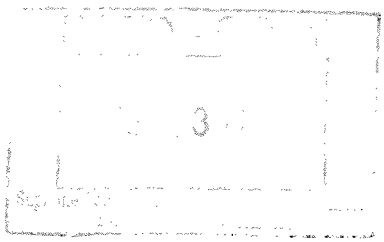
9-23-2011

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

FARM BUREAU MUTUAL INSURANCE COMPANY OF IDAHO, Appellant, MICHAEL JOHN EISENMAN and KATHRYN MARIE, individually, and co-personal representatives of the ESTATE OF PATRICIA EISENMAN; REBECCA L. McGAVIN AND PETER EISENMAN individually, Respondents.	Docket No. 38703-2011 Case No. CV OC 1010533



RESPONDENTS' BRIEF

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

HONORABLE MICHAEL MCLAUGHLIN

Rodney R. Saetrum (ISBN 2921)
Robert R. Gates (ISBN 2045)
SAETRUM LAW OFFICES
P.O. Box 7425
Boise, Idaho 83707
Attorneys for Appellant

Michael W. Moore (ISBN 1919)
Brady J. Hall (ISBN 7873)
Moore & Ellia, LLP
1001 W. Idaho Suite 400
P.O. Box 6756
Boise, Idaho 83707
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE CASE

On November 30, 2007, Patricia Eisenman was walking across Hayes Street near downtown Boise when she was struck and killed by a drunk driver. R. pp. 167-170. Ms. Eisenman was survived by her four adult children: Michael Eisenman, Kathryn Marie, Rebecca McGavin, and Peter Eisenman (hereinafter collectively referred to as the "Heirs"). R. p. 138. After obtaining their mother's Certificate of Death (R. p. 150), Michael and Kathryn duly created The Estate of Patricia Eisenman (hereinafter referred to as the "Estate") and volunteered to serve as the personal representatives of their mother's Estate. R. pp. 153-155. As used hereinafter by the Respondents, the terms "Estate" and "personal representatives" are synonymous.

Mary Zahm was the drunk driver who fatally hit Ms. Eisenman. R. pp. 167-170. She was charged criminally and eventually pled guilty to vehicular manslaughter. R. pp. 172-174. Ms. Zahm was sentenced and ordered to pay restitution of only several thousand dollars for Ms. Eisenman's death. *Id.* Ms. Zahm did have automobile liability insurance with American International Group ("AIG"), but the AIG policy was limited to only $50,000 in coverage. R. p. 138. On behalf of their mother's Estate, Michael and Kathryn filed a claim for damages under Ms. Zahm's policy and AIG subsequently paid the policy limits to the Estate. *Id.*

At the time of her death, Ms. Eisenman had maintained a home and auto insurance policy with Farm Bureau Mutual Insurance Company of Idaho (hereinafter referred to as "Farm Bureau"). R. pp. 96-136. Pursuant to the policy, Ms. Eisenman paid monthly premiums to Farm Bureau as consideration for $500,000 in underinsured motorist

coverage in the event she was injured or killed by an underinsured driver, such as Ms. Zahm. R. p. 134. The precise language of the insuring provision of the underinsured motorist coverage of Farm Bureau's policy provides in pertinent part as follows:

> We [Farm Bureau] 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. 122.

On April 28, 2010, Michael and Kathryn, in their capacity as the personal representatives of their mother's Estate, submitted a sworn proof of loss with Farm Bureau pursuant to the underinsured motorist provision. R. pp. 138-215. In addition to medical and funeral expenses, the proof of loss requested that Farm Bureau pay the wrongful death damages that the personal representatives of Ms. Eisenman's Estate are "legally entitled" to recover from Ms. Zahm pursuant Idaho Code § 5-311. R. p. 138. Commonly known as Idaho's wrongful death statute, Idaho Code § 5-311 is set forth below in relevant part:

> 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 the 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.

Idaho Code § 5-311(1) (emphasis added).

On April 30, 2010, Farm Bureau acknowledged receipt of the sworn proof of loss (R. pp. 217-218), but nonetheless made payment for only $22,941.40 to the order of "Patricia Eisenman Estate" for what Farm Bureau described as the "undisputed amount of

money" owed to the Estate pursuant to the underinsured motorist provision. R. pp. 220-224. The actual check identified the "type" of the policy as "UIM" and noted that the amount was "in payment of undisputed UIM owed to estate." R. p. 224. Most significantly, Farm Bureau identified the "insured" as "Patricia Eisenman Estate". R. p. 224. Despite recognizing that under Idaho law the Estate became the "insured" at the time of Ms. Eisenman's death, Farm Bureau has repeatedly denied paying any wrongful death damages as it had contractually promised pursuant to the underinsured motorist insuring language. R. pp. 217-222. *See also, generally, Idaho Code* § 15-3-703(c).

On May 26, 2010, Farm Bureau commenced this action by filing a Complaint for Declaratory Relief ("Complaint") in the district court in Ada County. R. pp. 4-7. Farm Bureau filed an Amended Complaint for Declaratory Relief ("Amended Complaint") on June 3, 2010, in order to provide the district court with a copy of the applicable insurance policy that Ms. Eisenman had purchased from Farm Bureau. R. pp. 8-59. The Amended Complaint named as defendants the Estate of Patricia Eisenman ("Estate") and each of Ms. Eisenman's surviving children ("Heirs") in their individual capacity. *Id.* For relief, Farm Bureau requested the district court to declare that none of the Heirs qualified as "insureds" because they did not reside with her at the time of her death. R. p. 10-11.

On July 30, 2010, the Estate and Ms. Eisenman's four individual Heirs filed an Answer to Farm Bureau's declaratory action. R. p. 60. In the Answer, they reiterated that the April 28, 2010 proof of loss was made by the Estate to recover economic damages as well as the wrongful death damages the Estate and its personal representatives are "legally entitled" to recover pursuant to Idaho Code § 5-311. R. p. 61.

Farm Bureau was also reminded that the proof of loss was not made by any of the Heirs in their individual capacities. *Id.* In addition, the Estate filed a counterclaim against Farm Bureau for breach of contract damages, attorney's fees, costs, and interest for failing to pay the Estate (i.e. the "insured") the wrongful death damages that the personal representatives of the Estate are legally entitled to recover against Ms. Zahm. R. pp. 63-68.

On November 1, 2010, the Estate filed its Motion for Summary Judgment and requested the district court to "rule as a matter of law" that Farm Bureau's underinsured motorist provision unambiguously provided coverage for the wrongful death damages that the Estate is "legally entitled" to recover against Ms. Zahm pursuant to Idaho Code § 5-311." R. pp. 81, 88-90. The Estate submitted a thorough memorandum in support of its motion in which it illustrated that the issue was one of Idaho contract interpretation and thus a question of law. R. p. 83-91.

On November 15, 2010, Farm Bureau filed its own Motion for Summary Judgment asking the district court to declare "no coverage" for the claim, which it misrepresented as being made by the Heirs, on the grounds that the Heirs do not qualify as "insureds" under the policy. R. pp. 240-241, 249-259. In filing the motion, Farm Bureau continued its misdescription of the Estate's claim, refusing to recognize the personal representatives' right to recover wrongful death damages against Ms. Zahm on behalf of the Heirs pursuant to Idaho Code § 5-311.

The district court heard oral arguments on the cross-motions for summary judgment and subsequently issued its Memorandum Decision on February 22, 2011. R.

pp. 266-274. The Honorable Judge Michael McLaughlin denied Farm Bureau's motion, but granted the Estate's Motion for Summary Judgment. *Id.* In ruling for the Estate, Judge McLaughlin recognized that the dispute was one of contractual interpretation and determined that to resolve the dispute required the court to "look at the language of the insurance policy to see if Ms. Eisenman's personal representatives [i.e. the "Estate"] are entitled to recover pursuant to I.C. § 5-311". R. p. 271. In doing so, Judge McLaughlin held that the Estate is entitled to recover wrongful death damages under the policy. *Id.*

ADDITIONAL ISSUES ON APPEAL

The multiple issues that Farm Bureau has presented on appeal mischaracterize the trial court's holdings, introduce "straw man" arguments, and pose unnecessary questions that this Court need not resolve. This case merely involves the interpretation of an unambiguous insurance provision. Farm Bureau sold Ms. Eisenman an insurance policy which provided underinsured motorist coverage. In exchange for monthly premiums, Farm Bureau promised Ms. Eisenman that it would pay to her Estate any and all recoverable "damages" in the event of her death by an underinsured motorist. Idaho Code § 5-311 clearly allows Ms. Eisenman's personal representatives (i.e. her "Estate") to recover wrongful death damages from Ms. Zahm. Therefore, the sole issue before this Court is: Whether Farm Bureau is contractually obligated pursuant to the underinsured motorist provision to pay the personal representatives of the Estate those wrongful death damages? The answer is "yes".

ATTORNEY FEES ON APPEAL

The Respondents hereby make a claim for attorney fees pursuant to Idaho Code § 41-1839. Farm Bureau failed to pay the wrongful death damages "justly due" under the policy within thirty (30) days after the Estate furnished Farm Bureau with an adequate proof of loss on April 28, 2010. *See, e.g., Cherry v. Coregis Ins. Co.,* 146 Idaho 882, 887 (2009) and *Parsons v. Mutual of Enumclaw Ins. Co.*, 143 Idaho 743, 748 (2007). *But see, e.g., Hill v. American Family Mut. Ins. Co.*, 150 Idaho 619, ___, 249 P.3d 812, 824 (2011) (Court did not award attorney's fees on appeal where Appellant had only been successful in vacating the lower court's award of summary judgment in favor of the insurer). The facts in *Hill* are distinguishable from the instant case. Here, the Respondents prevailed in the lower court, but the matter was certified for immediate appeal pursuant to Rule 54(b) before the Respondents were given an opportunity to prove the total amount "justly due" or obtain their award of attorney fees pursuant to Idaho Code § 41-1839. It was Farm Bureau who appealed, not the Estate or Ms. Eisenman's Heirs. Further, by prevailing on the issue of coverage, Respondents contend that, by corollary, they also proved that at least some amount was "justly due."

ARGUMENT

1. THE INTERPRETATION OF A PROVISION IN AN INSURANCE POLICY IS A QUESTION OF LAW OVER WHICH THIS COURT EXERCISES "FREE REVIEW" ON APPEAL.

When interpreting insurance policies, Idaho courts are to apply the general rules of contract law subject to certain special canons of construction. *Brinkman v. Aid Ins. Co.,* 115 Idaho 346, 352 (1988). Insurance policies are like any other bilateral contract; they

are a matter of contract between the insurer and the insured. *Id.* Beginning with the plain language of the insurance policy, the first step is to determine whether or not there is an ambiguity. *Martinez v. Idaho Counties Reciprocal Management Program*, 134 Idaho 247, 250 (2000). Whether an ambiguity exists is a question of law. *DeLancey v. DeLancey*, 110 Idaho 63, 65 (1986). Here, the parties agree that the underinsured motorist provision is unambiguous.

Interpretation of an unambiguous written contract is also a question of law over which an appellate court will exercise free review. *St. Clair v. Krueger*, 115 Idaho 702 (1989). "Where the policy language is clear and unambiguous, coverage must be determined, as a matter of law, according to the plain meaning of the words used." *Clark v. Prudential Property and Cas. Ins. Co.*, 138 Idaho 538, 541 (2003). More importantly, where the policy language is unambiguous, Idaho courts must "construe the policy as written" and "cannot create a liability not assumed by the insurer nor make a new contract for the parties or one different from that plainly intended, nor add words to the contract of insurance to either create or avoid liability." *Armstrong v. Farmers Ins. Co. of Idaho*, 147 Idaho 67, 70 (2009) (emphasis added).

Where the policy is ambiguous its meaning is a question of fact. *DeLancey*, 110 Idaho at 65 (1986). In a declaratory judgment action, a district court may resolve issues of fact incidental to the determination of rights and duties under the contract. See *I.C. 10-1209*. See also, *Farmers Ins. Exchange v. Tucker,* 142 Idaho 191, 194 (2005). An ambiguity exists where the "policy is reasonably subject to conflicting interpretations." *Arreguin v. Farmers Ins. Co.*, 145 Idaho 459, 461 (2008). When confronted with

ambiguous language in an insurance contract, Idaho courts must determine what a reasonable person would have understood the language to mean. *Mutual of Enumclaw Ins. Co. v. Roberts*, 128 Idaho 232, 235 (1996). The words used in the insurance policy must then be construed in their ordinary meaning. *Id.* However, as contracts of adhesion, not typically subject to negotiation between the parties, an ambiguity "must be construed most strongly against the insurer." See *Moss v. Mid-American Fire and Marine Ins.* Co., 103 Idaho 298, 300 (1982). The burden is on the insurer to use clear and precise language if it wishes to restrict the scope of coverage. *Id.*

In the district court below, Judge McLaughlin recognized the issue as a question of law and granted the Estate's motion for summary judgment. R. p. 271. Judge McLaughlin's decision was correct and this Court should affirm his Honor's ruling. However, when this Court is presented with a question of law on appeal, it "exercises free review and is not bound by the findings of the district court, but is free to draw its own conclusion from the evidence presented." *Mutual of Enumclaw v. Box*, 127 Idaho 851, 852 (1995). Likewise, when reviewing an order for summary judgment on appeal, the appellate court exercises free review in determining whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 852 (Ct. App. 1986). The appellate court uses the same summary judgment standard used by the district courts below. *Cristo Viene Pentecostal Church v. Paz,* 144 Idaho 304, 307 (2007).

Summary judgment is appropriate "if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). If there is no genuine issue of material fact, only a question of law remains, over which the courts exercise free review. *Jones v. HealthSouth Treasure Valley Hosp.*, 147 Idaho 109, 111 (2009). The burden of establishing the absence of a genuine issue of material facts is on the moving party. *Porter v. Bassett*, 146 Idaho 399, 403 (2008). The district court is to liberally construe all disputed facts in favor of the nonmoving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the nonmoving party. *Id.*

"It is axiomatic that upon a motion for summary judgment the non-moving party may not rely upon its pleadings, but must come forward with evidence by way of affidavit or otherwise which contradicts the evidence submitted by the moving party, and which establishes the existence of a material issue of disputed fact. *Jones*, supra, 147 Idaho at 112 (quoting *Zhem v. Associated Logging Contractors, Inc.*, 116 Idaho 349, 350 (1998)). The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment. *Van v. Portneuf Med. Ctr.*, 212 P.3d 982 (2009). "A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment." *Id.* Rather, the nonmoving party must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial. *Id.* Further, "if the nonmoving party fails to provide a sufficient showing to establish the essential elements of his or her case, judgment shall be granted to the moving party." *Porter v. Bassett*, 146 Idaho 399, 403 (2008).

2. THE UNDERINSURED MOTORIST PROVISION THAT MS. EISENMAN PURCHASED FROM FARM BUREAU UNAMBIGUOUSLY PROMISED TO PAY ANY AND ALL "DAMAGES" THAT MS. EISENMAN'S ESTATE IS LEGALLY ENTITLED TO RECOVER AGAINST MS. ZAHM, INCLUDING WRONGFUL DEATH DAMAGES PURSUANT TO IDAHO CODE § 5-311.

Again, the pertinent portion of the insuring agreement of the underinsured motorist coverage that Ms. Eisenman purchased from Farm Bureau reads as follows:

> We [Farm Bureau] 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. 122.

None of the above terms or definitions are in dispute. In fact, Farm Bureau agrees that the underinsured motorist provision is unambiguous. Specifically, Farm Bureau concedes that Ms. Eisenman was an "insured" at the time of her unfortunate death. R. pp. 75-79. Similarly, it is undisputed that the collision was an "occurrence" and that Ms. Zahm was operating an "underinsured motor vehicle." *Id.* Regardless, it goes without saying that the limit of Ms. Zahm's AIG policy (i.e. $50,000) is significantly less than the limits of Ms. Eisenman's underinsured motorist coverage (i.e. $500,000). Further, Farm Bureau expressly included "death" within the definition of "bodily injury", thus promising Ms. Eisenman that Farm Bureau would pay any and all recoverable "damages" in the event of her untimely death due to an "occurrence". R. p. 20 (defining "bodily injury" as "physical injury or death to a person.").

The Farm Bureau policy, including its underinsured motorist provision, was written in Idaho and sold to an Idaho insured. Idaho law clearly governs and the policy

must be viewed as contemplating Idaho law, including Idaho's probate statutes and wrongful death statute, particularly in view of the fact that this policy specifically covered "bodily injury" which was defined to include death. Idaho's wrongful death statute provides in pertinent part as follows:

> 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...

Idaho Code § 5-311(1). It is well-settled in Idaho that the Estate may sue Ms. Zahm to collect wrongful death damages on behalf of Ms. Eisenman's Heirs pursuant to Idaho's wrongful death statute. *Idaho Code* § 5-311. *See, generally, Turpen v. Garnieri*, 133 Idaho 244 (1999) and *Russell v. Cox*, 65 Idaho 534 (1994) [establishing that an action pursuant to Idaho Code § 5-311 may be maintained by the personal representatives of the decedent).

Under Idaho law, upon the death of an individual, the estate and through it the personal representatives, hold all rights, contract and otherwise, previously held by the decedent. 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. Prior to this litigation,

Farm Bureau recognized that the Estate is the "insured". R. p. 220-224 (in making partial payment for the "undisputed UIM owed to estate", Farm Bureau identified "Patricia Eisenman Estate" as the "insured".)

Under Farm Bureau's insuring provisions, Farm Bureau inserted no language restricting or otherwise limiting the type or nature of the "damages" that it promised to pay. In fact, Farm Bureau specifically included "death" within the term "bodily injury". In drafting the insuring provision of the underinsured motorist coverage, Farm Bureau broadly promised to pay any and all damages regardless of who they belong to, so long as they occurred because of "bodily injury", including death, sustained by Ms. Eisenman. R. p. 44. As Judge McLaughlin noted, other provisions of the policy support this analysis. R. p. 268. In the conditions section of the Farm Bureau policy, Farm Bureau provided for the payment of damages "[t]o a person authorized by law to receive such payment or to a person who is legally entitled to recover damages which the payment represents." R. p. 45. This language clearly contemplates payment to one legally entitled to recover, such as the personal representatives of the Eisenman Estate. Here, the personal representatives are specifically authorized by Idaho Code § 5-311 to pursue this claim on behalf of the Estate and the Heirs.

This Court must apply the plain meaning of the provision and broadly construe the policy as written. *Clark v. Prudential Property and Cas. Ins. Co.*, 138 Idaho 538, 540 (2003). This Court is not allowed to apply a limited definition of "damages" or otherwise create exceptions that Farm Bureau did not expressly include in its policy. *Armstrong v. Farmers Ins. Co. of Idaho*, 147 Idaho 67 (2009). Farm Bureau did not exclude wrongful

death damages and no such exception can be created at this time. Even if the meaning of "damages" is ambiguous, any such ambiguity must be construed strongly against Farm Bureau as it would act to exclude coverage. *See, e.g., Moss v. Mid-America Fire and Marine Ins. Co.*, 103 Idaho 298, 300 (1982).

Finally, the district court's reliance on *Sprouse v. Hawk*, 574 So.2d 754 (Ala. 1990) is not misplaced as Farm Bureau suggests. As a preliminary matter, the wrongful death statute at issue in *Sprouse* allowed the personal representatives to recover on behalf of the heirs, just like Idaho Code § 5-311. Further, the holding in *Sprouse* stands for the proposition that proceeds received under an insurance policy representing wrongful death damages may be distributed according to a state's wrongful death statute. 574 So.2d 754, 757. To distribute the proceeds accordingly in the instant case will be consistent with Idaho Code § 5-311 and Farm Bureau's underinsured motorist provision. *Idaho Code* § 5-311 calls for the proceeds obtained by the personal representatives to be distributed amongst Ms. Eisenman's four children all of whom qualify as "heirs" under the statute. *Idaho Code* § 5-311(1) and (2)(b). Similarly, Farm Bureau's own policy language allows the wrongful death benefits to be made either to the Estate, the personal representatives, or directly to the Heirs. R. p. 45. Farm Bureau's "payment of loss" provision provides that payment may be made to the "insured" (i.e. the Estate) as well as:

> 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.

R. p. 45. Farm Bureau's choice of language in its "payment of loss" provision clearly indicates that Farm Bureau contemplated payments under the policy to be made to an

estate, the personal representatives, or anyone else who can legally receive such payments. Farm Bureau wrote this policy in Idaho and must have been aware of Idaho's probate statutes, as well as Idaho Code § 5-311. Accordingly, payments representing wrongful death damages may be paid directly to the Estate or the Heirs in this matter.

3. FARM BUREAU HAS PRESENTED VARIOUS INACCURACIES AND "STRAW MAN" ARGUMENTS WHICH THIS COURT SHOULD REJECT OR DISREGARD COMPLETELY.

First and foremost, Farm Bureau has repeatedly argued throughout this litigation that the Heirs are not entitled to any damages or benefits because they are not "insureds" as defined under the policy. This argument misses the point entirely. The Estate has never argued that the Heirs are "insureds". Ms. Eisenman was the sole named "insured". Through the probate process, Ms. Eisenman's Estate and its personal representatives have become the "insured". Again, this fact really is not in dispute. *See, e.g,* R. p. 224 (in which Farm Bureau identified the "insured" as the "Patricia Eisenman Estate"). The proof of loss was submitted by the Estate to recover the wrongful death damages that it is legally entitled to collect from Ms. Zahm pursuant to Idaho Code § 5-311. R. pp. 138-215. Whether Ms. Eisenman's individual Heirs are "insureds" is irrelevant.

Second, Farm Bureau represents that it has never paid any damages to the Estate pursuant to the underinsured motorist provision and that the provision did not promise to pay any damages to Ms. Eisenman's Estate. *Appellant's Brief*, pp. 3, 12. These claims are incorrect and disingenuous and Farm Bureau should be estopped from making such arguments. Obviously, Ms. Eisenman was living at the time she purchased the policy so no Estate had yet been created. However, by including "death" within the definition of

"bodily injury", the underinsured motorist policy contemplated that damages would be payable to the Estate and/or personal representatives in the event of Ms. Eisenman's death. Further, Farm Bureau has already paid damages to the Estate, thus recognizing the Estate's right to receive payment for underinsured motorist benefits. R. pp. 220-224. By way of the May 19, 2010 check, Farm Bureau specifically paid $22,941.40 to the Estate in payment of the "undisputed UIM owed to estate." R. p. 224. It is important to note yet again that Farm Bureau identified the Estate as the "insured" in making the partial payment. R. p. 224.

Third, Farm Bureau unnecessarily cites to the Idaho Supreme Court case *Evans v. Twin Falls County*, 118 Idaho 210 (1990). In *Evans*, the Court affirmed its prior holding that "an injured person who is dead cannot benefit from an award for *his* pain and suffering." 118 Idaho 210, 214 (emphasis the Court's) (quoting *Vulk v. Haley*, 112 Idaho 855, 859 (1987)). In other words, Idaho does not recognize a "survival" claim. However, in this case, the Estate is not attempting to collect damages representative of Ms. Eisenman's own pain and suffering that was certainly inflicted upon her at the time of her death. Instead, the Estate is making a claim on behalf of Ms. Eisenman's Heirs for the damages they suffered as a result of her death. Such a claim is specifically authorized in Idaho pursuant to Idaho Code § 5-311 as was clearly recognized by the Court in *Evans v. Twin Falls County*. 118 Idaho at 213-216.

Fourth, Farm Bureau's discussion of *Farmers Ins. Co. of Idaho v. Buffa*, 119 Idaho 345 (1991) (superseded by statute) and the Idaho Legislature's amendment to Idaho Code § 41-2502 is misplaced. In *Buffa*, the claimants argued that unfavorable language in the

underinsured motorist provision was void as against public policy. 119 Idaho 345, 346. In rejecting the argument, the Court in *Buffa* was quick to point out that Idaho statutes did not require an automobile insurer to provide underinsured motorist coverage, and thus held that "[u]nderinsured coverage in this state is a matter of contract law, not public policy." 119 Idaho 345, 347 (citing *Nationwide v. Scarlett*, 116 Idaho 820, 822 (1989) (superseded by statute). However, in 2008, the Idaho Legislature made the issue of underinsured motorist coverage a matter of public policy by enacting legislature that forces insurers to at least offer the coverage. *See Idaho Code* § 41-2502(2). *See also, Hill v. American Family Mut. Ins. Co.,* 150 Idaho 619, ___, 249 P.3d 812, 816-17.

Here, the Respondents agree that when Ms. Eisenman purchased underinsured motorist coverage from Farm Bureau in 2007 that insurers in Idaho were not yet required to offer such coverage and that it was not yet a matter of public policy. However, this is irrelevant to the present dispute. The Estate is not attempting to invalidate Farm Bureau's underinsured motorist provision on the grounds of public policy as the claimants were trying to do in *Buffa*. Rather, the Estate seeks to have this Court enforce the provision as a matter of contract law because it unambiguously provides coverage for wrongful death damages that the Estate is "legally entitled" to recover under Idaho law. In fact, applying the plain meaning of Farm Bureau's underinsured motorist provision, as the Estate hopes this Court will do, would be consistent with Idaho's newly-stated public policy: "to protect Idaho's citizens from drivers carrying policies above the statutorily required policy levels but who have insurance insufficient to compensate their tort victims." *Hill*, 249 P.3d 812, 816. To allow the Estate to collect wrongful death

damages on behalf of Ms. Eisenman's heirs under the policy will serve to compensate Ms. Zahm's tort victims where she herself has failed to do so.

CONCLUSION

For the foregoing reasons, the Estate and Ms. Eisenman's Heirs respectfully submit that this Court should AFFIRM the trial court's decision granting the Estate's motion for summary judgment.

DATED this 23rd day of September, 2011.

MOORE & ELIA, LLP

Brady J. Hall, of the firm
Counsel for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of September, 2011, I served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

Rodney R. Saetrum
Robert R. Gates
Saetrum Law Offices
P.O. Box 7425
Boise, Idaho 83707
Attorneys for Farm Bureau

__X__ U.S. Mail, postage prepaid
_____ Hand Delivered
_____ Overnight Mail
_____ Facsimile Transmission 336-0448
_____ E-Mail

Brady J. Hall