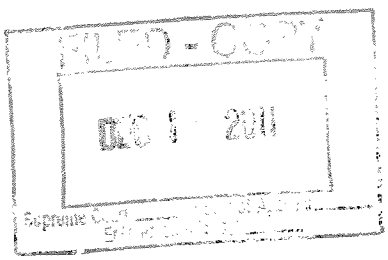
12-19-2011

Employers Mut. Cas. Co. v. Donnelly Respondent's Cross Appellant's Reply Brief Dckt. 38623

IN THE SUPREME COURT OF THE STATE OF IDAHO

EMPLOYERS MUTUAL CASUALTY COMPANY, an Iowa corporation, Appellant/Respondent, vs. DAVID DONNELLY and KATHY DONNELLY, husband and wife, Respondents-Cross Appellants,	)	Docket No. 38623-2011



RESPONDENTS/CROSS-APPELLANTS' REPLY BRIEF

Appeal from the District Court of the First Judicial District of The State of Idaho, in and for the County of Bonner

Honorable Steven C. Verby

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THE DISTRICT COURT CORRECTLY RULED THAT UNDER EMC'S POLICY IT IS REQUIRED TO PAY THE COSTS AND FEES ASSESSED AGAINST ITS INSURED RIMAR CONSTRUCTION COMPANY, EVEN WHEN THE COMPENSATORY DAMAGES ARE NOT COVERED UNDER THE POLICY

Issue presented: The issue presented is whether the "supplementary payments" section of the EMC policy (Exhibit I, pp. 7, 8)[1] entitles the insured, Rimar Construction, Inc. ("RCI"), to indemnification for any costs/fees assessed against it irrespective of coverage for compensatory damages assessed. An Idaho case is good authority for the conclusion that, irrespective of coverage for the assessed damages, the "supplementary payments" section of the EMC policy does provide coverage for fees and costs ("supplementary payments"). *Mutual of Enumclaw v. Harvey,* 115 Idaho 1009, 772 P.2d 216 (1989).

Mutual of Enumclaw is not distinguishable: Under the heading "Supplementary Payments Coverages A and B" [Coverage A is for "property damage liability], the EMC policy recites: "We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend: . . . (e) all costs taxed against the insured in the 'suit:'". (Exhibit I, pp. 1,7,8).

In *Mutual of Enumclaw,* relevant language of the Enumclaw policy stated: "Supplementary Coverages 2. (Personal Liability Claims, Expenses) a. all expenses incurred by Company and costs taxed against the insured in any suit defended by the Company". *Id.,* 115 Idaho 1112. *Mutual of Enumclaw* held that this coverage was "separate from and in addition to the basic policy coverage", i.e., the absence of coverage with respect to assessed damages did not prevent this coverage for fees and costs from attaching.

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[1] A portion of the clerk's record is not paginated, including exhibits to the Affidavit of James Reid. Unless otherwise noted, reference to "exhibits" is to those exhibits attached to the Reid affidavit.

EMC argues that, coverage for assessed costs in its policy is contingent upon the existence of coverage for damages " because the language 'supplementary payments' indicates that payments will only be made *in addition* to payments on the underlying claim" . Appellant's Reply Brief, p. 2. The problem with that argument is that, as applied to the section of Enumclaw policy entitled "Supplementary Coverages" the *Mutual of Enumclaw* Court should have found coverage did not exist for fees because, borrowing EMC's argument, the language "supplementary coverages" indicates that coverage for fees will exist only if there is coverage for the underlying claim. The Court in *Enumclaw* found to the contrary. 115 Idaho at 1012, 1013. The Court noted that "'Supplementary Coverages' implies that the provisions contained therein are separate from and in addition to the basic policy coverage to the basic policy coverage . . ." *Id.,* 115 Idaho at 1112. There is good reason, semantically and logically, that the same interpretation should be made with respect to the "Separate Payments" phrase in the EMC policy.

EMC's also argues that it does not have liability for Donnellys' fees, because that liability is conditioned upon a suit existing and "suit" is defined as a "civil proceeding" . . . to which this insurance applies" Exhibit I, p. 15. para. 18. The defect in this argument is that, by providing a defense to RCI, EMC has conceded that the Donnellys had filed a civil proceeding "to which this insurance applies".

It is notable as well that the EMC policy recites under "Supplementary Payments": "These payments will not reduce the limits of insurance". Exhibit I, p. 8. In the Mutual of Enumclaw policy, the Idaho Supreme Court observed similar language in the Enumclaw policy, i.e., "shall not reduce the applicable limit of liability", "implies that the provisions contained therein are separate

from and in addition to the basic policy coverage . . and Enumclaw's obligation to pay such costs is unaffected by the fact that the policy does not cover Oakes' [the insured] intentionally tortious conduct". *Id.*, 115 Idaho at 1012.

Mintarsih and *Mutual of Enumclaw* concur that the duty to pay assessed costs and fees is co-extensive with the duty to defend: In *State Farm v. Mintarsih*, 175 Cal.App. 274, 95 Cal.Rptr.3d 845 (App. 2009), relied on by EMC, the Court re-affirmed earlier authority that the duty to pay costs and fees under the "supplemental payments" coverage is triggered by the duty to defend, not the duty to indemnify.[2]:

> State Farm agreed to pay "expenses we incur and costs taxed against an Insured in suits we defend," under the terms of the homeowners policy. Under the terms of the umbrella policy, State Farm agreed to pay "the expenses we incur and costs taxed against you in suits we defend," provided that the claim or suit was not covered by any other policy. *These provisions made the insurer's obligation to pay an award of costs against the insured dependent on the defense duty.* Courts have interpreted the word "costs" as used in such a provision consistent with its use in Code of Civil Procedure section 1033.5, subdivision (a)(10), which provides that attorney fees authorized by contract, statute, or law are allowable as costs to the prevailing party under section 1032. (Prichard v. Liberty Mutual Ins. Co. (2000) 84 Cal. App. 4th 890, 912 (Prichard); Insurance Co. Of North America v. National American Ins. Co. (1995) 37 Cal. App. 4th 195, 206-207.)

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[2] In the Donnellys' opening brief, they cited *Arrowood Indemnity v. Travelers Indemnity*, 118 Cal.App. 1452, 116 Cal.Rptr.3d 559 (2010) as being on point. It has been correctly observed by opposing counsel that a petition for rehearing was granted in *Arrowood* and that case is not citable. Counsel was misled by the page references in "Cal.App." and "Cal.Rptr." Donnellys' counsel withdraws all reference to Arrowood and apologizes to the Court for this inadvertence. Donnellys' counsel has been advised by handling counsel that *Arrowood* has settled.

175 Cal. App. 4th at 284 (emphasis added).

The *Mintarsih* case (California) cited by plaintiff EMC is distinguishable by the underlying facts: Plaintiff EMC places heavy reliance on *State Farm v. Mintarsih, supra,*, and is asking this Court to accept *Mintarsih* as presenting the same factual posture as the case at bench. (Reply Brief, pp. 4 - 8). Unlike the case at bench, *Mintarsih* presents an issue of "mixed" claims, i.e., litigation alleging undisputedly covered and uncovered claims with each respective claim having a separate factual setting with the fee entitlement attaching solely to uncovered claims. In the case at bench, both tort claims (covered) and contract claims (uncovered) carry a fee entitlement and arise out of the same factual setting See footnote 3, *infra.*

Contrary to EMC's brief (p. 7), the amended complaint neither alleges nor prays for bodily injury damages. (Exhibit B and EMC's reservation of rights letter of September 7, 2007 at p. 3). However, the amended complaint does allege a covered liability, i.e., that in constructing the "addition", the underlying defendant RCI, "compromised the integrity of the original home", and alleged loss of use. R. Exhibit B, para. 10(a). In its reservation of rights letters, EMC has conceded that "physical injury to tangible property" is covered under the policy. See Exhibit I, (pp. 3, 4 of September 5, 2006, letter and pp. 4,5 of September 7, 2007, letter). However, EMC erroneously states in the letters that "there are no allegations of physical injury to tangible property". *Id.*, p. 4 to September 5, 2006, letter and p. 5 to September 7, 2007, letter. Ignoring the property damages alleged in the amended complaint, EMC bases its proffered defense on the carbon monoxide exposure to Kathy Donnelly described in the amended complaint (Exhibit B, para. 10(k), p. 5.), for which damages are neither alleged nor prayed for.

Again, EMC concedes that the amended complaint does not include a claim for bodily injury (*Id.*, Exhibit I, p. 3 of September 7, 2007, letter). Nonetheless, EMC continues to hang its duty to defend on this so-called bodily injury claim, *Id.*, p. 7, of September, 2007, letter.

Unlike the covered tort claims in *Mintarsih,* this covered liability (property damage) does entitle the Donnellys to attorney fees from the insured/defendant.[3] By erroneously advising this Court that the allegations of the Donnellys' amended complaint include "bodily injury claims" (which do not carry an attorney fee entitlement) EMC is wrongly attempting to place the case at bench on all fours with *Mintarsih* (Appellant's Reply Brief, pp. 6 - 8).

The *Mintarsih* Court ruled, with Solomnic fairness, that an insurance company which provides a defense respecting certain covered claims (with no attorney fee entitlement) should not be penalized for that defense by sticking it with attorney fees as to claims, in that same litigation, which are not covered and which have a different factual basis. That is, the plaintiff's claimed attorney fees in *Mintarsih* were only with respect to the wage and hour claim which had a separate factual basis from the tort claims upon which the plaintiff prevailed. *Id.*, 175 Cal. App. 4th at 287.

In the case at bench, because the allegations in the Amended Complaint sound both in tort and contract, concerning the same factual basis, there was the "potential for coverage", and EMC was obligated to defend and, by *Mutual of Enumclaw,* pay any attorney fees and costs assessed against its insured, RCI.

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[3] Where tortious conduct results in property damage in a commercial setting, such conduct does not preclude the plaintiff's entitlement to fees under Idaho Code §12-120(3). *City of McCall v. Buxton*, 146 Idaho 656, 665, 201 P.3d 629 (2009), citing *Blimka v. My Web Wholesaler*, 143 Idaho 723, 728.

THE DISTRICT COURT ERRED IN RULING THAT, UNDER THE EMC POLICY, EMC HAD NO DUTY TO INDEMNIFY ITS INSURED FOR DAMAGES ARISING FROM BREACH OF THE IMPLIED WARRANTY OF (GOOD) WORKMANSHIP

The jury did not find that RCI was negligent because the jury was never asked whether RCI was negligent: Contrary to EMC's argument, the entire array of jury questions need to be examined to ascertain whether coverage issues have been clarified.. For example, the jury found there was a contract breach but failed to award the Donnellys contract damages. Exhibit E, pp. 2, 7. The award of damages for breach of the implied warranty, ($126,611.55) was not, therefore, an award of contract damages. An instruction to the jury advised them that an implied warranty "is an obligation imposed by the law when there has been no representation or promise." Exhibit D, Instruction No. 48. As noted below, the evolution of the concept of implied warranty is not rooted in principles of contract law.

The Donnelly's recognize that, under the EMC policy, there was no coverage for damages arising from breach of contract. However, there was coverage for loss of use of property that had been "physically injured" and which property was outside the scope of the contract. Stated differently, if the property which was damaged was property being constructed by RCI, this damage constitutes a breach of contract for which there is no insurance coverage. However, if there is "physical injury to tangible property", the EMC policy does provide coverage. The reservation of rights letters, assert, incorrectly, that "there are no allegations of physical injury to tangible property". Exhibit I, p. 4, 2006 letter, p. 4, 5, 2007 letter. In fact, the Amended Complaint alleges that during the construction of the "addition", "compromise[d]' "the integrity of the original home"". Exhibit B, p. 3. para. 10(a). Included in the alleged bases of liability was "negligence". *Id.*

Finally, EMC tests the patience of this Court when it argues in its Reply Brief: " . . . [T]he jury found no liability, and awarded no damages as to the tort claims based on fraud, misrepresentation, nondisclosure, professional malpractice and negligence". *Id.*, p. 10. In fact, the jury was never presented with the question whether RCI committed negligence. Notwithstanding there were six jury questions regarding tort liability, the jury questions did not include a question as to RCI's negligence, the only tort alleged for which there was coverage. That is, the jury was never asked about RCI's negligence. Exhibit E. Also, see *infra* re the failure of EMC's attorneys to request an allocated verdict.

Whether the errors in the reservation of rights letters were inadvertent or intentional, EMC is now invoking these letters as evidence of non-coverage: (1) Phantom "bodily injury" claim: EMC now asserts that the reservation of rights letters were based upon Kathy Donnelly's exposure to carbon monoxide fumes and the fact that bodily injury claims are covered under the EMC policy. Hence, the reservation of rights letters and the defense provided to EMC. This justification does not pass muster.

First, the Donnellys never made a claim for personal injuries. More to the point, and as conceded by EMC, the Donnellys never alleged personal injuries in the complaint or amended complaint and never included a prayer for damages for personal injuries. Exhibit I (September, 2007, letter, p. 3). Why provide RCI the defense?

Secondly, EMC acknowledges that the so-called personal injuries occurred in 2005, shortly after the conclusion of RCI's work for the Donnellys. *Id.* p. 3. At the time EMC sent the 2007 reservation of rights letter, the purported claim for personal injuries had expired or was about to

expire under Idaho Code 5-219(4) i.e., a two year limitations period of personal injuries. Why provide RCI the defense?

Thirdly, in an attempt to make *Mintarsih* germane, EMC represents to this Court that Kathy Donnelly's "bodily injury" claim was dismissed by the Court in the underlying action. Appellant Brief, pp. 7, 8; Appellant Reply, p. 8. There was no motion to dismiss and there was no dismissal. There was an Order in Limine cautioning the Donnellys not mention Kathy Donnelly's sickness during the underlying trial. Exhibit C, pp. 2, 3.

(2) EMC ignores covered property damage liability: Prior to the issuance of the second reservation of rights letter (September 7, 2007) EMC gained knowledge that the RCI's construction work on the new porch was creating structural problems with the "original home" which was not the subject of the RCI contract. Just prior to the filing of the amended complaint, EMC's claims adjusters noted:

> Under para 10 it appear they are saying that the improperly const. addition and porches has compromised the original structure in that it is buckling walls, breaking windows, causing the roof line to sag and other problems–this is new info [7/11/07].

R. p. 267

Two months after receiving the amended complaint and making the entry identified in the preceding quotation, the September 2007, reservation of rights letter advised RCI: "Here there are no allegations of physical injury to tangible property. . . . [T]here is neither property damage nor an occurrence alleged with regard to construction defects". Exhibit I, September, 2007, pp. 5, 6.

A cynical person might speculate that EMC identified a phantom covered claim ("bodily

injury") to justify controlling RCI's defense, including jury interrogatories, without disclosure of the real reason for providing a defense ("property damage"). Whether inadvertent or otherwise, EMC, through its defense counsel, failed to submit to the jury an allocated verdict, e.g., an interrogatory as to whether RCI was negligent, which would have clarified the coverage issues without disclosing to the jury the existence of insurance. The absence of an allocated verdict imposed upon RCI and the Donnellys the impossible task of persuading the district court as to the jury's collective mindset respecting the damages awarded for breach of the implied warranty of workmanship.

The damages awarded the Donnellys arise from a breach of the implied warranty of workmanship and are not rooted in contract but, historically, arises by operation of law to insure a fair result. Such remedy is not dependent on the existence of a promise or contract. Exhibit D, Instruction Nos. 48, 49; Calamari on Contracts (Third Edition, West), §12-1, p. 19.

The duty imposed upon an insurer with respect to allocated verdicts: In view of the jury verdict against an award of contract damages and the failure of EMC, through retained defense counsel, to request an allocated verdict, the compensatory damages should be deemed to be covered damages under the EMC policy. EMC has provided a semantical discussion on the differences between a "special" verdict and "general" verdict (Appellant Reply Brief, pp. 12-15). However, EMC has failed to identify in which particulars the underlying verdict was an allocated verdict, addressing coverage issues and in which particulars EMC discharged its duty to the insured under *Buckley v. Orem,* 112 Idaho 117, 730 P.2d 1037 (Ct. App. 1986). That is, EMC has failed to identify how the verdict shed light on the issue of insurance coverage. *Buckley* is not cited in its briefing.

In *Buckley v. Orem,* the Appellate Court analyzed "the interplay between a particular verdict

form and the insurer's responsibilities when providing and directing the defense of its insured in the injury action". *Id.* 112 Idaho at 123. Both *Buckley* and its primary authority, *Duke v. Hoch,* 468 F.2d 973 (5th Cir., 1972), dealt with ambiguities in an unallocated verdict having to do with the available insurance limits. By contrast, the ambiguity in the Donnelly/RCI verdict concerned the basis of liability. However, in both *Buckley/Duke* and the case at bench, the insured or, alternatively, the judgment creditor, is put to the same "impossible burden" of persuading a second court of what the jury intended by its verdict:

> [A]t the merits trial [the insurer's] counsel was required to make known to the insured[s] the availability of a special verdict and the divergence of interest between [the insureds] and the insurer springing from whether damages were or were not allocated. The record before us does not indicate that counsel did so.
>
> . . . .
>
> Since on the present record the insurer failed to fully advise its insureds of the divergence of interest between it and them with respect to the verdict, the insureds [and the judgment creditor, Duke] must, subject to the possibility noted in part III, infra, be freed of the *impossible burden of proof* placed on them.

Duke v. Hoch, 468 F.2d at 979, 980 (emphasis added).

Disposition: In *Duke* and *Buckley*, the remedy for an unallocated verdict was to remand the matter on the issue "whether the insurer's counsel, as counsel having the right to control the defense, had adequately disclosed the situation to the insured's own counsel". *Buckley,* 112 Idaho at 124. Upon remand, ruled the *Buckley* court, "further proof is necessary to show whether Nationwide [the insurer] fully and fairly handled its defense responsibilities to the Orems [the insureds] in light of known risks". *Id.*

However, in *Buckley*, the Court made it clear that in the future it adopted the *Duke* standard respecting the conduct by an insurer: "Henceforth an insurer's duty in this regard shall be as extensive as that outlined in *Duke*". *Id.*, 112 Idaho at 125. In that case, "the district court was instructed that "[i]f the insurer could not make such showing [that there was adequate disclosure to the insured], then the district court was instructed to 'face the issue of attempting retrospectively to allocate the damages awarded.'" 468 F.2d at 984". *Buckley*, 112 Idaho at 124 (bracketed material explanatory).

In the case at bench, there is no evidence that EMC complied with its duty, as mandated by *Buckley*, in either its reservation of rights letters (Exhibit I) or elsewhere. That duty is described as follows:

> [W]hen the insurer sought to limit its liability to the coverage provided by the contract, the insurer was required to show that it had faithfully and fully performed its responsibilities to its insured by disclosing the need for an allocated verdict.

Id., 112 Idaho at 124.

In addition, to EMC's failure to disclose to its insured the need for an allocated verdict, there are other factors, as noted above, for concluding that breach of warranty damages are a covered liability: (1) with a curious lack of candor, EMC based its duty to defend on a non-existent bodily injury claim, ignoring the allegations of property damage covered under the policy; (Exhibit I); (2) the breach of implied warranty claim (for which damages were assessed) is not rooted in contract law (Exhibit D, Instruction Nos. 48 and 49); and (3) the jury found no contract damages (Exhibit E, p. 7), which damages, in any event, are not a covered liability.

UNDER IDAHO CODE §41-1839, THE DONNELLYS ARE THE PREVAILING PARTIES BECAUSE THE AMOUNT AWARDED BY THE TRIAL COURT WAS GREATER THAN THE AMOUNT TENDERED BY EMC

Preliminary note: The district court's analysis of the proof of loss issue and Donnellys' status as non-insureds assumes their status as prevailing parties. R. pp. 541-547. In order for the district court to be reversed on this point requires a showing of an abuse of discretion.

Issues pertaining to proof of loss and Donnellys' status as a non-insured: Following EMC"s suit, the Donnellys reference their Respondents' Brief, pages 34 through 39. It should be noted that the underlying judgment creditor (not the insured) in *Mutual of Enumclaw v. Harvey, supra,* had standing to recover portions of the judgment, including attorney fees pursuant to § 41-1839. *Id.,* 115 Idaho at 1011, 1015. Also, *Mutual of Enumclaw* held that, where the insurer denies liability, it waives the requirement that proof of loss be furnished as a prerequisite to recovery of attorney fees. *Id.* 115 Idaho at 1015.

EMC erroneously applies the "prevailing party' standard under Rule 54(d)((1) rather than the applicable standard under Idaho Code §41-1839: The authorities cited in EMC's Reply Brief pertain to the trial court's application of the "prevailing party" concept as set forth in Rule 54(d)(1), I.R.C.P., the awarding of fees and costs pursuant to Idaho Code §§12-120 and 12-121, e.g., *Joseph C.L.U. Assoc. v. Vaught,* 117 Idaho 555, 789 P.2d 1146 (Ct.App. 1990). See Reply brief, p. 19.

In the context of Idaho Code §41-1839, in order to be awarded attorney fees, the claimant need only recover more than was tendered by the insurance company in order to be the "prevailing party":

> When an insurer fails to tender the amount justly due under an insurance policy, within thirty days after receiving proof of loss. I.C.

> §41-1839(1) mandates an award of reasonable attorney fees to the insured. To be entitled to such an award, consequently, an insured must prevail. [cases cited] However, the insured need not obtain a verdict for the full amount requested. The insured need only be awarded an amount greater than that tendered by the insurer.

Slaathaug v. Allstate Insurance Co., 132 Idaho 705, 711, 979 P.2d 107 (1999).

EMC cites *Slaathaug* in connection with a Rule 59(e) motion, not in connection with Donnellys' attorney fee entitlement.

EMC initiated this action during the underlying litigation between the Donnellys and RCI, and this declaratory judgment action has been ongoing since that time. It is undisputed that the amount awarded to the Donnellys, i.e., $296,933.89 in costs and fees assessed against the insured RCI, had never been tendered by EMC, the insurer. Hence the Donnellys' entitlement to attorney fees and costs.

IN THE EVENT THE DONNELLY'S ARE ENTITLED TO ATTORNEY FEES IN THE DISTRICT COURT PROCEEDINGS. THEY ARE ENTITLED TO ATTORNEY FEES ON THIS APPEAL

In *Slaathaug v. Allstate Ins.. supra,* the Supreme Court declined to address attorney fees on appeal because that decision had not yet been reached by the district court. Depending on the decision as to an award of attorney fees in the proceedings below, such decision will determine whether the insured is entitled to fees on appeal.

> . . . [T]here have been no findings as to whether § 41-1839(1) mandated an award of fees in the litigation below. Absent such a finding, it would be premature to award fees under this section on appeal. *Whether the Slaathaugs are entitled to attorney fees below will determine whether they are entitled to fees for defending this appeal. CF. J.R. Simplot Co. V. Enviro-Clear Co., Inc.,* [132] Idaho [251], 970 P.2d 980 (1998) (remanding a case for a new trial and holding a request for attorney fees on appeal under § 12-120(3) to be premature since neither party could have yet prevailed). *Id.,*

132 Idaho at 711 (emphasis added)(bracketed material explanatory).

CONCLUSION

EMC's obligation to pay costs and fees assessed against its insured. Contrary to EMC's assertion, *Mutual of Enumclaw* holds that EMC is required to pay such fees and costs by reason of the "Supplementary Payments" section of its insurance policy. *State Farm v. Minitarsih*, although distinguishable from the case at bench on the facts corroborates *Mutual of Enumclaw,* on this point, *i.e.,* the obligation to pay costs/fees arises where the insurer has a duty to defend. *State Farm v. Mintarsih,* 175 Cal.App.4th at 285.

In its attempt to characterize *Mintarsih* as being on point, EMC wrongfully attributes to the underlying amended complaint an allegation of "bodily injury". In its reservation of rights letters, EMC concedes that the pleadings do not include such a claim. Exhibit I. The district court in the underlying litigation did not "dismiss" a bodily injury claim; rather it ordered that the Donnellys could not reference Kathy Donnelly's sickness during trial. Exhibit C, pp. 2, 3. EMC has erroneously represented to the Court that the claim was "dismissed". Appellant Brief, pp. 7, 8; Appellant's Reply Brief, p. 8.

EMC's obligation to pay the underlying damage award: It cannot be seriously disputed that the underlying verdict is not an allocated verdict. The closest the verdict comes to clarifying the coverage issues is the answer that there are no contract damages, which is not a covered liability. Exhibit E, p. 7. *Buckley v. Orem* places a burden on the insurer to "disclose the need for an allocated verdict". *Id.,* 112 Idaho at 124.

There is no evidence that such disclosure occurred. It is certainly not included in the

reservation of rights letters (Exhibit I). This omission coupled with EMC's phantom "bodily injury" claim as a pretext for providing a defense as well as jury verdict of no contract damages requires a conclusion that the implied warranty of workmanship damages is a covered liability for which the insurer EMC is obligated to indemnify RCI for the benefit of the Donnellys.

The Donnellys are entitled to attorney fees both in the district court proceedings and in this appeal: The Donnellys are the prevailing parties respecting their claim for attorney fees and costs assessed against the insured RCI in the underlying litigation. This "prevailing party" status is acquired under Idaho Code §41-1839 because the Donnellys prevailed respecting the assessed fees/costs which amount was never tendered by EMC. *Slaathaug v. Allstate, supra.*

Respectfully submitted this 19th day of December, 2011.

Allen B. Ellis
Attorney for Respondent/Cross-Appellant

I HEREBY CERTIFY That on this 19th day of December, 2011, I caused to be served two true and correct copies of the foregoing document by the method indicated below, and addressed to the following:

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