1-10-2012

Dave's v. Linford Respondent's Brief Dckt. 39059

IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVE'S INC., an Idaho corporation doing business as DAVE'S CONSTRUCTION

Plaintiff/Counterdefendant,

vs.

D. RICHARD LINFORD, LINDSEY LINFORD, husband and wife,

Defendants/Counterclaimants/Third Party Plaintiffs/Appellants

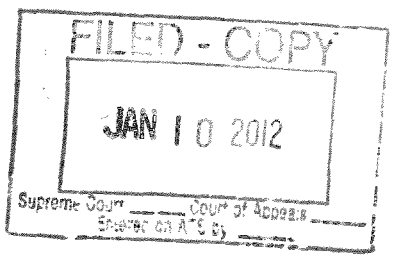
and

STATE FARM FIRE AND CASUALTY COMPANY, an Illinois corporation,

Third Party Defendant/Respondent.

Docket No. 39059-2011

RESPONDENT'S BRIEF



RESPONDENT STATE FARM FIRE AND CASUALTY COMPANY'S RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada Honorable Deborah A. Bail, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a grant of summary judgment dismissing all causes of action in the Third Party Complaint brought by Appellants/Third-Party Plaintiffs, D. Richard Linford and Lindsey Linford ("the Linfords") against Respondent/Third-Party Defendant, State Farm Fire and Casualty Company ("State Farm Fire").[1] The dispute between the parties arises out of a fire which caused property damage to portions of the Linfords' house. No one else's property was damaged and no one suffered bodily injury as a result of the fire. Because only the Linfords' property was damaged, the relevant coverage in the homeowners policy issued by State Farm Fire was Section I, Coverage A - Dwelling ("Coverage A").[2] (R., pp. 95-131; *See also* relevant portions of the Policy attached as Ex. A to the Addendum hereto.) This is a first party coverage.[3] Because there was no property damage or bodily injuries to anyone other than the Linfords,

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[1]The Linfords also purport to appeal from the denial of their Cross-Motion for Partial Summary Judgment. (Appellants' Brief, pp. 1; 9.) It is well established Idaho law that the denial of summary judgment is not reviewable on appeal. *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 376, 973 P.2d 142, 146 (1999). As will be discussed throughout this Brief, the attempted appeal from a denial of summary judgment is but one in a series of frivolous, unsupportable arguments made by the Linfords.

[2]There is no dispute between the parties regarding or appeal from payment for personal property losses or additional living expenses also triggered by the fire loss. (R., p. 187.)

[3]First party coverage regards a claim by an insured under his or her own insurance policy for bodily injury or property damage suffered by the insured. First party coverage provides indemnity but not a defense.

Section II, Coverage L - Personal Liability ("Coverage L") does not apply. This is a third party coverage[4]

Per the Linfords' homeowners policy, if there is a dispute as to the amount of the loss under Coverage A, the parties must have the loss appraised upon written demand of either party. (R., p. 112.) That appraisal process was demanded and carried out in accordance with the terms of the Policy and a signed, written letter agreement dated June 2, 2010 ("Letter Agreement"). (R., pp. 187-188; *see also* Ex. B to Addendum.) This Letter Agreement made various agreed upon modifications to the appraisal process and loss settlement provisions. The agreed upon appraiser determined the amount of loss under Coverage A to be $205,757.63. (R., p. 217.) This appraisal amount was paid by State Farm Fire.[5]

Despite there being no third party property damage or bodily injury claim against the Linfords and despite being paid the total amount of the fire loss as determined by the joint appraiser pursuant to the agreed upon appraisal process, the Linfords claim on appeal: (1) that State Farm Fire owed the Linfords a defense in the *Dave's v. Linfords'* lawsuit which seeks

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[4]Third party coverage regards a liability claim against the insured for property or bodily injury damages suffered by a third party and caused by the insured. Third party coverage provides an indemnity for and a duty to defend these claims.

[5]State Farm Fire had paid, before the appraisal, its' estimate for replacement costs for the fire damage to the house ($197,065.67). (R., p. 32.) State Farm Fire paid the additional amount determined in the appraisal process of $8,691.96 immediately following the appraisal. (R., p. 219.)

money damages for breach of two separate and distinct written construction contracts;[6] and (2) that State Farm Fire owes the Linfords whatever amount is ultimately determined to be due in the separate *Dave's v. Linfords* action for breach of the Fire Damage Contract.

The Linfords base their appeal upon the following arguments:

1. That a lawsuit by Dave's against the Linfords for breach of the Fire Damage Contract triggers a duty to defend under the first party, property damage coverage, Coverage A; or
2. Alternatively, that the lawsuit by Dave's triggers a duty to defend under the liability coverage, Coverage L; and
3. That the appraisal process either does not apply to the Linfords' dispute with State Farm Fire or it determined the wrong amount of loss; and
4. That the Fire Damage Contract between the Linfords and their contractor (Dave's) establishes the amount of loss owed by State Farm Fire regardless of the outcome of the dispute resolution process set forth in their contract with State Farm Fire.

These are frivolous, unreasonable or unsupportable arguments because: (1) by definition and well established insurance principles, there is no duty to defend under a first party coverage like Coverage A; (2) because Dave's Complaint does not allege that it suffered either property damage or bodily injury, there is not even a possibility of a duty to defend under Coverage L; (3) the Linfords expressly agreed to be bound by whatever amount was determined by appraisal; and (4) a separate breach of contract lawsuit cannot, as a matter of law, determine the amount owed under the Policy.

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[6]These two contracts are between the Linfords and their contractor, Dave's, to repair the fire damage ("Fire Damage Contract") and to remodel other portions of the house ("Remodeling Contract").

Simply said, the Linfords are asking the judicial system to relieve them of their contractual obligations to Dave's and make State Farm Fire pay those obligations and provide a defense in a separate breach of contract lawsuit. They seek this result by contorting the meaning of insurance law, the homeowners policy, the facts and their own Letter Agreement beyond any reasonable interpretation.

B. Course of Proceedings.

State Farm Fire generally agrees with the Linfords' Course of Proceedings.

C. Statement of Facts.

State Farm Fire adds the following to the Linfords' Statement of Facts:

CORRECTION - Appellants' Brief, p. 1. The Linfords' home did not burn down as a result of the fire. It was only partially damaged.

CORRECTION - Appellants' Brief, p. 8. The June 2, 2010 letter agreement, does not make "one minor modification." There are, in fact, nine modifications to the appraisal process and loss settlement provisions of the Policy, including:

> - the parties agree to resolve and set the amount of loss under Coverage A of the Policy by appraisal;
> . . .
> - Mr. Berkson will determine the cost to repair damages to the dwelling, caused by the fire, as if he was a contractor on the date of loss (amount of loss);
> - Mr. Berkson will provide a written appraisal of the amount of loss to the insureds and State Farm;
> - The parties agree to be bound by the written appraisal;
> . . .

(R., p. 188.)

Prior to completing repairs to the house, State Farm Fire estimated the actual cash value ("ACV") to repair the fire damage to be $153,751.40 (R., p. 132). On March 20, 2007, the Linfords entered into the Fire Damage Contract with their own local contractor, Dave's, Inc. ("Dave's"), to repair the fire damage to the house based on the ACV estimate. (R., pp. 59-63.) It specifically provides that Dave's would furnish all material and perform all the labor necessary to complete the following work:

> **Rebuild home from fire damage, as for the State Farm Insurance estimate of $153,751.40.**

(R., p. 59) (emphasis in original).

On May 9, 2007, the Linfords entered into a separate Remodeling Contract. (R., pp. 65-69.) In relevant part, this Remodeling Contract provides that Dave's would furnish all material and perform all the labor necessary to complete the following work:

> **Any and all changes that are not paid for by State Farm Inc. Co.**

(R., p. 65) (emphasis in original).

After completing repairs to the house, State Farm Fire estimated and paid ad additional amount reflecting the replacement cost to repair the fire damage to the house for a total of $197,065.67. (R., p. 187.) A dispute then arose between the Linfords and State Farm Fire regarding the amount owed after completion of the repairs. (*Id.*)

A dispute also arose between the Linfords and Dave's regarding the amount that Dave's was to be paid for the services it provided to repair and remodel the fire damaged house. On August 4, 2010, Dave's filed an Amended Verified Complaint ("Complaint") against the

Linfords, in which Dave's asserted the Linfords owed an additional $91,357.82 for the construction services provided under both the Fire Damage Contract and the Remodeling Contract. (R., pp. 49-70.). The Complaint asserted three causes of action against the Linfords based on these two contracts: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; and (3) unjust enrichment. (R., pp. 58-54.)

On September 9, 2009, the Linfords' counsel tendered Dave's Complaint to State Farm Fire for a defense and indemnification. (R., pp. 132-134.) At issue were two types of coverage provided to the Linfords: (1) Section I - Your Property – Coverage A, which provides indemnity for **losses suffered by** the Linfords (*Id.*, pp. 105-107.); and (2) Section II - Your Liability – Coverage L - Personal Liability, which provides a defense and indemnity for **claims asserted against** the Linfords for property damage or bodily injuries suffered by third parties. (R., 113-114.) On November 11, 2009, State Farm Fire sent correspondence to the Linfords explaining that it did not have a duty to defend or indemnify the Linfords for the claims asserted by Dave's. (R. pp. 153-155.)

The Linfords then filed a Third-Party Complaint against State Farm Fire asserting four causes of action: (1) breach of contract; (2) indemnification; (3) breach of the implied covenant of good faith and fair dealing; and (4) insurance bad faith. (R., pp. 70-84.)

In an effort to seek resolution of the first party claims for fire damage to the Linfords' house as stated in the Third-Party Complaint, by Letter Agreement, counsel for the Linfords and State Farm Fire agreed to have the amount of loss resolved by appraisal ("Letter Agreement"). (R., pp. 187-188; Appendix B.) That appraisal process was completed on October 13, 2010. (R.,

p. 189.) The amount of loss was determined in a written appraisal to be $205,757.63. (R., p. 217.) On November 1, 2010, State Farm Fire paid the Linfords, pursuant to the written appraisal, an additional $8,691.96,. (R., pp. 218-219.)

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

State Farm Fire presents the following additional or more specific issues on appeal:

1. Does State Farm Fire owe a duty to defend under Coverage A of the homeowners policy (new issue raised by the Linfords on appeal)?

2. Did the district court err in holding State Farm Fire had no duty to defend under Coverage L of the homeowners policy?

3. Did the district court err in holding there was no breach of the duty to indemnify because the amount owed for all fire loss damage to the house was determined by appraisal and paid by State Farm Fire?

4. Did the district court err in dismissing the breach of the implied covenant of good faith and fair dealing and bad faith causes of action?

5. Are the Linfords entitled to attorney fees on appeal?

6. Is State Farm Fire entitled to attorney fees on appeal pursuant to Idaho Code § 41-1839(4) for the Linfords bringing a frivolous, unreasonable and/or unsupportable appeal?

III. ARGUMENT

A. Standards of Review on Appeal.

1. Standard of Review for Grants of Summary Judgment.

In reviewing a grant of summary judgment, this Court's standard of review is the same as the district court's standard in ruling upon the motion. *Thomson v. Lewiston*, 137 Idaho 473, 475-476, 50 P.3d 488, 490-491 (2002). Thus, this Court will review the record before the district court, including the pleadings, depositions, admissions and affidavits, if any, to determine *de novo* whether, after construing the facts in the light most favorable to the non-moving party, there exists any genuine issues of material fact and whether the successful movant below is entitled to judgment as a matter of law. *Tusch Enterprise v. Coffin*, 113 Idaho 37, 40, 740 P.2d 1022, 1026 (1987); I.R.C.P. 56(c).

2. Standard of Review for Denial of Summary Judgment.

"It is well settled in Idaho that an order denying a motion for summary judgment is not an appealable order itself, nor is it reviewable on appeal from a final judgment." *Tiegs v. Robertson*, 149 Idaho 482, 484, 236 P.3d 474, 476 (Ct. App. 2010). "[A]n order denying a motion for summary judgment is not a final order and direct appeal cannot be taken from it. Moreover, an order denying a motion for summary judgment is not reviewable on appeal from a final judgment." *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 376, 973 P.2d 142, 147 (1999). Therefore, this Court cannot consider Appellants' issue on appeal that the district court erred in not granting summary judgment on their behalf.

3. Standard of Review for Contract Interpretation Issues.

The interpretation of the legal effect of a policy of insurance is a questions of law over which this Court exercises *de novo* review. *Howard v. Oregon Mutual Ins. Co.*, 137 Idaho 214, 46 P.3d 510 (2002). Where a contract is clear and unambiguous, the determination and effect of a contractual provision is a question of law to be decided by the Court. *Tolley v. T.H.I. Co.*, 140 Idaho 253, 92 P.3d 503 (2004). Interpreting contracts and applying law to undisputed facts constitutes matters of law which this Court also reviews *de novo*. *Fisk v. Royal Carribean Cruises, Ltd.*, 141 Idaho 290, 292, 108 P.3d 990, 992 (2004).

B. Analysis.

1. State Farm Fire Owes No Duty to Defend the Linfords.

The district court properly determined, based on the unambiguous terms of the policy, that State Farm Fire had no duty to defend the Linfords against Dave's Complaint under Coverage L (Personal Liability). (R., p. 370.) The district court did so based upon "the broadest of readings" of Dave's Complaint that might bring any alleged claim against the Linfords within the policy's liability coverage. *Id.* On appeal, the Linfords challenge the district court's finding of no duty to defend under Coverage L. They have also made a new argument on appeal -- that State Farm Fire alternatively owes a duty to defend under Coverage A (Property Damage).[7] Critical to the rejection of these frivolous arguments is a review of the language and well known differences between Coverage A and Coverage L.

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[7]This new argument/issue on appeal should not be reviewed. *Kirkman v. Stoker*, 134 Idaho 541, 544, 6 P.3d 397, 400 (2000).

a. There is No Duty to Defend Under Coverage A.[8]

(1) There is No Express Duty to Defend Provision Under Coverage A, a First Party Coverage.

Nowhere in Section I, the section that includes Coverage A, is there any mention of or reference to a duty to defend. This is not surprising since property insurance, or any first party coverage, is not the type of insurance that provides an insured a defense should the insured be sued for any reason, whether it be for property damage or bodily injury to others caused by the fire, or even breach of a contract related to the fire.[9] The homeowners policy's property coverage provides indemnity to the Linfords for the cost to repair or replace the fire loss damage to their house (i.e., losses suffered by the Linfords themselves). It does not provide an express duty to defend of any kind. To argue otherwise is frivolous and unsupportable and misunderstands basic insurance law.

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[8]The Linfords claim error because the district court only analyzed the duty to defend under Coverage L. (Appellants' Brief, p. 19.) The district court cannot rule upon that which has not been presented. At no time did the Linfords brief or argue to the district court that State Farm Fire owed a duty to defend under Coverage A. All prior arguments were based on a duty to defend under Coverage L. Other than for purposes of determining whether to award attorney fees on appeal for making frivolous arguments, this issue on appeal should not be reviewed. *See Turner v. Cold Springs Canyon Ltd. Partnership*, 143 Idaho 227, 230, 141 P.3d 1096, 1099 (2006).

[9]To the extent an insurance policy has a duty to defend provision, it would be found in the liability coverage.

(2) The Allegations in Dave's Complaint Do Not Reveal a Potential for Liability Covered by the Policy.

The duty to defend arises upon the filing of a complaint whose allegations, in whole or in part, read broadly, reveal a *potential* for liability that would be covered by the insurance policy. *County of Kootenai v. The Western Casualty and Surety Co.*, 113 Idaho 908, 910, 750 P.2d 87, 89 (1988). Consequently, the only documents to be reviewed to determine whether a duty to defend exists are Dave's Complaint and the insurance policy.

Coverage A is property insurance. The Linfords correctly identify this type of insurance as one "to indemnify another in whole or in part up to a specified amount for loss or damage to designated property by fire." (Appellants' Brief, p. 13, citing COUCH ON INSURANCE 3d., § 1:37 (1995).) (Emphasis added.) Property insurance provides first party coverage. First party "applies to an insured or the insured's own property, such as . . . fire insurance." BLACK'S LAW DICTIONARY, 8th Ed., p. 817 (2004). Coverage A is therefore a first party coverage for fire losses incurred by the Linfords to their own property.

Coverage A specifically provides coverage for property damage to the Linfords' house. (R., p. 101.) The losses insured by this coverage are "for accidental, direct, physical loss to the property. . ." (R., p. 105.)

Dave's Complaint against the Linfords seeks damages for the Linfords' breach of the Fire Damage Contract and the Remodeling Contract. (R., pp. 49-58.) Specifically, the Complaint alleges:

. . .

6

On or about January 19, 2007, Defendant's [sic] residence suffered from a fire, by reason of which Defendant [sic] needed home repairs, renovation and remodeling to be conducted. . . .

7

Plaintiff is in the business of providing services as a general contractor, and is licensed as such in the State of Idaho. Plaintiff's services include, but are not limited to, providing home repairs, renovation and remodeling.

8

On or about March 20, 2007, Plaintiff and Defendant [sic] entered in to [sic] an [sic] written agreement whereunder Plaintiff would provide such services and materials needed to repair, renovate and remodel Defendant's [sic] residence as it related to the fire damage the home suffered. . . .

9

On or about May 9, 2007, Plaintiff and Defendant [sic] entered in to [sic] an [sic] written agreement whereunder Plaintiff would provide such services and materials needed to renovate and remodel Defendant's [sic] residence as it related to other parts of Defendant's [sic] home that did not suffer fire damage. . . .

. . .

11

Despite the foregoing, Defendant [sic] has failed and refused to fully compensate Plaintiff in accordance with their above-referenced written agreements. The amount due and owing to Plaintiff by Defendant [sic], together with accrued interest as set forth in the agreements, as of June 4, 2009 is $91,357.82.

. . .

(R., pp. 51-52.) Dave's Complaint does not allege an accidental loss that resulted in property damage or bodily injury to Dave's. It does not allege that Dave's suffered a direct, physical loss of any kind. Nor does it allege that it seeks damages for bodily injury or property damage to the Linfords or their property. It is clearly and unequivocally a breach of contract complaint for

which there is no coverage, let alone a potential for coverage. Consequently, under the "*potential* liability for coverage" test for determining whether the Complaint allegations even remotely touch on a covered liability, Dave's Complaint fails utterly.

The Linfords themselves identify Coverage A as an indemnity coverage for loss or damage to their own property. (R., p. 13.) But they utterly misapply the common and unambiguous understanding of how and to what this coverage applies. From this indemnity coverage the Linfords seek a defense to a breach of contract lawsuit seeking monetary damages suffered by someone other than themselves (Dave's) and for something other than bodily injury or property. Coverage A is indemnity only and does not in any manner provide for a duty to defend the insured against any lawsuit, especially a breach of contract lawsuit. At the end of the day, the only issues that will be decided in the *Dave's v. Linfords* action is whether the Linfords have breached the Fire Damage and Remodeling Contracts and the amount of damages owed, if any, under those contracts to Dave's. There is no "potential for liability" duty to defend against these allegations under Coverage A. To claim otherwise is frivolous and unsupportable.

(3) A Duty to Indemnify Does Not Create an Implied Duty to Defend Under Coverage A.

The Linfords argue, without any support in the law, that there is an automatic duty to defend when there is a duty to indemnify. (Appellants' Brief, p. 20.) The Linfords base this frivolous argument on the theory that because the duty to defend is broader than the duty to indemnify, if there is a narrower duty to indemnify, *ipso facto* there is a duty to defend. (*Id.*) This circular argument is not true even in its broadest sense. First, Coverage A is a first party

property damage coverage. This type of insurance only indemnifies and does not provide a defense. Under the Linfords' theory, all indemnity-only insurance coverages would be converted into liability coverages simply because they offer the narrower duty to indemnify.[10] If there is no express duty to defend provision, the contract cannot be re-written to include one. *See Lovey v. Regence Blueshield of Idaho*, 139 Idaho 37, 41, 72 P.3d 877, 881 (2009) (courts do not posses the roving power to rewrite contracts).

Second, this argument makes even less sense in the context of this appeal. Coverage A does not even have the narrower duty to indemnify the Linfords for any breach of contract damages that may be awarded to Dave's in its lawsuit. The only duty to indemnify is for damage to the Linfords' property. A non-existent duty to indemnify damages arising out of the breach of contract complaint cannot trigger a non-existent duty to defend that claim.[11]

There is no duty to defend under Coverage A by definition, by contract interpretation or by operation of well established law. The Linfords' new attempt to create one is frivolous, unreasonable and unsupportable.

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[10]It would also transmute the standard fire policy set forth in Idaho Code § 41-2401 into a personal liability policy.

[11]Indeed, there cannot even be an implied duty to defend as argued by the Linfords because there is not even a *potential* for liability revealed by Dave's Complaint.

b. The Express Duty to Defend Provision Under Coverage L was Not Triggered by Dave's Complaint.

Unlike Coverage A, Coverage L has an express duty to defend provision.

> **COVERAGE L - PERSONAL LIABILITY**
>
> If a claim is made or a suit is brought against an **insured** for damages because of **bodily injury** or **property damage** to which this coverage applies, caused by an **occurrence**, we will:
> . . .
>
> 2. provide a defense at our expense by counsel of our choice.

(R., p. 113.) Like Coverage A, there is no duty to defend triggered by Dave's Complaint under Coverage L.

The same test applied above to Coverage A applies to whether there is a duty to defend under Coverage L. The issue is whether Dave's Complaint reveals a *potential* for some liability covered by the homeowners policy.

(1) The Undisputed Facts and Clear Policy Language Preclude a Duty to Defend Under Coverage L.

Coverage L is personal liability insurance. Commonly referred to as casualty insurance, the Linfords properly identify this type of insurance to be "insurance against loss through accidents or casualties resulting in bodily injury or death". (Appellants' Brief, p. 13, citing COUCH ON INSURANCE 3d., § 1:28 (1995).) (*See also* R., p. 113.) Casualty insurance also includes damage to property. This coverage applies to bodily injury or property damage to others. (R., p. 115.) (Exclusion 2.b.) This type of insurance protects an insured if he or she causes the bodily injury or property damage to third parties.

Liability insurance is a third party coverage. BLACK'S LAW DICTIONARY 8th Ed., p. 817 (2004). ("[a]n agreement to cover a loss resulting from the insured's liability to a third party. . . . Also termed *third-party insurance*; . . .") Coverage L is therefore for claims asserted by third parties against the Linfords resulting from their liability. Coverage L, under the terms of the homeowners policy, requires that the covered loss be for property damage or bodily injury suffered by these third parties. Therefore, Dave's suit must be based on allegations against the Linfords "because of" their personal liability for property damage or bodily injury suffered by Dave's.

In order to trigger a defense, Dave's lawsuit against the Linfords must allege "damages because of **bodily injury** or **property damage** to which this coverage applies. . . ." (R., p. 113.) The Linfords do not claim that Dave's Complaint seeks damages "because of" bodily injury. They argue, however, that Dave's Complaint seeks damages "because of" property damage to their house. (Appellants' Brief, pp. 22, 26.) This argument is false – Dave's Complaint seeks damages because the Linfords failed to pay for services rendered.

"Property damage" is specifically defined in the Linfords' homeowners policy as "physical damage to or destruction of tangible property, including loss of use of this property. . . ." (R., p. 100.) The damages sought in Dave's Complaint must also be "caused by an **occurrence**". (R., p. 113.) The homeowners policy defines occurrence as "an accident". (R., p. 100.)

Dave's Complaint allegations are not "because of" physical damage to or destruction of any of his tangible property. Dave's Complaint seeks damages "because of" a breach of contract

by the Linfords leading to economic damages suffered by Dave's or, stated another way, "because of" the LInfords' decision not to pay what is owed under their contracts with Dave's. Even if the breach of contract damages were "because of" property damage, the independent clause "caused by an occurrence" requires that the damages (regardless of whether they are for bodily injury, property damages or breach of contract) be caused by an accident. It is certainly no accident the Linfords did not pay Dave's. A breach of contract is not, and cannot be, an accident and, therefore, cannot be an occurrence as required by Coverage L.

The plain meaning of "because of" within the context of the duty to defend provision and the liability section of the policy does not encompass Dave's Complaint. Dave's Complaint was not brought "because of" physical damage to its property caused by an accident. Dave's Complaint was brought "because of" the Linfords' breach of the Fire Damage and Remodeling Contracts by failing to pay for services rendered.

From the common and well established understanding of liability insurance, the Linfords attempt to extract a duty to defend a breach of contract lawsuit that makes no allegations that a Third Party suffered property damage or bodily injury from the fire or that these damages were caused by the Linfords' negligence. Neither the alleged breach of contract or the damages sought trigger Coverage L, let alone a duty to defend under Coverage L.

(2) Well Settled Law Precludes a Duty to Defend Under Coverage L.

In addition to the Linfords' twisted interpretation and application of the duty to defend, they ignore well-settled law. This Court has previously made it clear that a breach of contract complaint does not trigger coverage under a liability policy.

> Both the amended complaint and the district court's instructions to the jury indicate that the Harper v. MVP lawsuit was an action for **breach of contract**, and did not involve any claim for damages in tort. MVP has failed to demonstrate that damage to property was at issue in the underlying suit. The Harper v. MVP lawsuit was a contract action, and there was **no allegation** of either **"property damage"** or an **"occurrence"** within the meaning of the policy.

Magic Valley Potato Shippers v. Continental Ins., 112 Idaho 1073, 1076-77, 739 P.2d 372, 375-76 (1987) (bold in original).[12]

Like the complaint in *Magic Valley*, Dave's Complaint is one for breach of contract. Like the complaint in *Magic Valley*, Dave's Complaint does not allege any claim for damages in tort. Like the complaint in *Magic Valley*, there are no allegations of "property damage" within the meaning of the policy (i.e., property damage to the property of Dave's). Like the complaint in *Magic Valley*, Dave's Complaint makes no allegation of an "occurrence" within the meaning of the policy (i.e., the Linfords caused, by accident, the damage suffered by Dave's). It matters not that the policy at issue in *Magic Valley* was a commercial general liability policy. (Appellants'

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[12]Courts in other jurisdictions have come to the same conclusions as this Court -- a breach of contract claim cannot constitute an "occurrence" under policies triggered by an accident or an occurrence. *See Jakobson Shipyard, Inc. v. Aetna Cas. & Sur. Co.*, 961 F.2d 387, 389 (2d Cir.1992) (finding no accident where insured shipbuilder provided tug boat with defective steering mechanism contrary to contract specifications); *Pace Constr. Co. v. United States Fid. & Guar. Ins. Co.*, 934 F.2d 177, 180 (8th Cir.1991) (no accident where insured subcontractor breached contractual duty to procure insurance for contractor); *Oak Crest Constr. Co. v. Austin Mutual Ins. Co.*, 329 Or. 620, 626, 998 P.2d 1254, 1257 (Or. 2000) ("...there can be no 'accident,' within the meaning of a commercial liability policy, when the resulting damage is merely a breach of contract..."); *Nationwide Property & Cas. v. Comer*, 559 F.Supp.2d 685, 692 (S.D. W.Va. 2008) (insurer did not have a duty to indemnify or defend insured vendors against purchasers' claim for rescission based on alleged breach of contract, since breaches of contracts were not accidents and therefore not occurrences as defined by the homeowner's policy, which defined occurrence to include property damage resulting from an accident).

Brief, p. 23.) The same issue was extant – does a breach of contract lawsuit create even the potential of coverage under a liability policy? The clear and unequivocal answer under long established Idaho law is "no".

Nevertheless, the Linfords argue that *Magic Valley* is distinguishable because it discussed an exclusion for breach of contract and State Farm Fire could have drafted a similar exclusion in order to make *Magic Valley* applicable in this case. (Appellants' Brief, pp. 23-24.) The breach of contract exclusion was not necessary to the finding that there was no coverage in *Magic Valley*. Rather, the contract exclusion was supporting evidence that there was no genuine issue of material fact on the coverage issue.

Regardless, Coverage L has an applicable "owned property" exclusion and therefore, like *Magic Valley*, provides supporting evidence that there is no duty to defend the Linfords against Dave's Complaint. This exclusion provides:

> 2. Coverage L does not apply to:
> . . .
> b. **Property damage** to property currently owned by any insured;

(R., p. 114-115.) Exclusion 2.b. excludes liability from coverage for property damage to the Linfords' property. This excludes from liability coverage any lawsuit brought "because of" property damage to the insured's property. As in *Magic Valley*, because there is a similar in affect exclusion for fire loss to property owned by the Linfords, there is further evidence that there is no potential for liability coverage and no duty to defend.

The frivolousness of the Linfords' position on appeal regarding a duty to defend under either Coverage A or L cannot be stated more clearly than in their own words.

> This distinction (between property insurance and liability insurance) is important because contracts of insurance should be considered in view of their general objectives. E.g., *Rauert*, 61 Idaho at 680, 106 P.2d at 1018. Property insurance, such as a homeowners policy, is purchased to protect an asset from loss or destruction. Casualty insurance, on the other hand, is purchased to insure "against loss through accidents or casualties resulting in bodily injury or death." *Couch on Ins.*, 3d. § 1:28. A business would not expect its casualty insurance to protect it from breach of contract, but homeowners would most certainly believe that their homeowners insurance would provide a defense when a suit is initiated against them "because of" fire damage caused to their home.

(Appellants' Brief, p. 24.)[13] The Linfords properly describe the general objectives of Coverage A – it is purchased to protect their assets from loss or destruction. The Linfords correctly identify the general objectives of Coverage L -- it is insurance purchased to insure them against loss through accidents or casualties resulting in property damage. The Linfords properly state that casualty insurance does not cover breach of contract claims against businesses. Where the Linfords go horribly wrong is when they immediately ignore these general objectives and axioms of insurance law and extend property insurance coverage to a claim (Dave's) that is not for loss or destruction of the Linfords' assets and extend personal liability insurance coverage to homeowners for breach of contract claims as long as the contract at issue has some connection to

[13]The Linfords admit elsewhere in their Brief that "a policy designed to cover injuries to third parties will not cover breach of contract." (Appellants' Brief, p. 25.) But the Linfords claim that this issue is not present in this case by redefining the issue (and insurance law) to "whether State Farm has a duty to protect the Linfords from an alleged breach of contract that they did not wish to enter into in the first place and only did so "because of" a covered occurrence". (*Id.*) Aside from its nonsensical syntax, accepting this argument would stand insurance law on its head.

a fire loss. The only basis the Linfords give for extending coverage to homeowners for that which they claim is only available to businesses is the parties' expectations. This Court long ago did away with the parties expectations as a basis for coverage. *Purdy v. Farmers Ins. Co. of Idaho*, 138 Idaho 443, 450, 65 P.3d 184, 191 (2003).

The Linfords cannot seek a defense to a suit brought against them for breach of contract that has nothing to do with protecting their home from fire loss or defending against a claim for property damage accidentally caused by the Linfords and suffered by a third party. The suit by Dave's was filed "because of" the Linfords' failure to pay money due under their contract with Dave's. There is no duty to defend under Coverage L. Pursuant to the well established rules of insurance contract interpretation and well established law in Idaho, there is no duty to defend owed by State Farm Fire against the breach of contract allegations in Dave's Complaint under either Coverage A or Coverage L. The arguments the Linfords make on appeal are frivolous, unreasonable and unsupportable.

2. State Farm Fire's Duty to Indemnify for Fire Loss to the Linfords' House was Met Upon Payment of the Appraisal Amount.

State Farm Fire acknowledged the fire loss and its duty to indemnify under Coverage A on the day of the fire. (R., p. 271-277.) After acknowledging the fire loss and before repairs to the house were completed, State Farm Fire paid an estimated actual cash value of the repairs in the amount of $153,751.40. (R., p. 365.) This payment was made pursuant to paragraph 1.a.(1) of Coverage A – Dwelling Loss Settlement provision of the homeowners policy (hereinafter referred to as "ACV Paragraph"). (R., p. 109.) After repairs to the house were completed on

April 25, 2008, State Farm Fire paid an additional amount of $43,314.27, representing the replacement cost of the covered repairs. (R., pp. 58; 366.) This brought the total payment amount to $197,065.67. This payment was made pursuant to paragraph 1.a.(2) of the Coverage A – Dwelling Loss Settlement provision (hereinafter referred to as "RC Paragraph"). (R., p. 109.)

A dispute arose over whether the Linfords were entitled to another, additional payment for replacement cost of the repairs. (R., p. 187.) On May 7, 2010, State Farm Fire "demanded that the amount of the loss under Coverage A be set/determined by appraisal." (*Id.*) The Linfords agreed to appraisal. (Appellants' Brief, p. 28.) The Linfords and State Farm Fire then signed a Letter Agreement modifying the contractual appraisal and loss settlement provisions of the Policy. (R., p. 188.) Of note was the substantive modification that expressly defined how the amount of loss was to be determined by the appraiser.

> Mr. Berkson will determine the cost to repair damages to the dwelling, caused by the fire, as if he was a contractor on the date of the loss (amount of loss).

(R., p. 188.) This Letter Agreement misdefined the calculation of the amount of the loss used in either the ACV or RC Paragraphs. The parties further agreed that the appraiser would provide "a written appraisal of the amount of loss to the insured" and "to be bound by the written appraisal." (*Id.*)[14]

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[14]The Linfords state that the district court "correctly" noted the Letter Agreement follows the terms of the Appraisal Paragraph with <u>one</u> modification: the parties jointly appointed one appraiser and State Farm Fire agreed to pay all of his fees and expenses. (Appellants' Brief, p. 28.) (Citing the district court's decision, R., p. 372.) The Linfords misinterpret this part the

The appraiser issued his written appraisal on October 13, 2010. (R., p. 189-217.) In the cover letter the appraiser indicated that the appraisal "has been completed in accordance with the directives given in the letter dated June 2, 2010 [Letter Agreement], by Elam & Burke, as was agreed to by all parties." (R., p. 189.) (bracketed information added.) The appraiser determined that the amount of loss to which the parties agreed to be bound was $205,757.63. (R., p. 217.) State Farm Fire had already paid $197,065.67. (R., p. 32.) Based on the agreement to be bound by the appraisal, State Farm Fire paid an additional $8,691.96. (R., p. 218.)

The analysis of whether State Farm Fire breached its duty to indemnify can, and should, stop here. The amount of indemnity owed was determined in an agreed upon alternative dispute resolution proceeding. The amount was determined by an agreed upon formula. The parties agreed to be bound by the process and the result. State Farm Fire promptly paid the additional amount of indemnity owed. The Linfords accepted the additional proceeds from this agreed upon appraisal process. The district court properly determined there was no breach of the duty to indemnify based on the unambiguous policy provisions, the undisputed facts and the terms of the Letter Agreement. Nevertheless, the Linfords ask the Court to relieve them of their promise to be bound by their agreement and allow them to seek breach of contract and bad faith damages against State Farm Fire. State Farm Fire did not breach its duty to indemnify the Linfords. The

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district court's decision and then use this misinterpretation to distance themselves from the other modifications made by the Letter Agreement, including agreeing to be bound by the appraiser's calculation of the amount of loss. A proper reading of the district court's decision indicates that the district court was discussing one modification to the appointment process of three appraisers and noted that this appointment process had a modification. (R., p. 371-372.) On its face, the Letter Agreement signed by the Linfords' counsel has nine modifications. (R., p. 188.)

Linfords should be held to their agreement and dismissal of the duty to indemnify should be upheld.

a. The Linfords are Bound by the Insurance Contract Dispute Resolution Process (Appraisal).

Alternative dispute resolution is a favored remedy. *International Association of Firefighters Local No. 672 v. City of Boise*, 136 Idaho 162, 168, 30 P.3d 940, 946 (2001) (discussing arbitration).[15] Alternative dispute resolution allows parties to settle their disputes without expending time and unnecessary expense on needless litigation. *Bingham County Commission v. Interstate Electric Company*, 105 Idaho 36, 41, 665 P.2d 1046, 1051 (1983) (discussing arbitration).

> The essential nature of arbitration is that the parties, by consensual agreement, have decided to substitute the final and binding judgment of an impartial entity conversant with the business world for the judgment of the courts. They seek to avoid the cost, in both time and money, of formal judicial dispute resolution. But when the parties bargain for the binding decision of an arbitrator, they necessarily accept the fact that his interpretation of the facts, the law, and the equities of the situation may not be entirely satisfactory to them.

Id., 105 Idaho at 42, 665 P.2d at 1052.

The Linfords argue on appeal that they are not bound by the appraisal process because it did not determine what they were owed under the homeowners policy; instead, that amount is to be determined by a jury in a different lawsuit based upon breach of a separate written contract

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[15]In the setting of this case, there is no reasoned distinction between appraisal and arbitration. They are similar in that both can bind the parties regarding the extent or amount of loss.

entered into with a third party (Dave's). (Appellants' Brief, pp. 29, fn 4; 30.) The basis of this argument is that "the appraisal determined the loss, not the amount spent to replace the damage". (*Id.*) Consequently, the argument continues, the Appraisal Paragraph is irrelevant and the Linfords are entitled to whatever amount is owed under Dave's Fire Damage Contract as determined in Dave's lawsuit. (*Id.*) The Linfords' arguments are based upon a tortured reading of the insurance policy and upon either ignoring or otherwise distancing themselves from the provisions of the Appraisal Paragraph and Letter Agreement.[16]

The Appraisal Paragraph in the policy states the "[w]ritten agreement signed by any two of these three [appraisers] shall set the amount of the loss. (R., p. 112.) (bracketed information and emphasis added.) The Letter Agreement modified this to a single appraiser. (R., p. 188.) The Linfords agreed to this in part to save money, one of the express purposes of ADR, because State Farm Fire agreed to pay all costs and fees of the appraisal. (R., pp. 187-188.) The Linfords, who were represented by counsel during the Letter Agreement negotiations, also agreed to be bound by the appraisal process. (R., p. 188.) Clearly, the parties bargained for an alternative dispute resolution process. By agreeing to appraisal and to be bound by the process, the Linfords gave up their right to be dissatisfied with or ignore the process. (*See Id.*)

Alternatively, the Linfords argue that the Appraisal Paragraph does not apply to this dispute because the applicable loss settlement provision is missing a word. (Appellants' Brief, p.

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[16]Whatever amount is determined in *Dave's v. Linfords* is not binding on State Farm Fire because it is not a party. Nor does the policy say it will pay what is determined in a third party case.

30.) In order to fully understand and then dispel this frivolous argument, the relevant, clear and unambiguous policy language must be explored.

There are two types of payments owed to an insured for property losses to dwellings under the subject homeowners policy property coverage. The first is known as actual cash value which is estimated and paid early in the process in order to provide the insured with funds to begin repairing the fire damage. The loss provision paragraph applicable to an actual cash value payment is paragraph 1.a.(1) (ACV Paragraph) and reads as follows:

> a. We will pay the cost to repair or replace with similar construction and for the same use of the premises . . . the damaged part of the property covered . . .subject to the following:
>
> (1) Until actual repair or replacement is completed, we will pay only the actual cash value at the time of the loss of the damaged part of the property, up to the applicable limit of liability shown in the **Declarations** not to exceed the cost to repair or replace the damaged part of the property; . . ."

(R., p. 109.) This estimate of damages applies until the repair of the fire loss is completed. Before repairs were completed, State Farm Fire estimated and paid to the Linfords ACV in the amount of $153,751.40. (R., p. 365.)

Once the fire damage repair has been completed, a different payment amount is made if additional amounts are warranted by the circumstances of the repair (i.e., RC is more than ACV). This is for replacement cost under paragraph 1.a.(2) (RC Paragraph).

> (2) When the repair or replacement is actually completed, we will pay the covered additional amount you actually and necessarily spend to repair

> or replace the damaged part of the property, or an amount up to the applicable limit of liability shown in the **Declarations**, whichever is less;

(R., p. 109.) After repairs were completed, State Farm Fire calculated and paid an additional amount of $43,314.27 in replacement cost, which subsumed the ACV amount already paid, for a total amount of loss of $197,065.67. (R., p. 1.)

The Linfords agree the RC Paragraph is the applicable provision because the repairs to the house have been completed. (Appellants' Brief, p. 29.) But, the Linfords argue that the Appraisal Paragraph does not apply to the RC Paragraph and only applies to the ACV Paragraph. (Appellants' Brief, p. 30.) Therefore, the Linfords argue the appraisal is not binding upon them and/or it determined the actual cash value and therefore the appraisal is irrelevant to the amount owed now that repairs have been concluded. This house of cards is built upon the absence of a single word in the RC Paragraph – "loss".

First, whether the Appraisal Paragraph applies to the ACV Paragraph or the RC Paragraph is a red herring argument. The Letter Agreement establishes that the amount of loss to be determined by appraisal "was the cost to repair damages, caused by fire, as if he was a contractor on the date of the loss (amount of loss)". (R., p. 188.) Whether the Appraisal Paragraph applies to a determination of the amount of loss under the ACV or RC Paragraphs is irrelevant. Indeed, the parties agreed the appraisal process was to determine what was owed under Coverage A, including what was actually and necessarily spent. The Letter Agreement controls as to how the amount of loss is to be determined. The tortured route taken by the Linfords to ignore their own agreement is prime evidence of the frivolous nature of their appeal.

Second, even ignoring the Letter Agreement modification as the Linfords do, no reasonable interpretation of the absence of the word "loss" in the RC Paragraph exempts the dispute over how much is owed the Linfords from the appraisal dispute resolution process set forth in the Appraisal Paragraph. On its face, it applies to all disputes over the amount of loss. (R., p. 112.) Regardless of the label used by the Linfords, they are disputing the amount of loss owed to them under the homeowners policy. The Appraisal Paragraph unambiguously applies to all disputes over the amount of loss whether the Linfords call it as ACV dispute, an RC dispute, an actually and necessarily spent to repair dispute or a banana dispute.

The Linfords argue that the Appraisal Paragraph applies to the ACV Paragraph but not to the RC Paragraph because the former has the word "loss" and the latter does not. The RC Paragraph has no different purpose than the ACV Paragraph – to provide the parameters for determining the amount of loss. The ACV Paragraph provides for determining the amount of loss before repairs are completed; the RC Paragraph provides for determining the amount of loss after repairs are completed.

In addition, the context of the RC Paragraph clearly establishes that it is used to determine the amount of loss despite the absence of the word "loss" and is therefore subject to the Appraisal Paragraph. The RC Paragraph is found in Section I – Loss Settlement. (R. p. 109.) The introductory paragraph to that section states "[w]e will settle covered property losses according to the following." (*Id.*) (Emphasis added.) The next subparagraph identifies itself as "1.A. – Replacement Cost Loss Settlement – Similar Construction." (*Id.*) (Emphasis added.) The RC Paragraph is a sub-subparagraph in Section I - Loss Settlement and it is under the

introductory paragraph and under the Similar Construction Loss Settlement paragraph heading. (*Id.*) The next sub subparagraph modifies the RC Paragraph and also has the word "loss" in it. (*Id.*) The Appraisal Paragraph says "amount of loss" or "amount of the loss" not once, but five times. (R., p. 112.)

It is axiomatic that, when construing contract provisions, it must be done within the context in which it occurs in the policy. *Armstrong v. Farmers Ins. Co. of Idaho*, 147 Idaho 67, 70, 205 P.3d 1203, 1206 (2009). Contract interpretation cannot be done in a vacuum. Yet the Linfords do just that. The Linfords argue that because the word "loss" is in the ACV Paragraph, is absent in the RC Paragraph, and because the purpose of the Appraisal Paragraph is to determine the amount of "loss", the Appraisal Paragraph does not apply to the RC Paragraph. The Linfords' "interpretation" of the absence of the word "loss" in the RC Paragraph ignores its context, including the section heading, introductory paragraph, title to the paragraph of which it is a subparagraph and the modifying sub-subparagraph following the RC Paragraph. All of these contain the word "loss". In context, the absence of the word "loss" does not exempt the dispute from appraisal. No reasonable interpretation of the policy can conclude that the RC Paragraph is not a paragraph designed to determine the amount of loss as referred to in the Appraisal Paragraph.

Just as unreasonable is the Linfords' argument that the Letter Agreement is irrelevant to this appeal.

b. The June 2, 2010 Letter Agreement is the Operative Document for Determining the Amount Owed Under the Duty to Indemnify.

The Linfords' compare and contrast the language in the Appraisal Paragraph and the Letter Agreement and come to the astounding conclusion that other than the modification from three to one appraiser, they "are exactly the same." (Appellants' Brief, pp. 28-29.) Therefore, the Linfords continue, "only an examination of the language contained in the Appraisal Paragraph of the Policy is relevant to the current dispute" and since the Appraisal Paragraph only applies to ACV disputes, both the Letter Agreement and the Appraisal Paragraph are irrelevant. (*Id.* at p. 29.) It is through this tortured "logic" the Linfords distance themselves from their own agreements and contracts and claim they are not bound by the appraisal amount.

The Letter Agreement cannot be ignored or compared away. It makes not one procedural modification, but a total of nine modifications to the Appraisal Paragraph and/or loss settlement provisions of the Policy, many of which are substantive. These include:

> – the parties agree to resolve and set the amount of loss under Coverage A of the Policy by appraisal;
> . . .
> – Mr. Berkson will determine the cost to repair damages to the dwelling, caused by the fire, as if he was a contractor on the date of loss (amount of loss);
> – Mr. Berkson will provide a written appraisal of the amount of loss to the insureds and State Farm;
> – the parties agree to be bound by the written appraisal. . . .

(R., p. 188.) (Emphasis added.) The Letter Agreement makes it clear that the end result of the appraisal process was to resolve the extant dispute between State Farm Fire and the Linfords.[17] It was to establish the amount of loss owed to the Linfords under Coverage A. The Letter Agreement required a written appraisal of the amount of loss "to the insured", again emphasizing that the appraisal was to determine what was owed to the Linfords and thereby resolve the dispute between the parties. It sets forth the precise method that is to be used by the appraiser in determining the amount of loss. It is undisputed that the appraiser used that method. (R., p. 189.) This method became the agreed upon loss settlement provision. The Linfords agreed to be bound by the written appraiser's determination of the amount owed under the Coverage A. State Farm Fire paid the additional amount owed as determined by the appraisal. The Linfords accepted the benefits of the process but now refuse to be bound by it. Instead, they ask the Court to relieve them of their agreements, rewrite the insurance policy and allow them to make State Farm Fire guarantors of any judgment entered in Dave's lawsuit. The Letter Agreement is a primary operative document. The Linfords' attempts to minimize, ignore or otherwise make this key document irrelevant are frivolous and unreasonable.

Perhaps one of the most disingenuous arguments against being bound by the written appraisal is the Linfords' argument that the appraiser did not determine the amount of loss owed them, but instead determined "a different estimate of the actual cash value". (Appellants' Brief,

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[17]The Third Party Complaint by the Linfords against State Farm Fire makes it clear the extant dispute was over how much more, if any, the Linfords were entitled to receive for repairs of the fire damage to their house. (R., pp. 75-84.)

p. 31.) (quoting from Tr. p. 24.) First, ACV is at issue only until repairs are completed. Once repairs are completed the only amount at issue is replacement cost. It is undisputed ACV was paid and repairs were completed long before either the Letter Agreement or the appraisal. Consequently, at the time the Letter Agreement was signed and when the appraisal occurred, ACV was not, and could not be, at issue. To argue that the written appraisal determined a "different" ACV ignores their own Third Party Complaint describing the dispute, ignores the undisputed fact that repairs were completed, ignores the express provisions of the Letter Agreement and contorts the policy language beyond any reasonable interpretation.

Second, based on their arguments on appeal it is now clear that the Linfords had no intention of being bound by the Letter Agreement or the appraisal results either before, during or after agreeing to participate. The Linfords state they decided to "go along with the appraisal" because: (1) they needed to comply with the following provision: "[n]o action shall be brought against [State Farm Fire] unless there has been compliance with the policy provision"[18]; and (2) they got State Farm Fire to pay all costs and expenses of the appraisal. (Appellants' Brief, p. 28.) (*See also*, Tr. p. 24.)

In other words, knowing they had already been paid ACV, and knowing repairs had been completed, and knowing the ACV Paragraph was no longer operative, and knowing they had accepted a supplemental payment after repairs were completed (which by definition could only be payment of replacement costs), and knowing the Letter Agreement was signed after repairs

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[18]This provision relates to an insured's ability to sue the insurer. Consequently, the Linfords agreed to appraisal in order to continue their suit against State Farm Fire.

were completed, and knowing the appraisal occurred after the repairs were completed, and accepting even more money as a result of the appraisal, the Linfords agreed to go along with an appraisal process they thought was unnecessary and irrelevant to the resolution of the actual dispute between State Farm Fire and them. The motives for going along with the appraisal are far more sinister when examined in the light of their own arguments – if State Farm Fire was willing to foot the bill for the unnecessary appraisal, it allowed them to continue their suit against State Farm Fire for breach of contract and bad faith.

Third, at no time prior to the appraisal, not even at the time of negotiating the Letter Agreement modifications, did the Linfords inform State Farm Fire of their view that the appraisal was meaningless and/or was merely a necessary step to avoid dismissal of their action. This Court has held that if there is a concern regarding an alternative dispute resolution process at the time of contracting, and nothing is said or done to address that concern, the parties are nevertheless bound by the alternative dispute resolution results regardless of the validity of the concerns. *See*, *Martel v. Bullotti*, 138 Idaho 451, 196-7, 65 P.3d 192, 455-6 (2003) (The potential bias of the architect selected to settle the dispute was known at the time of contracting so the parties were bound by the contract dispute resolution process and result.) Here, the parties contracted to make modifications to the alternative dispute resolution process and to the loss settlement provisions in the insurance policy by Letter Agreement. The parties were already in a dispute over the amount owed. The Linfords had reservations/concerns about the appraisal process. Nevertheless, the Linfords agreed to appraisal as modified. Based on their silence, the Linfords are bound by the written appraisal and cannot now complain about the process or the

result. *See J.R. Simplot Co. v. Chambers*, 82 Idaho 104, 110, 350 P.2d 211, 214 (1960). (This Court cannot make for the Linfords a better agreement than they themselves were satisfied to make.)

The Linfords' hypothetical in their Brief points out the fallacy of their position regarding appraisal in the present matter. (Appellants' Brief, pp. 32-33.) The Linfords hypothesis is based on the following assumptions: (1) a friend repaired the fire damage but waived overhead and profit; (2) the Linfords only paid $150,000.00 under that arrangement; (3) this amount was challenged by State Farm Fire as too high; and (4) the appraiser found the cost of repairs to be $200,000.00. Based on these facts, the Linfords hypothesize that State Farm Fire would pay only $150,000.00 because that was all the Linfords actually paid.

State Farm Fire's conduct in this case proves the hypothesis wrong. State Farm Fire did not ignore the appraisal award and choose a lower amount to pay. By their own admission, the Linfords have only paid Dave's $173,369.99 under the Fire Damage Contract. (R., pp. 53; 176; 343-344.) Under the Linfords' hypothesis and interpretation of the policy, State Farm Fire could have paid this amount as the amount actually and necessarily spent to repair fire damage at the time of the appraisal. It paid, however, the higher appraisal amount. State Farm Fire complied with its agreement to be bound by the appraisal. The only parties who have failed to live up to their agreement is the Linfords.

The Linfords have contracted away their right to challenge either the appraisal process or the appraiser's decision except on limited grounds not raised below or on appeal. Nevertheless, the Linfords have done exactly what they contracted away – challenge its application to them.

The Linfords are bound by the results of the appraisal and to say otherwise is frivolous and unsupportable.

c. The Linfords' Reliance on *Kane* is Misplaced.[19]

The Linfords argue the district court's indemnity holding should be overturned based on a so-called "admission" made by State Farm Fire in a class action filed in a foreign jurisdiction (Pennsylvania). (Appellants' Brief, p. 34.) (citing *Kane v. State Farm Fire, et al.*, 841 A.2d 1038 (Penn. 2003).) *Kane* is unpersuasive and irrelevant to this appeal and, worst of all, the "admission" was not made by State Farm Fire.

First, the *Kane* case dealt with a different policy provision (ACV) and a different issue (deducting depreciation from actual cash value) at a different point in the repair process (before repairs had been completed). This precludes *Kane's* use against State Farm Fire in this case.

Second, the Linfords rely on the following as the "admission" made in the *Kane* case:

> Finally, *Kane* noted that "there is no concern . . . that the insured will not be made whole" because State Farm has "conceded liability for replacement costs once Appellants undertake to repair or replace the damage to their properties." (*Id.* at 1050) (emphasis added). In the present case, State Farm is essentially retracting its admission in *Kane*.

(Appellants' Brief, p. 35.) *Kane* is a class action lawsuit against nine insurance companies. (*Id.*, at 1038.) State Farm Fire was only one of those nine insurance companies. (*Id.*) The *Kane* court put the insurance companies into two groups based on the similarity of the policy language. State Farm Fire was in "group one". (*Id.* at 1042.) The admission the Linfords lifted from *Kane*

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[19]A copy of the *Kane* decision is attached to the Addendum hereto as Exhibit C.

and attributed to State Farm Fire comes from that part of the decision examining policies issued by "group two" (Allstate, Metropolitan, Ace Fire and Markel). (*Id.* at 1050.) Not only do the Linfords' misapply *Kane*, the so called admission is not even an admission by State Farm Fire. This is the epitome of the frivolous, unreasonable and unsupportable nature of the Linfords' appeal.[20]

3. The District Court Did Not Err in Dismissing the Breach of Implied Covenant of Good Faith and Fair Dealing and Bad Faith Causes of Action.

If the dismissal of the breach of contract cause of action is upheld, neither the breach of the implied covenant of good faith and fair dealing or the bad faith causes of action survive.

a. The Breach of the Implied Covenant of Good Faith and Fair Dealing Cause of Action is Duplicative.

The Linfords claim that the district court erred in dismissing the breach of the covenant of good faith and fair dealing cause of action "[g]iven State Farm's actions and the admissions in *Kane*." (Appellants' Brief, p. 38.) As discussed above, State Farm Fire's actions in not providing a defense to the allegations in Dave's Complaint or providing additional payment under the fire loss property provisions is not a breach of contract, express or implied. Moreover, the so-called admission in *Kane* upon which the Linfords base yet another cause of action is not a binding admission or even an admission made by State Farm Fire. The appeal from dismissal of this cause of action is without support. Indeed, appeal from the dismissal of this cause of action is frivolous and unreasonable in the face of clear Idaho law.

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[20]The Linfords not only used this inapplicable "admission" as a basis for alleging a breach of contract, they argue "it also establishes that State Farm is acting in bad faith." (*Id.*)

In *Idaho First National Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 824 P.2d 841 (1991), this Court ruled that a breach of the implied covenant of good faith and fair dealing is not a stand alone cause of action, separate and distinct from a breach of contract claim:

> A violation of the implied covenant is a breach of the contract. It does not result in a cause of action separate from the breach of contract claims, nor does it result in separate contract damages, unless such damages specifically relate to the breach of the good faith covenant. To hold otherwise would result in a duplication of damages awarded for a breach of the same contract.

Id. at 289, 824 P.2d at 864; *see also Smith v. Meridian Joint School District #2*, 128 Idaho 714, 721, 918 P.2d 583, 590 (1986).[21] Regardless of whether this Court upholds dismissal of the breach of contract cause of action, the dismissal of this cause of action should be upheld because it cannot be a separate cause of action, as a matter of law.

b. The District Court Correctly Dismissed the Bad Faith Cause of Action.

If the Court agrees that State Farm Fire did not owe a duty to defend and has fully paid for fire loss damages, then there is no breach of the insurance contract. If there is no breach of contract, there cannot be bad faith, as a matter of law. *Robinson v. State Farm Mut. Auto. Ins. Co.*, 137 Idaho 173, 179, 45 P.3d 829, 835 (2002).

4. The Linfords are Not Entitled to Attorney Fees on Appeal.

The Linfords seek attorney fees on appeal pursuant to Idaho Code § 41-1839(1) and (4) and Idaho Code § 12-123. The Linfords have failed to provide any argument, basis or support for an award of attorney fees under either Idaho Code § 41-1839(4) or Idaho Code § 12-123. No

[21]This same Idaho case law was presented to the Linfords in the district court, yet they refuse to take heed.

attorney fees on appeal should be considered for the Linfords under either of these statutes. *See* I.A.R., Rule 35(a)(5).

The Linfords also seek attorney fees on appeal under Idaho Code § 41-1839(1) based on State Farm Fire's refusal to accept the Linfords' tenders of the defense of Dave's lawsuit within thirty days. (Appellants' Brief, p. 9.) The Linfords argue that these tenders triggered the duty to defend and entitled the Linfords to the defense costs they incurred defending that action. First, any such request is premature since there has been no determination that State Farm Fire owes any amount to the Linfords.

Second, breach of the duty to defend allows the insured to seek attorney fees as damages for breach of contract and not as statutory attorney fees under Idaho Code § 41-1839(1). *See Deluna v. State Farm Fire & Casualty Company*, 149 Idaho 81, 86, 233 P.3d 12, 17 (2008). The Linfords cannot double dip and seek attorney fees as damages and also seek them under Idaho Code § 41-1839(1).

Of course, the fact that the Respondents are merely attempting to uphold the district court's dismissal of all causes of action would be a further ground for denying the Linfords attorney fees on appeal.

5. State Farm Fire is Entitled to Attorney Fees on Appeal.

State Farm Fire requests that it be awarded attorney fees incurred in defending this appeal pursuant to Idaho Code § 41-1839(4). This statute provides authority for an award of attorney fees when this Court finds that the appeal was "brought, pursued, or defended frivolously, unreasonably or without foundation." *Id.* Idaho Code § 41-1839(4) provides a basis for an

award of attorney fees to either the insured or the insurer. *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 711, 979 P.2d 107, 113 (1999). A case is considered frivolously appealed "if the law is well settled and the appellants have made no substantial showing that the district court misapplied the law." *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 377, 973 P.2d 142, 148 (1999). Here, the law regarding the duties to defend and indemnify is well settled and was correctly applied by the district court.

An award of fees is also appropriate where an appeal presents no meaningful issue on a question of law but simply invites the appellate court to second guess the district court on conflicting evidence. *Electrical Wholesale Supply Co., Inc. v. Nielson*, 136 Idaho 814, 828, 41 P.3d 242, 256 (2001). The evidence that State Farm Fire owed a duty to defend or owed more than the appraisal amount does not even rise to the level of conflicting evidence. The appeal is instead a request of this Court to second guess the district court's application of undisputed facts and its interpretation of the contracts and to overturn well established law without any good reason for doing so. State Farm Fire is entitled to fees and costs on appeal because it was brought and pursued frivolously, unreasonably and/or without foundation.

IV. CONCLUSION

The district court's grant of summary judgment to State Farm Fire should be affirmed. The district court's denial of the Linfords' motion for partial summary judgment should be ignored. The Linfords' request for attorney fees on appeal should be denied and State Farm Fire's request should be granted.

DATED this 9 day of January, 2012.

ELAM & BURKE, P.A.

By: _____
Jeffrey A. Thomson, of the firm
Attorneys for Defendants/Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of January, 2012, I caused a true and correct copy of the foregoing document to be served as follows:

David P. Claiborne Ringert Law Chartered P.O. Box 2773 Boise, ID 83701-2773 *(Attorney for Plaintiff)*	✓ U.S. Mail ____ Hand Delivery ____ Federal Express ____ Facsimile
Neil D. McFeeley Corey J. Rippee Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered P.O. Box 1368 Boise, ID 83701 *(Attorneys for Third Party Plaintiffs/Appellants)*	____ U.S. Mail ✓ Hand Delivery ____ Federal Express ____ Facsimile

_____
Jeffrey A. Thomson

ADDENDUM

State Farm Fire and Casualty Company
Home Office, Bloomington, Illinois 61710

Dupont Operations Center
P.O. Box 5000
Dupont, Washington 98327-5000

CERTIFICATE

I, the undersigned, do hereby certify that I am custodian of the records pertaining to the issuance of policies issued by State Farm Fire and Casualty Company of Bloomington, IL that are processed by the Personal Lines Fire Division of the Dupont Operations Center, Dupont Washington.

Based on our available records, I further certify that the attached Renewal Certificate prepared May 24, 2006 represents a true copy of the policy provisions and coverages as of Jan 18, 2007 for policy 12-BX-7416-6 issued to Linford, D Richard & Lindsey

Sean Moore
Underwriting Team Manager
State Farm Fire and Casualty Company
Dupont Operations Center
Dupont, WA 98327

EXHIBIT A

SFE-LIN 01541

HOMEOWNERS POLICY

FP-7955
(8/96)

This policy is one of the broadest forms available today, and provides you with outstanding value for your insurance dollars. However, we want to point out that every policy contains limitations and exclusions. Please read your policy carefully, especially "Losses Not Insured" and all exclusions.

SFF-LIN 01542

TABLE OF CONTENTS

DECLARATIONS

Your Name
Location of Your Residence
Policy Period
Coverages
Limits of Liability
Deductibles

FP-7955
(8/96)

Printed in U.S.A.

SFF-LIN 01543

HOMEOWNERS POLICY

DECLARATIONS CONTINUED

We agree to provide the insurance described in this policy:

1. based on your payment of premium for the coverages you chose;
2. based on your compliance with all applicable provisions of this policy; and
3. in reliance on your statements in these **Declarations**.

You agree, by acceptance of this policy, that:

1. you will pay premiums when due and comply with the provisions of the policy;
2. the statements in these **Declarations** are your statements and are true;
3. we insure you on the basis your statements are true; and
4. this policy contains all of the agreements between you and us and any of our agents.

Unless otherwise indicated in the application, you state that during the three years preceding the time of your application for this insurance your Loss History and Insurance History are as follows:

1. Loss History: you have not had any losses, insured or not; and
2. Insurance History: you have not had any insurer or agency cancel or refuse to issue or renew similar insurance to you or any household member.

DEFINITIONS

"You" and "your" mean the "named insured" shown in the **Declarations**. Your spouse is included if a resident of your household. "We", "us" and "our" mean the Company shown in the **Declarations**.

Certain words and phrases are defined as follows:

1. "**bodily injury**" means physical injury, sickness, or disease to a person. This includes required care, loss of services and death resulting therefrom.

   Bodily injury does not include:

   a. any of the following which are communicable: disease, bacteria, parasite, virus, or other organism, any of which are transmitted by any **insured** to any other person;

   b. the exposure to any such disease, bacteria, parasite, virus, or other organism by any **insured** to any other person; or

   c. emotional distress, mental anguish, humiliation, mental distress, mental injury, or any similar injury unless it arises out of actual physical injury to some person.

2. "**business**" means a trade, profession or occupation. This includes farming.

3. "**Declarations**" means the policy **Declarations**, any amended **Declarations**, the most recent renewal notice or certificate, an Evidence of Insurance form or any endorsement changing any of these.

4. "**insured**" means you and, if residents of your household:

   a. your relatives; and

   b. any other person under the age of 21 who is in the care of a person described above.

   Under Section II, "**insured**" also means:

   c. with respect to animals or watercraft to which this policy applies, the person or organization legally responsible for them. However, the animal or watercraft must be owned by you or a person included in 4.a. or 4.b. A person or organization using or having custody of these animals or watercraft in the course of a **business**, or without permission of the owner, is not an **insured**; and

d. with respect to any vehicle to which this policy applies, any person while engaged in your employment or the employment of a person included in 4.a. or 4.b.

5. "**insured location**" means:

   a. the **residence premises**;

   b. the part of any other premises, other structures and grounds used by you as a residence. This includes premises, structures and grounds you acquire while this policy is in effect for your use as a residence;

   c. any premises used by you in connection with the premises included in 5.a. or 5.b.;

   d. any part of a premises not owned by an **insured** but where an **insured** is temporarily residing;

   e. land owned by or rented to an **insured** on which a one or two family dwelling is being constructed as a residence for an **insured**;

   f. individual or family cemetery plots or burial vaults owned by an **insured**;

   g. any part of a premises occasionally rented to an **insured** for other than **business** purposes;

   h. vacant land owned by or rented to an **insured**. This does not include farm land; and

   i. farm land (without buildings), rented or held for rental to others, but not to exceed a total of 500 acres, regardless of the number of locations.

6. "**motor vehicle**", when used in Section II of this policy, means:

   a. a motorized land vehicle designed for travel on public roads or subject to motor vehicle registration. A motorized land vehicle in dead storage on an **insured location** is not a **motor vehicle**;

   b. a trailer or semi-trailer designed for travel on public roads and subject to motor vehicle registration. A boat, camp, home or utility trailer not being towed by or carried on a vehicle included in 6.a. is not a **motor vehicle**;

   c. a motorized golf cart, snowmobile, motorized bicycle, motorized tricycle, all-terrain vehicle or any other similar type equipment owned by an **insured** and designed or used for recreational or utility purposes off public roads, while off an **insured location**. A motorized golf cart while used for golfing purposes is not a **motor vehicle**; and

   d. any vehicle while being towed by or carried on a vehicle included in 6.a., 6.b. or 6.c.

7. "**occurrence**", when used in Section II of this policy, means an accident, including exposure to conditions, which results in:

   a. **bodily injury**; or

   b. **property damage**;

   during the policy period. Repeated or continuous exposure to the same general conditions is considered to be one **occurrence**.

8. "**property damage**" means physical damage to or destruction of tangible property, including loss of use of this property. Theft or conversion of property by any **insured** is not **property damage**.

9. "**residence employee**" means an employee of an **insured** who performs duties, including household or domestic services, in connection with the maintenance or use of the **residence premises**. This includes employees who perform similar duties elsewhere for you. This does not include employees while performing duties in connection with the **business** of an **insured**.

10. "**residence premises**" means:

    a. the one, two, three or four-family dwelling, other structures and grounds; or

    b. that part of any other building;

    where you reside and which is shown in the **Declarations**.

loss is the direct and immediate cause of the collapse of the building.

This coverage does not increase the limit applying to the damaged property.

12. **Locks.** We will pay the reasonable expenses you incur to re-key locks on exterior doors of the dwelling located on the **residence premises**, when the keys to those locks are a part of a covered theft loss.

    No deductible applies to this coverage.

INFLATION COVERAGE

The limits of liability shown in the **Declarations** for Coverage A, Coverage B and, when applicable, Option ID will be increased at the same rate as the increase in the Inflation Coverage Index shown in the **Declarations**.

To find the limits on a given date:

1. divide the Index on that date by the Index as of the effective date of this Inflation Coverage provision; then
2. multiply the resulting factor by the limits of liability for Coverage A, Coverage B and Option ID separately.

The limits of liability will not be reduced to less than the amounts shown in the **Declarations**.

If during the term of this policy the Coverage A limit of liability is changed at your request, the effective date of this Inflation Coverage provision is changed to coincide with the effective date of such change.

SECTION I - LOSSES INSURED

COVERAGE A - DWELLING

We insure for accidental direct physical loss to the property described in Coverage A, except as provided in **SECTION I - LOSSES NOT INSURED**.

COVERAGE B - PERSONAL PROPERTY

We insure for accidental direct physical loss to property described in Coverage B caused by the following perils, except as provided in **SECTION I - LOSSES NOT INSURED**:

1. **Fire or lightning.**
2. **Windstorm or hail.** This peril does not include loss to property contained in a building caused by rain, snow, sleet, sand or dust. This limitation does not apply when the direct force of wind or hail damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening.

   This peril includes loss to watercraft of all types and their trailers, furnishings, equipment, and outboard motors, only while inside a fully enclosed building.
3. **Explosion.**
4. **Riot or civil commotion.**
5. **Aircraft**, including self-propelled missiles and spacecraft.
6. **Vehicles**, meaning impact by a vehicle.
7. **Smoke**, meaning sudden and accidental damage from smoke.

   This peril does not include loss caused by smoke from agricultural smudging or industrial operations.
8. **Vandalism or malicious mischief**, meaning only willful and malicious damage to or destruction of property.
9. **Theft**, including attempted theft and loss of property from a known location when it is probable that the property has been stolen.

   This peril does not include:

   a. loss of a precious or semi-precious stone from its setting;

   b. loss caused by theft:

      (1) committed by an **Insured** or by any other person regularly residing on the **insured location**. Property of a student who is an **Insured** is covered while located at a residence away from home, if the theft is committed by a person who is not an **Insured**;

      (2) in or to a dwelling under construction or of materials and supplies for use in the construction until the dwelling is completed and occupied; or

b. defect, weakness, inadequacy, fault or unsoundness in:

(1) planning, zoning, development, surveying, siting;

(2) design, specifications, workmanship, construction, grading, compaction;

(3) materials used in construction or repair; or

(4) maintenance;

of any property (including land, structures, or improvements of any kind) whether on or off the **residence premises**; or

c. weather conditions.

However, we do insure for any resulting loss from items a., b. and c. unless the resulting loss is itself a Loss Not Insured by this Section.

SECTION I - LOSS SETTLEMENT

Only the Loss Settlement provisions shown in the **Declarations** apply. We will settle covered property losses according to the following.

COVERAGE A - DWELLING

1. **A1 - Replacement Cost Loss Settlement - Similar Construction.**

   a. We will pay the cost to repair or replace with similar construction and for the same use on the premises shown in the **Declarations**, the damaged part of the property covered under **SECTION I - COVERAGES, COVERAGE A - DWELLING**, except for wood fences, subject to the following:

      (1) until actual repair or replacement is completed, we will pay only the actual cash value at the time of the loss of the damaged part of the property, up to the applicable limit of liability shown in the **Declarations**, not to exceed the cost to repair or replace the damaged part of the property;

      (2) when the repair or replacement is actually completed, we will pay the covered additional amount you actually and necessarily spend to repair or replace the damaged part of the property, or an amount up to the applicable limit of liability shown in the **Declarations**, whichever is less;

      (3) to receive any additional payments on a replacement cost basis, you must complete the actual repair or replacement of the damaged part of the property within two years after the date of loss, and notify us within 30 days after the work has been completed; and

      (4) we will not pay for increased costs resulting from enforcement of any ordinance or law regulating the construction, repair or demolition of a building or other structure, except as provided under **Option OL - Building Ordinance or Law Coverage**.

   b. Wood Fences: We will pay the actual cash value at the time of loss for loss or damage to wood fences, not to exceed the limit of liability shown in the **Declarations** for COVERAGE A - DWELLING EXTENSION.

2. **A2 - Replacement Cost Loss Settlement - Common Construction.**

   a. We will pay the cost to repair or replace with common construction and for the same use on the premises shown in the **Declarations**, the damaged part of the property covered under **SECTION I - COVERAGES, COVERAGE A - DWELLING**, except for wood fences, subject to the following:

      (1) we will pay only for repair or replacement of the damaged part of the property with common construction techniques and materials commonly used by the building trades in standard new construction. We will not pay the cost to repair or replace obsolete, antique or custom construction with like kind and quality;

      (2) until actual repair or replacement is completed, we will pay only the actual cash value at the time of the loss of the damaged part of the property, up to the applicable limit of liability shown in the **Declarations**, not to exceed the cost to repair or

4. **Appraisal.** If you and we fail to agree on the amount of loss, either one can demand that the amount of the loss be set by appraisal. If either makes a written demand for appraisal, each shall select a competent, disinterested appraiser. Each shall notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the **residence premises** is located to select an umpire. The appraisers shall then set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the amount of the loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by you and us.

5. **Other Insurance.** If a loss covered by this policy is also covered by other insurance, we will pay only our share of the loss. Our share is the proportion of the loss that the applicable limit under this policy bears to the total amount of insurance covering the loss.

6. **Suit Against Us.** No action shall be brought unless there has been compliance with the policy provisions. The action must be started within one year after the date of loss or damage.

7. **Our Option.** We may repair or replace any part of the property damaged or stolen with similar property. Any property we pay for or replace becomes our property.

8. **Loss Payment.** We will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment. Loss will be payable 60 days after we receive your proof of loss and:

   a. reach agreement with you;

   b. there is an entry of a final judgment; or

   c. there is a filing of an appraisal award with us.

9. **Abandonment of Property.** We need not accept any property abandoned by an **insured.**

10. **Mortgage Clause.** The word "mortgagee" includes trustee.

    a. If a mortgagee is named in this policy, any loss payable under Coverage A shall be paid to the mortgagee and you, as interests appear. If more than one mortgagee is named, the order of payment shall be the same as the order of precedence of the mortgages.

    b. If we deny your claim, that denial shall not apply to a valid claim of the mortgagee, if the mortgagee:

       (1) notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;

       (2) pays on demand any premium due under this policy, if you have not paid the premium; and

       (3) submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Appraisal, Suit Against Us and Loss Payment apply to the mortgagee.

    c. If this policy is cancelled by us, the mortgagee shall be notified at least 10 days before the date cancellation takes effect. Proof of mailing shall be proof of notice.

    d. If we pay the mortgagee for any loss and deny payment to you:

       (1) we are subrogated to all the rights of the mortgagee granted under the mortgage on the property; or

       (2) at our option, we may pay to the mortgagee the whole principal on the mortgage plus any accrued interest. In this event, we shall receive a full assignment and transfer of the mortgage and all securities held as collateral to the mortgage debt.

    e. Subrogation shall not impair the right of the mortgagee to recover the full amount of the mortgagee's claim.

11. **No Benefit to Bailee.** We will not recognize an assignment or grant coverage for the benefit of a person or organization holding, storing or transporting property for

a fee. This applies regardless of any other provision of this policy.

12. **Intentional Acts.** If you or any person insured under this policy causes or procures a loss to property covered under this policy for the purpose of obtaining insurance benefits, then this policy is void and we will not pay you or any other **insured** for this loss.

SECTION II - LIABILITY COVERAGES

COVERAGE L - PERSONAL LIABILITY

If a claim is made or a suit is brought against an **insured** for damages because of **bodily injury** or **property damage** to which this coverage applies, caused by an **occurrence**, we will:

1. pay up to our limit of liability for the damages for which the **insured** is legally liable; and
2. provide a defense at our expense by counsel of our choice. We may make any investigation and settle any claim or suit that we decide is appropriate. Our obligation to defend any claim or suit ends when the amount we pay for damages, to effect settlement or satisfy a judgment resulting from the **occurrence**, equals our limit of liability.

COVERAGE M - MEDICAL PAYMENTS TO OTHERS

We will pay the necessary medical expenses incurred or medically ascertained within three years from the date of an accident causing **bodily injury**. Medical expenses means reasonable charges for medical, surgical, x-ray, dental, ambulance, hospital, professional nursing, prosthetic devices and funeral services. This coverage applies only:

1. to a person on the **insured location** with the permission of an **insured**;
2. to a person off the **insured location**, if the **bodily injury**:
   a. arises out of a condition on the **insured location** or the ways immediately adjoining;
   b. is caused by the activities of an **insured**;
   c. is caused by a **residence employee** in the course of the **residence employee's** employment by an **insured**; or
   d. is caused by an animal owned by or in the care of an **insured**; or
3. to a **residence employee** if the **occurrence** causing **bodily injury** occurs off the **insured location** and arises out of or in the course of the **residence employee's** employment by an **insured**.

SECTION II - ADDITIONAL COVERAGES

We cover the following in addition to the limits of liability:

1. **Claim Expenses.** We pay:
   a. expenses we incur and costs taxed against an **insured** in suits we defend;
   b. premiums on bonds required in suits we defend, but not for bond amounts greater than the Coverage L limit. We are not obligated to apply for or furnish any bond;
   c. reasonable expenses an **insured** incurs at our request. This includes actual loss of earnings (but not loss of other income) up to $100 per day for aiding us in the investigation or defense of claims or suits;
   d. prejudgment interest awarded against the **insured** on that part of the judgment we pay; and
   e. interest on the entire judgment which accrues after entry of the judgment and before we pay or tender, or deposit in court that part of the judgment which does not exceed the limit of liability that applies.
2. **First Aid Expenses.** We will pay expenses for first aid to others incurred by an **insured** for **bodily injury** covered under this policy. We will not pay for first aid to you or any other **insured**.
3. **Damage to Property of Others.**
   a. We will pay for **property damage** to property of others caused by an **insured**.
   b. We will not pay more than the smallest of the following amounts:
      (1) replacement cost at the time of loss;
      (2) full cost of repair; or

SFF-LIN 01558

does not apply to **property damage** caused by fire, smoke or explosion;

d. **bodily injury** to a person eligible to receive any benefits required to be provided or voluntarily provided by an **insured** under a workers' compensation, non-occupational disability, or occupational disease law;

e. **bodily injury** or **property damage** for which an **insured** under this policy is also an insured under a nuclear energy liability policy or would be an insured but for its termination upon exhaustion of its limit of liability. A nuclear energy liability policy is a policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada, or any of their successors.

3. Coverage M does not apply to **bodily injury**:

a. to a **residence employee** if it occurs off the **insured location** and does not arise out of or in the course of the **residence employee's** employment by an **insured**;

b. to a person eligible to receive any benefits required to be provided or voluntarily provided under any workers' compensation, non-occupational disability or occupational disease law;

c. from nuclear reaction, radiation or radioactive contamination, all whether controlled or uncontrolled or however caused, or any consequence of any of these;

d. to a person other than a **residence employee** of an **insured**, regularly residing on any part of the **insured location**.

SECTION II - CONDITIONS

1. **Limit of Liability.** The Coverage L limit is shown in the **Declarations**. This is our limit for all damages from each **occurrence** regardless of the number of **Insureds**, claims made or persons injured.

   The Coverage M limit is shown in the **Declarations**. This is our limit for all medical expense for **bodily injury** to one person as the result of one accident.

2. **Severability of Insurance.** This insurance applies separately to each **insured**. This condition shall not increase our limit of liability for any one **occurrence**.

3. **Duties After Loss.** In case of an accident or **occurrence**, the **insured** shall perform the following duties that apply. You shall cooperate with us in seeing that these duties are performed:

   a. give written notice to us or our agent as soon as practicable, which sets forth:

      (1) the identity of this policy and **insured**;

      (2) reasonably available information on the time, place and circumstances of the accident or **occurrence**; and

      (3) names and addresses of any claimants and available witnesses;

   b. immediately forward to us every notice, demand, summons or other process relating to the accident or **occurrence**;

   c. at our request, assist in:

      (1) making settlement;

      (2) the enforcement of any right of contribution or indemnity against a person or organization who may be liable to an **insured**;

      (3) the conduct of suits and attend hearings and trials; and

      (4) securing and giving evidence and obtaining the attendance of witnesses;

   d. under the coverage - **Damage to Property of Others**, exhibit the damaged property if within the **insured's** control; and

   e. the **insured** shall not, except at the **insured's** own cost, voluntarily make payments, assume obligations or incur expenses. This does not apply to expense for first aid to others at the time of the **bodily injury**.

State Farm Fire and Casualty Company
PO Box 5000
Dupont, WA 98327-5000

M-15-1327-F495 F H

LINFORD, D RICHARD & LINDSEY
2241 E GOSSAMER LN
BOISE ID 83706-6141

RENEWAL CERTIFICATE

POLICY NUMBER	12-BX-7416-6
Homeowners Policy JUL 08 2006 to JUL 08 2007	
TO BE PAID BY MORTGAGEE	

Location: Same as Mailing Address

Coverages and Limits

Section I		
A Dwelling		$292,000
Dwelling Extension	Up To	29,200
B Personal Property		219,000
C Loss of Use		Actual Loss Sustained
Deductibles - Section I		
All Losses		1,000
Section II		
L Personal Liability		$300,000
Damage to Property of Others		500
M Medical Payments to Others (Each Person)		1,000

Loss Settlement Provisions (See Policy)
A1 Replacement Cost - Similar Construction
B1 Limited Replacement Cost - Coverage B

Forms, Options, and Endorsements

Homeowners Policy	FP-7955
Jewelry and Furs $2,500/$5,000	OPT JF
Increase Dwlg up to $58,400	OPT ID
Ordinance/Law 10%/ $29,200	OPT OL
Amendatory Endorsement	FE-7212.5
Policy Endorsement	FE-5320
Fungus (Including Mold) Excl	FE-5398
Back-Up Dwell/Listed Property	FE-5706.1
Motor Vehicle Endorsement	FE-5452

Annual Premium	$628.00
Premium Reductions	
Home/Auto Discount	93.00
Claim Free Discount	155.00

Inflation Coverage Index: 182.1

This policy does not provide earthquake coverage. If you are interested in obtaining earthquake coverage, please contact your State Farm agent for more information concerning the coverage and eligibility criteria.

138-3076 I.7 Rev 11-14-2005 (01130B9b)

SFF-LIN 01570

If you have mo[illegible]lease contact your agent.
See reverse side for important information.

Thanks for letting us serve you. We appreciate our long term customers.

8450 4011 1
N 1V,E9,G2

Agent ANGELA WEBB INS AGENCY INC
Telephone (208) 342-7728

REP

Prepared MAY 24 2006

SFF-LIN 01571

CONTINUED FROM FRONT

Mortgagee: PHH MORTGAGE CORPORATION
Loan No: 0024191983
2nd Mtg: PHH MORTGAGE CORPORATION
Loan No: 0024191991

Your coverage amount....

It is up to you to choose the coverages and limits that meet your needs. We recommend that you purchase a coverage limit equal to the estimated replacement cost of your home. Replacement cost estimates are available from building contractors and replacement cost appraisers, or, your agent can provide an estimate from Xactware, Inc.® using information you provide about your home. We can accept the type of estimate you choose as long as it provides a reasonable level of detail about your home. State Farm® does not guarantee that any estimate will be the actual future cost to rebuild your home. Higher limits are available at higher premiums. Lower limits are also available, which if selected may make certain coverages unavailable to you. We encourage you to periodically review your coverages and limits with your agent and to notify us of any changes or additions to your home.

Discounts and Rating - The longer you are insured with State Farm®, and the fewer claims you have, the lower your premium. For policyholders insured by State Farm for three or more years, the Claim Free Discount Plan provides a premium discount if you have not had any claims considered for the Plan in the most recent three-year period since becoming insured with State Farm. Premium adjustments under the Claim Record Rating Plan are based on the number of years you have been insured with State Farm and on the number of claims that we consider for the Plan. Depending on the Plan(s) that applies in your state/province, claims considered for the Plans generally include claims resulting in a paid loss and may include weather-related claims. Additionally, depending on your state/province's plan and your tenure with State Farm, any claims with your prior insurer resulting in property damage or injury may also influence your premium. For further information about whether a Claim Free Discount is in effect in your state/province, the Claim Record Rating Plan that applies in your state/province, and the claims we consider for the Plans, please contact your State Farm agent.

NOTICE TO POLICYHOLDER:

For a comprehensive description of coverages and forms, please refer to your policy.

Policy changes requested before the "Date Prepared", which appear on this notice, are effective on the Renewal Date of this policy unless otherwise indicated by a separate endorsement, binder, or amended declarations. Any coverage forms attached to this notice are also effective on the Renewal Date of this policy.

Policy changes requested after the "Date Prepared" will be sent to you as an amended declarations or as an endorsement to your policy. Billing for any additional premium for such changes will be mailed at a later date.

If, during the past year, you've acquired any valuable property items, made any improvements to insured property, or have any questions about your insurance coverage, contact your State Farm agent.

Please keep this with your policy.

ELAM & BURKE
ATTORNEYS AT LAW

JAMES D. LaRUE

251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701
Telephone 208 343-5454
Fax 208 384-5844
E-mail jdl@elamburke.com

June 2, 2010

JUN 03 2010
NEIL D. McFEELEY

Neil D. McFeeley
EBERLE, BERLIN, KADING, TURNBOW
& MCKLVEEN, CHARTERED
1111 West Jefferson Street, Suite 530
P.O. Box 1368
Boise, Idaho 83701

Re: *Dave's Inc. v. Linford v. State Farm Fire*
E&B No. 1-1267

Dear Mr. McFeeley:

The purpose of this letter is to confirm an agreement between D. Richard and Lindsey Linford ("insureds") and State Farm Fire and Casualty Company ("State Farm") collectively ("the parties") regarding the insureds' claims that State Farm has not paid the amount of loss claimed under Coverage A of their Homeowners Policy, Policy No. 12-BX-7416-6, ("the Policy") relating to the fire loss of January 17, 2007, at 2241 E. Gossamer Ln., Boise, Idaho.

It is my understanding that the insureds claimed benefits under Coverage A (Dwelling), Coverage B (Personal Property) and Coverage C (Loss of Use). It is also my understanding that there are no disputes between the insureds and State Farm regarding payments made by State Farm under Coverages B and C. It is further my understanding that the insureds have received payment under Coverage A in the amount of $197,065.67. The insureds entered into two contracts with Dave's Inc.: one contract for repair of the fire damage, and another contract for remodel of the dwelling. A dispute has arisen between Dave's Inc. and the insureds which resulted in a lawsuit being filed by Dave's Inc. On behalf of the insureds, your firm filed a third-party complaint against State Farm.

Pursuant to the terms of the Policy, by letter dated May 7, 2010, on behalf of State Farm, I demanded that the amount of the loss under Coverage A be set/determined by appraisal. The insureds have elected not to appoint a separate appraiser, but have agreed to modify Section I - Conditions, paragraph 4 - Appraisal - to the following terms:

EXHIBIT B

- the parties agree to resolve and set the amount of loss under Coverage A of the Policy by appraisal;
- the parties will jointly appoint Mike Berkson as their appraiser;
- the insureds and State Farm will be allowed to provide Mr. Berkson documents and information for his consideration;
- should Mr. Berkson have questions or require additional information, he should share such inquiries with both parties;
- the insureds will allow Mr. Berkson access to the insured dwelling, if requested, for purposes of performing his appraisal;
- Mr. Berkson will determine the cost to repair damages to the dwelling, caused by the fire, as if he was a contractor on the date of loss (amount of loss);
- Mr. Berkson will provide a written appraisal of the amount of loss to the insureds and State Farm;
- the parties agree to be bound by the written appraisal; and
- State Farm will pay Mr. Berkson fees and expenses as the parties' joint appraiser.

The insureds and State Farm agree to stay any further proceedings on the third-party complaint until the appraisal is completed.

If you agree to the above, kindly indicate by signing and returning the original of this letter on behalf of your clients.

Very truly yours,

ELAM & BURKE
A Professional Association

James D. LaRue

JDL:sd

6/11/10
Date

Neil D. McFeeley
Attorney for D. Richard and Lindsey Linford

841 A.2d 1038, 2003 PA Super 502

(Cite as: 841 A.2d 1038)

H

Superior Court of Pennsylvania.

William KANE and Dorothy Kane, his wife, William Mellinger, Noel Weiss, Michael Foster and Merrilee Foster, his wife, Keith McCall, Epiphaniana Beckham, Adnan Jaffar, Michael Raffaele and Margaret Muller, Vincent Carcia and Christine Carcia, his wife, James Miller and Elizabeth Miller, His Wife, on their own behalf and as representatives of similarly situated persons, Appellants,
v.
STATE FARM FIRE AND CASUALTY COMPANY, Allstate Insurance Company, Metropolitan Property and Casualty Insurance Company, Ace American Insurance Company, Ace Fire Underwriters Insurance Company, Markel American Insurance Company, One Beacon Insurance d/b/a Pennsylvania General Insurance Company, Keystone Insurance Company and Erie Insurance Company, Appellees.
Argued May 22, 2003.

Filed Dec. 22, 2003.
Reargument Denied March 3, 2004.

Background: Insureds brought class action against homeowners' insurers to recover for breach of contract and bad-faith failure to pay replacement cost for partial losses to dwellings before the property was repaired or replaced. The Court of Common Pleas, Bucks County, Civil Division, No. 01005040-16-1, Kane, J., sustained insurers' objections in nature of demurrer. Insureds appealed.

Holdings: The Superior Court, No. 237 EDA 2003, Todd, J., held that:

(1) term "actual cash value" in some of the policies could not mean replacement value without a deduction for depreciation, and
(2) a policy with a dwelling replacement cost guarantee endorsement entitled insured to replacement cost without deduction for depreciation before repairing or replacing the property.

Affirmed in part, reversed in part, and remanded.

Graci, J., filed a concurring and dissenting statement.

West Headnotes

[1] Appeal and Error 30 ⇨863

30 Appeal and Error

30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases
Review of an order sustaining preliminary objections is plenary.

[2] Appeal and Error 30 ⇨863

30 Appeal and Error

30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases
Appeal and Error 30 ⇨917(1)

30 Appeal and Error

30XVI Review
30XVI(G) Presumptions
30k915 Pleading
30k917 Demurrers
30k917(1) k. In General. Most Cited Cases
The Superior Court will sustain a demurrer only if,

assuming the material facts pled in the complaint to be true, plaintiff has failed to assert a legally cognizable cause of action.

[3] Pleading 302 ⇐216(1)

302 Pleading

302V Demurrer or Exception
302k216 Scope of Inquiry and Matters Considered on Demurrer in General
302k216(1) k. In General. Most Cited Cases

When considering the grant of preliminary objections in the nature of a demurrer, the Superior Court must resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside the complaint may be considered.

[4] Pleading 302 ⇐218(1)

302 Pleading

302V Demurrer or Exception
302k218 Hearing and Determination on Demurrer
302k218(1) k. In General. Most Cited Cases

Any doubt as to the legal sufficiency of the complaint should be resolved in favor of overruling demurrer.

[5] Insurance 217 ⇐1822

217 Insurance

217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1822 k. Plain, Ordinary or Popular Sense of Language. Most Cited Cases
Insurance 217 ⇐1855

217 Insurance

217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1855 k. Dictionaries. Most Cited Cases

Words of common usage in an insurance policy are to be construed in their natural, plain, and ordinary sense, and courts may inform their understanding of these terms by considering their dictionary definitions.

[6] Insurance 217 ⇐1809

217 Insurance

217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1809 k. Construction or Enforcement as Written. Most Cited Cases

Where the language of the insurance policy is clear and unambiguous, a court is required to give effect to that language.

[7] Insurance 217 ⇐1832(1)

217 Insurance

217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1832 Ambiguity, Uncertainty or Conflict
217k1832(1) k. In General. Most Cited Cases

Where a provision of an insurance policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement.

[8] Insurance 217 ⇐1808

217 Insurance

217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1808 k. Ambiguity in General. Most Cited Cases

While a court will not distort the meaning of insurance policy language or resort to a strained contrivance in order to find an ambiguity, it must find that contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts.

[9] Insurance 217 ⇐2177

217 Insurance

217XVI Coverage--Property Insurance
217XVI(A) In General
217k2173 Amount of Damage or Loss
217k2177 k. Partial Loss. Most Cited Cases
Insurance 217 ⚿2181

217 Insurance

217XVI Coverage--Property Insurance
217XVI(A) In General
217k2180 Valuation
217k2181 k. In General. Most Cited Cases

In partial loss situations, in the absence of clear language to the contrary, a property insurer may not deduct depreciation from the replacement cost to arrive at actual cash value; rather, "actual cash value" is replacement cost without deduction for depreciation, where such deduction would thwart the insured's expectation to be made whole.

[10] Insurance 217 ⚿2181

217 Insurance

217XVI Coverage--Property Insurance
217XVI(A) In General
217k2180 Valuation
217k2181 k. In General. Most Cited Cases

Where qualifying language is absent and an insured is promised "actual cash value," the insured is entitled to the cost to repair or replace the damaged property without a depreciation deduction.

[11] Courts 106 ⚿92

106 Courts

106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k92 k. Dicta. Most Cited Cases

Repetition does not elevate assertions that are otherwise dictum into binding precedent.

[12] Insurance 217 ⚿2172

217 Insurance

217XVI Coverage--Property Insurance
217XVI(A) In General
217k2167 Amount of Insurance
217k2172 k. Replacement. Most Cited Cases
Insurance 217 ⚿2181

217 Insurance

217XVI Coverage--Property Insurance
217XVI(A) In General
217k2180 Valuation
217k2181 k. In General. Most Cited Cases

The term "actual cash value" in homeowners' insurance policies could not mean replacement value without a deduction for depreciation; the policies entitled the insureds to actual cash value if they did not repair or replace the damage, stated that payment of actual cash value "may" include a deduction for depreciation, and unambiguously allowed the insurers to deduct depreciation until repair or replacement was made.

[13] Insurance 217 ⚿2172

217 Insurance

217XVI Coverage--Property Insurance
217XVI(A) In General
217k2167 Amount of Insurance
217k2172 k. Replacement. Most Cited Cases
Insurance 217 ⚿2181

217 Insurance

217XVI Coverage--Property Insurance
217XVI(A) In General
217k2180 Valuation
217k2181 k. In General. Most Cited Cases

The term "actual cash value" in homeowners' insurance policies could not mean replacement value without a deduction for depreciation; although the policies did not define "actual cash value," they required payment

of actual cash value until or unless repair or replacement was made.

[14] Insurance 217 ⚖2172

217 Insurance

217XVI Coverage--Property Insurance
217XVI(A) In General
217k2167 Amount of Insurance
217k2172 k. Replacement. Most Cited Cases

Homeowners' insurance policy entitled insured to replacement cost without deduction for depreciation before repairing or replacing partial loss to dwelling; although the policy limited payment to actual cash value until completion of repair or replacement, the dwelling replacement cost guarantee endorsement required payment of replacement cost without deduction for depreciation, the definition of "actual cash value" as including a depreciation deduction was in a section of the policy applicable to losses other than damage to dwelling, and the interrelation between the primary policy language and the endorsement language resulted in an ambiguity.

***1040** Jonathan Wheeler, Philadelphia and Joseph A. Zenstein, Jenkintown, for appellants.

Mark J. Levin, Philadelphia, for Allstate.

Moira C. Duggan, Philadelphia, for Keystone Insurance.

Before: TODD, GRACI, and TAMILIA, JJ.

TODD, J.

¶ 1 In this class action,[FN1] Appellants, who are home owner's insurance policy holders and who have sued on their own behalf and as representatives of classes of similarly situated persons, ask us to review the order entered in the Berks County Court of Common Pleas sustaining the preliminary objections in the nature of a demurrer filed by the Appellee insurers. We affirm in part, reverse in part, and remand.

FN1. Although this litigation was commenced as a class action, it has not been certified. Under Rule 1707 of the Pennsylvania Rules of Civil Procedure, class action certification is not determined until after the pleadings are closed. As this appeal is before us following the grant of preliminary objections, the pleadings have not closed, and so class certification has not yet been determined below.

¶ 2 As this appeal comes to us following the sustaining of preliminary objections against Appellants, the following background is gleaned from Appellants' amended complaint.[FN2] Appellants have "replacement cost" home owner's insurance policies, separately and variously, with Appellees State Farm Fire and Casualty Company ("State Farm"), Allstate Insurance Company ("Allstate"), Metropolitan Property and Casualty Insurance Company ("Metropolitan"), Ace American Insurance Company ("Ace American"), Ace Fire Underwriters Insurance Company ("Ace Fire"), Markel American Insurance Company ("Markel"), One Beacon Insurance d/b/a Pennsylvania General Insurance Company ("One Beacon"), Keystone Insurance Company ("Keystone"), and Erie Insurance Company ("Erie"). Each of Appellants have suffered partial physical losses to buildings covered under their respective policies.

FN2. The original complaint filed on August 3, 2001 identified 31 separate plaintiff-insureds and 28 separate defendant-insurers. Following a court conference, the insurers supplied the insureds with copies of the applicable insurance policies. After reviewing the policies and concluding that 19 of the policies contained unobjectionable language and that the case should be discontinued as to those issuing insurers, an amended complaint was filed alleging causes of action by the present Appellants (10 insureds) and the present Appellees (9 insurers).

¶ 3 At the core of this present dispute is the meaning of the phrase "actual cash value," as used and, to varying degrees, defined in the replacement cost policies at issue. Appellants assert that they have not received full indemnification under their insurance policies with Appellees for their partial losses because Appellees have deducted depreciation from the actual cost to repair or

replace the damaged portion of their buildings. Appellants contend that, under Pennsylvania law, unless the phrase "actual cash value" is specifically defined in an insurance policy to include depreciation, depreciation is not to be included, and a policy holder is entitled to repair/replacement cost. They assert that the definition of "actual cash value" in the policies issued by Appellees lacks the necessary***1041** specificity, and that, as a result, Appellees breached their contracts with Appellants by failing to proffer repair/replacement costs.

¶ 4 Appellees, on the other hand, assert that the issue is one of timing: they do not dispute Appellants' entitlement to replacement cost coverage, but, rather, assert that the policies specify that Appellants must first undertake to repair or replace the damaged property before being fully compensated. Until the damage is repaired or replaced, Appellees assert that, given the definition and usage of the phrase "actual cash value" in the respective policies, Appellants are entitled only to repair/replacement cost minus depreciation.

¶ 5 Challenging Appellees' practice of deducting depreciation from Appellants' loss settlements, Appellants brought suit alleging breach of contract, insurance bad faith under 42 Pa.C.S.A. § 8371, and violation of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201-1 *et seq.* As noted, Appellants brought this suit as a class action, on their own behalf and as representatives of classes of similarly situated persons in Pennsylvania.

¶ 6 Following the filing of Appellants' amended complaint, Appellees filed preliminary objections in the nature of a demurrer to each of Appellants' causes of action, asserting, *inter alia,* that given the language of the policies at issue, Appellants had failed to allege a breach of contract.

¶ 7 On November 18, 2002, the trial court granted the preliminary objections, finding that under the policy language and Pennsylvania caselaw, Appellants had failed to allege claims for breach of contract. The court rejected Appellants' arguments that the phrase "actual cash value" could never include depreciation under Pennsylvania law, and that, as used and defined in their respective policies, the phrase did not include depreciation. Thus, the court concluded that under the policies, Appellees were not required, in the first instance, to proffer repair or replacement costs without depreciation. For related reasons, the trial court found that Appellants had failed to allege claims for bad faith and a violation of the UTPCPL. Accordingly, the court dismissed Appellants' amended complaint. (Trial Court Order, 12/18/02.)

¶ 8 Appellants appealed this determination, and now ask: "Is an insurance company permitted to withhold depreciation from a policyholder's actual cash value payment from partial losses where the phrase 'actual cash value' is not defined in the insurance policy or where the insurance policy states that there may be a deduction for depreciation when determining actual cash value?" (Appellants' Brief at 3.)

[1][2][3][4] ¶ 9 Our review of an order sustaining preliminary objections is plenary. *Sunbeam Corp. v. Liberty Mut. Ins. Co.,* 740 A.2d 1179, 1183 (Pa.Super.1999). We will sustain the demurrer only if, assuming the material facts pled in the complaint to be true, "plaintiff has failed to assert a legally cognizable cause of action." *Id.* When considering the grant of preliminary objections in the nature of a demurrer, this Court must "resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside the complaint may be considered." *Mellon Bank, N.A. v. Fabinyi,* 437 Pa.Super. 559, 567-68, 650 A.2d 895, 899 (1994) (citation omitted). Any doubt as to the legal sufficiency of the complaint should be resolved in favor of overruling the demurrer. *220 Partnership v. Philadelphia Electric Co.,* 437 Pa.Super. 650, 654, 650 A.2d 1094, 1096 (1994).

***1042** ¶ 10 Further, to support a claim for breach of contract, "a plaintiff must plead: 1) the existence of a contract, including its essential terms; 2) a breach of a duty imposed by the contract; and 3) resultant damage." *Presbyterian Medical Center v. Budd,* 832 A.2d 1066, 1070 (Pa.Super.2003). There is no dispute in this case that elements one and three have been pled sufficiently. At issue, therefore, is whether Appellants have pled sufficiently a duty on the part of Appellees.

¶ 11 Whether a contract imposes a duty is a matter of

contract interpretation. In turn, interpretation of an insurance contract is a matter of law. *Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 557 Pa. 595, 606, 735 A.2d 100, 106 (1999). Our standard of review, therefore, is plenary. *Young v. Equitable Life Assurance Soc'y of the United States*, 350 Pa.Super. 247, 252, 504 A.2d 339, 341 (1986). In interpreting the language of an insurance policy, the goal is "to ascertain the intent of the parties as manifested by the language of the written instrument." *See Madison*, 557 Pa. at 606, 735 A.2d at 106. Indeed, our Supreme Court has instructed that the "polestar of our inquiry ... is the language of the insurance policy." *Id.*

[5][6][7][8] ¶ 12 Furthermore, when construing a policy, "[w]ords of common usage ... are to be construed in their natural, plain and ordinary sense ... and we may inform our understanding of these terms by considering their dictionary definitions;" where "the language of the [policy] is clear and unambiguous, a court is required to give effect to that language." *Id.* at 606-608, 735 A.2d at 106-108 (citations omitted). However, "[w]here a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement." *Id.* at 606, 735 A.2d at 106. Thus, while a court will not "distort the meaning of the language or resort to a strained contrivance in order to find an ambiguity", it must find that "contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts." *Id.*

¶ 13 We begin by reviewing the relevant language of the policies at issue. Each of the policies is a **replacement cost** policy, but each, Appellees assert, requires the insured first to endeavor to repair or replace damage before full **replacement costs** will be proffered. The policies refer to "actual cash value" as the compensation that will be provided until repairs are completed, and, to varying degrees, the policies define "actual cash value" as including a deduction for depreciation. In order to facilitate our analysis of these policies, we break them into three groups. In the first group, comprised of the State Farm, Keystone, Ace American, and One Beacon policies, the policies are silent as to the definition of "actual cash value." In relevant part, the State Farm policy provides:

> a. We will pay the cost to repair or replace ... subject to the following:
>
> (1) until actual repair or replacement is completed, we will pay only the actual cash value at the time of the loss of the damaged part of the property ...;
>
> (2) when the repair or the replacement is actually completed, we will pay the covered additional amount you **actually** and **necessarily spend** to **repair** or **replace** the damaged part of the property ...;

(State Farm Policy, at 11 (R.R. 35a).) The Keystone and Ace American policies provide as follows:

> (4) [W]e will pay no more than the actual cash value of the damage unless:
>
> ***1043** (a) actual repair or replacement is complete; or
>
> (b) the cost to repair or replace the damage is both:
>
> (i) less than 5% of the amount of insurance in this policy on the building; and
>
> (ii) less than [$2500 in ACE American; $1000 in Keystone].

(Keystone Policy, Endorsement HO-3, at 10-11 (R.R. 73a-74a); Ace American Policy, at 7 (R.R. 54a).) Finally, the One Beacon policy provides:

> (4) We will pay no more than the actual cash value of the damage until actual repair or replacement is complete. Once actual repair or replacement is complete, we will settle the loss according to the provisions of b.(1) and b. (2) above [which pay the **replacement cost** "without deduction for depreciation" of the part of the building damaged].
>
> However, if the cost to repair or replace the damage is both:
>
> (a) less than 5% of the amount of the insurance in this policy on the building; and
>
> (b) less than $2500,
>
> we will settle the loss according to the provisions of

b.(1) and (b).2 above whether or not actual repair or replacement is complete.

(One Beacon Policy, at 8 (R.R. 66a).)

¶ 14 In the second group, comprised of the Allstate, Metropolitan, Ace Fire, and Markel policies, the policies explicitly refer to depreciation as a deduction from "actual cash value." The Allstate policy provides as follows:

b) Actual Cash Value. If you do not repair or replace the damaged, destroyed or stolen property, payment will be on an actual cash value basis. This means there may be a deduction for depreciation....

You may make claim for additional payment as described in paragraph c, and paragraph d if applicable, if you repair or replace the damaged, destroyed or stolen covered property within 180 days of the actual cash value payment.

(Allstate Policy, at 17 (R.R. 39a).) The Metropolitan policy provides:

b. [W]e will not pay more than the actual cash value of the damage to the structure until actual repair or replacement is complete. You may make a further claim within 180 days after the loss, provided you still have an insurable interest in the property, for any additional liability based on the replacement cost value at the time of the loss.
Actual cash value means there may be a deduction for depreciation.

(Metropolitan Policy, Endorsement H303, at 2 (R.R. 50a).) The Ace Fire policy provides:

You can make a claim for loss or damage to a building based solely on the replacement cost of the damage less depreciation. If you then repair or replace the damaged property and the amount you received does not cover your loss, you may make a claim for the rest of your loss based on the replacement cost basis. The claim must be made, however, within 180 days from the date of the loss.

(Ace Fire Policy, at 2 (R.R. 57a).) Finally, the Markel policy provides as follows:

d) if "you" repair or replace the damaged property for the same use and on the same or contiguous site, "we" will pay the amount actually and necessarily spent to repair or replace such property to a condition and appearance***1044** similar to that which existed at the time of the loss.
* * *

e) If "you" decide not to repair or replace under paragraph d) above, the settlement will be made according to Actual Cash Value. This means there may be a deduction for depreciation.

(Markel Policy, Endorsement ML-255 (R.R. 63a).)

¶ 15 We place the remaining policy, the Erie policy, in its own category, as the interrelation of the primary policy language and the endorsement is more complicated, and affects the interpretation and meaning of "actual cash value". The Erie policy states, in the main body:

(8) LOSS SETTLEMENT

The following types of losses will be settled on an actual cash value basis. This means that we will deduct for depreciation.

Losses to:

- property insured under *Personal Property Coverage*
- structures that are not buildings or carports
- carpeting
- household appliances
- cloth awnings
- outdoor antennas and outdoor equipment, whether or not attached to buildings
- insured buildings and structures which do not meet the requirements for a replacement cost settlement

described below.

The actual cash value will be determined at the time of the loss. Payment will not exceed the amount necessary to repair or replace the damaged property.

Dwelling and Other Structures Coverage

Loss under *Dwelling Coverage or Other Structures Coverage* will be settled by one of the following methods:

1. REPLACEMENT COST SETTLEMENT (meaning we will not deduct for depreciation):

* * *

2. LESS THAN FULL REPLACEMENT COST SETTLEMENT

If full replacement cost settlement does not apply, we will pay the larger of the following amounts, but not exceeding the amount of insurance under this policy applying to the building:

a. the actual cash value of that part of the building damaged; or

* * *

We will pay no more than actual cash value of the damage until the actual repair or replacement is completed....

You may disregard the replacement cost provision and make claim for loss or damage to buildings on an actual cash value basis.

You have the right to make claim, within 180 days after the loss, for any additional amounts we will be required to pay under this *Loss Settlement* provision.

(Erie Policy, at 11 (R.R. 158a).) The Erie endorsement adds the following language, in relevant part:

8. Loss Settlement
2. Under *Dwelling Coverage* loss will be settled on a replacement cost basis, without deduction for depreciation. Payment will not exceed the smallest of the following amounts:

- the replacement cost of that part of the dwelling damaged for equivalent construction and use on the same premises;

***1045** - the amount actually and necessarily spent to repair or replace the damaged dwelling.

ALL OTHER PROVISIONS OF THE POLICY APPLY.

(Erie Policy Dwelling Replacement Cost Guarantee Endorsement HP-BK (R.R. 159a).) [FN3]

FN3. This endorsement was omitted from Appellants' amended complaint but attached to Erie's preliminary objections.

¶ 16 We now turn to a review of the meaning of the phrase "actual cash value" because, as we have noted, the usage and meaning of this phrase is at the heart of the present dispute. Analysis of the phrase has a long history in the courts of this Commonwealth. In *Fedas v. Insurance Co. of the State of Pennsylvania*, 300 Pa. 555, 151 A. 285 (1930), our Supreme Court first comprehensively addressed the meaning of this phrase in an insurance policy. In *Fedas,* the Court considered whether an insurer could deduct depreciation in the event of a partial loss under a fire insurance policy. The policy allowed compensation for "[a]ctual cash value (ascertained with proper deductions for depreciation) on the property at the time of loss or damage, but not exceeding the amount which it would cost to repair or replace the same with materials of like kind and quality within a reasonable time after such loss or damage." *Id.* at 561, 151 A. at 287. The Court stated that "in ascertaining the loss resulting from the partial burning of a building, the true result is to be reached by taking the cost of reconstruction according to the conditions existing and lawfully imposed at the time when the fire occurred." *Id.* The Court explained that "actual cash value" was not the same as market value, which would incorporate depreciation, but rather was akin to replacement cost:

> Generally speaking, 'actual cash value' does not mean market value, as the term is understood. 'Market value,' as here urged, embidies [sic] what a purchaser willing to buy feels justified in paying for property which one is willing but not required to sell. 'Market value' includes factors of time, place, circumstance, use, and benefit; depreciation is included, but one figure is the result of these considerations, the price to be paid. Ordinarily actual cash value has no relation to any of these factors; it is value under all times, such as the cost of manufacturing or building or book value. The policy intended something different from market value; the latter includes 'depreciation,' while the 'actual cash value' of the policy is to be diminished by 'depreciation.' *Actual cash value in a policy of insurance means what it would cost to replace a building or a chattel as of the date of the fire.*
>
> Where a building is entirely destroyed, the application of the rule is simple; where a building is partically [sic] destroyed, it may be difficult to arrive at actual cash value, less depreciation if it is to be considered; but difficulties cannot prevent the right to compensation. *There enters into actual cash value of the part destroyed the fact that it was a part of an entire property and the use made of it. It is summed up in the idea 'the cost of replacing in as nearly as possible the condition as it existed at the date of the fire.'*

Id. at 562-63, 151 A. at 288 (emphasis added). The Court concluded that, regardless of the reference to depreciation deductions, the insured was entitled to replacement cost, as this was the only recompense***1046** that could make the insured whole under the circumstances:

> The actual cost of new material, with deduction for depreciation, which is not sufficient to replace the building as nearly as it could be as of the date of the fire, does not comply with the policy, which was to insure against loss not exceeding the amount named in the insurance.
>
> ... The result reached is that called for in the policy-replacement as nearly as possible, or its cost. If part of the building destroyed cannot be replaced with material of like kind and quality, then it should be substantially duplicated within the meaning of the policy.
>
> ... To sum up, 'actual cash value' means the actual value expressed in terms of money of the thing for the purpose for which it was used; in other words, the real value to replace. The rule established by our decisions seeks a result which will enable the parties to restore the property to as near the same condition as it was at the time of the fire, or pay for it is [sic] cash; that was the loss insured against....

Id. at 563-64, 151 A. at 288. Thus, under *Fedas,* where an insured suffers a partial loss and is promised "actual cash value," he is entitled to replacement cost, without deduction for depreciation.

¶ 17 In *Farber v. Perkiomen Mut. Ins. Co.,* 370 Pa. 480, 88 A.2d 776 (1952), the Supreme Court again addressed the propriety of depreciation deductions with regard to a partial loss under a fire insurance policy. With language similar to that in *Fedas,* the policy at issue in *Farber* insured against loss "to the extent of the actual cash value of the property at the time of the loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss." *Id.* at 486, 88 A.2d at 779. The insured suffered a partial loss and, while the cost of labor and materials necessary to restore the building was more than the policy limit, the depreciated value was less than the limit, and the insurer offered only the depreciated value. The Court concluded that, under *Fedas* and other decisions of the Court, the insured was entitled to full replacement cost (up to the policy limit), without deduction for depreciation. *Id.* at 486, 88 A.2d at 779. Indeed, the Court added that, in the absence of a change by the insurers to their policies, no other result was allowable:

> The legal meaning of ["actual cash value"] having been determined and established by prior decisions of this court, we cannot now depart therefrom without impairing the obligation of the contracts as written. Nor is there any legally meritorious basis for suggesting the necessity for a change in the interpretation of the

> contracts. The defendant companies prepare their own policy forms and presumably exclude therefrom anything for which they desire not to assume liability. Moreover, insurance companies are, of course, conversant with the germane court decisions.... Any change in the defendants' policies in order to avoid in the future the impact of our prior decisions is for them to ponder. What they presently seek cannot justly be accorded by court decision.

Id. at 486-87, 88 A.2d at 779. Thus, where a policy promises "actual cash value," the insured is entitled to replacement cost. *See also Judge v. Celina Mut. Ins. Co.*, 303 Pa.Super. 221, 227-228, 449 A.2d 658, 661 (1982) (quoting with approval the language from *Fedas* that "[a]ctual cash value in a policy of insurance means what it would cost to replace a building or a chattel as of the date of the fire.")

***1047** ¶ 18 The significance of the final admonition in *Farber* was apparent in this Court's decision in *London v. Insurance Placement Facility of Pennsylvania*, 703 A.2d 45 (Pa.Super.1997) (*en banc*). There, the Court addressed whether the Insurance Placement Facility of Pennsylvania, which offered fire insurance policies under the Pennsylvania Fair Plan Act,[FN4] should be permitted to depreciate the cost of repairing a building partially destroyed by fire. The policy in question compensated for losses "to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property." *Id.* at 47 (emphasis omitted). The phrase "actual cash value" was defined in the policy as "the cost to repair or replace the damaged property less deductions for physical deterioration (depreciation) and obsolescence." *Id.* (emphasis omitted). The insureds asserted that Pennsylvania caselaw prohibited the insurers from deducting depreciation in a partial loss situation under a standard fire policy. While admitting that the insureds "may be correct," *id.* at 48, the Court rejected their contention that a Fair Plan Act policy was the equivalent of a standard fire policy. *Id.* at 48-49. Moreover, the Court held that the insurers had responded to the invitation of the Supreme Court in *Farber, supra,* to tailor their policies and clarify their coverage:

> FN4. 40 Pa.C.S.A. §§ 1600.101-.502. As a response to urban riots in the 1960s, the Fair Plan Act "requires each insurer that writes property insurance in this Commonwealth to participate in providing insurance for high-risk property for which insurance is not normally available." *London*, 703 A.2d at 48.

The *Farber* decision arguably prevents insurance companies from deducting depreciation in the event of a partial loss that does not exceed the depreciated value of the whole property. If the companies wanted to avoid such a result, the court plainly suggested that they should modify their policies.

As the endorsement defining "actual cash value" demonstrates, the Facility has done exactly what the *Farber* court advised. Presumably dissatisfied with the interpretation of "actual cash value" by the court, the Facility sought to define the phrase with greater precision. Especially when the high-risk associated with insuring property under the Fair Plan is considered, it is logical that the Facility would choose to protect itself with specific definitions of terms or phrases. Finally, it is an extremely unremarkable choice when one considers that our Supreme Court invited insurance companies to do this in *Farber.*

Id. at 50 (footnote omitted). *London* stands for the proposition that, although *Fedas* and *Farber, supra,* remain viable, explicit policy language may avoid their effects.

[9][10] ¶ 19 From these cases, we conclude that in partial loss situations, in the absence of clear language to the contrary, an insurer may not deduct depreciation from the replacement cost of a policy and that the phrase "actual cash value" may not be interpreted as including a depreciation deduction, where such deduction would thwart the insured's expectation to be made whole. Where qualifying language is absent and an insured is promised "actual cash value," the insured is entitled to the cost to repair or replace the damaged property. Under *Fedas* and *Farber, supra,* our Supreme Court asserts that such compensation is the only thing that can make an insured whole. *London, supra,* holds that a different result can be

contracted for, but the policy must be clear in that regard.

***1048** ¶ 20 Appellees cite to *Canulli v. Allstate Ins. Co.*, 315 Pa.Super. 460, 462 A.2d 286 (1983) and *Gilderman v. State Farm Ins. Co.*, 437 Pa.Super. 217, 649 A.2d 941 (1994), for the proposition that "actual cash value" can only mean the cost of repair or replacement minus depreciation. We find Appellees' reliance on these cases to be misplaced. It is true that in *Canulli* this Court, inexplicably citing *Farber, supra,* states that "actual cash value" includes depreciation. *See Canulli*, 315 Pa.Super. at 462, 462 A.2d at 287 (" 'Actual cash value' is the actual cost of repair or replacement less depreciation."). Putting aside that this assertion is in direct contravention to the holding in *Farber,* we note that the *Canulli* Court ultimately quashed the appeal by the insureds in that case as interlocutory, thus rendering the Court's definition of actual cash value nonbinding *dictum. See London,* 703 A.2d at 58 n. 7 (Ford Elliott, J., concurring and dissenting); *see generally T.B. v. L.R.M.*, 753 A.2d 873, 883 n. 2 (Pa.Super.2000) (dictum is not binding on this Court or trial courts), *aff'd* 567 Pa. 222, 786 A.2d 913 (2001).

[11] ¶ 21 In *Gilderman,* this Court likewise stated that "actual cash value" is "the actual cost of repair or replacement less depreciation." *Gilderman,* 437 Pa.Super. at 221, 649 A.2d at 943. The Court cited only *Canulli* for this proposition, and we note that repetition does not elevate assertions that are otherwise dictum into binding precedent. *See Commonwealth v. Perry*, 568 Pa. 499, 529, 798 A.2d 697, 715 (2002) (Castille, J., concurring) ("*Dicta* is not converted into binding constitutional precedent through repetition.") Moreover, the Court in *Gilderman* was not strictly concerned with the issue of depreciation; rather, there, the insurer asserted that "actual cash value" included both depreciation *and* a flat 20% fee (allegedly corresponding to contractor overhead). *Gilderman,* 437 Pa.Super. at 221, 649 A.2d at 943. As the insurers were not alleging that they were "entitled to full repair or replacement costs without a depreciation deduction prior to actual repair or replacement," the definition of "actual cash value" was not directly relevant. *Id.* at 222, 649 A.2d at 943. Thus, we are not persuaded by Appellees' citation to these cases.

¶ 22 Turning now to the policies at issue in the instant case, we note that absent from *Fedas, Farber*, and *London,* however, is the situation present herein which involves not the denial of liability for replacement cost, but the timing of that compensation. The trial court noted that Appellees "have never denied liability or failed to guarantee reimbursement for the repair or replacement of the lost personal property." [FN5] (Trial Court Opinion, 3/18/02, at 11.) Rather, Appellees maintain that they are only liable for such costs once replacement or repair is completed.[FN6] Unlike***1049** *Fedas, Farber*, and *London,* wherein the insurers contested liability for such replacement costs without including depreciation, here, only the timing of such payments is at issue.[FN7] Thus, the policy considerations underlying these cases-that an insured should be made whole, and that in the absence of language to the contrary, to make an insured whole "actual cash value" must be interpreted to mean replacement value without depreciation-apply with less force herein as there is no question that Appellants will be made whole by Appellees ultimately, if not initially.

FN5. Nor have Appellants sought such coverage. As the trial court explained:

> There are no facts offered that the [Appellants] actually completed the repairs or replacements to their respective properties, that they ever contracted to make the repairs or replacements, or that they ever even intended or attempted to repair or replace said property. Furthermore, this is no allegation that [Appellants] ever advised the [Appellees] that they wanted to make appropriate repairs, or that they submitted documentation to the [Appellees] showing that any repairs were made.
>
> (Trial Court Opinion, 3/18/02, at 7-8.)

FN6. The trial court noted in its Opinion that Appellees:

> have represented to this Court, in their pleadings as well as at oral argument, that even if [Appellants] did intend to repair or replace

> their claimed losses, *they would not be required to expend their own funds* up front to effectuate the repairs. To the contrary, once the [Appellants] undertake to make the appropriate repairs or replacements, for example, by contracting to do so, these insurers would pay the full cost of repairing or replacing the property.
>
> (Trial Court Opinion, 3/18/02, at 8 n. 4)(emphasis original.)

FN7. Appellants have not asserted that this two-step process, in itself, is contrary to Pennsylvania caselaw or public policy. We, therefore, offer no opinion in that regard.

¶ 23 In light of the foregoing, and after a review of the nine policies at issue, we conclude that, with the exception of Erie which we discuss further below, Appellants have failed to allege breach of contract claims against Appellees. We begin by discussing the policies in the second group.

[12] ¶ 24 These policies-issued by Allstate, Metropolitan, Ace Fire, and Markel-clearly note that compensation will be paid out on an actual cash value basis which "may" include a deduction for depreciation (*see* Allstate Policy, at 17 (R.R. 39a); Metropolitan Policy, Endorsement H303, at 2 (R.R. 50a); Markel Policy, Endorsement ML-255 (R.R. 63a)), or that compensation will be "less depreciation" (*see* Ace Fire Policy, at 2 (R.R. 57a)). Like the insurer in *London, supra,* Allstate, Metropolitan, Ace Fire, and Markel appear to have followed the Supreme Court's advice in *Farber* and have tailored their policies to clarify the extent of their intended coverage. We find no merit to Appellants' assertion that the use of "may" makes the policies ambiguous or misleading.

¶ 25 Moreover, and more persuasively, when read in the context of the language of the policies at issue, we conclude, as did the trial court, that the phrase "actual cash value" as used in those policies cannot mean replacement value, as Appellants contend, as such an interpretation would make the remaining policy language nonsensical. In each of these policies, there is qualifying language indicating that "actual cash value" will be the proffered compensation where the insured does not repair or replace the damage. (*See* Allstate Policy, at 17 (R.R. 39a) ("*If you do not repair or replace the damaged, destroyed or stolen property,* payment will be on an actual cash value basis." (emphasis added)); Metropolitan Policy, Endorsement H303, at 2 (R.R. 50a) ("[W]e will not pay more than the actual cash value of the damage to the structure *until actual repair or replacement is complete.*" (emphasis added)); Ace Fire Policy, at 2 (R.R. 58a) ("*If you then repair or replace the damaged property* and the [depreciated cost] does not cover your loss, you may make a claim for the rest of your loss based on the replacement cost basis." (emphasis added)); Markel Policy, Endorsement ML-255 (R.R. 63a) ("*If 'you' decide not to repair or replace* under paragraph d) above, the settlement will be made according to Actual Cash Value." (emphasis added)).) Thus, "actual cash value" cannot also mean "replacement value." Given that the policies have defined "actual cash value" to include deductions for depreciation, we find that the policies unambiguously allow the insurers ***1050** to deduct depreciation until repair or replacement is made.

¶ 26 Moreover, with respect to these policies, there is no concern, as was present in *Fedas* and *Farber, supra,* that the insureds will not be made whole. Here, Appellees have conceded liability for replacement cost once Appellants undertake to repair or replace the damage to their properties. Again, the issue is one of the timing of compensation, not its extent.

[13] ¶ 27 We come to the same conclusion regarding the policies in the first group. These policies-issued by State Farm, Keystone, Ace American, and One Beacon-do not contain any definition for "actual cash value." When read in the context of the language of the policies, however, we note, as we did for the policies in the second group, that the phrase "actual cash value" as used in those policies cannot be synonymous with replacement value, as Appellants contend, as such an interpretation would make the remaining policy language nonsensical. The language of these policies is clear that only "actual cash value" will be proffered "until" or "unless" repair or replacement is made. (*See* State Farm Policy, at 11 (R.R. 35a) ("*until actual repair or replacement is completed,* we will pay

only the actual cash value at the time of the loss" (emphasis added)); Keystone Policy, Endorsement HO-3, at 10-11 (R.R. 73a-74a) ("we will pay no more than actual cash value of the damage *unless ... actual repair or replacement is complete* " (emphasis added)); Ace American Policy, at 7 (R.R. 54a) (same); One Beacon Policy, at 8 (R.R. 66a) ("We will pay no more than the actual cash value of the damage *until actual repair or replacement is complete.*" (emphasis added)).)

¶ 28 Appellants do not assert that the phrase "actual cash value" as used in these policies is ambiguous; rather, they assert that it may not include a deduction for depreciation. We disagree. The only interpretation of the phrase "actual cash value" in these policies that makes sense is one that includes depreciation deductions. Moreover, this interpretation does not run afoul of *Fedas* and *Farber, supra,* as, under these policies, the insureds ultimately will be made whole. That is, as in the policies in the second group, there is no concern here, as was present in *Fedas* and *Farber,* that the inclusion of depreciation deductions will not fully compensate the insured.

[14] ¶ 29 We finally address the policy issued by Erie, which we have quoted at length above. While the policy clearly defines, in one section, "actual cash value" to mean that Erie "will deduct for depreciation," (Erie Policy, at 11 (R.R. 158a)), and while the policy states that Erie "will pay no more than actual cash value of the damage until the actual repair or replacement is completed" (*id.*), we find that the interrelation between the primary policy language and the endorsement language results in an ambiguity. First, as Appellants point out, the definition of "actual cash value" is prefaced with language indicating that it applies only to "the following types of losses" which specifically exclude dwelling damage as alleged herein. (*Id.*) Second, while later language in the "LOSS SETTLEMENT" section indicates that Erie "will pay no more than actual cash value of the damage until the actual repair or replacement is completed" (*id.*), it is unclear whether this phrase applies to dwelling damage once the endorsement language is overlaid. Specifically, the endorsement, which is entitled "DWELLING REPLACEMENT COST GUARANTEE ENDORSEMENT," specifically indicates that dwelling coverage "will be settled on a replacement cost basis, without deduction for depreciation." (Erie Policy Dwelling ***1051** Replacement Cost Guarantee Endorsement HP-BK (R.R. 159a).)

¶ 30 While it is reasonable to infer, as Appellees argue, that regardless of the endorsement, the provision in the main policy which indicates that only actual cash value will be offered until repair or replacement is complete remains, we conclude it is equally reasonable for a policy holder to interpret the policy, as Appellants suggest, to mean that replacement cost is to be paid in the first instance without depreciation deductions. As there are two reasonable interpretations of the policy language, we must apply the interpretation favoring the insureds. *See Madison,* 557 Pa. at 606, 735 A.2d at 106. At any rate, this ambiguity convinces us that it was error for the trial court to dismiss the breach of contract claim against Erie at this early preliminary objection stage of the litigation. *See 220 Partnership v. Philadelphia Elec. Co.,* 437 Pa.Super. at 654, 650 A.2d at 1096 (doubts as to the legal sufficiency of the complaint should be resolved in favor of overruling the demurrer).

¶ 31 For all the foregoing reasons, we conclude that the trial court properly dismissed the breach of contract claims against each of the Appellees, except for Erie, and accordingly affirm the order as to those Appellees. For the same reasons, we conclude the trial court properly dismissed Appellants' related claims under the UTPCPL, again, except as against Erie, and accordingly affirm the order as to those Appellees. We conclude, however, that the trial court erred in dismissing the breach of contract claim against Erie, and reverse the order below in that regard. Given that the trial court dismissed the UTPCPL claim against Erie based on an erroneous conclusion that the underlying breach of contract claims were meritless, we remand for the trial court to reconsider the UTPCPL claim against Erie in light of this opinion. Appellants have not challenged the dismissal of their bad faith claims against Appellees, and thus we do not disturb the trial court's determination in that respect.

¶ 32 Order **AFFIRMED** as to Appellees State Farm Fire and Casualty Company, Allstate Insurance Company, Metropolitan Property and Casualty Insurance Company,

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(Cite as: 841 A.2d 1038)

Ace American Insurance Company, Ace Fire Underwriters Insurance Company, Markel American Insurance Company, One Beacon Insurance, and Keystone Insurance Company. Order **REVERSED** as to Appellee Erie Insurance Company. Case **REMANDED** for proceedings consistent with this opinion. Jurisdiction **RELINQUISHED**.

¶ 33 GRACI, J. files a Concurring and Dissenting Statement.

GRACI, J., Concurring and Dissenting.

¶ 1 In typical fashion, the Opinion of the majority provides a thorough and compelling analysis of the complicated factual and legal issues presented in this case. I join its analysis and expression of the law in its entirety and differ from my esteemed colleagues only in the application of the law to the case against Erie.

¶ 2 The learned majority appropriately cites *Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 557 Pa. 595, 735 A.2d 100, 106 (1999), for the proposition that a court "must find that 'contractual terms are ambiguous if they are subject to more than one reasonable interpretation *when applied to a particular set of facts.*' " Opinion, at 1042 (emphasis added). In my view, under the particular set of facts present in this case, the contractual terms which the majority finds ambiguous are not subject to more than one reasonable interpretation. Like the language in the ***1052** other policies which the majority concludes yields a different result, the language of the Erie policy, under the particular facts present here, requires actual replacement before replacement value is due. The language in the Erie policy is the functional equivalent of that found sufficient in the other policies. Accordingly, in my view, the result should be the same. I would, therefore, affirm the order of the trial court in its entirety.

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