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Jackson v. Crow Appellant's Reply Brief Dckt. 45450

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IN THE SUPREME COURT OF THE STATE OF IDAHO

KERMIT JACKSON,

Plaintiff-Appellant,

vs.

JENNIFER J. CROW,

Defendant-Respondent.

Supreme Court Case No. 45450
(Ada County Case No. CV-PI-10-15546)

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

THE HONORABLE NANCY A. BASKIN PRESIDING

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INTRODUCTION

The arguments contained in Crow's responsive brief are addressed below in the order of their significance concerning the basis of the District Court's grant of summary judgment expressed in its decisions. Notwithstanding the *dicta* contained in the District Court's *Memorandum Decision and Order on Motion for Summary Judgment*, *R.* 557-572, the District Court clearly stated the basis of its decision:

> Moreover, I.R.Civ.P. 54 does not appear to provide for the entry of a judgment against a nominal party to indicate the judgment is only "nominally" against an individual and really against that individual's insurance company. Therefore, the Court finds allowing Plaintiff to proceed on his claims against defendant would violate the injunction and protections provided by 11 U.S.C. §524 and the *No-Direct-Action Rule* prevents Plaintiff from substituting the insurance company as the Defendant.

R. 569.

The District Court erred in assuming that the recognition of a party's interest in continued litigation as "nominal" is prohibited under the Idaho Rules of Civil Procedure. In fact, this Court has on numerous occassions directed that cases be continued against a named defendant to determine the amount of damages from which a surety would be liable despite the fact that the defendant was barred from collecting damages from the insured, as, for example, it expressly did in *Pigg v. Brockman,* 79 Idaho 233, 314 P.3d 609 (1957) and impliedly did in *Farmers Ins. Group v. Reed*, 109 Idaho 849, 712 P.2d 550, (1985).[1] The District Court also erred in

[1] "The state is immune and cannot be made liable to pay any judgment which may be entered, nor any of the expense of defending the action. However, in view of the stipulation in the policy, that the insurer cannot be sued until the amount of liability has been determined in an action against the insured, the state must continue as a nominal party defendant for the purpose of trial and judgment in order that the liability of the insurer, if any, may be thus determined and fixed. If a verdict is returned against the state the judgment entered thereon must in terms provide that the state is not liable therefor nor for any costs or expenses involved in the action, and that the judgment determines the liability of the insurer and fixes the amount of such liability, within the limits of the policy." *Pigg v. Brockman*, 79 Idaho 233, 245-246, 314

presuming that a judgment entered under the requirements of I.R.Civ.P. 54 cannot limit execution to conform with the requirements of the Bankruptcy Act. The implications of the District Court error in this regard are far-reaching and go beyond bankruptcy. For instance, if the District Court were correct, a plaintiff could never stipulate with a defendant that the plaintiff would only collect any judgment to the extent of available insurance.

Should this Court uphold the District Court's grant of summary judgment, it will overrule either expressly or *sub silentio* the holdings in *Pigg*, *Reed*, in which this Court stated, "Therefore, we hold that intrafamily actions may be maintained in this narrow area, but only up to the limits of the automobile liability insurance policy,"), in which this Court has recognized the practical necessity of proceeding against a party in cases in which collection of a judgment from the property of a Defendant is barred and those in which a declaration of rights is required. The *Reed* Court recognized the need to pursue a Defendant "nominally" to determine the amount of damages for which the nominal party's motor-vehicle insurance carrier is likely obligated under the Defendant's policy. Nothing more is being asked by Jackson in this case. Jackson also refutes, below, numerous other arguments raised by Crow which were not the basis for the District Court grant of summary judgment.

ANALYSIS

1. THE IDAHO RULES OF CIVIL PROCEDURE DOES NOT PRECLUDE PROCEEDING AGAINST A DEFENDANT NOMINALLY IN ORDER TO COMPLY WITH 11 U.S.C. 524

Crow argues that "[T]he Idaho Rules of Civil Procedure and statutory scheme do not

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P.2d 609, 616, (1957).

"Therefore, we hold that intrafamily actions may be maintained in this narrow area, but only up to the limits of the automobile liability insurance policy." *Farmers Ins. Group v. Reed*, 109 Idaho 849, 854, 712 P.2d 550, 555, (1985)

permit suit against 'nominal' parties," citing as authority *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). Jackson replies to Crow's reliance upon *Estate of Holland* and *Harris* simply by asking this Court to observe that if those cases stand for the proposition for which Crow advances them, it follows that they have must have overruled *sub silentio* both *Pigg* and *Farmers Ins. Group v. Reed*. Jackson doubts that was this Court's intention, for if it was the Court must also have intended to resurrect the enforceability of "household exclusion" clauses, which it found in *Reed* to be violative of I.C. § 49-233, unenforceable, and void as against public policy. *Reed*, Idaho 852-853, P.2d 553-554.

Crow argues for a myopic view of I.R.Civ.P. 54 counter to I.R.Civ.P. 1(b)'s instruction that Idaho's Rules of Civil Procedure "should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding." In support of Crow's contention that "The Idaho Rules of Civil Procedure and Statutory Scheme do not Permit Suit against 'Nominal' Parties" she argues "[T]he rules plainly provide that the only method to recover a monetary award against a Defendant is via a judgment," *Resp. Brief* at 16, and "[T]here 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." This assertion ignores the fact that I.R.Civ.P. 54 does not require that all judgments include a monetary award.

For instance, I.R.Civ.P. 57 provides for declaratory judgments. That rule states, "The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." Idaho Code § 10-1201 provides for the Court to enter judgments declaring the parties rights:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

Jackson included within the *ad damnum* clause of his Complaint a prayer "For such other and further relief as to the Court seem just and equitable." If a declaratory judgment can be entered when another adequate remedy is available, a judgment limited to a declaration of the extent of Jackson's damages should certainly be permitted where there is no other adequate remedy. As a practical matter, this is presumably what the *Reed* Court had in mind given its holding, though it did not expressly state that the judgment to be entered in favor of prevailing household member injured by another household member in the collision was "declaratory." Whatever form any pleading or judgment must be put in to satisfy the requirements of the Idaho Rules of Civil Procedure, *Reed* recognized the substantive result required when judgment must be rendered to reach available insurance.

Allowing Jackson's case to continue against Crow solely to obtain a judgment declaring the amount of his damages does not violate the permanent injunction provided by the Bankruptcy Act which states in pertinent part:

> § 524. Effect of discharge
>
> (a) A discharge in a case under this title [11 USCS §§ 101 et seq.]--
>
> (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 [11 USCS § 727, 944, 1141, 1228, or 1328], 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; …

> (e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

11 U.S.C. § 524.

The holdings in both *Pigg* and *Reed* are entirely consistent with Jackson proceeding against Crow as permitted under 11 U.S.C. § 524(a) because (1) Jackson is not proceeding to determine Crow's "personal liability" and (2) Jackson stipulates that process may only be employed to collect on any judgment obtained to the extent of Crow's available insurance. Any such judgment obtained by Jackson would be at least analogous to a declaratory judgment action, whether or not the procedure provided for by virtue of I.R.Civ.P. 57 is available to him. Any such judgment obtained by Jackson would entirely comply with the requirements of I.R.Civ.P. 54(a)(l). For example, a judgment limited to "JUDGMENT IS ENTERED AS FOLLOWS: Plaintiff has sustained $200,000 in damages. Execution may issue thereon only as to any rights Defendant may have for indemnification under (description of the applicable insurance policy)." A judgment in similar form would be entirely consistent with the express requirements of I.R.Civ.P. 54(a)(l). A judgment in similar form would not violate I.R.Civ.P. 54(a)(l)'s requirement that "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." Judgments typically contain statements to the effect of "Execution may issue hereon." Nothing in I.R.Civ.P. 54 precludes an appropriate limitation concerning execution. Indeed, the holding in *Reed* would appear to require it.

Alternatively, a judgment stating "Judgment Is Entered As Follows: Plaintiff has sustained $200,000 in damages, execution upon which should be limited to any rights which Defendant has under any insurance policy providing coverage for indemnification applicable to

the collision in this case" is also consistent with the requirements of I.R.Civ.P. 54(a)(l) and 11 U.S.C. 524(a) and (e).

Indeed, obtaining a judgment simply limited to "JUDGMENT IS ENTERED AS FOLLOWS: Plaintiff has sustained $(_____) in damages" would not violate 11 U.S.C. § 524 because so long as it is unrecorded, a judgment does not become a lien on the judgment debtor's property. Nevertheless, the better practice would be to limit the terms of the judgment and any possible execution to expressly comply with the limitations contained in 11 U.S.C. § 524(a)(1) and (2).

In her responsive brief, Crow in essence asks this Court to ignore what is at a minimum an invitation to this Court to recognize the practical need to manifest within the judgments which it authorizes in the case of Defendant debtors who receive a bankruptcy discharge a distinction between those determining the personal liability of the debtor and those which do not. Indeed, moving for summary judgment on procedural and equitable grounds, Crow implicitly admitted that Jackson's case is not being "determine" her "personal liability." This follows because were this case being continued for that purpose, neither the District Court nor this Court would have had jurisdiction to hear the case. See, *Kalb v. Feuerstein*, 308 U.S. 433, 60 S. Ct. 343, 84 L. Ed. 370, (1940).[2] If Crow believes that this action is being continued to establish her "personal

[2] "It is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack. But Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation create an exception to that principle and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally. Although the Walworth County Court had general jurisdiction over foreclosures under the law of Wisconsin, a peremptory prohibition by Congress in the exercise of its supreme power over bankruptcy that no state court have jurisdiction over a petitioning farmer-debtor or his property, would have rendered the confirmation of sale and its enforcement beyond the County Court's power and nullities subject to collateral attack. The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land. The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, state or federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law. If

liability" despite Jackson's stipulation that it is not and cannot, then her proper remedy would have been to return to Bankruptcy Court and seek relief from the tribunal in which the injunction arose. Ironically, while it would be entirely appropriate and make sense for Crow to have asked the District Court and to ask this Court to limit any judgment to comply with the requirement contained in 11 U.S.C. § 524(a) that such judgment expressly state that it does not establish her "personal liability," she asks this Court to do exactly the opposite.

Crow argues that 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 ... ," and were this Court to adopt Jackson's 'nominal' party concept it would be unworkable in the setting of default judgments." This argument also misses the mark because one can certainly obtain a default judgment in a declaratory judgment case.

Taking exception to Jackson's reference to Crow as Farmers Insurance "proxy" and "avatar," Crow construes Jackson's argument to be an invitation to this Court to render a decision against Farmers Insurance. Jackson makes no such invitation. Jackson simply observes that if, under the circumstances, this Court declines to continue to allow the case to proceed against Crow nominally for purposes of establishing damages for which Crow's surety is ultimately liable, then this Court should recognize a necessary exception to the "*No-Direct-Action Rule*" in light of limitation of the scope of the bankruptcy act's injunction against continuation of the suit

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Congress has vested in the bankruptcy courts exclusive jurisdiction over farmer-debtors and their property, and has by its Act withdrawn from all other courts all power under any circumstances to maintain and enforce foreclosure proceedings against them, its Act is the supreme law of the land which all courts -- state and federal -- must observe. The wisdom and desirability of an automatic statutory ouster of jurisdiction of all except bankruptcy courts over farmer-debtors and their property were considerations for Congress alone."

Kalb v. Feuerstein, 308 U.S. 433, 438-439, 60 S. Ct. 343, 346, 84 L. Ed. 370, 374-375, (1940).

against a discharged debtor provided for by 11 U.S.C. 524(a) and (e). How this Court may choose to that is up to it. However, it would appear that this Court's only alternative permitting Jackson to proceed in the manner recognized in *Pigg* and *Reed* is to allow sureties to reap a windfall notwithstanding the clear intention of Congress in passing 11 U.S.C. 524((e), and, more importantly, the salutary public purpose and policy underlying the Idaho Financial Responsibility Law.

2. AT THIS STAGE OF THE PROCEEDINGS, IDAHO'S *NO-DIRECT-ACTION RULE* IS NOT RELEVANT

In Crow's "overview of Crow's position," she argues that "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."[3] [4] Of

[3] Interestingly, while Crow argues vigorously that the teachings of *Pigg, supra,* should be ignored because it was decided prior to Idaho's articulation of the *No-Direct-Action Rule*, which rule Crow argues vitiates *Pigg's* continued validity, she really need not go there. This is because if Crow is correct that Idaho's *No-Direct-Action Rule* completely bars an action by Jackson against the tortfeasor's surety under all circumstances, then whether or not Jackson is able to obtain a judgment against Crow, nominally or otherwise, is irrelevant. This is the basis of Crow's distinction of *Houston v. Edgeworth,* 993 F.2d 51 (5th Cir. 1993) "[W]hich 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." If Crow is correct that Idaho will not permit Jackson to maintain a direct action against Crow's surety under any circumstances, it makes no difference whether Jackson is permitted to pursue Crow nominally or not, because whether or not Jackson obtains a judgment against Crow he cannot seek to have that judgment paid by Crow's surety. All of this ignores the obvious, which is that Jackson can simply execute upon Crow's rights under her insurance policy and, having obtained those rights pursue a direct action against her surety. This would not in any way violate the injunction arising by operation of 11 USCS § 524(a) prohibiting the continuation of an action, because the action is not being continued to collect, recover or offset any debt as a personal liability of the debtor. Therefore, continuation of a case for this limited purpose is precisely what is contemplated by 1 USCS § 524(a) stating that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."

[4] Crow sites *Dahmer v. Blackburn,* 2018 Unpublished Opinion No. 445 (2018) for the proposition that "this Court recently reaffirmed" the *No-Direct-Action Rule*. This opinion does not appear on the "Court of Appeals Civil Opinions" web page (https://www.isc.idaho.gov/appeals-Court/coa_civil). The copy of the opinion available from LEXIS states "Notice: THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY." *Dahmer v. Blackburn*, 2018 Ida. App. Unpub. LEXIS 142, *1. Respecting the Idaho Court of Appeals prohibition against citing Dahmer as authority, Jackson will refrain from

course, this is not appellant Jackson's argument at all. It is simply a clever way for Crow to make the laches and estoppel arguments that she acknowledges were not reached by the District Court, despite the District Court's *dicta* contained in its decisions granting summary judgment and denying reconsideration implicitly addressing those defenses without expressly referencing them. *R.* 557-572, 619-627.

Crow argues "Jackson's analysis ignores that he is a stranger to the insurance contract between Crow and Farmers Insurance Company of Idaho under the *No-Direct-Action Rule*." In reply, Jackson respectfully refers this Court back to *Appellant's Opening Brief* at pages 32-35. Additionally, Jackson offers the observation that the issue presented to this Court is not whether or not Idaho continues to respect the *No-Direct-Action Rule*, but what the implications of that rule are concerning the need to continue to recognize that in situations involving bankruptcy, those recognized in *Reed,* and potentially others not before the Court, the continuance of an action against a discharged debtor as a "nominal party" to obtain what is tantamount to a declaratory judgment is appropriate. In such cases, the insurance company, though neither actual nor a "nominal" party, will nevertheless almost always appear and defend the case. Absent extenuating circumstances no injustice is done to anyone in allowing plaintiffs to proceed "nominally" against a party will not end up having to pay a judgment. On the other hand, if this cannot be accomplished because of the *No-Direct-Action Rule* even though the insurance company is not a Defendant in the case, injustice is guaranteed. It is an interesting point to reflect upon that despite all the power that any Court has, including a Supreme Court, it can never guarantee justice, but it can guarantee injustice. Fundamentally, Crow asks this Court to make that Guarantee.

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distinguishing it.

3. CROW'S ARGUMENT THAT SIMPLY HAVING TO DEFEND THIS ACTION VIOLATES 11 U.S.C. § 524(A) FAILS

Crow argues, "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 under 11 U.S.C. § 524(a)." Emphasis supplied. *Resp. Brief* at 23-24. Even assuming that the underlined word "not" is simply a typographical error in Crow's brief, it is curious that Crow sites *In re Bracy*, 449 F.Supp. 70, 71 (D. Mont. 1978) in support of this position since it does not stand for that proposition. Rather, it states:

> It may be that Bracy was insured by Guaranty National Insurance Company and that the insurance policy covered the loss. It may be that under Montana law Palmer had some rights against the insurance company on account of the damages suffered by him. These are problems of Montana law, and this Court expresses no opinion as to them. Section 16 of the Bankruptcy Act (11 U.S.C. § 34) provides that "[the] liability of a person who is a codebtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." This Court specifically holds that, if an insurance company is as a matter of state law liable to a plaintiff in a personal injury action, subsequent discharge of the assured in bankruptcy does not alter the obligation of the insurance company. It seems clear that it is the policy of the law to discharge the bankrupt but not to release from liability those who are liable with him. See 1A Collier on Bankruptcy para. 16.15 (14th ed. 1976).
>
> The judgment of the state Court was, as a matter of law, null and void as to Bracy, and the order of discharge of June 7, 1977, and the subsequent order of September 23, 1977, were correct in declaring and in enjoining any action under it as to Bracy. If, however, as a matter of state law, the judgment in the state Court has the effect of establishing some fact or fixing some liability as to the insurance company, the state Courts are free to give that judgment its proper effect to long as they do not in any way involve Bracy in what is done.
>
> For that reason, the case is remanded to the bankruptcy court with directions to amend the order entered by Judge Gray on August 18, 1977, as follows:
>
> Delete all the words in paragraph 1, page 2, following the word "Montana" in line 4 and substitute the following in lieu thereof: "which would in any way affect, injure, or harass the bankrupt Bracy, and as to him the judgment is declared to be null and void."

In re Bracy, 449 F. Supp. 70, 71-72, (D. Mont. 1978). In light of some of the considerations contained in Jackson's briefing, the Montana Court's analysis of the case before it may not be as

eloquent or as eloquent as one might desire, but it certainly does not stand for the proposition for which Crow sites it.

Similarly, the other case relied upon by Crow in support of her argument that continuation of a suit against her violates 11 U.S.C. 524(a) is *Perez v. Cumberland Farms, Inc.,* 213 B.R. 622, 623-24 (D. Mass 1997).

> Courts relying on 11 U.S.C. § 524(e), however, almost unanimously allow claimants to proceed with claims against the debtor for the purpose of collecting from the debtor's liability insurer. See, e.g., In re Edgeworth, 993 F.2d 51, 54 (5th Cir. 1993); First Fidelity Bank v. McAteer, 985 F.2d 114, 118 (3rd Cir. 1993); Green v. Welsh, 956 F.2d 30, 33 (2nd Cir. 1992); In re Fernstrom Storage & Van Co., 938 F.2d 731, 734 (7th Cir. 1991); In re Walker, 927 F.2d 1138, 1142 (10th Cir. 1991); Jet Florida, 883 F.2d at 976; In re Doughty, 195 B.R. 1, 4 (Bankr. D. Me. 1996); In re Greenway, 126 B.R. 253, 254 (E.D. Tex. 1991); In re Catania, 94 B.R. 250, 253 (Bankr. D. Mass. 1989); contra In re White Motor Credit, 761 F.2d 270, 274-75 (6th Cir. 1985). Those Courts reason that § 524(a) discharges only the debtor's personal liability, not the liability of any other party such as the debtor's insurer. Furthermore, § 524(e) permits a creditor to recover against any other entity who may be liable on the debtor's behalf.

Perez v. Cumberland Farms, 213 B.R. 622, 623, (D. Mass 1997).

In *Perez*, the Defendant, Cumberland Farms, had a general liability insurance policy, requiring it to reimburse its insurer for 100% of the defense costs if the ultimate award was $ 500,000 or less. In this case, Farmers Insurance is defending Crow, and there is no evidence in the record that her defense will cost her a dime.

Although there are certain cases cited by Crow which misapply 11 U.S.C. § 524(a) and (e), the majority rule on this point is discussed in *Appellant's Opening Brief*. As cited therein, "Thus, Courts have been 'nearly unanimous' in holding that a post-discharge injunction does not prohibit a creditor from proceeding against the debtor nominally for the purposes of establishing liability as a prerequisite to proceeding against the debtor's insurer." Article: *Suing the Debtor: Examining Post-Discharge Suits Against the Debtor*, 83 Am. Bankr. L.J. 495, 496. Contrary to the argument advanced by Crow, her obligation to continue to participate in litigation is not

barred by 11 U.S.C. 524(a)'s injunction:

> As an initial matter, Courts have rejected the debtor's general claim that his fresh start is impaired when he is compelled to act as a witness and/or participate in litigation post-discharge. For example, in *In re Doar*, the debtor argued that the time required of the debtor to build a defense, submit to depositions, and go to trial would directly and adversely impact the debtor's fresh start. Overruling this objection, the Court reasoned that the "fresh start" of bankruptcy does not relieve the debtor of responsibilities common to all citizens. Indeed, because all citizens must testify at trial and/or participate in the discovery process as a witness, the debtor was not relieved of such a responsibility now. According to the Court, such demands on the debtor's time did not create an impairment sufficient to deny a post-discharge suit. This result is further supported by the fact that if post-discharge litigation proceeds, even nominally against the debtor, the debtor would still be required under the policy to cooperate with the insurer in the defense of the matter. Similarly, Courts have held that a debtor's financial outlay in the form of missed work or lost wages is insufficient to interfere with the debtor's financial fresh start. *In Reyes v. McCarley*, the debtor argued he would be prejudiced because the time spent at trial would be time spent away from work. The Court dismissed the defense and stated that this was an "incidental cost[]" which did not interfere with the debtor's fresh start. The Courts wisely rejected the debtors' claims in these cases. A broad reading of prejudice that would encompass any minimal infringement on the debtor's time, time spent away from work, or time required to perform responsibilities common to all citizens would create an exception so large that it would swallow the rule.

Article: *Suing the Debtor: Examining Post-Discharge Suits Against the Debtor*, 83 Am. Bankr. L.J. 495, 506-507. Emphasis supplied.

Moreover, Crow ignores the fact that she has not created a record showing that she would incur any financial cost or obligations associated with defending the lawsuit. In the absence of evidence showing a quantum of expense to Crow sufficient to override the obvious intention of Congress in passing 11 U.S.C. § 524(e), Crow simply invites this Court, as it invited the District Court, to speculate that continuation of the suit against her will in some way violates the fresh start provisions of the Bankruptcy Act.

4. CROW MISCHARACTERIZES THE NATURE OF THE JUDGMENT SOUGHT BY JACKSON

Crow argues "The mere entry of a judgment purporting to establish the personal liability

of the debtor violates the bankruptcy injunction," relying on *Pavelich v. McCormick, Barstow, Sheppard, Wayte & Carruth LLP (In re Pavelich)*, 229 B.R. 777, 1999. *Resp. Brief* at 25. Crow's citation from *Pavelich* is taken out of context. In context, *Pavelich* reasoned:

> 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. The statutory voidness and statutory injunction created by § 524(a) operate to strip a state Court of the subject matter jurisdiction to require a debtor to pay a discharged debt.

Id. at 782. Emphasis supplied.

Simply put, Jackson does not seek to "[obtain] a judgment that 'purports' to establish Crow's personal liability" as claimed by Crow.

5. CROW'S "STATEMENT OF FACTS" IS FACTUALLY INACCURATE

Crow makes a number of representations in the Statement of Facts portion of her responsive brief which, while not being relevant to the basis of the District Court's grant of summary judgment in her favor, nevertheless need to be corrected.

5.1 Crow's Statement of Facts Concerning Jackson's Bankruptcy Is Inaccurate

In support of Crow's argument that it was economically feasible for Jackson to pursue Crow's insurance within the context of Crow's bankruptcy, Crow argues that costs were not a disincentive for Jackson because his counsel had ag*Reed* to "advance" costs. Crow relies heavily on the fact that Jackson's counsel ag*Reed* to advance costs in pursuing the claim against Crow in the bankruptcy on behalf of both Jackson in the bankruptcy trustee. *Resp. Brief* at 5. There is an important distinction between an attorney agreeing to advance costs for the client and an attorney agreeing to pay a client's costs. In this case, while Jackson's attorney did agree to advance costs in bankruptcy, Jackson could only recover one-third of the proceeds of Crow's available insurance under the agreement that was entered into by Jackson, Jackson's counsel, and the

bankruptcy trustee. At the time, Jackson's attorney understood that amount to be $50,000. See, *Supplemental Memorandum Re: to Pending Motions for Summary Judgment*, *R.* 413-414, and the *Third Declaration of Wm. Breck Seiniger, Jr. Re: Pending Motions for Summary Judgment* filed March 10, 2017, explaining that Jackson's counsel had been attempting to obtain information concerning Crow's policy limits since April 2009 through discovery since 2011. *R.* 460-463. Nevertheless, a copy of Crow's Declaration Sheet was not provided until March 9, 2017 by Crow's counsel who indicated that he had requested a copy of Crow's insurance policy (also requested in discovery) "long ago" but had not yet been provided with a copy of it. *R.* 466-467, 472. Before March 10, 2017, Jackson's Counsel was under the impression that he had been advised by one of Defendant Crow's counsel that she had a liability of $50,000 concerning a single claim. *R.* 461.

By the terms of the agree with the bankruptcy trustee, the bankruptcy estate would not have been responsible for repayment of costs advance, but Jackson would.

Courts have determined that costs advanced on behalf of a client are to be treated as like loans for tax purposes. They are not deductible by the attorney as a current cost of conducting business. The costs are those of the client and not the attorney since there is an expectation of reimbursement. When an attorney advances costs for a client, and there is "an agreement or understanding that the attorney [will] be repaid, the advances are in the nature of loans and [are] not deductible business expenses." *Herrick v. Commissioner*, 63 T.C. 562, 569 (1975) (discussing *Burnett v. Commissioner*, 356 F.2d 755 (5th Cir. 1966).

While it is true that Jackson's counsel initially did agree to advance costs within the bankruptcy, on reflection, he later determined that it was not in Jackson's best interest to do so because of the reduced amount that Jackson might potentially recover due to having to split the

proceeds with the bankruptcy trustee. Given that it appeared that Jackson could only recover, at most, $16,666.67 from Crow's available policy limits given the fee split provided for in the agreement with the bankruptcy trustee and the likely costs of going to trial involved, Jackson's counsel upon reflection concluded that continuing to prosecute Jackson's civil claim against Crow on behalf of both Jackson and the Bankruptcy Trustee involved an unacceptable risk for Jackson. The bankruptcy trustee understood this and for this and other reasons also concluded that it was impractical to proceed on Jackson's claim and abandoned it. *R.* 462-463, 473-474.

5.2 Crow's Statement of Facts Concerning Her Bankruptcy Is Inaccurate

Crow represents "Jackson did nothing to pursue the lawsuit during the bankruptcy." *Resp. Brief* at 7. Crow fails to distinguish between pursuing the lawsuit and pursuing appellant's claim. Jackson successfully pursued his claim within Crow's bankruptcy to the extent permissible. Because Idaho does not allow a direct action rule against Crow's surety, Jackson could not obtain a judgment in state court against Crow nominally without leave of the Bankruptcy Court while Crow's bankruptcy remained pending. Even after Crow obtained a discharge, Jackson could not pursue a judgment against Crow in state court, even nominally, because Jackson's claim against her remained within the jurisdiction of the Bankruptcy Court until Crow's bankruptcy was closed.

Jackson's counsel sent a letter to Crow's counsel on January 5, 2017 - Settlement offer - *Resp. Brief* at 3. Crow appears to argue that the District Court's grant of summary judgment was based upon statements made in the settlement offer sent by Jackson's counsel to Crow's counsel. That letter is attached as Exhibit Z to Crow's counsel's Supplemental Affidavit filed on February 2, 2017. (R., pp. 000353-355). While it is true that Jackson did not move to strike Exhibit Z, Exhibit Z and its contents were not relied upon by Crow at the time that she moved for summary

judgment. See, Defendant Crow's *Memorandum in Support of Defendant's Motion for Summary Judgment* filed September 30, 2016, *R.* 290-313. Crow raised Exhibit Z in her *Reply Memorandum In Support Of Defendant's Motion For Summary Judgment* filed on February 24, 2017. A motion to strike Exhibit Z was not of the remedy available to Jackson under the Idaho Rules of Civil Procedure. As Jackson argued below under the heading *Plaintiff's Objection To Privileged Settlement Offers Placed In The Record By Defendant In Violation Of I.R.E. 408:*

> Defendant makes the point that Plaintiff did not file a motion to strike Exhibit Z from the supplemental affidavit filed in support of Defendant's motion served February 2, 2017. To the extent that the Court's decision must rest on procedural grounds, it should be noted that under the Idaho Rules of Civil Procedure (as under the Federal Rules of Civil Procedure1) a motion to strike is limited to pleadings. See, I.R.Civ.P. 12(f). Consequently, Plaintiff's motion to strike should be construed as an objection to the Court's reliance on hypothetical arguments made by counsel in documents intended to be privileged and which in any case are not facts upon which a decision should be based." Fnt. 1: Motions to strike are limited to pleadings, which are defined by Federal Rule 7(a); affidavits and exhibits filed in support of, or in opposition to, a motion for summary judgment are not pleadings. See *Albertson v. Fremont County*, Idaho, 834 F. Supp.2d 1117, 1123 n.3 (D. Idaho 2011). Thus, the motions to strike filed in this case will be construed as objections to the materials filed by the opposing party. *Shelton v. Reinke*, 2013 vs. Dist. 48181, *29, 2013 1319630 (D. Idaho Mar. 28, 2013).

R. 591-592. [Emphasis supplied.]

> There is a difference between what parties may argue to one another in correspondence speculatively and evidence that this Court should accept as established in the record for purposes of a decision. It is the bedrock principle of law that the arguments of counsel are not evidence of anything; much less is an argument made to persuade counsel hired by an insurance company to do the honorable thing to fulfil the object of a policy of insurance sold for the protection of the public and avoid a hypothetical outcome an admission of anything. Indeed, the "negative economic consequences to the named insured" referenced by Defendant are exactly the types of economic consequences that other Courts have found insufficient to overcome the clearly stated objectives of the exception to the fresh start provisions of the United States Bankruptcy Act."

R. 593.

Significantly, the District Court stated in its *Order Granting Motion To Extend Time And Denying Motion For Reconsideration And Motion To Strike*:

> As to Plaintiff's argument the Court improperly considered Exhibit Z to the Affidavit of Jade C. Stacy in Support of Defendant's Motion for Summary Judgment and the exhibit should be stricken, the Court finds Exhibit Z is was not relied upon by the Court in reaching its conclusion that allowing the action to proceed against Defendant could have a negative consequence to the discharged debtor's fresh start. While Exhibit Z may have included a statement by Plaintiff's counsel that concurs with the Court's conclusion, the same conclusion was reached by the Court based on its own analysis.

R. 626. Emphasis supplied.

Because a motion to strike was unavailable to Jackson, he considers it to be unnecessary to request this Court to augment the record by including a transcript of the hearing on the motion for summary judgment at which the inadmissibility and privileged nature of Exhibit Z were in fact argued. Jackson's briefing raised his objection sufficiently, in any case, the District Court expressly stated that it did not rely upon Jackson's counsel's adversarial speculations contained in Exhibit Z in granting summary judgment. For this reason, Jackson considers it unnecessary to delay this matter by requesting leave to augment the record with the transcript of the hearing on the motion for summary judgment which he believes would reflect the fact that objection was made at that time to the consideration of Exhibit Z based upon its privileged nature.

If the District Court did rely upon Jackson's counsel's speculations contained in Exhibit Z, despite its express denial of doing so, it erred. Under IRE 408 evidence of statements made during settlement negotiations is not admissible. Obviously, Jackson's counsel's letter was a settlement offer protected from being used as evidence by IRE 408 and not an admission of anything. It seriously undermines the purposes behind this rule for a settlement offer containing the speculations of counsel acting as an adversary for one side during settlement negotiations to be placed into evidence in support of anything, never mind, for a Court to rely upon it to establish anything as a matter of fact. To do so would effectively confer upon arguments made in a settlement offer the evidentiary status of an admission made under IRCP 37. There can be

no more well-settled legal principle than that the arguments of counsel are not evidence of anything. The reliance of the District Court upon Jackson's counsel's adversarial speculations contained in the settlement offer would essentially confer upon them the legal significance of a stipulation.

Straying far from the basis upon which Crow was awarded summary judgment, she argues that Jackson failed to pursue other avenues of obtaining a judgment under which he could have collected available insurance, though she fails to explain how she sees this occurring. Even if other avenues of recovering Jackson's damages from Crow's surety (those considered and potential others not considered by Jackson) might have been pursued, consideration of these alternate universes is irrelevant to the basis upon which the District Court based its opinion, as apparently conceded by Crow. See *Resp. Brief* at 32-33 ("The District Court Did Not Grant Summary Judgment Based on Estoppel or Laches" and "The District Court Did Not Base Summary Judgment on an 'Unproven Assumption.'")

6. CROW MISTAKENLY CLAIMS THAT JACKSON DID NOT RAISE THE PRECLUSIVE EFFECT OF CROW'S BANKRUPTCY BELOW

Crow represents to this Court that Jackson has raised the preclusive effect of his claim in Crow's bankruptcy for the first time on appeal. *Resp. Brief* at 29. This is incorrect. Jackson filed an *Amended Motion For Summary Judgment* on March 12, 2017 stating: "This motion is brought because the doctrine of issue preclusion (as applied to Jackson's allowed claim in Crow's bankruptcy proceeding in United States Bankruptcy Court for the District of Idaho Inc. Case No. 14-00080-JDP) precludes litigation of the amount of Plaintiff Jackson's damages." *R.* 486. Jackson presents his arguments regarding issue preclusion in *Plaintiff's Memorandum In Support Of Amended Motion For Summary Judgment, R.* 489-492.

7. CROW MISTAKENLY CLAIMS THAT JACKSON DID NOT RAISE THE ISSUE OF PUBLIC POLICY BELOW

Jackson did raise the issue of public policy below. Jackson cited authority that "Both the state legislatures and the Courts have clearly manifested their intent that automobile insurance should protect all who use the highways rather than the insured alone. Virtually all state legislatures have enacted remedial measures providing that no automobile insurance policy shall be issued which releases the insurer from liability in the event of the insured's being insolvent. Such measures commonly further require that the policy provide the injured party with a right of action directly against the insurance company after a judgment has been obtained against the insured tortfeasor." Paul E. Gilbert, *Direct Actions against Insurance Companies: Should They Join the Party*, 59 Cal. L. Rev. 525 (1971)." *R.* 407. Jackson discusses the public policy underlying Idaho's motor vehicle financial responsibility act and its application of this case at length in his *Memorandum In Support Of Motion To Amend Complaint*. *R.* 441-444.

Jackson addressed this policy again when moving for reconsideration:

> "It is the public policy of the state of Idaho that insurance be available to compensate accident victims the extent insurance policy purchased by the tortfeasor in that purchase by or on behalf of the injured party. "The Legislature clearly enacted the UIM amendments to protect the citizens of this State from being under compensated for their injuries, and exhaustion clauses impose a substantive, not merely procedural, obstacle in front of accident victims seeking UIM benefits. Requiring victims actually to exhaust the tortfeasor's policy limits is not the kind of UIM coverage the Legislature contemplated." *Hill v. Am. Family Mut. Ins. Co*., 249 P.3d 812, 820, 150 Idaho 619, 627, 2011 Ida. LEXIS 2, 22, 75 A.L.R.6th 701 (Idaho 2011). UIM insurance is mandated to protect tort victims from UIM, the primary insurance carried by the tortfeasor is also designed to protect tort victims.

Reply Memorandum On Plaintiff's Motion For Reconsideration, *R.* 593-594.

8. CROW'S *FARMERS'* INSURANCE LIABILITY POLICY DOES IMPLIEDLY PERMIT AN ACTION AGAINST IT WHEN ITS INSURED HAS RECEIVED A DISCHARGE IN BANKRUPTCY

Defendant argues that her policy does not permit an action similar to the *Pigg* policy. As discussed by Jackson below:

Plaintiff simply adds that *Defendant's Supplemental Memorandum Re: Insurance Policy* omits mention of the following provision of the policy:

> 7. Bankruptcy We are not relieved of any obligation under this policy because of the bankruptcy or insolvency of any insured person.

It is respectfully suggested that the policy must be construed to permit suit against Farmers Insurance in the event of bankruptcy, notwithstanding the policies provision (barring the insured from bringing an action against Farmers Insurance until certain conditions are fulfilled) in light of the provision of the policy addressing bankruptcy, since in the event that Plaintiff is not permitted to proceed against the Defendant to the extent of coverage under the policy and is barred from otherwise obtaining a judgment against the Defendant under the permanent injunction imposed by the Bankruptcy Act, the provision stating that Farmers Insurance is not relieved from its obligations would be meaningless.

Response To Defendant's Supplemental Memorandum Re: Insurance Policy, R. 614-615.

CONCLUSION

The District Court erred in granting Crow summary judgment on the grounds that entry of a judgment against a "nominal party" to indicate the judgment is only "nominally" against an individual and really against that individual's insurance company contravenes the requirement for entry of judgment contained in I.R.Civ.P. 54. Whether or not a judgment in that form may be entered under I.R.Civ.P. 54, the judgment sought by Jackson in this case need not state anything more than the amount of damages found by the jury up to the liability limit of Crow's insurance policy and that execution be limited to whatever rights Crow may have under that policy. Unless this Court has or is prepared to overrule the holdings in *Pigg v. Brockman,* 79 Idaho 233, 314 P.3d 609 (1957) and *Reed*, 109 Idaho 849, 854, 712 P.2d 550, 555, (1985), there is nothing in the Idaho Rules of Civil Procedure the bars Jackson from proceeding to trial and obtaining a judgment to that effect in whatever form this Court may deem appropriate.

Plaintiff Jackson requests that this Court vacate summary judgment entered in this matter and direct the District Court to allow the case to proceed to trial.

Dated June 4, 2018.

SEINIGER LAW

W[m] Breck Seiniger, Jr.
Attorney for Plaintiff-Appellant Jackson

CERTIFICATE OF SERVICE

On June 4, 2018, I caused two true and correct copy of the foregoing document to be hand delivered to:

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