1-31-2012

Dave's v. Linford Appellant's Reply 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' REPLY BRIEF

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

The Honorable Deborah A. Bail, District Judge, Presiding

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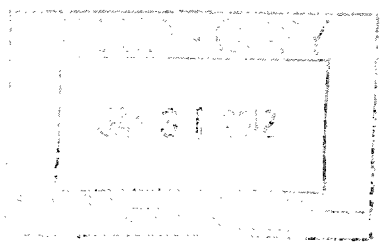

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I. INTRODUCTION

At the outset, it should be noted that the incivility and lack of respect State Farm Fire and Casualty Company ("State Farm") shows to its insureds, D. Richard Linford and Lindsey Linford (the "Linfords"), in its Respondent's Brief is indicative of State Farm's treatment of the Linfords throughout this entire dispute.

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). 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). On May 9, 2007, the Linfords entered into a separate written contract with Dave's to remodel the non-fire damaged portions of the Home (the "Remodeling Contract"). (R. p. 9, 20). On April 25, 2008, Dave's completed its repair work under the Fire Damage Contract. (R. p. 9). 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). During the litigation between the Linfords and State Farm, the district court granted summary judgment in favor of State Farm and entered a judgment resolving all claims against State Farm. (R. p. 376). The Linfords then appealed the district court's judgment after the district court certified the judgment

as final pursuant to I.R.C.P. 54(b). (R. pp. 380, 383).

It is undisputed that the Linfords only wanted the fire damage to the home repaired. (R. p. 269). State Farm, however, attempts to paint the picture that the Linfords were seeking to obtain some sort of financial windfall from the fire that disrupted their lives. For instance, State Farm states that the Linfords only paid Dave's "$173,369.99 under the Fire Damage Contract." (Respondent's Brief, p. 34.). First, this amount is incorrect. After providing the incorrect amount the Linfords paid Dave's, State Farm then postulates that all of the Linfords' arguments fail because "State Farm could have paid [the Linfords $173,369.99] as the amount actually and necessarily spent to repair fire damage at the time of the appraisal." (*Id.*). This last assertion is either an obvious attempt to tarnish the reputation of the Linfords or simply overlooks the record.

The Linfords entered into two written contracts with Dave's. The first contract was the Fire Damage Contract, which was executed on March 20, 2007, to repair the damage the Home sustained as a result of the fire. (R. pp. 9, 14, 365). The second contract was the Remodeling Contract, which was executed on May 9, 2007, to remodel the non-fire damaged portions of the Home. (R. p. 9, 20). The amount due under the Fire Damage Contract is the only issue remaining between Dave's and the Linfords because Dave's has admitted that the amount owed to it under the Remodeling Contract was $48,721.23. (R. p. 77). The October 13, 2010 appraisal found that the amount of loss relating to the fire damage as of the date of loss (January 19, 2007) would have been estimated to be $205,757.63 (R. p. 217). Therefore, based upon Dave's admission and the appraisal, the total amount due and owing to Dave's for its work under

both the Fire Damage Contract and the Remodeling Contract would be $254,478.86.[1]

The undisputed total amount the Linfords paid to Dave's under both the Fire Damage Contract and the Remodeling Contract was $232,884.27. (R. pp. 76-77). However, the Linfords directly paid for $37,571.50 worth of construction items that were used by Dave's to repair the fire damage to the Home, $23,668.68 of which Dave's does not dispute. (R. p. 76). Even using the undisputed $23,668.68, the total amount the Linfords paid to repair the fire damage and remodel the Home exceeds $254,478.86.[2] Nonetheless, Dave's still seeks damages in excess of $91,000. (R. p. 52). Based upon Dave's admission as to the value of the Remodeling Contract, these damages must relate to the Fire Damage Contract.

The primary argument advanced by the Linfords is that if Dave's prevails and is awarded any additional funds by the trier of fact, State Farm will not have paid the amount the Linfords "actually and necessarily" spend to repair the Home, as required under the Policy. Should the Linfords prevail against Dave's, then State Farm will have met its obligation to pay the amount the Linfords "actually and necessarily" spent to repair the Home. However, until the trier of fact

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[1] Dave's disputes that the appraisal is binding on it. (R. p. 52).

[2] To clarify, State Farm paid the Linfords the estimated actual cash value of the loss shortly after the fire damage occurred. State Farm revised its estimate several times and paid the Linfords additional amounts based upon the revised estimates. The Linfords then used the funds they received from State Farm to pay Dave's. Before the appraisal was performed, State Farm had paid the Linfords a total of $197,065.67 to repair the fire damage to the Home. (R. p. 76). Of the $197,065.67 the Linfords received from State Farm, $159,494.17 was paid by the Linfords directly to Dave's and the Linfords used the remaining $37,571.50 to purchase construction materials that were used to repair the fire damage to the Home. (R. p. 76). The Linfords then paid Dave's $73,390.10 out of their personal funds under the Remodeling Contract. (R. p. 77). Dave's admits that the value of its work under the Remodeling Contract was $48,721.23, and based on this admission, the Linfords over paid Dave's by $24,668.87. (*Id.*). The reason why the Linfords overpaid Dave's on the Remodeling Contract was because Dave's did not separate the work it performed under the Fire Damage Contract and the Remodeling Contract and the Linfords were forced to estimate the amount they should pay under the Remodeling Contract. (R. pp. 76-77). After Dave's answered the Linfords' discovery requests, the Linfords became aware that they overpaid Dave's on the Remodeling Contract and filed a

determines whether Dave's was fairly compensated, State Farm's obligations remain. Moreover, given that only the value of the Fire Damage Contract is in dispute, only the amount due under the Fire Damage Contract, and by extension, the amount covered by the Linfords' homeowners insurance, is at issue.

Despite these undisputed facts, all of which are in the record, State Farm argues that the Linfords are somehow acting in bad faith. Nothing could be further from the truth. It is undisputed that the Linfords overpaid Dave's the amount due under the Remodeling Contract. (R. p. 77). The Linfords attempted to mediate the dispute between Dave's and State Farm. (R. p. 269). Nonetheless, Dave's sued the Linfords. After being sued, the Linfords twice tendered defense of the action to State Farm (R. pp. 40, 326-30), and State Farm rejected both tenders of defense. (R. p. 40-41). The Linfords then agreed to comply with the Policy and enter into the appraisal process. (R. p. 112). The Linfords acted honorably and in compliance with their agreements with both Dave's and State Farm throughout the entire process. In fact, the Linfords overpaid Dave's under the Remodeling Contract in order not to get any unfair benefit from State Farm. For their actions, the Linfords were rewarded with a lawsuit by their contractor to recover monies that should be paid by their insurer. State Farm's reaction to these unfortunate circumstances was to fight the Linfords, rather than to defend (or even assist) them against Dave's. Finally, when the Linfords appealed the district court's decision, State Farm's reaction is to belittle, insult and challenge the credibility of the Linfords by misrepresenting the record in an apparent attempt to damage the reputation of the Linfords. As always, the Linfords simply

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counterclaim. (R. p. 77).

want their Home repaired and for State Farm to pay the amount the Linfords "actually and necessarily" spend to repair the fire damage to their Home in compliance with the Policy. As discussed below, the law supports such a determination.

II. ARGUMENT

A. State Farm Has Not Met Its Duty to Indemnify for the Fire Loss to the Home.

There is no dispute that State Farm had a duty to indemnify the Linfords for the fire loss to the Home. (Respondent's Brief, p. 21). Instead, the present dispute revolves around whether State Farm has met that duty.

State Farm argues that the June 11, 2012 letter agreement (the "Letter Agreement"), whereby the parties agreed to hire an appraiser to "determine the cost to repair damages to the dwelling, caused by the fire, . . . **on the date of loss**," settled all outstanding claims between State Farm and the Linfords. (R. p. 188) (emphasis added). This argument, however, completely ignores the actual terms of the Letter Agreement and the Policy. Before analyzing that language, it is important first to briefly frame the parties' arguments with respect to State Farm's duties before the Letter Agreement was executed.

1. The Policy required State Farm to pay for replacement cost.

The parties essentially agree that there are two types of payments to an insured for property loss under the Policy. The first payment 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, which provides as follows ("Paragraph 1"):

> (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). State Farm has labeled Paragraph 1 as the Actual Cash Value or "ACV Paragraph." (Respondent's Brief, p. 26.). By State Farm's own admission, the actual cash value loss "applies until the repair of the fire loss is completed." *(Id.)*.

The second payment is located in paragraph 1.a.(2) of Section I – Loss Settlement, which provides as follows ("Paragraph 2"):

> (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) (emphasis added). State Farm has labeled Paragraph 2 as the Replacement Cost or "RC Paragraph." *(Id.)*. Again by State Farm's own admission, the amount paid under this paragraph is usually more than the actual cash value under paragraph 1 or the ACV Paragraph. *(Id.)*.

In the present case, State Farm alleges that it paid the Linfords the actual cash value before the repair was completed of $153,751.40. *(Id.)*. State Farm then alleges that after the repairs were completed, State Farm "calculated and paid an additional amount of $43,314.27 in replacement cost, which subsumed the ACV amount already paid." *(Id.* at p. 27). This statement is incorrect. State Farm did initially estimate the cost to repair the fire damage to the Home to be $153,751.40 and paid that amount; however, State Farm did not pay a lump sum replacement cost amount of $43,314.27. In fact, Dave's asserted throughout the repair that State Farm's

estimate was too low, and State Farm actively negotiated with Dave's in attempting to settle the dispute. For instance, on June 10, 2008, State Farm sent a letter directly to Dave's stating that Dave's has made a claim for additional repairs to the Home of $114,245.62 in excess of the original $153,751.40. (R. p. 283). State Farm then stated that based on State Farm's evaluation of Dave's claim, State Farm owed Dave's an additional $34,512.86. (*Id.*). This evidence establishes that State Farm did not simply pay the Linfords the actual cash value and later pay a lump sum for the replacement cost. Rather, State Farm revised its actual cash value based upon its negotiations with Dave's, which go the heart of the Linfords' claims for breaching the covenant of good faith and fair dealing and insurance bad faith. State Farm ultimately failed to pay Dave's the entire replacement cost it was asserting, which then led to this lawsuit.

At first blush, the fact that the payments were not made in compliance with the Policy may seem to be innocuous. However, this fact establishes that there was a question of what the replacement cost was until well after the Home repairs were complete. That issue still remains, and as State Farm has admitted, Dave's alleges that it cost an additional amount of $114,245.62 over the actual cash value amount to repair the fire damage to the Home. Clearly Dave's, and by extension the Linfords, disputes that State Farm has paid for the replacement cost to repair the fire damage.

The Linfords submit that because the repair was completed, which is not in dispute, the Policy requires State Farm to pay the amount the Linfords "actually and necessarily" spend to repair the Home under Paragraph 2 or the RC Paragraph. The Linfords further submit that if the trier of fact agrees with Dave's and finds that the amount Dave's is entitled to recover for the

repair of the fire damage to the Home is in excess of the amount State Farm has paid to date, then State Farm will owe the additional amount awarded by the trier of fact under the express terms of the Policy because that amount will be what the Linfords "actually and necessarily" spend to repair the Home. State Farm has all but admitted that this analysis is correct. State Farm's only argument is that the Letter Agreement precludes any recovery by the Linfords for the replacement cost. This argument, however, is without merit.

2. *The Letter Agreement and the Policy are essentially the same.*

The Linfords submit that the Letter Agreement only made one minor modification to the Policy: the parties jointly appointed one appraiser and State Farm agreed to pay all of his fees and expenses. State Farm argues that the Letter Agreement made "nine modifications" to the Policy. (Respondent's Brief, p. 4). A comparison of the Letter Agreement and that appraisal paragraph of the Policy establishes that State Farm is incorrect:

Letter Agreement (R. p. 188)	**Appraisal Paragraph (R. p. 112)**
1. "The parties agree to resolve and set the amount of loss under Coverage A of the Policy by appraisal."	1. "If you and we fail to agree on the amount of loss, either one can demand that the amount of loss be set by appraisal."
2. "The parties will jointly appoint Mike Berkson as their appraiser."	2. "If either makes a written demand for appraisal, each shall select a competent, disinterested appraiser."
3. "The insured and State Farm will be allowed to provide Mr. Berkson documents and information for his consideration."	3. Silent as to this issue
4. "Should Mr. Berkson have questions or require additional information, he should share	4. Silent as to this issue.

such inquires with both parties."	
5. "The insureds will allow Mr. Berkson access to the insured dwelling, if requested for purposes of performing his appraisal."	5. Silent as to this issue.
6. "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)."	6. "The appraisers shall then set the amount of loss."
7. "Mr. Berkson will provide a written appraisal of the amount of loss to the insured and State Farm."	7. "Written agreement signed by any two of these three shall set the amount of loss."
8. "The parties agree to be bound by the written appraisal."	8. "the amount agreed upon shall be the amount of the loss."
9. "State Farm will pay Mr. Berkson (sic) fees and expenses as the parties' joint appraiser."	9. The parties are each required to appoint an appraiser.

The only substantive difference between the Letter Agreement and the Policy is that the parties jointly appointed Mr. Berkson as an appraiser. To achieve this change, the parties agreed to share information with Mr. Berkson. While language different from the Policy may have been used in the Letter Agreement, the Letter Agreement did not make any substantive changes to the appraisal paragraph of the Policy other than the joint appointment of Mr. Berkson.

3. Mr. Berkson only determined the Actual Cash Value of the loss.

Both the Letter Agreement and the appraisal paragraph of the Policy require the appraiser to determine the "amount of loss" on the date of the loss. It is axiomatic that the date of the loss occurred before repair was completed. This is a crucial fact because of the language contained in both the ACV Paragraph:

> (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), and the 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** . . . .

(R. p. 109) (emphasis added).

By State Farm's own admission, the "amount of loss" at the "time of loss" was determined by Mr. Berkson to be $205,757.63. (Respondent's Brief, p. 7; R. p. 188). The amount of loss is found under the ACV paragraph, which is the "cash value at the time of the loss." Mr. Berkson did not determine, and was not engaged to determine, the amount the Linfords "actually and necessarily spend to repair or replace the damaged part of the property," which is the replacement cost to repair the Home. State Farm has admitted that the replacement cost exceeds the actual cash value. (Respondent's Brief, p. 26). By State Farm's own admissions, the Linfords have not been paid for the replacement cost of the Home.

4. The Appraisal Paragraph and the Letter Agreement only determine ACV value.

The Appraisal Paragraph of the Policy provides that if the Linfords and State Farm "fail to agree on the amount of loss, either one can demand that the **amount of the loss** be set by appraisal." (R. p. 112) (emphasis added). This language only refers to the actual cash value of the loss under the ACV Paragraph.

The ACV Paragraph provides as follows: "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." (R. p. 109) (emphasis added). The RC paragraph provides that after repairs are completed, State Farm will pay the amount the Linfords "actually and necessarily" spend to repair the Home. Comparing this language to the Appraisal Paragraph, it is clear that the Appraisal Paragraph only applies to the ACV Paragraph because that is the only paragraph that refers to "the loss." This makes sense because before repairs are completed, State Farm and its insureds could clearly differ on the amount of loss whereas, after the repairs are completed, the relevant amount is the amount that the insureds "actually and necessarily" spend to repair the damage to the property. At worst, there is at least an ambiguity as to whether the appraisal paragraph applies to the RC Paragraph because the Appraisal Paragraph does not discuss or even refer to the amount the Linfords "actually and necessarily" spent to repair the Home.

Even assuming the Appraisal Paragraph is ambiguous, the Letter Agreement addresses the ambiguity because the Letter Agreement states that "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**)."[3] (R. p. 188) (emphasis added). This language clearly refers to the ACV Paragraph because a contractor on the date of loss cannot determine replacement cost, as the replacement would not have occurred on the date of loss. State Farm even goes further by using the same language in the Letter Agreement that is in the Appraisal Paragraph: "amount of loss,"

[3] "Date of loss" is nearly identical to the language used in the ACV Paragraph: "time of loss." "Amount of loss" is the exact language used in the Appraisal Paragraph. Nowhere are the words "actually and necessarily spent" used,

and defines that amount as the loss on the date of loss. Again, such a loss would be before the replacement cost was determined. By the terms of the Letter Agreement, which State Farm drafted, it is clear that State Farm agrees with the Linfords that the Appraisal Paragraph only applies to the ACV Paragraph, even though State Farm now appears to regret this agreement.

State Farm seems to accept the validity of this argument because State Farm states as follows: "This Letter Agreement **misdefined** the calculation of the amount of the loss used in either the ACV or RC Paragraphs." (Respondent's Brief, p. 22) (emphasis added). This argument is nothing more than a red herring. The Letter Agreement is clear. Mr. Berkson was engaged to determine the "amount of loss" "on the date of loss." The Letter Agreement, which State Farm drafted, could easily have stated that Mr. Berkson was engaged to determine the amount the Linfords "actually and necessarily spend" to repair or replace the damaged part of the property. Of course, the Linfords would have never signed such an agreement because such language is beyond the purpose of the Appraisal Paragraph.

The Linfords submit that both the Appraisal Paragraph and the Letter Agreement only apply to the actual cash value of the loss on the date of the loss. State Farm drafted the Letter Agreement, which directly follows this submission. Now, post hoc, State Farm attempts to argue that Mr. Berkson's charge was to determine the amount the Linfords "actually and necessarily" spent to repair the Home. Because State Farm drafted the Letter Agreement, and because the Letter Agreement is clear, unambiguous and specific as to the loss Mr. Berkson was engaged to find, it is respectfully submitted that State Farm's argument should be rejected by this Court.

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except in the RC Paragraph.

It must be noted that even if this Court is unclear as to whether the Linfords' submission is correct, then there is an ambiguity in the Policy because it is reasonably subject to more than one interpretation. *Cherry v. Coregis Ins. Co.*, 146 Idaho 882, 884, 204 P.3d 522, 524 (2009). In that instance, the law specifies that "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). Moreover, 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. Based upon this law, if this Court agrees that the Policy can be read so that both the Appraisal Paragraph and the Letter Agreement only apply to the actual cash value of the loss on the date of the loss, rather than to the amount the Linfords "actually and necessarily" spent to repair the Home, then the Linfords must prevail. It is respectfully submitted that such a determination would be favored because it is clearly the purpose of the insurance. *Intermountain Gas Co. v. Industrial Indem. Co. of Idaho*, 125 Idaho 182, 185, 868 P.2d 510, 513 (Ct. App. 1994).

5. This case is not determined by Mr. Berkson's appraisal.

State Farm alleges that the Linfords "agreed to be bound by the [appraisal] process and the result." (Respondent's Brief, p. 23). State Farm further argues that the appraisal process is tantamount to arbitration and the Linfords' appeal is somehow improper. (Respondent's Brief, p. 24). This argument is without merit.

First, the Linfords agree that they are bound by the appraisal. However, the Linfords are bound by what the appraisal was intended to do, and what the Letter Agreement specified: namely, the appraisal would "determine the cost to repair damages to the dwelling, caused by the fire, . . . on the date of the loss (amount of loss)." (R. p. 188). State Farm ignores this language and instead attempts to argue that the appraisal determined the amount the Linfords' "actually and necessarily" spent to repair the Home, which language is not found in either the Appraisal Paragraph or the Letter Agreement. It is respectfully submitted that State Farm's overreaching argument that the Letter Agreement served as a final settlement agreement in this matter be rejected.

State Farm then attempts to argue that the appraisal is akin to arbitration. Clearly, an appraisal is not an arbitration, and while the Linfords are bound by the amount of the appraisal, the appraisal does not act as a determination by a binding arbitrator. State Farm's arguments to the contrary should be rejected.

Finally, State Farm takes the position that whether "the Appraisal Paragraph applies to a determination of the amount of loss under the ACV or RC Paragraphs is irrelevant." (Respondent's Brief, p. 27). This argument is completely without merit.

State Farm had an obligation under the Policy to pay for the amount the Linfords "actually and necessarily" spent to repair the Home. It is undisputed that Mr. Berkson did not appraise the amount the Linfords "actually and necessarily" spent to repair the Home. Instead, Mr. Berkson found the actual cash value at the time of the loss. How could Mr. Berkson have determined the amount the Linfords "actually and necessarily" spent to repair the Home on the

date of the loss? The answer is simple: he could not have. State Farm's misguided attempts to argue that the appraisal did something other than what was stated in the agreement—to determine the amount of loss on the date of loss—should be rejected by this Court.

6. The Linfords' Reliance on Kane v. State Farm Fire is not misplaced.

In the Linfords' initial brief, the Linfords submitted that State Farm has argued in other cases that once repairs are completed the homeowner will ultimately be made whole. In support of this submission, the Linfords cited to *Kane v. State Farm Fire & Casualty Co.*, 841 A.2d 1038 (Pa. 2004). The Linfords noted in their analysis that "*Kane* is not directly on point," but cited to *Kane* because "the policies at issue in *Kane* include the same Paragraph 2." Of particular relevance, the Linfords cited to *Kane* because of a certain admission made by State Farm in *Kane*. That admission was as follows:

> *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).

State Farm argues that this "admission" was not made by State Farm and was instead made by other insurer defendants. (Respondent's Brief, pp. 35-36). State Farm then once again belittles the Linfords by stating that their reliance on *Kane* "is the epitome of the frivolous, unreasonable and unsupportable nature of the Linfords' appeal." (Respondent's Brief, p. 36).

Admittedly, the Linfords cited to language in *Kane* that did not apply to State Farm. This was an error. However, State Farm did concede liability for replacement costs once repairs are made in other portions of *Kane*.

The State Farm policy at issue in *Kane* was a "replacement cost" home owner's insurance policy, the same type of policy at issue here. *Kane*, 841 A.2d at 1040. State Farm, as one of the appellees in *Kane*, asserted that the homeowners "must first undertake to repair or replace the damaged property before being fully compensated." *Id.* at 1041. State Farm, as one of the appellees, asserted that until the repair was made, homeowners are only entitled to the "actual cash value." *Id.* Finally, *Kane* directly quotes Paragraph 1 (the ACV Paragraph) and Paragraph 2 (the RC Paragraph) from the State Farm policy at issue, which contains the exact language as the Policy at issue in the present case. *Id.* at 1042. Immediately before quoting State Farm's policy, the *Kane* court states: State Farm "requires the insured first to endeavor to repair or replace damage before full replacement costs will be proffered." *Id.*

State Farm apparently decided not to fully analyze *Kane* before drafting its Respondent's Brief. The Linfords admit that their specific cites to *Kane* were incorrect, but *Kane* does stand for the position that State Farm has admitted homeowners will be "fully compensated" once repairs are completed. There is no doubt that State Farm made this admission before the *Kane* court. In the present case, State Farm is essentially retracting this admission 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 fully compensated. If Dave's is awarded a judgment over the appraisal amount, such amount is owed by the Linfords and 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 position is inappropriate since it is in direct contravention to the Policy and State Farm's admissions in *Kane*.

There must be a difference in the Policy between "actual cash value" and the amount the Linfords "actually and necessarily" spend to repair the Home. This is the issue in the present case, and one which State Farm never specifically addresses. The Linfords submit that the difference can be found in *Kane*: once repairs are completed, the homeowner will be fully compensated for the amount it cost to repair the property.[4] Here, State Farm is attempting to shirk this responsibility. 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. State Farm Has A Duty to Defend the Linfords.

State Farm argues that it has no duty to defend the Linfords under either Coverage L or Coverage A of the Policy. (Respondent's Brief, p. 9). State Farm further argues that the Linfords have made a new argument on appeal, namely that State Farm owes a duty to defend under Coverage A of the Policy. Both of these arguments are without merit.

1. Whether State Farm has a duty to defend under coverage A is not a new issue.

It is well established in Idaho that an appellate court is "limited to the evidence, theories and arguments that were presented . . . below." *State v. Vierra*, 125 Idaho 465, 469, 872 P.2d

[4] At a minimum, this language is ambiguous because it "is reasonably subject to differing interpretations." *Clark v. Prudential Property and Casualty Insurance Co.*, 138 Idaho 538, 541, 66 P.3d 242, 245 (2002). In such a situation, "the trier of fact must determine what a reasonable person would have understood the language to mean." *Id.* Therefore, at a minimum, the district court erred in granting summary judgment in favor of State Farm, and this Court should overturn the district court's ruling.

728, 731 (Ct. App. 1994). There can be no doubt that in the district court the Linfords submitted the Policy, set forth their theory that State Farm owed a duty to defend under the Policy, and argued that State Farm had a duty to defend. Nonetheless, State Farm argues that because the Linfords did not argue below that State Farm had a duty to defend under a specific portion of the Policy, the Linfords are precluded from raising such an argument on appeal. This argument puts form over substance.

The Linfords argued below that State Farm has a duty to defend them under the Policy. They set forth that same issue on appeal. There is no law precluding the Linfords from adding to that argument on appeal. Indeed, State Farm's limited view on this issue would preclude any party from bolstering their argument or even citing to new authority on appeal. If this Court accepts State Farm's limited view, then there would be no reason to file additional briefing on appeal because the parties would essentially be stuck with the exact arguments and authorities they raised below. This certainly cannot be the law.

It should also be noted that the Linfords did raise this specific issue below. In their Third Party Complaint, the Linfords alleged that State Farm "has an obligation under the Policy and/or Idaho common law to indemnify Plaintiffs for any costs or expenses they incur in defending against Dave's Inc., lawsuit, and any damages that are awarded to Dave's, Inc., in such lawsuit." (R. p. 34). This same argument was also raised at the hearing by the Linfords' counsel:

> What does a . . . homeowner understand? That if the insurance company says go ahead and get your contractor, and hire him based on our estimate, the homeowner would believe that the insurance company should step in and – and help them out, not just leave them – leave them out in the cold.

(T. p. 19, ll. 17-22). Therefore, even if State Farm is correct and the Linfords were required to specifically raise whether State Farm had a duty to defend under Coverage A, the Linfords complied with this duty below and the issue is proper on appeal.

2. *State Farm has a duty to defend under Coverage A.*

The Linfords submit that Paragraph 2 (the RC Paragraph) requires State Farm to step in and defend the Linfords in the case against Dave's, as that case relates to the value of the work to repair the fire damage to the Home. This submission is based upon the fact that Paragraph 2 obligates State Farm 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. The law in support of this assertion is the well-established rule that an insurer's duty to defend is broader than its duty to indemnify, and if there is arguable potential for a claim to be covered by the policy, the insurer may not refuse to defend the insured. *Hoyle v. Utica Mut. Ins. Co.*, 137 Idaho 367, 372, 375, 48 P.3d 1256, 1261, 64 (2002).

In response, State Farm argues that the Linfords' submission is in error because nowhere in Section I of the Policy "is there any mention of or reference to a duty to defend." (Respondent's Brief, p. 10). The problem with this argument is that it ignores the express language in the Policy.

The Policy requires State Farm to pay the amount the Linfords "actually and necessarily" spend to repair the Home. Dave's lawsuit asserts that the Linfords have not fully compensated Dave's to repair the fire damage to the Home. If Dave's establishes at trial that it is entitled to

more than has been paid to it to date[5] for its repair of the fire damage to the Home, then State Farm will not have paid the Linfords the amount they "actually and necessarily" spend to repair the Home. Since there is no doubt that State Farm has a duty to indemnify the Linfords for the amount they "actually and necessarily" spend to repair the Home, and since the duty to defend is broader than the duty to indemnify, the law supports a finding that State Farm has a duty to defend the Linfords against the portion of Dave's complaint that seeks damages under the Fire Damage Contract.

3. State Farm has a duty to defend under Coverage L.

Coverage L of 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). The Linfords and State Farm's positions on this issue are well documented. State Farm argues 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). The Linfords submit that Dave's claims were brought "because of" property damage caused by an occurrence. In the interest of brevity, the Linfords will only address certain points raised by State Farm in its brief.

State Farm argues that "Dave's Complaint seeks damages because the Linfords failed to pay for services rendered." (Respondent's Brief, p. 16). Again, this argument ignores that State Farm is liable for those services because it is obligated to pay the amount the Linfords "actually and necessarily" spend to repair the Home. Had State Farm fully compensated Dave's, this

[5] Based upon the record, Dave's has been paid more than Mr. Berkson's estimate. *See* n. 2 *supra.*

lawsuit would not have occurred. Indeed, Dave's Complaint seeks damages because State Farm, not the Linfords, failed to pay for Dave's services to repair the fire damage to the Home.

State Farm next argues that Dave's lawsuit did not arise "because of . . . property damage," but because of "the Linfords' decision not to pay what is owed under their contracts with Dave's." (Respondent's Brief, p. 17). First, the not so subtle suggestion in this sentence is that the Linfords are attempting to receive an unfair benefit under the Remodeling Contract. As addressed above, this is not the case because the Linfords actually overpaid Dave's under the Remodeling Contract. Second, had the Home not been damaged by fire, the Fire Damage Contract would never have been executed. Hence, Dave's Complaint arose "because of" the fire damage.

State Farm next attempts to explain why *Magic Valley Potato Shippers v. Continental Ins.*, 112 Idaho 1073, 1076-77, 739 P.2d 372, 375-76 (1987), is on point. The Linfords adequately distinguished *Magic Valley* in their opening Brief. Nonetheless, State Farm argues that it "matters not that the policy at issue in *Magic Valley* was a commercial general liability policy." (Respondent's Brief, p. 18). This argument is curious because State Farm previously indicated in its brief that "the only documents to be reviewed to determine whether a duty to defend exists are Dave's Complaint and the insurance policy." (Respondent's Brief, p. 11). Despite this statement, State Farm argues that this Court can look for guidance from a case where: (1) there was no property damage; (2) the type of insurance discussed and analyzed was a completely different type of insurance from the case at bar; and (3) the policy in question

contained a specific exclusion for breach of contract that is not included in the present case. State Farm's reliance on *Magic Valley* is simply misplaced.

State Farm then argues that Coverage L "excludes from liability from coverage for property damage to the Linfords' property." (Respondent's Brief, p. 19). This argument, however, misses the point and contradicts State Farm's own analysis. "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." *Construction Management Systems, Inc. v. Assurance Co. of America,* 135 Idaho 682, 682, 23 P.3d 142, 144 (2001). Here, Dave's filed its lawsuit when he was not fully compensated to repair the fire damage to the Home. Dave's did not file its lawsuit for coverage to the Linfords' property, but because of the failure of State Farm to pay to repair the damage to the Linfords' property. Moreover, State Farm argues that Dave's lawsuit did not arise "because of . . . property damage." (Respondent's Brief, p. 17). Accordingly, the exclusion cited by State Farm has no bearing to the present dispute.

Essentially, the question of whether Coverage L requires State Farm to provide a defense to Dave's claim can be framed in a question: if the fire damage had not occurred would Dave's have filed the present lawsuit? If the answer to that question is no, then Coverage L requires State Farm to provide a duty to defend because Dave's claim was brought "because of" property damage caused by an occurrence. Here, there can be no doubt that without the fire damage, Dave's would not have filed a claim against the Linfords. As such, Dave's claim was brought "because of" an occurrence.

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

State Farm's only discussion with respect to whether the district court erred in dismissing the Linfords' claim for breach of the covenant of good faith and fair dealing is simply to argue this claim cannot be a stand-alone cause of action. (Respondent's Brief, p. 37). The Linfords submit that based upon the foregoing analysis, the covenant of good faith and fair dealing is not a stand-alone cause of action in this case because State Farm breached the contract by not providing a defense, and will be in breach of the contract if Dave's is awarded any additional damages.

Of particular importance, State Farm failed to address the Linfords' assertion that there is sufficient evidence of record without resolution of Dave's claim to find that State Farm has already breached the covenant of good faith and fair dealing. Such facts are fully briefed in the Linfords' opening Brief and will not be restated herein. It is sufficient to note simply that State Farm was aware in April 2008, at the latest, that Dave's questioned the accuracy of the Initial Estimate. (R. p. 283). It was not two years later, in October 2010, that 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 delay and actions over these two years evidence a violation of the covenant of good faith and fair dealing. Specifically, State Farm's delay and action have significantly hindered any chance the Linfords would have to settle with Dave's because of State Farm's direct negotiation and subsequent increase of the estimates. It is respectfully submitted

that because State Farm did not address these arguments that this Court should overturn the district court's ruling that granted summary judgment in favor of State Farm on the Linfords' claim for breach of the covenant of good faith and fair dealing.

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

Similar to its response to the Linfords' claim for breach of the covenant of good faith and fair dealing, State Farm only argues that if this Court disagrees with the Linfords' assertions above, State Farm did not commit bad faith. State Farm, however, did not address the Linfords' assertions that State Farm acted in bad faith by not initiating the Appraisal process sooner. The Linfords submit that State Farm acted in bad faith for the reasons set forth above. However, 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. Because State Farm did not address these arguments the district court's decision dismissing the Linfords' bad faith claims should be overturned.

E. State Farm is <u>Not</u> Entitled to Attorneys' Fees.

State Farm requests attorneys' fees under Idaho Code § 41-1839(4). State Farm argues that it is entitled to attorneys' fees under section 41-1839(4) because the Linfords' appeal was "'brought, pursued, or defended frivolously, unreasonably or without foundation.'" (Respondent's Brief, p. 38). State Farm's argument is misplaced.

For the reasons set forth above, the Linfords appeal is clearly not frivolous, unreasonable or without foundation. The language of the Policy, which the district court did not thoroughly analyze, clearly requires State Farm to reimburse the Linfords the amount they "actually and

necessarily" spend to repair the Home. The district court's ruling essentially relieves State Farm from this obligation. At a minimum, the district court erred in granting summary judgment to State Farm as the Policy is at worst ambiguous. Finally, State Farm did not even address some of the assertions raised by the Linfords with respect to their claims of breaching the covenant of good faith and fair dealing and insurance bad faith. At a minimum, whether State Farm's delay amounted to a breach of the covenant of good faith and fair dealing or insurance bad faith is clearly a good faith argument that precludes an award of attorneys' fees to State Farm.

F. The Linfords Are Entitled to Attorneys' Fees.

The Linfords request attorneys' fees on appeal under I.A.R. 41, I.C. §§ 41-1839(1) and (4), and I.C. § 12-123. State Farm argues that the Linfords are not entitled to attorneys' fees under section 41-1839 because "there has been no determination that State Farm . . . owes any amount to the Linfords." This argument is misplaced, however, because section 41-1839 states:

> "Any insurer . . . which shall fail for a period of thirty (30) days after proof of loss has been furnished . . . to pay to the person entitled thereto the amount justly due under such policy, . . . shall in any action thereafter brought against the insurer . . . pay such further amount as the court shall adjudge reasonable as attorney's fees in such action."

Idaho Code § 41-1839(1). It is clear under section 41-1839 that the Linfords are entitled to attorneys' fees because this is an action brought against the insurer for failure to pay the amount Dave's asserts it is entitled to. Accordingly, the Linfords are entitled to the attorneys' fees they incurred in the district court and the attorneys' fees they are incurring on appeal.

V. CONCLUSION

For the reasons argued above, the Linfords request this Court to reverse the district court's award 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 31st day of January, 2012.

EBERLE, BERLIN, KADING, TURNBOW
& McKLVEEN, CHARTERED

By: 

Corey J. Rippee, of the firm
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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 31st day of January, 2012, as indicated below and addressed as follows:

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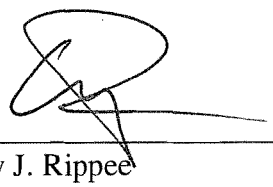

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