11-22-2011

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

Docket No. 39059-2011

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

v.

D. RICHARD LINFORD and 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.

APPELLANTS' BRIEF

Appeal from the District Court of the Fourth Judicial District Court for Ada County State of Idaho

The Honorable Deborah A. Bail, District Judge Presiding

ATTORNEY FOR APPELLANTS
Neil D. McFeeley (ISB No. 3564)
Corey J. Rippee (ISB No. 6803)
Adam B. Little (ISB No. 8224)
EBERLE, BERLIN, KADING, TURNBOW & MCKLVEEN, CHARTERED
Post Office Box 1368
Boise, Idaho 83701
Telephone: (208) 344-8535
Facsimile: (208) 345-8542

ATTORNEY FOR RESPONDENT
James D. LaRue (ISB No. 1780)
Jeffrey A. Thomson (ISB No.3380)
ELAM & BURKE, P.A.
Post Office Box 1539
Boise, Idaho 83701
Telephone: (208) 343-5454
Facsimile: (208) 384-5844

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES

STATUTES

RULES

APPELLATE RULES

OTHER AUTHORITIES

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

The Appellants D. Richard Linford and Lindsey Linford (the "Linfords") brought this appeal pursuant to I.R.C.P. 54(b) from the district court's grant of Respondent State Farm Fire and Casualty Company's ("State Farm") motions for summary judgment against the Linfords. The Linfords also appeal the district court's denial of their cross motion for summary judgment against State Farm.

The Linfords' home located in Boise, Idaho burned down as a result of a fire. The Linfords' homeowners' insurance policy issued by State Farm guarantees that the Linfords will be reimbursed for the amount that they actually and necessarily spend to repair the fire damage to the home. State Farm refused to fully compensate the contractor who repaired the fire damage, and the contractor filed suit against the Linfords. The Linfords tendered defense of the contractor's lawsuit to State Farm, who rejected the Linfords' tender of defense. The Linfords then filed a third party claim against State Farm alleging, among other things, that State Farm has a duty to defend the Linfords and must indemnify the Linfords for the value of the work to repair the fire damage to the home. On summary judgment, the district court dismissed all of the Linfords' claims against State Farm, which prompted this appeal.

B. COURSE OF PROCEEDINGS

On August 13, 2009, Dave's filed its Complaint against the Linfords. (R. pp. 9-10). The relevant portion of Dave's Complaint alleges that the Linfords failed to fully compensate Dave's for its work to repair the fire damage to the Linfords' home. (R. pp. 7-8).

On September 9, 2009 and January 19, 2010, the Linfords tendered the defense of Dave's lawsuit to State Farm. (R. pp. 40, 326-30). State Farm rejected both tenders of defense. (R. p. 40-41).

On February 11, 2010, the Linfords filed a Third Party Complaint against State Farm asserting that State Farm (1) breached the policy, (2) was required to indemnify the Linfords, (3) breached the covenant of good faith and fair dealing, and (4) committed insurance bad faith. (R. pp. 31-35).

On November 3, 2010, State Farm submitted a motion for partial summary judgment against the Linfords ("First Motion for Summary Judgment") claiming it had no duty to defend the Linfords against the allegations set forth in Dave's Complaint relating to the fire damage to the home. (R. p. 89). The Linfords then filed two motions for partial summary judgment against Dave's, which motions are not relevant in this appeal. (R. pp. 168, 176). On January 31, 2011, State Farm submitted a second motion for summary judgment that sought to dismiss the Linfords' claims of breach of contract, breach of covenant of good faith and fair dealing and bad faith ("Second Motion for Summary Judgment"). (R. pp. 181-82). On February 16, 2011, the Linfords' responded to State Farm's motions for summary judgment and filed a cross motion for summary judgment asserting that State Farm had a duty to defend the Linfords against Dave's claims that it had not been fully compensated in repairing the fire damage to the home. (R. p. 242).

On March 2, 2011, in a short 53 minute hearing, the parties argued the five motions for summary judgment. (T. pp. 6-45). On April 12, 2011, the district court issued a written opinion

on the claims between State Farm and the Linfords. The district court granted both of State Farm's motions for summary judgment and denied the Linfords' cross motion for summary judgment against State Farm. (R. pp. 364-74). The district court also denied the Linfords' motion for summary judgment against Dave's. On April 14, 2011, the district court entered a judgment resolving all claims against State Farm. (R. p. 376). On July 14, 2011, the district court certified the judgment as final pursuant to I.R.C.P. 54(b). (R. p. 380). On August 5, 2011, the Linfords filed this notice of appeal pursuant to I.R.C.P. 54(b) and I.A.R. 11(a)(3). (R. p. 383).

C. STATEMENT OF THE FACTS

On January 19, 2007, the Linfords' home in Boise, Idaho (the "Home") was damaged in a fire. (R. pp. 92, 268). At the time of the fire, the Home was insured by a homeowner's insurance policy (the "Policy") issued by State Farm. (R. pp. 93, 364). In relevant part the Policy provides:

> 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 cash value at the time of the loss of the damaged part of the property, . . . 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 . . . .

(R p. 109). The Linfords timely notified State Farm of the fire damage. (R. p. 364).

On January 19, 2007, State Farm claim representative Ron Richardson sent an

introductory letter to the Linfords discussing the Policy and the Linfords' repair options. (R. pp. 271-77). Of particular note, the January 19, 2007 letter from State Farm provided as follows:

> There are three scenarios available to you regarding repairs (sic) your home:
> . . .
>
> 2. You may have a contractor of your choice who is not a member of State Farm's PSP program make the repairs to your home. Should you choose to follow that scenario, I will create an estimate for the repairs to your home. I will give you a copy of that estimate, and a check for the actual cash value of those repairs, for you to give to your contractor. As you would see in my estimate, there would be additional money available to you once the repair process has been started by the contractor and or completed.
>
> The two terms that you need to know in this step of the process are Replacement Cost and Actual Cash Value. In this scenario, the first check I would give you would be for the Actual Cash Value of the repairs. That means I will depreciate the value of the building materials that need to be replaced by a certain percentage because of how old they are or how much of their useful life has been utilized. Replacement Cost value, or what it will cost for a contractor to purchase new materials and use them to fix your house, will be factored in to the estimate. As soon as repairs have been completed, or you have signed a contract with the contractor to complete the repairs, Replacement Cost funds will be made available to you for those items of repair being done. Under this scenario, your $1000 deductible would be subtracted from the value of my estimate.

(R. pp. 272-73) (emphasis added). The Linfords ultimately choose scenario two. State Farm initially estimated the cost to repair the fire damage to be $153,751.40 (the "Initial Estimate"). (R. p. 365).

On March 20, 2007, the Linfords entered into a written contract with Dave's Inc., a local general contractor ("Dave's"), to repair the damage the Home sustained as a result of the fire (the

"Fire Damage Contract"). (R. pp. 9, 14, 365). The Fire Damage Contract provides that it is based on the amount of the Initial Estimate. *Id.* Via written correspondence dated January 19, 2007, the Linfords promptly advised State Farm that Dave's had been engaged to repair the fire damage to the Home. (R. p. 277).

The work to repair the fire damage to the Home was extensive and required the Linfords to leave the Home for several months. Because they were leaving the Home while it was being repaired, the Linfords decided to have Dave's remodel portions of the Home that were not damaged by the fire. To this end, the Linfords entered into a separate written contract with Dave's on May 9, 2007 to remodel the non-fire damaged portions of the Home (the "Remodeling Contract"). (R. p. 9, 20). The Linfords have paid Dave's a total of $71,390.10 for its work under the Remodeling Contract. (R. p. 77). Dave's admitted in discovery that the amount owed to it under the Remodeling Contract was $48,721.23. (R. p. 77). Based on this admission, the Linfords filed a counterclaim against Dave's that is still pending below. The Remodeling Contract and the work performed thereunder is not an issue in this appeal, and only the amount Dave's is seeking to recover for its work under the Fire Damage Contract is relevant for the purposes of this appeal.

During the repair of the fire damage to the Home, State Farm was in direct communication with Dave's. (R. pp. 280-91). The correspondence between State Farm and Dave's clearly establishes that Dave's advised State Farm on a number of occasions that its Initial Estimate and subsequent estimates for the repairs caused by the fire were not accurate. (R. pp. 278, 280, 282, 286). In addition to communicating with Dave's regarding additional work

that needed to be completed to repair the fire damage, State Farm also advised the Linfords that it was actively working with Dave's to resolve the amount due to Dave's for its repair of the fire damage. (R. p. 282). By June 10, 2008 at the latest, State Farm began sending written correspondence directly to Dave's to discuss the additional work to repair the fire damage. (R. p. 283). This June 10, 2008 correspondence indicates that State Farm agreed that its estimates needed to be increased, but State Farm also requested additional information from Dave's so it could substantiate the work Dave's performed. (R. p. 283).

On April 25, 2008, Dave's completed its repair work under the Fire Damage Contract. (R. p. 9).

On September 4, 2008, State Farm issued its last revised estimate, which estimated the total amount of the repairs related to the fire damage to be $197,065.67 (the "Final Revised Estimate"). (R. pp. 326, 366). Dave's did not agree with the Final Revised Estimate, and on December 19, 2008, Dave's sent written correspondence directly to State Farm asserting that State Farm's pricing was "not equal to current pricing at the time of repairs" and the Final Revised Estimate was incomplete. (R. p. 292).

On June 8, 2009, State Farm sent correspondence to the Linfords discussing the difference between Dave's bills to repair the fire damage and the Final Revised Estimate. (R. p. 286). In this June 8, 2009 correspondence State Farm noted that "the bulk of the difference . . . is due to pricing" of labor as the scope of the work is "essentially the same." (R. p. 285-86).

Prior to the June 8, 2009 correspondence from State Farm to the Linfords, it was already apparent that State Farm and Dave's were not going to agree on the value of the work required to

repair the fire damage to the Home. Mr. Linford and his counsel held a meeting with Dave's and its counsel in the spring of 2009 to discuss the issue. (R. p. 269). During this meeting, the parties and their respective counsel discussed that the major difference between State Farm's Final Revised Estimate and Dave's actual cost to repair the fire damage to the Home was based upon the difference of the cost of labor. (R. p. 269).

Dave's then filed its Complaint against the Linfords, alleging breaches of both the Fire Damage Contract and the Remodeling Contract. (R. p. 7). The Linfords tendered the defense of Dave's lawsuit relating to the Fire Damage Contract to State Farm on two separate occasions. (R. pp. 40, 326-30). State Farm rejected both tenders of defense. (R. p. 40-41). The Linfords then filed a Third Party Complaint against State Farm for State Farm's failure to defend and indemnify the Linfords against Dave's claims relating to the work to repair the fire damage to the Home. (R. p. 31-35).

As the proceedings below were progressing, State Farm requested that the cost to repair the fire damage be assessed by an appraiser pursuant to the terms of the Policy. While the Linfords initially objected to the appraisal, the Linfords ultimately agreed to follow the terms of the Policy because the Policy contractually mandated that "[n]o action shall be brought unless there has been compliance with the policy provisions." (R. p. 112).

The Policy's appraisal provision states:

> If you and we fall 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.

(R. p. 112). On June 2, 2010, via letter agreement, the Linfords and State Farm mutually agreed to initiate an appraisal under this provision with one minor modification: the Linfords and State Farm jointly appointed a single appraiser whose fees would be paid entirely by State Farm. (R. p. 372). Of particular note, the appraisal provision in the contract provides that the appraisal process is only needed if the "amount of loss" is not agreed upon, (R. p. 112), and the June 2, 2010 letter provides that the appraiser is to "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)," which date of loss was January 19, 2007. (R. p. 188).

On October 13, 2010 the appraisal process was completed. (R. p. 189). The appraiser determined that as of January 19, 2007, the amount of loss relating to the fire damage would have been estimated to be $205,757.63 (R. p. 217), which amount was $8,691.96 more than the Linfords had been compensated through October 13, 2010. (R. p. 218). State Farm then issued a check to the Linfords for the difference. *Id.*

II. ISSUES PRESENTED ON APPEAL

1. Did the district court err in granting State Farm's First Motion for Summary Judgment in holding that State Farm had no duty to defend the Linfords?

2. Did the district court err in not granting the Linfords Cross Motion for Summary Judgment?

3. Did the district court err in granting State Farm's Second for Summary Judgment in holding that State Farm did not breach the Policy or breach the covenant of good faith and fair dealing, and dismissing the Linfords' claim for insurance bad faith?

III. ATTORNEY FEES ON APPEAL

The Linfords request attorney fees on appeal under I.A.R. 41, I.C. §§ 41-1839(1) and (4), and I.C. § 12-123. Idaho Code § 41-1839(1) provides that any insurer issuing any policy of indemnity, which does not pay within 30 days after a proof of loss is furnished, shall in any action thereafter brought pay reasonable attorney's fees. As discussed above, on September 9, 2009 and January 19, 2010, the Linfords tendered the defense of Dave's lawsuit to State Farm, which tenders State Farm rejected. (R. pp. 326-330). This triggered the duty to defend and entitled Linfords to defense costs by virtue of the Policy and I.C. § 41-1839. *Deluna v. State Farm Fire and Casualty Co.*, 149 Idaho 81, 84, 86, 233 P.3d 12, 15, 17 (2008). All subsequent reasonable attorney's fees incurred by the Linfords, including this appeal, should be borne by State Farm.

IV. ARGUMENT

The Linfords submit that the district court incorrectly granted State Farm's motions for

summary judgment and denied the Linfords' cross motion for summary judgment. It is respectfully submitted that this Court should find that State Farm owes the Linfords a duty to defend against Dave's claims related to the Fire Damage Contract and that there is at least a question of fact as to whether State Farm breached the Policy, breached the covenant of good faith and fair dealing, and acted in bad faith.

A. STANDARD OF REVIEW

In reviewing a district court's grant of summary judgment, the Supreme Court uses the same standard properly employed by the district court originally ruling on the motion. *Goodman Oil Co. of Lewiston v. Idaho State Tax Comm*, 136 Idaho 53, 55, 28 P.3d 996, 998 (2001).

Summary judgment is appropriate when the pleadings, depositions, affidavits and admissions on file show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Idaho R. Civ. P. 56(c). Failure of a party to make a showing sufficient to establish the existence of an element essential to that party's case and upon which that party bears the burden of proof entitles the moving party to summary judgment as a matter of law.

When considering a motion for summary judgment, the district court is generally required to liberally construe the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor. *Construction Management Systems, Inc. v. Assurance Co. of America,* 135 Idaho 680, 682, 23 P.3d 142, 144 (2001). Rule 56(e) requires the non-moving party to go beyond pleadings through affidavits, depositions, etc. to demonstrate that there are genuine issues of material fact. *Doe v. Durtschi*,

110 Idaho 466, 716 P.2d 1238 (1986). If the non-moving party fails to do so, then the moving party is entitled to summary judgment as a matter of law. *Id.* at 469, 716 P.2d at 1241; *see also Sparks v. St. Luke's Reg. Medical Ctr. Ltd.*, 115 Idaho 505, 768 P.2d 768 (1988).

In applying these summary judgment standards to the facts and circumstances here, the Court should rule as a matter of law that State Farm is not entitled to summary judgment. The Linfords also request that this Court overturn the district court's denial of the Linfords' cross-motion for summary judgment on the grounds that State Farm has a duty to defend the Linfords against the portion of Dave's Complaint related to the Fire Damage Contract. *Sirius LC v. Erickson*, 144 Idaho 38, 40-41, 156 P.3d 539, 541-42 (2007) ("Upon a party's request for summary judgment, a district court has the authority to render summary judgment in favor of any party . . . even if the non-moving party has not filed its own motion.").

B. OVERVIEW OF INSURANCE LAW

"Insurance policies are a matter of contract between the insurer and the insured." *AMCO Ins. Co. v. Tri-Spur Inv. Co.*, 140 Idaho 733, 739, 101 P.3d 226, 232 (2004). As such, insurance policies are governed by the same rules which are applicable to contracts. However, the Idaho Supreme Court has held on numerous occasions that insurance contracts "should be considered in view of their general [objectives] . . . *rather than on the basis of strict technical interpretation*." *E.g., Rauert v. Loyal Protective Ins. Co. of Boston, Mass.*, 61 Idaho 677, 680, 106 P.2d 1015, 1018 (1940) (citations omitted) (emphasis in original). Moreover, the Idaho Supreme Court "has long recognized that insurance policies are contracts of adhesion, not subject to negotiation between the parties, and [they] must be construed most strongly against the

insurer." *Moss v. Mid-America Fire & Marine Ins. Co.*, 103 Idaho 298, 300, 647 P.2d 754, 756 (1982). Finally, the law requires the court to construe an insurance policy as a whole, and a narrow construction of a policy will not be favored if it will defeat the purpose or objectives of the insurance. *Intermountain Gas Co. v. Industrial Indem. Co. of Idaho*, 125 Idaho 182, 185, 868 P.2d 510, 513 (Ct. App. 1994).

If the language of an insurance policy is clear and unambiguous, then the language in the contract will be given its plain and ordinary meaning. *Farm Bureau Ins. Co. of Idaho v. Kinsey*, 149 Idaho 415, 419, 243 P.3d 739, 743 (2010). Whether a contract is ambiguous is a question of law. *AMCO Ins. Co.*, 140 Idaho at 739, 101 P.3d at 232. An ambiguity will be found to exist when a contract term is reasonably subject to more than one interpretation. *Cherry v. Coregis Ins. Co.*, 146 Idaho 882, 884, 204 P.3d 522, 524 (2009). The court "must construe the policy 'as a whole, not by an isolated phrase.'" *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 663, 115 P.3d 751, 754 (2005). Thus, "[w]hen deciding whether or not a particular provision is ambiguous, [the court] must consider the provision within the context in which it occurs in the policy." *Purdy v. Farmers Ins. Co.*, 138 Idaho 443, 446, 65 P.3d 184, 187 (2006). If an ambiguity is found, "an objective standard should be applied to effectuate the intent of the parties." *Permann v. Nationwide Ins. Co.*, 108 Idaho 192, 194, 697 P.2d 1206, 1208 (Ct. App. 1985). Construction of a policy will not be favored if it will defeat the purpose of the insurance. *Intermountain Gas Co.*, 125 Idaho at 185, 868 P.2d at 513. Any ambiguities are resolved in favor of the insured and, if the language can reasonably be given two interpretations,

one which permits recovery and another which does not, Idaho law gives preference to the interpretation which favors the insured. *Cherry*, 146 Idaho at 884, 204 P.3d at 524.

Fire insurance is one of the most common types of property insurance. "The contract commonly agrees to indemnify another in whole or in part up to a specified amount for loss or damage to designated property by fire." Couch on Insurance 3d. § 1:37 (1995). "Fire insurance is a contract of indemnity against actual loss sustained by the insured, in an amount not exceeding that stipulated in the policy." *Id.* "The indemnity character limiting recovery to *actual loss* is generally said to be imposed as a matter of public policy to eliminate any motive of the insured to burn his or her property in order to profit thereby." *Id.* (emphasis added). When a home is replaced, there is no need to limit the recovery for the actual loss because the homeowner is merely a conduit and the payment goes to the contractor. Casualty insurance on the other hand is "insurance against loss through accidents or casualties resulting in bodily injury or death." Couch on Insurance 3d. § 1:28 (1995).

C. LEGAL ARGUMENT

The underlying facts of this case are largely undisputed. The Linfords purchased the Policy to insure their Home from damage caused by a fire. The Policy specifically provides that if the Home is damaged by fire, State Farm will: first, until the repair is completed, pay the cash value at the time of the loss; and second, when the repair is actually completed, pay the covered additional amount the Linfords actually and necessarily spend to repair or replace the damage to the Home. (R. p. 109).

The Linfords acted reasonably and fully complied with the terms of Policy. The Linfords paid their premiums and deductible. The Linfords timely notified State Farm of the fire, and State Farm gave the Linfords the option to engage a contractor of their choosing. In its January 19, 2007 correspondence to the Linfords, State Farm reiterated that the Linfords would first receive "a check for the **actual cash value** of [the] repairs." (R. p. 272) (emphasis added). Then, when the replacement cost was known, by contract or completion, State Farm would pay the remaining amount. (R. p. 273). The letter emphasized that "actual case value" is a preliminary payment less than the "replacement cost." (R. p. 272-73).

In compliance with this directive, the Linfords contracted with Dave's to repair the fire damage to the Home. The contract with Dave's was executed in May 2009, and specifically identified the scope of the project to be to rebuild the Home pursuant to the State Farm Insurance estimate of $153,751.40. (R. p. 14). Up to this point, there were no issues between State Farm, the Linfords and Dave's. If State Farm's Estimate had been correct, Dave's lawsuit would presumably have not been filed and this appeal would be unnecessary. However, soon after Dave's commenced work to repair the fire damage to the Home, it became apparent that State Farm's Estimate was significantly too low.

Dave's questioned the accuracy of the State Farm estimate and requested additional funds to repair the Home. State Farm then took an active role in negotiating with Dave's, and even increased its estimate based upon its discussions with Dave's. As the Linfords simply wanted the Home to be repaired, the Linfords stepped aside to let State Farm and Dave's resolve their dispute. The Linfords' approach was reasonable and appropriate because their Policy and

communications with State Farm underscored that they were to receive compensation for what they spent in repairing their Home. State Farm is the party with the interest in negotiating down Dave's costs because it is the party with the ultimate liability.

Dave's and State Farm could not resolve their differences as to the cost of the work to repair the fire damage to the Home. This dispute involved the Linfords because they had one contract with State Farm and one relevant contract with Dave's.[1] Those contracts, however, were based upon estimates that the Linfords did not create and work the Linfords did not perform. Moreover, State Farm was ultimately liable to repair the Home from the fire damage under the Policy. The Linfords were essentially following State Farm's directive to engage a contractor, and the work Dave's was performing was covered under the Policy.

The Linfords simply wanted the Home to be repaired pursuant to the terms of the Policy, as would any reasonable homeowner. The actual or estimated cost of those repairs is irrelevant to the Linfords because it is covered by the Policy. State Farm claimed that it would only pay its estimate. Dave's countered that State Farm's estimate does not equal current pricing. The Linfords submit that these competing claims should not involve them as the Policy provides that State Farm will pay the Linfords the amount that they "actually and necessarily spend to repair or replace the damaged part of the" Home. If Dave's is correct, then State Farm is obligated by the Policy to cover this increased amount because it is an amount the Linfords "actually and necessarily spend to repair or replace the damaged part of the" Home. If State Farm is correct,

[1] Again, the Linfords' third-party claims against State Farm only apply to the Fire Damage Contract. The Linfords have not made any claims against State Farm related to the Remodeling Contract.

then Dave's is not entitled to any damages. In either event, the Linfords, who acted as reasonable and prudent homeowners, should not be stuck in the middle of this dispute, forced to incur any attorneys' fees, or pay any money in the form of damages. It is respectfully submitted that until the validity of Dave's claim is litigated there is a question of fact as to whether State Farm has compensated the Linfords for the amount they will spend in repairing their Home, *i.e.*, whether it complied with the terms of the Policy. It is also respectfully submitted that State Farm, and not the Linfords, should bear the cost of defense against Dave's claims under the Fire Damage Contract.

1. State Farm Owes the Linfords a Duty to Defend

The district court erred in finding State Farm had no duty to defend the Linfords and granting State Farm's motion for summary judgment on this ground. (R. p. 370). State Farm has a duty to indemnify the Linfords under two provisions in the Policy: (1) under Coverage A, because the policy covers the additional amount the Linfords spend; and (2) under Coverage L, because Dave's claim arises because of an occurrence of property damage.

An insurer's duty to defend is broader than its duty to indemnify. *Hoyle v. Utica Mut. Ins. Co.*, 137 Idaho 367, 375, 48 P.3d 1256, 1264 (2002). If there is arguable potential for a claim to be covered by the policy, the insurer may not refuse to defend the insured. *Id.* at 372, 48 P.3d at 1261. "The duty to defend exists so long as there is a genuine dispute over facts bearing on coverage under the policy or over the application of the policy's language to the facts." *Construction Management Systems, Inc.*,135 Idaho at 682-83, 23 P.3d at 144-45. "An insurer's duty to defend arises upon the filing of a complaint whose allegations, in whole or in part, read

broadly, reveal potential for liability that would be covered by insured's policy." *Id.* at 682, 23 P.3d at 144. "When there is doubt as to whether a theory of recovery within the policy coverage has been pled in the underlying complaint, or which may be included in the underlying complaint, the insurer must defend." *Id.* at 683, 23 P.3d at 145. "An insurer seeking to establish that is has no duty to defend confronts a difficult burden since, at this stage, any doubts as to coverage must be resolved in favor of the insured." *Id.*

a. Coverage A mandates that State Farm has a duty to defend the Linfords

The language of the policy under "Coverage A – Dwelling" provides:

> 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 cash value at the time of the loss of the damaged part of the property, . . . 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. . .

(R p. 109). The above quoted "Paragraph 1" of the Policy obligates State Farm to initially make a payment of the actual cash value of the amount of loss at the time of the fire. Once the repair is completed, "Paragraph 2" obligates State Farm to compensate the Linfords for the additional

amount they actually and necessarily spend to repair the Home. The Policy further describes the mechanics of the payments:

> 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 replace the damaged part of the property as described in a.(1) above; (3) when the repair or replacement is actually completed as described in a.(1) above, 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. pp. 109-110). These basic terms state exactly what every homeowner believes his or her homeowners' policy accomplishes: cover the homeowner's cost to repair damage caused by an unexpected fire.

In *Hall v. Farmers Alliance Mutual Ins.*, 145 Idaho 313, 179 P.3d 276 (2008), this Court reviewed a substantially similar homeowners policy. The policy similarly only required the insurer to pay "the actual cash value of the damage until actual repair or replacement is completed." *Id.* at 318, 179 P.3d at 281. Once the repair or replacement was completed, then the

insurer was obligated for "the amount actually and necessarily spent to repair or replace the damaged building." *Id.* The homeowners in *Hall* had not repaired or replaced their home; therefore, the court recognized that the insurer need not pay "more than the actual cash value of the damage until actual repair or replacement is completed." *Id.* "[R]epair or replacement must be completed before the [homeowners] could receive more than the actual cash value of the damage." *Id.* The *Hall* Court stated: "It is clear under the policy that 'actual cash value' is different from the 'replacement cost.' [The insurer's] obligation was only to pay the actual cash value unless and until the [homeowners] rebuilt the home." *Id.* at 319, 179 P.3d at 282.

The policy in *Hall* also included an appraisal provision. In the event that the parties "fail to agree as to the actual cash value on the amount of loss," either party is permitted to demand in writing to have appraisers appointed, who would "appraise the loss." *Id.* at 316, 179 P.3d at 279. The *Hall* Court recognized that actual cash value is different from replacement cost and the appraisal process is only used for determining actual cash value. *Id.* at 318-19, 179 P.3d at 281-82.

The district court erroneously only analyzed "Coverage L" in determining whether State Farm had a duty to defend against Dave's claims related to the Fire Damage Contract. (R. p. 369-70). The relevant litigation with Dave's over the Fire Damage Contract is a dispute over how much the Linfords must spend to repair their Home. It is directly covered under Paragraph 2 of the Policy. The Linfords argued at the hearing that the Policy states that State Farm is "obligated to pay ... what the Linfords actually and necessarily spent." (T. p. 20). The Linfords submitted below that until the trier of fact determined how much Dave's is owed under the Fire

Damage Contract, the amount the Linfords actually and necessarily will spend is unknown. (T. p. 20). Further, the Linfords asserted State Farm had a duty to defend them against Dave's claims under the Fire Damage Contract. (T. p. 20). In essence, the Linfords believe, and still assert, that State Farm should have "stepped in to represent the Linfords in this case." (T. p. 20).

State Farm is obligated under Paragraph 2 to indemnify the Linfords for whatever amount the trier of fact decides Dave's is owed under the Fire Damage Contract because this amount will be what the Linfords actually and necessarily spend to repair the Home. Because the duty to defend is broader than the duty to indemnify, State Farm is obligated to defend the Linfords in this action until such determination is made because State Farm is ultimately liable for this cost under Paragraph 2. State Farm's failure to defend the Linfords is also a breach of the Policy.

b. *Coverage L mandates that State Farm has a duty to defend the Linfords*

In its first Motion for Partial Summary Judgment, State Farm argued that Dave's "Complaint does not allege a covered 'occurrence'" because Dave's is not seeking to recover for property damage or bodily injury. (R. p. 158). State Farm erroneously asserted that "Dave's claims against the Linfords do not stem from the fire. Rather, Dave's claims . . . stem from the alleged breach of two contracts." (R. p. 153). This argument not only places form over substance, but ignores the language of the Policy.

The Policy provides for liability coverage if "a claim is made or a suit is brought against an insured for damages **because of** . . . **property damage** to which this coverage applies, **caused by an occurrence**." (R. p. 153 "Coverage L") (emphasis added). "Occurrence" is defined in the Policy as an accident. (R. p. 100). "Property damage" is defined in the Policy as "physical

damage to or destruction of tangible property." (R. p. 100). The words "because of" are not defined in the Policy and, pursuant to well-established law, the words "because of" should be defined according to the meaning given to those words by laymen in daily usage. *Howard v. Oregon Mut. Ins. Co.*, 137 Idaho 214, 218, 46 P.3d 510, 514 (2002). Based upon the express terms of the Policy, and the overriding law that contracts of insurance should be considered in view of their general objectives, the Linfords are entitled to a defense as Dave's suit is brought "because of" physical damage to the Home caused by an occurrence.

In the present case, it is undisputed that the Home sustained physical damage caused by an occurrence. It is also undisputed that Dave's Complaint clearly identifies the occurrence (the fire) and the property damage (the Home needed to be repaired). Complaint, ¶¶ 6, 8. Therefore, the only issue is whether Dave's claim is brought "because of" that damage and occurrence. State Farm takes the strict view that Dave's Complaint only asserts a claim for relief for breach of contract. However, State Farm fails to address the underlying facts in Dave's Complaint and address whether those facts, read broadly, reveal that the Complaint was brought "because of" the undisputed damage and occurrence.

Dave's filed its Complaint against the Linfords "because of" the fact that it believed that State Farm did not adequately compensate it for the work it performed to repair the fire damage. Had there never been damage caused by an occurrence then the Linfords would not have contracted with Dave's. Had the Linfords never contracted with Dave's the present lawsuit would not have been initiated. On the other hand, had State Farm fully compensated Dave's based upon the cost that Dave's charged for its work, Dave's would not have filed the present

lawsuit. In any event, it is patently clear that Dave's claim was brought for reasons over which the Linfords had no control. It is equally clear that Dave's claim was brought "because of" the damage and occurrence. "But for" the fire and resulting property damage, there would be no lawsuit.

The district court accepted State Farm's narrow view of the Policy by holding that Dave's "did not file a claim against the Linfords for bodily injury or property damage but for breach of contract." (R. p. 369). This statement, however, completely ignores the actual language of the Policy and the fact that the contract at issue was only executed because of a covered occurrence. The Policy provides that coverage applies if "a claim is made or a suit is brought against an insured for damages **because of** . . . property damage." (R. p. 113). It is clear that Dave's claim arose "because of . . . property damage." Had there been no property damage there would have been no claim. It is respectfully submitted that the district court erred by not analyzing the actual terms of the Policy.

This outcome is also supported by long-standing Idaho precedent. State Farm argued, and the district court found, that Dave's claims against the Linfords stem from breach of contract; however, the Linfords submit that Dave's claims were brought "because of" property damage caused by an occurrence. Even if this Court is persuaded that Dave's complaint was brought because of a breach of contract, there cannot be any doubt that the words "because of" are broad enough to encompass the Linfords' assertion that but for the property damage there would not have been any lawsuit. At a minimum, therefore, the words "because of" are subject to conflicting interpretations under *Cascade Auto Glass, Inc.*, 141 Idaho 660, 115 P.3d 751.

Moreover, the ambiguity creates a situation where one interpretation permits recovery while the other does not. In this instance, the Linfords' interpretation should be preferred under *Cherry*, 146 Idaho 882, 204 P.3d 522.

The district court below did not address whether the words "because of" created an ambiguity in the Policy. The Linfords submit that the district court erred in not granting them summary judgment, but even if this Court disagrees, the district court still erred by not analyzing whether there is an ambiguity in the Policy with respect to the words "because of." The district court also failed to analyze whether that ambiguity should be resolved in favor of the Linfords. For these reasons, the Linfords submit that the district court's judgment was in error and that the judgment should be overturned by this Court.

The district court also erred by holding that *Magic Valley Potato Shippers v. Continental Insurance*, 112 Idaho 1073, 739 P.2d 372 (1987), was "directly applicable to the instant case." (R. p. 369). The insured in *Magic Valley* asserted a duty to defend based upon the breach of a contract to supply potatoes. *Id.* at 1074-75, 739 P.2d at 373-74. The underlying lawsuit did not involve any claims that the potatoes were damaged as a result of a covered "occurrence"; in fact, no part of the underlying suit "involved property damage." *Id.* at 1076, 739 P.2d at 376. In the present case, Dave's lawsuit specifically involves a failure to pay for property damage covered by an occurrence. Moreover, the primary insurance policy at issue in *Magic Valley* was a comprehensive business liability policy that specifically excluded "liability assumed by the insured under any contract or agreement." *Id.* at 1075, 739 P.2d at 975. No such contractual

exclusion is contained in the Policy at issue in the present case. Based upon these facts, *Magic Valley* is clearly distinguishable from the case at bar.

In the present case, the policy at issue is a homeowner's policy (property insurance), while the contract of insurance in *Magic Valley* was a comprehensive business liability policy (casualty insurance). This distinction 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' insurer would provide a defense when a suit is initiated against them "because of" fire damage caused to their home. The interpretation of the insurance policy in *Magic Valley* is simply not applicable to the present case because it interprets casualty insurance. Had the *Magic Valley* insurance covered property damage then *Magic Valley* might be relevant. In such a situation, however, the Linfords would submit that the insured's business would assert that that its property insurer would have a duty to defend it from a breach of contract lawsuit that arose "because of" the damage to the building. Such a situation is not present in *Magic Valley,* and *Magic Valley* is accordingly not applicable to the case at bar.

Magic Valley is also not on point because the casualty policy at issue in that case contained an exclusion for breach of contract. Such an exclusion is not present in the case at bar. Again, the reason why the insurance policy at issue in *Magic Valley* contained a breach of

contract exclusion is because it was a casualty policy. A policy designed to cover injuries to third parties will not cover breach of contract. That issue is not present in this case. The issue here is 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.

Finally, *Magic Valley* is not on point because there was no property damage in that case. Again, the reason for this is self-evident. Had the insured in *Magic Valley* suffered property damage, its property insurance would have been triggered. Simply stated, *Magic Valley* is not on point with the present case, and the district court erred in finding that *Magic Valley*'s "holding is directly applicable" to the current dispute.

While not on point or controlling, *Magic Valley* does support a finding that State Farm owes the Linfords a duty to defend. The Policy in this case provides that coverage applies if "a claim is made or a suit is brought against an insured for damages **because of** . . . property damage." (R. p. 113). Had State Farm wanted to exclude coverage for a case such as the present one initiated by Dave's, State Farm could have easily included an exclusion similar to the one set forth in *Magic Valley*. In the alternative, State Farm could have drafted the Policy more clearly. For instance, the Policy could have easily stated that coverage is excluded if "a claim is made or a suit is brought against an insured [to recover damages for] . . . property damage" or "for property damage caused by the insured." However, the Policy as written only uses the words "because of," and there is no doubt that Dave's lawsuit was brought "because of" property damage caused by a covered occurrence. The Policy is at best ambiguous and State Farm owes

the Linfords a duty to defend. The Linfords submit that because the Policy does not contain a specific exclusion, and because Dave's Complaint was brought "because of" property damage, State Farm also owes the Linfords a duty to indemnify.

The Linfords assert that while the Court should find that State Farm owes them a duty to defend, there is at least a question of fact as to whether a duty to defend exists. The district court ruled that "[e]ven under the broadest of readings of the Amended Complaint, it does not allege any claim which would bring it within the Policy's liability coverage." (R. p. 370). This holding, however, ignores the words "because of." At a minimum, there is a question of fact as to whether the words "because of" require State Farm to provide the Linfords a defense to Dave's claims relating to the Fire Damage Contract. The Linfords would therefore request that if this Court finds that the district court did not err in denying the Linfords' motion for summary judgment, that this Court find that the district court erred in granting summary judgment to State Farm.

The Linfords purchased the Policy to protect against an accidental fire. An accidental fire ultimately occurred and the Linfords only ask that State Farm repair the Home based upon the provisions of the Policy. By refusing to pay Dave's, State Farm is not living up to its promise because the Linfords may be forced to pay a portion of the construction costs to repair the Home if Dave's is successful. This is not the purpose of the Policy. Accordingly, it is respectfully submitted that this Court should overturn the district court's order awarding summary judgment to State Farm.

2. The District Court Erred in Granting State Farm's Second Motion for Partial Summary Judgment

State Farms' Second Motion for Partial Summary Judgment sought to dismiss the Linfords' first party claims. Those claims include the Linfords' assertion that State Farm breached the Policy, breached the covenant of good faith and fair dealing, and acted in bad faith. (R. pp. 33-35). State Farm alleged in its Second Motion for Partial Summary Judgment that the Policy "provides for the manner in which State Farm and the Linfords are to resolve any dispute **relating to the amount of loss**."[2] (R. pp. 225-26) (emphasis added). According to State Farm, this "process" is an appraisal process that is found in Section I – Conditions, paragraph 4, of the Policy. State Farm claims that because the appraisal has been performed and State Farm has paid the Linfords additional funds based upon that appraisal, State Farm's obligations under the Policy have been extinguished. A closer examination of the Policy reveals that State Farm's arguments are misplaced.[3]

Section I – Conditions, paragraph 4 (the "Appraisal Paragraph") of the Policy, provides as follows:

> **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

[2] The Policy does not define "amount of loss" or "loss." *See* (R. pp. 96-131).

[3] Obviously, if the Court finds that State Farm had or has a duty to defend against Dave's claims, then State Farm will be in breach of the Policy in any event because it has rejected the Linfords' tender of defense.

> an umpire. The appraisers shall then **set the amount of the loss**. If the appraisers fail to agree within a reasonable time, they shall submit their difference 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.

(R. p. 119) (emphasis added). As mentioned above, this Court examined a very similar provision in *Hall*, 145 Idaho at 318-19, 179 P.3d at 281-82, and interpreted it as only applying to that policy's equivalent of the current Policy's paragraph 1.a.(1) of Section I – Loss Settlement.

On May 7, 2010, State Farm first "demanded that the amount of the loss under Coverage A be set/determined by appraisal." (R. p. 187). Initially, the Linfords declined to agree to an appraisal because the dispute was not over the value of the loss but whether State Farm, and not the Linfords, should bear the legal cost of defending the litigation by Dave's. State Farm, however, agreed to modify the terms of the letter agreement to accurately reflect the Appraisal Paragraph. The Linfords ultimately agreed to execute the June 2, 2010 letter agreement, (R. p. 188), because they were contractually obligated to so under the Policy. (R. p. 112) ("No action shall be brought unless there has been compliance with the policy provisions."). As the district court correctly noted, the June 2, 2010 letter follows the terms of the Appraisal Paragraph with one modification: "the parties jointly appointed an appraiser, Mike Berkson, and State Farm agreed to pay all of his fees and expenses." (R. p. 372). From the Linfords' viewpoint, this modification makes perfect sense because (1) the Linfords did not want to breach the Policy and (2) the Linfords did not want to bear the cost of an appraiser. Other than this modification, the

June 2, 2010 letter agreement and Appraisal Paragraph are exactly the same.[4] Therefore, only an examination of the language contained in the Appraisal Paragraph of the Policy is relevant to the current dispute.

By its terms, the Appraisal Paragraph only applies if State Farm and the Linfords "fail to agree on the amount of loss." The amount of loss is only relevant to State Farm's obligation to pay the "actual cash value at the time of the loss of the damaged part of the property" under paragraph 1.a.(1) of Section I – Loss Settlement ("Paragraph 1"), which provides as follows:

> (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, . . . not to exceed the cost to repair or replace the damaged part of the property. . . .

(R. p. 109) (emphasis added). Resolution of the amount of loss through an appraisal only resolves State Farm's obligation "until actual repair or replacement is complete," under Paragraph 1. The resolution of the amount of loss, however, does not release State Farm of its obligations to cover the additional amount that the Linfords actually spend to repair the damages, under Paragraph 2.

The paragraph of the Policy applicable to the present dispute is paragraph 1.a.(2) of Section I – Loss Settlement ("Paragraph 2"), which provides as follows:

> (2) *when the repair or replacement is actually completed,* **we will pay the covered additional amount you actually and**

[4] The stated purpose of the June 2, 2010 letter agreement is to "set the amount of loss under Coverage A of the Policy." (R. p. 187). The letter goes on to direct the appraiser to "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)," which was January 19, 2007. (R. p. 188) (emphasis added). This language is almost identical to the Appraisal Paragraph: "The appraisers shall set the amount of loss," (R. p. 112), and comparable to Paragraph 1 of the Policy, "at the time of the loss." (R. p. 109). The appraisal determined the loss, not the amount spent to replace the damage.

necessarily spend to repair or replace the damaged part of the property . . . .

(R. p. 109) (emphasis added). Because the repair was completed, the Policy provides that State Farm will pay the amount the Linfords "actually and necessarily" spend to repair the Home. Nothing in Paragraph 2 implicates a dispute as to the amount of loss. Rather, State Farm is obligated to pay the additional "actual and necessary" costs once repair is completed.

The Policy is also clear that the amount of loss cannot be greater than the amount spent to replace, but there is no limitation on the amount spent to replace being greater than the amount of loss, other than the Policy limits which are not applicable in this case.

The Linfords submit that the Appraisal Paragraph and letter agreement are not relevant to this case because neither of them applies to Paragraph 2, which requires State Farm to pay the additional amount the Linfords "actually and necessarily" spent once repair is completed. Paragraph 1, on the other hand, requires State Farm to pay the cash value "at the time of the loss" until repair is completed. The interplay between these sections is essentially a timing issue based upon whether the repair was completed. In this case, it is undisputed that the repair was completed. Therefore, State Farm is bound under the Policy to pay the amount the Linfords "actually and necessarily" spend, which will be settled in the litigation with Dave's.

Below, the Linfords raised this same argument. The Linfords postulated that the amount they "actually and necessarily" spend cannot be resolved until the trier of fact determines whether Dave's is entitled to more compensation for its work to repair the Home. (T. p. 17). At the hearing the Linfords argued: "in this [appraisal] letter that we agreed to sign, we said, fine, we'll

go along with [the Policy], that – if – if you want to make a – a different estimate of the actual cash value. But it doesn't say [the appraiser] will determine what is actually and necessarily spent to repair the damaged part of the building." (T. p. 24). The Linfords asserted that if Dave's prevails and the Court specifies an additional amount to be paid, there can be no doubt that the Linfords "actually and necessarily" incurred that amount. In that event, State Farm would clearly be in breach of the Policy because it failed to pay the amount the Linfords "actually and necessarily" spent under Paragraph 2. On the other hand, if Dave's does not prevail at trial then State Farm would have met its obligations under the Policy. The Linfords essentially submitted below that until Dave's claim is resolved it is unknown whether State Farm breached its agreement. The district court erred when it rejected this assertion.

Not only did the district court err when it rejected the Linfords' assertion, but the district court erred in failing to even address the interplay between Paragraph 1, Paragraph 2 and the Appraisal Paragraph. The Linfords pointed out that the appraisal only pertains to Paragraph 1 and that State Farm is obligated to them under Paragraph 2. (R. p. 253). In its opinion, the district court solely relied upon the Appraisal Paragraph in finding that the appraisal "'set the amount of loss.'" (R. p. 371). While noting that the Appraisal Paragraph "is designed to resolve the amount of loss," the district court only mentioned Paragraph 2 in passing:

> When the repairs were completed, there remained a dispute over the 'actual and necessary' cost of repair which was resolved in accordance with the Policy . . . .

(R. p. 372). The district court, however, failed to examine what this language means and simply concluded that there is no action for breach of contract. It seems patently clear that since the

repairs were completed in this case, the Policy requires State Farm to pay the "actual and necessary" costs for the repairs. It is respectfully submitted that the district court erred in not concluding that State Farm still had an obligation under Paragraph 2 and in finding that there is no viable action for breach of contract.

The above quoted language from the district court shows the mistaken interpretation of the Policy. The dispute with Dave's is over the "cost" to repair the damage to the Home. State Farm's obligation under Paragraph 2 to the Linfords is broader than cost. State Farm is obligated to compensate the Linfords for the amount they actually "spend" in repairing their Home. Under the terms of the appraisal, the appraiser "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)." (R. p. 188). As the appraiser's October 13, 2010 letter reiterated, the "appraisal was made using the current pricing from Xactware that was in effect on January 19, 2007. (the date of loss)" (R. p. 189). The appraisal is clearly focused on the cost as of the date of the fire, January 19, 2007. This is Paragraph 1. Paragraph 2 is concerned with the amount the Linfords actually spend to make the repair. The appraisal does not address the Linfords' claim against State Farm. The appraisal process made no investigation into the amount the Linfords will eventually spend. (*See* R. pp. 187-89).

Before the district court, the Linfords proposed a hypothetical. (T. p. 25-26). Assume that the Linfords had a friend do the work in repairing their home that did not charge overhead and only billed the Linfords $150,000 for his work. Further assume that State Farm then challenged this amount as being too high and ordered an appraisal of the amount of loss.

Assume finally that the appraisal determined that the amount of loss at the time of the occurrence was $200,000. Under this scenario, State Farm would argue, correctly, that the Linfords could only recover $150,000 from State Farm under Paragraph 2. This conclusion is required because that was the cost the Linfords "actually and necessarily" spent to repair the Home. The Linfords could not demand payment of the extra $50,000 because State Farm would correctly assert that its duty was only to pay for the actual and necessary amount that the Linfords spent to repair the Home, which in this hypothetical would only have been $150,000. The exact opposite situation is present here, and State Farm incorrectly asserts that Paragraph 1 shields it from paying the actual and necessary costs to repair the Home. This argument is simply incorrect. The appraisal determined the amount of loss at the time of the occurrence. State Farm's argument that it only has to pay the appraised amount of loss completely ignores Paragraph 2, which State Farm would undoubtedly point to in the Linfords' hypothetical. In essence, State Farm is attempting to cherry-pick which provision of the Policy applies depending on the situation. This conduct is not only incorrect, but it is reprehensible.

a. *State Farm has previously argued in support of the Linfords' position*

The Linfords simply want to be made whole. They paid premiums for a homeowners' policy to protect their home from an unexpected fire. Such a fire occurred, and now State Farm is arguing that it should not be forced to pay the "actual and necessary" costs to repair the Home. State Farm's arguments reek of inequity. More importantly, however, State Farm has argued in other cases that once repairs are completed the homeowner will ultimately be made whole. State

Farm cannot now argue, in the present dispute, that the Policy should not fully compensate the Linfords.

In *Kane v. State Farm Fire and Casualty Company*, 841 A.2d 1038 (Pa. 2004), State Farm was sued in a class action lawsuit by a number of homeowners who claimed that they had "not received full indemnification under their insurance policies" because State Farm had "deducted depreciation from the actual cost to repair or replace the damaged" buildings. *Id.* at 1040. The *Kane* Court was concerned primarily with Paragraph 1, which includes the words "actual cash value." *Id.* This means that the repairs in question in *Kane* were not completed and only a determination of the amount of loss was at issue. *Kane* is not directly on point because this case deals with Paragraph 2. However, the policies at issue in Kane include the same Paragraph 2. *Id.* at p. 1042. More importantly, State Farm made striking admissions in *Kane* regarding Paragraph 2.

The court noted in *Kane* that State Farm had "never denied liability or failed to guarantee reimbursement for the repair or replacement of the lost" property. *Id.* at 1048. Rather, State Farm maintained in *Kane* that it is "only liable for such costs once replacement or repair is completed." *Id.* Based upon State Farm's admissions in *Kane*, the timing of when repair is completed is a crucial issue. *Id.* at 1049. The *Kane* Court relied upon these admissions to find as follows:

> 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. ("*If you do not repair or replace the damaged, destroyed or stolen property*, payment will be on an actual cash value basis.")

. . .

Thus, 'actual cash value' cannot also mean 'replacement value."

Id. at 1049 (quoting the State Farm policy at issue) (emphasis in original).[5] 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 admissions in *Kane*.

The Linfords completed the repair and replacement of the Home. Based upon State Farm's admissions in *Kane*, the Linfords should now be made whole. State Farm, however, argues, and the district court apparently agreed, that if Dave's is awarded a judgment over the appraisal amount, such amount is owed by the Linfords. In this scenario, the Linfords will clearly not be made whole despite fully complying with the conditions of the Policy. State Farm is essentially denying liability and failing to guarantee reimbursement for the repair or replacement of the Home after it has been repaired. This argument is inappropriate since it is in direct contravention to the argument State Farm made in *Kane*. At a minimum, this establishes that State Farm will be in breach of the contract if Dave's is awarded any money over the appraisal amount. Moreover, it also establishes that State Farm is acting in bad faith.

Similar to the *Kane* holding that "'actual cash value' cannot also mean 'replacement value,'" Paragraph 1's "amount of loss" in this case cannot also mean the amount the Linfords

---

5 In *Hall*, 145 Idaho at 319, 179 P.3d at 282, this Court recognized the same point that "actual cash value" is the insurer's initial obligation and differs from "replacement cost."

"actual and necessary" spend to repair the Home. It is respectfully submitted that the district court erred in holding that there can be no breach of contract in this case because if Dave's prevails and State Farm fails to reimburse the Linfords for the excess, State Farm will be in breach of the Policy.

b. *Even if the Appraisal Paragraph somehow applies to Paragraph 2, there is an ambiguity in the Policy*

As set out above, Idaho law regarding ambiguities in insurance policies is well-established, and ambiguities are to be interpreted in favor of the policyholder. Applying these rules to the Policy, it is clear that at a minimum the Policy is ambiguous because Paragraph 2 does not contain the word "loss" or denote any situation where the appraisal process may be needed. Indeed, Paragraph 2 clearly provides that State Farm will pay the amount the Linfords "actually and necessarily" spend to repair the Home once the repair is completed. There are no estimates or appraisal processes needed once the repairs are completed because State Farm is obligated to pay the amount the Linfords "actually and necessarily" spend to repair the Home. On the other hand, Paragraph 1, which provides for payment before the repairs are made, identifies a situation in which the appraisal process may be needed because the amount of the loss has not been determined.[6] The Policy is therefore generally ambiguous as to what provisions

[6] An example of such a situation would occur if the Home were completely destroyed by fire and the Linfords choose not to rebuild the Home. In this scenario, the Linfords would have to be reimbursed some amount for their loss, even though the repair will never occur. In this situation, Paragraph 1 is applicable because State Farm would only have to pay the "amount of loss" at the "time of occurrence." If State Farm and the Linfords disagreed as to the amount of loss, the Appraisal Paragraph would settle the dispute. However, in the situation that is present in this case, the repair was completed and State Farm must reimburse the Linfords the amount they "actually and necessary" spend to repair the Home.

and which of State Farm's obligations the Appraisal Paragraph applies to, and specifically ambiguous as to whether the Appraisal Paragraph applies to Paragraph 2.

Below, the district court found that the Policy is clear and unambiguous. This determination was in error because the Policy is either ambiguous or requires State Farm to reimburse the Linfords for the amount they "actually and necessarily" spend. In either event, the district court failed to apply an objective standard to the Policy to effectuate the intent of the parties. *Permann*, 108 Idaho at 194, 697 P.2d at 1208. The Linfords purchased the policy to ensure repair of the Home in the event the Home suffered accidental fire damage. Unfortunately, that occurred in the present case. Until those repairs are paid for, State Farm has not complied with its obligations under the Policy.

3. The District Court Erred in Dismissing the Linfords' Claim for Breach of the Covenant of Good Faith and Fair Dealing

The district court held below that because State Farm complied with the Policy there could not be any breach of the covenant of good faith and fair dealing and granted State Farm's motion for summary judgment on these grounds. Based upon the foregoing analysis, this finding was in error.

The covenant of good faith and fair dealing "requires 'that the parties perform in good faith the obligations imposed by their agreement.'" *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 289, 8424 P.2d 841, 864 (1991) (citations omitted). The covenant is violated when "'action by either party . . . violates, nullifies or significant impairs any benefit of the . . . contract.'" *Id.* (citations omitted). Here, there is more than enough evidence to present a

question of fact as to whether State Farm breached the covenant. Given State Farm's actions and the admissions in *Kane*, the Linfords submit that there is sufficient evidence to find that State Farm breached the covenant of good faith and fair dealing as a matter of law.

As noted above, the Policy was purchased to repair damage caused by an unexpected fire. In the present case, the Home has been repaired, but Dave's alleges that State Farm has not reimbursed it for the reasonable value of his work. If Dave's prevails, then State Farm's refusal to pay will violate, nullify and significantly impair the intended benefit of the Policy because the Linfords will have to pay for work and damages that were covered by the Policy. Until Dave's claim is litigated, there is a question of fact as to whether State Farm has complied with its obligations promised in the Policy.

Moreover, there is sufficient evidence to find that State Farm has already breached the covenant of good faith and fair dealing. Beginning in April 2008, at the latest, State Farm was aware that Dave's questioned the accuracy of the Initial Estimate. (R. p. 283). State Farm even began contacting and negotiating with Dave's directly. (R. p. 283-91). Based upon these negotiations, State Farm increased the amount of the Initial Estimate several times. On June 8, 2009, more than a year after State Farm first became aware that Dave's questioned the accuracy of the estimate, State Farm was still negotiating with Dave's and noted that the main problem was "due to pricing as the scope between the State Farm estimate and Daves (sic) Construction estimate are (sic) essentially the same." (R. p. 286). Dave's then filed suit against the Linfords on August 13, 2009. The Linfords tendered the defense of this action to State Farm on two separate occasions, but State Farm rejected both tenders of defense. (R. p. 324-30). Thereafter,

the Linfords were forced to expend attorneys' fees, costs and their personal time to defend against allegations that were covered by the Policy. In October 2010, State Farm increased the amount that was due to the Linfords based upon the Appraisal Paragraph. While the Linfords submit that the Appraisal Paragraph is not binding on the Linfords' request for the actual amount spent on repairs, State Farm's actions over the last two years evidence a violation of the covenant of good faith and fair dealing.

By taking an active role in negotiating with Dave's, increasing the estimate, and then rejecting the Linfords' tender of defense, State Farm has "significantly impaired" the Linfords' benefit of the Policy. The Linfords purchased the Policy to repair their Home. A covered occurrence damaged the Linfords' Home, and State Farm has refused to pay for the repairs to the Home. Moreover, State Farm has significantly hindered any chance the Linfords would have to settle with Dave's because of their direct negotiation and subsequent increase of the estimates. Further, State Farm now asserts that it has paid all amounts due to the Linfords based upon the Appraisal Paragraph. While the Linfords dispute that the Appraisal Paragraph applies in this case, had State Farm taken such action two years ago and paid the extra money Dave's may very well have never filed the present lawsuit. In any event, it is clear that State Farm's actions have at a minimum "significantly impaired" the benefit of the Policy. State Farm has further impaired the benefit of the Policy by refusing to defend the Linfords. It is respectfully submitted not only that State Farm's Second Motion for Summary Judgment must be denied, but that the Court should hold as a matter of law that State Farm has breached the implied covenant of good faith and fair dealing.

Finally, State Farm admitted in *Kane*, 841 A.2d at 1048, that it had "never denied liability or failed to guarantee reimbursement for the repair or replacement of the lost" property. State Farm has also admitted that it was "liable for such costs once replacement or repair is completed." *Id.* State Farm also "conceded liability for replacement costs once" the repairs are completed. *Id.* at 1050. Despite these admissions, State Farm argues in the present case that its duty to the Linfords has been extinguished by the letter agreement. State Farm makes this argument knowing full well that the Linfords may be liable to Dave's for the repair work State Farm was contractually obligated to provide. State Farm's actions and contradictory arguments establish that State Farm is not in good faith performing its obligations under the Policy. The district court therefore erred in dismissing this cause of action.

4. The District Court Erred in Dismissing the Linfords' Insurance Bad Faith Claim

In order to prevail on their bad faith claim, the Linfords must establish that (1) State Farm intentionally and unreasonably denied the payment of the Linfords' fire loss claim; (2) the Linfords' claim was not fairly debatable; (3) State Farm's denial of the claim was not the result of a good faith mistake; and (4) the Linfords' harm is not fully compensable by contract damages. *Robinson v. State Farm Mut. Auto Ins. Co.*, 137 Idaho 173, 179, 45 P.3d 829, 835 (2002). At the summary judgment stage of the litigation, the district court was required to draw all reasonable inference and conclusions in favor of the Linfords. Despite this directive, the district court held that "State Farm did not intentionally and unreasonably deny or withhold

payment" to the Linfords and did not commit insurance bad faith. It is respectfully submitted that this determination was in error.

State Farm has rejected the Linfords' tender of defense and request for indemnification against Dave's claim. (R. p. 153). If this Court agrees with even one argument set forth above, there will be sufficient grounds for finding that State Farm's denial was unreasonable and not supported by the Policy. Further, at the summary judgment stage, the district court should have held that the Linfords' claim was not fairly debatable under Rule 56(c) because the Policy specifically provides that State Farm will reimburse the Linfords for all costs they "actually and necessarily" spend to repair the Home, which State Farm has not yet done. State Farm's denial is also not the result of a good faith mistake because State Farm made its determination based upon the express provisions of the Policy. Last, whether the Linfords' harm is fully compensable by contract damages cannot yet be determined because such damages will not be fully quantifiable until after the jury renders its verdict.

Finally, it should be mentioned that even if this Court agrees with the arguments made by State Farm and accepted by the district court, State Farm still acted in bad faith by not initiating the Appraisal process sooner. The repairs to the Home were completed in April 2008. (R. p. 9). On November 1, 2010, State Farm paid the Linfords an additional $8,691.96 based upon the appraisal. (R. p. 219). Had State Farm acted sooner, Dave's may have accepted the additional $8,691.96 as full compensation for its work. State Farm's two and one-half year delay, however, may have prevented such acceptance. At a minimum, there is a question of fact as to whether

State Farm unreasonably delayed in paying the additional funds to such an extent that it could lead the trier of fact to conclude that State Farm acted in bad faith.

For the foregoing reasons, it is respectfully submitted that this Court should overturn the district court's dismissal of the Linfords' claim for insurance bad faith.

V. CONCLUSION

For the reasons argued above, the Linfords request this Court to reverse the district court's awards of summary judgment in favor of State Farm. This Court should rule as a matter of law that State Farm has a duty to defend and a duty to indemnify the Linfords in the action with Dave's and that State Farm breached the Policy and acted in bad faith in contesting this issue.

DATED this 22nd day of November, 2011.

EBERLE, BERLIN, KADING, TURNBOW
& McKLVEEN, CHARTERED

By: _____
Corey J. Rippee, of the firm
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney(s) this 22nd day of November, 2011, as indicated below and addressed as follows:

James D. LaRue
Jeffrey A. Thomson
ELAM & BURKE, P.A.
Post Office Box 1539
Boise, Idaho 83701
Attorneys for Respondent

[ ] U.S. Mail
[x] Hand Delivery
[ ] Overnight Mail
[ ] Fax (208) 384-5844

Corey J. Rippee