8-10-2017

Eastman v. Farmers Insurance Company Appellant's Reply Brief 2 Dckt. 44889

IN THE SUPREME COURT OF THE STATE OF IDAHO

JENNIFER EASTMAN, a single woman, Appellant/Plaintiff, vs. FARMERS INSURANCE COMPANY, an Idaho corporation, Respondent/Defendant.	Idaho Supreme Court No. 44889

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT FOR KOOTENAI COUNTY

THE HONORABLE RICH CHRISTENSEN, PRESIDING

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1. TABLE OF CONTENTS

Page

2. TABLE OF CASES AND AUTHORITIES

A. CASES

1. Idaho Courts

B. Statutes

REPLY

In Respondent's brief, Defendant cites the District Court numerous times to support its argument on appeal. This appeal is *de novo*, and the Supreme Court is not bound by the District Court's reasoning. While the District Court noted it was bound to *stare decisis* principles when evaluating the parties' motions, the District Court properly noted that "[h]owever, to the extent there is merit in Plaintiff's construction and policy arguments, such arguments are proper before the State's appellate courts." (R. 333)

A. Ms. Eastman Properly Presented The Issues For Appeal.

Loosely citing I.A.R. 35, Defendant argues that Ms. Eastman failed to list "the issues presented on appeal." Ms. Eastman would direct the Court and Defendant to the following section of her brief on pgs. 5-6:

> *Legal Argument*
>
> Plaintiff first argues that (A) the 2008 UIM mandate in I.C. § 41-2502 creating public policy entitles her to UIM coverage in this case. Plaintiff then argues that (B) the additional language mandated in 2008 in Plaintiff's insurance policy grants her UIM coverage under the plain language. Plaintiff then explores how (C) the 2008 mandated language (Disclosure) must be deemed included in the insurance policy. Finally, Plaintiff argues that (D) she is entitled to UIM coverage because Defendant has not clearly and precisely limited UIM coverage under the terms of Plaintiff's insurance policy.

Michael v. Zehm, 74 Idaho 442, 263 P.2d 990 (1953) (After trial, appellant failed to cite any authority or argument as to why certain findings of fact or conclusion of law were erroneous).

Unlike cases cited by Defendant, Ms. Eastman has listed ample authority and argument to support reversing the District Court's summary judgment decision.

B. Public Policy Grants Plaintiff UIM Coverage In This Case.

Idaho public policy weighs heavily in support of providing UIM coverage from Defendant to Ms. Eastman. In recent years this Court in *Hill* and *Gearhart* has announced clear, simple, and straightforward Idaho UIM public policy: the UIM mandate is meant (1) to protect Idahoans with catastrophic injuries who would find themselves without sufficient coverage; and (2) to avoid the anomaly that injured Idaho motorists be in a position to collect more if the at fault driver had no insurance than if the driver was underinsured. *Hill v. American Family Mutual Ins. Co.,* 150 Idaho 619, 624, 249 P.3d 812, 817(2011); *Gearhart v. Mutual of Enumclaw,* 160 Idaho 666, 670, 378 P.3d 454, 458 (2016). This is *clear* public policy.

Ms. Eastman's claim to her own UIM is exactly what the legislature wanted to address with the two public policy rationales outlined in *Hill.* One, Ms. Eastman suffered a catastrophic injury alleging $209,237.60 in medical damages alone, with only $98,846.00 collected to date. If she is denied her UIM coverage—which she paid for—

she will be undercompensated. Two, had the Van not carried any UIM coverage, Defendant concedes Ms. Eastman would have access to the whole $500,000 UIM/UM coverage she paid for. Thus, Ms. Eastman would be entitled to more UIM coverage if the other drivers had no insurance coverage. Both UIM public policy considerations apply here.

Moreover, the anti-stacking analysis performed in *Gearhart* is directly analogous to our case. In *Gearhart,* this Court explained that the plaintiff should be able to stack two separate UIM coverages to secure sufficient coverage, because to find otherwise would lead to the plaintiff being undercompensated for his injuries. *Gearhart,* 378 P.3d at 458. Ms. Eastman is asking nearly the exact same thing; to include her own UIM with the UIM on the Van to ensure that she will be fully compensated for her injuries.

Idaho's UIM public policy is clearly laid out in both the case law and the plain language of the statute. Contrary to Defendant's suggestion, UIM coverage is *mandated* in Idaho.[2] The use of the term "shall" mandates that UIM coverage is required. *Hill,* 150

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[2] I.C. 41-2502. UNINSURED MOTORIST AND UNDERINSURED MOTORIST COVERAGE FOR AUTOMOBILE INSURANCE — EXCEPTIONS. (1) Except as otherwise provided in subsection (2) of this section, **no owner's or operator's policy of motor vehicle liability insurance** that is subject to the requirements of section 49-1212(1) or (2), Idaho Code, ***shall* be delivered or issued** for delivery in this state with respect to any motor vehicle registered or principally garaged in this state **unless coverage is provided** therein or supplemental thereto, in limits for bodily injury or death as set forth in section 49-117, Idaho Code, as amended from time to time, under provisions approved by the director of the department of 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. (emphasis added); *Bonner*

Idaho at 623-24. There is nothing "optional" about requiring insurance companies in Idaho to offer UIM coverage. Nonetheless, irrespective of the mandate for UIM, this Court has clearly established Idaho public policy.

C. The Insurance Agreement Has Changed Since the *Purdy* case.

1. *The Disclosure Modifies The Insurance Agreement.*

In its summary judgment briefing, Defendant's agent, Mark Stevens, signed an affidavit attaching a true and correct copy of Ms. Eastman's insurance agreement. (R. 97-98) Included in this agreement was the Disclosure. (R. 124) Not only was the Disclosure included in the agreement, as per Mark Steven's affidavit, the Disclosure form was modified to specifically include Ms. Eastman's name, her insurance agreement number, her effective date of coverage, and other items specifically referring to her coverage. (R. 124). By Defendant's own admission on the record, the Disclosure is included in Ms. Eastman's insurance agreement.

County, Idaho, v. Cunningham, 156 Idaho 291, 297 (Ct.App. 2014).(the Supreme Court has consistently held that the use of the term "shall" or "must" in a statute is mandatory)

Farmers argues that the Disclsoure cannot be part of the insurance agreement because the Disclosure itself states that it is not an insurance agreement:

> 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...

Plaintiff agrees that the Disclosure *by itself* cannot be an insurance agreement—that is what the Disclosure states. But neither can the insurance agreement be valid without the inclusion of the Disclosure. *See* I.C. § 41-2502 (3).

The Disclosure in conjuction with the insurance agreement documents combine to create a valid insurance agreement. The Disclosure is required to be included with the UIM insurance agreement to be valid. *See* I.C. § 41-2502 (3); Department of Insurance Bulletin No. 08-08. (R. 314-16). An insurance agreement is invalid if it does not include the language described in the Disclosure. Thus, an insurance agreement can exist *only* when a Disclosure is included: there can be no insurance agreement without the Disclosure.

2. *The Disclosure Grants Ms. Eastman UIM Coverage.*

Farmers argues that, while the Disclosure grants "offset" UIM coverage, such coverage only applies when the tortfeasor alone does not have sufficient liability insurance. This argument ignores the facts of the case and misinterprets the 2008 UIM law. The Disclosure states that:

> 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.

(R. 124). The tortfeasor who hit Ms. Eastman's Van had inadequate insurance to pay for her injuries. Thus, the tortfeasor had inadequate liablity insurance, and Ms. Eastman can look toward her own UIM for coverage.

Farmers argues that the Van did not have insufficient "liability insurance", but only insufficient UIM to compensate Ms. Eastman, and the language of the Disclosure does not apply. This is too narrow a reading of the 2008 amendments. By carrying insufficient UIM, the Van also had "inadequate limits of liablity insurance." The 2008 amendments made UIM and UM part of "liability coverage":

> UNINSURED MOTORIST AND UNDERINSURED MOTORIST COVERAGE FOR AUTOMOBILE INSURANCE -- EXCEPTIONS. (1) Except as otherwise provided in subsection (2) of this section, **no owner's or operator's policy of motor vehicle *liability insurance*** that is subject to the requirements of section 49-1212(1) or (2), Idaho Code, **shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto,** in limits for bodily injury or death as set forth in section 49-117, Idaho Code, as amended from time to time, under provisions approved by the director of the department of 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.

I.C. 41-2502(1). "Liability insurance" is defined as including UIM and UM. A liablity insurance agreement is insufficient if there is inadequate UIM coverage. Thus, Ms. Eastman can turn to her own UIM for coverage since the tortfeasor and the Van had inadequate liablity insurance.

3. *Defendant Fails To Address Ms. Eastman's Contract Arguments.*

In her motion for reconsideration in front of the District Court, Ms. Eastman argued that the Disclosure statement was incorporated into the insurance agreement by reference, and that denial of UIM coverage creates illusory UIM coverage. (R. 339-343). These arguments were again made in Ms. Eastman's appellate brief to this Court. Defendant has cited no authority as to why these arguments fail to grant Ms. Eastman UIM coverage. Accordingly, Ms. Eastman contends that Defendant has conceded these arguments and asks this court to find that the Disclosure is incorporated by reference, and failing to grant Ms. Eastman UIM coverage would create illusory coverage. As outlined in her brief, Ms. Eastman is entitled to UIM coverage from Defendant.

D. Attorney Fees

Ms. Eastman requests attorney fees pursuant to I.C. § 41-1839(1) for failure to pay benefits entitled to Ms. Eastman within 60 days of presenting her proof of balance. Ms. Eastman also requests attorney's fees from Defendant pursuant to I.C. § 12-121 for

pursuing the action frivolously, unreasonably and without foundation in light of the clear contract and public policy changes stemming from the 2008 UIM amendments.

IV. CONCLUSION

Defendant fails to cite reasonable opposition to grant Ms. Eastman's UIM coverage in this matter based upon the 2008 amendments to I.C. § 41-2502. Based on the 2008 changes to UIM public policy and contract language, Ms. Eastman is entitled to claim UIM under her insurance agreement as a matter of law and the District Court's decision should be reversed.

Dated this 7 day of August, 2017.

CRARY, CLARK, DOMANICO & CHUANG, P.S.

By: _____
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Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that I am a licensed attorney in the State of Idaho, have my office located in Spokane, Washington and on August 8, 2017, I served a true and correct copy of the Appeallant's Reply on the following individuals by the method of delivery designated:

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

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