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Eastman v. Farmers Insurance Company Respondent's Brief Dckt. 44889

IN THE SUPREME COURT FOR THE STATE OF IDAHO

JENNIFER EASTMAN, a single woman, Plaintiff/Appellant, v. FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation Defendant/Respondent.	Supreme Court Docket No. 44889 Kootenai County Case No. CV-16-4603 **RESPONDENT'S BRIEF**

RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County
Honorable Richard Christensen, District Judge Presiding

Robert B. Crary
Aaron A. Crary
CRARY, CLARK,
DOMANICO, CHUANG, P.S.
9417 E. Trent Avenue
Spokane, Washington 99201
Telephone: (509) 926-4900
Facsimile: (509) 924-7771
Attorneys for Plaintiff/Appellant

Trudy Hanson Fouser
Julianne S. Hall
GJORDING FOUSER, PLLC
Plaza One Twenty One
121 North 9th Street, Suite 600
P.O. Box 2837
Boise, Idaho 83701-2837
Telephone: 208.336.9777
Facsimile: 208.336.9177
Attorneys for Defendant/Respondent

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I. STATEMENT OF THE CASE

A. Introduction

In this appeal, Ms. Eastman is challenging a long-standing, unambiguous clause in her Farmers' underinsured motorist policy. This clause provides that if she is injured in a vehicle other than her insured vehicle that has underinsured motorist coverage, her injuries will be covered by that underinsured motorist policy rather than Farmers' policy. This "Other Insurance" clause has been part of Farmers' underinsured motorist policy language since at least 1997. Insureds have previously unsuccessfully challenged this clause. In 2003, this Court held that the specific "Other Insurance" clause in this case was sound and unambiguous. *Purdy v. Farmers Ins. Co.*, 138 Idaho 443, 446, 65 P.3d 184, 187 (2003). The Court also held in *Purdy* that the insured was not entitled to underinsured benefits from Farmers when in a vehicle other than his or her insured vehicle with underinsured motorist coverage.

Despite the clear binding precedent of *Purdy* and the identical clause in her Farmers' policy, Ms. Eastman nevertheless filed a lawsuit and moved for summary judgment against Farmers. Not surprisingly, the District Court followed *Purdy* and denied Ms. Eastman's request for summary judgment.

The District Court also rejected Ms. Eastman's flawed argument that a Disclosure Statement (a generic explanation of the types of underinsured motorist insurance available in Idaho based on the Idaho Department of Insurance Bulletin) was part of her policy. Ms. Eastman advanced this "inclusion" argument, despite the fact that the plain language of the Disclosure

Statement provided in bold letters **"[t]his general explanation is NOT an insurance agreement."**

Ms. Eastman also asserted a misguided argument that the subject policy language violates public policy. She contends she should be entitled to benefits under her UIM policy, despite the fact that she collected monies from both the tortfeasor and another non-Farmers underinsured motorist policy. As discussed herein, there are no public policy grounds under the facts and circumstances in this case that *Purdy* should be overruled and/or the language of Farmers' "Other Insurance" clause should be invalidated.

B. Course of Proceedings

Ms. Eastman filed a complaint seeking a declaratory judgment ruling as to her underinsured motorist coverage under her Farmers' policy of insurance. Both Ms. Eastman and Farmers filed Motions for Summary Judgment. The District Court granted Farmers' Motion for Summary Judgment and denied Plaintiff's Motion for Summary Judgment.

C. Statement of Facts

At all times relevant, Jennifer Eastman was the named insured on a policy issued by Farmers Insurance Company of Idaho, an E-Z Reader Car Policy – Idaho, 1st Edition for her 2005 Toyota RAV 4. (R., 227) and (R., 12). Ms. Eastman had purchased underinsured motorist coverage for her insured vehicle. (R., 227) and (R., 12). On March 18, 2014, Ms. Eastman was a passenger in a 2009 Chevrolet Van, owned by Spokane Transit Authority, which was rear-ended on Interstate 90. (R., 12). She was participating in an organized government ride share or ride pool program. The Van was insured with the Washington State Transit Insurance Van Pool.

Id. Ms. Eastman recovered her damages from the tortfeasor. *Id.* She received the limits of tortfeasor's liability policy. *Id.* Additionally, the Washington State Transit Insurance Van Pool maintained $60,000.00 in underinsured motorist coverage. *Id.* Due to multiple claimants, Ms. Eastman received approximately $47,000.00 in underinsured motorist benefits from the Washington State Transit Insurance Van Pool policy. *Id.* Thereafter, Ms. Eastman sought additional underinsured motorist benefits under her own policy with Farmers. *Id.*

II. STANDARD OF REVIEW

A *de novo* review standard applies to an appeal arising from an order granting or denying summary judgment. *Reynolds v. Trout Jones Gledhill Fuhrman, P.A.*, 293 P.3d 645, 650-651 (2013). The standard of review on appeal from summary judgment is the same standard as that used by the district court in ruling on the motion for summary judgment. *Taylor v. McNichols*, 149 Idaho 826, 832, 243 P.3d 642, 648 (2010).

Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). "If there is no genuine issue of material fact, only a question of law remains, over which this Court exercises free review." *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 307, 160 P.3d 743, 746 (2007).

III. ARGUMENT

A. Ms. Eastman's brief fails to identify the issues she is presenting on appeal and merely asks this Court to "second guess" the District Court, without referencing any legal errors of the District Court.

Ms. Eastman's appellate brief fails to comply with the requirements of Idaho Appellate Rule 35. I.A.R. 35 expressly provides that the brief shall include "a list of the issues presented on appeal." I.A.R. 35(a)(4). Also, a general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue. *Michael v. Zehm*, 74 Idaho 442, 445, 263 P.2d 990, 991 (1953) Under Idaho law, to the extent that an assignment of error is not argued and supported in compliance with the Idaho Appellate Rules, it is deemed to be waived. *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005).

Here, Ms. Eastman's brief is missing a significant key component: identify the issue or issues she is presenting on appeal, as is required by I.A.R. 35(a)(4). Furthermore, she fails to specifically identify the alleged legal errors of the District Court. Rather, she generally argues that based on "public policy" she is entitled underinsured motorist coverage, contrary to the express language of the policy and contrary to the binding Idaho precedent. In light of these significant omissions, under Idaho law, Ms. Eastman may have failed to preserve these issues for appeal and/or any argument as to assignment of error is deemed waived. *See Suitts*, 141 Idaho at 708, 117 P.3d at 122.

B. Applicable Policy Provisions

The appellate issues pending before the Court involve Ms. Eastman's Farmers' underinsured motorist policy, Endorsement ID 021A, which provides, in relevant part, as follows:

> **Coverage C-1 UNDERinsured Motorist Coverage**
>
> . . .
>
> We will pay all sums which an **insured person** is legally entitled to recover as **damages** from the owner or operator of an **UNDERinsured motor vehicle** because of **bodily injury** sustained by the **insured person.**
>
> **Limits of Liability**
>
> a. Our liability under the UNDERinsured Motorist Coverage cannot exceed the limits of the UNDERinsured Motorist Coverage stated in this policy, and our maximum liability under the UNDERinsured Motorist Coverage is the lesser of:
>
> 1. The difference between the amount paid in **damages** to the **insured person** by and for any person or organization who may be legally liable for the **bodily injury**, and the limit of UNDERinsured Motorist Coverage; or
>
> 2. The amount of **damages** established but not recovered by any agreement, settlement, or judgment with or for the person or organization legally liable for the **bodily injury**.
>
> . . .
>
> **Other Insurance**
>
> 3. We will not provide insurance for a vehicle other than **your insured car** or **your insured motorcycle**, unless the owner of that vehicle has no other insurance applicable to this part.

(R., 277-278)

Under Idaho law, a policy provision is only ambiguous if it is reasonably subject to differing interpretations. *Moss v. Mid-Am. Fire and Marine Ins. Co.*, 103 Idaho 298, 647 P.2d 754 (1982). Additionally, when deciding whether or not a particular provision is ambiguous, the court must consider the provision within the context in which it occurs in the policy. *North Pac. Ins. Co. v. Mai*, 130 Idaho 251, 939 P.2d 570 (1997). As discussed below, the subject policy is not ambiguous.

C. The District Court in this case correctly applied the doctrine of *Stare Decisis*, relying on *Purdy v. Farmers Ins. Co.*, which remains sound law, to apply the "Other Insurance" clause in the policy limiting Ms. Eastman's UIM coverage.

The specific language of Ms. Eastman's underinsured motorist policy has already been evaluated by the Court. In 2003, the Idaho Supreme Court addressed the "Other Insurance" clause in the Farmers' underinsured motorist policy. *Purdy v. Farmers Ins. Co.*, 138 Idaho 443, 446, 65 P.3d 184, 187 (2003).[1] Ms. Eastman, through her counsel, has admitted that the "Other Insurance" provision in this case is identical to the clause in *Purdy*. (R., 327). Accordingly, the District Court correctly held that it was bound by *stare decisis* and appropriately relied upon *Purdy* in denying Plaintiff's Motion for Summary Judgment. (R., 333). As the District Court aptly held, "*Purdy* remains good law." *Id.* Accordingly, Ms. Eastman's appeal lacks merit.

In *Purdy*, the Purdys' challenged the non-owned, but insured UIM clause in a Farmers' policy. *Purdy*, 138 Idaho at 446, 65 P.3d at 187. As background, prior to the 1997 accident in *Purdy*, the Purdys had purchased an underinsured motorist policy from Farmers Insurance with

[1] Of note, in the Purdys' Farmers policy, this clause was found in paragraph 4, as opposed to paragraph 3 in the subject policy, but otherwise was identically worded to the subject policy.

underinsured limits of $100,000.00. *Id.* at 445. Beth Purdy was severely injured while riding as a passenger in a car owned and operated by her mother. *Id.* Her mother's car was rear-ended by a truck. *Id.* The truck driver's liability policy settled with the Purdys for $17,500.00. *Id.* Her mother maintained an underinsured motorist policy with Farmers Alliance and had underinsured motorist limits of $25,000.00. *Id.* Farmers Alliance paid the Purdys underinsured motorist benefits of $25,000.00 under her mother's policy. *Id.*

The Purdys then submitted a proof of loss to Farmers Insurance in an attempt to obtain additional underinsured motorist benefits under their own policy. *Id.* In *Purdy*, Farmers denied the Purdys' claim for underinsured motorist benefits based on the above-referenced "Other Insurance" clause because Ms. Purdy was injured in a vehicle which was not her "insured car" and the owner of the car (her mother) had an underinsured motorist policy. *Id.*

Thereafter, the Purdys filed a lawsuit against Farmers alleging breach of contract and bad faith. *Id.* In the subsequent litigation, Farmers filed a motion for summary judgment on the Purdys' claim for bad faith. *Id.* On summary judgment, Farmers argued there was no bad faith cause of action because there was no coverage under the policy. *Id.* In opposing Farmers' summary judgment, the Purdys argued that the policy contained several ambiguities. In that case, the Purdys argued that the phrase, "We will not provide insurance for a vehicle other than your insured car" was redundant when read with conjunction with the similarly worded underinsured motorist exclusion which provided "this coverage does not apply to bodily injury sustained by a person if the person was occupying a vehicle you do not own which is insured for

this coverage under another policy." *Purdy*, 138 Idaho at 447, 65 P.3d at 188. The Purdys argued that this redundancy made the policy ambiguous. *Id.*

On appeal, the Court noted that while redundancy may be considered when interpreting an ambiguous provision in an insurance policy, redundancy does not by itself make policy provisions ambiguous. *Id.*

Ultimately, in *Purdy*, the Idaho Supreme Court concluded that the language in the Farmers' policy was unambiguous. *Id.* at 448. The Court also affirmed the District Court's holding that there was no coverage under the Purdys' Farmers policy for Ms. Purdy's injuries because she was injured in a vehicle that was not her insured vehicle and the owner had an underinsured motorist policy. *Id.*

In this case, based on *Purdy,* the Court should affirm the District Court's ruling and conclude that the "Other Insurance" clause in Farmers' policy is unambiguous and enforceable. (R., 333). As is undisputed in this case, Ms. Eastman was injured in a vehicle other than her "insured car," the Toyota Rav 4. Additionally, the owner of the Van had underinsured motorist coverage which has paid Ms. Eastman for her injuries.

Accordingly, the District Court correctly determined, under the sound law set forth in *Purdy,* that there is no underinsured motorist coverage under Farmers' policy for Ms. Eastman for this accident.

D. The District Court correctly dismissed Ms. Eastman's suggestion that the "Disclosure Statement" is part of the UIM insurance agreement and as such would distinguish this case from *Purdy*.

In its Memorandum Decision and Order, the District Court correctly noted "[a] court reviewing a claim based on the contract begins with the language of the contract itself." (R., 323). *Cristo Viene Pentecostal Church*, 144 Idaho at 307, 160 P.3d at 746. In this case, the Disclosure Statement which forms the basis of Ms. Eastman's argument, in pertinent part, provides as follows:

> Idaho law requires that every auto liability insurance policy include **Uninsured Motorist (UM)** coverage and **Underinsured Motorist (UIM)** bodily injury coverage, unless a named insured has rejected these coverages in writing. If the insured is not provided a copy of the written rejection at the time it is made, the insured may receive a copy from the insurer upon request.
>
> **UM** coverage may pay damages for bodily injury to an insured person who is legally entitled to collect damages from the owner or operator of a vehicle that has no insurance, or from a hit-and-run vehicle where the owner or operator is unknown.
>
> **UIM** coverage may pay damages for bodily injury to an insured person who is legally entitled to collect damages from the owner or operator of a vehicle with inadequate limits of liability insurance coverage.
>
> **UIM** coverage is offered in different forms by different insurers, and insurers are not required to offer more than one type of UIM coverage. There are two commonly available forms of UIM coverage — "Difference in Limits" (or "Offset") Coverage and "Excess" Coverage. Your policy offers "Difference in Limits" which is briefly explained below:
>
> **"'Difference in Limits'" (or "'Offset'") Coverage**- The policy's UIM coverage limits are reduced or eliminated by the amount of any damages recovered by an insured, from or on behalf of any underinsured owner(s) or operators(s).

....

> **This general explanation is NOT an insurance agreement. All auto liability insurance policies that include UM and/or UIM coverage have other terms and conditions that may affect or limit the availability of either coverage. . . .**

(R., 275)

Before the District Court, Ms. Eastman argued that the above-referenced "Disclosure Statement" was included in the parties' contractual agreement. She argued the Disclosure Statement means that whenever the insured recovers an amount, Defendant's liability is reduced or off-set by that recovery.[2] (R., 327).

In addition to erroneously arguing that the Disclosure Statement is part of the policy, Ms. Eastman's reading of the Disclosure Statement is also misguided because she fails to appreciate the difference between liability insurance and underinsured motorist insurance. Here, the Disclosure Statement states "UIM coverage may pay for bodily injury to an insured person who is legally *entitled to collect damages from the owner* or operator of a vehicle with *inadequate limits of liability insurance coverage*." (Emphasis added.) The italicized words above are of high importance. UIM coverage is limited to circumstances where the owner or operator of a vehicle has inadequate limits of liability insurance coverage. This is fundamental to the purpose of

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[2] Ms. Eastman argues for the following reading of the policy:

> We will pay all sums which an insured person is legally entitled to recover as damages from the owner or operator of an underinsured motor vehicle because of bodily injury sustained by the insured person [but] the policy's UIM coverage limits are reduced or eliminated by the amount of any damages recovered by any insured, from or on behalf of any underinsured(s) owner or operator(s).

Mot. Hr'g Nov. 1, 2016 at 3:23 p.m., See (R., 327).

underinsured motorist coverage. Here, Ms. Eastman suggests that if a vehicle owner is "underinsured," then Ms. Eastman's own policy of insurance should apply to provide underinsured insured motorist benefits to her in this case.

However, the critical flaw in Ms. Eastman's argument is that both the Disclosure Statement and the actual UIM language of her insurance policy provide that UIM payments are for bodily injury to an insured person who is legally entitled to collect damages from the owner or operator of a vehicle with inadequate limits of liability insurance coverage. Hence, while Ms. Eastman is correct that it does not matter if the individual who is underinsured is the operator or the owner, the type of insurance that is insufficient does matter.

Of significance, here, Ms. Eastman is not arguing that the owner of the van she was riding in had any liability for proximately causing the subject. Nor has there has been any suggestion that the van's liability policy was inadequate. Rather, Ms. Eastman's argument is that the van's underinsured motorist coverage for Ms. Eastman was inadequate. Liability insurance and underinsured motorist insurance are different, apply in different circumstances and cannot be intermixed as Ms. Eastman suggests.

While noting Ms. Eastman's suggested interpretation, in its Memorandum Decision and Order, the District Court expressly and succinctly stated, "the dispositive issue with this argument is that the disclosure is not part of the insurance contract." (R., 327). As reviewed by the District Court, the Disclosure Statement explains what the law requires, explains what may be provided to the insured, briefly explains how it may be provided, and then unambiguously provides in bold: "This general explanation is NOT an insurance agreement. All auto liability

insurance policies that include . . . UIM coverage have other terms and conditions that may affect or limit the availability of either coverage." (R., 328 and 275).

In rejecting Ms. Eastman's inclusion argument, the District Court stated "to find that this disclosure statement was part of the contract would defy the plain language of the document." (R., 328). "A document that sets forth in no uncertain terms it is not part of the agreement cannot, by its very own language, establish terms to a contract it is not a part of." (R., 329). Accordingly, the District Court held the disclosure statement was separate from the insurance contract and therefore it cannot be used to interpret the insurance contract. *Id.*

However, of significance, the District Court went one step further and, for the sake of argument, addressed coverage and the language of the contract as if the Disclosure Statement was part of the policy of insurance. Not surprisingly, the end result remained the same. The Disclosure Statement, by its plain terms provides that "other terms and conditions may affect or limit availability of coverage."

Hence, even for sake of argument, if Ms. Eastman's misguided inclusion argument of the Disclosure Statement is accepted and it is considered part of the policy, the "terms and conditions" as set forth in the "Other Insurance" clause further limiting underinsured motorist coverage still remain part of the underinsured motorist policy. (R., 329). Accordingly, based on the controlling precedent of *Purdy*, Ms. Eastman still has no coverage under the policy for this accident.

The bottom line remains, as the District Court aptly explained, Ms. Eastman "has failed to distinguish the policy language and facts from *Purdy* and, consequently, this Court is bound to interpret the same provision in the same fashion." (R., 329).

Similarly, on appeal, Ms. Eastman wholly fails to address the Court's clear contractual holding based on plain language of the document. Ms. Eastman also fails to provide any legal authority to suggest such a ruling was legally erroneous. Rather, on appeal, Ms. Eastman skirts around the straight-forward issue of the plain and unambiguous language of the contract and argues that based on "public policy" the contractual language should be read differently than it is actually written.

Also, on appeal Ms. Eastman improperly, for the first time, raises two new arguments: her argument that the Disclosure Statement is incorporated by reference and her argument that the Disclosure Statement combined with the Policy provides illusory coverage. Here, Ms. Eastman did not raise these arguments in the District Court. (R., 329, fn. 5).

Because these issues were not raised before the District Court, this Court should not consider them on appeal. *Mc Kinney v. State*, 133 Idaho 695, 708, 992 P.2d 144, 157 (1999) citing *McCoy v. State,* 129 Idaho 70, 75, 921 P.2d 1194, 1199 (1996). Furthermore, neither of these arguments are meritorious nor do such arguments provide grounds to overrule *Purdy*.

E. Farmers' policy and the "Other Insurance" clause do not violate any established public policy in Idaho.

At both the District Court and on appeal, Ms. Eastman makes a general and non-specific argument that the "Other Insurance" underinsured motorist policy language at issue violates

public policy and she seeks a judicial ruling that she should be entitled to coverage under Farmers' UIM policy. Whether an insurance contract is against public policy "is to be determined from all the facts and circumstances of each case." *Hill v. Am. Family Mut. Ins. Co.*, 150 Idaho 619, 623, 249 P.3d 812, 816 (2011) citing *Foremost Ins. Co. v. Putzier*, 100 Idaho 883, 887, 606 P.2d 987, 991 (1980).

Here, as discussed below, the facts and the circumstances of this case strongly weigh against a finding that the subject Farmers policy language violates public policy. The policy language at issue is an unambiguous clause merely designating which underinsured motorist coverage applies, if the insured is not in the designed insured vehicle at the time of the accident. Farmers' policy limitation does not wholly preclude an insured's collection of underinsured motorist benefits. Additionally, Farmers policy limitation does not leave an insured with no redress for his or her injuries, it simply limits the applicable of Farmers' underinsured motorist coverage when another underinsured motorist policy applies. Furthermore, the clause at issue does not provide a "condition precedent" to obtaining underinsured motorist coverage (*i.e.*, like an exhaustion clause). The "Other Insurance" clause does not violate public policy.

As the Court is aware, in the Idaho legislature's 2008 amendment to Idaho Code § 41-2502, the legislature only required that insurance companies offer underinsured motorist coverage and expressly provided that insureds can reject it. Several other states, such as Nebraska and Illinois, have clear legislation mandating the inclusion of underinsured motorist coverage with every liability policy underwritten. Yet, Idaho, unlike other states, has not taken the step to make the underinsured motorist coverage "mandatory" or applicable in all policies of

insurance. While a mandatory statutory scheme of underinsured motorist coverage may be better suited to serving the goal of protecting Idaho drivers from uncompensated harm caused by underinsured motorist; nevertheless, at this time, Idaho's underinsured motorist coverage remains wholly "optional."

Additionally, Idaho public policy underlying underinsured motorist coverage remains largely undefined, likely due to the optional nature of Idaho's underinsured motorist legislation. Public policy case law discussions relating to underinsured motorist insurance are unclear, convoluted and appear divided, especially when considered in relationship to the actual scope of Idaho's statute *(i.e.*, requiring insurance companies to "offer" underinsured motorist benefits to an insured and obtain a written waiver if the benefits are not purchased). Moreover, in Idaho, the scope and the breadth of any public policy as it pertains to underinsured motorist coverage remains uncertain. (R., 332).

Specifically, none of this Court's decisions addressing UIM following the 2008 legislative amendment, including *Hill* and *Gearhart*, are clearly binding precedent applicable to the facts and circumstances in this case. None of these cases reference *Purdy* or discuss how public policy applies, generally, to contracts of insurance which have underinsured motorist coverage limitations set forth in the policy like the "Other Insurance" clause. Additionally, as discussed below, the holdings of *Hill* and *Gearhart* should be limited to the facts and contract provisions addressed in those decisions.

Hill is distinguishable from the subject case. *Hill*, 150 Idaho at 619, 249 P.3d at 812. In *Hill*, the Court stated it must evaluate whether requiring insureds to comply with UIM

exhaustion clauses would thwart the Legislature's goal of protecting motorists from underinsured drivers. *Id.* First, in this case, the language at issue does not involve an exhaustion clause. Another distinguishing factor is that the exhaustion clause in *Hill* acted as a complete bar to obtaining UIM coverage, whereas the policy provision in this case merely provides for an election of UIM policies or a limitation on Farmers' UIM coverage.

Second, the "public policy" used by the majority in the *Hill* decision is muddled, unclear and provides no general guidance to the application of public policy in underinsured motorist contracts. *Id.* at 632.. The majority in *Hill* held that the exhaustion clause in the American Family policy was void based on Idaho's "public policy aimed at protecting its citizens from underinsured drivers" and "based on the doctrine of judicial economy, which includes shielding parties from excessive litigation and preventing unnecessary demands on the judicial system." *Id.* However, the majority in *Hill* appears to suggest that UIM coverage is mandatory for all individuals, contrary to the express directive of the Idaho legislature which only requires that insurance companies offer such coverage and allows insureds to reject it. *Id.* As the dissent in *Hill* notes, the "majority's hyperbole indicates it believes that a statute simply requiring insurance companies to offer UIM coverage will somehow magically reduce accidents caused by underinsured motorists." *Id.* Accordingly, there is no clear public policy take away from *Hill* applicable to the subject case.

In *Gearhart*, another divided Court invalidated an anti-stacking provision in a Mutual of Enumclaw UIM policy. *Gearhart v. Mut. of Enumclaw Ins. Co.*, 378 P.3d 454 (2016). In *Gearhart*, a minor's parents had each purchased identical polices containing underinsured

motorist coverage from Mutual of Enumclaw. *Gearhart*, 378 P.3d at 455. After the minor was seriously injured, each parent sought coverage under his or her respective underinsured motorist coverage with Mutual of Enumclaw for their child, hoping to obtain the joint $600,000 worth of UIM coverage the parents had together. *Id.* The at-issue insurance clause in *Gearhart* read:

> If this policy and any other policy providing similar insurance apply to the accident, the maximum limit of liability under all the policies shall be the highest applicable limit of liability under any one policy. However, insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

Id. As explained in *Gearhart*, anti-stacking provisions are designed to keep insureds with multiple policies from the same company from being overcompensated for their injuries and in the *Gearhart* policy provided the insured with the highest applicable limit under any one policy. *Id.* at 457. In *Gearhart*, the majority held that the "actual language employed in the Enumclaw policies was confusing to the extent that it is ineffective to establish a barrier to recovery of Trent's (the insured's) actual damages in the full amount of the limit provided in each of the two Enumclaw policies." *Id.* at 456.

Unlike *Gearhart*, this case does not involve interpretation of anti-stacking language similar to the language referenced above. Additionally, this case does not involve the interpretation of two Farmers' UIM policies purchased by Ms. Eastman, like in *Gearhart*. Rather, this case involves language of one policy designating which underinsured motorist coverage applies if Ms. Eastman was injured while not in her insured vehicle. Additionally, *Gearhart* is distinguishable because the subject policy language at issue in this case is not "confusing" like the Mutual of Enumclaw policy was, according to the *Gearhart* court. In fact,

the Idaho Supreme Court has already expressly concluded that the subject "Other Insurance" clause in this case is unambiguous and clear.

In *Gearhart*, the majority generically held that the barrier imposed by the anti-stacking provision "caused the insured to be undercompensated" and did not advance the public policy enunciated in *Hill*, a case involving a bar to UIM coverage and exhaustion clauses. Unfortunately, *Gearhart* does not provide any significant guidance as to the application of the public policy underlying underinsured motorist insurance and more specifically, application of public policy to Farmers' "Other Insurance" clause. Thus, the Court's ruling in *Gearhart* does not support Ms. Eastman's public policy argument in this case.

Here, the District Court correctly stated in rejecting Ms. Eastman's urgings to invalidate Farmers' policy on public policy grounds:

> As between controlling and undoubtedly applicable precedent in *Purdy* and two uncertain and divided holdings in *Hill* and *Gearhart,* this Court resorts to *stare decisis* and relies on *Purdy.* The Court is not convinced that *Purdy* is manifestly wrong or has been proven over time to be unjust or unwise. Neither is the Court convinced that the application of *Purdy* here is a plain, obvious and continued injustice to principles of law and remedy.
>
> (R., 333).

Hence, this Court should similarly be guided by its clear opinion previously issued in *Purdy*, and reject Ms. Eastman's suggestion that the previously reviewed "Other Insurance" provision should now be invalidated as against public policy. Furthermore, *Hill* and *Gearhart*, the two UIM cases decided after 2008 are distinguishable from the present case. In sum, *Purdy*

remains sound law and there is no public policy consideration weighing in favor of invalidating Farmers' "Other Insurance" clause limiting the insured's underinsured motorist coverage.

IV. ATTORNEY FEES ON APPEAL

Farmers requests an award of costs and fees on appeal pursuant to Idaho Appellate Rules 40and 41, and Idaho Code §12-121. An award of attorney fees is appropriate if this Court finds that the appeal was pursued frivolously, unreasonably or without foundation. *Kirkman v. Stoker*, 134 Idaho 541, 546, 6 P.3d 397, 402 (2000). Such an award is proper where the appellant argued issues that were not preserved for appeal, the appellant invited this Court to substitute its own judgment for that of the District Court and the appellant asks this Court to ignore firmly-established law. *Id.* at 546. Where an appellant's argument hinges on a question of law, attorney fees will be awarded under I.C. § 12-121 if the question of law is clearly settled and the appellant makes no substantial showing that the district court misapplied the law. *Hutchinson v. State*, 134 Idaho 18, 23, 995 P.2d 363, 368 (Ct. App. 1999). It is also proper when the appellant does nothing more than simply invite this Court to second-guess a District Court. *Pass v. Kenny*, 118 Idaho 445, 450, 797 P.2d 153, 157 (Ct. App. 1990).

Here, in the face of the long-standing binding precedent and evaluation of the identical Farmers' clause in *Purdy*, Ms. Eastman asks this Court to overrule that well-reasoned decision. In pursuit of the appeal, Ms. Eastman failed to identify her issues on appeal and only vaguely referenced the District Court's ruling in this case. Under Idaho law, fees are appropriate when the appellant does nothing more than simply invite this Court to second-guess a District Court, as Ms. Eastman did on this appeal.

Here, the District Court expressly held that Ms. Eastman failed to distinguish the policy language and facts from *Purdy* and, consequently, the District Court was bound to interpret the same provision in the same fashion. On appeal, Ms. Eastman made no substantial showing that the District Court misapplied well-settled law.

V. CONCLUSION

For the reasons set forth above, Farmers respectfully requests this Court affirm the decisions of the District Court in all respects and award costs and fees.

DATED this 20th day of July, 2017.

GJORDING FOUSER, PLLC

By _____
Trudy Hanson Fouser – Of the Firm
Julianne S. Hall – Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of July, 2017, a true and correct copy of the foregoing was served on the following by the manner indicated:

Robert B. Crary
Aaron A. Crary
CRARY, CLARK, DOMANICO & CHUANG, P.S.
9417 E. Trent Avenue
Spokane, WA 99206

- [X] U.S. Mail
- [ ] Hand-Delivery
- [ ] Overnight Delivery
- [X] Facsimile – 509/924-7771
- [ ] Email: acrary@ccdlaw.com
- [ ] Electronic Transmission (File & Serve)

_____
Julianne S. Hall