anyone occupying an **insured vehicle**; or
   c. Anyone occupying a **nonowned vehicle** while operated by you or your **relative.**

R p. 44.

The bolded words above are defined in the policy.

DEFINITIONS APPLICABLE TO SECTION III

The following definitions apply to Section III.

Throughout this Section, we, us, and our mean the Company named in the Declarations. You and you mean the person named in the Declarations and that person's spouse if a resident of the same household. You and you also refer to a partnership, corporation, limited liability company, estate, or trust named in the Declarations. The following defined words appear in bold print in the policy.

Bodily injury means physical injury or death to a person. . . .

Occurrence means an accident arising out of the ownership, maintenance or use of a **motor vehicle**, including continuous or repeated exposure to conditions which results in unexpected **bodily injury** or **property damage** during the policy period. All **bodily injury** and **property damage** resulting from a common cause shall be considered the result of one **occurrence**. . . .

> **Relative** means a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child.

R p. 20, 21.

The language of the Farm Bureau policy has previously been examined by the Idaho Court of Appeals in *Baker v. Farm Bureau Mutual Insurance Co. of Idaho, Inc.,* 130 Idaho 415, 417, 941 P.2d 1316, 1318 (Ct. App. 1997). Coverage P of the policy in that case was identical to that of Ms. Eisenman's policy. It stated:

> We will pay damages which an insured is legally entitled to recover from the owner or operator of an . . . underinsured motor vehicle because of bodily injury sustained by an insured and caused by an occurrence.

Id.

Bodily injury in *Baker v. Farm Bureau*, as in this case, was defined to include death. *Id.*, R p. 19. Insured was defined to include relatives living in the same household as the named insured. The UIM coverage part of the Farm Bureau policy is unambiguous, and the district court in this case did not find otherwise. Instead, the district court focused on the language in Idaho's Wrongful Death Act which defined heirs who can recover under the Act. Defendants met the definition of an heir in the Act. The district court then went to quote the UIM language in Ms. Eisenman's policy which states:

> We will pay damages which an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury sustained by an insured and caused by an occurrence.

R p. 273.

The district court completed its analysis with the following logic. The first premise is that Idaho's Wrongful Death Act allows personal representatives to sue, on behalf of the statutory heirs, the wrongdoer who caused the death. The next premise is that Defendants are personal

representatives and heirs of Ms. Eisenman's estate. The next premise is that Farm Bureau's loss payable clause, not the insuring agreement, states that "any amount due under this coverage" may be paid "to 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." The next premise is that Defendants as personal representatives and heirs are entitled to recover damages from a wrongdoer under Idaho's Wrongful Death Act. The next premise, is that Farm Bureau's UIM insuring agreement states, "We will pay damages which an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury sustained by an insured and caused by an occurrence." Finally, the district court's logic concluded with this statement:

> The insurance policy in the case specifically provided insurance coverage for Patricia Eisenman in the event of physical injury or death. Furthermore, the Defendants are entitled to recover those damages pursuant to Idaho's Wrongful Death Act. Therefore, the Court grants the Defendants' Motion for Summary Judgment and denies the Plaintiff's Motion for Summary Judgment.

R p. 272 - 273.

The district court's logic is flawed because it failed to first consider the definition of an insured in the policy and then to apply that definition to Defendants who were making the UIM claim for the death of Ms. Eisenman. It is agreed that Ms. Eisenman was the only named insured in the policy. R p. 13. The policy went on to define the term, "relative", as a person related to the named insured by blood, marriage, or adoption who is a resident of insured's household. R p. 21. The term "insured" was further defined in the UM/UIM coverage as the named insured and any relative. R p. 26. Putting the two definitions together, an insured can be the named insured or a relative residing in the same household as the named insured. Defendants were neither named insureds or were they relatives residing in the same household as their mother. If Ms. Eisenman

wished to add her adult nonresident children to her policy, she could have done so by specifically requesting the same, having Farm Bureau's underwriting rate the additional risk, and by paying the additional premium.

The Farm Bureau policy agrees to pay damages to *an insured* who is legally entitled to recover from the owner or operator of an underinsured vehicle. The policy does not agree to pay damages to the *estate* of an insured or to the nonresident family members who are not named insureds on the policy. The district court essentially held that: 1) because Idaho's Wrongful Death Act allows defined family members to sue the tortfeasor who killed their parent; and 2) the policy's loss payable clause allows payment of benefits to a person authorized by law to receive such payment, or to a person who is legally entitled to recover the damages; then 3) the same defined family members who could sue under the Wrongful Death Act should be allowed to claim and collect damages from their parent's UIM policy. This result ignores the plain language of the insuring agreement which limits recovery of UIM benefits to insureds in the policy. The district court did what this Court has previously held courts should not do: create coverage in an insurance policy where it did not exist. *Lovey v. Regence BlueShield of Idaho,* 139 Idaho 37, 41, 72 P.3d 877, 881 (2003).

In *Farmers Ins. Co. of Idaho v. Buffa*, 119 Idaho 345, 347, 806 P.2d 438, 440 (1991), the issue was whether an insurer could impose an offset requirement in its UIM coverage of the payment of the tortfeasor's liability insurance against the limits of the insured's UIM coverage. Claimants argued that the insurer's construction of the offset requirement in the underinsured motorist provisions of that policy were void as against public policy. The Court stated:

> This argument ignores the fact that our statutes do not require an automobile insurer to include underinsured vehicle coverage in its policies or even to offer this coverage to its insureds. Underinsured coverage in this state is a matter of contract law, not public policy. *Scarlett,* 116 Idaho at 822, 780 P.2d at 144; *Meckert v. Transamerica Ins. Co.*,

108 Idaho 597, 701 P.2d 217 (1985); *Blackburn v. State Farm Mut. Auto. Ins. Co.,* 108 Idaho 85, 697 P.2d 425 (1985).

Farmers Ins. Co. of Idaho v. Buffa, 119 Idaho 345, 347, 806 P.2d 438, 440 (1991).

Because underinsured motorist coverage was not required at the time of the accident in this case, the *Buffa* decision that underinsured coverage in Idaho is a matter of contract law is still good law as applied to this case. Because underinsured coverage is a matter of contract law in Idaho, this Court must focus on the plain language of the policy. Expanding the language of the Wrongful Death Act to rewrite the insurance contract to create coverage where none existed is contrary to this Court's prior rulings.

It should be kept in mind that insurance is basically a transfer of risk. In exchange for payment of premium, an insurance company is willing to take the risk of some form of unfortunate loss for specifically identified insureds for certain events. This analysis of risk is the essential part of an insurance company's ability to pay losses and survive as an entity. This basic concept, therefore, forms the necessity for asking questions of prospective insureds as to how many people live in a household, drive vehicles, how many vehicles are there, and what is the driving history of the various individuals. The number of individuals who are insureds increases the risk of eventual accidents. An insurance company can appropriately adjust premium or simply choose not to write the business. *See,* generally, Robert E. Keeton & Alan I. Widiss, *Insurance Law, A Guide to Fundamental Principles, Legal Doctrines and Commercial Practices*, § 1.3(b), at 10-12 (1988), for a discussion of the factors involved in risk transference.

Under the district court's analysis in its decision, the number of individuals who could arguably make claims pursuant to the Wrongful Death Act becomes quiet large depending upon how many relatives there are and how many claimants have received substantial support from the decedent. By increasing the potential number of claimants beyond the number for which

premium was calculated, the district court has expanded Idaho law such that insurers will necessarily have to increase their premiums for UM/UIM coverage.

Farm Bureau maintains that its UIM policy's insuring agreement limits the persons who can obtain UIM benefits to those persons who meet the definition of an insured in the policy. Applying the definition of an insured in the policy to the facts of this case, Defendants adult children of Ms. Eisenman have admitted that they did not live with their mother at the time of her death. R p. 247, 268. Neither the Estate of Ms. Eisenman or the other named Defendants were named insureds in Ms. Eisenman's policy. *Id.* Therefore, the only insured in Ms. Eisenman's policy was Ms. Eisenman herself, the named insured.

The district court agreed with Farm Bureau that none of Defendants were either named insureds or qualified as defined insureds in the policy. R p. 268. Farm Bureau maintains that the language of the insuring agreement governs this case and UIM damages can only be paid to an *insured*, who "is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** because of **bodily injury** sustained by an **insured** and caused by an **occurrence**." Coverage P-1 Underinsured Motorist, above; R p. 44. Defendants are not insureds and cannot recover UIM damages under the Farm Bureau policy.

There has been only one Idaho Supreme Court case involving the declaration of any public policy for UIM insurance policies; *Hill v. American Family Mut. Insurance Co.,* 150 Idaho 619, 249 P.3d 812 (2011). The *Hill* case saw this Court invalidating an exhaustion clause in the insurer's UIM policy. The majority found that the change in the statutory language requiring all auto insurers to offer UIM coverage was not retroactive. *Id.* 249 P.3d at 820, 821. This Court's majority opinion did invalidate the exhaustion clause because it violated the public policy of Idaho by diluting "Idahoans' protection against underinsured drivers and to prevent

insureds from collecting legitimate claims." *Id.* 249 P.3d at 823. There has been no claim or argument in the present case that Farm Bureau's UIM insuring agreement or its definition of an insured is contrary to public policy. Unlike the exhaustion clause in *Hill*, which conditioned receipt of benefits on the payment of the policy limits of the tortfeasor, Farm Bureau's insuring agreement tracks the language of the UIM statute. The Farm Bureau insuring agreement does not expand coverage beyond insureds defined in the policy. There is no violation of public policy in the Farm Bureau policy.

Furthermore, contracts are to be interpreted according to the law at the time the contract is executed. *Smith v. Idaho Hosp. Serv., Inc.,* 89 Idaho 499, 503, 406 P.2d 696, 698 (1965) as cited in *Hill v. American Family Mut. Insurance Co.,* 150 Idaho 619, 249 P.3d 812, 821 (2011). Therefore, the insuring agreement in the Farm Bureau policy is to be applied as written.

This Court should focus on the plain and unambiguous language of the UIM insuring agreement in the Farm Bureau Farm and Ranch policy. It is the policy language which governs the extent of the coverage, not Idaho's Wrongful Death Act, Idaho Code §5-311. The Wrongful Death Act's created a cause of action for the surviving, defined heirs of a decedent. The Wrongful Death Act did not and does not modify the Farm Bureau UIM policy language and create new insureds which were not defined in the policy. This is essentially what the district court did in its decision; it created a new category of insureds not previously identified.

Farm Bureau maintains that the first requirement for coverage in the policy has been overlooked by the district court's decision. An **insured** must be able to recover the damages. Not the insured's estate; not the insured's personal representative; not the insured's adult children who do not live with insured. The insured in this case was Ms. Eisenman, who lived alone. Her adult children who live in Idaho would have been able to have become insureds under her policy

if they had been acceptable to underwriting guidelines and paid the additional premium. But they did not pay additional premium. Her adult children were not defined as the third category of insureds, i.e., relatives living with the named insured in the same residence. Farm Bureau wrote the UIM policy language only to cover claims made by insureds. Farm Bureau did not write the policy to cover any possible third parties who might also have legal claims under the Wrongful Death Act.

Had Ms. Eisenman been severely injured, only she would have a cause of action against the tortfeasor. She would then be able to make a UIM claim on her policy for damages not covered by the tortfeasor's liability insurance. Her adult children would have no cause of action against the tortfeasor for the injuries received by Ms. Eisenman in the accident. This is because her adult children were not insureds as defined by the policy. By tragic happenstance, Ms. Eisenman died of her injuries. Under Idaho law, any claim she had against the tortfeasor ended with her death. *Evans v. Twin Falls County,* 118 Idaho 210, 796 P.2d 87 (1990). Since Idaho has passed a Wrongful Death Act, Idaho Code §5-311, Ms. Eisenman's adult children now have a cause of action for their loss of society and other potential damages against the tortfeasor for her wrongful death. Just because Defendants now have a cause of action against the tortfeasor, does not automatically mean that they have a claim against their mother's UIM policy. The existence of any claim against Ms. Eisenman's UIM policy is now governed by the language in the policy itself. That language limits recovery of UIM benefits to insureds.

Defendants have argued in the district court that once Ms. Eisenman died, and her estate was created, the estate in effect became Ms. Eisenman. Therefore, Ms. Eisenman, through her estate, was legally entitled to recover damages from the tortfeasor. R p. 89; Tr p. 18, L. 14-17.

Idaho's Wrongful Death Act allows either the heirs of the decedent or the decedent's personal representative on behalf of the heirs to bring the action against the tortfeasor. (emphasis added)

Idaho's Wrongful Death Act, Idaho Code §5-311, states:

> (1) When the death of a person is caused by the wrongful act or neglect of another, **his or her heirs or personal representatives on their behalf** may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case as may be just. (Emphasis supplied.)

The Idaho Wrongful Death Act allows certain defined heirs to file an action for recovery of damages for wrongful death from the tortfeasor. However, to allow either Ms. Eisenman's estate or her heirs, who are not defined as insureds in her UIM policy, and who have not paid premiums for the coverage, to recover what amounts to wrongful death damages against Farm Bureau, amounts to changing the UIM coverage into an accidental death policy. Defendants could have easily have become additional named insureds on Ms. Eisenman's auto policy in which case they would be able to collect the UIM benefits because they would have paid the additional premium to become named insureds. That did not happen in our fact situation.

C. THE DISTRICT COURT'S RELIANCE ON ALABAMA CASE LAW AND STATUTES IS MISPLACED AS BOTH THE FACTS AND LAW ARE DISTINGUISHABLE FROM THOSE OF THE PRESENT CASE.

The facts of the present case present a matter of first impression for this Court. R p. 270. The district court recognized this and decided to look to the law of the State of Alabama for guidance in its ruling. R p. 271. The district court relied upon the case of *Sprouse v. Hawk,* 574 So.2d 754 (Ala. 1990). In *Sprouse*, a wife and mother, Mrs. Hawk, living with her husband and two minor sons, died in an auto accident with an uninsured motorist. Her surviving husband had

four State Farm auto policies of which Mrs. Hawk was an insured. One of her sons had a State Farm policy of which Mrs. Hawk was also an insured. The State Farm insuring clause read:

> We [the insurer] will pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle. The bodily injury must be caused by an accident arising out of the operation, maintenance or use of an uninsured motor vehicle.

Id. 574 So.2d 757, n. 3. The payment or loss payable clause stated that, "We will pay any amount due: 1. To the insured; 2. To a parent or guardian if the insured is a minor or an incompetent person; 3. To the surviving spouse; or 4. At our option, to a person authorized by law to receive such a payment." *Id.* 574 So.2d at 755.

The surviving spouse/husband made a claim against all policies for uninsured motorist benefits. State Farm paid the limits of all the policies to decedent's husband. The two sons intervened arguing that the Alabama Wrongful Death Statute, Ala. Code 1975, § 6-5-410, governed the distribution of damages in wrongful death cases, including uninsured motorist payments in a wrongful death case. The Alabama Supreme Court stated the issue to be: "how uninsured or underinsured motorist insurance proceeds are to be distributed when they are being paid as the result of the death of an insured." *Sprouse,* 574 So.2d at 756.

The issue in *Sprouse* is clearly different from that in our case as are the facts. The Hawk family was living together. The issue was the order of distribution of the UM benefit, not if any of the claimants were insureds under the policies. Also, Alabama's Wrongful Death Statue is unique in the United States because only the personal representative can bring the action against the negligent party, and the damages must be paid according to the statute. The Alabama Supreme Court agreed that the damages were to be distributed according to the statute. *Sprouse,* 574 So.2d at 756. Thus, the husband and his two sons shared in the uninsured motorist benefits.

The Alabama Supreme Court further stated that but for the Wrongful Death Statute, there could be no damages of any kind recovered for wrongful death because no right to damages for wrongful death existed at common law. *Id.* at 757. The court also cited the uninsured motorist statute which allowed damages for wrongful death. But, note that the husband and sons of decedent were still insureds under the uninsured motorist policies.

The *Sprouse* facts are not the same as those in our case where Defendants, adult children of Ms. Eisenman, who were not living with her and were not insureds as defined in the policy, are claiming damages under her policy. Ms. Eisenman's insuring clause stated: "We will pay damages *which an insured* is legally entitled to recover from the owner or operator of an underinsured motor vehicle . . .." (Emphasis supplied). R p. 44. The Farm Bureau policy can and did limit payment of UIM benefits to those persons defined as insureds in the policy. The Alabama Supreme Court did not need to consider the insuring agreement in the State Farm policies because surviving insureds were making the claims against the policy. The Alabama court looked only to the loss payable clause which, after coverage had been determined under the insuring agreement, gave the insurer options on how to pay the benefits. This clause was important because the husband had been paid all of the benefits. Under Alabama's Wrongful Death Statute, the benefits had to be paid according to the statute to all of the heirs.

The Alabama Supreme Court found that Mrs. Hawk, and not her husband or sons was the true insured under the State Farm policies. Her husband would not be able to bring a wrongful death action in his individual capacity, only in the capacity of an executor of the estate. *Sprouse* 574 So.2d 754, 757. Lastly note that all of the State Farm policies provided that an insured was also defined as, "5. Any person entitled to recover damages because of bodily injury to an insured under 1 through 4 above." Paragraphs 1through 4 referred to the other definitions of an

insured in the policy. Those were: "1. The first person named in the declarations; 2. His or her spouse; 3. Their relatives; and 4. Any other person while occupying: . . .." *Sprouse* 574 So.2d 755, n 2. All of members of the Hawk family met the definition of an insured in the broad definition contained in the State Farm policies. The above paragraph 5. of the definition of an insured in the State Farm policy is also not included in the definition of an insured in Ms. Eisenman's Farm Bureau policy. *Sprouse* is distinguished on both the law and the facts from the present case.

The *Sprouse* case cited the case of *Satzinger v. Satzinger,* 156 N.J.Super. 215, 383 A.2d 753 (1978) as a similar case. In that case, the facts were that a mother's minor daughter was killed while she was a passenger in a vehicle driven by an uninsured driver. Her daughter was covered under the uninsured motorist coverage of mother's auto policy. The daughter lived with her mother. Mother sued the driver and obtained a judgment. She then made a claim for damages under her own uninsured motorist policy. Her auto insurer settled with her making a payment from her uninsured motorist coverage. The decedent's father, mother's ex-husband, who did not live with the mother and was not an insured under her policy, then made a claim for a share of the settlement mother made with her insurer. One of the holdings in the case was that the uninsured motorist statute was "intended to provide indemnity for damages resulting from an insured's wrongful death caused by an uninsured motorist, payable to whatever person or persons may be entitled to bring an action under the New Jersey Wrongful Death Act." *Id.* at 223, 383 A.2d at 757, as quoted in *Sprouse*, 574 So.2d 754, 757.

As in Alabama, only the estate's administrator had the right to maintain the wrongful death action in New Jersey; the mother had no individual right to maintain a wrongful death action. The divorced father, as an heir under the intestate succession statute, was entitled to share

of the insurance settlement proceeds. *Satzinger v. Satzinger,* 156 N.J.Super. 215, 219, 383 A.2d 753, 755 (1978).

The facts in *Satzinger* are also distinguishable from the facts in the present case. As in *Sprouse*, the case involved uninsured motorist coverage which was required to be offered with an auto liability policy, not an underinsured motorist policy such as Farm Bureau's. The New Jersey Wrongful Death Act only allowed an estate's administrator to bring the wrongful death action. Heirs had no right to bring their own wrongful death actions. The mother's receipt of the insurance benefit was dependent on and the result of the judgment in the wrongful death case where the driver was found to be negligent in causing daughter's death. *Satzinger,* 156 N.J. Super. 215, 222, 383 A.2d 753, 756. The policy benefits had to be shared among the heirs. The mother in the case was also living with her daughter, and daughter was an insured . Also, the New Jersey court declared that uninsured motorist coverage was intended to provide indemnity for damages from an insured's wrongful death, and payable to "whatever person or persons may be entitled to bring an action under the New Jersey Wrongful Death Act . . .." *Satzinger,* 156 N.J.Super. 215, 223, 383 A.2d 753, 756-57 (citations omitted).

Both the Alabama and New Jersey cases dealt with required uninsured motorist coverage for which a state policy had been declared and had wrongful death statutes significantly different than Idaho's version. In the present case, underinsured motorist coverage was not required at the time of the accident. The language of the Farm Bureau policy must govern this Court's decision. The Farm Bureau underinsured motorist insuring agreement limits payment to insureds. Defendants making the claim against Ms. Eisenman's policy are not insureds. Also, the Alabama and New Jersey courts relied on decisions from other jurisdictions in holding that they would only look to their respective wrongful death statutes to see who could bring an action to

recover under the uninsured motorist insurance policy. *E.g., Satzinger,* 156 N.J. Super. 215, 221-22, 383 A.2d 753, 756-57. No detailed analysis of the definition of an insured was undertaken in *Satzinger.*

This lack of detailed analysis of the insuring agreement is a critical element of appeal in the present case. The *Satzinger* court did state that a fund recovered under the Wrongful Death Act is not part of the decedent's estate. *Id.,* 56 N.J. Super. 215, 224, 383 A.2d 753, 757. In that respect, the analysis is different from Defendants' arguments that Ms. Eisenman was entitled to recover her children's wrongful death damages pursuant to Idaho Code § 5-311. R p. 271. Although the district court appeared to find that as long as there is someone who could recover under Idaho's Wrongful Death Act, they can also recover under decedent insured's UIM policy, even though that person is not defined as an insured. Under this analysis, any distant relative could claim that insured decedent was supplying substantial support to them and then make a claim. Idaho Code § 5-311, *infra* at p. 15-16.

The district court's decision noted that the Farm Bureau policy's loss payable clause allowed the payment of any amount due to 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." in conjunction with the persons who can bring a wrongful death action that determined if UIM benefits were to be paid. R p. 268. Actually, this provision in the policy is part of the Conditions Applicable to Coverages P & P-1 [the UM/UIM coverage.] R p. 45. The conditions also include the limits of liability, nonstacking of limits, reduction of amounts payable, hit-and-run accident, mediation, arbitration, trust agreement, nonbinding judgment, and interest in addition to payment of loss. R p. 45-46. The critical distinction here is that as a "condition", the actual payment of the loss does not even arise unless there is coverage for the

claim and the person making the claim. The loss payable clause is not part of the insuring agreement. The loss payable clause does not expand coverage, it simply tells the insured and the company to whom to write the check.

D. SUMMARY AND CONCLUSION

There are of course two basic types of wrongful death acts in the United States. In Alabama and New Jersey, jurisdictions relied upon by the District Court, the wrongful death statute requires that the only proper person to bring a wrongful death action is the personal representative. In Idaho, however, wrongful death actions are individual to each heir who can make a claim against the tortfeasor. In this case, reliance upon Alabama and New Jersey for integration of the wrongful death statute to underinsured motorist coverage is misplaced. The uninsured motorist policies in those two states were specifically written to comply with their state's statutory framework in UM/UIM wrongful death cases. The district court's decision by incorporating as an insured all persons that could possibly make a claim under Idaho's Wrongful Death Act, has rewritten the insurance contract, ignored the concept of risk analysis and underwriting, and effectively changes the UIM coverage into a second automobile accidental death policy.

Farm Bureau's grant of coverage pursuant to the underinsured motorist protection, which includes the definition of the insured, is unambiguous and should be upheld. The analysis of this type of insurance policy is not complex. It begins with first reviewing the grant of coverage, or insuring agreement, which includes defined terms and identification of insureds. Step two is to identify an event or occurrence that activates the coverage. Step three, is the review of the policy provisions as to the nature of the incident and what can or cannot be paid under the terms of the policy. Step four, after coverage has been determined, is the loss payable clause condition. It tells

the insured and the insurance company to whom payment can be made. Depending upon policy provisions, this loss payable clause may identify persons other than insureds. For example, medical providers, lien holders, the fire department for rescue, or it may be individuals or heirs. The loss payable clause does not create coverage; it simply identifies who gets the check.

For the above reasons, Appellant Farm Bureau respectfully requests that the Court reverse the district court's decision granting Respondent's Summary Judgment Motion and find that Farm Bureau's underinsured motorist policy, as written, shall be upheld.

DATED this 18 day of August 2011.

SAETRUM LAW OFFICES

By _____
Rodney R. Saetrum
Attorneys for Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of August 2011, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

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_____ U.S. Mail
__X__ Hand Delivery
_____ Overnight Mail
_____ Facsimile

_____
Rodney R. Saetrum

APPENDIX A – Idaho Code § 41-2502

Idaho Code § 41-2502. Uninsured motorist coverage for automobile insurance. – No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any natural person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death as set forth in section 49-117, Idaho Code, as amended from time to time, under provisions approved by the director of the department of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. The named insured shall have the right to reject such coverage, which rejection must be in writing; and provided further, such coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer.

[I.C., § 41-2502, as added by 1967, ch. 61, § 1, p. 124; amended 1988, ch. 265, § 572, p. 549.]

APPENDIX B – Idaho Code § 5-311

Idaho Code § 5-311. Suit for wrongful death by or against heirs or personal representatives – Damages. – (1) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action under this section, such damages may be given as under all circumstances of the case as may be just.

(2) For the purposes of subsection (1) of this section, and subsection (2) of section 5-327, Idaho Code, "heirs" means:

(a) Those persons who would be entitled to succeed to the property of the decedent according to the provisions of subsection (22) of section 15-1-201, Idaho Code.

(b) Whether or not qualified under subsection (2)(a) of this section, the decedent's spouse, children, stepchildren, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the illegitimate child of a mother, but not the illegitimate child of the father unless the father has recognized a responsibility for the child's support.

1. "Support" includes contributions in kind as well as money.

2. "Services" means tasks, usually of a household nature, regularly performed by the decedent that will be a necessary expense to the heirs of the decedent. These services may vary according to the identity of the decedent and heir and shall be determined under the particular facts of each case.

(c) Whether or not qualified under subsection (2)(a) or (2)(b) of this section, the putative spouse of the decedent, if he or she was dependent on the decedent for support or services. As used in this subsection, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

(d) Nothing in this section shall be construed to change or modify the definition of "heirs" under any other provision of law.

[I.C., § 5-311, as added by 1984, ch. 158, § 3, p. 385; amended 2010, ch. 349, § 1. P. 911]