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IN THE SUPREME COURT OF THE STATE OF IDAHO

KERMIT JACKSON, Plaintiff/Appellant, vs. JENNIFER J. CROW, Defendant/Respondent.	Docket No. 45450 Ada County Case No. CV-PI-10-15546

RESPONDENT'S BRIEF

In the District Court of the Fourth Judicial District of the State of Idaho,
In and for the County of Ada, Honorable Nancy Baskin, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case.

The question on appeal is whether there is a procedure that allows Jackson to pursue Crow, in spite of Crow being discharged in bankruptcy from Jackson's personal injury claim, without violating Idaho's no-direct-action rule.

The auto accident between Crow and Jackson happened August 5, 2008. Jackson sued Crow for personal injuries. Jackson filed for bankruptcy on February 4, 2013, and he and his counsel expressly agreed to pursue his case against Crow for the benefit of his creditors. In spite of their promise to the bankruptcy trustee and Jackson's creditors, Jackson did nothing to pursue the case in bankruptcy. The bankruptcy court declared his estate to have no assets, and discharged him from his debts on June 4, 2013. (R., p. 000140.)

Crow and her husband filed for bankruptcy on January 18, 2014. Jackson filed a claim and was paid $1,932.45 from Crow's bankruptcy estate. Crow and her husband were discharged from their bankruptcy on April 30, 2014. (R., p. 000274.)

Having washed himself of his debts to his creditors, Jackson resumed his case against Crow in District Court. In the midst of those proceedings, Jackson sent Crow's counsel a letter threatening financial harm to Crow in spite of her discharge from Jackson's personal injury claim. (R., p. 000350.) To avoid application of the post-discharge bankruptcy injunction, Jackson argued that he could proceed against Crow as a

"nominal" party, and/or add Crow's liability insurer (Farmers Insurance Company) as a defendant, or proceed against Crow's insurance policy.

Crow moved for summary judgment, arguing that the bankruptcy injunction protected her and there was no rule or statutory mechanism by which Jackson could proceed against her without violating Idaho's "no-direct-action rule."[1]

The District Court agreed and dismissed Jackson's case.

B. Course of Proceedings.

Jackson filed his complaint on the day the statute of limitations ran, August 5, 2010. Trial was set to begin September 13, 2013 but was continued.

Jackson and his wife filed for bankruptcy on February 4, 2013 and were discharged on December 20, 2013. (R., p. 000182.) Though they had agreed to proceed with their case against Crow as part of their bankruptcy, for the benefit of their creditors, they failed to do so.[2]

Crow and her husband filed for bankruptcy on January 18, 2014 and were discharged on April 30, 2014. (R., p. 000256.) Jackson's claim for $61,018.56 was accepted, but the bankruptcy estate paid only $1,932.45 on the claim.

---

[1] Crow also moved for summary judgment on the basis of judicial estoppel and laches, defenses which the District Court did not reach.

[2] The reason Jackson gave for failing to proceed against Crow in bankruptcy was that it did not make economic sense to pursue the claim. The District Court struggled with this explanation, noting that costs would have been incurred whether the case was pursued in bankruptcy or not. The District Court found Jackson's position "confusing," (R., p. 000561 (n. 1)), and noted that in bankruptcy Jackson was to split the proceeds of recovery 50-50 with the bankruptcy estate, but would get 100% of the recovery outside of bankruptcy.

Once Crow's bankruptcy was over, Jackson then proceeded against Crow again in state court, starting with a simple letter of June 15, 2015, inquiring whether the parties could agree to put the case back on the active calendar since Crow had been "discharged." (R., p. 000277.)

Crow filed for summary judgment on September 30, 2016. (R., p. 000051.) Jackson opposed the motion and filed his own Motion for Summary Judgment Re: Liability on February 1, 2017. (R., p. 000314.)

Jackson's counsel sent a letter to Crow's counsel on January 5, 2017, which threatened Crow with an excess judgment and listed the various negative impacts a judgment would have on Crow's employment prospects, credit rating, and her ability to rent property. (R., pp. 000353-355.) Crow's counsel brought this letter to the District Court's attention by way of a supplemental affidavit. (R., p. 000350.)

The hearing on Crow's motion for summary judgment and Jackson's motion for partial summary judgment was held March 3, 2017. Jackson then moved to amend his complaint on March 10, 2017, (R., p. 000430), and submitted a proposed Amended Complaint to the District Court naming Farmers Insurance Policy No. 0182612689 as a party. (R., p. 000432.)

At the March 3, 2017 hearing, the District Court requested additional briefing, which Jackson submitted on March 10, 2017 (R., p. 000406) and Crow the same day. (R., p. 000446.)

The District Court entered its Memorandum Decision and Order on Motion for Summary Judgment on April 13, 2017. (R, p. 000557.) Jackson then filed motions for reconsideration and to strike,[3] a stipulation for credit against judgment, and a memorandum in support of these motions. (R., pp. 000573 and 000580.)

The Court issued an Order relating to these motions on June 19, 2017, (R., p. 000596), received additional briefing on the effect of terms in Crow's policy on the case, and issued its final Order Granting Motion to Extend Time and Denying Motion for Reconsideration and Motion to Strike on August 31, 2017. (R., p. 000619.)

The Court entered final Judgment on August 31, 2017. (R., p. 000629.)

Jackson filed his Notice of Appeal on September 28, 2017. (R., p. 000631.)

C. Statement of Facts.

1. Jackson's Bankruptcy.

Jackson and his wife filed for bankruptcy on February 4, 2013 – Bk. Case No. 13-00189-TLM. (R., p. 000076.)

In his bankruptcy petition, Jackson listed his lawsuit against Crow as a Schedule B – Personal Property contingent and unliquidated asset. (R., p. 000088.) Jackson also listed the medical bills from his rotator cuff surgery in his bankruptcy petition on Schedule F – Creditor Holding Unsecured Nonpriority Claim debts. (R., p. 000097.) Jackson's medical bills and other debts were discharged on June 4, 2013. (R., p. 000140.)

[3] Jackson moved to strike his letter of January 5, 2017 (R., p. 000353), which Crow submitted – without objection by Jackson – on summary judgment.

During the pendency of Jackson's bankruptcy proceeding, the Chapter 7 Trustee ("Trustee") filed an application with the bankruptcy court to employ Jackson's counsel, Seiniger, as special counsel to pursue this lawsuit in Jackson's bankruptcy proceeding for the benefit of his creditors. (R., p. 000145.)

To that end, Jackson's counsel filed a Verified Statement of Special Counsel indicating he represented Jackson in his lawsuit prior to Jackson's bankruptcy proceeding and "attempted to negotiate a settlement with respect to Mr. Jackson's third-party claim but was not able to do so." (R., p. 000156 and 157.) Trustee also filed a motion with the bankruptcy court indicating Jackson's counsel represented to him this lawsuit is "considerably more valuable than the Loveland case [another lawsuit by Jackson stemming from a motorcycle accident that occurred on May 5, 2009, approximately nine months after the Subject Accident]." (R., p. 000161.)

The Loveland case settled for $25,745.00. (R, p. 000160.) In exchange for Jackson agreeing "to split the net proceeds of the cause of action described as "Kermit Jackson v. Jennifer Crow, Case No. CV PI 1015546" in Debtors' schedule B on a 50/50 basis", the Trustee agreed to abandon the Loveland case settlement. (*Id.*)

As part of this agreement with the Trustee, Jackson agreed to waive any claims to costs and expenses he accrued prior to the date Jackson filed for bankruptcy. (R., p. 000158.) Jackson's counsel also agreed to advance costs. (R., p. 000167 (¶ 3).) The bankruptcy court granted Trustee's application to employ Jackson's counsel. (R., p. 000172.)

Jackson did nothing to pursue this lawsuit in his bankruptcy proceeding on behalf of himself and his creditors after the bankruptcy court granted Trustee's application to employ Jackson's counsel. He did not reopen this lawsuit in state court by substituting in the Trustee as a real party in interest, or file an adversary action in his bankruptcy action against Crow.

Jackson's counsel later indicated in a letter this lawsuit was not pursued during the pendency of Jackson's bankruptcy proceeding because the Trustee was unwilling to advance costs and "I did not feel that I could advise Mr. Jackson to advance costs himself." (R., p. 000298.) This contention seems at odds with counsel's Agreement for Legal Representation, which provides "[t]he Client's (the trustee's) pro rata share of the actual costs required to prepare and prosecute the lawsuit, or to achieve a settlement, are to be advanced by the attorney . . ." (R., p. 000167.)

Jackson's position was that once "the bankruptcies of our clients closed Mr. Jackson's claim reverted back to him as a matter of law free of any interest in it held by the Bankruptcy Estate" (i.e., once the bankruptcy estate creditors were out of the picture), and Jackson could again begin pursuing this lawsuit for his sole benefit. (Id.)[4]

Trustee's Report of No Distribution was filed with the bankruptcy court on December 16, 2013, which indicated there was no property available for distribution from

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[4] Jackson's counsel agreed to advance costs in pursuit of the case against Crow in Jackson's bankruptcy. So, even had economic risk been an appropriate consideration in determining whether to pursue the case in bankruptcy as promised, the risk was only to Jackson's counsel. (R., p. 000167 (counsel's agreement to advance costs).)

the estate and $223,640.43 in scheduled creditor claims were discharged without payment, including the medical bills from Jackson's rotator cuff surgery. (R., p. 000180.) The bankruptcy court approved Trustee's Report of No Distribution the next day and closed Jackson's bankruptcy proceeding. (R., p. 000182.)

2. Crow's Bankruptcy.

Crow and her husband filed their bankruptcy on January 18, 2014 – Bk. Case No. 14-00080-JDP. (R., p. 000185.) In her bankruptcy petition, Crow listed this lawsuit as an unsecured nonpriority debt. (R., p. 000207.) Jackson, through his counsel, filed a proof of claim in Crow's bankruptcy for $61,018.56, which was allowed. (R., p. 000274.)[5]

Jackson did nothing further to pursue this lawsuit during the pendency of Crow's bankruptcy proceeding. Jackson did not file a motion for relief from stay and attempt to pursue an adversary proceeding or otherwise file any type of objection to his lawsuit being discharged. Crow's debts (including this lawsuit) were discharged on April 30, 2014. (R., p. 000260.)

Jackson was awarded, and accepted, a distribution of $1,932.45 from Crow's bankruptcy estate; again without objecting to Crow's alleged debt to Jackson being discharged. (R., p. 000274.)

[5] This claim was only for Jackson's medical bills and, evidently, workers compensation benefits.

3. The District Court Action Resumes.

On June 15, 2015, Jackson wrote Crow and, for the first time since Jackson filed for bankruptcy in February of 2013, indicated an intention to continue his lawsuit. (R., p. 000277.) Crow responded by indicating the lawsuit was listed in Crow's bankruptcy petition and discharged in April of 2014. (R., p. 000279 (August 14, 2015 letter).) Jackson then took the position that the permanent bankruptcy injunction protected only Crow personally and proposed substituting in Crow's surety as a real party in interest. (R., p. 000281 (November 9, 2015 letter.)

Jackson later argued that Crow could be sued "nominally" for the purposes of recovering against Crow's surety, (R., p. 000282), and later still that he could proceed only against the policy. (R., p. 000430 (motion to amend complaint).

Crow filed her motion for summary judgment on September 30, 2016.

4. Jackson Threatens Crow With a Judgment in Spite of Her Chapter 7 Discharge.

In the course of discussing whether Jackson could proceed against Crow in light of her bankruptcy discharge, Jackson sent a letter to Crow's counsel on January 5, 2017. (This letter was presented to the District Court by Crow on summary judgment (R., p. 000350 (Exh. Z)), and Jackson failed to object to the letter until after the summary judgment hearing on March 3, 2017.)

In that letter, Jackson threatened to take a judgment against Crow, personally, and laid out the various ways in which a judgment would be harmful, financial and otherwise, to Crow:

> I see it as being inevitable that Mr. Jackson will obtain a verdict approaching, if not in excess of, any offer of judgment being made in this case and Mrs. Crow's policy limits. (R., p. 000353.)
>
> [N]evertheless, continued litigation is bound to have some negative effect on Mrs. Crow. (R., p. 000354.)
>
> Trial always poses the risk of emotional injury from the very significant stresses associated with litigation and damage to the Crows' credit reputation. (*Id.*)
>
> I know from first-hand experience what effect litigation has on parties in terms of stress, the intrusion upon their time, and the effect that a judgment may have even if a judgment is promptly paid off.
> (*Id.*)
>
> Even an offer of judgment creates the opportunity for Jackson to file a notice of acceptance and have a judgment entered against a Crow.
> (*Id.*)
>
> One consequence of a judgment entered upon an offer of judgment is that the defendant has it on her record which she would likely have to explain every time she applies for a loan for years to come, and in other situations, such as when submitting job and other applications.
> (*Id.*)
>
> Judgments in civil cases remain part of the public record which credit bureaus regularly review and include in credit reports.
> (*Id.*)[6]

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[6] Jackson also included a lengthy passage from a website regarding judgments, which stated: "The inclusion of civil judgment information in a credit file will often cause a more noticeable drop in [a credit] score than that of a similarly sized loan, . . . civil judgments, like other reported public records, are generally considered to be harmful to credit scores and often have an immediate effect at the time of their addition. . . . In most

> An individual applying for a job who has a judgment on his record may well have to explain why the judgment was entered against him or her, thereby creating a black mark on that person's application for employment as compared with the similarly qualified individual with no judgments against them.

(*Id.*)

Ironically, in the January 5, 2017 letter, Jackson relied on his own bankruptcy discharge to argue that he could harm Crow but she could not harm him:

> I see no possibility that the Crow could ever recover any attorney's fees even in the unlikely event that they should be awarded against Mr. Jackson. As you are aware from discovery conducted in this case, Mr. Jackson has previously declared bankruptcy, has no substantial assets and his only income is from retirement and disability both of which are exempt from execution.

(*Id.*)

By supplemental affidavit, Crow brought these threats of economic harm to the District Court's attention. (R., p. 000350.)

II. ISSUES PRESENTED ON APPEAL

Crow takes issue with the issues presented on appeal as posed by Jackson's opening brief.

Jackson asks this Court to determine whether he was "entitled to summary judgment on the record?" (Appellant's Brief, p. 8.) Jackson only moved for partial summary judgement on liability and damages. (R., p. 000314.) The District Court granted neither. This Court has long held that denials of motions for summary judgment

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cases, removing a civil judgment from your credit report is not a possibility. Most judgments will remain on your credit report for seven years from the filing date, and this timeframe will apply whether you pay off your damages or not." (R., p. 000354.)

are not appealable. An order denying a motion for summary judgment is not subject to review – even after the entry of an appealable final judgment. *Hoffman v. Board of the Local Improvement District No. 1101,* ____ Idaho ___, _____, 415 P.3d 332, 336-337 (2017). Accordingly, this Court's case law prevents it from considering whether Jackson is "entitled to summary judgment on the record."

Crow does not disagree with the remaining issues identified in section II. B. 1. – 6. of Jackson's opening brief.

III. ARGUMENT

A. Standard of Review.

In an appeal from an order of summary judgment, this Court's standard of review is the same as the standard used by the district court in ruling on the motion for summary judgment. *East Lizard Butte Water Corp. v. Howell,* 122 Idaho 679, 681, 837 P.2d 805, 807 (1992). On review, this Court liberally construes the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor. *Farm Credit Bank of Spokane v. Stevenson,* 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994). Summary judgment shall be granted if the court determines that "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." Idaho Rule of Civil Procedure 56(c).

B. Analysis.

1. Overview of Crow's Position.

Jackson proposes that this Court rewrite the no-direct-action rule because he did not follow through on his promise to pursue his case against Crow for the benefit of his creditors in his Chapter 7 Bankruptcy. Jackson's bankruptcy estate retained his counsel to pursue the case, evidently in state court.[7] Jackson did nothing, and Crow ultimately filed her own Chapter 7 bankruptcy to seek the same "fresh start" Jackson obtained in his Chapter 7.

The bankruptcy court discharged Crow from her debt to Jackson.

In renewing his pursuit of Crow in state court, Jackson gambled that he had a procedural mechanism under Idaho (not federal) law to recover from Crow in something other than the form of a judgment, as the bankruptcy code prohibits Jackson from obtaining and enforcing a judgment against Crow. To work around that protection, Jackson proposed pursuing Crow as a "nominal" party, proposed adding Farmers Insurance Company of Idaho as a party to the case, and proposed suing the Farmers Insurance Company of Idaho policy *in rem.*

The problem with each of these approaches is that they ignore that under the Idaho Rules of Civil Procedure, statutes, and case law, there is only one way to recover in

[7] The Verified Statement of Counsel submitted in Jackson's bankruptcy read: "If approved, the undersigned (Jackson's counsel) will represent both the bankruptcy estate of the debtors herein and Mr. Jackson, as well as Boise City's subrogation interest in Ada County, Idaho case number CV PI 1015546." (R., p. 000157.)

this case, and that is to obtain a judgment from Crow personally, which Jackson cannot do because of the bankruptcy injunction that protects Crow.

2. Jackson's Analysis Ignores that He is a Stranger to the Insurance Contract between Crow and Farmer's Insurance Company of Idaho under the No Direct Action Rule

Page after page, Jackson explains that his various proposals are simply ways to establish the liability of Crow's insurer, Farmer's Insurance Company of Idaho, which is not a party to this case: (a) "At this point, D/R Crow is in reality *Farmers*' avatar, serving as its proxy in this litigation for the sole purpose of avoiding its obligation under Idaho's Motor Vehicle Financial Responsibility Law to pay P/A Jackson's Damages;"[8] (b) "This case is not being continued to collect recover or offset damages from D/R. Crow as a personal liability;"[9] (c) "[I]t is being continued . . . to collect damages from *Farmers,* contractually liable to satisfy any judgment entered against D/R Crow . . .;"[10] (d) proposing a form of judgment that provides recovery "may only be had against Crow's motor vehicle insurance policy;"[11] arguing that this Court should permit Jackson's pursuit of Crow in district court as a "nominal" party for the "sole purpose of establishing the amount which the Crow's insurance company would owe to satisfy the judgment."[12]

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[8] Jackson's Brief, pp. 15-16.
[9] *Id.*, p. 16.
[10] *Id.*
[11] *Id.*, p. 27.
[12] *Id.*, p. 33.

As a preliminary matter, undersigned counsel represents Crow, not Farmer's Insurance Company of Idaho, which is not a party to this case. This Court cannot effectively render a decision against an entity that is not a party to the case. *Valentine v. Perry,* 118 Idaho 653, 655-56 798 P.3d 935, 937-38 (1990) (holding court cannot render judgment for an absent party). This, however, is precisely what Jackson asks this Court to do, and expressly admits as much by referring to Crow as her insurer's "proxy" and "avatar." Jackson Brief, p. 14.

Accordingly, this Court should decline the invitation.

Crow's insurer's absence from the case is dictated by this Court's no-direct-action Rule, and this Court should reject Jackson's effort to make holdings that directly implicate the rights and interests of Crow's insurer.

In whatever form Jackson's efforts to work around the Idaho Rule of Civil Procedure take, they bump up against the no-direct-action rule, which this Court recently reaffirmed in *Dahmer v. Blackburn*, 2018 Unpublished Opinion No. 445 (2018).

This Court has "repeatedly reaffirmed the no-direct-action rule: 'absent a contractual or statutory provision authorizing the action, an insurance carrier cannot be sued directly and cannot be joined as a party defendant.'" *Brooksby v. Geico Gen. Ins. Co.,* 153 Idaho 546, 548, 286 P.3d 183, 184 (2012). The basis for this rule is that an insurance policy is "a matter of contract between the insurer and the insured," and a third party "allegedly injured by the insured is not a party to the insurance contract and has no

rights under it." *Id., citing Hartman v. United Heritage Prop. & Cas. Co.,* 141 Idaho 193, 199, 108 P.3d 340, 346 (2005).

Unlike the plaintiff in the *Brooksby* case, *supra*, who sued the defendant's liability carrier directly, Jackson has only proceeded against Crow.

Like the plaintiff in *Brooksby*, Jackson's argument that he has legal rights under Crow's liability policy are, in form and substance, a request for declaratory relief, which he lacks standing to assert. *See Brooksby*, 153 Idaho at 548, 286 P.3d at 184 (holding that a third party with no rights under an insurance policy has no right under Idaho Code § 10-1202 to seek declaratory relief). Because the plaintiff in *Brooksby* had no rights against, or relationship with, GEICO, this Court held she had no standing to seek declaratory relief against GEICO.

Such is the case here. Jackson is a stranger to Crow's liability policy with Farmers Insurance Company of Idaho. He has not involved Farmers Insurance Company of Idaho as a party, which is fatal to his effort to ask this Court to make rulings that directly affect Farmer's interests, i.e., he requests that the Court hold either that he can proceed against Crow "nominally" for the purpose of fixing Farmers Insurance Company of Idaho's liability to him, or name Farmers Insurance Company of Idaho as a party, or permit him to name Crow's policy *in rem*.

None of these approaches are consistent with the no-direct-action rule, i.e., they are all efforts to circumvent the rule. As this Court has repeatedly held, Jackson can only pursue Crow and is effectively a stranger to Crow's relationship with her insurer.

3. The Idaho Rules of Civil Procedure and Statutory Scheme do not Permit Suit against "Nominal" Parties.

The District Court correctly concluded that Idaho law provides no mechanism by which a plaintiff like Jackson can proceed against a "nominal" defendant (in this case Crow) for the purpose of establishing liability against a third party (Farmers Insurance Company of Idaho): "[T]he Court is aware of no mechanism under Idaho law for suing a defendant 'nominally' and then enforcing the judgment against the defendant's insurer or bringing an action against the defendant's insurer to collect on the judgment." (R., p. 000566.)

The District Court is correct.

The Idaho Rules of Civil Procedure do not provide, or contemplate, for recovery from a "nominal" defendant. The word does not exist in the rules.

Rather, the rules plainly provide that the only method to recover a monetary award against a defendant is via a judgment. Rule 54(a)(1) explains the definition and form of a judgment, providing that it must:

> [S]tate the relief to which a party is entitled on one or more claims for relief in the action, which may include dismissal with or without prejudice.
>
> * * * * *
>
> A judgment or partial judgment must begin with the words "JUDGMENT IS ENTERED AS FOLLOWS . . .," and it must not contain any other wording between those words and the caption. A judgment may include any findings of fact or conclusions of law expressly required by statute, rule, or regulation.

Importantly, judgments which do not comply with Rule 54(a) are not appealable because they are not considered final. Only "final judgments" as defined by Rule 54(a) are appealable. *See* I.A.R. 11(a)(1). Time and again this Court has rejected appeals that do not comply with the form of judgment specified by Rule 54(a). *See, e.g., Estate of Holland v. Metro. Prop. and Cas. Ins. Co.,* 153 Idaho 94, 99, 279 P.3d 80, 85 (2012); *Harrison v. Certain Underwriters at Lloyd's, London,* 149 Idaho 201, 205, 233 P.3d 132, 136 (2010).

In line with the above, there is no way for Jackson to proceed successfully against Crow without obtaining a judgment against her personally. The form of that judgment, under the rules, would have to simply state the amount of the judgment against Crow. The form of judgment proposed by Jackson (*see* Jackson Brief, p. 27)[13] would violate Rule 54(a)'s strict requirements for the form of judgments.

Other rules support the District Court's recognition that, contrary to Jackson's desire to proceed against Crow as the "proxy" or "avatar" of Farmers Insurance Company of Idaho, the only party against whom a plaintiff can obtain and enforce a judgment is the defendant. For example, I.R.C.P. 3(c) provides that any party against whom a complaint is filed "must be identified as the defendant or respondent." Rule 3 does not provide for a "nominal" defendant that is actually a stand in for a third party, such as a liability carrier.

[13] Jackson argues that the judgment could be against Crow, but provide that "execution may only be had against Defendant's motor vehicle insurance policy." Not only does 54(a) forbid this approach, but the form of the judgment would effectively enter judgment against a non-party in violation of basic due process and the no-direct-action rule.

Similarly, the concept of a "nominal" defendant does not comport with this Court's rules for default judgments, which provide that a default judgment can only be taken "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend . . ." *See* I.R.C.P. 55(a)(1). This rule contemplates a default judgment only against the named defendant, as due process would dictate. Were this Court to adopt Jackson's "nominal" party concept it would be unworkable in the setting of default judgments.[14]

I.R.C.P. 69 permits execution on "appealable final judgment[s]," and Idaho Code §11-104 contemplates execution of a judgment only against a defendant. Neither rule provides a procedure by which a plaintiff can obtain a judgment against a "nominal" defendant and then enforce it against a third party.

Last, I.R.C.P. 68 provides another example of a rule that would be rendered unworkable under Jackson's proposed approach. That rule contemplates a defendant making an offer of judgment. If accepted, judgment is entered against the defendant making the offer. The rule provides no mechanism for a "stand in" defendant to make an offer of judgment that is binding on a third party, such as a liability carrier.

In conclusion, the rules simply do not contemplate the "nominal" party approach urged by Jackson. If the rules do not contemplate the approach then this Court should not

[14] Further illustration of this point is that I.R.C.P. 55(b)(3) requires notice to the party against whom default judgment is requested at an address most likely to give notice. The rule is silent as to what to do in the event the named defendant, who hasn't defended, is a "proxy" or "avatar" of a third party.

permit it. While there is no dispute that various federal courts have permitted the "nominal" party approach as a way to permit a plaintiff to recover on a defendant's liability policy, we are not in federal court, and the decisions of the 5th Circuit,[15] for example, do not amend our rules of civil procedure.

4. *Pigg v. Brockman* Does Not Permit Suits Against "Nominal" Defendants.

Jackson argues that *Pigg v. Brockman*, 79 Idaho 233, 314 P.3d 609 (1957), permits suit against nominal parties. Jackson Brief, pp. 25-29. The District Court rejected the reliance on *Pigg*, where this Court permitted an action to continue against the State as a "nominal party defendant" in order to determine and fix the State's liability insurer's liability. *Pigg*, 79 Idaho at 245, 314 P.3d at 616. (R., pp. 000566-568.) There are a variety of problems with relying on *Pigg*.

First, it long predates the no-direct-action rule and the Idaho Rules of Civil Procedure. Accordingly, to the extent Jackson relies on *Pigg* to undermine Crow's argument that the no-direct-action rule and the Idaho Rules of Civil Procedure, *Pigg* is inapposite, distinguishable, and of questionable validity.

Second, the policy at issue in *Pigg* expressly provided for suit by a party that had obtained a judgment against the insured.[16] Accordingly, the policy in *Pigg* permitted suit

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[15] The Fifth Circuit issued *Houston v. Edgeworth,* 993 F.2d 51 (5th Cir. 1993), which Jackson relies upon as the sole case in which a creditor was allowed to pursue a bankrupt defendant in a no-direct-action rule state. *See* Jackson Brief, p. 17.

[16] The policy provided "Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to

for the purpose of fixing the liability of the insurer, which Idaho's no-direct-action rule recognizes as an exception. "[A]bsent a contractual or statutory provision authorizing the action, an insurance carrier cannot be sued directly and cannot be joined as a party Crow." *Brooksby,* 153 Idaho at 548, 286 P.3d at 184. Had *Pigg* been decided today it would have fallen within one of the no-direct-action rule exceptions.

While Jackson argued that the language in Crow's policy with Farmers Insurance Company of Idaho permitted suit against her, the District Court disagreed (R., pp. 000623-624), finding that language contained in the "Legal Action Against Us" provision did not "provide that a third party can bring suit against the insurance company directly."[17] Similarly, the Court rejected Jackson's argument that the "Bankruptcy" provision of the policy supported him suing Crow's liability carrier. (R., pp. 000624-625.) That provision reads "We are not relieved of any obligation under this policy because of the bankruptcy or insolvency of any insured person." This does not do anything but state the obvious, which is that the obligations owed to Crow, the party with whom her liability carrier contracted, were not relieved because of a bankruptcy. It does not give Jackson the right to sue Crow's liability carrier.

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recover under this policy to the extent of the insurance afforded by this policy." *Pigg,* 79 Idaho at 244, 314 P.2d at 615.

[17] That provision provides: "We may not be sued unless there is full compliance with all the terms of this policy. We may not be sued under the Liability Coverage until the obligation of a person we insure to pay is finally determined either by judgment against that person at the actual trial or by written agreement of that person, the claimant and us." This language does not provide that a plaintiff can sue a defendant's third party insurance carrier.

To the extent that the Jackson seeks to rely on the *Pigg* case to undermine the modern Idaho Rules of Civil Procedure and this Court's no-direct-action rule, this Court should decline. *Pigg* is of questionable validity, and cannot stand for the broad propositions argued by Jackson in light of legal developments since 1957.

5. Jackson's Proposal to Pursue Crow to Judgment is Barred by 11 U.S.C. §§ 524 and 727.

a. In the 9th Circuit, all Judgments "Purporting" to Establish Personal Liability of a Debtor are *void ab initio*.

When a discharge is granted under 11 U.S.C. § 727, the automatic stay is replaced by the permanent injunction of § 524,[18] which enjoins creditors from attempting to collect from the debtor or from the debtor's assets any debts that have been discharged. *In re Eastlick*, 349 B.R. 216, 229 (Bankr.D.Idaho 2004), citing *Watson v. Shandell (In re Watson)*, 192 B.R. 739, 749 (9th Cir. BAP 1996), aff'd, 116 F.3d 488 (9th Cir.1997); *In re Venegas*, 257 B.R. 41, 44, 01.1 I.B.C.R. 5 (Bankr.D.Idaho 2001).

All prepetition debts that are not determined to be nondischargeable are discharged under § 727. *See* § 727(b).36. The debtor and his assets are then protected by

[18] 11 U.S.C. §524 provides: (a) A discharge in a case under this title—
(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived;

§ 524 from any attempts to collect those discharged debts. *In re Eastlick*, 349 B.R. at 229.

The purpose of the discharge injunction is to protect the debtor from having to put on a defense in an improvident state court action or otherwise suffer the costs, expense and burden of collection activity on discharged debts. *Id.*, citing *Levy v. Bank of the Orient (In re Levy)*, 87 B.R. 107, 108 (Bankr.N.D.Cal.1988).

The § 524 injunction is an absolute defense and cannot be waived. *In re Eastlick*, 349 B.R. at 229, citing *Pavelich v. McCormick, Barstow, Sheppard, Wayte & Carruth LLP (In re Pavelich)*, 229 B.R. 777, 781–82 (9th Cir. BAP 1999). "Thus, *all judgments purporting to establish personal liability* of a debtor on a discharged debt, including judgments obtained after bankruptcy, are void to that extent. They are not voidable, they are void ab initio as a matter of federal statute." *Id.* at 782 (emphasis supplied).

Stated simply, the only way for Jackson to proceed against Crow is to obtain a judgment against her, personally, which the bankruptcy injunction does not permit.

b. Federal Cases Permitting Suits Against "Nominal" Defendants in the Case of Liability Coverage are Non-binding and in Conflict with Idaho's No-Direct-Action Rule, its Rules of Civil Procedure, and its Statutes.

Many lower level federal district courts[19] – though, apparently, none in the 9th Circuit – treat the bankruptcy injunction in personal injury lawsuits, where the debtor is

[19] The only federal court of appeals decisions cited by Jackson appear to be *Houston v. Edgeworth (In re Edgeworth)*, 993 F.2d 51, (5th Cir. 1993) and *In re Jet Florida Systems, Inc.*, 883 F.2d 970, 973 (11th Cir. 1989).

insured, uniquely based upon 11 U.S.C. § 524(e), which provides that "[a] discharge of a debt of the debtor, however, does not affect the liability of any other entity on, or the property of any other entity for, such debt."

In these circuits, after discharge the plaintiff/creditor can sue the debtor "nominally" [20] for the sole purpose of recovering directly against the debtor's insurance company. *See, e.g., HDR Architecture, P.C. v. Maguire Grp. Holdings,* 523 B.R. 879, 888 (Bankr. S.D. Fla. 2014); *In re Hayden,* 477 B.R. 260, 264 (Bankr. N.D. Ga. 2012); *In re Morris,* 430 B.R. 824, 828 (Bankr. W.D. Tenn. 2010).

As the District Court recognized, (see R., p. 000565), these courts generally caution that maintaining such an action against the debtor nominally must not cause any negative economic consequences to the debtor. For example, requiring the debtor to spend money to defend the lawsuit would violate the "fresh-start" policy embodied in the Bankruptcy Code. *See Perez v. Cumberland Farms, Inc.,* 213 B.R. 622, 623 (D. Mass. 1997), *discussing In re Jet Florida Sys., Inc.,* 883 F.2d 970, 976 (11th Cir. 1989). When the debtor would not have to incur any financial costs or obligations associated with the lawsuit, or participate in the lawsuit "in any way at all," the lawsuit remains barred by the permanent discharge injunction pursuant to 11 U.S.C. § 524(a). *See, e.g., In re Bracy,*

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[20] A "nominal party" is "a party to an action who has no control over it and no financial interest in its outcome; esp., a party who has some immaterial interest in the subject matter of the lawsuit and who will not be affected by any judgment, but who is nonetheless joined in the lawsuit to avoid procedural defects. BLACK'S LAW DICTIONARY 945 (11th ed. 2005) (emphasis added).

449 F.Supp. 70, 71 (D. Mont. 1978); *Perez v. Cumberland Farms, Inc.*, 213 B.R. 622, 623-24 (D. Mass 1997).

Likewise, where a judgment would potentially cause a debtor's insurance rates to increase, impact future employment, or otherwise interfere with the debtor's ability to obtain a financial "fresh start in her economic life," the lawsuit remains barred by the permanent discharge injunction pursuant to 11 U.S.C. § 524(e). *See, e.g., In re Daniels*, 493 B.R. 740, 746-47 (N.D. Miss. 2013).

It is well established that the "decisions of lower federal courts are not binding on state courts, even on issues of federal law." *English v. Taylor,* 160 Idaho 737, 742, 378 P.3d 1036, 1041 (2016) (citations omitted). Accordingly, the various federal lower federal court decisions cited by Jackson are not binding on this Court and are in direct conflict with this Court's no-direct-action rule.

Neither, for that matter, are the decisions of the 5th or 11th Circuits, which have no bearing on this Court's interpretation of the no-direct-act rule, its own Rules of Civil Procedure, or Idaho statutes.

The only case cited by Jackson which "deals" with the issue before this Court in a no-direct-action rule state is *Edgeworth*, though, that case contains no analysis. It merely states in a footnote that "Texas, the state in which this case arose, does not allow direct actions against the insurer." *Edgeworth,* 993 F.2d at 54, n. 5.

Accordingly, to the extent that Jackson relies upon that 5th Circuit case, decided under Texas law, to argue how this Court should analyze whether to permit him to proceed against Crow in spite of her bankruptcy injunction, the case is unpersuasive.

c. **The Mere Entry of a Judgment "Purporting" to Establish the Personal Liability of the Debtor Would Violate the Bankruptcy Injunction.**

While the District Court did not analyze whether the entry of a judgment against a bankruptcy debtor violates the injunction, 9th Circuit case law holds that it does. This is important because, as argued *supra*, there is no way for Jackson to proceed successfully in the state court action without obtaining a judgment against Crow personally, a conclusion dictated by the Idaho Rules of Civil Procedure and Idaho's no-direct-action rule.

"[A]ll judgments *purporting to establish personal liability* of a debtor on a discharged debt . . . are void ab initio as a matter of federal statute." *Pavelich*, 229 B.R. at 781-782.

Because there is no way for Jackson to recover in his state case without obtaining a judgment that "purports" to establish Crow's personal liability, the case cannot proceed without violating the bankruptcy injunction.

d. **The Record Establishes that the Litigation Against Crow Would Result in "Negative Economic Consequences" to Crow in Violation of the Bankruptcy Injunction.**

As a preliminary matter, Jackson took the position that his letter of January 5, 2017, in which he listed for Crow the myriad ways in which a judgment entered against

her would harm her economically, (R., pp. 000353-355), is inadmissible under I.R.E. 408, the harm is speculative, and it should be ignored. These arguments fail for a variety of reasons.

As noted, Crow filed her motion for summary judgment on September 30, 2016. (R., p. 000051.) Because the January 5, 2017 letter was relevant to the question of the economic harm a judgment could cause Crow, her counsel provided the letter to the Court by a supplemental affidavit on February 2, 2017. (R., p. 000350.) Jackson filed his opposition to the summary judgment on February 16, 2017. (R., p. 000375.) Jackson did not object to admission of the January 5, 2017 letter in his opposition. The motion was argued March 3, 2017, the Court issued its Memorandum Decision & Order on April 13, 2017, (R., p. 000557), and Jackson objected to admission of the letter for the first time in his Motion for Reconsideration and Motion to Strike on *April 14, 2017.*

Jackson's objection was waived under *Antim v. Fred Meyers Stores, Inc.,* 150 Idaho 774, 782, 251 P.3d 602 (2011) (holding that a trial court is not required to rule on an affidavit's admissibility in the absence of an objection and can base a decision on noncompliant evidence in an affidavit). Crow noted that the Supplemental Affidavit attaching the letter as Exhibit Z was filed and served on February 2, 2017, more than 28 days before the hearing, and there was no objection or motion to strike. (R., p. 000586.)

The District Court agreed and considered the letter.[21]

Nevertheless, Jackson appears to take issue with his own letter, arguing that the economic consequences to Crow are speculative and faulting the District Court for considering speculation in reaching its decision. *See* Jackson Brief, pp. 19-22. In his letter Jackson informed Crow, among other things, that "civil judgments, like other reported public records, are generally considered to be harmful to credit scores and often have an immediate effect at the time of their addition. . . . In most cases, removing a civil judgment from your credit report is not a possibility." (R., p. 000354.) Jackson informed that a judgment against Crow would be a "black mark" on her employment prospects, would make it more difficult to find housing, and would be emotionally stressful. (*Id.*)

The District Court recognized, as conceded/argued by Jackson, that "entry of a judgment can have a negative impact on Crow for purposes of explanation to future employers or creditors," and that "a judgment against Crow could also affect Crow's credit rating." (R., p. 000568.)

Jackson's argument regarding whether or not Crow would have had to have paid a deductible is irrelevant, and the District Court noted that whether that was the case was not entirely clear. (R., p. 000626.) Ultimately, the Court relied on Jackson's statements in his January 5, 2017 letter, and Jackson has not argued that he has a basis to disavow

[21] In its Order on Jackson's motion for reconsideration and to strike, the Court ruled it "did not erroneously rely on Exhibit Z in reaching its conclusion and the exhibit need not be stricken from the record." (R., p. 000627.)

the statements in his letter that Crow would suffer negative economic consequences if the litigation proceeded and judgment were entered against her.

In conclusion, Crow took Jackson at his word that he intended to obtain a judgment against Crow and harm her economically. She acted accordingly in defending herself from this flagrant violation of the bankruptcy injunction by filing for summary judgment.

It is not plausible for Jackson to fault the District Court for relying on "speculative' evidence contained in his own letter of January 5, 2017.

Jackson does not bother to address that he made no objection to admission and consideration of the January 5, 2017 letter, until *after* the Court considered the letter and ruled on Crow's summary judgment. The objections were waived.

e. Jackson's Proposed Approach Would Violate Crow's Right to a "Fresh Start" Following Her Bankruptcy Discharge.

It is well settled that at the core of the Bankruptcy Code are the twin goals of ensuring an equitable distribution of the debtor's assets to his creditors and giving the debtor a "fresh start." *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 563, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994). This means providing a procedure by which insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt. *Grogan v. Garner*, 498 U.S. 279, 286, 111 S.Ct.

654, 112 L.Ed.2d 755 (1991) (quoting *Local Loan Co. v. Hunt,* 292 U.S. 234, 244, 54 S.Ct. 695, 78 L.Ed. 1230 (1934)).

Jackson obtained his own "fresh start" under the bankruptcy code but seeks to deny Crow her own. It is difficult to see how forcing Crow to go through continued litigation, depositions (she has not been deposed), written discovery, and spending roughly a week in a courtroom, does not violate the bankruptcy injunction. In addition to the economic harm she is sure – in Jackson's own words – to suffer, the burden of continuing to litigate would deny her the "fresh start" promised by the code.

"Trial always poses the risk of emotional injury from the very significant stresses associated with litigation *and damage to the plaintiff's credit reputation.*" (R., p. 000354, emphasis added). These are Jackson's own words. They establish his intention to violate the bankruptcy injunction in Crow's favor, and the District Court reached the correct conclusion in vindicating the injunction by granting summary judgment.

5. Jackson's Remaining Arguments are Procedurally Deficient and Substantively Flawed.

a. Jackson did not present argument on the preclusive effect of his claim in Crow's bankruptcy below; even had he done so, denials of motions for summary judgment are interlocutory and not appealable.

Jackson wrongly argues (at roughly pages 8-14 of his brief) that this Court should enter judgment against Crow and find that the District Court committed error in various respects by not taking the alleged preclusive effect of Crow's bankruptcy into account. *See, e.g.,* Jackson's Brief, p. 9 (claim allowance in bankruptcy has preclusive effect); p.

11 (Crow precluded from relitigating liability and damages by bankruptcy act); p. 13 (allowance of Jackson's bankruptcy claim establishes and limits his damages); p 15 (denial of motion to amend to add Farmer's policy error because of preclusive effect of Crow's bankruptcy).

The longstanding rule of this Court is that it will not consider issues presented for the first time on appeal. *Sanchez v. Arave,* 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). "Such a practice would destroy the purpose of an appeal and make the supreme court one for deciding questions of law in the first instance." (*Id.*)

Jackson's motion for partial summary judgment, filed February 1, 2017, did not argue that the disposition of his claim in Crow's bankruptcy had a preclusive effect. Neither his motion (R., p. 000314) or his supporting memorandum (R., pp. 000316-333) made the argument.

Accordingly, these arguments are not properly before this Court, having been presented to this Court for the first time.

Even had the arguments been appropriately made, they were made via a motion for partial summary judgment, which was effectively denied by the District Court. Denials of motions for summary judgment are interlocutory and not appealable. *Hoffman v. Board of the Local Improvement District No. 1101,* ___ Idaho at ___, 415 P.3d at 336-337.

Accordingly, this Court should reject Jackson's efforts to utilize the allegedly preclusive effect of his claim's disposition in bankruptcy court to argue that the District Court was in error.

b. Jackson Never Argued Below that Idaho "Public Policy" Dictated His Desired Outcome; Nevertheless, there is No Authority for the Proposition that This Court Should Construe Unambiguous Rules of Civil Procedure and Modify the No-Direct-Action Rule To Implement "Public Policy."

Jackson argues that this Court should allow him to proceed against Crow to achieve the goals of Idaho's Motor Vehicle Safety Responsibility Act. *See* Jackson Brief, pp. 13-14. He argues that the District Court's "holding that this case could not continue as a matter of law fails to take into account Idaho's public policy."

As a preliminary matter, Jackson never raised this argument below. Under *Sanchez, supra,* this Court cannot consider arguments made for the first time on appeal.

Jackson presents no authority for the proposition that this Court should apply the "public policy" of statutes, such as the Motor Vehicle Safety Responsibility Act, to alter the plain language of its Rules of Civil Procedure, or the no-direct-action rule, or to essentially pronounce rules on a complex issue more appropriately addressed by the Idaho Legislature.

This Court should reject Jackson's invitation to modify this Court's basic rule of statutory construction, which is that unambiguous rules and statutes are to be applied as written. Policy formation is best left to "the deliberative body that is better positioned to

consider the pros and cons of the issue." *Rountree v. Boise Baseball, LLC,* 154 Idaho 167, 173, 296 P.3d 373, 379 (2013).

This Court has repeatedly held, in the context of the no-direct-action rule, that the two exceptions to the rule are contractual and statutory. If the Legislature wanted to create a statutory exception to the rule it would. It hasn't.

c. The District Court Did Not Grant Summary Judgment Based on Estoppel or Laches.

Jackson argues that the District Court "impliedly" granted summary judgment based on Crow's affirmative defenses of estoppel and laches. Jackson Brief, pp. 37-40. In granting summary judgment, the District Court expressly stated that it "need not reach Crow's judicial estoppel and/or laches argument." (R., p. 000569.)

Why Jackson seeks to have this Court rule on a strawman argument is unclear. Perhaps, in the event of a reversal and remand, his desire is that this Court provide favorable commentary that he can then use to counter the estoppel and laches defenses, which still have not been addressed.

The Court should decline the invitation to issue essentially an advisory opinion on defenses the District Court declined to reach. *State v. Barclay*, 149 Idaho 6, 9, 232 P.d 327, 330 (2010) (court does not issue advisory opinions).

d. The District Court Did Not Base Summary Judgment on an "Unproven Assumption".

Jackson argues that the District Court based its decision in part upon Jackson's failure to pursue his case against Crow during his bankruptcy, as he agreed to do when his counsel was retained by the bankruptcy trustee. (Appellant's Brief, pp. 40-44.)

Jackson devotes this portion of his brief primarily to the idea that it was not "economically feasible" for him to pursue his case in Jackson's bankruptcy. He argues that his counsel "had hoped to proceed within P/A Jackson's bankruptcy to recover something for P/A Jackson," *id.*, p. 41, misperceiving that the point of his retention in Jackson's bankruptcy was to recover money for Jackson's creditors.

Again, the point of these arguments is unclear. The District Court did not reach the estoppel or laches defenses, raising the question of why Jackson argues that he has a viable excuse for not pursuing his case in his own bankruptcy before Crow filed for bankruptcy. As with the preceding section, perhaps he seeks favorable commentary from this Court that he can use to counter the estoppel and laches defenses. Again, this Court should resist the invitation to render an advisory opinion.

IV. CONCLUSION

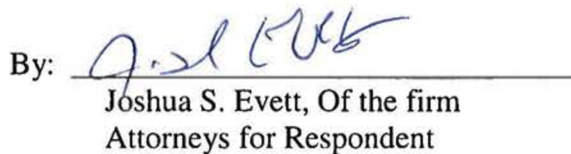
Jackson has provided no sound basis to overrule and/or modify this Court's longstanding no-direct-action rule. He has provided no sound basis to essentially amend significant portions of the Idaho Rules of Civil Procedure by case law. He had every opportunity to pursue his case against Crow before she filed for bankruptcy and chose not

to, and asks this Court to bend the Rules of Civil Procedure and this Court's case law to accommodate that choice.

This Court should reject the invitation.

DATED this 14th day of May, 2018.

ELAM & BURKE, P.A.

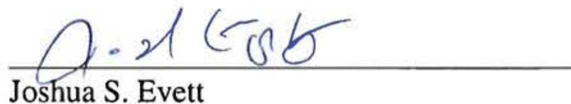


By: ______________________
Joshua S. Evett, Of the firm
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of May , 2018, I caused a true and correct copy of the foregoing document to be served as follows:

Wm. Breck Seiniger	✓ U.S. Mail
Seiniger Law Offices, P.A.	____ Hand Delivery
942 Myrtle Street	____ Federal Express
Boise, ID 83702	____ Via Facsimile – (208) 4700



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Joshua S. Evett

4838-3861-9743, v. 1