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Vol 1 of 2 COPY

IN THE

LAW CLERK

SUPREME COURT

OF THE

STATE OF IDAHO

Christina Brooksby

Plaintiff and

Appellant

vs.

Geico General Insurance Company

Defendant and

Respondent

Appealed from the District Court of the Seventh *Judicial*

District of the State of Idaho, in and for Bonneville *County*

Hon. Dane H. Watkins, Jr. *, District Judge*

Jordan S. Ipsen, 477 Shoup Ave, Ste 203, Idaho Falls, ID 83402
Attorney for Appellant

Kevin J. Scanlan, P.O. Box 1271, Boise, ID 83701
Attorney for Respondent

FILED - COPY
AUG - 9 2011

Filed this ______ *day of* ______________, 20___

______________ *Clerk*

By ______________ *Deputy*

38761

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHRISTINA BROOKSBY, Plaintiff/Appellant, vs. GEICO GENERAL INSURANCE COMPANY, Defendant/Respondent.	)))))))))))	Case No. CV-10-6403 Docket No. 38716-2011

* * * * * * * * * * * * * *

CLERK'S RECORD ON APPEAL

* * * * * * * * * * * * * *

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.

* * * * * * * * * * * * * *

Jordan S. Ipsen
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Idaho Falls, ID 83402

Attorney for Appellant

Kevin J. Scanlan
Hall, Farley, Oberrecht & Blanton, P.A.
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Attorney for Respondent

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Seventh Judicial District Court - Bonneville County

User: MCGARY

ROA Report

Case: CV-2010-0006403 Current Judge: Dane H Watkins Jr

Christina Brooksby vs. Geico General Insurance Co

Christina Brooksby vs. Geico General Insurance Co

Date	Code	User		Judge
10/20/2010	SMIS	SOLIS	Summons Issued	Gregory S. Anderson
	NCOC	SOLIS	New Case Filed-Other Claims	Gregory S. Anderson
	NOAP	SOLIS	Plaintiff: Brooksby, Christina Notice Of Appearance Jordan S. Ipsen	Gregory S. Anderson
		SOLIS	Filing: A - All initial civil case filings of any type not listed in categories B-H, or the other A listings below Paid by: Ipsen, Jordan S. (attorney for Brooksby, Christina) Receipt number: 0049291 Dated: 10/20/2010 Amount: $88.00 (Check) For: Brooksby, Christina (plaintiff)	Gregory S. Anderson
	COMP	SOLIS	Complaint Filed	Gregory S. Anderson
12/3/2010	JUDGE	MESSICK	Judge Change (batch process)	
12/15/2010	MEMO	DOOLITTL	Memorandum in Support of Defendant's Motion to Dismiss Pursuant to I.R.C.P. 12(b)(6) (fax)	Dane H Watkins Jr
	NOTH	DOOLITTL	Notice Of Hearing 2-3-11 @ 8:30 a.m. (fax)	Dane H Watkins Jr
	NOAP	LYKE	Defendant: Geico General Insurance Co Notice Of Appearance Kevin J. Scanlan	Dane H Watkins Jr
	MOTN	LYKE	Motion to Dismiss Pursuant to I.R.CP 12(b)(6)	Dane H Watkins Jr
		LYKE	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Scanlan, Kevin J. (attorney for Geico General Insurance Co) Receipt number: 0058532 Dated: 12/21/2010 Amount: $58.00 (Check) For: Geico General Insurance Co (defendant)	Dane H Watkins Jr
1/13/2011	HRSC	LMESSICK	Hearing Scheduled (Motion 02/10/2011 09:00 AM) Motion to Dismiss	Dane H Watkins Jr
1/18/2011	NOTH	DOOLITTL	Amended Notice Of Hearing (Telephonic) 2-10-11 @ 9:-00 a.m. (fax)	Dane H Watkins Jr
1/31/2011	RESP	LYKE	Plaintiff's Response to Defendant's Motion to Dismiss	Dane H Watkins Jr
2/8/2011		SOLIS	Defendant's Reply To Plaintiff's Response To Defendant's Motion To Dismiss Pursuant To IRCP 12(b)(6)	Dane H Watkins Jr
2/10/2011	MINE	LMESSICK	Minute Entry Hearing type: Motion Hearing date: 2/10/2011 Time: 9:00 am Courtroom: Court reporter: Minutes Clerk: Lettie Messick Tape Number: Party: Christina Brooksby, Attorney: Jordan Ipsen Party: Geico General Insurance Co, Attorney: Kevin Scanlan	Dane H Watkins Jr

Seventh Judicial District Court - Bonneville County

ROA Report

Case: CV-2010-0006403 Current Judge: Dane H Watkins Jr

Christina Brooksby vs. Geico General Insurance Co

Christina Brooksby vs. Geico General Insurance Co

Date	Code	User		Judge
2/10/2011	DCHH	LMESSICK	Hearing result for Motion held on 02/10/2011 09:00 AM: District Court Hearing Held Court Reporter: Karen Konvalinka Number of Transcript Pages for this hearing estimated: 50 pages Motion to Dismiss	Dane H Watkins Jr
3/8/2011	MEMO	LMESSICK	Memorandum Decision Re: Motion to Dismiss	Dane H Watkins Jr
	ORDR	LMESSICK	Judgment Re: Motion to Dismiss	Dane H Watkins Jr
3/11/2011	NOTC	DOOLITTL	Notice of Change of Address	Dane H Watkins Jr
3/18/2011	MOTN	SBARRERA	Defendant's Motion For Award of Costs	Dane H Watkins Jr
	MEMO	SBARRERA	Defendant's Verified Memorandum Of Costs	Dane H Watkins Jr
	AFFD	SBARRERA	Affidavit Of Counsel In Support Of Defendant's Verified Memorandum Of Costs	Dane H Watkins Jr
4/15/2011	APDC	SOLIS	Appeal Filed In Supreme Court	Dane H Watkins Jr
		SOLIS	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Gordon Law Firm Receipt number: 0019546 Dated: 4/27/2011 Amount: $101.00 (Check) For: Brooksby, Christina (plaintiff)	Dane H Watkins Jr
4/26/2011	BNDC	BOULWARE	Bond Posted - Cash (Receipt 19383 Dated 4/26/2011 for 100.00)	Dane H Watkins Jr
		BOULWARE	Clerk's Certificate of Appeal mailed to S.C.	Dane H Watkins Jr
5/11/2011		BOULWARE	Clerk's Certificate Filed (SC)	Dane H Watkins Jr
		BOULWARE	Notice of Appeal Filed - Clerk's Record Due 7/5/11 (SC)	Dane H Watkins Jr
6/17/2011		LMESSICK	Clerk's Record Due Date Reset 8/10/11	Dane H Watkins Jr

BON... ...
10 OCT 20 ... :33

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Attorney for Plaintiff

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

CHRISTINA BROOKSBY, Plaintiff, vs. GEICO GENERAL INSURANCE COMPANY, Defendant.	Case No. CV- 10-6403 **COMPLAINT** Fee Category: A1 Filing Fee: $88.00

Plaintiff, by and through her undersigned counsel of record, hereby alleges and complains as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff, Christina Brooksby ("Plaintiff"), is a resident of California.

2. Defendant, Government Employees Insurance Company ("Geico"), is a foreign corporation licensed and authorized to do business in the state of Idaho at all relevant times.

3. The events giving rise to this action occurred in Bonneville County, Idaho.

4. This Court has jurisdiction over the claims and parties to this action by virtue of Idaho Code § 1-705 and § 5-514.

5. Plaintiff brings this action pursuant to the Uniform Declaratory Judgment Act, Idaho Code § 10-1201 *et seq.*

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.

7. The actual case and controversy existing between Plaintiff and Defendant requires the Court to make a declaration as to the rights and obligations of the parties hereto, between one another.

8. Craig Brooksby and Christina Brooksby were involved in a motor vehicle collision that occurred on or about December 8, 2007.

9. Christina Brooksby was travelling as a passenger in Craig's vehicle on or about December 8, 2007.

10. Craig rolled the vehicle two times causing the roof of the vehicle to rip off ejecting Plaintiff from the vehicle.

11. Christina Brooksby was taken to the hospital via ambulance and treated for injuries she sustained in the motor vehicle collision.

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 Craig Brooksby's policy for the bodily injuries and other damages she sustained in the subject motor vehicle collision.

14. Defendant has denied Plaintiff's claim based upon a so-called "household exclusion."

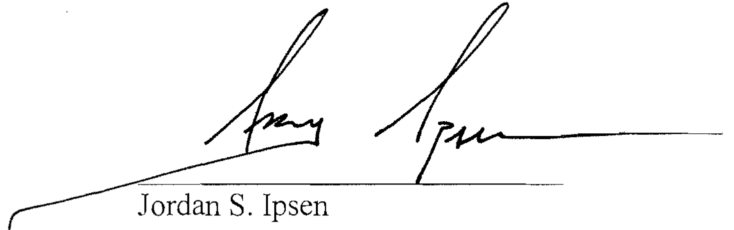
15. The Idaho legislature mandates insurance coverage for damge, injury, or death suffered "by any person."

16. The Idaho Supreme Court has unequivocally stated that "the household exclusion clause is flatly and unmistakably in violation of Idaho's compulsory insurance law" and that "the clause is unenforceable, and void as agasint public policy."

WHEREFORE, Plaintiff prays for judgment against the Defendants declaring:

1. That Craig Brooksby was insured by Defendant 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.

DATED October 20, 2010.



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Attorneys for Defendant GEICO General Insurance Company

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

CHRISTINA BROOKSBY, Plaintiff, vs. GEICO GENERAL INSURANCE COMPANY, Defendants.	Case No. CV-10-6403 **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PURSUANT TO I.R.CP. 12(b)(6)**

COMES NOW the defendant, GEICO General Insurance Company, (hereinafter "GEICO"), by and through its counsel of record, and hereby submits this memorandum in support of its motion to dismiss, seeking this Court's order dismissing the claims against it by plaintiff Christina Brooksby ("Plaintiff" or "Ms. Brooksby"), as contained in Plaintiff's Complaint ("Complaint") with prejudice, on the grounds that Plaintiff has failed to state claims upon which relief can be granted against defendant GEICO.

SUMMARY OF ARGUMENT

Plaintiff's Complaint is devoid of any allegation that she is an insured under the policy upon which she seeks to sue. Rather, the Complaint attempts to establish the insured status of Craig Brooksby, and, in conjunction therewith, coverage under his policy for automobile liability coverage ("the Policy") for Plaintiff's claimed damages. As Plaintiff fails to assert anywhere in the Complaint that she is an insured under the Policy, and because she otherwise attempts to have this Court determine the policy rights of a non-party (Craig Brooksby), her lawsuit constitutes a third-party direct action against GEICO, which Idaho courts have repeatedly stated are barred. Thus, the Complaint fails to state a claim upon which relief can be granted and should be dismissed. Further, GEICO is entitled to its attorney fees.

SUMMARY OF PLAINTIFF'S ALLEGATIONS

Plaintiff alleges that in December 2007, she was injured and taken by ambulance to a hospital after Craig Brooksby rolled the vehicle in which she was a passenger and she was ejected. Complaint at ¶¶ 8-11. Plaintiff alleges that Defendant GEICO insured Craig Brooksby under the Policy at the time of the accident and that, thus, GEICO may not deny her coverage for the damages she sustained in the accident. *Id.* at 3. Plaintiff does not allege anywhere in the Complaint that she is an insured of GEICO under the Policy.

RULE 12(b)(6) STANDARD

Idaho Rule of Civil Procedure 12(b)(6) provides that a motion to dismiss may be brought upon a plaintiff's failure to state a claim upon which relief can be granted. Under I.R.C.P. 12(b)(6), an action should be dismissed when, after reading the complaint in the light most favorable to the plaintiff, it appears the plaintiff has alleged no facts in support of her claims which would entitle her to relief. *See, Rincover v. Dep't of Fin., Sec. Bureau*, 128 Idaho 653, 917

P.2d 1293 (1996). In order to withstand a motion to dismiss, the nonmoving party must allege all essential elements of the claims presented. *Johnson v. Boundary School Dist. No. 101*, 138 Idaho 331, 334, 63 P.3d 457, 460 (2003).

ARGUMENT

A. Plaintiff Fails to Allege She is an Insured Under the Policy at Issue.

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, 613, 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 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). In that case, the trial court dismissed the insurance company from the suit. *Id.* On appeal, the trial court's dismissal was affirmed. *Id.*

The plaintiff in *Hettwer* was injured in an automobile accident by defendant. *Id.* at 373, 797 P.2d at 81. 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, 797 P.2d at 82. 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 v. United Heritage Property and Cas. Co.*, 141 Idaho 193, 199, 108 P.3d 340, 346 (2005)("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.")

In this case, Plaintiff does not allege that she is directly insured by GEICO under the Policy. Indeed, Plaintiff's 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.

(emphases added). Clearly, Plaintiff'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 improperly asserted under a policy insuring someone else (Craig Brooksby). Further, Brooksby has failed to allege any statutory or contractual provision that would authorize her suit against GEICO. Accordingly, Plaintiff's Complaint is defective on its face as violative of Idaho's prohibition of direct actions, and should be dismissed.[1]

B. Plaintiff Otherwise Improperly Seeks to Determine the Rights as Might Exist Between GEICO and Its Insured, Craig Brooksby.

Even if Plaintiff were to have asserted that she were an insured, or otherwise attempt to do so in responding to this motion, Plaintiff's Complaint still remains defective, because it does

[1] In making this argument, defendant assumes that Plaintiff is advancing the position that Idaho law applies, as reflected by Plaintiff's Idaho law argument in her Complaint, at ¶¶15-16. Thus, defendant makes its argument as to the direct action rule strictly through the lens of Plaintiff's Complaint, which advocates application of Idaho law. In making this motion, defendant does not waive any arguments it may have as to the applicable law that may ultimately apply to any action for damages arising out of the underlying accident, and does not necessarily agree that Idaho law will govern resolution of such a dispute.

not seek declaratory relief as to her own claimed rights under the Policy, but, rather, seeks to determine the rights of Craig Brooksby (a non-party) under the terms of the Policy. Plaintiff's prayer for relief illustrates this point:

> WHEREFORE, Plaintiff prays for judgment against the Defendants [sic] declaring:
>
> 1. That **Craig Brooksby was insured** by Defendant 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.

(emphases added). As Plaintiff does not seek a determination of any rights she may have under the Policy – instead apparently seeking to have this Court issue a declaratory judgment as to the rights under the Policy as exist between defendant and a non-party, Craig Brooksby – the Complaint remains defective on its face in violating Idaho's prohibition on direct actions.

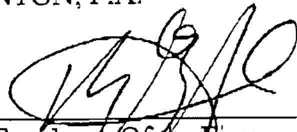
For this reason, also, Plaintiff's Complaint should be dismissed.

CONCLUSION

For the reasons stated above, defendant GEICO's Motion to Dismiss should be granted, and those claims against it by Brooksby, as contained in her Complaint, should be dismissed with prejudice.

RESPECTFULLY SUBMITTED this 15th day of December, 2010.

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

By: 
Kevin J. Scanlan – Of the Firm
Bryan A. Nickels – Of the Firm
Attorneys for Defendant GEICO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of December, 2010, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Jordan S. Ipsen	☒ U.S. Mail, Postage Prepaid
GORDON LAW FIRM, INC.	☐ Hand Delivered
477 Shoup Avenue, Ste. 101	☐ Overnight Mail
Idaho Falls, ID 83402	☒ Telecopy
Fax: 866/886-3419	☐ Email sky@brentgordonlaw.com

Kevin J. Scanlan
Bryan A. Nickels

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2010 DEC ... PM 1:09

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Attorneys for Defendant

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

CHRISTINA BROOKSBY, Plaintiff, vs. GEICO GENERAL INSURANCE COMPANY, Defendants.	Case No. CV-10-6403 **MOTION TO DISMISS PURSUANT TO I.R.CP. 12(b)(6)**

COMES NOW Defendant Government Employees Insurance Company, (hereinafter "GEICO"), by and through its counsel Hall, Farley, Oberrecht & Blanton, P.A., and hereby submits this motion to dismiss the plaintiff's Complaint pursuant to I.R.C.P. 12(b)(6), seeking this Court's order dismissing plaintiff's claims against GEICO as contained in Plaintiff's Complaint, with prejudice, for failure to state a claim upon which relief can be granted.

This motion is supported by the Memorandum in Support of Motion to Dismiss lodged herewith and the record in this matter.

Oral argument is requested.

DATED this 14 day of December, 2010.

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

By: [signature]
Richard E. Hall – Of the Firm
Kevin J. Scanlan – Of the Firm
Attorneys for Defendant GEICO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14 day of December, 2010, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

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- [ ] Hand Delivered
- [ ] Overnight Mail
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Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

CHRISTINA BROOKSBY, Plaintiff, vs. GEICO GENERAL INSURANCE COMPANY, Defendant.	Case No. CV-10-6403 **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS**

Plaintiff, by and through her undersigned counsel, hereby submits the following memorandum of law in opposition to Defendant's Motion to Dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

Craig Brooksby was travelling on Interstate 15 near Idaho Falls, Idaho just after midnight on December 8, 2007. Brooksby was travelling with his wife, Brenda, and his daughter, Christina. The Brooksbys were travelling from Manteca, California to Idaho Falls, Idaho to

attend the marriage of Craig and Brenda's daughter, Lori Brooksby, on December 8, 2007. Near milepost 118, Craig lost control of his vehicle while driving approximately 55 miles per hour. The vehicle made a 180 degree turn on the roadway, slid off the right shoulder, and rolled. The roof was ripped completely off as the vehicle rolled and Christina flew out of the top of the vehicle. Christina landed on the shoulder of the frontage road, approximately 49 feet away from the van.

Christina was transported to Eastern Idaho Regional Medical Center immediately following the collision, where she was diagnosed with having a contusion to the back of her head causing nausea and vomiting and three fractured vertebrae in the thoracic spine. Christina made a claim against Craig's automobile insurance policy with GEICO General Insurance Company ("GEICO") for the damages sustained in the collision. GEICO has denied the claim based on a so-called "household exclusion" clause. Christina filed suit against Craig in Bonneville County Case No. CV-09-7120. Since Christina does not wish to pursue a recovery against her father if there is no applicable insurance coverage, the Honorable Joel E. Tingey ordered a stay in the proceedings pending the results of this declaratory action. Christina has brought this declaratory action against GEICO for purpose of determining whether there is insurance coverage for the damages she sustained in the automobile collision on December 8, 2007.

GEICO has brought a motion to dismiss Christina's declaratory action pursuant to Rule 12(b) of the Idaho Rules of Civil Procedure. The sole legal argument in support of the motion is

that the declaratory action constitutes an impermissible third-party direct action against GEICO. (Mem. in Supp. of Def.'s Mot to Dismiss Pursuant to I.R.C.P. 12(b)(6) at 2.)

STANDARD OF ADJUDICATION

A Rule 12(b)(6) motion to dismiss for failure to state a claim, without affidavits or deposition testimony introduced into the record either in support or in opposition, is addressed solely to the sufficiency of the complaint. *See Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995). All inferences from the facts pleaded in the complaint must be drawn in favor of the party opposing the motion; and the issue presented is "whether the plaintiff is entitled to offer evidence to support the claims." *Id.* A motion to dismiss should be granted if a party can show that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law. *Gibson v. Ada County*, 142 Idaho 746, 751, 133 P.3d 1211, 1216 (2006).

On a motion to dismiss, the Court looks only at the pleadings, and all inferences are viewed in favor of the non-moving party. *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969).

LEGAL ANALYSIS

Defendant's sole argument in support of its motion to dismiss is that Plaintiff's "lawsuit

constitutes a third-party direct action against GEICO." (Mem. in Supp. Of Def.'s Mot to Dismiss Pursuant to I.R.C.P. 12(b)(6) at 2.) Defendant has cited to seven cases in support of its accusation that Christina has brought an improper third-party claim against GEICO. (*Id.* at 2-4.) However, not one of these cases is on point. Not one of these seven cases holds that an injured party cannot bring a declaration action against the torfeasor's insurance carrier to determine the extent of liability insurance coverage. The cases cited by Defendant are the following:

1. *Graham v. State Farm Mut. Auto. Ins. Co.*, 138 Idaho 611, 67 P.3d 90 (2003) stands for the unremarkable proposition that an injured party can not bring a tort action (the so-called "direct third-party action") seeking damages against the tortfeasor's insurance carrier for bad faith. Christina Brooksby is not bringing a tort action against GEICO nor is she seeking to recover damages from GEICO.
2. *Pocatello Indus. Park Co. v. Steel W., Inc.*, 101 Idaho 783, 621 P.2d 399 (1980) holds that a lessor's insurance carrier could not maintain an action for indemnification against a lessee's insurance carrier for payments the lessee's insurance carrier had paid to an employee of lessee who was injured due to the lessor's negligence.
3. *Downing v. Traveler's Ins. Co.*, 107 Idaho 511, 691 P.2d 375 (1984) holds that a widow of an injured party could not maintain an action against the injured party's employer's insurance carrier as a "third party beneficiary" to the insurance contract. Again, Christina Brooksby is not seeking insurance benefits from GEICO under the policy it issued to

Craig Brooksby, but rather is seeking a declaration regarding liability insurance coverage.

4. *Hettwer v. Farmers Ins. Co.*, 118 Idaho 373, 797 P.2d 81 (1990), like *Graham*, holds that an injured party cannot seek damages from a tortfeasor's insurer for tortiously denying or delaying payment of a claim. Christina is not claiming that GEICO tortiously denied her claim; rather she is seeking a declaration that there is indeed insurance coverage for the subject automobile collision.
5. *Hartman v. United Heritage Prop. & Cas. Co.*, 141 Idaho 193, 108 P.3d 340 (2005) holds that the judgment creditors of a tortfeasor could not maintain a direct action against the tortfeasor's insurance carrier for breach of contract or for the tort of bad faith.
6. *Trinity Universal Ins. Co. v. Kirsling*, 139 Idaho 89, 92 73 P.3d 102, 105 (2003) merely states that "insurance policies are a matter of contract between the insurer and the insured."
7. *Stonewall Surplus Lines Ins. Co. v. Farmers Ins. Co.*, 132 Idaho 318, 971 P.2d 1142 (1998) holds that the insurance carrier of a tortfeasor could not seek indemnification from a co-tortfeasor's insurance carrier because indemnification should have been sought from the co-tortfeasor.

None of the cases cited by GEICO are applicable to the case at bar. Not one of the cases stands for the proposition that an injured party cannot maintain a declaratory action against the tortfeasor's insurance carrier to determine the extent of the insurer's liability coverage.

There is an evident distinction between a claim for damages and a declaratory action seeking a determination of liability coverage. In *Christian v. Sizemore*, 383 S.E.2d 810 (W. Va. 1989), the trial court denied an injured party's request to amend the personal injury complaint against the tortfeasor to add a claim against the tortfeasor's insurance carrier after the insurance carrier asserted that the policy had lapsed at the time of the automobile collision. The trial court denied the motion relying on a case that states, "An injured party may not join the defendant's insurance carrier in a suit for damages filed against the defendant arising from a motor vehicle accident, unless the insurance policy or a statute authorizes such direct action." *Id.* at 812. The appellate court overruled the trial court, explaining that the rule prohibiting a third-party direct action is not applicable to a declaratory action.

> In this case, however, the plaintiff is not seeking to recover damages against the defendants' insurance carrier. Instead, she seeks a declaration that Kemper [the tortfeasor's insurer] is required to provide insurance coverage to the defendants in the personal injury suit. This declaration is entirely ancillary to the personal injury suit for damages against the defendants.

Id. Similarly, in *Reagor v. Travelers Ins. Co.,* 415 N.E.2d 512 (Ill. 1980), an injured party brought a personal injury suit against an alleged tortfeasor and a separate declaratory action against the tortfeasor's insurance carrier. The appellate court framed the insurance carrier's argument thusly: "Travelers also argues that this action cannot be maintained because it would be contrary to our State's policy of prohibiting direct actions against an insurer before judgment has been rendered against its insured." *Id.* at 515. The court soundly rejected that argument

stating:

> The issue of coverage, which is the subject of this action, has been effectively severed from any question of the insured's liability and the assessment of damages, which will be determined in the pending personal injury action. Under these circumstances, plaintiffs' declaratory judgment action cannot be barred on the basis that it is a direct action suit against the insurer.

Id. The court went on to hold that "the trial court in this case may grant declaratory relief determining whether there is coverage under the policy." *Id.* at 516.

The prohibition against bringing a direct action for damages against a tortfeasor is not implicated by Christina Brooksby's Complaint. Brooksby is not seeking a recovery of damages caused by GEICO's insured's negligence. Brooksy has standing to bring this action pursuant to the Uniform Declaratory Judgment Act, I.C. § 10-1201 *et seq.* Idaho Code § 10-1202 sets forth who may bring a declaratory action thusly:

> Any person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

"An injured party may bring a declaratory judgment action against the defendant's insurance carrier to determine if there is policy coverage before obtaining a judgment against defendant in the personal injury action where the defendant's insurer has denied coverage." 22A Am. Jur. 2d *Declaratory Judgments* § 138 (2003). Numerous cases exist in which an injured party has brought a declaratory action against the tortfeasor's insurance carrier. *See generally, Id. See, e.g.*,

Richmond v. Hartford Underwriters Ins. Co., 727 A.2d 968 (1999) (wife who was passenger is husband's automobile sought declaratory action against husband's insurer to determine extent of liability insurance coverage). Courts have also specifically held that an injured party has a right to bring a declaratory action against the tortfeasor's insurance carrier. *See, e.g.*, *Beeson v. State Auto. & Casualty Underwriters,* 508 P.2d 402, *aff'd,* 516 P.2d 623 (Colo. 1973); *Atkinson v. Atkinson,* 326 S.E.2d 206 (Ga. 1985); *Reagor v. Travelers Ins. Co.,* 415 N.E.2d 512 (Ill. 1980); *Baca v. New Mexico State Highway Dep't,* 486 P.2d 625 (N.M. 1971). *See also e.g., Draper v. Draper*, 115 Idaho 973, 772 P.2d 180 (1989) ("Barbara also included in the action a claim against State Farm and Van, requesting a declaratory judgment that the household exclusion was void and that there was coverage for her injuries under the policy. State Farm filed a counterclaim against Barbara and a cross-claim against Van, requesting a declaratory judgment that the household exclusion was valid and that State Farm had no liability to Barbara under the policy.");

In *Temperance Insurance Exchange v. Carver*, 83 Idaho 487, 490, 365 P.2d 824, 826 (1961), the Idaho Supreme Court stated, "Injured 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." In 2008, Idaho Rule of Civil Procedure 57 was amended to add the following language:

> 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.

Christian 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. No plausible reading of Plaintiff's Complaint could construe it as direct third-party action. It is indisputable that it is an action seeking a declaration regarding the extent of insurance coverage under a policy issued by Defendant. Any attempt to characterize it as a direct third-party action is not grounded in fact nor warranted under existing law.

CONCLUSION

Defendant's sole argument is that Plaintiff cannot bring a direct action against the Defendant since Plaintiff has not claimed that she is an insured under the policy. Plaintiff's action is not a direct action. Therefore, Defendant's motion to dismiss should be denied.

DATED January 28, 2011

Jordan S. Ipsen

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2011, I mailed a copy of the foregoing to the following:

Kevin Scanlan
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho Street, Suite 700
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____
Jordan S. Ipsen

BONNEVILLE COUNTY
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Attorneys for Defendant GEICO General Insurance Company

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

CHRISTINA BROOKSBY, Plaintiff, vs. GEICO GENERAL INSURANCE COMPANY, Defendants.	Case No. CV-10-6403 **DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS PURSUANT TO I.R.CP. 12(b)(6)**

COMES NOW the defendant, GEICO General Insurance Company, (hereinafter "GEICO"), by and through its counsel of record, and hereby submits this memorandum in reply to Plaintiff's response to Geico's motion to dismiss.

ARGUMENT

In response to GEICO's motion to dismiss her lawsuit on the basis that it constitutes a third-party direct action against GEICO, which Idaho courts have repeatedly stated are barred, Plaintiff fails to cite to any viable Idaho authority, misapprehends the application of I.R.C.P. 57,

and asks this Court to ignore the reality that through her Complaint she seeks damages under a contract to which she is not a party without any liability issues having been litigated. Plaintiff has failed to show that her Complaint states a claim upon which relief can be granted, and the Court should therefore dismiss it.

A. Plaintiff Cites to No Viable Idaho Case Law to Support Her Position

In her response, Plaintiff cites to several cases from other states in order to support her position. It is axiomatic, however, 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). In other words, even though Plaintiff has cited cases from six other states, the only decisions applicable to the motion before this Court are those that are in line with valid Idaho law.[1]

Even if the cases cited by Plaintiff were binding on this Court, they would remain inapt. For example, Plaintiff cites *Reagor v. Travelers Ins. Co.*, 415 N.E.2d 512, 515 (Ill. App. Ct. 1980) as supportive of her action. In *Reagor*, there was an underlying personal injury action between the plaintiffs and the alleged tortfeasor. By contrast, Plaintiff makes no allegation that any such action is pending in this matter.[2] *See* Compl. at 1-4. Perhaps more importantly, the applicable law cited by the Illinois court included a key concept foreign to Idaho: that an injured party "is a real party in interest to the liability insurance contract." *Id.* at 514; *compare with*

---

[1] Again, in making this argument, defendant assumes that Plaintiff is advancing the position that Idaho law applies, as reflected by Plaintiff's Idaho law argument in her Complaint, at ¶¶15-16. Indeed, Plaintiff's opposition does not appear to suggest that she believes that any other state's law applies. Thus, defendant makes its argument as to the direct action rule strictly through the lens of Plaintiff's Complaint and opposition, which advocate application of Idaho law. Again, in making this motion, defendant 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 will govern resolution of this dispute.

[2] Plaintiff's opposition memorandum does contend that there exists an action against Craig Brooksby, and that such action is stayed; however, the Complaint makes no such assertion. *See* Plaintiff's Response to Defendant's Motion to Dismiss, at p.2. Moreover, a review of ISTARS reflects that the case cited by plaintiff is closed.

Hartman v. United Heritage Prop. & Cas. Co., 141 Idaho 193, 199, 108 P.3d 340, 346 (2005) ("[T]he person allegedly injured by the insured **is not a party to the insurance contract** and has no rights under it.")(emphasis added). Thus, *Reagor* offers nothing by way of guidance to determination of the motion at bar.

Similarly, Plaintiff cites to *Richmond v. Hartford Underwriters Ins. Co.*, 727 A.2d 968, 970 (Md. Ct. Spec. App. 1999), in support of her position that she is not barred from bringing the instant suit under Idaho's direct-action law. In that case, however, the plaintiff in *Richmond* was the spouse of the defendant in the underlying litigation, and her declaratory action suit sought coverage, in part, under the uninsured motorist provision of the policy (thus, claiming status as an insured). *Id.* Plaintiff has made no such assertion here. Moreover, the *Richmond* court relied upon the *Hartford Mut. Ins. Co. v. Woodfin Equities Corp.* decision, which confirmed that, under Maryland law, "[o]nce there is a verdict or judgment in the tort action, a direct action may be maintained against the liability insurer." 687 A.2d 652 (Md. 1997). While this may provide a basis to approve pre-judgment direct actions in Maryland, Idaho lacks such legal predicate, as in Idaho, even judgment creditors are barred from pursuing direct actions. *Hartman*, 141 Idaho at 198 ("**We have never held that an insured's judgment creditor has a direct action against the insurer.**")(emphasis added).

In *Atkinson v. Atkinson*, another foreign case cited by Plaintiff to support her position, 326 S.E.2d 206 (Ga. 1985) (holding that mother of a child killed in automobile accident was entitled to bring declaratory action to determine insurer's duty to defend its insured in underlying wrongful death action), the declaratory action actually arose as a complicated question relating to a settlement with one claimant and a subsequent intervention by a second claimant based upon a divorce-related dispute between the two claimants. The actual issue was whether, based upon a

return of settlement monies, the insurer had to again defend its insured; the case does not specify which party raised the question, nor is the factual posturing of *Atkinson* even remotely similar to this action. Thus, *Atkinson* and its procedural complexities are unhelpful in this matter.

In *Baca v. New Mexico State Highway Dept.*, another case to which Plaintiff cites, the action was again posited upon existing underlying litigation. 486 P.2d 625, 626 (N.M. Ct. App. 1971) ("[a]ctions involving deaths and personal injuries resulting from the collision of motor vehicles were brought"). The court in *Baca*, however, emphasized the unique posture of the case, which involved a suit against the New Mexico State Highway Department: "The Department is immune from suit in the absence of liability insurance coverage (§ 5-6-19 and § 5-6-20, N.M.S.A. 1953 (Repl. Vol. 2). ... As has been pointed out, no action is maintainable against the Department in the absence of liability insurance coverage extended to the particular accident. ... In our view, an actual controversy does exist as between the plaintiffs and the Company with respect to coverage, absent which the suit against the Department is not maintainable." *Id.* at 960 & 963. Thus, the unique immunity question posed in *Baca*, a 40 year-old decision from another jurisdiction, again is wholly distinct from this action, as plaintiff has not – and cannot – assert that Craig Brooksby is somehow statutorily immune from suit absent insurance coverage.[3]

The next case that Plaintiff cites from another state in support of her position is *Beeson v. State Automobile and Casualty Underwriters*, 508 P.2d 402 (Colo. App. 1973). As regards *Beeson*, the Supreme Court of Colorado, in the later case *Farmers Ins. Exch. v. Dist. Court for Fourth Judicial Dist.*, 862 P.2d 944, 947 (Colo. 1993), pointed out that in *Beeson*, "[t]he losing insurance companies appealed the substantive decision of the court. None of them raised the

[3] In plaintiff's opposition briefing, plaintiff simply indicates that she "does not wish to pursue a recovery against her father if there is no applicable insurance coverage[.]" Plaintiff's Response to Defendant's Motion to Dismiss, at p.2.

question of whether the [injured party] had standing to bring the action. Neither the court of appeals nor this court addressed the issue of standing." The *Farmers* court went on to hold that the injured party lacked standing to bring a declaratory judgment action before she had obtained a judgment against other driver. *Id.* at 948-49 ("The issue of whether a plaintiff may bring a declaratory judgment action against a defendant's insurance company, before obtaining a judgment against the defendant, is one of first impression for this court. However, other states that have considered the question have ruled that a plaintiff does not have standing to bring such an action.")

Plaintiff further cites to a case decided by the Idaho Supreme Court, but fails to point out that the 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 973, 772 P.2d 180 (1989) (holding that the law of Oregon applied and that under Oregon law at time of accident, the household exclusion was valid). The Court did not decide *Draper* under Idaho law, which is the law Plaintiff seeks to have govern this case. Furthermore, both the plaintiff and defendant had an ownership interest in the automobile involved in the accident at issue in *Draper*. *Id.* at 974 ("The primary issue presented is whether the household 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). By contrast, Plaintiff does not contend that she had any ownership interest in the vehicle driven by Craig Brooksby. Thus, *Draper* does not offer either the factual or legal support for Plaintiff's position that she urges it does.

Plaintiff also cites *Christian v. Sizemore*, 383 S.E.2d 810, 812 (W.V. 1989) for the proposition that the present suit can be maintained during the pendency of an injury suit; however, plaintiff disregards that the basis for the Court's ruling in that case was based on extant law that: "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 case offers nothing to the present action, however, as the right to recover via direct action as a judgment-creditor is expressly barred by Idaho law. *Hartman*, 141 Idaho at 198 ("We have never held that an insured's judgment creditor has a direct action against the insurer.").

Finally, Plaintiff cites to *Temperance Insurance Exchange v. Carver*, an Idaho case from 1961, to oppose Defendant's motion to dismiss. 83 Idaho 487, 365 P.2d 824. Again, this case does not offer valid support for Plaintiff's position. Plaintiff's citation to language within that case ignores the key component of the statement: "Injured 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). In this matter, plaintiff is, by definition, not a party defendant, nor did GEICO initiate this lawsuit, nor does this lawsuit even implicate any coverage dispute between GEICO and its insured Mr. Brooksby. In any event, Idaho's bar on direct third-party action law has been more than amply developed since *Temperance*. *See, e.g., Pocatello Indus. Park Co. v. Steel West, Inc.*, 101 Idaho 783,791, 621 P.2d 399, 407 (1980) (holding that "[i]t 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 511, 515, 691 P.2d 375, 379 (1984) (holding that wife of deceased train engineer could not maintain direct action against insurer on theory that she was a third-party beneficiary under group policy). Thus, plaintiff's citation to *Temperance* is unavailing.

In short, Plaintiff cites to no viable Idaho authority in her opposition to Defendant's motion to dismiss that supports her position.

B. Plaintiff Misapprehends the Application of I.R.C.P. 57

Plaintiff cites I.R.C.P. 57 in opposition to Defendant's motion to dismiss. That rule provides in relevant part that:

> 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.

This rule contemplates the joinder of a third-party claimant in a declaratory action between an insurer and insured. That is not this case, as <u>there is no action between the insurer and the insured</u>. Here, Plaintiff seeks to bring a direct claim against defendant insurer, a procedure not contemplated by Rule 57.

Accordingly, Idaho Rule of Civil Procedure 57 does not provide support for Plaintiff's opposition to Defendant's motion to dismiss.

C. Plaintiff Seeks to Recover Damages Without Litigating Liability

The Idaho Supreme Court has already opined on the question of whether a third-party should be able to litigate directly against an insurer prior to the insured and insurer resolving issues of coverage between themselves.

The Court stated that:

> 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 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*199 **346 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).

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 v. United Heritage Prop. & Cas. Co., 141 Idaho at 198-99. If Plaintiff's claim is allowed to go forward, she will be forcing GEICO to defend a suit regardless of the possible outcomes of any dispute resolution between GEICO and its insured. The Supreme Court has unequivocally expressed the undesirability of such actions, and rejected the right of a claimant to interfere in the insurer-insured relationship. Plaintiff's Complaint should therefore be dismissed.

CONCLUSION

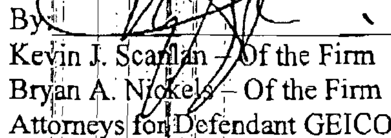
Plaintiff's Complaint notably lacks any information regarding whether or not plaintiff claims insured status or has a suit against Mr. Brooksby, and otherwise fails to assert that any caselaw, statute, or contractual provision allows her to bypass Idaho's long-standing rule against direct actions by attempting to force a ruling on GEICO's duty to indemnify any judgment/settlement which Mr. Brooksby might ultimately be found to owe, absent any kind of judgment/settlement against Mr. Brooksby or even a dispute from Mr. Brooksby as to the limits

of his coverage under his GEICO policy, is patently untenable under Idaho law. To permit otherwise would allow every claimant in Idaho to file declaratory actions against potential insurers to merely allow them to gauge their interest is pursuing an action against an alleged tortfeasor, which would constitute a wholesale abandonment of Idaho's direct action prohibition (certainly something the Idaho Supreme Court has not endorsed).

Thus, for these reasons and for the reasons stated above, defendant GEICO's motion to dismiss should be granted, and those claims against it by Plaintiff, as contained in her Complaint, should be dismissed with prejudice and GEICO should be awarded its attorney fees and costs.

RESPECTFULLY SUBMITTED this 7th day of February, 2011.

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



By ______________________
Kevin J. Scanlan – Of the Firm
Bryan A. Nickels – Of the Firm
Attorneys for Defendant GEICO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of February, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Jordan S. Ipsen	[X] U.S. Mail, Postage Prepaid
GORDON LAW FIRM, INC.	[ ] Hand Delivered
477 Shoup Avenue, Ste. 101	[ ] Overnight Mail
Idaho Falls, ID 83402	[X] Telecopy
Fax: 866/886-3419	[ ] Email sky@brentgordonlaw.com

Kevin J. Scanlan
Bryan A. Nickels

``IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

CHRISTINA BROOKSBY, Plaintiff, vs. GEICO GENERAL INSURANCE COMPANY, Defendants.	)))))))))))	Case No. CV-2010-6403 MINUTE ENTRY ON MOTION TO DISMISS

February 10, 2011, at 9:00 A.M., Defendant's Motion to Dismiss came on for hearing before the Honorable Dane H. Watkins, Jr., District Judge, sitting in open court at Idaho Falls, Idaho.

Ms. Karen Konvalinka, Court Reporter, and Ms. Lettie Messick, Deputy Court Clerk, were present.

Mr. Jordan Ipsen appeared on behalf of the plaintiff. Mr. Kevin Scanlan appeared by telephone on behalf of the defendant.

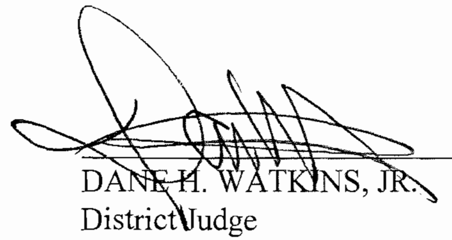
Mr. Scanlan presented argument supporting Defendant's Motion to Dismiss.

Mr. Ipsen presented argument in opposition to Defendant's Motion.

Mr. Scanlan presented rebuttal argument.

The Court took the matter under advisement.

Court was thus adjourned.



DANE H. WATKINS, JR.
District Judge

c: Jordan Ipsen
Kevin Scanlan

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE.

CHRISTINA BROOKSBY, Plaintiff, vs. GEICO GENERAL INSURANCE COMPANY; Defendant.	)))))))))))	Case No. CV-10-6403 **MEMORANDUM DECISION RE: MOTION TO DISMISS**

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 8, 2017, Craig and Brenda Brooksby and their daughter Cristina were traveling from California to Idaho Falls for a wedding. As the Brooksbys were approaching the Idaho Falls exit, Mr. Brooksby lost control of the vehicle. The vehicle slid off the road and rolled. The top of the vehicle ripped off and Christina was ejected. Christina was taken to the hospital where she was diagnosed with a contusion to the back of her head and three fractured vertebrae in the thoracic spine.

Christina made a claim against her father's insurance policy with GEICO General Insurance Company (hereafter "GEICO") for the damages sustained in the collision. GEICO denied the claim based on a "household exclusion" clause in Mr. Brooksby's policy.

On December 4, 2009, Christina filed suit against her father and GEICO in Bonneville County Case No. CV-09-7120 (hereafter "suit for damages"). On October 20, 2010, Chirstina filed a notice of voluntary dismissal of GEICO. Christina, however, does not wish to pursue a recovery against her father if there is no coverage for her alleged damages under Mr. Brooksby's

insurance policy with GEICO.[1] Thus, on October 20, 2010, Christina filed this action for declaratory judgment, asking this Court to determine whether GEICO is required to provide coverage for Christina's damages. The Honorable Joel E. Tingey ordered a stay in the proceedings of Christina's suit for damages, pending the results of this action.

On December 15, 2010, GEICO filed a motion to dismiss this action pursuant to Rule 12(b)(6) of the Idaho Rules of Civil Procedure. On January 31, 2011, Christina filed a brief in opposition to GEICO's motion to dismiss. On February 8, 2011, GEICO filed a reply brief.

II. STANDARD OF ADJUDICATION

A court may grant a motion for judgment on the pleadings when there are no material issues of fact or law. *Davenport v. Burke*, 27 Idaho 464, 149 P. 511 (1915). A court may grant a motion to dismiss for failure to state a claim "when it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim which would entitle [the plaintiff] to relief." I.R.C.P. 12(b)(6).

The non-moving party is entitled to have all inferences viewed in his or her favor. *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). Yet, the non-moving party's case must be anchored in something more than speculation. *Petricevich v. Salmon River Canal Company*, 92 Idaho 865, 452 P.2d 362 (1969). "Factual allegations must be enough to raise a right to relief above the speculative level." *Williams ex rel. Tabiu v. Gerber Products Co.*, 523 F.3d 934, 938 (9th Cir. 2008) quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 927 (2007). The allegations must be more "than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic*, 550 U.S. at 555.

[1] Mr. Brooksby's insurance policy containing the "household exclusion" has not been filed. Nor have any affidavits been filed by either party in this action.

A claim has facial plausibility only when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556. It asks for more than sheer possibility that a defendant has acted unlawfully. *Id.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* at 557. The United States Supreme Court explained the analysis a court must take when considering a motion for judgment on the pleadings:

> Two working principles underlie [our decision in] *Twombly.* First, the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements. Second, determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense. A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1940, 173 L. Ed. 2d 868 (2009).

III. DISCUSSION

By this action, Christina seeks to establish the insured status of her father and the coverage under his insurance policy with GEICO for her claimed damages. Christina argues she "has standing to bring this action pursuant to the Uniform Declaratory Judgment Act, I.C. § 10-1201 *et seq*." Brief in Opposition at 7.

GEICO believes this action should be dismissed because it constitutes a third-party direct action against GEICO. In its briefs, GEICO cites numerous cases which reaffirm Idaho's "direct action rule," which holds that an injured party cannot sue a tortfeasor's insurance carrier directly.

"'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, 613, 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)). *See also Hartman v. United Heritage Property and Cas. Co.*, 141 Idaho 193, 199, 108 P.3d 340, 346 (2005); *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); *Hettwer v. Farmers Ins. Co. of Idaho*, 118 Idaho 373, 797 P.2d 81 (1990); *Downing v. Travelers Ins. Co.*, 107 Idaho 511, 515, 691 P.2d 375, 379 (1984).

There is no dispute that under Idaho's direct action rule Christina lacks standing to bring an action for damages against GEICO because she is not a party to the insurance policy. Christina asks this Court to conclude that Idaho's Declaratory Judgment Act broadens the scope of persons who have standing to sue on an insurance contract.

Idaho Code Section 10-1202 describes the parties that are authorized to bring an action for declaratory judgment:

> Any person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

In *Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Andrus*, 127 Idaho 239, 245, 899 P.2d 949, 955 (1995) (hereafter "SPBA I"), two environmental groups sued the Idaho State Board of Land Commissioners and the Idaho Department of Lands seeking to challenge a timber sale. Trying to assert their standing to maintain the suit, the environmental groups argued that the

Declaratory Jedgment Act "somehow broadens the scope of standing." The court responded to that argument, stating,

> 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*. Therefore, the environmental groups' claim that they have standing because a declaratory judgment would resolve the "rights, status, and legal relations existing between the parties" is without merit.

Id. (emphasis added).

In a separate suit regarding a different timber sale, the same environmental groups tried to establish standing pursuant to the Declaratory Judgment Act in order to challenge the constitutionality of Idaho Code §§ 58-405 and 407. The court again reaffirmed the rule that "the Declaratory Judgment Act does not relieve a party from showing that it has standing to bring the action in the first instance." *Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Batt*, 128 Idaho 831, 919 P.2d 1032 (1996) (hereafter "SPBA II"). The court then recited the rules that govern standing in an action to challenge statutory provisions. Because the environmental groups lacked "standing to challenge the timber sale in the first instance, it [could] not maintain a claim of invalidity under the Declaratory Judgment Act." *Id.*

Although the subject of this suit is the interpretation of an insurance contract rather than the constitutionality of statutory provisions, Christina's position in this litigation and the question of her standing is remarkably similar to that of the environmental groups in SPBA I and SPBA II. To the extent that Christina could be considered an "interested" person under the Declaratory Judgment Act, that fact alone would not give Christina standing to bring this action. Christina's argument that the "direct action rule" does not apply to declaratory judgment actions is essentially the same argument made by the environmental groups in SPBA I and SPBA II—that

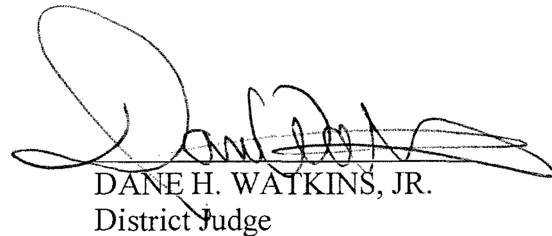
standing is broader when making a claim under the Declaratory Judgment Act than it is otherwise. The Idaho Supreme Court has rejected that argument on two occasions. Furthermore, Christina has not supported her argument with any authority that is binding upon this Court.

This Court concludes that Christina cannot maintain this action against GEICIO 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 contact between GEICO and her father gives her authorization to sue GIECO. Christina has not cited any statutory provision that gives her authority to sue on the contract between her father and GEICO.

IV. CONCLUSION

GEICO's motion to dismiss should be granted.

DATED this 4 day of March 2011.



DANE H. WATKINS, JR.
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 8 day of March 2011, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Jordan S. Ipsen
GORDON LAW FIRM, INC.
477 Shoup Ave, Suite 101
Idaho Falls, ID 83402

Kevin J. Scanlan
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho, Suite 700
P.O. Box 1271
Boise, ID 83701

RONALD LONGMORE
Clerk of the District Court
Bonneville County, Idaho

By
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE.

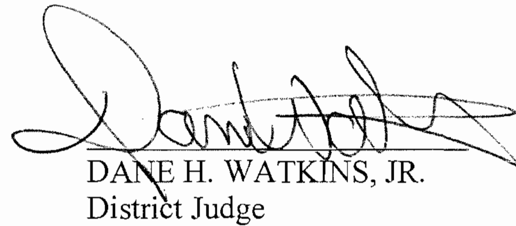
CHRISTINA BROOKSBY, Plaintiff, vs. GEICO GENERAL INSURANCE COMPANY; Defendant.	Case No. CV-10-6403 **JUDGMENT RE: MOTION TO DISMISS**

This cause having come before this Court pursuant to GEICO's January 31, 2011 Motion to Dismiss, this Court being fully advised in the premises, and good cause appearing;

NOW, THEREFORE:

GEICO's Motion to Dismiss is granted.

DATED this 4 day of March 2011.



DANE H. WATKINS, JR.
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 8 day of March 2011, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

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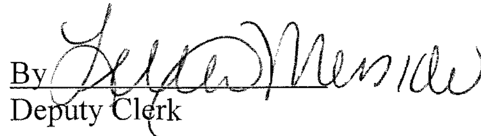
RONALD LONGMORE
Clerk of the District Court
Bonneville County, Idaho



By
Deputy Clerk

BONNEVILLE COUNTY
IDAHO

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Jordan S. Ipsen (ISB #7822)
GORDON LAW FIRM, INC.
477 Shoup Ave, Suite 101
Idaho Falls, ID 83402
Telephone: (208) 552-0467
Facsimile: (866) 886-3419

Attorney for Plaintiff

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

CHRISTINA BROOKSBY, Plaintiff and Appellant, vs. GEICO GENERAL INSURANCE COMPANY, Defendant and Respondent.	Case No. CV-10-6403 **NOTICE OF APPEAL**

TO: THE ABOVE NAMED RESPONDENT, GEICO GENERAL INSURANCE COMPANY AND THE PARTY'S ATTORNEYS, KEVIN SCANLAN, HALL, FARLEY, OBERRECHT & BLANTON, P.A., 702 WEST IDAHO STREET, SUITE 700, BOISE, IDAHO 83701, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant, Christina Brooksby, appeals against the above named

respondent to the Idaho Supreme Court from the final judgment entered in the above entitled action on the fourth day of March, 2011, Honorable Judge Dane Watkins presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1), I.A.R.
3. Appellant intends on appealing the issue of whether the district court erred in ruling that Appellant does not have standing to bring an action against Respondent.
4. No order has been entered sealing any portion of the record.
5.
    a) A reporter's transcript is requested.
    b) The appellant requests the reporter's transcript in hard copy. Appellant requests a partial transcript consisting of the hearing held on Defendant's Motion to Dismiss held on February 10, 2011.
6. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.:
    1) Defendant's Memorandum in Support of Defendant's Motion to Dismiss Pursuant to I.R.C.P. 12(b)(6).
    2) Defendant's Motion to Dismiss Pursuant to I.R.C.P. 12(b)(6).
    3) Plaintiff's Response to Defendant's Motion to Dismiss.

4) Defendant's Reply to Plaintiff's Response to Defendant's Motion to Dismiss Pursuant to I.R.C.P. 12(b)(6).

5) Memorandum Decision Re: Motion to Dismiss.

6) Memorandum Decision Re: Motion for Reconsideration.

7) Order Re: Motion to Dismiss.

8) I certify:

   a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

      Karen Konvalinka
      605 N. Capital Ave.
      Idaho Falls, Idaho 83402

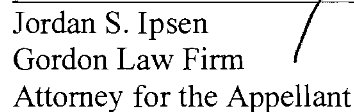
   b) That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript.

   c) That the estimated fee for preparation of the clerk's record has been paid.

   d) That the appellate filing fee has been paid.

   e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED THIS 15 day of April, 20111.



Jordan S. Ipsen
Gordon Law Firm
Attorney for the Appellant

CERTIFICATE OF SERVICE

I hereby certify that on April 15, I mailed a copy of the foregoing to the following:

Kevin Scanlan
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
702 West Idaho Street, Suite 700
Boise, ID 83701

Karen Konvalinka
605 N. Capital Ave.
Idaho Falls, Idaho 83402

Jordan S. Ipsen

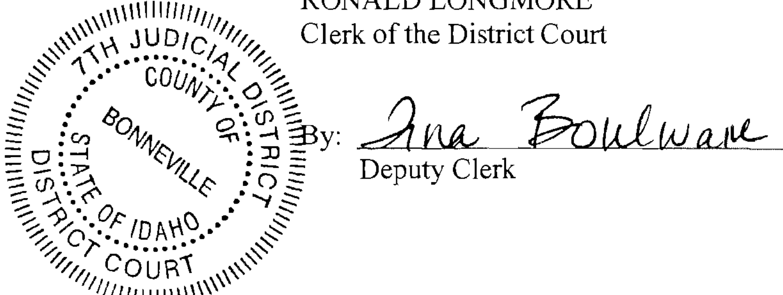
IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

CHRISTINA BROOKSBY, Plaintiff/Appellant, vs. GEICO GENERAL INSURANCE COMPANY, Defendant/Respondent.	)	**CLERK'S CERTIFICATE OF APPEAL** Case No. CV-10-6403 Docket No.

Appeal from:	Seventh Judicial District, Bonneville County
Honorable Dane H. Watkins, Jr., District Judge, presiding.	
Case number from Court:	CV-10-6403
Order or Judgment appealed from:	Judgment Re: Motion to Dismiss, entered March 8, 2011
Attorney for Appellant:	Jordan S. Ispen, 477 Shoup Ave, Ste. 101, Idaho Falls, ID 83402
Attorney for Respondent:	Kevin Scanlan, 702 West Idaho Street, Ste. 700, Boise, ID 83701
Appealed by:	Christina Brooksby
Appealed against:	Geico General Insurance Company
Notice of Appeal Filed:	April 15, 2011
Appellate Fee Paid:	Yes
Was District Court Reporter's Transcript requested?	Yes, estimated 50 pages
If so, name of reporter:	Karen Konvalinka
Dated: April 26, 2011	

RONALD LONGMORE
Clerk of the District Court



By: Ana Boulware
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

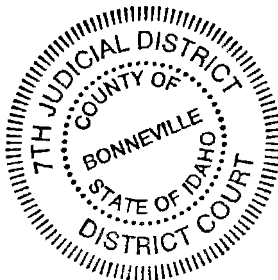
CHRISTINA BROOKSBY, Plaintiff/Appellant, vs. GEICO GENERAL INSURANCE COMPANY, Defendant/Respondent.	)	**CLERK'S CERTIFICATE** Case No. CV-10-6403 Docket No. 38716-2011

STATE OF IDAHO)
)
County of Bonneville)

I, Ronald Longmore, Clerk of the District Court of the Seventh Judicial District, of the State of Idaho, in and for the County of Bonneville, do hereby certify that the above and foregoing Record in the above-entitled cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents as are automatically required under Rule 28 of the Idaho Appellate Rules.

I do further certify that no exhibits were either offered or admitted in the above-entitled cause, that the Clerk's Record will be duly lodged with the Clerk of the Supreme Court, as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the District Court at Idaho Falls, Idaho, this 7th day of July, 2011.



RONALD LONGMORE
Clerk of the District Court

By: ______________
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

CHRISTINA BROOKSBY, Plaintiff/Appellant, vs. GEICO GENERAL INSURANCE COMPANY, Defendant/Respondent.	)	**CERTIFICATE OF SERVICE** Case No. CV-10-6403 Docket No. 38716-2011

I HEREBY CERTIFY that on the 7th day of July, 2011, I served a copy of the Reporter's Transcript (if requested) and the Clerk's Record in the Appeal to the Supreme Court in the above entitled cause upon the following attorneys:

Jordan S. Ipsen
Gordan Law Firm, Inc.
477 Shoup Ave., Suite 203
Idaho Falls, ID 83402

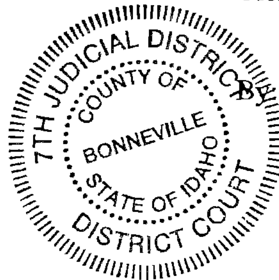
Attorney for Appellant

Kevin J. Scanlan
Hall, Farley, Oberrecht & Blanton, P.A.
702 West Idaho, Suite 700
P.O. Box 1271
Boise, ID 83701

Attorney for Respondent

by depositing a copy of each thereof in the United States mail, postage prepaid, in an envelope addressed to said attorneys at the foregoing address, which is the last address of said attorneys known to me.

RONALD LONGMORE
Clerk of the District Court



By [signature]
Deputy Clerk