10-23-2017

Estate of Ekic v. Geico Indem. Co. Respondent's Brief Dckt. 45018

IN THE SUPREME COURT OF THE STATE OF IDAHO

ESTATE OF ALDINA EKIC, Decedent, and IBRAHIM & HALIDA EKIC, Parents and sole beneficiaries of decedent, Plaintiffs/Appellants, vs. GEICO INDEMNITY COMPANY, A Maryland corporation, Defendant/Respondent.	)	SUPREME COURT NO. 45018

RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, the Honorable Melissa Moody, District Judge presiding.

* * *

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STATEMENT OF THE CASE

A. The Nature of the Case

This is a lawsuit brought by the Estate of Aldina Ekic and Aldina's parents, Ibrahim and Halida Ekic ("the Ekics") against GEICO Indemnity Company ("GEICO") for alleged breach of contract, misrepresentation, bad faith, and promissory estoppel. The Ekics disputed GEICO's interpretation of the underinsured motorists ("UIM") provision in Aldina Ekic's automobile insurance policy. GEICO contended that the language of its UIM amendment in Ms. Ekic's policy precluded the Ekics' claim. The District Court granted summary judgment in favor of GEICO on all of the Ekics' claims. The District Court then granted costs and attorney fees to GEICO because the District Court found that the Ekics' lawsuit was brought frivolously, unreasonably and without foundation. The Ekics now appeal the granting of summary judgment and the award of attorney fees.

B. Course of Proceedings

The Ekics filed a Complaint against GEICO in Ada County District Court on October 30, 2015, alleging claims for breach of contract, misrepresentation and bad faith. R: 08 (Complaint and Demand for Jury Trial). GEICO filed an Answer on December 18, 2015. R: 016 (Answer and Demand for Jury Trial). GEICO propounded Discovery Requests to the Ekics on January 5, 2016. R: 03. A Status Conference was held February 22, 2016, after which the parties jointly submitted a Stipulation for Scheduling and Planning, whereupon the

Court issued a Scheduling Order. R: 03, 21-31. On February 28, 2016, Plaintiffs served responses to GEICO's Discovery Requests. R: 38-47 (Plaintiffs' Answers to Defendant's First Set of Discovery).

GEICO filed a motion for summary judgment on April 5, 2016. R: 03, 33-97. On May 5, 2016, the Ekics filed a Motion to Amend Complaint to add a cause of action for promissory estoppel. R: 03, 0114-5. A hearing was held on GEICO's Motion for Summary Judgment on May 16, 2016, after which the District Court issued its Order Granting Motion for Summary Judgment. R: 04, 147-9.

The District Court entered an Order for Additional Briefing as to the Motion to Amend on June 14, 2016, after which the Ekics filed a Brief in Support of Motion to Amend Complaint. R: 04, 150-9. The District Court granted leave for filing the Amended Complaint on August 18, 2016. R: 04, 17-2. The Ekics filed the Amended Complaint on August 23, 2016, and GEICO filed an Answer and Demand for Jury Trial on October 5, 2016. R: 04, 192-205.

The Ekics propounded interrogatories and requests for production to GEICO on September 25, 2016. R: 0201. GEICO served Answers and Responses to the Ekics' Discovery Requests on October 26, 2016. R: 0207.

On November 1, 2016, the parties filed a Stipulated Motion to Continue Trial. R: 0209. In the Stipulated Motion, the parties represented to the District Court that "Defendant anticipates that it will bring a second motion for summary judgment as to Plaintiffs' new claim of promissory estoppel." R: 0210. The District Court granted the Stipulated Motion. R: 0211. The District Court then convened a telephonic status conference, and subsequently issued a Scheduling Order, setting oral argument on

GEICO's second motion for summary judgment for January 30, 2017. R: 0213. GEICO then filed its second motion for summary judgment on December 14, 2016. R: 0215.

Approximately two weeks before the scheduled hearing on GEICO's Second Motion for Summary Judgment, the Ekics filed a Motion to Defer Hearing on Defendant's Second Motion for Summary Judgment for 60 days And For Additional Time Pursuant to Rule 56(d)(1) and (2), IRCP. R: 0222-4. On January 24, 2017, the District Court entered its Order Denying Motion to Defer Hearing. R: 0227-8.

A hearing was held on GEICO's Second Motion for Summary Judgment on February 2, 2017, and the District Court granted the motion from the bench. R: 0229. On February 3, 2017, the District Court issued its Order Granting GEICO's Second Motion for Summary Judgment. R: 0230-2. The District Court then issued a Judgment on February 3, 2017. R: 0233-4.

On February 8, 2017, GEICO filed a Memorandum of Costs and Attorney Fees. R: 0235-243. On February 17, 2017, the Ekics filed a Motion to Set Aside Judgment and Order Granting Summary Judgment and For New Trial Pursuant to Rule 59(a)(1(B) IRCP. R: 0247-250. On February 22, 2017, the Ekics filed an Objection to GEICO's Memorandum of Costs and Attorney Fees. R: 0251-5.

The District Court issued its Order Denying Motion to Set Aside Judgment and Orders Granting Summary Judgment and Denying Motion for New Trial on March 2, 2017. R: 0256-9. On March 2, 2017, the District Court issued its Order Awarding Costs and Attorney Fees. R: 0260-3. The District Court issued a Judgment on March 3, 2017. R: 0264-5.

On March 16, 2017, the Ekics filed a Motion to Set Aside the Trial Court's Order Granting Defendant's Memorandum of Costs and Attorney Fees. R: 0266-7. On March 27, 2017, the District Court issued an Amended Judgment. R: 0275-6. On April 6, 2017, the District Court issued its Order Denying Motion to Set Aside Award of Costs and Attorney Fees. R: 0277-9.

On April 12, 2017, the Ekics filed their Notice of Appeal. R: 0280-4. On May 15, 2017, the Ekics filed an Amended Notice of Appeal. R: 0300-5.

C. Concise Statement of Facts

The following facts are undisputed material facts that were stipulated to by the Ekics in their response brief on GEICO's first motion for summary judgment. R: 0103 (Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment). On or about November 1, 2013, Aldina Ekic died in an automobile accident when she was a passenger in an automobile driven by Andrew Cassell. R: 082-6 (Idaho Vehicle Collision Report). Andrew Cassell had an automobile policy with Progressive Insurance Company, which policy had limits of liability of $25,000. R: 011 (Complaint, Par. VIII); R: 045 (Plaintiffs' Answers to Interrogatories, Answer to Interrogatory No. 16). The Ekics entered into a settlement with Andrew Cassell and Progressive for policy limits of $25,000. *Id.*

At the time of the accident, Aldina Ekic owned an Idaho Family Automobile Insurance Company with GEICO, Policy No. 4248-93-31-05, effective dates June 25, 2013, to December 25, 2013, with UIM limits of $25,000/$50,000. R: 09 (Complaint, Par. IV); R: 049-80 (GEICO Policy No. 4248-93-31-05). GEICO Policy No.

4248-93-31-05 contains an Underinsured Motorist Coverage Idaho Automobile Policy Amendment, which provides in relevant part:

> Under the Underinsured Motorist coverage, we will pay damages for **bodily injury** caused by an accident which the **insured** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** arising out of the ownership, maintenance, or use of that auto.

R: 074 (A291 (06-12), page 3 of 4)(emphasis in original). The Declarations Page lists the Underinsured Motorist Coverage Idaho Automobile Policy Amendment, Form A291. R:50 (Declarations Page). The UIM Idaho Automobile Policy Amendment defines an "underinsured motor vehicle" as:

> "a motor vehicle insured under a motor vehicle liability policy but insured for an amount that is less than the underinsured motorist limits carried on the motor vehicle of the injured person."

R: 072 (A291(06-12), page 1 of 4). The UIM Idaho Automobile Policy Amendment provides that "if an **insured** is injured as a pedestrian or while **occupying** or using an auto not described in this policy, this insurance is excess over any other similar insurance available to the **insured** and the insurance which applies to the occupied auto is primary." R: 074 (A291(06-12), page 3 of 4)(emphasis in original). Aldina Ekic paid $11.40 in premium for the UIM insurance. R: 049 (Declarations Page).

The Ekics made a claim under Aldina Ekic's GEICO policy, and GEICO informed the Ekics that since the Ekics had received an amount equal to the UIM coverage under the policy, there is no UIM coverage available under the GEICO policy. R: 011 (Complaint, Par. IX). The Ekics did not provide any evidence of representations made by GEICO or its agents other than Policy No. 4248-93-31-05. R:

042-3 (Plaintiffs' Answers to Defendant's First Set of Discovery Requests, Answers to Interrogatories Nos. 9, 10, 11 and 13).

IV.

ADDITIONAL ISSUES PRESENTED ON APPEAL

GEICO is seeking attorney fees on the basis that the Ekics' appeal is brought frivolously, unreasonably and without foundation.

V.

ARGUMENT

1. The Ekics failed to preserve an objection to the Affidavit of Counsel filed by GEICO in support of its Motion for Summary Judgment, and assuming for the sake of argument the Ekics did not waive any objection, the Affidavit of Counsel was properly admitted by the District Court.

Under Idaho Rule of Evidence 103(a), error may not be predicated on a ruling admitting evidence unless "a timely objection or motion to strike appears of record, stating the specific ground of objection." *See, Ballard v. Kerr*, 160 Idaho 674, 687, 376 P.3d 464, 477 (2016)(declining to address appellant's arguments that the district court erred in admitting testimony where appellant did not raise objection). Here, the Ekics did not object to the Affidavit of Counsel filed by GEICO in support of its Motion for Summary Judgment. In fact, in the Ekics' Memorandum in Opposition to GEICO's Motion for Summary Judgment, the Ekics stated, "Plaintiffs also have no dispute with the recitation of the Statement of Undisputed Material Facts as contained in pp. 2-3 of Defendant's Memorandum." R: p. 0103. GEICO's Statement of Undisputed Material Facts was based on evidence contained in exhibits to the Affidavit

of Counsel filed by GEICO. The Ekics even cited to the Affidavit of GEICO's counsel in the Ekics' Memorandum in Opposition. R: p. 0104. Therefore, because the Ekics did not make an objection or a motion to strike with respect to the Affidavit of Counsel filed by GEICO, the Ekics may not raise on appeal an alleged error predicated on the Court's admission of the affidavit.

Even assuming for the sake of argument that the Ekics had preserved the alleged error for appeal, the Affidavit of Counsel was properly admitted by the District Court. A party asserting that a fact cannot be or is genuinely disputed must support his assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." I.R.C.P. 56(c)(1)(A). An affidavit used to support or oppose a motion must be made upon personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. I.R.C.P. 56(c)(4).

Here, GEICO's attorney submitted an affidavit attaching the Ekics' Answers to GEICO's First Set of Discovery Requests, a copy of the liability insurance policy GEICO issued to Aldina Ekic, and a copy of the Idaho Vehicle Collision Report for the subject accident. R: pp. 35-86. The Ekics' Answers to GEICO's First Set of Discovery Requests were verified so they were self-authenticating. I.R.E. 1007. GEICO's insurance policy was attached to the Ekics' verified Complaint as Exhibit A. R: pp. 8-15. The Vehicle Collision Report was produced with the Ekics' verified Answers to GEICO's First Set of Discovery Requests, and was attached to the

Answers. R: 46. Therefore, the Affidavit of Counsel and the exhibits attached to the affidavit were all properly admitted by the District Court.

2. The District Court did not err in granting GEICO's First and Second Motions for Summary Judgment because there was no additional coverage under Aldina Ekic's UIM limits.

The District Court properly granted GEICO's first and second motions for summary judgment because there was no additional coverage under Aldina Ekic's UIM limits. Idaho requires automobile insurers to offer their policyholders insurance "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured and underinsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom." Idaho Code Section 41-2502(1). The minimum amount of required insurance is $25,000 per person and $50,000 per accident. Idaho Code Section 49-117(18).

A) Breach of Contract Claim

The Ekics assert that because their damages arising out of their daughter's death exceed the amount of $25,000, the policy limits provided by Andrew Cassell's liability insurance, Mr. Cassell became an underinsured motorist and therefor GEICO is liable to the Ekics under its UIM coverage. This argument for stacking of policy benefits was rejected by the Idaho Supreme Court in *Erland v. Nationwide Insurance Co.*, 136 Idaho 131, 30 P.3d 286 (2001)(reversing summary judgment against insurer under UIM provisions). There, a passenger was injured in a car accident. The passenger's daughter was the driver. The daughter's insurance policy had limits of $100,000, which the insurer paid to the passenger. The passenger then

made a UIM claim under her policy for $50,000. The passenger's insurer denied the claim because the policy contained anti-stacking language that stated if more than one insurance policy applied, the total applicable limit would not exceed the highest limit amount under any one of them. The passenger sued the insurer, and the district court granted summary judgment against the insurer. On appeal, the Idaho Supreme Court reversed. The Supreme Court held that the district court erred in holding that the combined limits of both policies were available to the passenger. The passenger's UIM provision provided that if more than one policy applies, the total of the insured's recovery will not exceed the highest limit amount of any of them. The Supreme Court held that this provision was enforceable, and thus the passenger was limited to a recovery of $100,000.

Similarly, in *Howard v. Oregon Mutual Insurance Co.*, 137 Idaho 214, 46 P.3d 510 (2002)(affirming summary judgment for insurer), a driver was injured by another motorist whose policy paid its limit of $50,000 to the driver. The driver had UIM limits of $50,000, and sought recovery of UIM benefits. The insurance company brought a declaratory judgment action, and the district court granted summary judgment, finding no coverage under the policy's UIM provisions. On appeal, the Idaho Supreme Court affirmed:

> Consequently, we hold that the offset provision unambiguously provides that the amounts received from Pearce's insurer are applied to reduce the amount that Oregon Mutual would otherwise be obligated to pay under the UIM policy limits, as opposed to reducing the total amount of damages the Howards suffered. Oregon Mutual's obligation under the UIM coverage was therefore reduced to zero. We affirm the district court's grant of summary judgment in favor of Oregon Mutual.

Id., 137 Idaho at 219, 46 P.3d at 515.

In the case at hand, Aldina Ekic's GEICO policy provides that "if an **insured** is injured as a pedestrian or while **occupying** or using an auto not described in the policy, this insurance is excess over any other similar insurance available to the **insured** and the insurance which applies to the occupied auto is primary." R: 075 (GEICO policy A291 (06-12), page 3 of 4)(emphasis in original). A contract must be interpreted according to the plain meaning of the words used if the language is clear and unambiguous. *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Insurance Co.*, 141 Idaho 660, 115 P.3d 751 (2005)(affirming summary judgment for insurer on breach of contract claim). If a provision in an insurance policy is unambiguous, coverage must be determined in accordance with the plain meaning of the words used. *Markel International Insurance v. Erekson*, 153 Idaho 107, 279 P.3d 93 (2012)(affirming ruling that insurer had no duty to defend or indemnify). Here, as in *Erland* and *Howard*, where both policies provide limits of $25,000, the anti-stacking provision is enforceable, and the Ekics are limited to recovery of the $25,000 they obtained from Progressive.

Additionally, the Ekics cannot recover under the GEICO policy because the Cassell vehicle does not qualify as an underinsured motor vehicle under the GEICO Underinsured Motorist Coverage Idaho Automobile Policy Amendment. The GEICO policy defines an "underinsured motor vehicle" as "a motor vehicle insured under a motor vehicle liability policy but insured for an amount that is less than the underinsured motorist limits carried on the motor vehicle of the injured person." R: 073 (GEICO policy A291 (06-12), page 1 of 4). Mr. Cassell's automobile was not insured for an amount that is less than the UIM limits carried on Aldina Ekic's motor vehicle. Therefore, by

definition, the Cassell vehicle was not an underinsured vehicle, and therefore the Ekics could not recover under the UIM portion of their daughter's GEICO policy.

The Ekics asserted both at the District Court and on appeal that GEICO's UIM policy for the minimum financial limits allowed in Idaho is worthless and illusory. R: 0182 (Amended Complaint, Par. VI). Policies that are approved by the Director of the Idaho Department of Insurance are presumed to be in accordance with public policy. *Hansen v. State Farm Mutual Automobile Insurance Co.*, 112 Idaho 663, 735 P.2d 974 (1987)(reversing judgment against insurer for underinsured motorist benefits). An insurance company's policy is illusory if

> It appears that if any actual coverage does exist it is extremely minimal and affords no realistic protection to any group or class of injured persons. The declarations page of the policy contains language and words of coverage, then by definition and exclusion takes away the coverage. The fact that there might be some small circumstance where coverage could arguably exist does not change the reality that, when the policy is considered in its entirety, the City was receiving only an illusion of coverage for its premiums. This Court will not allow policy limitations and exclusions to defeat the precise purpose for which the insurance is purchased.

National Union Fire Insurance Co. v. Dixon, 141 Idaho 537, 541-2, 112 P.3d 825, 829-830 (2005)(affirming summary judgment in favor of insurer and finding coverage not illusory).

In the case at hand, GEICO's UIM provisions are not illusory because they provide realistic protections. For example, the policy would provide for a recovery of UIM benefits from a tortfeasor with the required minimum liability limits from numerous states that are less than Idaho minimum limits of $25,000. See, Arizona Revised Statutes, Section 28-4009(2) ($15,000/$30,000/$10,000); California Insurance Code

Section 1580(b) ($15,000/$30,000/$5,000); Connecticut General Statutes Section 14-112(a) ($20,000/$40,000/$10,000); Delaware Code Section 2902 ($15,000/$30,000/$10,000); Florida Statute tit. XXII, Section 324.021 ($10,000/$20,000/$10,000)[1]; Hawaii tit. 24, Section 431.10 C-301 ($20,000/$40,000/$10,000); Louisiana Revised Statutes Section 32-900 ($15,000/$30,000/$25,000); Massachusetts Gen. Laws ch. 90, Section 34A ($20,000/$40,000/$8,000); Michigan Compiled Laws 257.520(b), 500.3009 ($20,000/$40,000/$10,000); Nevada Revised Statutes Section 485.185 ($15,000/$30,000/$10,000); New Jersey Statutes Am. @ 39.6A-3 ($15,000/$30,000/$5,000); 75 Pennsylvania Comm. Statutes Section 1702 ($15,000/$30,000/$5,000). In addition, the GEICO policy would potentially provide for a recovery in a situation in which there were multiple claimants and insufficient insurance. The fact that Aldina Ekic's policy does not provide a benefit under the facts of this case does not render the coverage illusory. Aldina Ekic paid a premium of $11.40 to purchase her UIM insurance. R: 049 (GEICO Declarations Page). Ms. Ekic elected to purchase UIM coverage for the same amount she purchased for her liability coverage. Ms. Ekic could have chosen to pay additional premium for a higher UIM limit.

The Ekics argue that three opinions from other jurisdictions "essentially held that the positioning of the disclaimer language buried at the end of the policy with no link or reference to the language contained on the Declaration Page was clearly intended to obscure and conceal the disclaimer language from the insured and was

[1] Florida allows the purchase of a policy for personal injury protection and property damage liability for $10,000 only. Florida Statutes Annotated Section 627.736.

construed as constituting a waiver and/or non-enforceable disclaimer in favor of the insured against the insurance companies in those three cases." Appellants' Brief, p. 1.18. There is no reason for the court to consider these cases because Idaho law is clear. However, even if the court elects to consider these cases, review of the three intermediate appellate court opinions reveals that they should not be considered persuasive.

Dowhower v. Marquez, 659 N.W.2d 57 (Wisc.Ct.App. 2003), is a decision by the Wisconsin Court of Appeals, the intermediate appellate court in that state. The decision was reversed by the Wisconsin Supreme Court, and then remanded to the intermediate appellate court for further consideration in light of the Wisconsin Supreme Court's opinion in *Folkman v. Quamme*, 665 N.W.2d 857 (Wisc. 2003). *Dowhower v. Marquez*, 668 N.W.2d 735(Wisc. 2003). In a subsequent opinion, the Wisconsin Court of Appeals modified its discussion of the impact of the declarations page in light of the *Folkman* opinion. Recognizing the position of the Wisconsin Supreme Court that a declarations page is intended to provide a summary of coverage and cannot provide a complete picture of coverage under a policy, the Court of Appeals then found that under the specific circumstances of the *Dowhower* case the declaration page "in no way assists the insured in understanding that the limits of liability are subject to conditions and exceptions set forth later in the policy...," and that "the declarations mislead the insured about where to find the UIM coverage in the policy." *Dowhower v. Marquez*, 674 N.W.2d 906, 913-4 (Wisc.Ct.App. 2003). In 2006, the Wisconsin Supreme Court distinguished the holding of *Dowhower* in *Dempich v. Pekin Insurance Co.*, 710 N.W.2d 691 (Wisc.Ct.App. 2006). In *Dempich*, the Wisconsin Court of Appeals found that the

declarations page in the subject insurance policy was "a serviceable road map to the policy." *Id.*, 710 N.W.2d at 696. Underinsured motorist coverage had its own line in the "coverages" section, instead of being subsumed by the line item for uninsured motorist coverage as it was in *Dowhower*. *Id.* Unlike *Dowhower*, the insured was made aware of the existence of endorsements to the policy on the declarations page in a separate section entitled "policy endorsements." *Id.* The endorsement for UIM coverage was referenced on the declarations page, which was determined by *Folkman* to be "'the most crucial section of the policy for the typical insured.'" *Id.*, (quoting, *Folkman, supra*, 665 N.W.2d 857). Thus, in *Dempich* the appellate court found the UIM endorsement to be enforceable. *Id.*

Dowhower is also distinguishable from the case at hand. The declarations page in the UIM policy listed the UIM coverage as "$50,000 each person $100,000 each accident," and did not provide any further explanation of the extent of the policy's UIM coverage. *Dowhower, supra,* 674 S.W.2d at 914. The *Dowhower* Court found that the declarations page "in no way assists the insured in understanding the limits of liability are subject to conditions and exceptions set forth later in the policy." *Id.* The *Dowhower* Court also found that the declarations page mislead the insured about where to find the UIM coverage in the policy because UIM coverage was listed under "Coverage C" "uninsured motorist coverage," but the policy's uninsured motorists coverage did not even reference UIM coverage. *Id.* Conversely, in the Ekic policy, UIM coverage has its own line in the Coverages section. The limits of UIM coverage are clearly shown. On the second page of the Declarations Page, the UIM endorsement, Form

A291, is specifically referenced. Uninsured motorist coverage is provided for separately, and this is not confusing.

Long v. Shelter Insurance Companies, 351 S.W.3d 692 (Mo.Ct.App. 2011), is an opinion by the Missouri Court of Appeals, the intermediate appellate court in that state. In *Long*, the insurer refused to stack UIM coverage under six policies on the basis that a general anti-stacking provision in those six policies unambiguously prohibited stacking of UIM coverage. On appeal, the Missouri Court of Appeals found the policy to be ambiguous. In analyzing the policy as a whole, the appellate court found that the language in the policies' "other insurance" clauses could be reasonably interpreted by an ordinary person of average understanding to mean that the UIM coverage would provide excess coverage to all other UIM policies, whether sold by other companies or by Shelter. The promise of excess UIM coverage conveyed in the "other insurance" clause conflicted with the general anti-stacking provision, which stated that the insurer's liability under all its policies would not exceed the highest limit of any one policy. The anti-stacking provision took away that promised excess insurance by limiting Shelter's liability to the maximum UIM coverage available under one of its policies. *Long*'s discussion of the flaws in the declaration page was part of a comprehensive discussion of what the court perceived as flaws in Shelter's policy.

The application of *Long* is severely limited by the recent en banc Missouri Supreme Court opinion in *Owners Insurance Co. v. Craig*, 514 S.W.3d 614 (Mo. 2017). There the district court entered summary judgment in favor of policyholders that denied the insurer the right to reduce the amount paid pursuant to its UIM coverage by the amount paid by the at-fault motorist's liability insurer. On appeal, the Supreme

Court reversed. The Court found that the offset provision was clear and unambiguous. The Supreme Court also rejected the policyholders' argument that the declarations page was misleading:

> While the Craigs point to the declarations' listed limit amount and other portions of the policy that make bare, general references to the declarations containing the limit of liability, the declarations "are introductory only and subject to refinement and definition in the body of the policy." *Peters v. Farmers Ins. Co.*, 726 S.W.2d 749, 751 (Mo. banc 1987). The declarations "do not grant any coverage. The declarations state the policy's essential terms in an abbreviated form, and when the policy is read as a whole, it is clear that a reader must look elsewhere to determine the scope of coverage." *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, 439 S.W.3d 215, 221 (Mo. banc 2014). Evaluating the policy as a whole, it unambiguously provides that the declarations' listed limit amount serves only as a reference point for use with the set-off provisions, which are likewise unambiguous.

Id, 514 S.W.3d at 617–18; *see also, GEICO Casualty Co. v. Clampitt*, 521 S.W.3d 290 (Mo.Ct.App.Div. 3 2017)(reversing summary judgment declaring that UIM coverage limits on three vehicles could be stacked, and noting that insurance policy has to be read as a whole, and the fact that the declarations page did not expressly prohibit stacking did not create an ambiguity). The holdings in *Owners* and *Clampitt* indicate that the Missouri courts have evolved to take a position more consistent with that taken by Idaho courts in construing the entire policy as a whole.

Long is also distinguishable from the instant case. *Long* was about stacking, which is not the issue here. Further, in *Long*, the Court criticized the declarations page because it informed the insured that UIM coverage was $100,000 per person/$300,000 per accident. There was nothing to indicate to the insured that the limits were subject to set-off or reduction. However, here GEICO's Declaration Page directs the policy holder to the endorsements, including A291, the UIM

endorsement. When construing the GEICO policy as a whole, there is no ambiguity and nothing to mislead the insured.

In *Nationwide Mutual Insurance Co. v. Davis*, 600 N.Y.S.2d 482 (App.Div. 2nd Dept. 1993), the New York Appellate Division, an intermediate appellate court in that state, held in a Memorandum Decision that an insurer was not entitled to set off the amount the policyholder had recovered from another tortfeasor because the declarations page did not indicate that the payment of underinsured motorist benefits would be subject to a reduction. In *Allstate Insurance Co v. Urban*, 23 F.Supp.2d 324 (E.D.N.Y. 1998), the Court noted that the New York Court of Appeals held in *Matter of Arbitration between Allstate Insurance Company and Stolarz (Kathleen), New Jersey Manufacturers Insurance Co.*, 613 N.E.2d 936 (N.Y. 1993), that the decisions in *Davis* and similar cases were "strictly limited to situations where the policy in question was for *under* insurance not a combined underinsurance and uninsurance policy." *Allstate Insurance Co. v. Urban, supra,* 23 F.Supp.2d at 325 (emphasis in original). Therefore, where the insurance policy at issue clearly is a combination underinsured/uninsured policy, the courts have refused to follow the rationale set forth in *Davis*, and have permitted a set-off. *Id.*

Davis was decided before the adoption of regulations by the New York Superintendent of Insurance approving single limits and specifically requiring reduction in coverage for amounts recovered from underinsured drivers. 11 NYCRR 60-2.1; *see* discussion in *Matter of Allstate Insurance Co. (Stolarz)*, *supra*, 613 N.E.2d at 938; *and see GEICO v. O'Haire*, 667 N.Y.S.2d 917 (App.Div. 2d Dept. 1998)(set off provision in insurance policy is enforceable even where the provision is not contained in

the declaration page). In addition, the fact pattern presented in *Davis* is not analogous to the case at bar. In *Davis*, the declaration page did not have any indication that the payment of UIM benefits would be subject to reduction. The appellate court also found the coverage amount was misleading to the extent that it purported to reduce the UIM coverage so as to spare the insurer from ever having to pay a coverage limit. Here, GEICO's policy refers the insured to the UIM endorsement, Form A291. The coverage amount is not misleading. Further, here Aldina Ekic did not meet the definition of an underinsured driver under her policy, since her limits were identical to Mr. Cassell's.

The Declarations Page used in Aldina Ekic's GEICO policy provides a "serviceable roadmap" to the policy. UIM coverage has its own line in the Coverages section. The limits of the UIM coverage are clearly shown. On the second page of the Declarations Page, the UIM endorsement, Form A291, is specifically referenced. Here, Aldina Ekic was made aware of the existence of Form A291, the Automobile Policy Amendment Underinsured Motorist Coverage Idaho. Thus, the GEICO policy unambiguously set forth Ms. Ekic's UIM coverage and its limitations.

Therefore, because of the anti-stacking provision in GEICO's policy, as well as the fact that the Cassell vehicle does not qualify as an underinsured motor vehicle, the District Court properly granted summary judgment to GEICO on the Ekics' breach of contract claim.

(B) Misrepresentation Claim

The District Court properly granted GEICO's motion for summary judgment as to the Ekics' misrepresentation claim. Although the Ekics alleged that misrepresentations were made by GEICO's agent inducing Aldina Ekic to purchase her

automobile liability policy, the Ekics produced no evidence to support this allegation. GEICO propounded interrogatories to the Ekics, and specifically asked the Ekics to identify "each and every statement of fact Plaintiffs believe were untrue or misstatements." R: 042-3 (Plaintiffs' Answers to Defendant's First Set of Discovery, Answer to Interrogatory No. 11). The Ekics responded that the "initial representations were made in the policy language itself. Additional misrepresentations are anticipated in discovery and deposition testimony of the sales agent who sold the subject policy to insured decedent." *Id.*

If a party fails to properly address an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it. I.R.C.P. 56(e)(3). Where the non-moving party bears the burden of proof at trial, to prevail on summary judgment the moving party need only point out an absence of evidence supporting the non-moving party's claims. *See Samuel v. Hepworth, Nungester, and Lezamiz, Inc.*, 134 Idaho 84, 88, 996 P.2d 303, 307 (2000). "[A] mere scintilla of evidence or only slight doubt as to the facts" is not sufficient to create a genuine issue for purposes of summary judgment. *Harpole v. State*, 131 Idaho 437, 439, 958 P.2d 594, 596 (1998). The non-moving party "must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial." *Samuel*, 134 Idaho at 87, 996 P.2d at 306. "Therefore, the moving party is entitled to judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element to that party's case on which that party will bear the burden of proof at trial." *Thomas v. Med.*

Ctr. Physicians, P.A., 138 Idaho 200, 205, 61 P.3d 557, 562 (2002). Since the Ekics did not come forward with specific evidence to support their misrepresentation claim, the District Court properly granted summary judgment to GEICO on the Ekics' claim for misrepresentation.

(C) Bad Faith Claim

The District Court properly granted GEICO's motion for summary judgment as to the Ekics' bad faith claim. Idaho recognizes an implied covenant of good faith and fair dealing in every insurance contract. *Simper v. Farm Bureau Mutual Insurance Company of Idaho*, 132 Idaho 471, 974 P.2d 1100 (1999)(affirming summary judgment in favor of insurer). In order to recover on a bad faith claim, the insured must show: (1) the insurer intentionally and unreasonably denied or delayed payment; (2) the claim was not fairly debatable; (3) the denial or delay of payment was not the result of a good faith mistake; and (4) the resulting harm is not fully compensable by contract damages. *Id.*

In the case at bar, there was no evidence to support the Ekics' bad faith claim against GEICO. First, GEICO did not breach its contract with Aldina Ekic, and therefore it did not unreasonably deny payment. Second, even if the District Court had rejected GEICO's coverage analysis, the claim was fairly debatable. An insurer does not act in bad faith if it challenges the validity of a "fairly debatable" claim. *McGilvray v. Farmers New World Life Insurance Co.*, 136 Idaho 39, 28 P.3d 380 (2001)(affirming summary judgment for insurer). When a claim is fairly debatable the insurer is entitled to dispute the claim and will not be deemed liable in bad faith for failure to pay the claim. *Id.*

Accordingly, the District Court properly granted summary judgment to GEICO as to the Ekics' bad faith claim.

(D) Promissory Estoppel Claim

After GEICO filed its first motion for summary judgment, the Ekics filed a motion for leave to amend their complaint to add a cause of action for promissory estoppel. The District Court granted leave to the Ekics to amend. GEICO then filed its second motion for summary judgment on the promissory estoppel claim, which the District Court properly granted.

The Ekics allege that Aldina Ekic purchased UIM insurance with limits of $25,000 from GEICO in reliance on the Declarations Page; that GEICO's failure to pay under the UIM insurance caused a substantial economic loss to the Ekics; that this economic loss was foreseeable to GEICO, because the offset provisions drafted by GEICO put GEICO on notice that typically an insured who purchases $25,000 in UIM insurance would have zero recovery from any Idaho insured or out of state driver having limits of $25,000; and that Aldina Ekic acted reasonably in reliance on the promise of $25,000 in coverage which Aldina Ekic believed she was purchasing. Thus, the Ekics assert that GEICO is liable to them under a theory of promissory estoppel.

The elements of promissory estoppel are 1) the detriment suffered in reliance was substantial in an economic sense; 2) substantial loss of the promisee acting in reliance was or should have been foreseeable by the promisor; and 3) the promisee must have acted reasonably in justifiable reliance on the promise as made. *Gillespie v. Mountain Park Estates, LLC*, 138 Idaho 27, 56 P.3d 1277 (2002). When promissory estoppel is found, it acts as 'a substitute for

consideration. *Id.* If there was consideration for the parties' agreement, then there is no need to apply the promissory estoppel doctrine to apply consideration. *Id.*

Turning to the case at hand, the Ekics' claim of promissory estoppel fails because there is no evidence of a promise made by GEICO to Aldina Ekic different from the express terms of the insurance policy. Aldina Ekic's policy clearly provided UIM insurance with limits of $25,000. This is the insurance Aldina Ekic chose to purchase. Although Ms. Ekic's UIM insurance did not provide an additional benefit under the circumstances of this case, as was previously discussed this did not make her coverage illusory.

In addition, there was consideration for the parties' agreement. In return for Aldina Ekic's payment of $11.40 in premium, GEICO provided Ms. Ekic with UIM insurance with limits of $25,000. The fact that Ms. Ekic chose to spend only $11.40 to purchase her UIM coverage does not eliminate the presence of consideration. Since consideration exists, the doctrine of promissory estoppel is not available.

Accordingly, the District Court properly granted summary judgment on the promissory estoppel claim.

3. The District Court did not abuse its discretion in denying the Ekics' Motion to Defer Hearing on Defendant's Second Motion for Summary Judgment for 60 Days And For Additional Time Pursuant to Rule 56(d)(1) and (2) IRCP.

The District Court properly denied the Ekics' eleventh hour motion to continue the hearing on GEICO's second motion for summary judgment. On November 1, 2016, the parties filed a Stipulated Motion to Continue Trial. R: 0209. In the Stipulated Motion, the parties represented to the Court that "Defendant anticipates that

it will bring a second motion for summary judgment as to Plaintiffs' new claim of promissory estoppel." R: 0210. The Court granted the Stipulated Motion. R: 0211. The Court convened a telephonic status conference, and subsequently issued a Scheduling Order, setting oral argument on GEICO's second motion for summary judgment for January 30, 2017. R: 0213. GEICO filed its second motion for summary judgment on December 14, 2016. R: 0215. This provided the Ekics approximately one month to file their response. See, I.R.C.P. 56(b)(2).

Approximately two weeks prior to the scheduled hearing on GEICO's Second Motion for Summary Judgment, the Ekics filed a Motion to Defer Hearing on Defendant's Second Motion for Summary Judgment for 60 days And For Additional Time Pursuant to Rule 56(d)(1) and (2) IRCP. Rule 56(d) provides:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
> (1) defer considering the motion or deny it;
> (2) allow time to obtain affidavits or declarations or to take discovery; or
> (3) issue any other appropriate order.

I.R.C.P. 56(d). The decision to grant or deny a continuance on a motion for summary judgment is within the sound discretion of the trial court. *Wolford v. Montee*, 161 Idaho 432, 387 P.3d 100 (2017)(affirming denial of motion to continue hearing on motion for summary judgment). When seeking a continuance on a motion for summary judgment, the moving party must "'affirmatively demonstrate [ ] why he cannot respond to a movant's affidavits...and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.'" *Id.*, 161 Idaho at 438, 387 P.3d at 106 (quoting, *Jenkins v. Boise*

Cascade Corp., 141 Idaho 233, 239, 108 P.3d 380, 386 (2005)). The movant "has the burden of setting out what further discovery would reveal that is essential to justify their opposition, making clear what information is sought and how it would preclude summary judgment." *Id.* A trial court does not abuse its discretion it if (1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason. *Elliott v. Murdock*, 161 Idaho 281, 385 P.3d 459 (2016)(trial court did not abuse its discretion in denying discovery request).

Additionally, litigants must comply with the District Court's scheduling orders, and failure to comply with such orders may result in sanctions. I.R.C.P. 16(i); *Krinitt v. Idaho Department of Fish and Game*, 162 Idaho 425, 398 P.3d 158 (2017) (district court did not abuse discretion by failing to dismiss summary judgment motion as sanction for violating scheduling order). I.R.C.P. 16(a) empowers district courts to fashion scheduling orders for effective case management. *Id.*

Turning to the case at hand, the District Court found that good cause did not exist to continue the hearing, and ordered that the February 2, 2017 hearing on the second motion for summary judgment remain on its calendar. The Ekics' attorney filed an affidavit in which he stated that he had been out of town for extended time periods in November and December 2016, and had been "unable to dedicate sufficient time for discovery in the instant case until early January, 2017, pertaining to the additional promissory estoppel claim..." R: 0225. The Ekics did not articulate how postponement of the hearing would enable them to rebut GEICO's showing of the absence of a genuine issue of fact. The Ekics did not set out what further discovery would reveal that

is essential to justify their opposition, making clear what information is sought and how it would preclude summary judgment.

In addition, the Ekics clearly had sufficient time to conduct discovery on their promissory estoppel claim. The Ekics filed their Motion to Amend Complaint on May 5, 2016. R: 0114. The Ekics did not set the motion for hearing. The District Court issued an Order for Plaintiffs to File the Proposed Amended Complaint on August 10, 2016. R: 0170. The Ekics filed their First Amended Complaint on August 15, 2016. R: 0180. The District Court issued an Order Granting Motion to Permit Filing of Amended Complaint. R: 0189.

It is clear that the district Court intended in its Scheduling Order to have the litigants diligently resolve the remaining dispositive motion issue as proceeding to trial. The parties had jointly represented to the District Court on November 1, 2017 that GEICO would be bringing a second motion for summary judgment "as to Plaintiffs' new claim of promissory estoppel." R: 0210. The District Court granted the stipulated motion, and then held a scheduling conference. R: 0211-3. As a result of the scheduling conference and order, a hearing was scheduled to occur January 30, 2017. R: 0213. GEICO then filed its second motion for summary judgment on December 14, 2017. R: 0213.

The Ekics propounded interrogatories and requests for production to GEICO on September 15, 2016, R: 0201. GEICO filed an Answer to the amended Complaint on October 5, 2016, R: 0202, and then served answers and responses to the Ekics' discovery on October 26, 2016. R: 0207. It was obvious from at least November 1, 2016 that GEICO planned to seek summary judgment on the promissory estoppel

claim. The Ekics had essentially eight months to conduct discovery on their promissory estoppel claim, but limited their discovery to written interrogatories and requests for production. The Ekics never noticed a deposition of anyone. At the very least, the Ekics could have noticed a Rule 30(b)(6) deposition of GEICO. Clearly, the Ekics did not demonstrate good cause for the postponement of the hearing, and they did not diligently pursue discovery as envisioned by the District Court in its Scheduling Order.

Accordingly, the District Court properly exercised its discretion in finding that the Ekics did not show good cause in their motion to continue the hearing on GEICO's second motion for summary judgment.

4. The District Court did not err in awarding GEICO attorney fees because the District Court found that the Ekics had brought their case frivolously, unreasonably and without foundation.

In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation. Idaho Code Section 12-121; I.R.C.P. 54(e)(2). An award of attorney fees pursuant to Idaho Code Section 12-121 will not be disturbed absent an abuse of discretion. *Idaho Military Historical Society, Inc. v. Maslen*, 156 Idaho 624, 329 P.3d 1072 (2014)(affirming district court's award of attorney fees).

Here, GEICO filed a Memorandum of Costs and Attorney Fees, and asserted that the Ekics' filing of their original complaint, the Ekics' opposition to GEICO's first motion for summary judgment, the Ekics' filing of their motion to amend, and the Ekics' opposition to GEICO's second motion for summary judgment constituted

frivolous conduct. R: 0235. An affidavit of GEICO's counsel contained within the Memorandum of Costs and Attorney Fees set forth the required information explaining the attorney fee request. After the Ekics filed an objection to GEICO's Memorandum of Costs and Attorney Fees, R: 0251, the District Court issued its Order Awarding Costs and Attorney Fees. R: 0260. In its decision, the District Court properly found that GEICO was the prevailing party. The District Court then found that the case "was brought without foundation." *Id.* The District Court noted that the "anti-stacking provision in Aldina Ekic's automobile insurance policy, together with Idaho Supreme Court precedent that is directly on point, clearly precluded this action." *Id.* The District Court also found that the amount of time and billing rate for GEICO's attorneys were reasonable. *Id.* Accordingly, the District Court properly awarded attorney fees in favor of GEICO against the Ekics because they brought their lawsuit unreasonably and without foundation.

5. GEICO should be awarded attorney fees on appeal.

GEICO asserts that it should be awarded attorney fees on this appeal pursuant to I.A.R. 41. The basis for the claim for attorney fees is that the Ekics brought their appeal frivolously, unreasonably and without foundation. Attorney fees can be awarded on appeal under Idaho Code Section 12-121 if the appeal was brought or defended frivolously, unreasonably, or without foundation. *Kiebert v. Goss*, 144 Idaho 225, 159 P.3d 862 (2007)(awarding attorney fees because appeal brought frivolously, unreasonably or without foundation).

Here, as at the District Court level, the Ekics have brought their appeal frivolously, unreasonably and without foundation. The Ekics argue that the District

Court improperly admitted the affidavit of counsel in support of GEICO's first motion for summary judgment where the Ekics did not object to the affidavit and in fact stipulated that GEICO's Statement of Material Undisputed Facts was correct. The Ekics have come forward with no arguments to justify their claims. The Ekics cannot support their eleventh hour attempt to delay the hearing on GEICO's second motion for summary judgment. The Ekics also cannot show why their Complaint was not brought frivolously, unreasonably or without foundation. Accordingly, GEICO requests that it be granted attorney fees on appeal.

VI.

CONCLUSION

For the reasons stated above, GEICO requests that the District Court's decisions be affirmed in all respects, and that GEICO be awarded its attorney fees on appeal.

DATED this 23rd day of October, 2017.

PERKINS, MITCHELL, POPE & MCALLISTER LLP

By: _____
Richard L. Stubbs, of the Firm
Attorneys for Defendant/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of October, 2017 I served a true and correct copy of the foregoing RESPONDENT'S BRIEF by delivering the same to each of the following, by the method indicated below, addressed as follows:

Kenneth O. Kreis	[X]	U.S. Mail, postage prepaid
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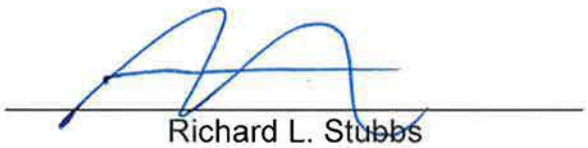
P.O. Box 4811	[ ]	Overnight Mail
Boise, Idaho 83711	[ ]	Facsimile ()
Attorney for Plaintiffs/Appellants	[ ]	ICourt/E-Filing



Richard L. Stubbs