

8-16-2011

Employers Mut. Cas. Co. v. Donnelly Clerk's Record v. 3 Dckt. 38623

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3 3

IN THE SUPREME COURT OF THE STATE OF IDAHO

EMPLOYERS MUTUAL CASUALTY COMPANY,
an Iowa Corporation

LAW CLERK

Appellant/Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., Idaho Corporation, and
DAVID and KATHY DONNELLY, husband and wife

Respondents/Defendants

FILED
AUG 6 2011
Supreme Court

Appealed from the District Court of the First Judicial
District of the State of Idaho in and for Bonner County

HONORABLE STEVE VERBY
District Judge

11029
AUG 6 2011
JANUARY

JAMES G. REID
Attorney for Appellants

ALLEN B. ELLIS
Attorney for Respondents

38623

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STATE OF IDAHO
County of Bonner }
FILED 7-13-10
AT 10:50 O'CLOCK 9 M
CLERK DISTRICT COURT
DEPUTY

Attorneys for Defendants Donnelly

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY
COMPANY, an Iowa Corporation,

Plaintiff,

v.

RIMAR CONSTRUCTION INC., an Idaho
Corporation; and DAVID and KATHY
DONNELLY, husband and wife;

Defendants.

CASE NO. CV-07-00885

**SECOND AMENDED ANSWER,
COUNTERCLAIM and CROSS
CLAIM**

COME NOW Defendants David and Kathy Donnelly, husband and wife, (hereinafter "Defendants"), by and through their counsel of record, and hereby amends their Answer as follows:

I. ANSWER

1. Defendants hereby deny each, every, and all allegations and representations set forth in Plaintiff's Petition unless specifically admitted herein.

2. In answer to Paragraphs 1, 2, 5, 6, 13, 14 and 16 of Plaintiff's Petition, Defendants are without sufficient information to form a belief as to the truth of the matters alleged therein and therefore deny the same.

3. In answer to Paragraphs 3, 4 and 8 of Plaintiff's Petition, Defendants admit the same.

4. In answer to Paragraph 7, of Plaintiff's Petition, Defendants admit only that a contract was entered into, and that the contract speaks for itself. Defendants deny the remainder of said Paragraph.

5. In answer to Paragraph 9 of Plaintiff's Petition, Defendants admit only that Rimar performed work on the Donnelly Residence, and deny the remainder of said Paragraph.

6. In answer to Paragraphs 10, 11 and 12 of Plaintiff's Petition, Defendants admit only that Plaintiff's Verified Petition in Bonner County Case No. CV-06-00445 (and any subsequent amendments thereto) speaks for itself. Defendants deny the remainder of said Paragraphs.

7. In answer to Paragraphs 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 of Plaintiff's Petition, Defendants deny the same.

II. AFFIRMATIVE DEFENSES

8. Defendants incorporate as affirmative defenses the allegations contained in Paragraphs 1-7, above.

9. Plaintiff has failed to state a claim upon which relief can be granted.

10. Plaintiff's claims are barred by the equitable doctrines of waiver, laches, unclean hands, and in pari delicto.

11. Plaintiff's claims are barred by the equitable doctrine of estoppel.

12. Plaintiff's claims are barred due to failure of a condition precedent.

13. Plaintiff has failed to join an indispensable party.

14. The losses and claims asserted by the Defendants against Rimar Construction Inc. and Ivan Rimar are not excluded from coverage of EMC's policy.

III. COUNTERCLAIM and CROSS CLAIM

A. DECLARATORY JUDGMENT

15. At times material hereto, the Plaintiff, Employers Mutual Casualty Company (“EMC”), is and was an Iowa corporation authorized to conduct the business of selling insurance, including commercial general liability insurance, in the State of Idaho.

16. At times material hereto, the Defendant, Rimar Construction, Inc. (“RCI”) is and was an Idaho corporation that was engaged in the business of providing general contracting services in the State of Idaho.

17. At times material hereto, the Defendants, David and Kathy Donnelly (“Donnelly”), hired RCI to provide general contracting services for improvements to their real property located in Bonner County, State of Idaho.

18. On or about September 14, 2004, EMC sold and RCI purchased commercial general liability policy no. 2D1-32-95-05 (“CGL Policy”) with the effective coverage dates identified as October 1, 2004, up and through October 1, 2005.

19. On or about March 7, 2006, the Donnellys filed suit against RCI for claims arising out of and related to RCI undertaking to provide general contracting services for certain improvements to the Donnelly property and arising during the effective coverage dates in EMC CGL Policy in Bonner County Case Number CV-06-00445 (herein “Underlying Litigation”). The Underlying Litigation was litigated through trial resulting in a jury verdict in Donnelly’s favor as against RCI on or about July 9, 2008.

20. On or about August 14, 2008, in the Underlying Litigation a Judgment On Special Verdict With Regard To Claims Of Plaintiffs And Defendant Rimar Construction, Inc. (“Initial Judgment”) was entered in the amount of \$128,611.55 to accrue interest at the legal rate against RCI in favor of Donnelly. Later, on March 20, 2009, in the Underlying Litigation an Amended Judgment On Special Verdict With Regard To Claims Of Plaintiffs And Defendant Rimar Construction, Inc. / Rule 54(b) Certificate (“Amended Judgment”) was entered in the total

amount of \$425,545.44 including an award of the Donnellys' attorney's fees in the amount of \$277,062.00 and costs in the amount of \$19,871.89.

21. On or about March 30, 2009, the Amended Judgment was properly recorded in Bonner County, State of Idaho, as record instrument #769177.

22. Pursuant to its policy of insurance, EMC defended RCI through the trial in the Underlying Litigation. Having undertaken the defense of its insured, EMC knew and recognized the Donnellys as claimants against RCI's commercial general liability policy. In addition, RCI knew and/or expected that the Donnellys would incur costs and attorney's fees to prosecute its claim against RCI.

23. On or about May 24, 2007, EMC initiated this action seeking a declaratory judgment that, under the EMC CGL Policy, it has no contractual duty to pay, in whole or in part, any of the Donnellys' then claims as against RCI. On or about December 12, 2007, this action was stayed pending the outcome of the Underlying Litigation. The stay in this action was later lifted on or about July 17, 2009.

24. Following a trial and entry of a jury verdict in the Underlying Litigation, the Donnellys are judgment creditors of RCI and have a claim, right or interest including a judgment lien right, in whole or in part, to the proceeds or policy benefits from the EMC CGL Policy due and owing to RCI in whole or partial satisfaction of the Donnellys' judgment against RCI.

25. Pursuant to Idaho Code § 10-1202, the Donnellys are persons interested under the EMC CGL Policy whose rights, status or other legal relations are affected by the policy and, therefore, request a construction of the EMC CGL Policy to obtain a declaration of their rights, status or other legal relations under the policy. In particular, the Donnellys seek a declaration that EMC has a contractual duty to pay and/or indemnify RCI, in whole or in part, for the Donnelly judgment including, but not limited to, post-judgment interest accrued to date on the entire judgment.

26. To date, neither EMC nor RCI has made any payment to Donnelly or to the Court in effort to satisfy the Donnelly judgment in whole or in part and the Donnelly judgment remains unsatisfied.

B. FRAUDULENT CONVEYANCE

27. The Defendants/Counterclaimants, David and Kathy Donnelly, re-allege paragraphs 15-26 as if set forth herein.

28. On March 20, 2009, in the Underlying Litigation an Amended Judgment in the total amount of \$425,545.44 was awarded in favor of Defendants David and Kathy Donnelly and against Defendant RCI. On or about March 30, 2009, the Amended Judgment was properly recorded in Bonner County, State of Idaho, as record instrument #769177. A true and correct copy of the Amended Judgment, Bonner County Record Instrument # 769177 is attached hereto as **Exhibit A** and is adopted by reference pursuant to IRCP 10(c).

29. Following entry of the Initial Judgment and Amended Judgment, the Donnellys were and are judgment creditors of RCI. The Amended Judgment recorded as a judgment lien against the real property, if any, of RCI pursuant to Idaho Code § 10-1110 and rendered the real and personal property of RCI liable to seizure pursuant to Idaho Code § 11-201.

30. The Plaintiff, EMC, had actual and/or constructive knowledge of the Initial Judgment and Amended Judgment awarded in favor of the Donnellys and against its insured, RCI, having tendered a defense to RCI and Ivan Rimar, individually, in the Underlying Litigation and having initiated this declaratory judgment action against the named Defendants herein. As a result, EMC, knew or should have known that the Donnellys had a legal and/or equitable right in the real and/or personal property of RCI liable to pay the Amended Judgment. In particular, EMC knew the Donnellys were the beneficiaries and/or intended beneficiaries of insurance benefits and/or monies owed by EMC to RCI under EMC's Commercial General Liability ("CGL") policies 2D1-32-95-05 and 2D1-32-95-06 with RCI.

31. The Defendant, RCI, had actual and/or constructive knowledge of the Initial Judgment and Amended Judgment awarded against it having defended the Underlying Litigation

through trial. As a result, RCI knew, or should have known, that the Donnellys had a legal and/or equitable right in the real and/or personal property of RCI liable to pay the Amended Judgment. In particular, RCI knew the Donnellys were the beneficiaries and/or intended beneficiaries of insurance benefits and/or monies owed by EMC to RCI under EMC's Commercial General Liability ("CGL") policies 2D1-32-95-05 and 2D1-32-95-06.

32. On or about March 30, 2009, the Defendant RCI, a judgment debtor of the Donnellys, had a contract claim to certain policy benefits or monies against EMC pursuant to EMC's CGL policies. In particular, RCI had a claim that EMC indemnify it, in whole or in part, against the Donnellys' Amended Judgment pursuant to the terms of its CGL policies.

33. In addition, on or about March 30, 2009, the Defendant RCI, a judgment debtor of the Donnellys, had a pending counterclaim seeking money damages against EMC. In part, RCI's counterclaim against EMC included causes of action for insurance bad faith and breach of contract.

34. Sometime in September of 2009, EMC and RCI entered into a Settlement Agreement with a stated effective date of August 17, 2009. In part, the Settlement Agreement purports to be a transfer of RCI's property right in its contract claims against the EMC CGL policy and its pending counterclaim to EMC. A true and correct copy of the Settlement Agreement produced by EMC as Exhibit J to the Affidavit of James G. Reid is attached hereto as **Exhibit B** and adopted by reference pursuant to IRCP 10(c).

35. EMC, RCI and Ivan Rimar, individually, entered into the Settlement Agreement with no notice to David or Kathy Donnelly and the Donnellys are not parties to the Settlement Agreement.

36. On November 10, 2009, the Donnellys caused a Writ of Execution to issue from the Clerk of the Bonner County Court under the Underlying Litigation case number to seek collection against RCI on the Amended Judgment. Along with the Writ of Execution, a letter with Instructions to the Sheriff was sent to the Bonner County Sheriff for the purposes of collecting on the Amended Judgment. A true and correct copy of the letter with Instructions to

the Sheriff without its attachments is attached hereto as **Exhibit C** and adopted by reference pursuant to IRCP 10(c) and a true and correct copy of the Writ of Execution is attached hereto as **Exhibit D** and adopted by reference pursuant to IRCP 10(c).

37. Following execution on the Writ of Execution by the Bonner County Sheriff, the Donnellys received a copy of a Memorandum dated November 24, 2009, from counsel for RCI to the Bonner County Sheriff that, in part, represented as follows: Please be advised that RIMAR CONSTRUCTION, INC. owns no property, real or personal. Further, RIMAR CONSTRUCTION, INC. owns no equipment, heavy equipment, titled or untitled motor vehicles, tools, receivables, inventory, or any other personal property of any description. A true and correct copy of the Memorandum from RCI to the Bonner County Sheriff dated November 24, 2009 is attached hereto as **Exhibit E** and adopted by reference pursuant to IRCP (c).

38. On or about December 7, 2009, the Bonner County Sheriff returned the Writ of Execution unsatisfied. A true and correct copy of the return on the Writ of Execution from the Bonner County Sheriff's Office is attached hereto as **Exhibit F** and adopted by reference pursuant to IRCP 10(c). In particular, the Sheriff was unable to or could not levy on:

a. Notice and attachment of all right and interest in judgment debtor's claims to insurance benefits and/or monies from Employers Mutual Casualty Company Commercial General Liability policy number 2D1-032-95-05 dated October 1, 2004 through October 1, 2005 and policy number 2D1-32-95-06 dated October 1, 2005 through October 1, 2006; and

b. Notice and attachment of all right and interest in judgment debtor's causes of action and/or counterclaim(s) as set forth in Bonner County CV-2007-00885.

39. The Settlement Agreement by and between EMC, RCI and Ivan Rimar is considered a fraudulent transfer to the Donnellys as judgment creditors of RCI, as the Settlement Agreement purports to be a transfer made by RCI after the debt obligation to the Donnellys was incurred and was made with (a) the actual intent to hinder, delay or defraud the Donnellys, or (b) was made without receiving a reasonably equivalent value from EMC in exchange for the transfer and, the transfer resulted in RCI having little or no assets remaining and/or left RCI

otherwise insolvent and unable to satisfy the Donnellys' Amended Judgment in contravention of Idaho Code §§ 55-913(1)(a); 55-913(b) and 55-914(1).

40. As a result of the transfer by and between EMC and RCI set forth in the Settlement Agreement, the Donnellys have been damaged and are entitled to the remedy of creditors as set forth in Idaho Code § 55-916 *et. seq.* including the avoidance of the transfers from RCI to EMC set forth in the Settlement Agreement and the attachment, levy and execution on the transferred property in favor of the Donnellys in partial satisfaction of their Amended Judgment.

41. The Donnellys have retained the law firm of Ramsden & Lyons, LLP, and have incurred attorney's fees and costs in defense and prosecution of this action.

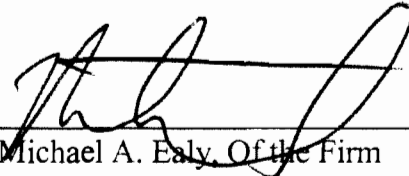
NOW WHEREFORE, Defendants David and Kathy Donnelly pray for the following relief:

1. That the Plaintiff's Petition be dismissed in its entirety and that it take nothing thereby;
2. That the Defendant Donnelly have declaratory judgment finding that under the EMC CGL policies, EMC has a contractual duty to pay and/or indemnify RCI, in whole or in part, the Donnellys' Amended Judgment entered in the Underlying Litigation and including post-judgment interest on the entire judgment amount;
3. That the Settlement Agreement by and between EMC, RCI and Ivan Rimar be avoided with regard to the transfer of property from RCI to EMC and that the court order levy and execution on the transferred property and/or its proceeds in favor of Donnelly in accord with Idaho Code § 55-916 *et. seq.*;
4. That the Defendants Donnelly be awarded reasonable attorney fees and costs as incurred herein pursuant to I.C. §§ 10-1201 *et seq.*; 12-120 and 12-121; and 41-1839; and

5. For such other and further relief as the Court deems just and equitable under the circumstances.

DATED this 12 day of July, 2010.

RAMSDEN & LYONS

By 
Michael A. Ealy, Of the Firm
Attorneys for Defendants Donnelly

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12 day of July, 2010, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

James G. Reid
David P. Claiborne
Ringert Clark Chartered
P.O. Box 2773
Boise, ID 83701-2773

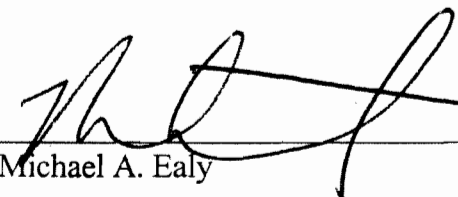
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Michael A. Ealy

MICHAEL G. SCHMIDT: ISB# 6911
WILLIAM D. HYSLOP: ISB# 7141
LUKINS & ANNIS, P.S.
250 Northwest Blvd., Ste. 102
Coeur d'Alene, ID 83814-2971
Telephone: (208) 667-0517
Attorneys for Plaintiffs

FILED BY
Kathy Donnelly
2008 MAR 20 12:57
STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT
MARIE SCOTT
BONNER COUNTY RECORDER
2008 MAR 20 A 11:47
DEPUTY
MARIE SCOTT
CLERK DISTRICT COURT
ax
DEPUTY
769177

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

DAVID DONNELLY and KATHY
DONNELLY, Husband and Wife,

Plaintiffs/Counterclaim Defendants,

vs.

RIMAR CONSTRUCTION, INC., an Idaho
Corporation; IVAN RIMAR

Defendants/Counterclaim Plaintiffs

NO. CV-06-00445

AMENDED JUDGMENT ON
SPECIAL VERDICT WITH REGARD
TO CLAIMS OF PLAINTIFFS AND
DEFENDANT RIMAR
CONSTRUCTION, INC.

RULE 54(b) CERTIFICATE

This matter was tried before a jury commencing on June 23, 2008 and the jury having heard the evidence and having rendered a verdict on July 9, 2008, by way of Special Verdict,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered as follows:

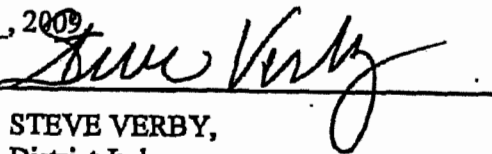
1. That with regard to the Donnellys' claim of breach of contract against Rimar Construction, Inc., the jury found a breach of contract, but awarded Zero (\$0.00) dollars in damages,
2. That with respect to the Donnellys' claim of express warranty against Rimar Construction, Inc., the jury did not find any such breach, and therefore Judgment is rendered in favor of Rimar Construction, Inc.
3. That with respect to the Donnellys' claim of breach of implied warranty of workmanship, the jury found such a breach and awarded the sum of \$126,611.55, and Judgment is

entered in favor of the Donnellys in the amount of \$126,611.55 against Rimar Construction, Inc.

4. That with respect to the Donnellys' claims for violations of the Idaho Consumer Protection Act against Rimar Construction, Inc., concerning the specific disclosures by a general contractor, the jury determined that the failure to make such disclosures constituted a violation of the Consumer Protection Act and awarded \$1,000.00 for the failure to provide such disclosures, and Judgment is hereby entered in favor of the Donnellys in the amount of \$1,000.00.
5. That with respect to other alleged violations of the Consumer Protection Act brought by the Donnellys against Rimar Construction, Inc., the jury found that such a violation occurred and awarded damages in the amount of \$1,000.00, and Judgment is hereby entered in favor of the Donnellys in the amount of \$1,000.00.
6. That with respect to the Donnellys' claim for negligence against Rimar Construction Inc. as an architect the jury found that Rimar Construction Inc. did not act as an architect and therefore, there is no liability under that theory and Judgment is rendered in favor of Rimar Construction, Inc. on the architectural negligence cause of action.
7. That with respect to the Donnellys' claim of alleged engineering negligence against Rimar Construction, Inc., the jury found that Rimar Construction, Inc., did not act as an engineer and therefore, found no liability. Accordingly, Judgment is rendered in favor of Rimar Construction, Inc., on the engineering negligence cause of action.
8. That with respect to Rimar Construction, Inc.'s claims against Mr. and Mrs. Donnelly for breach of contract, the Court has determined that the Donnellys were excused from performance of the Contract, and that Rimar Construction, Inc. is not entitled to an award of any damages.
9. That with respect to Rimar Construction, Inc.'s claims against Mr. and Mrs. Donnelly for foreclosure of its mechanic's and materialmen's lien under I.C. 45-501 et seq., the jury and Court have determined that Rimar Construction Inc. failed to establish its right to foreclose said lien. Accordingly, Judgment is rendered in favor of the Donnellys on the lien foreclosure cause of action. The Claim of Lien filed as Bonner County Instrument No. 695132, and the Lis Pendens filed as Bonner County Instrument No. 702306, are therefore declared to be of no legal effect, and are hereby expunged.

10. That Plaintiffs / Counterclaim Defendants David and Kathy Donnelly, as the prevailing party against Defendant Rimar Construction, Inc., recover from Defendant Rimar Construction, Inc. attorney's fees in the amount of \$277,062.00 and costs in the amount of \$19,871.89, for a total recovery against Defendant Rimar Construction, Inc. in the sum of \$425,545.44, which shall accrue interest at the legal rate as provided by Idaho Code § 28-22-104(2) from the date of entry of judgment.

DATED this 20th day of March, 2009



STEVE VERBY,
District Judge

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this 20th day of March, 2009.



STEVE VERBY,
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26 day of March, 2000, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Brent C. Featherston
Featherston Law Firm
113 South Second Avenue
Sandpoint, ID 83864
Fax: (208) 265-1713

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)

Chris H. Hansen
Anderson Julian & Hull, LLP
250 South Fifth Street, Ste 700
PO Box 7426
Boise, ID 83707-7426
Fax: (208) 344-5510

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)

Michael G. Schmidt
William D. Hyslop
Lukins & Annis, P.S.
250 Northwest Blvd., Ste. 102
Coeur d'Alene, ID 83814-2971
Fax: (208) 664-4125

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)

Michael L. Haman
Haman Law Office PC
923 North 3rd Street
P.O. Box 2155
Fax: (208) 676-1683

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)

A. Phillips
Deputy Clerk

SETTLEMENT AGREEMENT

Between: Employers Mutual Casualty Company, an Iowa corporation (herein referred to as "EMC");

And: Rimar Construction, Inc., an Idaho corporation, and Ivan Rimar, an individual (herein collectively referred to as "RIMAR");

Effective Date: August 17, 2009.

RECITALS

A. David and Kathy Donnelly (herein collectively referred to as "DONNELLY") brought legal action against RIMAR in the First Judicial District Court of the State of Idaho, in and for the County of Bonner, Case No. CV-2006-00445 (this action shall be referred to herein as the "UNDERLYING ACTION"), making several allegations against RIMAR surrounding the design and remodel of a home owned by DONNELLY; and

B. At the relevant times involved in the claims alleged in the UNDERLYING ACTION, a policy and agreement of insurance existed between EMC and RIMAR; and

C. A dispute formed, and continued to exist, between EMC and RIMAR as to whether the policy of insurance provided any coverage for the claims alleged in the UNDERLYING ACTION, but nevertheless EMC provided a complete defense to RIMAR in the UNDERLYING ACTION; and

D. During the pendency of the UNDERLYING ACTION, EMC brought legal action against RIMAR and DONNELLY to address issues of coverage under the policy of insurance, said action being brought before the First Judicial District Court of the State of Idaho, in and for the County of Bonner, Case No. CV-2007-00885 (this action shall be referred to herein as the "DECLARATORY ACTION"); and

EXHIBIT B

E. The UNDERLYING ACTION did result in judgment being entered against RIMAR, but only as to Rimar Construction; and

F. EMC and RIMAR have come to an agreement, the terms and conditions of which are set forth herein, whereby the DECLARATORY ACTION will be forever resolved as between them, and whereby EMC will continue to provide a defense to RIMAR in what remains of the UNDERLYING ACTION.

AGREEMENT

WHEREFORE, the parties acknowledge the understandings expressed in the above Recitals, and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Promises of Parties. Incident to this Agreement, the following promises are made:

(a) Continued Defense of Underlying Action. EMC shall continue to provide to RIMAR a full and complete defense and legal representation as to all pending, unresolved and remaining matters and issues involved in the UNDERLYING ACTION, including upon appeal, *provided however that*

(i) EMC shall have no duty to indemnify, defend or hold harmless RIMAR for and from any and all issues and matters surrounding the collection and enforcement of any judgments entered against RIMAR in the UNDERLYING ACTION; and

(ii) EMC shall have no duty to indemnify, defend or hold harmless RIMAR for and from any and all claims which could have been brought, but were not, by DONNELLY against RIMAR in the UNDERLYING ACTION, including but not limited to fraudulent transfer allegations and the like.

8

(b) Stipulated Dismissal of Counterclaims in Declaratory Action. RIMAR hereby agrees and stipulates to the dismissal, with prejudice, of any and all counterclaims, whether known or unknown, and whether alleged or not, that it has or might have against EMC in the DECLARATORY ACTION. RIMAR shall further execute, or cause to be executed, such additional documents and pleadings necessary to effectuate the foregoing, including but not limited to execution of a pleading dismissing its counterclaims alleged against EMC in the DECLARATORY ACTION.

(c) Release of Liability by RIMAR. RIMAR forever releases and discharges EMC for and from any and all actions, causes of action, grievances, claims or demands for damages, including, but not limited to, attorney fees, court costs, and litigation expenses, arising out of or which could have arisen out of -

- (i) the UNDERLYING ACTION and the subject matter involved therein; and
- (ii) the DECLARATORY ACTION and the subject matter involved therein; and
- (iii) EMC's handling, processing, investigation, treatment and disposition of the insurance claims and demands made, or which could have been made, by RIMAR and/or DONNELLY in relation to anything related, in whole or in part, to the UNDERLYING ACTION or its subject matter.

(d) No Contest of Declaratory Action. With respect to the DECLARATORY ACTION, RIMAR shall no longer contest the same, RIMAR shall not oppose in any way EMC's efforts to obtain a judgment therein favorable to EMC, RIMAR shall admit the allegations made in the DECLARATORY ACTION by EMC, and RIMAR shall confess to entry of judgment against RIMAR in the DECLARATORY ACTION, provided however that EMC and RIMAR shall each

be obligated to satisfy their own attorney fees and court costs incurred in the DECLARATORY ACTION and EMC shall take no effort to receive a judgment for attorney fees and court costs as against RIMAR in the DECLARATORY ACTION. RIMAR shall further execute, or cause to be executed, such additional documents and pleadings necessary to effectuate the foregoing.

2. Representations. The parties each represent that:

(a) at the time of execution of this Agreement, the party freely and voluntarily assented to being bound by the terms and conditions of this Agreement;

(b) at the time of execution of this Agreement and during all times related to the negotiation and drafting of this Agreement, the party had capacity to act and was knowledgeable and aware of the dealings and effect of this Agreement;

(c) this Agreement is not being executed for an illegal purpose and the terms and conditions of this agreement do not contain any illegal subject matter;

(d) the party, at the time of execution of this Agreement and during all times related to the negotiation and drafting of this Agreement, made no misrepresentations, false assertions of facts, and did not conceal any facts;

(e) at the time of execution of this Agreement and during all times related to the negotiation and drafting of this Agreement, the party was acting voluntarily and not subject to duress or coercion;

(f) the party is unaware of any mutual or unilateral mistakes related to the formation or execution of this Agreement;

(g) the party has read and understands the terms and conditions of this Agreement and believes all of them to be fair and reasonable;

(h) the party received adequate consideration in support of execution of this Agreement. These representations shall survive the execution of this Agreement and continue until the terms and conditions of this Agreement have been fulfilled by each party.

3. Assignment of Rights and Delegation of Duties. No party to this Agreement may assign any rights of that party under this Agreement without the express written consent of all parties to this Agreement and any purported assignment not complying with this section shall be considered invalid and of no effect. No party to this Agreement may delegate any duties of that party under this Agreement without the express written consent of all parties to this Agreement and any purported delegation not complying with this section shall be considered invalid and of no effect.

4. Duty of Good Faith. Each of the parties to this Agreement agrees to perform and execute this Agreement in accordance with the highest standards of good faith, honesty in fact, and fair dealing.

5. Construction. In the event that any word, term, or language contained in or incorporated in this Contract shall be necessary to resolve an ambiguity or a disagreement between the parties, the word, term, or language shall be construed or interpreted according to its plain meaning within the context in which it is used. To ascertain plain meaning, *Webster's Third New International Dictionary* may be consulted, to the exclusion of all other standard dictionaries. If plain meaning does not resolve the ambiguity or disagreement, the word, term, or language shall be construed simply and fairly and not for or against either of the parties hereto because that party or that party's legal representative drafted the Contract.

6. Litigation. In the event of a dispute or disagreement regarding performance, execution,

interpretation, or any other matter related to the formation or fulfillment of this Agreement:

(a) Choice of Law. The laws of the State of Idaho shall govern all matters related to such;

(b) Choice of Forum. The District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner, shall have exclusive jurisdiction to hear and resolve such;

(c) Consent to Jurisdiction. Each of the parties to this Agreement expressly consents to personal jurisdiction and venue in the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner, and waives any objection to personal jurisdiction or venue that the party might have;

(d) Attorneys' Fees and Court Costs. If any party seeks the services of an attorney regarding such, the prevailing party upon trial, appeal, or other judicial disposition shall be entitled to reimbursement of all reasonable attorney fees, court costs, and litigation expenses incurred in enforcing this Agreement and in collecting on any judgment resulting therefrom, except such fees, costs, and expenses incurred in pursuing an invalid or unenforceable provision of this Agreement.

7. Miscellaneous.

(a) Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

(b) Severability. If any term or provision of this Agreement or the application of it to any person or circumstance shall to any extent be invalid or unenforceable, the remainder of this Agreement and the application of such term or provision to persons or circumstances other than

those to which it is held invalid or unenforceable shall not be affected thereby, and each term or provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law and in equity.

(c) Language. As the context may require in this Agreement, the use of any gender (male, female, or neuter) shall include the other gender, and the singular shall include the plural and the plural the singular.

(d) Binding Effect. This Agreement shall be binding upon and operate to the benefit of all parties to this Agreement and their respective heirs, successors, legal and personal representatives, and permitted assigns.

(e) Captions. The captions heading the sections of this Agreement are inserted for convenience of reference only, and in no way define, limit, construe or describe the scope or intent of any terms, provision, or section of this Agreement.

(f) Time of the Essence. Time is of the essence in this Agreement in all particulars. All times referred to or described in this Agreement shall hereinafter apply to the transaction unless, subsequent to the date of this Agreement, the parties expressly agree otherwise in writing. The term "days" means calendar days unless the term "business days" is used.

(g) Advice of Counsel. Each of the parties acknowledge that they have had the opportunity to consult with their respective legal counsel prior to and regarding the formation, execution, and performance of this Agreement.

(h) Waiver. The failure of either of the parties to this Agreement to insist on the strict performance of any of the provisions of this Agreement shall not be construed as a waiver of any subsequent default of the same or similar nature, nor shall it affect the parties' rights to claim

strict performance of any other portions of this Agreement.

8. Confidentiality. All of the parties to this Agreement agree that the terms and conditions of this Agreement and the disposition, resolution, and other matters related to fulfilling the terms and conditions of this Agreement shall remain CONFIDENTIAL between the parties, and shall not be disclosed to anyone except to the extent that either party is legally obligated to disclose, or to the extent that any party is required to disclose to fulfill the terms and conditions of this Agreement. The parties may disclose the terms and conditions of this Agreement to a spouse or professional advisor, provided such person agrees to be bound by this provision and that any breach of this provision by that person shall be a breach under this Agreement by the party the person represents. The parties shall safeguard all confidential information in such manner as to guarantee against its inadvertent or negligent disclosure. This Agreement may be used as evidence in any subsequent proceeding in which any of the parties to this Agreement alleges a breach of this Agreement.

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9. MERGER. THIS INSTRUMENT CONTAINS THE FINAL AND CONCLUSIVE AGREEMENT BETWEEN THE PARTIES PERTAINING TO THE SUBJECT MATTER DESCRIBED IN IT, AND SUPERSEDES ALL PRIOR AND CONTEMPORANEOUS AGREEMENTS, PROMISES, REPRESENTATIONS AND UNDERSTANDINGS, ORAL OR WRITTEN. NO MODIFICATIONS OR AMENDMENTS OF THIS AGREEMENT SHALL BE BINDING UNLESS REDUCED TO WRITING AND SIGNED BY THE PARTY SOUGHT TO BE BOUND.

EXECUTED by the parties or their duly authorized representatives, to be effective as provided above.

Chris Campbell

 Employers Mutual Casualty Company
 By: *Chris Campbell*
 Its: *adjuster*

Ivan Rimar

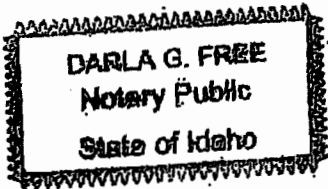
 Rimar Construction, Inc.
 By: *Ivan Rimar*
 Its: _____

 Ivan Rimar

WITNESSETH

STATE OF IDAHO)
)
) SS.
COUNTY OF BONNER)

On this 1 day of Sept., 2009, before me, a notary public for the State of IDAHO, personally appeared before me the following above-named parties; Rimar Construction, Inc., by and through its above-identified agent, and Ivan Rimar, who is (or are) personally known to me to be the person(s) so named, or proven to me on the basis of satisfactory evidence to be the person(s) so named, whose name(s) is (or are) subscribed to the within instrument, and acknowledged to me that he/she (or they) executed the same.



Darla G. Free
Notary Public for IDAHO
Residing in Sandpoint
My Commission Expires: April 14, 2012

STATE OF North Dakota
COUNTY OF Burleigh SS.

On this 30 day of September, 2009, before me, a notary public for the State of North Dakota personally appeared before me Employers Mutual Casualty Company, by and through its above-identified agent, who is (or are) personally known to me to be the person(s) so named, or proven to me on the basis of satisfactory evidence to be the person(s) so named, whose name(s) is (or are) subscribed to the within instrument, and acknowledged to me that he/she (or they) executed the same.

Connie Holzer
Notary Public for _____
Residing in _____
My Commission Expires: _____
CONNIE HOLZER
Notary Public
State of North Dakota
My Commission Expires June 18, 2011

RAMSDEN & LYONS, LLP

ATTORNEYS AT LAW

MICHAEL E. RAMSDEN*
MARC A. LYONS*
DOUGLAS S. MARFICE*
MICHAEL A. EALY*
TERRANCE R. HARRIS*
APRIL M. LINSKOTT
RUDY J. VERSCHOOR
JENNIFER L. DAHLSTROM*
CHRISTOPHER D. GABBERT
VIRGINIA McNULTY ROBINSON
THERON J. De SMET

P.O. BOX 1336
COEUR D'ALENE, ID 83816-1336

TELEPHONE: (208) 664-5818
FACSIMILE: (208) 664-5884
E-MAIL: firm@ramsdennyons.com
WEBSITE: www.ramsdennyons.com

STREET ADDRESS:
700 NORTHWEST BLVD.
COEUR D'ALENE, ID 83814

ALL ATTORNEYS LICENSED IN IDAHO
* LICENSED IN WASHINGTON

WILLIAM F. BOYD, OF COUNSEL

November 10, 2009

Bonner County Sheriff
Civil Section
4001 N. Boyer Road
Sandpoint, Idaho, 83864

INSTRUCTIONS TO THE SHERIFF

Re: Donnelly v. Rimar Construction, Inc.
Bonner County Case No. CV-06-00445

Name of Defendants to be executed against: **Rimar Construction, Inc.**

Defendants Social Security# and/or date of birth: N/A

Mailing address of Defendant:

Rimar Construction, Inc.
11707 Culvers Drive
Sandpoint, ID 83864

Employer of Defendant including their address and phone number: N/A

Bank(s) to be served and their address:

1. **Mountain West Bank**
201 E Superior Street
Sandpoint, ID 83864

2. **Bank of America**
405 N. 2nd Avenue
Sandpoint, ID 83864
3. **Panhandle State Bank**
414 Church Street
Sandpoint, ID 83864

Vehicle(s) to be picked up and their vehicle inquiry forms: **None identified to date.**

Misc. personal property (including description, serial#'s and location:

1. **Notice and attachment of all right and interest in judgment debtor's claims to insurance benefits and/or monies from Employers Mutual Casualty Company Commercial General Liability policy number 2D1-32-95-05 dated October 1, 2004 through October 1, 2005 and policy number 2D1-32-95-06 dated October 1, 2005 through October 1, 2006.**
2. **Notice and attachment of all right and interest in judgment debtor's causes of action and/or counterclaim(s) as set forth in Bonner County CV-2007-00885.**
3. **Notice and attachment of any and all right and interest in judgment debtor's contractual right or claim to proceeds and/or monies from its contract to construct buildings five and six at the Seasons at Sandpoint Condominiums located at or about 313 N. 1st Avenue, Sandpoint, Idaho.**
4. **Notice and attachment of any and all of judgment debtor's accounts receivable(s) and/or right and interest in judgment debtor's contractual right or claim to proceeds and/or monies earned from any contracts upon which it is owed or due monies.**

CHOOSE ONLY ONE

Request garnish wages at place of employment:	No
Request garnishment of Bank Account:	Yes
Request levy on personal property listed:	No

Additional information (Directions, etc.): **As of November 10, 2009, the total judgment owed by the judgment debtor inclusive of interest is \$449,625.66. Judgment creditor seeks levy and attachment on any and all real and/or personal property of the judgment debtor found in satisfaction of the judgment. Attached hereto is a true and correct copy of the Judgment on Special Verdict with Regard to Claims of Plaintiffs and Defendant**

Bonner County Sheriff
November 10, 2009
Page 3

Rimar Construction, Inc., dated August 14, 2008, and Amended Judgment on Special Verdict with Regard to Claims of Plaintiffs and Defendant Rimar Construction, Inc., dated March 20, 2009, and recorded March 30, 2009, Instrument #769177. Also attached is a copy of the Idaho Secretary of State business entity information sheet for Rimar Construction, Inc.

Dated this 10 day of November, 2009

Signed: _____

Michael A. Ealy, Attorneys for
David and Kathy Donnelly

RAMSDEN & LYONS, LLP
700 Northwest Blvd.
P.O. Box 1336
Coeur d'Alene, ID 83816-1336
Telephone: (208) 664-5818
Facsimile: (208) 664-5884
Michael A. Ealy, ISB #5619
Marc A. Lyons, ISB #3145

Attorneys for Plaintiffs/Counterdefendants

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

DAVID DONNELLY and KATHY
DONNELLY, husband and wife,

Plaintiffs/Counterdefendants,

vs.

RIMAR CONSTRUCTION, INC., an Idaho
corporation,

Defendant/Counterclaimant.

Case No. CV-06-00445

WRIT OF EXECUTION

THE PEOPLE OF THE STATE OF IDAHO
TO THE SHERIFF OF THE COUNTY OF BONNER
GREETINGS:

WHEREAS on the 20th day of March, 2009, plaintiff recovered an initial Judgment on Special Verdict With Regard to Claims of Plaintiffs and Defendant Rimar Construction, Inc. in the initial amount of \$128,611.55 plus interest at the legal rate (7.625%) as entered on August 14, 2008, and final Amended Judgment on Special Verdict With Regard to Claims of Plaintiffs and Defendant Rimar Construction Inc. in the amended amount of \$425,545.44 to accrue

interest at the legal rate (7.625% to July 1, 2009 and 5.625% after July 1, 2009) as entered on March 20, 2009 in the District Court of the State of Idaho, County of Bonner, against the defendant, Rimar Construction, Inc., for the total sum of \$449,625.66, plus interest accrued at the legal rate from entry of the initial judgment on August 14, 2008 up and until November 10, 2009 as follows:

Judgment Amount	\$128,611.55	\$431,402.55	\$440,594.97	
Interest on Judgment	0.07625	0.07625	0.05625	
Interest/Yr	\$9,806.63	\$32,894.44	\$24,783.47	
Days/Yr	365	365	365	
Per Day Rate	\$26.87	\$90.12	\$67.90	
Days	218	102	133	
Total Interest	\$5,857.11	\$9,192.42	\$9,030.69	\$24,080.22
Total with Interest	<u>\$134,468.66</u>	\$440,594.97	\$449,625.66	
Fees and Costs	\$296,933.89			
Total March 20, 2009	\$431,402.55			

Note: Rate of Interest on Money Judgments was 7.625% effective July 1, 2008
 Rate of Interest on Money Judgments was 5.625% effective July 1, 2009

AND, WHEREAS, that final Amended Judgment on Special Verdict With Regard to Claims of Plaintiffs and Defendant Rimar Construction Inc. was duly filed in the Clerk's office of the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner, on March 20, 2009 and that Judgment was duly recorded as a judgment lien with the Bonner County Recorder on March 30, 2009;

NOW, you, the Sheriff of Bonner County, are hereby required to satisfy said Judgment, with the accrued interest as aforesaid, out of the personal property of the defendant Rimar Construction, Inc., the judgment debtor, or if sufficient property of said debtor cannot be found, then out of the real property in Bonner County belonging to said judgment debtor on the date of

service of this writ, and make return of this writ within sixty (60) days after the receipt hereof, with what you have done endorsed thereon.

WITNESS my hand and official seal this 10 day of November, 2009.

Marie Scott, Clerk

By Pracy B
Deputy



ELSAESSER JARZABEK ANDERSON MARKS & ELLIOTT
CHARTERED
ATTORNEYS - AT - LAW

102 SOUTH EUCLID AVENUE, SUITE 307
P. O. BOX 1049
SANDPOINT, IDAHO 83864-0855
TELEPHONE (208) 263-8517
FACSIMILE (208) 263-0759

FORD ELSAESSER
JOSEPH E. JARZABEK
BRUCE A. ANDERSON*
DOUGLAS B. MARKS**
CINDY ELLIOTT
JAMES S. MACDONALD

*ALSO LICENSED IN COLORADO
**ALSO LICENSED IN WASHINGTON

ford@ejame.com
brucea@ejame.com
dmarks@ejame.com
cindy@ejame.com
james@ejame.com
dlarue@ejame.com
lois@ejame.com

DONNA LARUE, CLA
PARALEGAL
LOIS La POINTE, RP
LEGAL ASSISTANT TO FORD ELSAESSER

MEMORANDUM

To: Bonner County Sheriff
Attn: Chief Civil Deputy
4001 North Boyer
Sandpoint, ID 83864

cc: Larry Goins, Bonner County Prosecutor's Office
Mike Ealy, Esq., Ramsden & Lyons, LLP

From: Ford Elsaesser

Date: November 24, 2009

Re: First District Court of Idaho for Bonner County
Case No. CV-06-00445
David Donnelly and Kathy Donnelly v. Rimar Construction, Inc.

Dear Deputy:

Reference is made to a WRIT OF EXECUTION issued on November 10, 2009, with regard to the above-entitled matter.

Please be advised that RIMAR CONSTRUCTION, INC. owns no property, real or personal. Further, RIMAR CONSTRUCTION, INC. owns no equipment, heavy equipment, titled or untitled motor vehicles, tools, receivables, inventory, or any other personal property of any description. The only property owned by RIMAR CONSTRUCTION, INC. was a bank account which was used to pay some tailing phone bills after the company shut down. Those funds have already been garnished by your office for the benefit of the judgment creditor.

I wanted to advise the Sheriff's Department of these facts so that any further action that is taken, or not taken, will be with the full knowledge of these circumstances.

EXHIBIT E

Bonner County Sheriff, Chief Civil Deputy

November 24, 2009

Page 2

Please contact me if you have any questions of any kind. Please note that this judgment has no effect or impact on IVAN RIMAR, personally, or on any other company with which he is associated.

Thank you.

Very truly yours,



Ford Elsaesser

FE/11

State of IDAHO
Bonner County Sheriff's Office
Civil Division
4001 N. Boyer Ave.
Sandpoint, ID 83864

Defendant Disposition:
Rimar Construction
1707 Culvers Dr; PO Box 6 Sandpoint, ID 83864

Garnishee Disposition: SRU Served, returned unsatisfied
Mountain West Bank
201 E Superior St Sandpoint, ID 83864
Served on: 13th day of November, 2009 by Peasha, J
Served to: Cassidie Spinney Manager
201 E Superior St Sandpoint, ID 83864

Bank of America
402 N 2nd Ave Sandpoint, ID 83864
Served on: 13th day of November, 2009 by Peasha, J
Served to: Lynn Jennings Assistant Manager
402 N 2nd Ave Sandpoint, ID 83864

Panhandle State Bank
414 Church St Sandpoint, ID 83864
Served on: 13th day of November, 2009 by Peasha, J
Served to: Kelly Glenn Manager
414 Church St Sandpoint, ID 83864

Plaintiff Disposition:
David Michael Donnelly
3662 Cocolalla Loop Road Cocolalla, ID 83813

Attorney Disposition:
Michael A Ealy Atty
PO Box 1336 Coeur d'Alene, ID 83814

Process Number: C09-01949

Court Number: CV06-445

I, Daryl D Wheeler, Sheriff of Bonner County Sheriff's Office do hereby certify that I received the foregoing Writ of Execution on the 12th day of November, 2009.

Dated the 7th day of December, 2009

Fees:
Service: 75.00
Mileage: 1.00
Other : 224.10
Total : 300.10

Daryl D Wheeler, Sheriff
Bonner County Sheriff's Office, IDAHO
BY: *Rosa Moore*
Authorized Representative
Civil Division

Comments
11/17/09 Mailed instructions to defendant. cmw

RAMSDEN & LYONS, LLP
700 Northwest Blvd.
P.O. Box 1336
Coeur d'Alene, ID 83816-1336
Telephone: (208) 664-5818
Facsimile: (208) 664-5884
Michael A. Ealy, ISB #5619
Marc A. Lyons, ISB #3145

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT

2010 JUL 15 A 9:05

CLERK OF COURT
[Signature]

Attorneys for Defendants Donnelly

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY
COMPANY, an Iowa Corporation,

Plaintiff,

v.

RIMAR CONSTRUCTION INC., an Idaho
Corporation; and DAVID and KATHY
DONNELLY, husband and wife;

Defendants.

CASE NO. CV-07-00885

**DEFENDANT'S OBJECTION TO
PLAINTIFF'S MOTION FOR
EXTENSION OF TIME AND
CONTINUANCE OF HEARING**

COME NOW Defendants David and Kathy Donnelly, by and through their counsel of record, and objects to the Plaintiff's Motion for Extension of Time and Continuance of Hearing on the following grounds:

1. The Donnellys are prejudiced by the Plaintiff's Motion To Continue. The court can take notice of the record herein and record in the Underlying Litigation in Donnelly v. Rimar Construction, Inc. et al., Bonner County CV-06-00445 and recognize that the Donnellys have been involved in this instant litigation since its inception in 2007 and the Underlying Litigation

since 2006. Having prevailed in the Underlying Litigation and obtained a substantial judgment (\$425,545.44) against Rimar Construction, Inc. ("RCI"), the Donnellys are judgment creditors of RCI, whose recorded judgment remains unsatisfied. To date, EMC, has vigorously contested any duty to pay the Donnelly judgment on behalf of its insured, RCI and, to date, has never made any payment to Donnelly in an effort to satisfy their judgment, in whole or in part, thus forcing the Donnellys to continue to expend time and resources toward the satisfaction of their judgment through this action. Further delay prejudices the Donnellys' efforts to prosecute and defend this action and impedes their on-going efforts to satisfy their judgment.

2. EMC is represented by multiple attorneys. EMC is represented by both Mr. Reid and Mr. Claiborne of the firm Ringert Law Chartered. It is the Donnellys' position that since EMC has two attorneys working on this matter, the Plaintiffs have not and cannot demonstrate good cause as to why EMC cannot timely respond to the Donnellys' pending Motion to Reconsider.

3. EMC is not prejudiced by the Donnellys' Motion to Reconsider. It is the Donnellys' position that EMC has not shown any particular prejudice caused by the Donnellys' motion and has failed to demonstrate good cause for continuing that motion into the future for the sole convenience of EMC and to the noted prejudice of the Donnellys. The Donnellys' pending Motion to Reconsider doesn't prejudice or otherwise prevent EMC from pursuing its own motion at a later date should it decide to pursue one.

4. The Donnellys want their motion heard. The Donnellys want this litigation to reach resolution whether by motion practice or trial. Their pending Motion to Reconsider seeks to do that. The Donnellys do not want to have to endure any further or unnecessary delay in

moving this matter toward resolution. While a business entity, like EMC, may have a different perception of this action and timing of litigation matters, to individuals like Dave and Kathy Donnelly, this litigation (and the Underlying Litigation) has taken years and the expenditure of considerable resources and, therefore, EMC's motion to continue is perceived as one that is intended to cause them further delay and expense to their detriment and prejudice.


Therefore, the Donnellys would ask the Court to deny the Plaintiff's Motion to Continue and leave its pending Motion to Reconsider noted for hearing as scheduled.

Oral argument is requested on EMC's Motion to Continue.

DATED this 14 day of July, 2010.

RAMSDEN & LYONS, LLP

By


Michael A. Ealy, Of the Firm
Attorneys for Defendants Donnelly

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14 day of July, 2010, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

James G. Reid
David P. Claiborne
Ringert Clark Chartered
P.O. Box 2773
Boise, ID 83701-2773

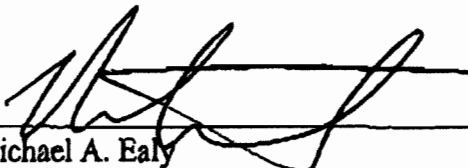
US Mail
 Overnight Mail
 Hand Delivered
 Facsimile (208) 342-4657

Stephen D. Phillabaum
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421 W. Riverside, Suite 900
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Brent C. Featherston
Featherston Law Firm
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 Facsimile (208) 263-0400



Michael A. Ealy

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Facsimile: (208) 664-5884
Michael A. Ealy, ISB #5619
Marc A. Lyons, ISB #3145

Attorneys for Defendants Donnelly

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2010 JUL 15 P 3:33

MARIE SCOTT
CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY
COMPANY, an Iowa Corporation,

Plaintiff,

v.

RIMAR CONSTRUCTION INC., an Idaho
Corporation; and DAVID and KATHY
DONNELLY, husband and wife,

Defendants.

CASE NO. CV-07-00885

**ORDER GRANTING DEFENDANT
DONNELLY'S MOTION TO
AMEND ANSWER AND
COUNTERCLAIM**

This matter having come before the Court on the Defendants' Dave and Kathy Donnelly's Motion to Amend Answer and Counterclaim, and the Court having considered the pleadings filed both in support and opposition thereto, and having considered the oral arguments of the parties both in support and opposition thereto, and having considered the record on file herein, and for those reasons stated on the record in open court;

IT IS HEREBY ORDERED that Defendant Donnelly's Motion to Amend Answer and Counterclaim is hereby **GRANTED** and the Donnelly's are granted leave to file their Second Amended Answer, Counterclaim and Cross Claim as proposed.

DATED this 15th day of July, 2010.


Steve Verby, District Court Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16 day of July, 2010, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

James G. Reid
David P. Claiborne
Ringert Clark Chartered
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Brent C. Featherston
Featherston Law Firm
113 South Second Avenue
Sandpoint, ID 83864

US Mail
 Overnight Mail
 Hand Delivered
 Facsimile (208) 263-0400

CLERK OF THE DISTRICT COURT

Linda Appels
Deputy Clerk

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2010 JUL 16 A 8:36

MARKIE SCOTT
CLERK DISTRICT COURT

DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

**EMPLOYERS MUTUAL CASUALTY)
COMPANY, an Iowa corporation,)
)
Plaintiff,)
)
vs.)
)
RIMAR CONSTRUCTION, INC., an)
Idaho corporation; and DAVID and)
KATHY DONNELLY, husband and wife,)
)
Defendants.)

---**

Case No. CV-2007-0000885

ORDER ON MOTION TO CONTINUE

The court has before it a motion to continue David and Kathy Donnellys' motion for reconsideration and an objection to that motion. The motion for reconsideration is presently scheduled for hearing on July 21, 2010.

The Donnellys' objection to continuing the hearing is based on the underlying supposition that the court will reconsider and then conclude that the previous order denying summary judgment will be withdrawn and that summary judgment will be granted in the Donnellys' favor. The Donnellys' main objection is that further delay is prejudicial to them.

ORDER ON MOTION TO CONTINUE- 1.

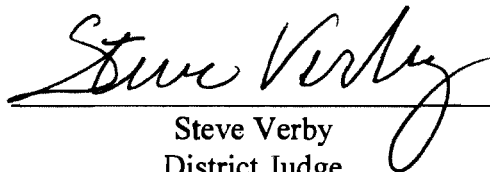
On July 7, 2010, the court granted the Donnellys' motion to amend its pleadings to allege additional causes of action. The new allegations resulted in a delay due to the fact that the opposing parties were entitled to have adequate time to conduct discovery and file pretrial motions in regard to the new causes of action. Now that a trial is scheduled to begin on April 25, 2011, it appears to be prudent to have the motion to reconsider fully briefed by all parties before oral argument occurs.

NOW THEREFORE, recognizing that a motion to continue is addressed to the sound discretion of the trial court, for the reason that additional briefing is desirable and for the reason that a continuance will allow the court time to conduct further research on the issues raised,

IT IS ORDERED that Employers Mutual Casualty Company's motion to continue the hearing on the motion for reconsideration is granted.

IT IS FURTHER ORDERED that the Donnellys' motion to reconsider shall be heard at 10:00 a.m., on September 8, 2010.

DATED this 16th day of July, 2010.


Steve Verby
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was faxed, this 16 day of July, 2010, to:

James G. Reid
David P. Claiborne
Ringert Clark Chartered

Faxed 208-342-4657

Michael A. Ealy
Ramsden & Lyons, LLP

Faxed 208-664-5884

Stephen D. Phillabaum
Phillabaum Ledlin, Matthews & Sheldon

Faxed 509-625-1909

Brent C. Featherston
Featherston Law Firm

Faxed 208-263-0400

Linda Appel
Deputy Clerk

JAMES G. REID, ISB # 1372
DAVID P. CLAIBORNE, ISB # 6579
RINGERT LAW CHARTERED
455 South Third Street
P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
E-mail: dpc@ringertlaw.com

Attorneys for Plaintiff

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT

2010 JUL 26 A 11:16

CLERK
ap

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an Idaho
corporation; and **DAVID** and **KATHY
DONNELLY**, husband and wife; and **IVAN
RIMAR**, an individual;

Defendants.

Case No. CV-2007-00885

**PLAINTIFF'S REPLY TO SECOND
AMENDED ANSWER,
COUNTERCLAIM AND CROSS CLAIM**

COMES NOW the Plaintiff, Employers Mutual Casualty Company, by and through its attorneys of record, Ringert Law Chartered, and hereby answers, responds and replies to Defendant David and Kathy Donnelly's *Second Amended Answer, Counterclaim and Cross Claim* (herein "the Counterclaim"), filed on or about July 13, 2010, as follows:

PLAINTIFF'S REPLY TO SECOND AMENDED ANSWER, COUNTERCLAIM AND CROSS CLAIM - 1

ORIGINAL

PRELIMINARY STATEMENT

1

The Counterclaim sets forth both counterclaims directed at Plaintiff and cross claims directed at Defendants Rimar Construction, Inc. and Ivan Rimar. This Reply addresses only those allegations made as a counterclaim as against Plaintiff. To the extent any of the allegations of the cross claim are directed to Plaintiff, those allegations are denied.

RULE 12 DEFENSES

2

The Counterclaim fails to state a claim upon which relief may be granted and therefore ought to be dismissed with prejudice.

GENERAL DENIALS

3

Plaintiff denies each and every allegation and averment contained in the Counterclaim unless expressly admitted herein.

4

Paragraphs 1 through 14 of the Counterclaim set forth certain denials, defenses and affirmative defenses to which no response is required, but to the extent response is required, then those paragraphs are denied.

5

Plaintiff admits paragraphs 15, 16, 17, 18, 19, 20, 21, 23, 28, 35 and 41 of the Counterclaim.

6

With respect to paragraph 22 of the Counterclaim, Plaintiff admits it knew and recognized
PLAINTIFF'S REPLY TO SECOND AMENDED ANSWER, COUNTERCLAIM AND CROSS
CLAIM - 2

the Donnellys as potential claimants against RCI's commercial general liability policy, but the remainder of the allegations of paragraph 22 of the Counterclaim are denied.

7

With respect to paragraph 25 of the Counterclaim, Plaintiff admits the Donnellys are persons interested under the EMC CGL Policy whose rights, status or other legal relations are affected by the Policy and that the Donnellys are entitled to a declaration of their rights, status or other legal relations under the policy, but the remainder of the allegations of paragraph 25 of the Counterclaim are denied.

8

With respect to paragraph 26 of the Counterclaim, Plaintiff admits that it has not made any payments to Donnelly or the Court in effort to satisfy the Donnelly judgment, but the remainder of the allegations of paragraph 26 of the Counterclaim are denied.

9

With respect to paragraphs 29, 30 and 31 of the Counterclaim, the allegations contained thereat contain and set forth legal conclusions and argument to which no response is required, but to the extent response is required then Plaintiff denies the allegations set forth at paragraphs 29, 30 and 31 of the Counterclaim.

10

With respect to paragraph 34 of the Counterclaim, Plaintiff admits EMC and RCI entered into a Settlement Agreement dated August 17, 2009, a true and correct copy of which is attached to the Counterclaim as Exhibit B, the contents of which speak for itself, but the remainder of the allegations of paragraph 34 of the Counterclaim are denied.

PLAINTIFF'S REPLY TO SECOND AMENDED ANSWER, COUNTERCLAIM AND CROSS CLAIM - 3

11

Plaintiff lacks sufficient knowledge so as to form a belief as to the truth of the matters alleged at paragraphs 36, 37 and 38 of the Counterclaim, and therefore those allegations are denied.

AFFIRMATIVE DEFENSES

12

(Avoidance)

Defendants are not entitled to all or part of the relief they seek by way of their Counterclaim for the reason that the damages alleged in the Counterclaim reasonably could have been avoided by Defendants.

13

(Compliance)

Defendants should be denied all or part of the relief they seek by way of their Counterclaim for the reason that Plaintiff complied with all of the contractual requirements imposed upon it.

14

(Real Party in Interest)

With respect to all or part of the claims raised in the Counterclaim, Plaintiff is not the real party in interest.

15

(Failure to Mitigate Damages)

Defendants should be denied all or part of the relief they seek by way of their Counterclaim for the reason that Defendants have failed to mitigate any damages to which
PLAINTIFF'S REPLY TO SECOND AMENDED ANSWER, COUNTERCLAIM AND CROSS
CLAIM - 4

Defendants may have been entitled.

16

(Exception)

Defendants should be denied all or part of the relief they seek by way of their Counterclaim for the reason that the alleged damage or act was excepted from coverage under the applicable policies.

17

(Exclusion)

Defendants should be denied all or part of the relief they seek by way of their Counterclaim for the reason that the alleged damage or act was excluded from coverage under the applicable policies.

18

(Intentional Act)

Defendants should be denied all or part of the relief they seek by way of their Counterclaim for the reason that the injury to Defendants, if any, was caused by the intentional acts of Plaintiff's insured, for which no coverage is allowed or for which coverage would be against public policy.

19

(No Coverage)

Defendants should be denied all or part of the relief they seek by way of their Counterclaim for the reason that the applicable policies do not provide coverage for the alleged acts or damage.

PLAINTIFF'S REPLY TO SECOND AMENDED ANSWER, COUNTERCLAIM AND CROSS CLAIM - 5

(Reservation of Additional Affirmative Defenses)

Pursuant to Rule 11 of the IDAHO RULES OF CIVIL PROCEDURE, all possible affirmative defenses may not have been alleged and set forth herein because sufficient facts are not available at this time to form an adequate factual basis for the defenses, after Plaintiff has made reasonable inquiry to obtain such facts. Therefore, Plaintiff reserves the right to raise additional affirmative defenses as fact-gathering and discovery in this matter progresses.

COURT COSTS AND ATTORNEY FEES

Pursuant to IDAHO CODE § 12-101, and/or Rule 54(d) of the IDAHO RULES OF CIVIL PROCEDURE, Plaintiff is entitled to an award of litigation expenses and court costs incurred relative to the defense of this action.

In order to defend against this action, Plaintiff has retained the attorney services of Ringert Law Chartered.

Pursuant to IDAHO CODE §§ 12-120, 12-121, and/or 41-1839 and/or Rule 54(e) of the IDAHO RULES OF CIVIL PROCEDURE, Plaintiff is entitled to an award of litigation expenses and reasonable attorney fees incurred relative to the defense of this action.

WHEREFORE, Plaintiff **PRAYS** that Defendants David and Kathy Donnelly take nothing in or by way of the *Second Amended Answer, Counterclaim and Cross Claim*, that the same be dismissed with prejudice, and that Plaintiff be awarded its court costs, reasonable

PLAINTIFF'S REPLY TO SECOND AMENDED ANSWER, COUNTERCLAIM AND CROSS CLAIM - 6

litigation expenses and reasonable attorney fees incurred in defense of the same.

WAIVER OF JURY TRIAL


Plaintiff hereby makes a **WAIVER** of any and all rights to trial by jury of any facts or issues involved in this action.

RESERVATION OF RIGHT TO AMEND OR ADD CLAIMS

The foregoing constitutes the present full and complete reply of Plaintiff, but Plaintiff hereby reserves the right to seek amendment of the reply, and to possibly assert other claims and/or third party claims, as discovery is conducted and further facts are developed relative to the matters described and alleged in the *Second Amended Answer, Counterclaim and Cross Claim*.

DATED this 22nd day of July, 2010.

RINGERT LAW CHARTERED

by: 
James G. Reid
David P. Claiborne

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 22nd day of July, 2010 by the following method:

**STEPHEN D. PHILLABAUM
PHILLABAUM, LEDLIN, ET AL.**
421 West Riverside, Suite 900
Spokane, Washington 99201
Telephone: (509) 838-6055
Facsimile: (509) 625-1909
E-Mail: stevep@spokanelaw.com
Attorneys for Rimar Construction

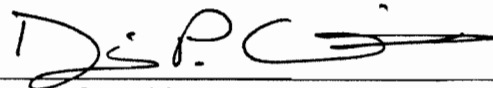
- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail

**MARC A. LYONS
MICHAEL A. EALY
RAMSDEN LYONS**
700 Northwest Blvd.
Coeur d'Alene, Idaho 83816-1336
Telephone: (208) 664-5818
Facsimile: (208) 664-5884
E-Mail: firm@ramsdentlyons.com
Attorneys for David and Kathy Donnelly

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail

**HONORABLE STEVE VERBY
DISTRICT JUDGE**
215 South 1st Avenue
Sandpoint, Idaho 83864
Telephone: (208) 265-1445
Facsimile: (208) 263-0896
E-Mail: n/a
Presiding Judge - Courtesy Copy

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail




James G. Reid
David P. Claiborne

RAMSDEN & LYONS, LLP
700 Northwest Blvd.
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Telephone: (208) 664-5818
Facsimile: (208) 664-5884
Michael A. Ealy, ISB #5619
Marc A. Lyons, ISB #3145

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT

2010 AUG 11 A 11:48

CLERK



Attorneys for Defendants Donnelly

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY
COMPANY, an Iowa Corporation,

Plaintiff,

v.

RIMAR CONSTRUCTION INC., an Idaho
Corporation; and DAVID and KATHY
DONNELLY, husband and wife,

Defendants.

CASE NO. CV-07-00885

**NOTICE OF INTENT TO TAKE
DEFAULT**

TO: Cross Defendant Rimar Construction, Inc. and its attorney of record, Stephen D.

Phillabaum:

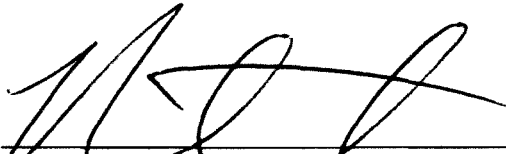
NOTICE IS HEREBY GIVEN that Cross Claimants David and Kathy Donnelly will make application to the Court for entry of default and default judgment against Cross Defendants Rimar Construction, Inc. on or after August 13, 2010, if it does not otherwise answer or plead in this action.

///

///

DATED this 10 day of August, 2010.

RAMSDEN & LYONS

By 
Michael A. Ealy, Of the Firm
Attorneys for Defendants Donnelly

CERTIFICATE OF SERVICE

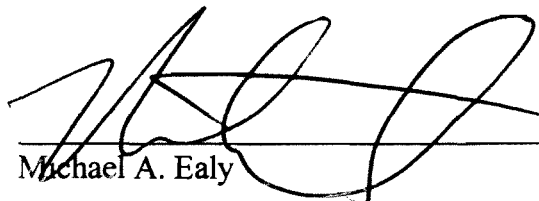
I HEREBY CERTIFY that on the 10 day of August, 2010, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

James G. Reid
David P. Claiborne
Ringert Clark Chartered
P.O. Box 2773
Boise, ID 83701-2773

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 Overnight Mail
 Hand Delivered
 Facsimile (208) 342-4657

Stephen D. Phillabaum
Phillabaum, Ledlin, Matthews & Sheldon
421 W. Riverside, Suite 900
Spokane, WA 99201

US Mail
 Overnight Mail
 Hand Delivered
 Facsimile (509) 625-1909


Michael A. Ealy

1 BRENT C. FEATHERSTON, ISB NO. 4602
2 FEATHERSTON LAW FIRM, CHTD.
3 113 South Second Avenue
4 Sandpoint, ID 83864
(208) 263-6866
(208) 263-0400 (Fax)

5 STEPHEN D. PHILLABAUM, ISB NO. 5127
6 PHILLABAUM, LEDLIN, MATTHEWS
7 & SHELDON, PLLC
8 421 West Riverside, Suite 900
9 Spokane, Washington, 99201
(509) 838-6055
(509) 625-1909 (Fax)

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.
2007 JUL 10 AM 11:17
MATTHEWS
CLERK DISTRICT COURT
DEPUTY

11 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
12 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER
13

14 EMPLOYERS MUTUAL CASUALTY
15 COMPANY, an Iowa corporation,

16 Plaintiff,

17 v.

18 RIMAR CONSTRUCTION, INC., an Idaho
19 corporation; and DAVID and KATHY
20 DONNELLY, husband and wife,

21 Defendants.

NO. CV-2007-00885

REPLY OF RIMAR
CONSTRUCTION, INC. and IVAN
RIMAR TO SECOND AMENDED
ANSWER, COUNTERCLAIM AND
CROSS CLAIM

22
23 COME NOW Defendants IVAN RIMAR and RIMAR CONSTRUCTION, INC.

24 (hereinafter "Defendants"), by and through their attorneys of record, Phillabaum, Ledlin,
25 Matthews & Sheldon, PLLC, and hereby answer, respond and reply to Defendant David and

26
27
28 DEFENDANTS' REPLY TO SECOND AMENDED
ANSWER, COUNTERCLAIM AND CROSS-CLAIM - 1

PHILLABAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC
ATTORNEYS AT LAW
421 W. RIVERSIDE AVE., SUITE 900
SPOKANE, WASHINGTON 99201-0418
TELEPHONE (509) 838-6055

1 Kathy Donnelly's *Second Amended Answer, Counterclaim and Cross Claim* (herein "the
2 Counterclaim"), filed on or about July 13, 2010, as follows:

3
4 PRELIMINARY STATEMENT

5 1

6 The Counterclaim sets forth both counterclaims directed at Plaintiff and cross claims
7 directed at Defendants Rimar Construction, Inc. and Ivan Rimar. This Reply addresses only
8 those allegations made as a counterclaim as against Rimar Construction, Inc. and Ivan Rimar.
9 To the extent any of the allegations of the counterclaim are directed to Defendants Rimar, those
10 allegations are denied.
11

12 RULE 12 DEFENSES

13 2

14 The Counterclaim fails to state a claim upon which relief may be granted and therefore
15 ought to be dismissed with prejudice.
16

17
18 GENERAL DENIALS

19 3

20 Defendants deny each and every allegation and averment contained in the Cross Claim
21 unless expressly admitted herein.
22

23
24
25
26
27 DEFENDANTS' REPLY TO SECOND AMENDED
28 ANSWER, COUNTERCLAIM AND CROSS-CLAIM - 2

PHILLABAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC
ATTORNEYS AT LAW
421 W. RIVERSIDE AVE., SUITE 900
SPOKANE, WASHINGTON 99201-0418
TELEPHONE (509) 838-6055

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4

Paragraphs 1 through 14 of the Cross Claim set forth certain denials, defenses and affirmative defenses to which no response is required, but to the extent response is required, then those paragraphs are denied.

5

Defendants admit paragraphs 15, 16, 17, 18, 19, 20, 21, 23, 28, 32, 33, 35 and 41 of the Cross Claim.

6

With respect to paragraph 22 of the Cross Claim, Defendants admit EMC defended Rimar Construction, Inc. through trial. Defendants are without sufficient information to admit or deny the remainder of paragraph 22 and therefore deny.

7

With respect to paragraph 25 of the Cross Claim, Defendants admit the Donnellys are persons interested under the EMC CGL Policy whose rights, status or other legal relations are affected by the Policy and that the Donnellys are entitled to a declaration of their rights, status or other legal relations under the policy, but the remainder of the allegations of paragraph 25 of the Cross Claim are denied.

8

With respect to paragraph 26 of the Cross Claim, Defendants admit that they have not made any payments to Donnelly or the court in effort to satisfy the Donnelly judgment, but the remainder of the allegations of paragraph 26 of the Cross Claim are denied.

DEFENDANTS' REPLY TO SECOND AMENDED
ANSWER, COUNTERCLAIM AND CROSS-CLAIM - 3

PHILLABAUM, LEDLIN, MATTHEWS
& SHELDON, PLLC
ATTORNEYS AT LAW
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SPOKANE, WASHINGTON 99201-0418
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With respect to paragraphs 29, 30 and 31 of the Cross Claim, the allegations contained thereat contain and set forth legal conclusions and argument to which no response is required, but to the extent response is required then Defendants deny the allegations set forth at paragraphs 29, 30 and 31 of the Cross Claim.

With respect to paragraph 34 of the Cross Claim, Defendants admit EMC and RCI entered into a Settlement Agreement dated August 17, 2009, a true and correct copy of which is attached to the Cross Claim as Exhibit B, the contents of which speak for itself, but the remainder of the allegations of paragraph 34 of the Counterclaim are denied.

Defendants lack sufficient knowledge so as to form a belief as to the truth of the matters alleged at paragraphs 36, 37 and 38 of the Cross Claim, and therefore those allegations are denied.

AFFIRMATIVE DEFENSES

Any cross claims asserted by the Donnellys in this action are barred by the doctrine of *res judicia*.

(Reservation of Additional Affirmative Defenses)

Pursuant to Rule 11 of the Idaho Rules of Civil Procedure, all possible affirmative defenses may not have been alleged and set forth herein because sufficient facts are not available at this time to form an adequate factual basis for the defenses, after Defendants have made reasonable inquiry to obtain such facts. Therefore Defendants reserve the right to raise additional affirmative defenses as fact-gathering and discovery in this matter progresses.

COURT COSTS AND ATTORNEY FEES

Pursuant to Idaho Code § 12-101, and/or Rule 54(d) of the Idaho Rules of Civil Procedure, Defendants are entitled to an award of litigation expenses and court costs incurred relative to the defense of this action.

In order to defend against this action, Defendants have retained the attorney services of Phillabaum, Ledlin, Matthews & Sheldon, PLLS.

Pursuant to Idaho Code §§ 12-20, 12-121, and/or 41-1839 and/or Rule 54(e) of the Idaho Rules of Civil Procedure, Defendants are entitled to an award of litigation expenses and reasonable attorney fees incurred relative to the defense of this action.

WHEREFORE, Defendants pray that Defendants David and Kathy Donnelly take nothing in or by way of the *Second Amended Answer, counterclaim and Cross Claim*, that the

DEFENDANTS' REPLY TO SECOND AMENDED ANSWER, COUNTERCLAIM AND CROSS-CLAIM - 5

PHILLABAUM, LEDLIN, MATTHEWS & SHELDON, PLLC
ATTORNEYS AT LAW
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1 same be dismissed with prejudice, and that Defendants be awarded their court costs, reasonable
2 litigation expenses and reasonable attorney fees incurred in defense of the same.

3
4
5 **WAIVER OF JURY TRIAL**

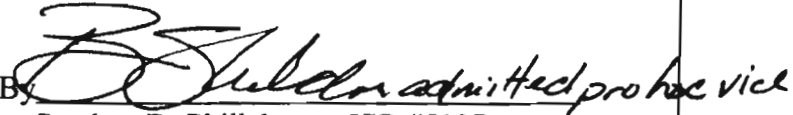
6 Defendants hereby make a WAIVER of any and all rights to try by jury of any facts or
7 issues involved in this action.

8 **RESERVATION OF RIGHT TO AMEND OR ADD CLAIMS**

9
10 The foregoing constitutes the present full and complete reply of Defendants, but
11 Defendants hereby reserve the right to seek amendment of the reply, and to possibly assert other
12 claims and/or third party claims, as discovery is conducted and further facts are developed
13 relative to the matters described and alleged in the *Second Amended Answer, Counterclaim and*
14 *Cross Claim.*

15
16 DATED August 12, 2010.

17 PHILLABAUM, LEDLIN, MATTHEWS
18 & SHELDON, PLLC

19
20 By  admitted pro hac vice
21 Stephen D. Phillabaum, ISB #5127
22 Attorneys for Rimar Construction, Inc.
23 and Ivan Rimar

24
25
26
27 DEFENDANTS' REPLY TO SECOND AMENDED
28 ANSWER, COUNTERCLAIM AND CROSS-CLAIM - 6

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, true and correct copies of the foregoing document were served by the method indicated below, and addressed to the following:

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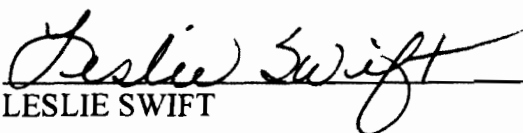
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Honorable Steve Verby
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Sandpoint, Idaho 83864
Presiding Judge – Courtesy Copy

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DATED August 12, 2010.


LESLIE SWIFT

Reply to Second Amended Answer Counterclaim CrossClaim.doc

DEFENDANTS' REPLY TO SECOND AMENDED
ANSWER, COUNTERCLAIM AND CROSS-CLAIM - 7

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STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an Idaho
corporation; and **DAVID** and **KATHY
DONNELLY**, husband and wife; and **IVAN
RIMAR**, an individual;

Defendants.

Case No. CV-2007-00885

**PLAINTIFF'S MOTION FOR
RECONSIDERATION**

COMES NOW the Plaintiff, Employers Mutual Casualty Company, by and through its attorneys of record, Ringert Law Chartered, and, **PURSUANT TO** Rules 11(a)(2) and 56 of the IDAHO RULES OF CIVIL PROCEDURE, **HEREBY MOVES THE COURT** for the reconsideration of its *Order Denying Cross-Motions for Summary Judgment*, entered April 7, 2010.

Good cause and proper grounds exist for entry of the relief requested hereby for the reasons

set forth in the *Memorandum Re: Motions for Reconsideration*, which is filed herewith.

This Motion is supported by the *Memorandum Re: Motions for Reconsideration*, which is filed herewith, as well as by all pleadings, affidavits and other documents on file with the Court herein, particularly those submitted relative to prior proceedings concerning summary judgment.

Oral argument on this Motion is respectfully requested.

DATED this 19th day of August, 2010.

RINGERT LAW CHARTERED

by: 

James G. Reid
David P. Claiborne

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this ~~19th~~ ²⁰ day of August, 2010 by the following method:

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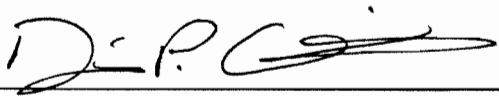
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DISTRICT JUDGE
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Presiding Judge - Courtesy Copy

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Attorneys for Defendants Donnelly

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY
COMPANY, an Iowa Corporation,

Plaintiff,

v.

RIMAR CONSTRUCTION INC., an Idaho
Corporation; and DAVID and KATHY
DONNELLY, husband and wife;

Defendants.

CASE NO.CV-07-00885

**DEFENDANT DONNELLY'S REPLY
MEMORANDUM IN SUPPORT OF
MOTION FOR
RECONSIDERATION**

COME NOW Defendants David and Kathy Donnelly, by and through their counsel of record, and submit this reply memorandum in support of their Motion for Reconsideration and in opposition to EMC's Motion for Reconsideration.

I. INTRODUCTION

The parties' prior cross motions for summary judgment and competing motions to reconsider address two issues: (1) how to characterize the jury's damage award in the Underlying Litigation for the purposes making a coverage determination; and (2) whether or not EMC has a supplementary duty to pay the Donnellys' attorney's fees and costs and interest on the judgment regardless of that characterization. Based on the undisputed factual record and by

their motion to reconsider, the Donnellys ask the court to address both of these issues and decide them, as a matter of law.

IV. LEGAL ARGUMENTS

A. THE UNDERLYING JURY VERDICT IS A GENERAL VERDICT WITH INTERROGATORIES AND IS UNALLOCATED FOR THE PURPOSE OF DETERMINING COVERAGE.

EMC argues that the underlying jury verdict is a "special verdict" and one that allocated liability and damages. While the underlying jury verdict is labeled as a "Special Verdict," pursuant to I.R.C.P. 49(b) and in substance, it is best characterized and recognized as a general verdict with interrogatories. Idaho Rule of Civil Procedure 49 distinguishes and describes each as follows:

(a) Special Verdicts and Interrogatories--Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. ...

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. ...

I.R.C.P. 49 (emphasis added).

EMC cited Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020 (9th Cir. 2003) which explains the distinction well under the similar F.R.C.P. 49. In Zhang, the Ninth Circuit Court of Appeals explained as follows:

A jury may return multiple general verdicts as to each claim, and each party, in a lawsuit without undermining the general nature of its verdicts. [citation omitted]. Although some general verdicts are more general than others, encompassing multiple claims, the key is not the number of questions on the verdict form, but whether the jury announces the ultimate legal result of each claim. If the jury announces only its ultimate conclusions, it returns an ordinary general verdict; if it makes factual findings in addition to the ultimate legal conclusions, it returns a general verdict with interrogatories. If it returns only factual findings, leaving the court to determine the ultimate legal result, it returns a special verdict.

Zhang, 339 F.3d at 1031 (citation omitted) (emphasis added).

As applied to the underlying verdict, the verdict announces the ultimate legal result of each claim and makes factual findings by answer to certain interrogatories. Therefore, it is properly characterized as a general verdict with interrogatories. Since it doesn't return only the jury's factual findings leaving the court to determine the ultimate legal result, it is not a special verdict.

As applied to this case, there is no dispute that the underlying jury verdict apportioned liability to RCI as set forth on the face of the verdict and the court entered judgment accordingly. However, because the jury was not asked by special interrogatory to further itemize or characterize its damage award, it remains unknown whether it was the jury's intent to compensate the Donnellys for property damage, or economic loss or both. This has left the parties to argue how to characterize the jury's damage award for the purposes of determining whether EMC owes a duty to pay those damages.

By their motion to reconsider, the Donnellys ask the court to revisit its earlier decision on this issue by looking at the Idaho case authority set forth in Buckley v. Orem, 112 Idaho 117, 730 P.2d 1037 (Ct. App. 1986). In Buckley, the Idaho Court of Appeals noted that the "precise issue is the extent of Nationwide's liability under its insurance contract to pay the final judgment against the Oremes for unapportioned damages." Id. at 119. Similarly, in this case, the issue could be stated as: The extent of EMC's liability under its insurance contract to pay the final judgment against RCI for unapportioned damages.

The plain meaning of the word "apportion" is "to divide and assign according to some plan or proportion; allot; partition." Am. Hert. Dict., 1979, p. 64. The distinction, if any, in Buckley, is that the total damage award was "unapportioned" as between the injured plaintiffs Kelly and Betsy Buckley, whereas, in this case, the damage award of \$128,611.55 is apportioned as to RCI, but is otherwise "unapportioned"--or incapable of division or assignment--as a covered or uncovered claim under EMC's policy. Therefore, despite this distinction, this case is analogous to Buckley because Buckley addresses the issue of how the court is to allocate an underlying jury verdict when the verdict is incapable of being allocated as either a covered or uncovered claim under an insurance policy.

If the court follows Buckley, then the initial burden is on the Donnellys to first show the claim is "apparently" within EMC's policy coverage. Buckley, 112 Idaho at 122 (emphasis added). The Donnellys can and have met this burden by the fact that EMC undertook to defend RCI and Ivan Rimar based on the Donnellys' claims being apparently covered under the EMC policy. Otherwise, EMC would have simply denied the claim. This apparent coverage served as a basis for the stay entered in this action pending the trial in the Underlying Litigation. In other words, if there was no apparent coverage, there was no basis

to stay this action. In addition, the Donnellys alleged that RCI's poor workmanship had rendered portions of the Donnellys' residence uninhabitable, unusable and unsafe, causing a loss of use of those portions of the home, which EMC recognized as a potential property damage claim. (See Mem. Supp. Mot. Summ. Judgment, p.4, ¶ ¶ 6, 12). Further, the Donnellys' claims included property damage for heat mats that RCI cut when attempting to repair the Donnellys' existing slate floor for damages arising from a "cracked" façade engineered by Ivan Rimar. (Id. at p. 3, ¶ 5). Therefore, the Donnellys can or have met any initial burden of showing their claim against RCI was apparently within EMC's policy coverage.

This necessarily shifted the burden to EMC to show a substantial likelihood of overpayment should the Donnellys' unallocated verdict be paid. However, unlike Nationwide in Buckley, EMC can't meet this burden because the underlying verdict makes no allocation or apportionment of the damages that would otherwise allow EMC to show any risk of overpayment should the underlying verdict be paid. This is because EMC's policy limit was \$1,000,000 per occurrence and the Donnellys' initial judgment of \$128,611.55 was well below and within EMC's stated policy limit. Notably, EMC's duty to make supplementary payments doesn't reduce its policy limits, so its supplementary duty to pay the Donnellys' attorney's fees and costs and interest on the judgment poses no risk of overpayment and further makes the Donnellys' argument that EMC's supplementary payments promises are "independent" of coverage under the policy.

In addition, to date there is no evidence in the record that EMC informed or otherwise sought to inform RCI of its interest in the verdict form in the Underlying Litigation and the risks to RCI in the event it sought an unallocated verdict. The Buckley decision and the case

authority cited therein recognizes the patent unfairness in allowing an insurer, like EMC, to control the defense of its insured and, in doing so, potentially escape liability at the expense of its insured and its insured's judgment creditor by obtaining an unallocated verdict that places an impossible burden on the insureds and insured's judgment creditors to prove up coverage.

As applied in this case, the court can find from the undisputed factual record that the Donnellys have met any initial burden to show their liability claims were apparently within EMC's policy coverage. Since EMC cannot meet its burden to prove a substantial likelihood of overpayment should the unallocated verdict be paid, the court can grant the Donnellys' motion for summary judgment and allocate the \$128,611.55 verdict as payable under the EMC policy because it would clearly fall within EMC's \$1,000,000 per occurrence policy limit. As previously noted, EMC's supplementary promise to pay the Donnellys' attorney's fees and costs and interest on the judgment does not reduce the limits of insurance and, therefore, has no effect on EMC's risk of overpayment.

However, should the court find that EMC can show a substantial likelihood of overpayment if the unallocated verdict was paid, then the court can further apply the rationale Buckley and Duke v. Hoch, 468 F.2d 973, 984 (5th Cir. 1972) to further relieve the Donnellys of their burden to prove coverage and place the burden on EMC to show that it informed RCI of its interest in the underlying verdict form and, if so, the court can then allocate the damages "as best it can" as instructed by the Buckley court. Buckley v. Orem, 112 Idaho 117, 125, 730 P.2d 1037, 1045 (Ct. App. 1986) (notably the Buckley court doesn't indicate how the trial court is to allocate the damages, only stating that it do "the best it can"). As recommended in Duke, this might include the court reviewing the Underlying Litigation trial

transcript containing evidence on which the jury based its verdict so the court, as the finder of fact and “as best it can,” can make the allocation the jury would have made had it been given the opportunity to do so. See Duke v. Hoch, 468 F.2d 973, 984 (5th Cir. 1972).

The Buckley and Duke decisions are instructive and offer a reasoned approach as to how the court might best apportion a jury verdict that is otherwise unapportioned or unallocated from the standpoint of insurance coverage. EMC’s argument that all the damages are contractual or otherwise economic in nature seems to miss the mark given that under Special Verdict Question No. 26 the jury awarded the Donnellys \$0 in monetary damages for breach of contract despite finding a material breach of contract in answer to Question No. 3.

The fact that the jury awarded damages for breach of the implied warranty under Question No. 30 necessarily implies the jury intended those damages to flow from the breach of the implied warranty found in answer to Question No. 6 and for something other than RCI’s breach of contract. From this, it is reasonable to infer that the jury intended its compensatory award to include monies for “property damage” as opposed to just contractual or pure economic loss damage. Since the underlying verdict form leaves the jury’s intent in this regard to speculation, the Buckley and Duke decisions provide a reasoned approach to move the argument past argumentative speculation regarding the jury’s intent.

B. EMC HAS AN INDEPENDENT AND SUPPLEMENTARY DUTY TO PAY THE DONNELLYS’ ATTORNEY’S FEES AND COSTS TAXED AS COSTS AND INTEREST ON THE JUDGMENT.

The EMC policy plainly states that EMC has “[n]o other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments—Coverages A and B.” (emphasis added). The policy plainly promises the following:

SUPPLEMENTARY PAYMENTS – COVERAGES A AND B

1. We [EMC] will pay, with respect to any claim we investigate, settle, or any “suit” against an insured we defend [*i.e. EMC defended RCI in the Underlying Litigation.*]:

e. All costs taxed against the insured in the “suit.” [*i.e. attorney’s fees and costs taxed against RCI in the Underlying Litigation.*]

g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in the court the part of the judgment that is within the applicable limit of insurance. [*i.e. All interest on the full amount of the Donnelly judgment.*]

These payments will not reduce the limits of insurance. [*i.e. The obligation to make supplementary payments is an independent promise from the promise to pay damages for bodily injury or property damage.*]

(Reid Aff. 11/9/09 Ex. A.) (emphasis added.)

In Idaho, insurance policies are interpreted under general rules of contract construction subject to certain special rules of construction. Arregon v. Farmers Ins. Co. of Idaho, 145 Idaho 459, 461, 180 P.3d 498, 500 (2008) (citation omitted.) In general, for a policy to be ambiguous it must be reasonably subject to conflicting interpretations. Id. (citations omitted). Because insurance policies are contracts of adhesion, a special rule of construction is “that any ambiguity that exists in the contract must be construed most strongly against the insurer.” Id. (citation omitted.) Whether an insurance policy is ambiguous or not is a question of law. Id. (emphasis added).

The Donnellys’ position has always been that the Supplementary Payments language in the EMC policy is plain and unambiguous. Therefore, it is and remains the Donnellys’ position that the court can decide, as a matter of law, whether EMC has an independent and supplementary duty to pay the Donnellys’ attorney’s fees and costs taxed against RCI and

interest on the judgment, accordingly. It is and remains the Donnellys' position that there is no ambiguity in the Supplementary Payments language in the EMC policy and this construction and conclusion finds direct support in the Idaho Supreme Court's decision of Mutual of Enumclaw v. Harvey, 115 Idaho 1009, 772 P.2d 216 (1989). The Donnellys note that EMC has never cited any Idaho authority contrary to Harvey.

Specifically, the Donnellys further note that: EMC has never cited to the court any specific language in its policy that conditions its supplementary promises to pay on coverage under either Coverage A or B. This is because no such language exists. Instead, EMC relies upon a policy argument recognized by Division Three of the Second Appellate District of the California Court of Appeals in State Farm v. Minatarsih, 95 Cal.Rptr.3d 845 (Cal. Ct. App. 2009). However, the policy recognized in Minatarsih ignores the plain language in the underlying insurance policy and, therefore, is in direct contravention of Idaho's rules of contract construction and the Harvey decision. Therefore, EMC's argument for the court to follow Minatarsih, as opposed to Harvey, is a clear invitation to error because it asks the court to ignore Idaho law. EMC's policy argument is not new and was plainly rejected by the Idaho Supreme Court in Harvey.

As previously argued, in Harvey, the Idaho Supreme Court adopted then District Judge Schroeder's analysis that the plain language of the supplemental payments provision in the Mutual of Enumclaw policy implied that the "provision contained therein are separate from and in addition to the basic policy coverage and, therefore, ... Mutual of Enumclaw's obligation to pay such costs is unaffected by the fact that the policy does not cover Oakes' intentionally tortuous conduct." Harvey, 115 Idaho at 1012. Judge Schroeder succinctly reasoned that the "[l]anguage in the policy of this case does not indicate that payment of costs is conditioned upon

a final determination that the policy covers the insured's conduct. The language of the policy says that the Company will pay all costs taxed against the insured in any suit defended by the Company." Id. (emphasis added). This is the same analysis and reasoning the Donnellys have applied to the plain and unambiguous language of the EMC policy. The Donnellys ask the court to apply this same analysis and reasoning in reconsideration of their motion for summary judgment.

EMC's sole reliance on the policy decision in Mintarsih is noticeably weakened by the Division Two of the Second Appellate District of the California Court of Appeals decision of Employers Mutual Casualty Company v. Philadelphia Indemnity Insurance Company, 86 Cal.Rptr.3d 383 (Cal. Ct. App. 2008) whereby EMC was awarded \$400,000 against Philadelphia based on the same supplementary payments language in the Philadelphia CGL policy that is found in EMC's own policy at issue in this case. The point being that EMC will gladly benefit from the plain language of a CGL policy's supplementary payments language when it is to EMC's own financial advantage but it will wholesale abandon that same plain language when it is applied to its own financial detriment.

It is and remains the Donnellys' position that the court can rule, as a matter of law, that EMC has a supplementary duty to pay the Donnellys' attorney's fees and costs in the amount of \$296,933.89 taxed as costs against RCI regardless of whether or not there is coverage for the underlying jury verdict of \$128,611.55. In addition, since EMC has never paid, offered to pay, or deposited with the court any part of the Donnellys' judgment that is within the applicable limit of insurance (there is no risk overpayment on a \$1,000,000 limit), EMC should pay interest on the full amount of the judgment since the entry of the judgment.

C. RCI AND IVAN RIMAR'S COUNTERCLAIMS SHOULD NOT BE DISMISSED.

In EMC's prior motion for summary judgment, it argued for a dismissal of RCI's counterclaims based solely on its Settlement Agreement with RCI and Ivan Rimar. In reply to EMC's motion, the Donnellys argued that the Settlement Agreement was unenforceable as a fraudulent conveyance and, that to the extent EMC intended to rely on the Settlement Agreement to avoid paying the Donnellys as judgment creditors of RCI, the Donnellys asked the Court to find the agreement void to the extent it operates as a fraudulent conveyance against the Donnellys. Since that time, the Donnellys have been granted leave to amend their answer and assert a counterclaim seeking to void the Settlement Agreement as a fraudulent conveyance and have since pled this claim against EMC, RCI and Ivan Rimar as parties to the Settlement Agreement.

Because the Donnellys have a pending counterclaim seeking to void the Settlement Agreement, it would be improper for the court to grant EMC summary judgment based on that same Agreement and dismiss RCI's counterclaims with prejudice creating a *res judicata* or claim preclusion defense for EMC in the event the Agreement is later set aside as a fraudulent conveyance. Notably, neither EMC nor RCI/Ivan Rimar made any prior attempt to submit a stipulation for dismissal based on the terms of the Settlement Agreement. This is arguably because both EMC and RCI/Ivan Rimar treated the Agreement as having transferred, by way of release or otherwise, RCI and Ivan Rimar's counterclaims to EMC. Regardless of EMC's arguments to the contrary, it appears EMC is in control of RCI and Ivan Rimar's counterclaims under the terms of the Settlement Agreement.

In sum, whether the Settlement Agreement is a fraudulent conveyance or not is a question of fact. See Idaho Code § 55-908. As a result, there are necessarily genuine issues of material

fact that would preclude dismissing RCI and Ivan Rimar's counterclaims against EMC based solely on a Settlement Agreement that may be determined to be a fraudulent conveyance as to the Donnellys as judgment creditors of RCI. At a minimum, the Donnellys should be given additional time under I.R.C.P. 56(f) to conduct discovery against EMC, RCI and Ivan Rimar in support of their fraudulent conveyance claim. Under the circumstances, this causes no material prejudice to EMC because it can renew its motion at a later date and advance of trial. At some point, the court can recognize the Settlement Agreement for what it is—an intended "safe harbor" to shelter EMC from paying the Donnellys in the event it lost on the merits of this action. Therefore the court must necessarily deny EMC's motion to reconsider this request which was already implicitly denied by the court previously.

CONCLUSION

The Donnellys respectfully ask the court to reconsider its prior Order Denying Cross-Motions for Summary Judgment and, in reconsideration of this motion and the Donnellys' prior Motion for Summary Judgment, grant the Donnellys summary judgment, in whole or in part, as a matter of law and deny EMC's motion to reconsider, accordingly.

DATED this 1 day of September, 2010.

RAMSDEN & LYONS, LLP

By


Michael A. Ealy, Of the Firm
Attorneys for Defendants Donnelly

CERTIFICATE OF SERVICE

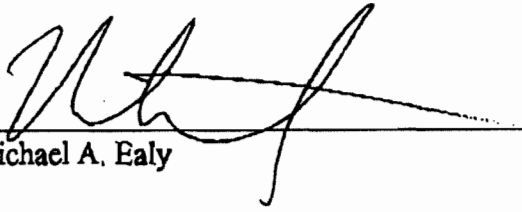
I HEREBY CERTIFY that on the 1 day of September, 2010, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Michael A. Ealy

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CLERK DISTRICT COURT

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DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF BONNER**

EMPLOYERS MUTUAL CASUALTY)
COMPANY, an Iowa corporation)
)
Plaintiff,)
)
v.)
)
RIMAR CONSTRUCTION, INC., an Idaho)
corporation; and DAVID and KATHY)
DONNELLY, husband and wife,)
)
Defendants.)

CASE NO. CV-2007-0000885

**ORDER re: MOTIONS FOR
RECONSIDERATION**

Partial summary judgment is granted in favor of Employers Mutual Casualty Company as to whether there is coverage for the claims of (1) breach of implied warranty of workmanship by Rimar Construction, Inc., and (2) violations of Idaho's Consumer Protection Act by Rimar Construction, Inc., for which the jury found liability in the underlying litigation. Neither of these claims are covered.

Partial summary judgment is granted in favor of David and Kathy Donnelly as to whether EMC is required to pay the attorneys' fees and court costs taxed against Rimar Construction, Inc., in the underlying litigation. Employers Mutual Casualty Company is responsible for the \$296,933.89 in attorneys' fees and costs previously awarded to the Donnellys, as well as any interest on that judgment which has accrued.

I. INTRODUCTION

On November 12, 2009, Plaintiff Employers Mutual Casualty Company (hereafter, "EMC") filed a Motion for Summary Judgment, seeking a declaratory judgment holding that EMC has no duty or responsibility to pay any of the damages awarded to David and Kathy Donnelly (hereafter, "Donnellys") in the underlying litigation, *Donnelly v. Rimar Construction, Inc., et al.*, Bonner County Case No. CV-2006-0445.

On December 21, 2009, the Donnellys filed a Motion for Summary Judgment, requesting that EMC be ordered to pay the Donnellys' judgment, in whole or in part, on behalf of its insured, Rimar Construction, Inc. (hereafter, "RCI").

On April 7, 2010, the Court entered an "Order Denying Cross-Motions for Summary Judgment," determining that summary judgment was improper because: (1) the parties failed to meet their respective burdens of persuasion; and (2) inferences could be drawn from the language of the policy in relation to the facts presented which could result in conflicting results.

On July 8, 2010, the Donnellys filed a Motion for Reconsideration of the order denying summary judgment. On August 23, 2010, EMC also filed a Motion for Reconsideration. The parties' motions for reconsideration came before the Court for hearing on September 8, 2010.

Judicial notice is taken of the facts presented in the underlying litigation, the legal theories relied upon by the Donnellys as reflected in their Amended Complaint, and the jurors' conclusions set forth in their Special Verdict. The parties also enumerated undisputed facts in their requests for summary judgment. These undisputed facts have also been considered.

II. STANDARD

A motion for reconsideration of an interlocutory order is governed by Idaho Rule of Civil Procedure 11, which provides, in part:

A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry of the final judgment. A motion for reconsideration of any order of the trial court made after entry of final judgment may be filed within fourteen (14) days from the entry of such order; provided, there shall be no motion for reconsideration of an order of the trial court entered on any motion filed under Rules 50(a), 52(b), 55(c), 59(a), 59(e), 59.1, 60(a), or 60(b).

I.R.C.P. 11(a)(2)(B).

The Idaho Supreme Court, in *Van v. Portneuf Medical Center*, 147 Idaho 552, 212 P.3d 982 (2009), set forth the standard for granting or denying a motion for reconsideration:

A decision of whether to grant or deny a motion for reconsideration made pursuant to Idaho Rule of Civil Procedure 11(a)(2)(B) is left to the sound discretion of the trial court. *Commercial Ventures, Inc. v. Rex M. & Lynn Lea Family Trust*, 145 Idaho 208, 212, 177 P.3d 955, 959 (2008).

Id. at 560, 212 P.3d at 990.

The standard to be applied for granting or denying a motion for summary judgment is outlined in the April 7, 2010, Order.

III. DISCUSSION

In essence, the Donnellys have three claims in this action. They all relate to their overarching position that EMC is obligated under its insurance policy to pay for the damages awarded in the underlying litigation.

The Donnellys' claims are summarized as follows:

1. A claim for \$126,611.55 in actual damages awarded in the underlying litigation for RCI's breach of the implied warranty of workmanship;
2. A claim for \$2,000.00 in statutory damages awarded in the underlying litigation for RCI's violations of the Idaho Consumer Protection Act; and
3. A claim for \$296,933.89 in attorneys' fees and court costs taxed against RCI in the underlying litigation.

These claims will each be addressed in the sequence set forth above.

A. There Is No Coverage For Damages Sustained By The Donnellys For Breach Of The Implied Warranty Of Workmanship.

To understand why the jury's award of compensatory damages for breach of the implied warranty of workmanship is a contract based claim involves a review of the jury's decision as related to the instructions provided, the causes of action pled by the Donnellys, the law of the underlying case, and Idaho's appellate decisions.

1. The Jury Instructions

In the underlying litigation, the jury found there was a breach of contract, but awarded no damages for that specific cause of action. The jury verdict of \$126,611.55 was based solely on the legal theory of breach of the implied warranty of workmanship.

The jury was given the following instructions on the implied warranty of workmanship:

Instruction No. 47

The Donnellys allege that Rimar Construction, Inc., breached implied warranties by failing to perform the agreed upon construction in a workmanlike manner.

Instruction No. 48

An implied warranty is an obligation imposed by the law when there has been no representation or promise. Such a warranty arises by operation of law because of the circumstances.

Instruction No. 49

The implied warranty of workmanship imposes a duty to perform in a workmanlike manner.

Instruction No. 50

In a construction contract, there is an implied warranty that the work is to be completed in a workmanlike manner. Resolution of the question of whether the buyer has received that which he bargained for does not depend upon the status of the buyer or ultimate user; it depends upon the quality of the dwelling delivered and the expectations of the parties.

The implied warranty does not require a builder to build a perfect house free from any and all minor defects.

Instruction No. 51

With regard to the claim of the implied warranty of workmanship, the Donnellys have the burden of proving each of the following:

1. A contract existed between Rimar Construction, Inc., and the Donnellys;
2. Rimar Construction, Inc., rendered services to the Donnellys;
3. Rimar Construction, Inc., failed to perform services in a workmanlike manner;
4. Failing to perform services in a workmanlike manner by Rimar Construction, Inc., was the proximate cause of damages to the Donnellys; and
5. The elements of damage, and the amount thereof.

If you find from your consideration of all the evidence that the foregoing elements have been proven, then you must find in favor of the Donnellys on this issue. If you find from your consideration of all the evidence that any of the foregoing propositions has not been proven, your verdict should be for Rimar Construction, Inc.

2. The Donnellys' Amended Complaint

In their Amended Complaint, the Donnellys alleged that there were a large number of material breaches of the contract and that such breaches resulted in various accidental, incidental, collateral, consequential, and/or negligent damage and injury. (*Plaintiffs' Amended Verified Complaint*, at ¶ 10). As a result of the alleged breaches, the Donnellys claimed in their Amended Complaint that they sustained “damage to property, physical injury to tangible property,” “loss of use regarding said property,” “damages for the diminution to the value of the home,” as well as “property damage to the original structure of the Plaintiffs’ residence” (*Plaintiffs' Amended Verified Complaint*, at ¶¶ 11 and 12).

In regard to the breach of the implied warranty claim, the Donnellys alleged:

33. Implied in law in the services and materials provided by Defendant RCI, or overseen by RCI, is the warranty of workmanship that all work performed will meet or exceed the standards of workmanship expected for the construction trades involved.
34. Additionally, Defendant Ivan Rimar provided express and implied warranties that the design and construction of the front and side porches would be structurally sound and adequate for the home.

(*Plaintiffs' Amended Verified Complaint*, at ¶¶ 33 and 34).

3. Previous Rulings – The Law of the Underlying Case

After the verdict and the original judgment were entered, the Donnellys were awarded costs as a matter of right, as well as attorneys’ fees totaling \$296,933.89. This award was based

on a number of factors, including, but not limited to:

- (1) The basic issue litigated by the parties was whether the construction was completed in a workmanlike manner;
- (2) The Donnellys proved that RCI failed to adequately perform the work it contracted to perform;
- (3) The agreement between the Donnellys and RCI was a commercial transaction;
- (4) Costs and fees were awarded because the gravamen of the action and the resulting verdict was based on a contract based commercial transaction;
and
- (5) The jury did not return a verdict in favor of the Donnellys on a tort based legal theory.

The above ruling awarding costs and fees was not appealed.

4. Idaho's Appellate Decisions Characterizing Actions as Tort or Contract

In the precise context presented in this case, there are no Idaho appellate cases which have decided whether the breach of the implied warranty of workmanship is contract based or tort based.

In *Sumpter v. Holland Realty, Inc.*, 140 Idaho 349, 93 P.3d 680 (2004), the Idaho Supreme Court examined case law and quoted *Taylor v. Herbold*, 94 Idaho 133, 138, 483 P.2d 664, 669 (1971), which states:

The law governing the ability to obtain remedies for breach of contract, as well as tortious behavior, is confusing, with few, if any, court decisions on the subject. Ordinarily, a breach of contract is not a tort. A contract may, however, create a state of things that furnishes the occasion for a tort. 38 Am.Jur. 662, Negligence § 20. If the relation of the plaintiff and the defendants is such that a duty to take due care arises therefrom irrespective of contract and the defendant is negligent, then the action is one of tort. To found an action in tort, there must be a breach of duty apart from the nonperformance of a contract. 52 Am.Jur. 379, Torts, § 26.

Id. at 353, 93 P.3d at 684.

The *Sumpter* Court went on to state:

As *Taylor* states above, “[i]f the relation of the plaintiff and the defendants is such that a duty to take due care arises therefrom irrespective of contract and the defendant is negligent, then the action is one of tort.” Citing the United States Supreme Court, this Court further held:

The distinction is that: If the cause of complaint be for an act of omission or nonfeasance, which, without proof of a contract to do what has been left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists), then the action is founded upon contract, and not upon tort.

94 Idaho at 138, 483 P.2d at 669, quoting *Atlantic & P. Railway Co. v. Laird*, 164 U.S. 393, 399, 17 S.Ct. 120, 122, 41 L.Ed. 485, 487 (1896). See also *Hudson v. Cobbs*, 118 Idaho 474, 477-78, 797 P.2d 1322, 1325-26 (1990). It can also be said that if a cause of action for breach of a duty based on a contractual promise could also be maintained without the contract by virtue of a statutory or common law duty, then the action is founded upon tort, not contract.

Id. at 353-354, 483 P.2d at 684-685.

A complication in analysis is attendant to the characterization of the cause of action when considering whether there was solely “economic loss” as opposed to “property damage.” In *Aardema v. U.S. Dairy Systems, Inc.*, 147 Idaho 785, 215 P.3d 505 (2009), the Idaho Supreme Court discussed this issue:

Economic loss is distinguishable from property damage, which would be recoverable under a tort claim. “Property damage encompasses damage to property other than that which is the *subject of the transaction*.” *Ramerth v. Hart*, 133 Idaho 194, 196, 983 P.2d 848, 850 (1999) (emphasis in original) (quoting *Salmon Rivers Sportsman Camps, Inc.*, 97 Idaho at 351 544 P.2d at 309). This Court has not defined the “subject of the transaction,” instead relying on factual comparisons from previous decisions. *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 301, 108 P.3d 996, 1001 (2005) (finding that the house and the lot are the subject of the transaction and, therefore, constitute economic loss where the allegation is damage to the house from the settling foundation); *Ramerth*, 133 Idaho at 197, 983 P.2d at 851 (finding that repair of the engine is the subject of the transaction if the allegedly negligent repair subsequently causes need for further repair to the engine); *Duffin*, 126 Idaho at 1007, 895 P.2d at 1200 (finding that no property loss, other than property which is the subject of the transaction, existed when delivered and certified seed is found to contain bacterial ring rot); *Tusch Enter. v. Coffin*, 113 Idaho 37, 41, 740 P.2d 1022, 1026 (1987) (holding that allegations of negligent design and construction of a duplex is barred by the economic loss rule); *Oppenheimer Indus., Inc.*, 112 Idaho at 426, 732 P.2d at 664 (holding that tort action may be maintained when the plaintiff alleged that his cattle were sold without his permission because the cattle brand inspector failed to verify cattle ownership prior to the sale). This line of cases delineates a clear pattern that this Court has implicitly defined the “subject of the transaction” by the subject matter of the contract.

Id. at 791, 215 P.3d at 511 (footnote omitted).

Other jurisdictions have held that the breach of the implied warranty of workmanship is contractual in nature and not tortious. In Illinois, it was determined that “recovery generally cannot be had in tort for what is termed purely economic loss. Economic loss has been defined as damages for inadequate value and/or costs of repair.” *Meyers v. Woods*, 374 Ill. App. 3d 440, 448, 871 N.E.2d 160, 168 (Ill. App. 3 Dist. 2007) (citations omitted). In *Meyers*, the Illinois 3rd district appellate court stated:

Illinois courts have rejected a tort cause of action in cases where a construction contract is breached because the work was not performed in a workmanlike manner. Our supreme court has held that when a plaintiff seeks

recovery for faulty construction alleging the defendant failed to perform in a workmanlike manner, which resulted in eventual deterioration and the losses alleged are solely economic, there can be no recovery under a negligence theory. *Foxcroft Townhome Owners Association v. Hoffman Rosner Corporation*, 96 Ill.2d 150, 156-57, 70 Ill.Dec. 251, 449 N.E.2d 125, 128 (1983). ... In Illinois, tort-based theories of recovery are generally inappropriate if the damages suffered are purely economic and the subject matter of contract.

...

The ordinary rule applied in building contract cases is that a builder is held only to a duty of substantial performance in a workmanlike manner, and that failure to perform in a workmanlike manner constitutes a breach of contract entitling the plaintiff to damages. *Mayfield v. Swafford*, 106 Ill.App.3d 610, 612, 62 Ill.Dec. 155, 435 N.E.2d 953, 954 (1982). Thus, once a breach of contract has been found by the defendant's failure to perform in a workmanlike manner, the issue then becomes calculation of damages.

Id. at 449, 453, 871 N.E.2d at 168, 172.

In *Heath v. Palmer*, 181 Vt. 545, 915 A.2d 1290 (2006), the Vermont Supreme Court ruled that the trial court properly rejected the plaintiff homeowners' claim against the defendant property development company for "contractor's negligence." The court found that "plaintiffs' remedy for the purely economic losses resulting from the reduced value or costs of repairs of the construction defects sounded in contract rather than tort." *Id.* at 550, 915 A.2d at 1296. In *Heath*, the Vermont Supreme Court also recognized that "[t]he limitation to contract remedies in this context is the general rule in most other jurisdictions, as well," including, Arizona, Idaho, Illinois, Kansas, Nevada, and Utah. *Id.* at 550, 915 A.2d at 1296-1297.

5. Summary of Ruling Concerning Compensatory Damages

It appears that the cause of action of breach of the implied warranty of workmanship sounds in contract, not tort, as previously concluded by the Court in the underlying action. The

breach of the implied warranty of workmanship is most closely related to a breach of contract, and under the unique circumstances and the particular facts presented in this case, this Court holds that damages for a breach of the implied warranty of workmanship under EMC's policy are not covered.

EMC's Commercial General Liability insurance policy does not act as a performance bond; and it does not provide for payment of damages resulting from a breach of contract. In fact, such damages are excluded from coverage. Because no award was made by the jury for any tort cause of action that was pled and submitted, and because the breach of the implied warranty of workmanship as presented in the underlying case was a contract related breach, EMC has no obligation to pay the compensatory damages in the amount of \$126,611.55 previously awarded to the Donnellys.

B. The \$2,000.00 Idaho Consumer Protection Act Judgment Is Not Covered.

The Donnellys were awarded \$2,000.00 in damages for RCI's violations of the Idaho Consumer Protection Act. There are two reasons why these damages are not covered. First, these damages are a category of damages that are strictly statutory in nature and not associated with either the loss of use of property or with physical injury to tangible property. As such, there is no coverage for damages resulting from RCI's failure to comply with the Act. Thus, the Donnellys' claim for Idaho Consumer Protection Act damages is a claim which is not within the coverage terms of EMC's Commercial General Liability Policy.

Second, to establish violations of the Idaho Consumer Protection Act, the Donnellys had to establish that RCI engaged in conduct which was prohibited by the Act either with actual

knowledge of the violation, or under circumstances where the exercise of due care would impose such knowledge. *See* Idaho Code § 48-603. The portions of the Act under which the Donnellys argued liability against RCI involve deception, falsity, failure to perform promises, misleading conduct, and failure to follow statutory requirements (e.g., nondisclosures). The policy's Expected or Intended Injury Exclusion absolutely bars coverage for any bodily injury or property damage that is expected or intended from the standpoint of the insured or any of its employees. For the Donnellys to prevail on their claim of violation of the Idaho Consumer Protection Act, they had to prove that RCI knowingly violated the provisions of the Act. This would require that RCI would reasonably expect damage to occur if it violated the Act. Thus, the statutory damages for which RCI is legally obligated to pay to the Donnellys on account of violations of the Idaho Consumer Protection Act are not covered under EMC's policy.

C. EMC Is Responsible For Payment Of Costs And Fees Previously Awarded.

When a business entity's or individual's insurance company provides a lawyer to represent that defendant, the insurance company has a right to control the litigation. Concomitant with this right to control is a duty to exercise diligence, intelligence, good faith, as well as honest and conscientious fidelity to the common interest of the company and the insured. Thus, by controlling the defense of a case, the insurance company can potentially put its insured "at risk" when litigation decisions are made.

In this case, EMC argues that the Supplementary Payments provision of the policy must be tied to an initial finding that there is in fact coverage. This argument, however, is not supported by existing case law.

1. Policy Interpretation

In Idaho, when interpreting insurance policies, courts apply the general rules of contract law subject to certain special rules of construction. *Arreguin v. Farmers Insurance Co. of Idaho*, 145 Idaho 459, 461, 180 P.3d 498, 500 (2008). In *Farm Bureau Insurance Co. of Idaho v. Kinsey*, 149 Idaho 415, 234 P.3d 739 (2010), the Idaho Supreme Court enumerated those special rules:

Because insurance policies are contracts of adhesion that are not usually subject to negotiation between the parties, any ambiguity in a policy is construed strongly against the insurer. Where the language used in an insurance policy is clear and unambiguous, the language must be given its plain, ordinary meaning. Coverage will be determined according to the plain meaning of the words in the policy. A provision in an insurance policy is ambiguous if it is reasonably subject to conflicting interpretations. If confronted with ambiguous language, the reviewing court must determine what a reasonable person would understand the language to mean.

234 P.3d at 743 (internal citations omitted).

Whether an insurance policy is ambiguous is a question of law over which courts exercise free review. *Arreguin*, 145 Idaho at 461, 180 P.3d at 500.

The Idaho Supreme Court has also held that insurance contracts shall be construed “in a light most favorable to the insured and in a manner which will provide full coverage for the indicated risks rather than to narrow its protection.” *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Insurance Co.*, 141 Idaho 660, 663, 115 P.3d 751, 754 (2005) (quoting *Smith v. O/P Transp.*, 128 Idaho 697, 700, 918 P.2d 281, 284 (1996)).

Using these fundamental precepts as a starting point, an examination of the operative language of EMC’s policy is in order. The policy states: “*No other obligation or liability to pay*

sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.” The Supplementary Payments provision of the policy provides:

SUPPLEMENTARY PAYMENTS – COVERAGES A AND B

1. 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”
 - ...
 - g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in the court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

This language plainly states that with respect to any suit pursued against an insured which it defends, EMC will pay all costs taxed against that insured. The language appears to be unambiguous, and thus, it must be given its plain meaning. EMC has never set forth any specific language in its policy that ties its promise to pay costs on a finding that there is coverage. Because EMC defended its insured, RCI, in the underlying litigation, EMC is responsible to the Donnellys for the \$296,933.89 in fees and costs taxed against RCI in that lawsuit, as well as any interest on that judgment which has accrued.

Even assuming *arguendo*, however, that the language of the Supplementary Payments provision is subject to the conflicting interpretation offered by EMC that payment of costs and interest should be tied to an initial finding of coverage, the policy does not plainly state that payment of assessed costs must be made only if there is coverage. At best, when viewing the

policy from EMC's perspective, the "Supplementary Payments" heading, when read in context with the language of Paragraph 1 (beginning with "We will pay ..."), is ambiguous. Any ambiguity, however, is to be construed strongly against EMC and in favor of the Donnellys, and "in a manner which will provide full coverage for the indicated risks rather than to narrow its protection." *Cascade Auto Glass, supra*. Pursuant to these rules of interpretation, EMC is still responsible to the Donnellys for the payment of the costs and interest awarded in the underlying litigation.

2. Mutual of Enumclaw Insurance Co. v. Harvey

In *Mutual of Enumclaw v. Harvey*, 115 Idaho 1009, 772 P.2d 216 (1989), the Idaho Supreme Court addressed a similar issue. The Supreme Court concluded that even though there was no coverage, the "costs" taxed against the insured were payable by the insurance company, Mutual of Enumclaw. Similar to the facts in this case, Mutual of Enumclaw's "Supplementary Coverages 2" provision of the policy provided that the insurance company would pay "... all costs taxed against the insured in any suit defended by the Company." *Id.* at 1011, 772 P.2d at 218. There, as here, the insurer argued that the payment of the insured's costs incurred in the underlying case was dependent on whether there was coverage of the underlying claims in that suit. In a unanimous decision, the Supreme Court affirmed Fourth Judicial District Judge Gerald F. Schroeder's reasoning and quoted his opinion as its own.

Again, similar to the provision in EMC's policy, Mutual of Enumclaw's policy provided that the payment of costs would not reduce the applicable limit of liability.

Judge Schroeder stated:

The results in the cases depend 'upon the language employed by the parties in their contract.' 76 ALR 2D 985. Language in the policy of this case does not indicate that payment of costs is conditioned upon a final determination that the policy covers the insured's conduct. The language of the policy says that the Company will pay all costs taxed against the insured in any suit defended by the Company. Beyond what appears to be the clear term of the policy, it is arguable that since the Company has the right to control the defense, including the power to refuse settlement, it should also bear the consequences of its case management decisions, including the consequence that the trial court may tax the opponent's costs against the insured.

Mutual of Enumclaw, 115 Idaho at 1012, 772 P.2d at 219 (citations omitted).

In *Mutual of Enumclaw*, as in this case, the issue of "reservation of rights" arose. As to that issue, Judge Schroeder reasoned:

Mutual of Enumclaw also argues that undertaking Oakes' defense with a reservation of rights exonerates it from having to pay costs. The court rejects this contention. It is generally recognized that coverage defenses may be properly preserved by a reservation of rights agreement. 'Preservation' implies the continuation, the saving of something that existed. It is not a destruction of the insured's rights nor a creation of new rights for the Company. It preserves that to which the parties had originally agreed. Mutual of Enumclaw, in Section II, Supplementary Coverages 2.a. agreed to pay 'all costs taxed against the insured in any suit defended by the Company.' The fact the company reserved its contractual rights before undertaking the defense in no way dissipates its obligation to pay such costs.

Mutual of Enumclaw, 115 Idaho at 1013, 772 P.2d at 220 (internal citations omitted).

Thus, a unanimous Idaho Supreme Court and a future Chief Justice of the Idaho Supreme Court both concluded that the insurance carrier must stand behind its promise to pay costs in the underlying litigation when the language of the policy plainly provides it will do so. Although

EMC points to the distinction in the headings of the provisions of the two policies that address the required payment of costs, such a distinction does not disturb the core of the promise to pay costs when the insurance company defends the case.

If EMC wanted to tie the payment of costs in the underlying suit to a finding of coverage, it, using plain language, could have easily done so. EMC could have simply stated that it would only pay costs taxed against its insured if there was coverage under the policy. It did not do so.

D. Resolution of RCI's Counterclaims

The Donnellys objected to the settlement of this case between EMC and RCI and filed a cause of action claiming that such settlement should not be accepted by the Court. This decision may make such cause of action moot. The Court declines to address that issue at this time and will not take any further action pending discussion by the respective parties.

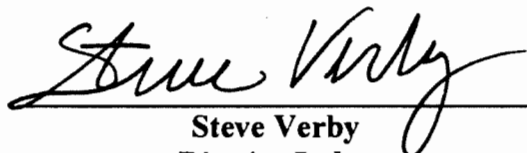
IV. CONCLUSION

Based on the foregoing, the Court grants partial summary judgment in favor of EMC as to whether there is coverage for the claims of (1) breach of implied warranty of workmanship by RCI, and (2) violations of Idaho's Consumer Protection Act by RCI, for which the jury found liability in the underlying litigation. Neither of these claims are covered.

The Court grants partial summary judgment in favor of the Donnellys as to whether EMC is required to pay the attorneys' fees and court costs taxed against RCI in the underlying litigation. EMC is responsible for the \$296,933.89 in attorneys' fees and costs previously awarded to the Donnellys, as well as any interest on that judgment which has accrued.

IT IS SO ORDERED.

DATED this 5th day of November, 2010.



Steve Verby
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 5th day of November, 2010, to:

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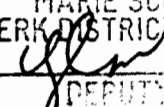

Deputy Clerk

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Attorneys for Defendants Donnelly

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2010 DEC 16 P 2:21

MARIE SCOTT
CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY
COMPANY, an Iowa Corporation,

Plaintiff,

v.

RIMAR CONSTRUCTION INC., an Idaho
Corporation; and DAVID and KATHY
DONNELLY, husband and wife; and IVAN
RIMAR, individually;

Defendants.

CASE NO.CV-07-00885

**MOTION TO WITHDRAW AS
COUNSEL OF RECORD**

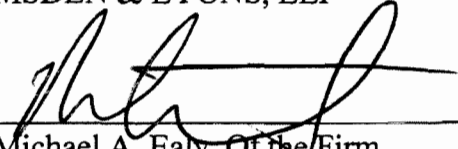
COMES NOW Michael A. Ealy of the firm Ramsden & Lyons, LLP and pursuant to I.R.C.P. Rule 11(b)(2) moves the Court for entry of an Order Granting Leave to Withdraw as attorneys of record for the Defendants DAVID and KATHY DONNELLY in the above-captioned matter.

This motion is based on the affidavit of Michael A. Ealy filed herewith that sets forth good cause for granting the motion to withdraw.

DATED this 15 day of December, 2010.

RAMSDEN & LYONS, LLP

By


Michael A. Ealy, Of the Firm

Attorneys for Defendants Donnelly

CERTIFICATE OF SERVICE

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

James G. Reid
David P. Claiborne
Ringert Clark Chartered
P.O. Box 2773
Boise, ID 83701-2773

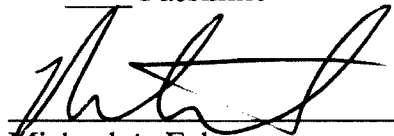
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David and Kathy Donnelly
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Eden, Utah 84310

US Mail
 Overnight Mail
 Hand Delivered
 Facsimile



Michael A. Ealy

STATE OF IDAHO
 County of Bonner
 FILED 1-5-11
 AT 10:05 O'CLOCK A M
 CLERK DISTRICT COURT
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY)
COMPANY, an Iowa corporation)

Plaintiff,)

v.)

RIMAR CONSTRUCTION, INC., an Idaho)
corporation; and DAVID and KATHY)
DONNELLY, husband and wife,)

Defendants.)

CASE NO. CV-2007-0000885

ORDER GRANTING LEAVE
TO WITHDRAW AS COUNSEL

On December 16, 2010, Michael A. Ealy and the firm of RAMSDEN & LYONS, LLP, moved the court, pursuant to Rule 11(b)(2) of the Idaho Rules of Civil Procedure, for an Order Granting Leave to Withdraw as attorneys of record for Defendants David Donnelly and Kathy Donnelly. Mr. Ealy has determined that it is in both his clients' and his own best interest that he withdraw from their representation for the reasons set forth in Rule 1.16(b)(4), 1.16(b)(6), and 1.16(b)(7) of the Idaho Rules of Professional Conduct.

NOW, THEREFORE, the court having considered the motion, and for good cause shown, IT IS ORDERED that:

1. **MICHAEL A. EALY and the firm of RAMSDEN & LYONS, LLP are hereby granted leave to withdraw as the attorneys of record for David and Kathy Donnelly in the above-entitled matter.**
2. **MICHAEL A. EALY shall forthwith, and with due diligence, serve a copy of this Order upon David and Kathy Donnelly, via certified mail, or by personal service, to the last known address most likely to give them notice, and service shall be complete upon mailing. MICHAEL A. EALY shall then file an Affidavit of proof of service of the same with the court, specifying the method of service and if service was accomplished by certified mail, and listing the mailing address of David and Kathy Donnelly.**
3. **David and Kathy Donnelly shall appoint another attorney to appear, or shall appear in person by filing a written notice with the court, stating how they will proceed without an attorney, within 20 days from the date of service or mailing of the Order.**
4. **Upon entry of the Order, no further proceedings shall be had in the above-entitled matter which will affect the rights of David and Kathy Donnelly for a period of 20 days after service or mailing of the Order.**
5. **If David and Kathy Donnelly do not file and serve an additional written appearance in the above-entitled matter, in person or through a newly appointed attorney within the 20-day period, such failure shall be sufficient ground for the entry of default and the entry of a default judgment against them without**

further notice.

6. The last known address for David and Kathy Donnelly is: P.O. Box 885, Eden, Utah 84310.

DATED this 5th day of January, 2011.


Steve Verby
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 6 day of January, 2011, to:

Stephen D. Phillabaum
PHILLABAUM, LEDLIN, ET AL.
421 West Riverside, Suite 900
Spokane, Washington 99201
Attorneys for Rimar Construction, Inc.

James G. Reid
David P. Claiborne
RINGERT CLARK CHARTERED
455 South Third Street
P.O. Box 2773
Boise, Idaho 83701
Attorneys for Employers Mutual Casualty Co.

Michael A. Ealy
RAMSDEN & LYONS, LLP
700 Northwest Blvd.
P.O. Box 1336
Coeur d'Alene, Idaho 83816
Attorneys for David and Kathy Donnelly

DAVID AND KATHY DONNELLY
P.O. Box 885
Eden, Utah 84310


Deputy Clerk

ALLEN B. ELLIS
ELLIS, BROWN & SHEILS, CHARTERED
Attorneys-at-Law
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
(208) 345-7832 (Telephone)
(208) 345-9564 (Facsimile)
ISB. No. 1626

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2011 JAN 12 P 3:19

CLERK DISTRICT COURT
DEPUTY

Attorneys for Defendants, David Donnelly and Kathy Donnelly

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY)
COMPANY, an Iowa corporation,)
Plaintiff,)
vs.)
RIMAR CONSTRUCTION, INC., an)
Idaho corporation; and DAVID DONNELLY)
and KATHY DONNELLY, husband and)
wife,)
Defendants.)

Case No. CV-2007-885
NOTICE OF APPEARANCE

TO: The above-named plaintiff, and its attorney of record, James G. Reid:

YOU WILL PLEASE TAKE NOTICE That Allen B. Ellis, of the firm of Ellis, Brown &
Sheils, Chartered, 707 North 8th Street, P.O. Box 388, Boise, Idaho 83701, hereby enters the

NOTICE OF APPEARANCE - 1

appearance of said firm as attorneys of record for defendants, David Donnelly and Kathy Donnelly,
in this action.

DATED This 12th day of January, 2011.



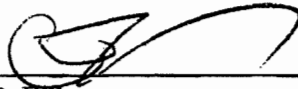
Allen B. Ellis
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 12th day of January, 2011, I caused to be served a true
and correct copy of the foregoing document by the method indicated below, and addressed to the
following:

James G. Reid
David P. Claiborne
Ringert Law Chartered
455 South Third Street
P.O. Box 2773
Boise, Idaho 83701-2773

____ U.S. Mail, postage prepaid
____ Hand delivery
____ Overnight delivery
 X Facsimile (342-4657)



Allen B. Ellis

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2011 FEB -4 A 11:12

DEPUTY
CLERK DISTRICT COURT

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF BONNER**

EMPLOYERS MUTUAL CASUALTY)
COMPANY, an Iowa corporation)
)
Plaintiff,)
)
v.)
)
RIMAR CONSTRUCTION, INC., an Idaho)
corporation; and DAVID and KATHY)
DONNELLY, husband and wife,)
)
Defendants.)
)

CASE NO. CV-2007-0000885

**SUPPLEMENTAL ORDER
re: MOTIONS FOR
RECONSIDERATION**

Employers Mutual Casualty Company's (EMC's) request for summary judgment as to the counterclaims against it brought by Rimar Construction, Inc., (RCI) is denied because genuine issues of material fact exist. These issues relate to whether the Settlement Agreement between EMC, RCI, and Ivan Rimar is a fraudulent conveyance.

By letter to the Court dated December 17, 2010, counsel for Employers Mutual Casualty Company (EMC) requested that the Court render a decision on whether the Settlement Agreement between EMC and Rimar Construction, Inc., (RCI) would result in the granting of summary judgment in EMC's favor as to the counterclaims brought against it by RCI.

After this request was made, counsel for David and Kathy Donnelly moved to withdraw from the representation and an order was issued allowing counsel to withdraw. The Donnellys now have new counsel, who has made a formal appearance in this action, and the issue of whether EMC is entitled to summary judgment against RCI will be addressed.

In the Donnellys' response to the request by EMC to dismiss RCI's counterclaims, the Donnellys argued that the Settlement Agreement was unenforceable as a fraudulent conveyance, and that to the extent EMC intended to rely on the Settlement Agreement to avoid paying the Donnellys as judgment creditors of RCI, the Court should find the agreement void. The Donnellys were granted leave to amend their Answer and assert a counterclaim seeking to void the Settlement Agreement as a fraudulent conveyance, and have since pled this claim against EMC, RCI, and Ivan Rimar as parties to the Settlement Agreement.

As the Donnellys pending counterclaim seeks to void the Settlement Agreement, it would be improper to grant EMC summary judgment based on that same agreement and dismiss RCI's counterclaims with prejudice. This would create a *res judicata* or claim preclusion defense for EMC in the event the Settlement Agreement is later set aside as a fraudulent conveyance. When all inferences are considered in favor of the nonmoving party, it is notable that neither EMC nor RCI/Ivan Rimar made any earlier attempt to submit a stipulation for dismissal based on the terms of the Settlement Agreement. This is arguably because both EMC and RCI/Ivan Rimar treated the agreement as having transferred, by way of release or otherwise, RCI and Ivan Rimar's counterclaims to EMC. Even though EMC argues the contrary position, EMC may factually be in control of RCI and Ivan Rimar's counterclaims under the terms of the Settlement Agreement.

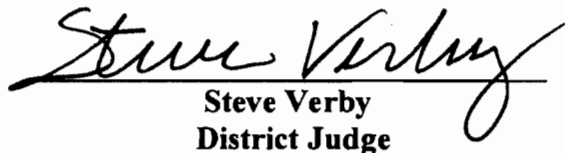
There appear to be genuine issues of material fact which preclude dismissing RCI and Ivan Rimar's counterclaims against EMC at this time. Whether the Settlement Agreement is a fraudulent conveyance is a question of fact. *See* Idaho Code § 55-908.

Regardless of whether there are material issues of fact, the Donnellys previously requested that they be given additional time pursuant to I.R.C.P. 56(f) to conduct additional discovery on this factual issue in support of their fraudulent conveyance claim. In the exercise of the trial court's discretion, it appears that discovery on this issue causes no material prejudice to EMC because it can renew its motion to dismiss RCI's counterclaims at a later date in advance of trial. Further, in light of the fact that the Donnellys have new representation, it would be appropriate to allow additional time for consultation between the clients and their lawyer to determine if their fraudulent conveyance claim should be pursued, as obtaining enough proof to establish a prima facie case is rife with difficulty when consideration is given to the protections afforded by the attorney-client privilege and the work product principle.

NOW, THEREFORE, based on the foregoing, EMC's request for summary judgment as to the counterclaims against it brought by RCI is DENIED.

IT IS SO ORDERED.

DATED this 4th day of February, 2011.


Steve Verby
District Judge

CERTIFICATE OF SERVICE

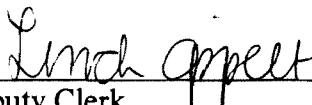
I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid,
this 4 day of February, 2011, to:

Brent C. Featherston
FEATHERSTON LAW FIRM
113 South Second Avenue
Sandpoint, Idaho 83864
Attorneys for Rimar Construction, Inc.

Stephen D. Phillabaum
PHILLABAUM, LEDLIN, MATTHEWS & SHELDON
421 West Riverside, Suite 900
Spokane, Washington 99201
Attorneys for Rimar Construction, Inc.

James G. Reid
David P. Claiborne
RINGERT CLARK CHARTERED
455 South Third Street
P.O. Box 2773
Boise, Idaho 83701-2773
Attorneys for Employers Mutual Casualty Co.

Allen B. Ellis
ELLIS, BROWN & SHEILS, CHARTERED
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
Attorneys for David and Kathy Donnelly



Deputy Clerk

JAMES G. REID, ISB # 1372
DAVID P. CLAIBORNE, ISB # 6579
RINGERT LAW CHARTERED
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E-mail: dpc@ringertlaw.com

Attorneys for Plaintiff

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT

ORIGINAL

2011 FEB 18 A 10:27

CLERK

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff.

vs.

RIMAR CONSTRUCTION, INC., an Idaho
corporation; and **DAVID** and **KATHY
DONNELLY**, husband and wife; and **IVAN
RIMAR**, an individual:

Defendants.

Case No. CV-2007-00885

STIPULATION

COMES NOW the Plaintiff, Employers Mutual Casualty Company, by and through its attorney of record, James G. Reid, and the Defendants, Rimar Construction, Inc. and Ivan Rimar, by and through their attorney of record, Stephen D. Phillabaum, and the Defendants, David and Kathy Donnelly, by and through their attorney of record, Allen B. Ellis; and

STIPULATION - 1

WHEREAS, the Court has issued its *Order re Motions for Reconsideration* on November 5, 2010.

WHEREAS the parties in this matter wish to enter into stipulated dismissals with respect to certain counterclaims and cross-claims in this matter in order that a final judgment may be entered herein.

WHEREAS for the purposes of this Stipulation only the term "Settlement Agreement" references that certain settlement agreement entered into between Plaintiff Employers Mutual Casualty Company, on the one hand, and Defendants Rimar Construction, Inc., and Ivan Rimar on the other, on August 17, 2009.

Based upon the foregoing premises, **IT IS HEREBY STIPULATED AND AGREED:**

1. The parties stipulate and agree. **PURSUANT TO** Rule 41(a)(1)(ii), I.R.C.P., that Defendants Rimar Construction, Inc. and Ivan Rimar's counterclaims, set forth in *RCI's Amended Answer to Plaintiff's Amended Petition for Declaratory Judgment*, filed on or about July 9, 2009, be and are hereby **DISMISSED WITH PREJUDICE**, said dismissal being made to conform with the Settlement Agreement; and
2. The parties stipulate and agree. **PURSUANT TO** Rule 41(a)(1)(ii), I.R.C.P., that Defendant David and Kathy Donnelly's counterclaim and cross-claim for fraudulent conveyance, set forth at Section III.B. of the *Second Amended Answer, Counterclaim and Cross Claim* against Ivan Rimar and Rimar Construction, Inc., filed on or about July 12, 2010, be and is hereby **DISMISSED WITH PREJUDICE**, each party to

bear their own costs and fees: and

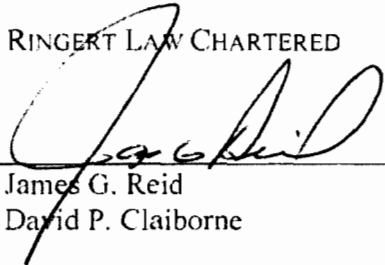
3. The parties further stipulate and agree that Plaintiff, Employers Mutual Casualty Company and Defendant, Rimar Construction, Inc. and Defendant, Ivan Rimar, shall not assert any defense, whether by claim of avoidance or otherwise, in reliance on the Settlement Agreement, and including Hartman v. United Heritage Property and Casualty Co., 141 Idaho 193, 1089 P.3d 340 (2005), in this action or in any subsequent appeal, to the on-going and continuing standing of the Defendants David and Kathy Donnelly, to seek the recovery or payment of monies direct from the Plaintiff, Employers Mutual Casualty Company in satisfaction of the *Amended Judgment On Special Verdict With Regard to Claims of Plaintiffs And Defendant Rimar Construction, Inc.* entered in Donnelly v. Rimar Construction, Inc., et al., Case No. CV-06-00445 (Bonner County, Idaho).
4. The parties stipulate and agree that the Court may enter a final judgment upon the request of either the Plaintiff or Defendant's David and Kathy Donnelly based on the *Order re: Motions for Reconsideration*, dated November 5, 2010, and the trial date of April 25, 2011 may be vacated accordingly as it is the intent that this Stipulation leave no further issues for further adjudication by trial with the exception of issues pertaining to Rule 54, I.R.C.P., costs and attorney fees.

By reason of the above and foregoing stipulations, the undersigned respectfully request entry
by the Court of an order in conformance herewith.

DATED this 7 day of February, 2011.

RINGERT LAW CHARTERED

by:


James G. Reid
David P. Claiborne

DATED this ____ day of February, 2011.

PHILLABAUM, LEDLIN, MATTHEWS &
SHELDON

by:

151
Stephen D. Phillabaum
Brian S. Sheldon

DATED this 4 day of February, 2011.

ELLIS, BROWN & SHEILS

by:


Allen B. Ellis

STIPULATION - 4

By reason of the above and foregoing stipulations, the undersigned respectfully request entry
by the Court of an order in conformance herewith.

DATED this 7 day of February, 2011.

RINGERT LAW CHARTERED

by: 

James G. Reid
David P. Claiborne

DATED this 15 day of February, 2011.

PHILLABAUM, LEDLIN, MATTHEWS &
SHELDON

by: 

Stephen D. Phillabaum
Brian S. Sheldon

DATED this 4 day of February, 2011.

ELLIS, BROWN & SHEILS

by: 

Allen B. Ellis

STIPULATION - 4

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 16th day of February, 2011 by the following method:

**STEPHEN D. PHILLABAUM
PHILLABAUM, LEDLIN, ET AL.**
421 West Riverside, Suite 900
Spokane, Washington 99201
Telephone: (509) 838-6055
Facsimile: (509) 625-1909
E-Mail: stevep@spokanelaw.com
Attorneys for Rimar Construction


- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail

**ALLEN B. ELLIS
ELLIS, BROWN & SHEILS**
707 N. 8th
P.O. Box 388
Boise, ID 83701
Telephone: (208) 345-7832
Facsimile: (208) 345-9564
E-Mail: aellis@ebslaw.com *Attorneys for
David and Kathy Donnelly*

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- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail

**HONORABLE STEVE VERBY
DISTRICT JUDGE**
215 South 1st Avenue
Sandpoint, Idaho 83864
Telephone: (208) 265-1445
Facsimile: (208) 263-0896
E-Mail: n/a
Presiding Judge - Courtesy Copy

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail



James G. Reid
David P. Claiborne

JAMES G. REID, ISB # 1372
DAVID P. CLAIBORNE, ISB # 6579
RINGERT LAW CHARTERED
455 South Third Street
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Boise, Idaho 83701-2773
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E-mail: dpc@ringertlaw.com

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2011 FEB 23 A 9:01

MARIE SCOTT
CLERK DISTRICT COURT

DEPUTY

ORIGINAL

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an Idaho
corporation; and **DAVID** and **KATHY
DONNELLY**, husband and wife; and **IVAN
RIMAR**, an individual;

Defendants.

Case No. CV-2007-00885

ORDER ADOPTING STIPULATION

UPON CONSIDERATION of the *Stipulation*, filed February 18, 2011, and good
cause appearing for entry of the relief requested thereby;

NOW, THEREFORE, it is hereby **ORDERED** as follows:

1. That for purposes of this Order only the term "Settlement Agreement" means that certain Settlement Agreement entered into between Plaintiff Employers Mutual Casualty Company, as party of the first part, and Defendants Rimar Construction, Inc. and Ivan Rimar, as parties


ORDER ADOPTING STIPULATION - 1

of the second part, effective August 17, 2009; and

2. That, **PURSUANT TO** Rule 41(a)(1)(ii), I.R.C.P., Defendants Rimar Construction, Inc. and Ivan Rimar's counterclaims, set forth in *RCI's Amended Answer to Plaintiff's Amended Petition for Declaratory Judgment*, filed on or about July 9, 2009, be and are hereby **DISMISSED WITH PREJUDICE**, said dismissal being made to conform with the Settlement Agreement; and
3. That, **PURSUANT TO** Rule 41(a)(1)(ii), I.R.C.P., Defendant David and Kathy Donnelly's counterclaim and cross-claim for fraudulent conveyance, set forth at Section III.B. of the *Second Amended Answer, Counterclaim and Cross Claim* against Ivan Rimar and Rimar Construction, Inc., filed on or about July 12, 2010, be and is hereby **DISMISSED WITH PREJUDICE**, each party to bear their own costs and fees; and
4. That Plaintiff, Employers Mutual Casualty Company and Defendant, Rimar Construction, Inc. and Defendant, Ivan Rimar, shall not assert any defense, whether by claim of avoidance or otherwise, in reliance on the Settlement Agreement, and including Hartman v. United Heritage Property and Casualty Co., 141 Idaho 193, 1089 P.3d 340 (2005), in this action or in any subsequent appeal, to the on-going and continuing standing of the Defendants David and Kathy Donnelly, to seek the recovery or payment of monies direct from the Plaintiff, Employers Mutual Casualty Company in satisfaction of the *Amended Judgment On Special Verdict With Regard to Claims of Plaintiffs And Defendant Rimar Construction, Inc.* entered in Donnelly v. Rimar Construction, Inc., et al, Case No. CV-06-00445 (Bonner County, Idaho); and

5. That the trial date in this action of April 25, 2011 be and is hereby **VACATED**.

IT IS SO ORDERED this 23rd day of February, 2011.

by: 
Steve Verby
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 23 day of February, 2011 by the following method:

**STEPHEN D. PHILLABAUM
PHILLABAUM, LEDLIN, ET AL.**
421 West Riverside, Suite 900
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Telephone: (509) 838-6055
Facsimile: (509) 625-1909
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Attorneys for Rimar Construction

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- U.S. Certified Mail, Postage Prepaid
- Federal Express
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- Facsimile
- Electronic Mail

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David and Kathy Donnelly*

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DAVID P. CLAIBORNE
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Attorneys for Plaintiff

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- Hand Delivery
- Facsimile
- Electronic Mail



Deputy Clerk

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2011 FEB 23 A 9:17

MARIE SCOTT
CLERK DISTRICT COURT
44
DEPUTY

ORIGINAL

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff,

vs.

RIMAR CONSTRUCTION, INC., an Idaho
corporation; and **DAVID** and **KATHY
DONNELLY**, husband and wife; and **IVAN
RIMAR**, an individual;

Defendants.

Case No. CV-2007-00885

JUDGMENT

UPON CONSIDERATION of the *Order Re: Motions for Reconsideration*, entered November 5, 2010, and the *Order Adopting Stipulation*, entered herewith, and good cause appearing for entry of the relief set forth herein;

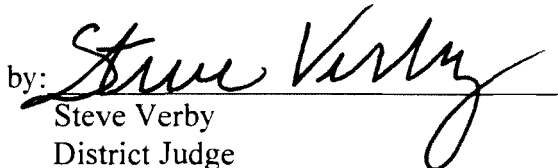
NOW, THEREFORE, it is hereby **ORDERED, ADJUDGED** and **DECREED** as follows:

1. With respect to Plaintiff's claim for declaratory judgment, it is hereby **DECLARED** that there is no coverage under EMC's insurance policy with Defendants Rimar Construction, Inc. and Ivan Rimar for the claims of Defendants David and Kathy Donnelly for damages

awarded due to breach of the implied warranty of workmanship and/or violations of the Idaho Consumer Protection Act in the matter of Donnelly v. Rimar Construction, Inc., et al., Case No. CV-06-00445 (Bonner County, Idaho); and

2. With respect to Defendants David and Kathy Donnelly's claim for declaratory judgment, it is hereby **DECLARED** that there is coverage under EMC's insurance policy with Defendants Rimar Construction, Inc. and Ivan Rimar for the claims of Defendants David and Kathy Donnelly for attorney fees and court costs awarded in the matter of Donnelly v. Rimar Construction, Inc., et al., Case No. CV-06-00445 (Bonner County, Idaho); and
3. With respect to any and all other claims of any of the parties advanced in this action, each and every such claim be and is hereby **DISMISSED WITH PREJUDICE**, each party to bear their own costs and fees.


IT IS SO ORDERED this 23rd day of February, 2011.

by: 
Steve Verby
District Judge

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby **CERTIFIED**, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

IT IS SO ORDERED this 23^d day of February, 2011.

by: 
Steve Verby
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 23 day of February, 2011 by the following method:

**STEPHEN D. PHILLABAUM
PHILLABAUM, LEDLIN, ET AL.**
421 West Riverside, Suite 900
Spokane, Washington 99201
Telephone: (509) 838-6055
Facsimile: (509) 625-1909
E-Mail: stevep@spokanelaw.com
Attorneys for Rimar Construction

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- U.S. Certified Mail, Postage Prepaid
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- Electronic Mail

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ELLIS, BROWN & SHEILS**
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Attorneys for David and Kathy Donnelly

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DAVID P. CLAIBORNE
RINGERT LAW CHARTERED**
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Attorneys for Plaintiff

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- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail



Deputy Clerk

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DAVID P. CLAIBORNE, ISB # 6579
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E-mail: jgr@ringertlaw.com
E-mail: dbc@ringertlaw.com

Attorneys for Plaintiff/Appellant

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT

ORIGINAL 2011 MAR -2 A 10: 25

CLERK

slk

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff/Appellant

vs.

RIMAR CONSTRUCTION, INC., an Idaho
corporation; **IVAN RIMAR**, an individual; and
DAVID and **KATHY DONNELLY**, husband
and wife;

Defendants/Respondent

Case No. CV-2007-00885

NOTICE OF APPEAL

TO: THE ABOVE-NAMED RESPONDENTS, David and Kathy Donnelly, and your attorney of record; and the Clerk of the above-titled Court:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, Employers Mutual Casualty Company, appeals against the above-named Respondents to the Idaho Supreme Court from the Judgment (including any relevant adverse pre-trial rulings, procedural rulings and evidentiary rulings), entered in the above-entitled action on the 23rd day of February, 2011, Honorable Steve Verby, District Judge, presiding.

NOTICE OF APPEAL - 1

2. The Appellant is represented by James G. Reid and David P. Claiborne of Ringert Law Chartered, 455 S. Third Street, Boise, ID 83701, telephone (208) 342-4591, email jgr@ringertlaw.com and dpc@ringertlaw.com.

3. The Respondents are represented by Allen B. Ellis, Ellis, Brown & Sheils, 707 N. 8th Street, Boise, ID 83701, telephone (208) 345-7832, email aellis@ebslaw.com.

4. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1), I.A.R.

5. Appellant provides the following as a preliminary statement of the issue on appeal: Did the District Court err in determining that Appellant insurance company had a duty under an insurance contract supplemental payments provision to make payments to the Respondent Claimants on claims not covered by the insurance contract.

6. (a) Is a reporter's transcript requested? Yes.

7. The Appellant requests the following documents to be included in the clerk's record, in addition to those automatically included in the Clerk's record pursuant to Rule 28 I.A. R.:

- (a) Petition for Declaratory Judgment filed May 24, 2007.
- (b) Defendant Donnellys' Answer filed July 18, 2007.
- (c) Defendant Rimar Construction's Answer to Plaintiff's Petition for Declaratory Judgment, Counterclaim and Request for Jury Trial filed August 1, 2007.
- (d) Plaintiff's Amended Petition for Declaratory Judgment filed November 7, 2007.
- (e) Order Staying Plaintiff's Declaratory Judgment Action filed December 12, 2007.
- (f) Notice of Hearing on Motion to Vacate Order Staying Plaintiff's Declaratory Judgment Action filed March 12, 2009.
- (g) Defendant Rimar Construction's Response to Plaintiff's Motion to Vacate Order Staying Plaintiff's Declaratory Judgment Action filed April 1, 2009.

- (h) Judge's Ruling on Motion to Lift Stay (Hearing held on April 8, 2009)
- (i) Plaintiff's Second Motion to Vacate Order Staying Declaratory Judgment Action filed May 22, 2009.
- (j) Defendant Donnellys' Objection to EMC's Motion to Lift Stay filed June 29, 2009.
- (k) Plaintiff's Non-Opposition to Vacating Stay and Stipulation to Allow Filing of Amended Answer and Counterclaim filed July 7, 2009.
- (l) Plaintiff's Reply Memorandum in Support of Plaintiff's Second Motion to Vacate Order Staying Plaintiff's Declaratory Judgment Action filed July 7, 2009.
- (m) Defendant Rimar Construction's Amended Answer to Amended Petition for Declaratory Judgment and Counterclaim filed July 10, 2009.
- (n) Plaintiff's Reply to Counterclaim filed July 15, 2009.
- (o) Order Vacating Stay of Plaintiff's Declaratory Judgment Action filed July 17, 2009.
- (p) Plaintiff's Motion for Summary judgment filed November 12, 2009.
- (q) Affidavit of James G. Reid filed November 12, 2009.
- (r) Statement of Facts filed November 12, 2009.
- (s) Memorandum in support of Motion for Summary Judgment filed November 12, 2009.
- (t) Defendant Donnellys' Motion for Summary Judgment filed December 22, 2009.
- (u) Affidavit in Support of Defendant Donnellys' Motion for Summary Judgment filed December 22, 2009.

- (v) Memorandum in Support of Motion for Summary Judgment filed December 22, 2009.
- (w) Defendant Donnellys' Amended Answer and Counterclaim filed December 23, 2009.
- (x) Plaintiff's Memorandum in Opposition to Defendant Donnellys' Motion for Summary Judgment filed January 7, 2010.
- (y) Defendant Donnellys' Memorandum in Reply to Plaintiff's Memorandum in Opposition filed January 14, 2010.
- (z) Plaintiff's Reply to Counterclaim January 21, 2010.
- (aa) Order denying Cross-Motions for Summary Judgment filed April 7, 2010.
- (bb) Defendant Donnellys' Motion for Reconsideration of Order on Motions for Summary Judgment filed July 8, 2010.
- (cc) Defendant Donnellys' Memorandum in Support of Motion for Reconsideration filed July 8, 2010.
- (dd) Defendant Donnellys' Second Amended Answer, Counterclaim and Cross Claim filed July 13, 2010.
- (ee) Plaintiff's Reply to Second Amended Answer, Counterclaim and Cross Claim filed July 26, 2010.
- (ff) Reply of Rimar Construction and Ivan Rimar to Second Amended Answer, Counterclaim and Cross Claim filed August 13, 2010.
- (gg) Plaintiff's Motion for Reconsideration filed August 23, 2010.
- (hh) Plaintiff's Memorandum re: Motions for Reconsideration filed August 23, 2010.
- (ii) Defendant Donnellys' Reply Memorandum in Support of Motion for Reconsideration filed September 1, 2010.
- (jj) Order re: Motion for Reconsideration filed November 5, 2010.
- (kk) Supplemental Order re: Motions for Reconsideration filed February 4, 2011.
- (ll) Stipulation filed February 18, 2011.
- (mm) Order Adopting Stipulation filed February 23, 2011.
- (nn) Judgment filed February 23, 2011.

8. I certify:

- (a) That the estimated fee for preparation of the Clerk's record has been paid.
- (b) That the Appellate filing fee has been paid.
- (c) That service has been made upon all parties required to be served pursuant

to Rule 20.

DATED this 28th day of February, 2011.

RINGERT LAW/CHARTERED

By

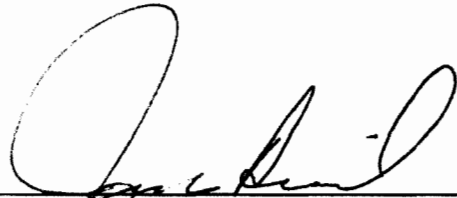


James G. Reid
David P. Claiborne

CERTIFICATE OF SERVICE

This does hereby certify that on the 28th day of February, 2011, he served the foregoing document by placing a true and correct copy in the United States Mail, postage prepaid and properly addressed as follows:

Allen Ellis
Ellis, Brown & Sheils
707 N. 8th Street
P.O. Box 388
Boise, ID 83701



James G. Reid
David P. Claiborne

ALLEN B. ELLIS
ELLIS, BROWN & SHEILS, CHARTERED
Attorneys-at-Law
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
(208) 345-7832 (Telephone)
(208) 345-9564 (Facsimile)
ISB. No. 1626

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2011 MAR -4 P 2:39

NAME
CLERK DISTRICT COURT
DEPUTY

Attorneys for Defendants, David Donnelly and Kathy Donnelly

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY)
COMPANY, an Iowa corporation,)
)
Plaintiff,)
)
vs.)
)
RIMAR CONSTRUCTION, INC., an)
Idaho corporation; and DAVID DONNELLY)
and KATHY DONNELLY, husband and)
wife,)
)
Defendants.)
_____)

Case No. CV-2007-00885

MOTION TO AMEND
JUDGMENT (RULE 59(e), I.R.C.P.)

Come now the defendants Kathy Donnelly and David Donnelly, through their attorney of record, and move the Court to amend the judgment in this matter to include a money judgment in favor of defendants Donnelly and against plaintiff Employers Mutual Casualty ("EMC") in the amount of \$296,933.89, i.e., the judgment of attorney fees and costs which plaintiffs were awarded

MOTION TO AMEND JUDGMENT - 1

in the underlying matter of *Donnelly v. Rimar, et al* (Bonner County Case No. CV-2006-445) which is consistent with the judgment entered in this matter on February 23, 2011, to the effect that plaintiff EMC is obligated for this amount.

This motion is based upon the memorandum of law filed herewith, the affidavit of Allen B. Ellis, the pleadings and records in this matter and such other oral and documentary evidence as may be presented at the time of hearing.

DATED This 4th day of March, 2011.



Allen B. Ellis
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 4th day March, 2011, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

James G. Reid
David P. Claiborne
Ringert Law Chartered
455 South Third Street
P.O. Box 2773
Boise, Idaho 83701-2773

- U.S. Mail, postage prepaid
- Hand delivery
- Overnight delivery
- Facsimile (342-4657)



Allen B. Ellis

JAMES G. REID, ISB # 1372
 DAVID P. CLAIBORNE, ISB # 6579
 RINGERT LAW CHARTERED
 455 South Third Street
 P. O. Box 2773
 Boise, Idaho 83701-2773
 Telephone: (208) 342-4591
 Facsimile: (208) 342-4657
 E-mail: dpc@ringertlaw.com

STATE OF IDAHO
 COUNTY OF BONNER
 FIRST JUDICIAL DIST.

2011 MAR 17 A 11:49

MARIE SCOTT
 CLERK DISTRICT COURT
 DEPUTY

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
 COMPANY, an Iowa corporation;**

Plaintiff,

vs.

**RIMAR CONSTRUCTION, INC., an Idaho
 corporation; and DAVID and KATHY
 DONNELLY, husband and wife; and IVAN
 RIMAR, an individual;**

Defendants.

Case No. CV-2007-00885

**MOTION TO DISALLOW COSTS AND
 FEES**

COMES NOW the Plaintiff, Employers Mutual Casualty Company, by and through its attorneys of record, Ringert Law Chartered, and, **PURSUANT TO** Rules 54(d)(6) and 54(e)(6) of the IDAHO RULES OF CIVIL PROCEDURE, **MOVES THE COURT** to disallow all of the court costs and attorney fees requested by Defendants David and Kathy Donnelly by way of their *Memorandum of Costs and Fees*, served March 3, 2011.

This Motion is supported by the *Memorandum in Support of Motion to Disallow Costs and*

Fees and the *Affidavit of Counsel in Support of Motion to Disallow Costs and Fees*, each of which is filed herewith. This Motion is further supported by the pleadings, affidavits, record of action, and all other materials and documents on file with the Court in this action.

Oral argument on this Motion is respectfully requested.

DATED this 17th day of March, 2011.

RINGERT LAW CHARTERED

by:



James G. Reid
David P. Claiborne

CERTIFICATE OF SERVICE

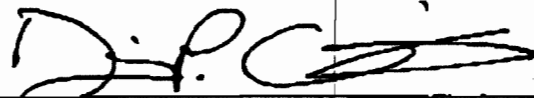
I hereby certify that a true and correct copy of the foregoing document was served on the following on this 17th day of March, 2011 by the following method:

ALLEN B. ELLIS
ELLIS, BROWN & SHEILS
707 N. 8th
P.O. Box 388
Boise, ID 83701
Telephone: (208) 345-7832
Facsimile: (208) 345-9564
E-Mail: aellis@ebslaw.com *Attorneys for*
David and Kathy Donnelly

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail

HONORABLE STEVE VERBY
DISTRICT JUDGE
215 South 1st Avenue
Sandpoint, Idaho 83864
Telephone: (208) 265-1445
Facsimile: (208) 263-0896
E-Mail: n/a
Presiding Judge - Courtesy Copy

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail



James G. Reid
David P. Claiborne

In the Supreme Court of the State of Idaho

STATE OF IDAHO
 COUNTY OF BONNER
 FIRST JUDICIAL DIST.

2011 MAR 24 10:36

MARIE SCOTT
 CLERK DISTRICT COURT

MS
 DEPUTY

ORDER SUSPENDING APPEAL

Supreme Court Docket No. 38623-2011
 Bonner County Docket No. 2007-885

EMPLOYERS MUTUAL CASUALTY)
 COMPANY,)
)
 Plaintiff-Appellant,)
)
 v.)
)
 DAVID DONNELLY and KATHY)
 DONNELLY, husband and wife,)
)
 Defendants-Respondents,)
)
 and)
)
 RIMAR CONSTRUCTION, INC., an Idaho)
 corporation; IVAN RIMAR, an individual)
)
 Defendants.)

The Notice of Appeal in the above captioned matter filed in this Court March 16, 2011, requested that a Reporter's Transcript be prepared. However, the Notice of Appeal failed to comply with Idaho Appellate Rules 17(o)(5)(b) and 25(a) in that it did not specifically list the date(s) and title(s) of the hearing(s) required to be transcribed for purposes of this Appeal: therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellant shall file an AMENDED NOTICE OF APPEAL which complies with Idaho Appellate Rules 17(o)(5)(b) and 25(a), and shall specify the date(s) and title(s) title of the hearing(s) required to be transcribed for purposes of this Appeal.

IT FURTHER IS ORDER that Appellant shall serve the Reporter(s) with a copy of the Amended Notice of Appeal and shall indicate in the Amended Notice of Appeal which reporter(s) was served.

IT FURTHER IS ORDERED the Amended Notice of Appeal shall be filed with the District Court within fourteen (14) days from the date of this Order. In the event an Amended Notice of Appeal is not filed, this appeal may proceed on the Clerk's Record ONLY.

IT FURTHER IS ORDERED that this appeal is SUSPENDED until further notice.

ORDER SUSPENDING APPEAL – Docket No. 38623-2011

DATED this 21 day of March 2011.

For the Supreme Court

Stephen Kenyon

Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
District Court Reporter

ORIGINAL

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2011 MAR 30 A 10:07

MARIE BOYD
CLERK DISTRICT COURT
slk
DEPUTY

JAMES G. REID, ISB # 1372
DAVID P. CLAIBORNE, ISB # 6579
RINGERT LAW CHARTERED
455 South Third Street
P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657
E-mail: jgr@ringertlaw.com
E-mail: dpc@ringertlaw.com

Attorneys for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

**EMPLOYERS MUTUAL CASUALTY
COMPANY**, an Iowa corporation;

Plaintiff/Appellant

vs.

RIMAR CONSTRUCTION, INC., an Idaho
corporation; **IVAN RIMAR**, an individual;
and **DAVID** and **KATHY DONNELLY**,
husband and wife;

Defendants/Respondent

L4-101.00

Supreme Court Docket No. 38623-2011

Bonner County Case No. CV-2007-885

AMENDED NOTICE OF APPEAL

TO: THE ABOVE-NAMED RESPONDENTS, David and Kathy Donnelly, and your attorney of record; and the Clerk of the above-titled Court:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, Employers Mutual Casualty Company, appeals against the above-named Respondents to the Idaho Supreme Court from the Judgment (including any relevant adverse pre-trial rulings, procedural rulings and evidentiary rulings), entered in the above-

AMENDED NOTICE OF APPEAL - 1

entitled action on the 23rd day of February, 2011, Honorable Steve Verby, District Judge, presiding.

2. The Appellant is represented by James G. Reid and David P. Claiborne of Ringert Law Chartered, 455 S. Third Street, Boise, ID 83701, telephone (208) 342-4591, email jgr@ringertlaw.com and dpc@ringertlaw.com.

3. The Respondents are represented by Allen B. Ellis, Ellis, Brown & Sheils, 707 N. 8th Street, Boise, ID 83701, telephone (208) 345-7832, email aellis@ebslaw.com.

4. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1), I.A.R.

5. Appellant provides the following as a preliminary statement of the issue on appeal: Did the District Court err in determining that Appellant insurance company had a duty under an insurance contract supplemental payments provision to make payments to the Respondent Claimants on claims not covered by the insurance contract.

6. (a) Is a reporter's transcript requested? No.

7. The Appellant requests the following documents to be included in the clerk's record, in addition to those automatically included in the Clerk's record pursuant to Rule 28 I.A. R.:

(a) Petition for Declaratory Judgment filed May 24, 2007.

(b) Defendant Donnellys' Answer filed July 18, 2007.

(c) Defendant Rimar Construction's Answer to Plaintiff's Petition for Declaratory Judgment, Counterclaim and Request for Jury Trial filed August 1, 2007.

(d) Plaintiff's Amended Petition for Declaratory Judgment filed November 7, 2007.

(e) Order Staying Plaintiff's Declaratory Judgment Action filed December 12,

2007.

- (f) Notice of Hearing on Motion to Vacate Order Staying Plaintiff's Declaratory Judgment Action filed March 12, 2009.
- (g) Defendant Rimar Construction's Response to Plaintiff's Motion to Vacate Order Staying Plaintiff's Declaratory Judgment Action filed April 1, 2009.
- (h) Judge's Ruling on Motion to Lift Stay (Hearing held on April 8, 2009)
- (i) Plaintiff's Second Motion to Vacate Order Staying Declaratory Judgment Action filed May 22, 2009.
- (j) Defendant Donnellys' Objection to EMC's Motion to Lift Stay filed June 29, 2009.
- (k) Plaintiff's Non-Opposition to Vacating Stay and Stipulation to Allow Filing of Amended Answer and Counterclaim filed July 7, 2009.
- (l) Plaintiff's Reply Memorandum in Support of Plaintiff's Second Motion to Vacate Order Staying Plaintiff's Declaratory Judgment Action filed July 7, 2009.
- (m) Defendant Rimar Construction's Amended Answer to Amended Petition for Declaratory Judgment and Counterclaim filed July 10, 2009.
- (n) Plaintiff's Reply to Counterclaim filed July 15, 2009.
- (o) Order Vacating Stay of Plaintiff's Declaratory Judgment Action filed July 17, 2009.
- (p) Plaintiff's Motion for Summary judgment filed November 12, 2009.
- (q) Affidavit of James G. Reid filed November 12, 2009.
- (r) Statement of Facts filed November 12, 2009.
- (s) Memorandum in support of Motion for Summary Judgment filed November 12, 2009.
- (t) Defendant Donnellys' Motion for Summary Judgment filed December 22, 2009.

- (u) Affidavit in Support of Defendant Donnellys' Motion for Summary Judgment filed December 22, 2009.
- (v) Memorandum in Support of Motion for Summary Judgment filed December 22, 2009.
- (w) Defendant Donnellys' Amended Answer and Counterclaim filed December 23, 2009.
- (x) Plaintiff's Memorandum in Opposition to Defendant Donnellys' Motion for Summary Judgment filed January 7, 2010.
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- (z) Plaintiff's Reply to Counterclaim January 21, 2010.
- (aa) Order denying Cross-Motions for Summary Judgment filed April 7, 2010.
- (bb) Defendant Donnellys' Motion for Reconsideration of Order on Motions for Summary Judgment filed July 8, 2010.
- (cc) Defendant Donnellys' Memorandum in Support of Motion for Reconsideration filed July 8, 2010.
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- (ee) Plaintiff's Reply to Second Amended Answer, Counterclaim and Cross Claim filed July 26, 2010.
- (ff) Reply of Rimar Construction and Ivan Rimar to Second Amended Answer, Counterclaim and Cross Claim filed August 13, 2010.
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- (hh) Plaintiff's Memorandum re: Motions for Reconsideration filed August 23, 2010.
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- (kk) Supplemental Order re: Motions for Reconsideration filed February 4, 2011.
- (ll) Stipulation filed February 18, 2011.
- (mm) Order Adopting Stipulation filed February 23, 2011.
- (nn) Judgment filed February 23, 2011.

8. I certify:

- (a) That the estimated fee for preparation of the Clerk's record has been paid.
- (b) That the Appellate filing fee has been paid.
- (c) That service has been made upon all parties required to be served pursuant

to Rule 20.

DATED this 28th day of March, 2011.

RINGERT LAW CHARTERED

By



James G. Reid
David P. Claiborne

CERTIFICATE OF SERVICE

This does hereby certify that on the 28th day of March, 2011, he served the foregoing document by placing a true and correct copy in the United States Mail, postage prepaid and properly addressed as follows:

Allen Ellis
Ellis, Brown & Sheils
707 N. 8th Street
P.O. Box 388
Boise, ID 83701



James G. Reid
David P. Claiborne

ALLEN B. ELLIS
 ELLIS, BROWN & SHEILS, CHARTERED
 Attorneys-at-Law
 707 North 8th Street
 P.O. Box 388
 Boise, Idaho 83701-0388
 (208) 345-7832 (Telephone)
 (208) 345-9564 (Facsimile)
 ISB. No. 1626

STATE OF IDAHO
 COUNTY OF BONNER
 FIRST JUDICIAL DIST.

2011 MAR 30 A 10:25

MARIE S. ...
 CLERK DISTRICT COURT
MS
 DEPUTY

Attorneys for Defendants/Cross-Appellants (Donnelly)

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY)
 COMPANY, an Iowa corporation,)
)
 Appellant/Respondent,)
)
 vs.)
)
 DAVID DONNELLY and KATHY)
 DONNELLY, husband and wife,)
)
 Respondents-Cross Appellants,)
)
 and)
)
 RIMAR CONSTRUCTION, INC., an)
 Idaho corporation; IVAN RIMAR, an)
 individual,)
)
 Defendants.)
)

Case No. CV-2007-00885

NOTICE OF CROSS-APPEAL

TO: THE ABOVE-NAMED APPELLANTS/CROSS-RESPONDENTS, Employers Mutual
 Casualty:

NOTICE OF CROSS-APPEAL - 1

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Respondents/Cross Appellants, David Donnelly and Kathy Donnelly, appeal against the above named Appellant/Respondent to the Idaho Supreme Court from the Judgment (including any relevant adverse pre-trial rulings, procedural rulings and evidentiary rulings), entered in the above-entitled action on the 23rd of February, 2011, Honorable Steve Verby, District Judge, presiding.
2. The Respondents/Cross Appellants are represented by Allen B. Ellis of Ellis, Brown & Sheils, Chtd., P.O. Box 388, Boise, Idaho, 83701.
3. The Appellant/Cross-Respondent is represented by James G. Reid and David P. Claiborne of Ringert Law Chartered, 455 S. Third Street, Boise, Idaho 83701.
4. That the parties have a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1), I.A.R.
5. Respondents/Cross-Appellants provide the following as a preliminary statement of the issue on appeal: Whether the District Court erred in concluding that damages assessed against Rimar Construction, Inc., for breach of the implied warranty of workmanship in the underlying action are not covered under the subject insurance policy.
6. An additional reporter's transcript is **not** requested.
7. Documents to be included in clerk's record in addition those designated by appellant in the initial notice of appeal: **None.**

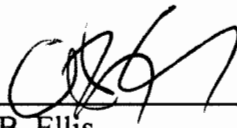
8. I certify:

(a) That the appellate filing fee has been paid.

(b) That service has been made upon all other parties required to be served

pursuant to Rule 20.

DATED This 28th day of March, 2011.



Allen B. Ellis
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 28th day of March, 2011, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

James G. Reid
David P. Claiborne
Ringert Law Chartered
455 South Third Street
P.O. Box 2773
Boise, Idaho 83701-2773

____ U.S. Mail, postage prepaid
____ Hand delivery
____ Overnight delivery
 X Facsimile (342-4657)



Allen B. Ellis

2011 MAY 20 AM 11:50

HARIE SCOTT
CLERK DISTRICT COURT

af
DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF BONNER**

EMPLOYERS MUTUAL CASUALTY)
COMPANY, an Iowa corporation)
)
Plaintiff,)
)
v.)
)
RIMAR CONSTRUCTION, INC., an Idaho)
corporation; and DAVID and KATHY)
DONNELLY, husband and wife,)
)
Defendants.)
)
_____)

CASE NO. CV-2007-0000885
ORDER GRANTING PLAINTIFF'S
MOTION TO DISALLOW
COSTS AND FEES

I. BACKGROUND

On February 23, 2011, a Judgment was entered in the above-entitled matter, which decreed as follows:

1. With respect to the claim of Plaintiff Employers Mutual Casualty Company (hereafter, "EMC") for declaratory judgment, there is no coverage under EMC's insurance policy with Defendants Rimar Construction, Inc. (hereafter, "RCI") and Ivan Rimar for the claims of Defendants David and Kathy Donnelly for damages awarded due to breach of the implied warranty of workmanship and/or violations of the Idaho Consumer Protection

Act in the underlying litigation, *Donnelly v. Rimar Construction, Inc., et al.*, Bonner County Case No. CV-2006-0445.

2. With respect to the Donnellys' claim for declaratory judgment, there is coverage under EMC's insurance policy with RCI and Ivan Rimar for the claims of the Donnellys for attorney's fees and court costs awarded in the underlying litigation.
3. With respect to any and all other claims of any of the parties advanced in this action, each and every claim is dismissed with prejudice, each party to bear their own costs and fees.

On March 4, 2011, the Donnellys filed a "Motion to Amend Judgment," requesting that the Court amend the judgment, pursuant to I.R.C.P. 59(e), to include a money judgment in their favor and against EMC in the amount of \$296,933.89, which is the judgment of attorney's fees and costs which the Donnellys were awarded in the underlying litigation. At a hearing on April 20, 2011, on the record, the Court denied the motion to amend the judgment.

On March 8, 2011, the Donnellys filed a "Memorandum of Costs and Fees," in which they contend they are entitled to an award of \$70,481.25 in costs and attorney's fees expended in litigating this declaratory judgment action pursuant to either I.C. § 41-1839 or I.C. § 12-120(3).

On March 17, 2011, EMC filed a "Motion to Disallow Costs and Fees," which disputes the applicability of either statute to award the Donnellys attorney's fees and costs in this matter.

II. STANDARD OF REVIEW

In *Straub v. Smith*, 145 Idaho 65, 175 P.3d 754 (2007), the Idaho Supreme Court set forth the standard of review for a Rule 59(e) motion to alter or amend a judgment, as follows:

The Court reviews an order denying a motion to alter or amend judgment for abuse of discretion. *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 707, 979 P.2d 107, 109 (1999). Pursuant to I.R.C.P. 59(e), a district court can correct legal and factual errors occurring in proceedings before it. *Id.*

Id. at 71, 175 P.3d at 760.

III. DISCUSSION

A. Idaho Code § 41-1839 Is Not Applicable To This Case.

Idaho Code § 41-1839, which governs the allowance of attorney's fees in suits against insurers provides, in part:

Any insurer issuing any policy, certificate or contract of insurance, surety, guaranty or indemnity of any kind or nature whatsoever, which shall fail for a period of thirty (30) days after proof of loss has been furnished as provided in such policy, certificate or contract, to pay to the person entitled thereto the amount justly due under such policy, certificate or contract, shall in any action thereafter brought against the insurer in any court in this state or in any arbitration for recovery under the terms of the policy, certificate or contract, pay such further amount as the court shall adjudge reasonable as attorney's fees in such action or arbitration.

I.C. § 41-1839(1).

In *Wolfe v. Farm Bureau Ins. Co.*, 128 Idaho 398, 913 P.2d 1168 (1996), the Idaho Supreme Court stated:

Idaho Code 41-1839 provides for the award of attorney fees if the insurance company fails to pay an amount justly due under the policy within thirty days after proof of loss. **But, before an insured can recover attorney fees under the statute, an action in court must be brought to recover under the terms of the insurance policy.** I.C. § 41-1839; ...

Id. at 404, 913 P.2d at 1174. (Emphasis supplied).

In this case, the Donnellys are **not** an insured under EMC's insurance policy with RCI and Ivan Rimar. Therefore, I.C. § 41-1839 is not applicable to this matter. Even if the statute was applicable, because the Donnellys provided no evidence that "proof of loss has been furnished as provided in such policy," the requirements of I.C. § 41-1839 were not met, and thus, the Donnellys are not entitled to recover attorney's fees pursuant to this statute.

B. The Donnellys Are Not Entitled To Attorney's Fees Under I.C. § 12-120(3).

Idaho Code § 12-120(3) provides:

In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

In *In re University Place/Idaho Water Center Project*, 146 Idaho 527, 199 P.3d 102 (2008), the

Idaho Supreme Court stated:

Idaho Code § 12-120(3) ... grants the prevailing party the right to an award of a reasonable attorney's fee in "any civil action to recover ... in any commercial transaction." **The statute applies to declaratory judgment actions if the gravamen of the action is a commercial transaction.** *Freiburger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 423, 111 P.3d 100, 108 (2005). "The term 'commercial transaction' is defined to mean all transactions except transactions for personal and household purposes." I.C. § 12-120(3). ...

"Idaho Code § 12-120(3) does not require that there be a contract between the parties before the statute is applied; the statute only requires that there be a commercial transaction." *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 472, 36 P.3d 218, 224 (2001). ...

Id. at 541, 199 P.3d at 116. (Emphasis supplied).


This declaratory judgment action was brought to determine rights and obligations under an insurance policy between EMC and RCI/Ivan Rimar. The Donnellys were included in this action not because of any commercial relationship with EMC, but rather as a proper party as the claimant to potential policy proceeds. Here, a commercial relationship exists between EMC and RCI/Ivan Rimar, but no such relationship exists between the Donnellys and EMC. Accordingly, in the absence of a commercial transaction directly between the Donnellys and EMC, the Donnellys are not entitled to the recovery of attorney's fees under I.C. § 12-120(3).

IV. CONCLUSION

NOW, THEREFORE, based on the foregoing, EMC's motion to disallow costs and fees is GRANTED, and the Donnellys' request for attorney's fees and costs is denied.

IT IS SO ORDERED.

DATED this 20th day of May, 2011.


Steve Verby
District Judge

CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 20 day of May, 2011, to:

Brent C. Featherston
FEATHERSTON LAW FIRM
113 South Second Avenue
Sandpoint, Idaho 83864
Attorneys for Rimar Construction, Inc.

Stephen D. Phillabaum
PHILLABAUM, LEDLIN, MATTHEWS & SHELDON
421 West Riverside, Suite 900
Spokane, Washington 99201
Attorneys for Rimar Construction, Inc.

James G. Reid
David P. Claiborne
RINGERT CLARK CHARTERED
455 South Third Street
P.O. Box 2773
Boise, Idaho 83701-2773
Attorneys for Employers Mutual Casualty Co.

Allen B. Ellis
ELLIS, BROWN & SHEILS, CHARTERED
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
Attorneys for David and Kathy Donnelly



Deputy Clerk

ALLEN B. ELLIS
 ELLIS, BROWN & SHEILS, CHARTERED
 Attorneys-at-Law
 707 North 8th Street
 P.O. Box 388
 Boise, Idaho 83701-0388
 (208) 345-7832 (Telephone)
 (208) 345-9564 (Facsimile)
 ISB. No. 1626

STATE OF IDAHO
 COUNTY OF BONNER
 FIRST JUDICIAL DIST.

2011 MAY 31 A 10:55

MARIE SCOTT
 CLERK DISTRICT COURT
MS
 DEPUTY

Attorneys for Defendants/Cross-Appellants (Donnelly)

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY)
 COMPANY, an Iowa corporation,)
)
 Appellant/Respondent,)
)
 vs.)
)
 DAVID DONNELLY and KATHY)
 DONNELLY, husband and wife,)
)
 Respondents-Cross Appellants,)
)
 and)
)
 RIMAR CONSTRUCTION, INC., an)
 Idaho corporation; IVAN RIMAR, an)
 individual,)
)
 Defendants.)
)

Docket NO. 38623-2011
CV-2007-0885
 AMENDED
 NOTICE OF CROSS-APPEAL

TO: THE ABOVE-NAMED APPELLANTS/CROSS-RESPONDENTS, Employers Mutual Casualty:

AMENDED NOTICE OF CROSS-APPEAL - 1

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Respondents/Cross Appellants, David Donnelly and Kathy Donnelly, appeal against the above named Appellant/Respondent to the Idaho Supreme Court from the Judgment (including any relevant adverse pre-trial rulings, procedural rulings and evidentiary rulings), entered in the above-entitled action on the 23rd of February, 2011, Honorable Steve Verby, District Judge, presiding and from the Order Granting Plaintiff's Motion to Disallow Costs and Fees signed May 20, 2011, by the Honorable Steve Verby, District Judge.
2. The Respondents/Cross Appellants are represented by Allen B. Ellis of Ellis, Brown & Sheils, Chtd., P.O. Box 388, Boise, Idaho, 83701.
3. The Appellant/Cross-Respondent is represented by James G. Reid and David P. Claiborne of Ringert Law Chartered, 455 S. Third Street, Boise, Idaho 83701.
4. That the parties have a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1), I.A.R.
5. Respondents/Cross-Appellants provide the following as a preliminary statement of the issue on appeal: Whether the District Court erred in concluding that damages assessed against Rimar Construction, Inc., for breach of the implied warranty of workmanship in the underlying action are not covered under the subject insurance policy.
6. An additional reporter's transcript is **not** requested.

7. Documents to be included in clerk's record in addition those designated by appellant in the initial notice of appeal: **None.**

8. I certify:

(a) That the appellate filing fee has been paid.

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

- DATED This 27th day of May, 2011.




Allen B. Ellis
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 27th day of May, 2011, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

James G. Reid
David P. Claiborne
Ringert Law Chartered
455 South Third Street
P.O. Box 2773
Boise, Idaho 83701-2773

____ U.S. Mail, postage prepaid
____ Hand delivery
____ Overnight delivery
 X Facsimile (342-4657)



Allen B. Ellis

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF BONNER

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY)
COMPANY, an Iowa Corporation)

Appellant/Plaintiff,)

vs.)

RIMAR CONSTRUCTION, INC.,)
an Idaho Corporation; and DAVID)
and KATHY DONNELLY, husband and)
wife)

Respondents/Defendants)
_____)

SUPREME COURT NO 38623-2011

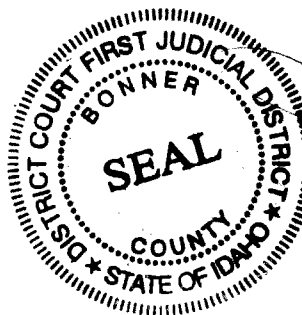
CLERK'S CERTIFICATE

Bonner County Case # CV-2007-0885

I, Marie Scott, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner, do certify that the foregoing Record in this cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents requested by Appellant Rule 28.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 30th day of June, 2011.

Marie Scott
Clerk of the District Court



Monna A. Helso
Deputy Clerk

Clerk's Certificate

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY)	
COMPANY, an Iowa Corporation)	
Appellant/Plaintiff,)	SUPREME COURT NO 38623-2011
vs.)	CLERK'S CERTIFICATE OF EXHIBITS
RIMAR CONSTRUCTION, INC.,)	Bonner County Case # CV-2007-0885
an Idaho Corporation; and DAVID)	
and KATHY DONNELLY, husband and)	
wife)	
Respondents/Defendants)	
_____)	

I, Marie Scott, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner, do hereby certify that the following is offered as the Clerk's Exhibit on Appeal:

Memorandum in Support of Motion to Dismiss filed August 17, 2007.

Memorandum in Support of Motion to Stay Proceedings filed September 4, 2007.

Memorandum in Opposition to Motion to Stay Proceedings filed September 12, 2007.

Defendant Rimar Construction, Inc.'s Memorandum Joining with Defendants Donnellys' Motion to Stay Proceedings & Responding to Plaintiff's Memorandum in Opposition to Stay Proceedings filed September 14, 2007.

Reply Memorandum in Support of Motion to Dismiss Defendant Rimar Construction's Counterclaim filed September 14, 2007.

Memorandum in Support of Defendants' Motion for Dismissal of Plaintiff's Amended Petition filed November 7, 2007.

Affidavit of Peter J. Johnson in Support of Defendant's Motion to Dismiss Plaintiff's Amended Petition filed November 7, 2007.

Supplemental Memorandum in Support of Motion to Stay Proceedings filed November 9, 2007.

Memorandum in Opposition to Rimar's Motion to Dismiss Amended Petition filed November 28, 2007.

Supplemental Memorandum in Opposition to Motion to Stay Proceedings filed November 28, 2007.

Rimar Construction's Reply Memorandum in Support of Motion to Dismiss Amended Petition filed November 30, 2007.

Defendant Rimar Construction, Inc.'s Response Memorandum in Opposition to Motion to Strike Affidavit of Peter J. Johnson filed November 30, 2007.

Supplemental Affidavit of Peter J. Johnson in Support of Defendant's Motion for Dismissal of Plaintiff's Amended Petition for Declaratory Judgment filed November 30, 2007.

Rimar Construction's Reply Memorandum in Support of Motion to Dismiss Amended Petition filed April 1, 2009.

Memorandum in Support of Defendants' Motion for Dismissal of Plaintiff's Amended Petition filed April 1, 2009.

Memorandum in Support of Second Motion to Vacate Order Staying Plaintiff's Declaratory Action filed May 22, 2011.

Plaintiff's Motion for Summary Judgment filed November, 12, 2009.

Affidavit of Michael A. Ealy in Support of Motion to Amend Answer and Counterclaim filed November 25, 2009.

Memorandum in Support of Motion to Amend Answer filed November 25, 2011.

Letter to Clerk of the Court from Michael A. Ealy filed December 18, 2011.

Memorandum in Support of Motion for Permissive Appeal filed April 19, 2010.

Affidavit of Michael A. Ealy in Support of Motion to Amend Answer and Counterclaim filed June 21, 2010.

Memorandum in Opposition to Defendant Donnelly's Motion to Amend Answer and Counterclaim filed July 6, 2010.

Verified Memorandum in Support of Motion for Extension of Time and Continuance of Hearing filed July 8, 2010.

Memorandum RE: Motions for Reconsideration filed August 23, 2010.

Letter to Judge from Michael A. Ealy filed November 2, 2010.

Affidavit of Michael A. Ealy in Support of Motion to Withdraw as Counsel of Record filed December 16, 2010.

Letter to Judge Verby from David P. Claiborne filed December 20, 2010.

Letter to Clerk from Kathy L. K. Donnelly filed December 27, 2010.

Memorandum in Support of Motion to Amend Judgment (Rule 59(e), I.R.C.P.) filed March 4, 2010.

Affidavit of Allen B. Ellis filed March 4, 2010.

Affidavit of Michael G. Schmidt in Support of Defendants Donnelly's Claim for Attorney Fees and Costs filed March 8, 2011.

Memorandum of Costs and Attorney Fees filed March 8, 2011.

Memorandum in Support of Motion to Disallow Costs and Fees filed March 21, 2010.

Affidavit of Counsel in Support of Motion to Disallow Costs and Fees filed March 21, 2010.

Memorandum in Opposition to Motion to Amend Judgment filed April 8, 2010.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 28th day of June, 2011.

Marie Scott
Clerk of the District Court



Thomas L. Kelso
Deputy Clerk

Clerk's Certificate of Exhibits

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO,
 IN AND FOR THE COUNTY OF BONNER

EMPLOYERS MUTUAL CASUALTY)	
COMPANY, an Iowa Corporation)	
Appellant/Plaintiff,)	SUPREME COURT NO 38623-2011
vs.)	CLERK'S CERTIFICATE OF SERVICE
RIMAR CONSTRUCTION, INC.,)	Bonner County Case # CV-2007-0885
an Idaho Corporation; and DAVID)	
and KATHY DONNELLY, husband and)	
wife)	
Respondents/Defendants)	

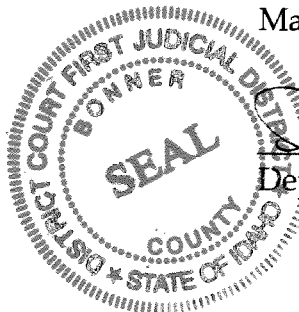
I, Marie Scott, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner, do hereby certify that I have personally served or mailed, by United Parcel Service or US Priority Mail one copy of the CLERK'S RECORD to each of the Attorneys of Record in this cause as follows:

JAMES G. REID
 RINGERT LAW CHARTERED
 455 S. THIRD ST., P.O. BOX 2773
 BOISE, ID 83701-2773
 ATTORNEY FOR APPELLANT

ALLEN B. ELLIS
 ELLIS, BROWN, & SHEILS, CHARTERED
 707 N. 8TH ST., P.O. BOX 388
 BOISE, ID 83701-0388
 ATTORNEY FOR RESPONDENTS

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 5th day of July, 2011.

Marie Scott, Clerk of the District Court



Theresa A. Kelsa
 Deputy Clerk