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IN THE SUPREME COURT OF THE STATE OF IDAHO

CHRISTINA BROOKSBY, Plaintiff-Appellant, vs. GEICO GENERAL INSURANCE COMPANY, Defendant-Respondent.	Supreme Court Docket No. 38761-2011 (Bonneville County District Court Docket No. CV-2010-6403)

RESPONDENT'S RESPONSE BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, In and for the County of Bonneville

HONORABLE DANE H. WATKINS, JR., DISTRICT JUDGE, PRESIDING

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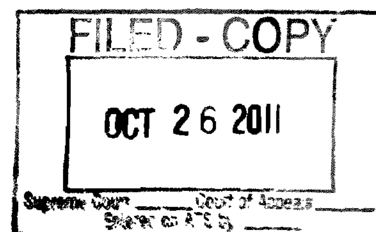

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I. STATEMENT OF THE CASE

A. Nature of the Case

This appeal arises from the District Court's granting of Defendant-Respondent GEICO General Insurance Co.'s ("GEICO") motion to dismiss pursuant to Idaho Rule of Civil Procedure 12(b)(6), thereby dismissing a direct action by non-insured Plaintiff-Appellant Christina Brooksby ("Brooksby") against GEICO regarding an automobile insurance policy issued by GEICO to a third-party not involved in this litigation, Craig Brooksby. Brooksby appeals, contending that the District Court erred in dismissing her suit.

B. Course of the Proceedings

Brooksby's Complaint was filed on October 20, 2010.[1] (R. at 3-6.) GEICO thereafter filed its Motion to Dismiss Pursuant to I.R.C.P. 12(b)(6) and related memorandum on December 15, 2010. (R. at 7-16.) Following briefing by the parties and oral argument thereon held on February 10, 2011, the Court issued its Memorandum Decision Re: Motion to Dismiss on March 8, 2011, granting GEICO's Motion to Dismiss. (R. at 39-45.) The District Court issued its Judgment on March 8, 2011 (R. at 46-47), and Brooksby subsequently filed her Notice of Appeal on April 15, 2011 (R. at 48-51).

---

[1] By way of background, Brooksby initiated suit against her father and a different GEICO-related entity initially in an action entitled *Christina Brooksby v. Government Insurance Employees Company and Craig Brooksby*, Case. No. 09-7120 (Bonneville County) on December 4, 2009, as reflected in this Court's online Data Repository (available at https://www.idcourts.us/repository/mainpublic_id.do?forward=mainpublic_id). The action against the other GEICO-related entity has been dismissed.

C. Concise Statement of the Facts[2]

Brooksby's Complaint alleges that on or about December 8, 2007, she was travelling as a passenger in Craig Brooksby's vehicle, which was involved in a motor vehicle collision. (R. at 4.) Brooksby's Complaint further alleges that she was taken to the hospital and treated for injuries sustained in the collision. (*Id.*) Brooksby's Complaint further alleges that GEICO insured Craig Brooksby under an automobile insurance policy ("Policy"). (*Id.*) Brooksby's Complaint then asserts that she made an insurance claim against Craig Brooksby's policy for bodily injuries and other damages she sustained in the collision, which claim was denied. (*Id.*) Brooksby sought the following relief:

> 1. That Craig Brooksby was insured by Defendant [GEICO] at the time of the subject collision.
>
> 2. That Craig Brooksby had in effect liability coverage at the time of the subject collision.
>
> 3. That there are no applicable exclusions under the Policy which would allow Defendant to deny coverage for damages Plaintiff sustained as a result of the subject motor vehicle collision.
>
> 4. For such other and further relief as the Court deems just and proper.

(R. at 5.)

Brooksby's Complaint contains no allegation that she is an insured under the GEICO

---

[2] Brooksby's Statement of Facts section does not clarify that the majority of the 'facts' identified – particularly as to the alleged accident and alleged claim process, cited as "R. at 4" and "R. at 5" – are merely allegations stated in her Complaint (R. at 3-6), and have not in any way been established or otherwise proven in the litigation, nor did Brooksby verify the Complaint or submit any affidavit in support of the Complaint's allegations.

Policy. (R. at 3-6.) Brooksby's Complaint contains no allegation that any judgment had been secured by her against Mr. Brooksby. (*Id.*) Brooksby's Complaint further lacks any allegation that she had any ownership interest in the vehicle involved in the collision. (*Id.*) Brooksby's Complaint identifies no bases, whether by statute, common law, or contract, providing her standing to initiate suit against GEICO as an injured party. (*Id.*)

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

GEICO does not identify any additional issues on appeal.

III. ATTORNEY FEES ON APPEAL

GEICO does not seek fees on appeal in this matter, but requests an award of costs should it prevail, pursuant to I.A.R. 40, and/or Idaho Code §10-1210.

IV. SUMMARY OF ARGUMENT

Brooksby's action, as framed in her Complaint, is barred by Idaho's long-established prohibition on third-party direct actions by a non-insured against an insurer. This principle is grounded in this Court's recognition that "[t]he basis of the no-direct-action rule is that the person allegedly injured by the insured is not a party to the insurance contract and has no rights under it. 'Insurance policies are a matter of contract between the insurer and the insured.'" Hartman v. United Heritage Property and Cas. Co., 141 Idaho 193, 199, 108 P.3d 340, 346 (2005). Further, Idaho has not recognized any exception to this rule for declaratory actions by non-insureds, nor does the recent amendment to I.R.C.P. 57 create any right of a non-insured to seek declaratory relief. In the present matter, Brooksby's Complaint makes no contention that

she has a contractual relationship with GEICO, and only seeks declaratory rulings as to what Craig Brooksby's contract with GEICO might require.

Further, Brooksby's reliance on out-of-state authority is unhelpful. All of the jurisdictions identified provide some right to judgment creditors to initiate a direct action against a tortfeasor's insurer, either by way of statute or common law recognition. Idaho has no direct action statute, and this Court has not permitted judgment creditors to pursue direct actions against insurers. Hartman, 141 Idaho at 345 ("We have never held that an insured's judgment creditor has a direct action against the insurer. ... We have previously held, 'A third party may not directly sue an insurance company in an attempt to obtain the coverage allegedly due the insurer's policyholder.'"). In Brooksby's case, however, the Complaint fails to make any allegation that she is a judgment creditor, and otherwise fails to identify what statute, common law, or contractual provision she asserts gives her standing to seek a direct action against GEICO.

Nor does public policy dictate a different result. To the contrary, Idaho has a stated public policy that prevents invasion of the insurer-insured contractual relationship by outsiders, and this Court has also indicated its reluctance to allow declaratory actions that do not serve a "useful purpose." Even were this Court to abandon its long-standing prohibition on direct actions, Brooksby's action would serve no "useful purpose," given, again, Brooksby's Complaint fails to make any allegation that she is a judgment creditor, and otherwise fails to identify what statute, common law, or contractual provision she asserts gives her standing to seek a direct action against GEICO even were she to hold a judgment against Craig Brooksby.

Finally, Brooksby's argument that the District Court erred in utilizing I.R.C.P. 12(b)(6) in dismissing her suit against GEICO fails. The District Court's cited authority does, in fact, illustrate the necessary showing to survive a standing challenge, which showing Brooksby did not make. Further, the District Court did not look beyond the pleadings in reaching its decision, as the District Court was actually noting the lack of necessary allegations by Brooksby required to survive a standing challenge.

For these reasons, the judgment of the District Court, dismissing Brooksby's action against GEICO, should be affirmed.

V. STANDARD OF REVIEW

As recently summarized by this Court:

> "[A] district court's dismissal of a complaint under I.R.C.P. 12(b)(6) shall be reviewed de novo." Taylor v. McNichols, 149 Idaho 826, 832, 243 P.3d 642, 648 (2010). The Court on appeal must determine "whether the non-movant has alleged sufficient facts in support of his claim, which if true, would entitle him to relief." Orrock v. Appleton, 147 Idaho 613, 618, 213 P.3d 398, 403 (2009) (quoting Rincover v. Dep't of Fin., 128 Idaho 653, 656, 917 P.2d 1293, 1296 (1996)). The Court must "draw[ ] all reasonable inferences in favor of the non-moving party." Taylor v. Maile, 142 Idaho 253, 257, 127 P.3d 156, 160 (2005) (citation omitted). "After drawing all inferences in favor of the non-moving party, the Court then examines whether a claim for relief has been stated." Id.

Hoffer v. City of Boise, 151 Idaho 400, 257 P.3d 1226, 1228 (2011). Further, as this Court has explained:

> In order to withstand a motion to dismiss, the nonmoving party must allege all essential elements of the claims presented. If the plaintiff can prove no set of facts upon which the court could grant relief, the complaint should be dismissed. See Gardner v. Hollifield, 96 Idaho 609, 611, 533 P.2d 730, 732 (1975).

Johnson v. Boundary School Dist. No. 101, 138 Idaho 331, 334, 63 P.3d 457, 460 (2003). Finally, "[w]here a case has been dismissed because of a lack of standing, this Court must examine **whether Plaintiffs have sufficiently alleged the requisite elements of standing in their complaint** to survive a 12(b)(6) motion to dismiss." Taylor v. Maile, 142 Idaho 253, 257, 127 P.3d 156, 160 (2005)(emphasis added).

VI. ARGUMENT

A. Direct Actions Are Not Permitted in Idaho.[3]

1. Idaho's bar on third-party actions, generally.

In Idaho, third-parties cannot sue an insurance company under an insured's insurance policy. "'It is well established that absent a contractual or statutory provision authorizing the action, an insurance carrier cannot be sued directly and cannot be joined as a party defendant." Graham v. State Farm Mut. Automobile Ins. Co., 138 Idaho 611, 67 P.3d 90, 92 (2003) (quoting Pocatello Indus. Park Co. v. Steel West, Inc., 101 Idaho 783,791, 621 P.2d 399, 407 (1980)). The Idaho Supreme Court has previously held that a third-party cannot maintain a direct action against an insurer on the theory that the plaintiff was a third-party beneficiary under an

[3] As noted in GEICO's arguments before the District Court (R. at 11, 28), GEICO assumes that Brooksby is advancing the position that Idaho law applies, as reflected by Brooksby's Idaho law argument in her Complaint (R. at 5, ¶¶15-16) and Brooksby's failure to identify other salient facts which might be determinative of a choice of law question particularly relating to interpretation of the Complaint, including the residence of Craig Brooksby and the location where the subject vehicle is primarily garaged. Thus, GEICO's arguments are framed under Idaho law, given both the procedural standing requirements under Idaho law, and the absence of sufficient allegations in this 12(b)(6) motion context to establish application of a different state's law at this time. GEICO does not waive any arguments it may have as to the applicable law that may ultimately apply in this action (including, but not limited to, California law), and does not necessarily agree that Idaho law would ultimately govern resolution of this dispute.

insurance policy. Downing v. Travelers Ins. Co., 107 Idaho 511, 515, 691 P.2d 375, 379 (1984).

The Idaho Supreme Court has also prevented a third-party from joining to the litigation the insurer of a tortfeasor for the insurer's alleged intentional delay of payment of a claim. Hettwer v. Farmers Ins. Co. of Idaho, 118 Idaho 373, 797 P.2d 81 (1990). The plaintiff in Hettwer was injured in an automobile accident by defendant. *Id.* at 373. The plaintiff attempted to join the defendant's insurance company as a defendant, alleging that (1) the insurance company insured the defendant under an automobile liability policy at the time of the accident, (2) the plaintiff had presented claims to the insurance company for payment under the policy, and (3) the insurance company had intentionally and tortiously denied or delayed payment on these claims. *Id.* The Idaho Supreme Court held there was no basis for a third-party claim against the insurance company. *Id.* at 374. Not only did the Idaho Supreme Court affirm the dismissal of the action against the insurance company, but the Court stated, that it found the appeal to be "unreasonable and without foundation." *Id.*

Thus, the law in Idaho as to whether a third-party may bring a cause of action against an insurer has been well settled – in summary, direct actions are not permitted. *See, e.g.,* Pocatello Indus. Park Co. v. Steel West, Inc., 101 Idaho at 791 ("It is well established that absent a contractual or statutory provision authorizing the action, an insurance carrier cannot be sued directly and cannot be joined as a party defendant."); Downing v. Travelers Ins. Co., 107 Idaho at 514-15 ("Appellant should not be allowed to sue the insurance company directly any more than a tort victim injured in an automobile accident should be able to directly sue the insurance

carrier of the tortfeasor without having first proved a claim against the tortfeasor individually."); *see also* Hartman, 141 Idaho at 199 ("The basis of the no-direct-action rule is that the person allegedly injured by the insured is not a party to the insurance contract and has no rights under it. 'Insurance policies are a matter of contract between the insurer and the insured.'")(quoting Trinity Universal Ins. Co. v. Kirsling, 139 Idaho 89, 92, 73 P.3d 102, 105 (2003)); Stonewall Surplus Lines Insurance v. Farmers Insurance, 132 Idaho 318, 971 P.2d 1142 (1998) ("A third party may not directly sue an insurance company in an attempt to obtain the coverage allegedly due the insurer's policyholder.")

2. Brooksby's action constitutes an improper third-party direct action.

In this case, Brooksby has not alleged that she is directly insured by GEICO under the Policy. (R. at 3-6.) Indeed, her Complaint is expressly framed in the context of her making claim against the policy of a non-party, Craig Brooksby:

> 6. An actual case and controversy exists between Plaintiff and Defendant with respect to whether the bodily injuries sustained by Christina Brooksby in a motor vehicle accident, which occurred in Bonneville County, are subject to **coverage and/or coverage exclusions contained in Craig Brooksby's automobile insurance policy** purchased from Defendant.
>
> ...
>
> 12. At the time of the subject collision, **Craig Brooksby had an automobile insurance policy with Defendant**, which provided liability coverage, among other coverages.
>
> 13. Plaintiff has made an insurance claim **agasint [sic] Craig Brooksby's policy** for the bodily injuries and other damages she sustained in the subject motor vehicle collision.

(*Id.* at 4-5)(emphases added). Thus, Brooksby's allegations are entirely framed as third-party claims against GEICO, with whom she does not contend she has any policy or contract, and are expressly asserted as against a policy stated to be insuring someone else (Craig Brooksby). Further, Brooksby has failed to allege any statutory, common law, or contractual provision that would authorize her suit against GEICO. Accordingly, the Complaint is defective on its face as violative of Idaho's prohibition on third-party direct actions, and was appropriately dismissed by the District Court.

3. This Court has not permitted injured parties to file declaratory actions against insurers.

Brooksby tries to avoid application of Idaho's rule barring third-party direct actions by bolding asserting as a section heading that "The Idaho Supreme Court Has Allowed Declaratory Judgment Actions by Injured Parties." (Appellant's Brief at 12.) This brash statement, however, is quickly tempered by the immediate acknowledgment, in the following text, that "the Idaho Supreme Court has not explicitly ruled on the issue of whether an injured party has standing to initiate a declaratory judgment action against a tortfeasor's insurer[.]" (*Id.*) Brooksby cites Idaho authority to suggest that such an action is permissible; however, none of these Idaho decisions stand for this proposition and are readily distinguishable.

- Chancler v. American Hardware, 109 Idaho 841, 712 P.2d 542 (1985) involved a declaratory judgment action brought by a policy-holder (Chancler) and an injured party (Christensen) regarding coverage for a product defect claim. This Court ruled upon the coverage issues, not addressing the status of Christensen as

an insured/non-insured under the Policy, which was apparently not raised by the parties. As an initial matter, the matter was appropriately ruled upon by this Court because an insured was, in fact, a plaintiff seeking a declaratory ruling – in this action, however, Craig Brooksby is not a party. Further, that a direct action violation is not raised is not an unknown circumstance to this Court. In Empire Fire and Marine Ins. Co. v. North Pacific Ins. Co., 127 Idaho 716, 905 P.2d 1025 (1995), this Court ruled upon a declaratory action filed by one insurer against another insurer – which would constitute a violation of Idaho's direct action rule; however, the violation was not addressed by this Court, having not apparently been raised by the parties. In a subsequent decision involving a declaratory action by two insurers against a third insurer, this Court rejected citation to Empire Fire as allowing direct actions, noting, in relevant part, that "the question whether a direct action by one insurance company against another was permitted was not decided by the Court." Stonewall Surplus Lines, 132 Idaho at 322 n.2.[4] Thus, Chancler illustrates a different factual scenario, and the issue of direct action was apparently not raised, thereby rendering citation to Chancler unhelpful.

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[4] Brooksby later argues (Appellant's Brief at 13-14) that courts have a duty to raise standing *sua sponte*, and therefore, any direct action case not dismissed on standing grounds must signal approval of third-party direct actions. This not only disregards the potential that the issue may simply be simply overlooked or the record may lack sufficient information to resolve the issue, but it also improperly attempts to ignore this Court's oft-repeated position that direct actions are not permitted in Idaho.

- Mutual of Enumclaw v. Harvey, 115 Idaho 1009, 772 P.2d 216 (1989) involved a counter-suit by a judgment creditor against an insurer to recover a portion of a judgment. Brooksby's reliance to this authority fails for two reasons. First, Brooksby has not alleged, at any time, that she is a judgment creditor. Second, the Court's approval of standing in Harvey was expressly made upon the fact that the policy at issue itself conferred standing: "'Any person or organization or the legal representative thereof who has secured such judgment (a judgment against the Insured after actual trial) ... shall thereafter be entitled to recover under this policy to the extent of the insurance afforded under this policy.'" *Id.* at 1010. As Brooksby's Complaint lacks any allegation that she is a judgment creditor and that the Policy confers upon her standing as a result of such status (as well as what conditions and limitations would be placed upon such standing), Harvey provides no guidance in this matter, and Brooksby's Complaint is subject to dismissal under I.R.C.P. 12(b)(6).
- Doron Precision Sys. v. United States Fid. & Guar Co., 131 Idaho 680, 963 P.2d 363 (1998), *withdrawn by* 133 Idaho 11, 981 P.2d 246 (1999), is not authority in Idaho. After the initial opinion of this Court was issued, the Court subsequently issued its order withdrawing the Doron opinion: "IT IS FURTHER ORDERED that the MOTION TO WITHDRAW COURT'S OPINION be, and hereby is, GRANTED and this Court's Opinion issued **June 4, 1998** shall be WITHDRAWN and shall not be cited as authority." 133 Idaho at 12 (bold

emphasis in original, underline emphasis added).

- Gillingham Constr. Inc. v. Newby-Wiggins Constr. Inc., 142 Idaho 15, 121 P.3d 946 (2005) is apparently cited for its brief discussion of Mutual of Enumclaw v. Pedersen, 133 Idaho 135, 983 P.2d 208 (1990), which actually supports GEICO's position in this litigation. In that matter, a husband, wife, and daughter moved into the husband's father's home. 133 Idaho at 136. While residing there, the husband injured his daughter in a lawnmower accident. *Id.* at 137. The wife made claim against the husband's father's homeowner's policy. *Id.* The insurer then sought declaratory relief that there was no coverage for the accident, as all parties were "residents" of the "household," and, thus, were all collectively insureds for which claims between them were not covered under a household exclusion. *Id.* This Court held that the husband, wife, and daughter were, in fact, "insureds" under the terms of the policy based upon their residing at the husband's father's house. *Id.* at 139. Thus, all were appropriately parties to a declaratory action, as the dispute was ultimately between an insurer and "insureds" under the terms of the policy. Additionally, however, note that this Court also briefly rejected, on standing grounds, the wife and daughter's attempts to raise the issues of whether the insurer was obligated to defend and indemnify the husband or the husband's father. *Id.* ("Furthermore, we hold that Kate and Wendy have no standing to raise the issue of whether Mutual has a duty to indemnify or defend Jeff or John. While Jeff or John could have raised this issue,

neither are parties to this appeal and therefore, we need not decide the issue."). Thus, even where all parties were insureds under the policy, this Court still rejected an attempt to assert a third-party direct action – that is, a demand for ruling on an insurer's obligations with respect to an insured made by a party other than that particular insured. The Gillingham court, citing Pedersen, explained, in summary, that, "*Pedersen* merely held that a plaintiff in a personal injury case does not have standing to raise the issue of whether an insurance company has a duty to indemnify or defend its insured." *Id.*[5]

- Draper v. Draper, 115 Idaho 973, 722 P.2d 180 (1989) is also inapposite. Brooksby fails to point out that this Court in that case held as a threshold matter that Oregon law applied to the issue of whether a household exclusion in an insurance policy was valid. *Draper v. Draper*, 115 Idaho at 975. The Court did not decide Draper under Idaho law, which is the law Brooksby seeks to have govern this case. Furthermore, both the plaintiff and defendant in Draper had an ownership interest in the insured automobile involved in the accident at issue in Draper. *Id.* at 974 ("The primary issue presented is whether the household

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[5] The Gillingham court went on to assert that the mother and daughter "were not named parties" in the Pedersen case. 142 Idaho at 20. This appears to conflict with the Pedersen decision, which identifies the mother and daughter as defendants, even noting that the mother had filed an answer and counterclaim. 133 Idaho at 135, 137. Nevertheless, the core principle stated in Gillingham – that "a plaintiff in a personal injury case does not have standing to raise the issue of whether an insurance company has a duty to indemnify or defend its insured" – still holds true.

exclusion clause contained in the insurance policy was void, allowing a wife (Barbara) to maintain an action against her husband (Van) up to the limits of the policy. ... Van and Barbara were residents of Nyssa, Oregon. State Farm insured a 1979 automobile (the insured vehicle) **owned by Van and Barbara.")** (emphasis added). In contrast, Brooksby has not alleged that she had any ownership interest in the vehicle driven by Craig Brooksby (that is, an ownership interest in a vehicle insured under the Policy). Further, the Draper decision is actually somewhat ambiguous as to the wife's status as an insured; contrary to Brooksby's suggestion that the wife was a non-insured, the Draper decision suggests otherwise: "The basis for applying the household exclusion [in State Farm and Casualty Co. v. Jones, 306 Or. 415, 759 P.2d 271 (1988)] **was that the injured party was the insured**. By the terms of the household exclusion, it excluded coverage for 'any insured' as well as 'any member of an insured's family residing in the insured's household.' **The same is true of the household exclusion in this case**." 115 Idaho at 978 (emphases added). Thus, Draper does not offer either the factual or legal support for Plaintiff's position that she urges it does.

Accordingly, the authority which Brooksby claims proves that "The Idaho Supreme Court Has Allowed Declaratory Judgment Actions by Injured Parties" (Appellant's Brief at 12), in fact, does not prove anything of the sort; rather, it supports the opposite conclusion that, absent a statutory or contractual basis to the contrary, Idaho law prohibits direct actions by third-parties

against insurance carriers. Accordingly, no error lies in the District Court's dismissal of Brooksby's Complaint.

4. Rule 57 does not grant an injured party a right to initiate suit against an insurer.

Lacking Idaho authority in support of her position, Brooksby instead turns to I.R.C.P. 57 which, having added a subsection (b) via amendment in 2008, provides that:

> (b) In an action seeking declaratory judgment as to coverage under a policy of insurance, any person known to any party to have a claim against the insured relating to the incident that is the subject of the declaratory action shall be joined if feasible.

By its plain language, this rule only contemplates the joinder of a third-party claimant in an existing declaratory action between an insurer and insured. It does not authorize a injured party to initiate suit, nor does it even fully enunciate the role of the injured party following joinder. In the present matter, Brooksby did not enter this litigation via joinder in a declaratory suit between Craig Brooksby and GEICO – Craig Brooksby is not even a party to this litigation.[6] As such, this is not a case to which Rule 57 applies, as there is no action between the insurer and the insured. Here, Plaintiff seeks to bring a direct claim against defendant insurer, a procedure not contemplated or permitted by Rule 57.

The amendment to Rule 57, adding the above subsection (b), simply reiterates this Court's prior ruling in Temperance Ins. Exch. v. Carver, 83 Idaho 487, 365 P.2d 824 (1961),

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[6] Brooksby fails to explain how Rule 57 would allow her to initiate suit against an insurer with which she has no contractual relationship absent involvement of the actual insured as a party against whom she has a personal injury claim. The record reflects that Craig Brooksby is not a party in this declaratory action, nor has Brooksby made any effort in this litigation to name or join Craig Brooksby.

that "[i]njured third parties are proper, but not necessary, **parties defendant in an action brought by an insurer** for a declaratory judgment determining the validity of an insurance policy, and its liability thereunder." 83 Idaho at 491 (emphasis added). Temperance, decided in 1961, clearly has not provided a basis for third-party direct actions, given that this Court has rejected such direct actions on multiple occasions in the decades following the Temperance decision, including the Hartman decision, which not only held that the lack of inclusion of the injured parties did not render a declaratory judgment between an insurer and insured void, but also reiterated the general rule that direct actions were prohibited, even such that judgment creditors themselves could not seek direct actions against insurers. Hartman, 141 Idaho at 345 ("We have never held that an insured's judgment creditor has a direct action against the insurer. ... We have previously held, 'A third party may not directly sue an insurance company in an attempt to obtain the coverage allegedly due the insurer's policyholder.'").

Thus, neither Rule 57, nor the related principle stated in Temperance, authorize an injured party to bring a third-party direct action against an insurer, and, as such, Brooksby's argument on this argument fails. The decision of the District Court should be affirmed.

B. Out-of-State Decisional Authority Provides No Grounds to Vitiate Idaho Law.

Apparently recognizing that Idaho law provides no basis for her suit, Brooksby instead predicates much of her appellate argument via citation to legal treatises and out-of-state decisional authority, even before discussion of Idaho law regarding direct actions. (Appellant's Brief at 3-12.) Brooksby also relied heavily on non-Idaho sources in opposing the motion to

dismiss, a strategy appropriately rejected by the District Court: "Furthermore, [Brooksby] has not supported her argument with any authority that is binding upon this Court." (R. at 44.)

It is axiomatic that, in Idaho, judicial "decisions from sister states are not controlling," and that this Court is bound to "apply to the case under consideration that line of decisions which . . . [are] consonant with [Idaho law] . . . , regardless of any numerical weight of authority." Oneida County Fair Bd. v. Smylie, 86 Idaho 341, 367, 386 P.2d 374, 391 (1963). That is to say, it very well may be that other states permit direct actions, or permit declaratory actions by injured parties prior to judgment in the underlying tort actions; however, Idaho has no such authority, such that reference to non-binding out-of-state decisions and legal treatises, regardless of the volume of citation, is unnecessary and not useful.

Nevertheless, Brooksby's lengthy discussion of out-of-state law overlooks a key common point found in the cases, which is not at issue in this litigation: the cases all involve some recognized right (whether by statute or at common law) of a judgment creditor to initiate a direct action against an insurer, which some courts (outside of Idaho) will view as thereby creating an adequate legal interest to allow an injured party to seek declaratory relief directly against an insurer.[7] A relatively cursory review of Brooksby's cases illustrates this point:

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[7] That some jurisdictions allow declaratory actions by injured parties against insurers based upon a judgment-creditor direct action right, even before a final judgment against an insured tortfeasor is secure, is still not indicative of a universal rule. For example, Nevada allows judgment creditors to proceed directly against insurers following judgment. Hall v. Enterprise Leasing Company-West, 137 P.3d 1104, 1109 (Nev. 2006). By the same token, however, Nevada law does not permit pre-judgment declaratory actions, as an injured party's rights do not mature until an actual judgment is secured against the insured. Vignola v. Gilman, 2011 WL

- Dorchester Mut. Ins. Co. v. Legeyt, 25 Mass. L. Rep. 262, 2008 WL 5784218 (Mass. Super. 2008) is a lower court decision from Massachusetts involving, in part, a counterclaim by a defendant named by an insurer in a declaratory judgment action. Brooksby's lengthy quotation from Dorchester ignores the court's preceding remarks:

> Although Massachusetts appellate courts do not appear to have addressed the issue of an injured party's standing to seek a declaratory judgment against a tortfeasor's insurer, the Supreme Judicial Court has stated that an injured party's interest in the policy of another originates with the accident. *Fallon v. Mains,* 302 Mass. 166, 168, 19 N.E.2d 68 (1939). In *Fallon,* the Court stated that the "plaintiff's right to have recourse to the policy came into existence upon the occurrence of the accident...." *Id.* See *Goldstein v. Bernstein,* 315 Mass. 329, 332, 52 N.E.2d 559 (1943) ("Upon the happening of the accident, ... the plaintiffs acquired a beneficial interest in the proceeds of the policy and the right, if judgments were entered in their favor in the tort actions, to enforce in their own names the satisfaction of their judgments out of the indemnity furnished to the insured by the company").

2008 WL 5784218, at *5. Idaho has no such legal principle enshrined in its caselaw, nor does it have any variety of "reach and apply" statute such as

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1399840, at *4 (D. Nev. 2011) ("In contrast, under Nevada law, declaratory relief between a third party claimant and an insurer is proper only after the third party obtains a tort judgment against the tortfeasor. The rights of a tort claimant against a tortfeasor's insurer do not mature until the tort claimant obtains a judgment against the tortfeasor. Thus, a plaintiff has 'no legally protectable interest' in an action for declaratory relief until she establishes liability of the tort defendant. Prior to obtaining a tort judgment against the tortfeasor, a plaintiff's rights against the tortfeasor's insurer are speculative and not ripe for declaratory relief.")(internal citations omitted).

Massachusetts',[8] which is also referenced in the Dorchester opinion. Mass. Gen. L. 175 §113[9] (cited at 2008 WL 5784218, at *5, n.8.)

- Christian v. Sizemore, 383 S.E.2d 810 (W.V. 1989) involved a personal injury plaintiff attempting to amend her personal injury complaint to add a declaratory action against the alleged tortfeasor's insurer. While the West Virginia Supreme Court permitted such, the basis for the Court's ruling in that case was based on extant West Virginia law: "This Court has recognized that an injured plaintiff who has obtained a judgment against a defendant vehicle owner or operator is entitled to maintain a declaratory judgment action against the defendant's insurance carrier to impose liability under the policy." *Id.* at 812. For that reason, "there is an actual controversy between the insurance carrier and the injured plaintiff because of the very real possibility that the plaintiff will look to the insurer for payment." *Id.* at 814. This is because, in West Virginia, it is "established law that if an insured with coverage under a liability insurance policy does not pay the underlying judgment entered in a personal injury action,

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[8] Massachusetts' "reach and apply" right is simply a direct action right; that is, a right to proceed directly against an insurer to recover a judgment amount secured against an insured tortfeasor. *See, e.g.,* Rogan v. Liberty Mut. Ins. Co., 25 N.E.2d 188 (Mass. 1940).

[9] "Upon the recovery of a final judgment against any person by any person, including executors or administrators, for any loss or damage specified in the preceding section, if the judgment debtor was at the accrual of the cause of action insured against liability therefor, the judgment creditor shall be entitled to have the insurance money applied to the satisfaction of the judgment as provided in the ninth clause of section three of chapter two hundred and fourteen." Mass. Gen. L. 175 §113.

the injured plaintiff may institute a direct action against the insurance company to recover the amount of the judgment up to the limits of the policy." Broy v. Inland Mut. Ins. Co., 233 S.E.2d 131, 132 (W.Va. 1977).

- Maryland Cas. Co. v. Nestle, 2010 WL 3735756 (S.D. Miss. 2010) involved, in part, an argument by an injured party that an insurer was equitably estopped from denying a duty to defend and indemnify regarding a suit between the injured party and the insured. In noting that "[i]n a declaratory judgment action, an injured party has standing to establish coverage under a tortfeasor's insurance policy," however, the court referred to two earlier decisions: Johnson v. Great Am. Ins. Co., 213 F. Supp.2d 657 (S.D. Miss. 2001) and Titan Indem. Co. v. Williams, 743 So.2d 1020, 1023 (Miss. Ct. App. 1999). In Johnson, the court noted that Mississippi Rule of Civil Procedure 57, amended in 2000, specifically authorized direct actions. 213 F. Supp. 2d at 661, n.4.[10] Titan, which preceded the M.R.C.P. 57 amendment in 2000, simply noted that "Mississippi's long-standing prohibition against litigating a claim against an alleged tortfeasor's liability insurer without first obtaining a judgment against the insured has been limited in the interest of judicial economy[.]" 743 So. 2d at 1023. The Titan holding simply recognized that such actions earlier in litigation would be

[10] Indeed, M.R.C.P. 57(b)(2) expressly provides: "(2) A contract may be construed either before or after there has been a breach thereof. Where an insurer has denied or indicated that it may deny that a contract covers a party's claim against an insured, that party may seek a declaratory judgment construing the contract to cover the claim."

permitted, as Mississippi already authorized judgment creditors to directly seek recovery from insurers. *See, e.g.,* Coleman v. Mississippi Farm Bureau Ins. Co., 708 So.2d 6 (1998) (garnishment action by judgment creditor against insurer); Leader Nat. Ins. Co. v. Lindsey, 477 So.2d 1323 (Miss. 1985)(same).

- Sagamore Ins. v. Deming, 2008 WL 4071195 (Conn. Super. 2008) is a lower court decision from Connecticut regarding a summary judgment motion made by a defendant-injured party named by an insurer in a declaratory action regarding a pending personal injury action. There, the court's discussion of "persons with direct interests" (*6) made little discussion of what said "interests" were. A review of Connecticut law, however, demonstrates that Connecticut's limitation on direct actions is itself limited, as Connecticut not only allows direct actions where questions of the insured's negligence are not implicated, *see, e.g.,* Alexander v. W.F. Shuck Petroleum Co., 2009 WL 2783587 (Conn. Super. 2009) ("Thus, because the medical payments provision is a 'distinct and separate provision' ... that does not implicate the insured's negligence, the policy concerns embodied under Connecticut law are inapplicable, and the plaintiff can bring a direct action against the insurer."), but also has a statute specifically authorizing direct actions by a judgment creditor against an insurer. Conn. Gen. Stat. §38a-321.[11]

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[11] "Upon the recovery of a final judgment against any person, firm or corporation by any

- Dial Corp. v. Marine Office of Am. Corp., 743 N.E. 2d 621 (Ill. Ct. App. 2001) involved a declaratory action brought by an insured during the pendency of an underlying personal injury action. However, Illinois permits direct actions by judgment creditors against insurers, even requiring insurers to advise Illinois insureds of such. Ill. Comp. Stat. 215 5/388;[12] *accord* Skidmore v. Throgmorton, 751 N.E.2d 637, 640 (Ill. App. 2001) (discussing statute and related authority).
- Monroe v. United States Fidelity & Guar. Co., 603 N.E.2d 855 (Ill. Ct. App. 1992), another Illinois decision, involved an effort by a decedent's estate to reform an underinsured motorist policy, regarding a claim for damages wherein the decedent was a passenger in the vehicle operated by the insured at the time of

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person, including administrators or executors, for loss or damage on account of bodily injury or death or damage to property, if the defendant in such action was insured against such loss or damage at the time when the right of action arose and if such judgment is not satisfied within thirty days after the date when it was rendered, such judgment creditor shall be subrogated to all the rights of the defendant and shall have a right of action against the insurer to the same extent that the defendant in such action could have enforced his claim against such insurer had such defendant paid such judgment."

[12] "No policy of insurance against liability or indemnity for loss or damage to any person other than the insured, or to the property of any person other than the insured, for which any insured is liable, shall be issued or delivered in this State after July 1, 1937, by any company subject to this Article unless it contains in substance a provision that the insolvency or bankruptcy of the insured shall not release the company from the payment of damages for injuries sustained or death resulting therefrom, or loss occasioned during the term of such policy, and stating that in case a certified copy of a judgment against the insured is returned unsatisfied in any action brought by the injured person or his or her personal representative in case death results from the accident because of such insolvency or bankruptcy, **then an action may be maintained by the injured person** or his or her personal representative against such company under the terms of the policy and subject to all of the conditions thereof for the amount of the judgment in such action not exceeding the amount of the policy." (emphasis added).

the accident. In addition to the legal backdrop of Illinois' allowance of direct actions by judgment creditors, the court in Monroe also made the express finding that "plaintiff's decedent, because she was 'occupying' the Gibbons' automobile, was an insured under the Gibbons policy now in question." 603 N.E.2d at 858.

- Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677 (7th Cir. 1992) related to, in summary, an underlying negligence suit by an injured party against an insured regarding an estimate of oil and gas reserves. The injured party filed suit against the insured, then sought declaratory relief against the insurer. *Id.* at 679-80. In distinguishing between a tort-based 'direct action,' and a declaratory action, the court applied Illinois law. Of course, as already discussed above, Illinois allows direct actions by judgment creditors.[13]
- Utica Mut. Ins. Co. v. Stockdale, 50 F. Supp. 2d 871 (N.D. Iowa 1999), as Brooksby expressly recognizes, is made in the shadow of Iowa's direct action statute, Iowa Code §516.1.[14] It is this statute, affording a judgment creditor a direct action, that creates the legally cognizable interest allowing an injured party

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[13] Brooksby also cites Reagor (Appellant's Brief at 11), but, again, Illinois law allows direct actions by judgment creditors.

[14] "All policies insuring the legal liability of the insured, issued in this state by any company, association or reciprocal exchange shall, notwithstanding any other provision of the statutes, contain a provision providing that, in event an execution on a judgment against the insured be returned unsatisfied in an action by a person who is injured or whose property is damaged, the judgment creditor shall have a right of action against the insurer to the same extent that such insured could have enforced the insured's claim against such insurer had such insured paid such judgment." Iowa Code §516.1.

to bring a declaratory action, per Iowa decisions cited by the Utica court. *See* Iowa Mut. Ins. Co. v. McCarthy, 572 N.W.2d 537, 541 (Iowa 1997)("Iowa's direct action statute gives an injured party, such as the estate, a cause of action against the insurer if the injured party obtains a judgment that he cannot collect by execution against the insured. Consequently, the estate has an interest in McCarthy's insurance coverage. Because this interest is "of sufficient immediacy and reality to warrant declaratory [relief,]"... the estate has standing to pursue this appeal.")(internal citations omitted); Farm & City Ins. Co. v. Coover, 225 N.W.2d 335, 337 (Iowa 1975)("The general rule is that the injured person's interest in the liability insurance policy of the insured arising at the time of the injury under this kind of direct action statute is sufficient to make a coverage dispute between the insurer and insured a justiciable controversy between the insurer and the injured person.").

- Berrios v. Jevic Transp., Inc.[15] is a lower-court Rhode Island decision involving a wrongful death action, where the estate of the injured party sought to amend the complaint against the insured to also assert a claim for declaratory relief against the insured's insurer. Again, however, the court noted that Rhode Island

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[15] Berrios is a Superior Court decision not presently available on Westlaw or in the Rhode Island caselaw library on Casemaker. It is, however, available at the Rhode Island Superior Court website, at http://www.courts.ri.gov/Courts/SuperiorCourt/DecisionsOrders/decisions/04-2390.pdf (retrieved October 6, 2011). Citations are made to the page number notations on the .pdf copy of the decision.

permits a judgment creditor to assert a direct action against an insurer: "Section 27-7-1 of the Rhode Island General Laws states in relevant part: 'every policy written insuring against liability for. . . personal injuries. . . shall contain provisions to the effect that the insurer shall be directly liable to the injured party. . . to pay that party the amount of damages for which the insured is liable.'... Section 27-7-2 states in part: 'an injured party. . . , in his or her suit against the insured, shall not join the insurer as a defendant. . . The injured party. . . after having obtained judgment against the insured alone, may proceed on that judgment in a separate action against the insurer.'" *Id.* at p. 4-5. In light of this, "'the victim of an insured's tort ... has a legally protectable interest in that policy before he has reduced his tort claim to judgment.' This injury was sufficient to confer standing upon the injured party to bring a declaratory-judgment action against the insurer." *Id.* at p. 5 (quoting Mendez v. Brites, 849 A.2d 329 (R.I. 2004)).

- Miller v. Augusta Mut. Ins. Co., 157 Fed. Appx. 632 (4th Cir. 2005) is an unpublished decision from the Fourth Circuit regarding an appeal from the Western District of Virginia, wherein an injured party's estate sought a declaratory action against a homeowner's insurer. Notably, the quote offered by Brooksby is actually dicta within a footnote, as the issue of standing was actually resolved as a question of federal law, rather than Virginia state law. *Id.* at 637 ("Whether Miller has standing to maintain this declaratory judgment action is a

question that must be resolved under well-established principles of federal law.").[16] Turning to Virginia law, then, the other Virginia authority cited by Brooksby – Martirosov v. Shenandoah Flight Services, Inc., 2003 WL 23312786 (Va. Cir. Ct. 2003) – which related to a personal injury action by a decedent's estate against an insured, again notes that Virginia also has a statute that allows for post-judgment direct actions against insurers. *Id.* at *4 (discussing Va. Code §38.2-2200[17] and Appleman on Insurance Law and Practice (2d) §142.1[18]).

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[16] The Fourth Circuit found standing under federal law, based upon the fact that the injured party's estate had secured a verdict: "When Miller commenced this action, the district court in her wrongful death case had already entered against Mitch a default judgment on liability. Thus, while there was at the time of filing a question about the extent of damages that would be awarded, there was no doubt that some amount of damages would be awarded. The certainty of a damage award against one of Augusta Mutual's insureds thus makes the coverage question definite and concrete." 157 Fed. Appx. at 637.

[17] "No policy or contract insuring or indemnifying against liability for injury to or the death of any person, liability for injury to or destruction of property, or liability for injury to the economic interests of any person, shall be issued or delivered in the Commonwealth unless it contains in substance the following provisions or other provisions that are at least equally favorable to the insured and to judgment creditors: 1. That the insolvency or bankruptcy of the insured, or the insolvency of the insured's estate, shall not relieve the insurer of any of its obligations under the policy or contract. 2. That if execution on a judgment against the insured or his personal representative is returned unsatisfied in an action brought to recover damages for injury sustained or for loss or damage incurred during the life of the policy or contract, then an action may be maintained against the insurer under the terms of the policy or contract for the amount of the judgment not exceeding the amount of the applicable limit of coverage under the policy or contract." Va. Code §38.2-2200.

[18] As quoted by the Martirosov court: ""The injured party generally has standing to bring a direct action against the insurer for a declaratory judgment concerning coverage, even though the liability action against the insured has not been liquidated in any way. The injured party's interest in the coverage issue is legally sufficient to support standing to seek a declaratory judgment, even though there is no judgment against the insured **because of the injured party's right, under either the case law of the state or the state's direct action statute, to sue the**

The same is true of the legal treatises cited by Brooksby, which, read more completely, do not support Brooksby:

- 22A Am. Jur.2d *Declaratory Judgments* § 138 (cited in Appellant's Brief at 3) notes that declaratory actions are "inappropriate where the issues presented by the coverage question cannot be adequately resolved before the underlying case is resolved, or where the court feels that resolution of the underlying case might obviate the need for the judgment sought." Further, § 134 of this Am. Jur. even specifically notes, as a prerequisite for a justiciable controversy between an injured party and an insurer, that there be a direct action statute: "An injured person's interest in the liability policy of the insured, arising at the time of the injury, **under a direct action statute giving an injured person who obtains a judgment the right to proceed against the insurer if his or her execution against the judgment debtor is returned unsatisfied**, is sufficient to make a coverage dispute between the insurer and insured a justiciable controversy between the insurer and the injured person." (*Id.*)(emphasis added). Idaho has no such direct action statute.
- Couch §232:67, cited by Brooksby, also cautions: "However, since a court asked to render a declaratory judgment on whether an insured's conduct is covered under a liability policy must not determine disputed issues of fact which form the

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insurer directly after obtaining a judgment against the insured." 2003 WL 23312786, at *4 (emphasis added).

basis for the insured's liability in the underlying tort action, the existence of a bona fide controversy over whether an insured's conduct alleged in an underlying tort case is negligent or intentional renders premature a declaratory judgment action to determine liability coverage until the controversy is resolved in the underlying case." (*Id.*) Given the lack of a judgment against Craig Brooksby, the lack of a right of a judgment creditor in Idaho to seek a direct action against an insurer, and a lack of a litigated dispute between GEICO and Craig Brooksby, it would be premature for the District Court to rule as to Craig Brooksby's potential liability (and, in turn, GEICO's duty to indemnify any damages that Brooksby would be legally be entitled to recover from Craig Brooksby) – thus, declaratory relief by Brooksby would be inappropriate. Note, additionally, that Couch §242:1 correctly includes an Observation that "[n]ot all jurisdictions allow for direct actions by a third party against the insurer." As has been established, Idaho is among those jurisdictions that does not.

- Insurance Claims and Disputes §8:8 is also more caveated than indicated by Brooksby. Windt specifically notes:

> The issue, however, is far from resolved. Arguments can be and have been made that the injured party's interest in the policy proceeds is too contingent to sustain an action by the injured party against the insurer and that, although the injured party can be joined in an action brought by the insurer, joinder in that case is necessary to avoid a multiplicity of litigation, a consideration not present when the injured party seeks to sue the insurer. Moreover, the *Reagor* decision is premised on the court's holding that the injured party was a third-party beneficiary of the insurance contract. **This is not true in all jurisdictions, and where it is**

> **not, the better rule would probably be to hold that there is no justiciable controversy between the injured party and the insurer prior to the time the injured party obtains a judgment against the insured.**
>
> (*Id.*)(emphasis added). Note, too, that Windt's characterization of the law in §8:8 ("Of course, once the injured party has a judgment against the insured, the injured party does have standing to sue.") and, later, in §9:11 ("In all states, however, an injured party who has once obtained a judgment against the insured can then sue the carrier for the amount owed under the policy.") is wholly incorrect as regards Idaho, as this Court has clearly stated the law in this jurisdiction to be exactly the opposite. Hartman, 141 Idaho at 345 ("**We have never held that an insured's judgment creditor has a direct action against the insurer**.")(emphasis added).

Thus, Brooksby's cited authority contemplates both legal and factual predicates that do not exist in this matter or within the law of this state.

Therefore, to reiterate, it is indisputable that Idaho affords judgment creditors no right to seek a direct action against an insurer. There is no statute affording such a right, and this Court has never indicated that Idaho's common law provides such a right. Hartman, 141 Idaho at 345 ("We have never held that an insured's judgment creditor has a direct action against the insurer. ... We have previously held, 'A third party may not directly sue an insurance company in an attempt to obtain the coverage allegedly due the insurer's policyholder.'"). In the present matter, Brooksby has alleged no right as against GEICO that would, in turn, create a legally

cognizable interest to seek a declaratory action regarding Craig Brooksby's insurance policy. Further, even were one to assume, *arguendo*, that Brooksby did have some direct action right against GEICO based upon a judgment creditor status, Brooksby has not alleged that she is presently a judgment creditor.

Thus, not only is Brooksby's out-of-state authority directly contrary to established Idaho law, but is also inapplicable, given that the legal and factual prerequisites set forth in that authority does not mirror the instant litigation. Even were Brooksby to eventually identify some out-of-state, lower court, unpublished decision that allowed an injured party to seek declaratory relief against a tortfeasor's insurer in the absence of a direct action right, such a discovery would not warrant reversal of long-standing, existing Idaho law. As such, the District Court's decision should be affirmed.

C. <u>Public Policy Also Provides No Basis for Brooksby's Action.</u>

Brooksby next turns to a public policy argument in support of her contention that her declaratory action should not have been dismissed. (Appellant's Brief at 15-17.) In support of such argument, Brooksby again relies upon caselaw addressing Illinois law (addressed above), Mississippi law (addressed above), and West Virginia law (addressed above), all of which recognize the right of a judgment creditor to institute a direct action against an insurer following a judgment, thereby allowing declaratory actions prior to judgment in certain circumstances. Brooksby also cites to a treatise regarding New York law; however, New York's highest court has more recently addressed the issue, and, taking a more stringent approach like Nevada, noted that its direct action statute only created a right to declaratory relief <u>after</u> judgment:

> Insurance Law § 3420 grants an injured plaintiff the right to sue a tortfeasor's insurance company to satisfy a judgment obtained against the tortfeasor. The issue presented in this appeal is whether the injured party may bring a declaratory judgment action against the insurance company before securing a judgment against the tortfeasor. We hold that a judgment is a statutory condition precedent to a direct suit against the tortfeasor's insurer.
> ...
> While the personal injury case was pending, plaintiff also initiated this declaratory judgment action against Hanover challenging the disclaimer of coverage. Plaintiff sought a declaration that Bachman was an insured under the Durbin policy and that Hanover was therefore obligated to compensate Lang for the injuries Bachman negligently caused. Hanover answered and moved to dismiss the complaint. Among other arguments, Hanover asserted that plaintiff lacked standing to sue Hanover directly because plaintiff had not yet obtained a judgment against Bachman, Hanover's purported insured.
> ...
> **Here, it is undisputed that plaintiff did not obtain a judgment against Bachman, the alleged tortfeasor. Having failed to fulfill the condition precedent to suit, plaintiff could not pursue a direct action against Hanover and the Appellate Division properly granted Hanover's motion to dismiss the complaint.**

Lang v. Hanover Ins. Co., 820 N.E.2d 855, 856 & 858 (N.Y. 2004)(emphasis added).[19]

In addition to incorrectly emphasizing public policy statements of jurisdictions with different direct action legal schemes, Brooksby's argument overlooks this Court's previous emphasis on the sanctity of the insurance contract between the insurer and the insured, which demonstrates the public policy against allowing a stranger to the contract to attempt to dictate contractual relations through an action on that contract against one of the contracting parties:

> We have never held that an insured's judgment creditor has a direct action against the insurer. In support of their argument that we have implicitly approved such

[19] Note, further, that Lang does not draw an artificial distinction between a "declaratory judgment action" and a "direct action," simply holding that an improper declaratory action violated New York's bar on pre-judgment direct actions.

actions, the Hartmans cite language from *Downing v. Travelers Insurance Co.*, 107 Idaho 511, 514-15, 691 P.2d 375 378-79 (1984), wherein we stated, "Appellant should not be allowed to sue the insurance company directly any more than a tort victim injured in an automobile accident should be able to directly sue the insurance carrier of the tortfeasor *without having first proved a claim against the tortfeasor individually*." (Emphasis added.) According to the Hartmans, the emphasized language indicates that once the injured party has proved a claim against the tortfeasor individually, the injured party can then sue the tortfeasor's insurance carrier directly. The Hartmans read that portion of the Downing opinion too broadly, and overlook our clarification of it in *Graham v. State Farm Mutual Automobile Insurance Co.*, 138 Idaho 611, 67 P.3d 90 (2003).

In *Graham*, the plaintiff had obtained a judgment for $2,100 against the insured in small claims court, and the insurance company appealed. At the trial de novo on appeal, the plaintiff obtained a judgment against the insured for $2,602.50. He then filed an action against the insurance company alleging that by appealing the small claims judgment, it breached a duty of good faith and fair dealing owing to a judgment creditor of its insured. When arguing that we should recognize such cause of action, he relied upon the same portion of the Downing opinion as do the Hartmans here. We rejected the argument and explained that the plaintiff in *Graham* was reading too much into that portion of the *Downing* opinion.

> In context, this statement does not establish Graham's position. The controversy in the Downing case was one of a "direct action of an employer against an insurer, by a party not a party to the insurance contract," and it did not concern a third-party with a judgment. The point on which the court disposed of the case was the fact that the plaintiff had attempted to bring an action "without first establishing entitlement to any death benefits under the collective bargaining agreement, appellant is attempting to circumvent the requirement that she establish a right under the death benefit provision of the collective bargaining agreement." Downing was decided prior to White v. Unigard [Mutual Insurance, 112 Idaho 94, 730 P.2d 1014 (1986)] and cannot be read to establish the right of a third party to bring an action for the breach of good faith and fair dealing against the tortfeasor's insurance company. In Idaho there is no such right.

138 Idaho at 614, 67 P.3d at 93 (internal citations omitted).

Hartman, 141 Idaho at 198-99. The Idaho Supreme Court further emphasized and explained this point, recognizing the well-established policy of this state to preserve the sanctity of the contract between an insurer and its insured:

> Any rights against United Heritage that the Hartmans may acquire as judgment creditors of Keane cannot be greater than the rights that Keane would herself have against United Heritage. If the Hartmans executed upon Keane's claims against United Heritage, they could only obtain whatever claims she had on the day the execution was levied. I.C. § 11-309. Their status as judgment creditors of Keane does not make them additional insureds under the insurance contract. Even if we were to grant them the right to seek recovery directly from United Heritage, rather than by executing upon whatever claims Keane may have, their right to recover against United Heritage would be no greater than Keane's right to recover.
>
> We have previously held, "A third party may not directly sue an insurance company in an attempt to obtain the coverage allegedly due the insurer's policyholder." *Stonewall Surplus Lines Ins. Co. v. Farmers Ins. Co. of Idaho*, 132 Idaho 318, 322, 971 P.2d 1142, 1146 (1998). While recognizing the no-direct-action rule, the Hartmans ask us to hold that the insurance company and its insured are prevented from resolving between themselves the issue of coverage under the policy, at least until the third party has litigated its claim against the insured. **The basis of the no-direct-action rule is that the person allegedly injured by the insured is not a party to the insurance contract and has no rights under it.** "Insurance policies are a matter of contract between the insurer and the insured." *Trinity Universal Ins. Co. v. Kirsling*, 139 Idaho 89, 92, 73 P.3d 102, 105 (2003). We decline to adopt a rule preventing the parties to that contract from resolving disputes that may arise between them regarding the terms of their contract.

Hartman, 141 Idaho at 199 (emphasis added).

This public policy concern is even more amplified in this scenario, where there is neither a judgment nor a right to seek a direct action even with a judgment. This Court has previously expressed its discomfort with declaratory actions that do not serve a "useful purpose" or which involve facts more appropriately determined in the underlying proceeding rather than in the

declaratory action. Ennis v. Casey, 72 Idaho 181, 185-86, 238 P.2d 435, 438 (1951)("An action for a declaratory judgment may be maintained only for the purpose of determining and declaring fixed legal rights where it will accomplish some useful purpose. It cannot be invoked merely to try issues and determine questions which are uncertain and hypothetical."); Country Ins. Co. v. Agricultural Development, Inc., 107 Idaho 961, 975, 695 P.2d 346, 360 (1984) ("[T]here would be a strong inclination to direct a dismissal for lack of jurisdiction under the Declaratory Judgment Act to try, as dispositive of the question of policy coverage, factual issues of negligence and proximate cause. Under consideration of good judicial administration, we highly question the propriety of trying such issues in advance of those same issues being tried in the underlying action, wherein the judgment will be dispositive and not moot.").

For these reasons, no public policy ground favors reversing the District Court's decision to dismiss Brooksby's action against GEICO, and that decision should be affirmed.

D. The District Court Did Not Err in Dismissing Brooksby's Action Pursuant to I.R.C.P. 12(b).

Finally, Brooksby contends that the District Court erred in dismissing the Complaint under I.R.C.P. 12(b)(6), and erred in citing to Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Andrus, 127 Idaho 239, 899 P.2d 949 (1995) ("SPBA I") and Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Batt, 128 Idaho 831, 919 P.2d 1032 (1996) ("SPBA II"). Brooksby's arguments on these points are incorrect.

The District Court's discussion of SPBA I and SPBA II, and its dismissal of the Complaint per I.R.C.P. 12(b)(6), was squarely framed by this Court's statement that: "It is well

established that absent a contractual or statutory provision authorizing the action, an insurance carrier cannot be sued directly and cannot be joined as a party defendant." Graham, 138 Idaho at 613 (quoted by the District Court at R. at 42). Thus, in opposing GEICO's motion to dismiss, Brooksby had to identify some contractual or statutory provision authorizing her direct action against GEICO.

As noted above, the Complaint is devoid of any contention that Brooksby had a contract with GEICO or was otherwise insured under the GEICO policy, and instead only asserts that the Policy was Craig Brooksby's. (R. at 4, ¶6 and at 5, ¶12.) Recognizing this problem during the motion to dismiss phase, Brooksby made no alternative allegation, and instead retreated to the language of Idaho's Declaratory Judgment Act, §10-1202, arguing that it provided standing. (R. at 23.)

The Court's discussion of SPBA I and SPBA II was in the context of what Brooksby had to demonstrate to prove that she had standing to pursue a direct action against GEICO. Both SPBA I and SPBA II make clear that the Uniform Declaratory Judgment Act is not, itself, a substitute for standing. 127 Idaho at 245 ("While the Declaratory Judgment Act may potentially expand the scope of remedies available to the environmental groups if they are ultimately successful, it does not relieve them of the obligation to demonstrate that they have standing to bring the action in the first instance."); 128 Idaho at 834 ("As SPBA acknowledges, the Declaratory Judgment Act does not relieve a party from showing that it has standing to bring the action in the first instance."); R. at 42-44 (discussing same). Thus, a plaintiff must still demonstrate that they are an "interested" party under Idaho Code §10-1202 on some other basis

of standing, and this Court has made clear that, for an action against an insurer, there must be "a contractual or statutory provision authorizing the action." Graham, 138 Idaho at 613.[20] Brooksby has identified none, and, in the context of an I.R.C.P. 12(b)(6) motion, did not aver any such valid contractual or statutory provision in her Complaint. (R. at 3-6.) Brooksby's attempts to distinguish SPBA I and SPBA II on the grounds that such decisions implicated different kinds of relief and were in different procedural contexts does not impact the District Court's correct evaluation of those cases for the principle that the Declaratory Judgment Act does not itself confer standing to a party that otherwise lacks standing.

Further, Brooksby appears to intimate that the Court looked beyond the scope of the pleadings in ruling upon GEICO's motion to dismiss, arguing that "[t]he relevant insurance contract was not placed before the court and it is a factual determination as to whether any provision in the policy or any circumstances surrounding the automobile collision 'authorize the action.'" (Appellants' Brief at 19.) Brooksby's argument disregards the fact that the onus is upon her to make an allegation in her Complaint that there is a contractual or statutory provision authorizing the action. Taylor v. Maile, 142 Idaho at 257 ("Where a case has been dismissed because of a lack of standing, this Court must examine **whether Plaintiffs have sufficiently alleged the requisite elements of standing in their complaint** to survive a 12(b)(6) motion to dismiss.")(emphasis added). No such allegation is contained in Brooksby's Complaint, which,

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[20] Again, that Idaho Code §10-1202 itself does not provide standing for a direct action against an insurer is borne out by the simple fact that it became law in 1933, and has not been amended since. In the subsequent decades, however, this Court has outlined and reiterated that direct actions are not permitted in Idaho.

again, only asserts that the Policy was Craig Brooksby's. (R. at 4, ¶6 and at 5, ¶12.) Brooksby did not attach the Policy to her Complaint. Brooksby did not submit an affidavit during the motion to dismiss briefing stage to present such evidence to the Court. Brooksby's Response to Defendant's Motion to Dismiss specifically asserts she is seeking relief against a policy not held by her. (R. at 25: "Christina Brooksby has standing, as an injured party, to bring a declaratory action against GEICO to seek determination regarding whether there is liability insurance coverage in a claim she is making against GEICO's insured."). Brooksby's brief-in-chief on this appeal specifically notes that "Christina made a claim against her father's insurance carrier." (Appellant's Brief at 1.) In arguing to the District Court on the motion to dismiss, Brooksby made no contention that the Policy made her an insured in some fashion or authorized her action. (Tr. at ll. 12:23-16:1.) In fact, the District Court was not referencing any evidence outside of the pleadings, but instead was simply illustrating the lack of allegations by Brooksby that would otherwise be needed to survive a standing challenge:

> This Court concludes that Christina cannot maintain this action against GEICO without manifesting a 'contractual or statutory provision authorizing the action.' *See Graham*, 138 Idaho at 613, 67 P.3d at 92. **Christina has never asserted** that a contractual relationship exists between her and GEICO. **Christina has never asserted** that any provision of the contract between GEICO and her father gives her authorization to sue GIECO [sic]. **Christina has not cited** any statutory provision that gives her authority to sue on the contract between her father and GEICO.

(R. at 44)(emphases added).

Thus, Brooksby's belated attempt to now suggest that the Policy may offer some authorization for her action should be disregarded, given that Brooksby – at no time in her

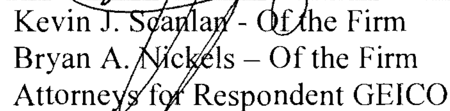
Complaint or in arguing before the District Court – made any such suggestion. Given the lack of any such allegation in her Complaint, Brooksby has failed to properly allege standing (per Taylor v. Maile, *supra*), such that the District Court's dismissal of her Complaint pursuant to I.R.C.P. 12(b)(6) was entirely appropriate and not in error.

VII. CONCLUSION

For the reasons stated above, the March 8, 2011 decision of the District Court dismissing Brooksby's Complaint pursuant to I.R.C.P. 12(b)(6) should be affirmed.

RESPECTFULLY SUBMITTED this 26th day of October, 2011.

HALL, FARLEY, OBERRECHT
& BLANTON, P.A.



By:___________________________________
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Attorneys for Respondent GEICO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of October, 2011, I caused to be served two (2) true and correct copies of the foregoing document, which were faxed and mailed via U.S. Mail to each of the following:

Jordan S. Ipsen
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Kevin J. Scanlan