STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

UNITED FINANCIAL CASUALTY COMPANY, an Ohio Corporation,

Plaintiff,

vs.

NW CREATIVE SOLUTIONS an Idaho Limited Liability Company, dba INCREDIBLE CORN MAZE, TYESON J. SCHULTZ, an individual, DOES, ENTITIES and INDIVIDUALS I-X,

Defendants.

and

JEREMY McSPADDEN, SR., individually, and as Personal Representative of the estate of JEREMY T. McSPADDEN, JR., deceased, and JESSICA MILLSPAUGH, individually,

Intervenors.

Case No. **CV 2017 2609**

MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiff United Financial Casualty Company's (United Financial) Motion for Summary Judgment and Declaration of Non-Coverage.

On October 10, 2014, Jeremy T. McSpadden Jr. (Decedent) volunteered to play the role of a zombie at a corn maze operated by defendant NW Creative Solutions (NWCS), dba The Incredible Corn Maze. In his role as a zombie, the Decedent was directed to approach a moving bus full of passengers as it passed through the corn maze,

and, in turn, the passengers on the bus were encouraged to shoot at the Decedent and the other "zombies" using their paintball guns. At approximately 10:00 p.m. that evening, the Decedent approached a bus driven by Tyeson J. Schultz (Schultz), an employee of NWCS. As he did so, it is thought that the Decedent slipped or tripped and fell underneath the bus. The rear tires of the bus ran over the Decedent and the Decedent died as a result of his injuries. At the time of the Decedent's death, the NWCS bus was insured by United Financial under a commercial auto insurance policy.

On October 7, 2016, the Decedent's father and mother, Jeremy T. McSpadden, Sr. and Jessica Millspaugh (Estate), filed a Complaint against NWCS, John Doe Bus Driver, and several other parties alleging wrongful death resulting from negligence and negligent infliction of emotional distress. That case is Kootenai County Case No. CV-2016-7395; it is currently pending before the Honorable Cynthia K.C. Meyer. That case will be referred to as the "wrongful death" case.

As for the case before this Court, on April 3, 2017, United Financial filed a Complaint for Declaratory Relief against defendants NWCS and Schultz. This case will be referred to as the "declaratory relief" case. In its Complaint for Declaratory Relief, United Financial requests a declaration that it has no duty to defend or indemnify NWCS or Schultz in the underlying pending civil action. United Financial also claims in its Complaint for Declaratory Relief that NWCS breached its insurance policy with United Financial by failing to promptly notify it of the October 10, 2014, accident. Neither defendant NWCS nor defendant Schultz filed an Answer to United Financial's Complaint for Declaratory Relief.

No Summons was issued for the Estate in this declaratory relief case. Under I.R.C.P. 57(b), effective July 1, 2016, United Financial had a duty to give notice of this declaratory judgment action to the Estate. Idaho Rule of Civil Procedure 57(b) reads:

> (b) **Coverage under insurance policy.** A party seeking a declaratory judgment as to coverage under a policy of insurance must give notice of the action to any person known to have a claim against the insured relating to the incident that is the subject of the declaratory action.

A review of the file in this declaratory relief case does not show if United Financial actually gave the Estate notice of this declaratory judgment action, but in any event, on May 4, 2017, the Estate filed a Notice of Appearance and Motion to Intervene in the instant case. The Court issued an Order for Intervention in favor of the Estate on May 9, 2017. That order allowed McSpadden and Millspaugh (the Estate) to intervene in this declaratory judgment action and required the case caption to name both parents, McSpadden and Millspaugh, as intervenors pursuant to I.R.C.P. 24(a)(2). Order for Intervention 1. To date, counsel for United Financial and counsel for the Estate/intervenors have ignored that order by not adding the Estate/intervenors to the caption of their pleadings.

On August 16, 2017, United Financial filed a Motion for Entry of Default and Stipulated Motion for Entry of Default against NWCS. While this was more than three months after this Court's Order for Intervention, not only did United Financial fail to include the Estate/intervenors in the caption of its stipulation, United Financial failed to provide the Estate/intervenors with notice of this Motion for Entry of Default and Stipulated Motion for Entry of Default against NWCS. An Order for Entry of Default against NWCS was presented by United Financial and was issued by this Court the next day, August 17, 2017. On the certificate of mailing prepared by counsel for United Financial, the Estate/intervenors were not provided notice of this Court's subsequent Order for Entry of Default. Counsel for the Estate/intervenors claim, "Intervenor was not notified nor to this day have we received a copy of Plaintiff's Motion for Default." Intervenor's Resp. Pl.'s Mot. Summ. J. 2, ¶ e.

On October 30, 2017, United Financial submitted a Motion for Summary Judgment and Declaration of Non-Coverage, in which United Financial seeks summary judgment on its claim for declaratory relief. In support of that Motion for Summary Judgment and Declaration of Non-Coverage, United Financial filed a Memorandum in Support of Plaintiff's Motion for Summary Judgment and Declaration of Non-Coverage and an Affidavit of Robert T. Wetherell. While failing to list Estate/intervenors on the caption, counsel for United Financial signed a certificate of mailing that he had mailed a copy of the Motion, Memorandum, and Affidavit to counsel for the Estate/intervenors. NWCS and Schultz did not respond to United Financial's Motion.

On November 29, 2017, the Estate/intervenors, filed Intervenor's Response to Plaintiff's Motion for Summary Judgment. In its Response, the Estate highlights problems with several of United Financial's assertions of fact and generally opposes this Court granting summary judgment in favor of United Financial.

On December 4, 2017, United Financial submitted Plaintiff's Reply to Intervenor's Response to Plaintiff's Motion for Summary Judgment.

A hearing on United Financial's Motion for Summary Judgment and Declaration of Non-Coverage was held December 14, 2017.

II. STANDARD OF REVIEW.

Idaho courts review motions for summary judgment in actions for declaratory relief as they would in other civil suits. *Kepler-Fleenor v. Fremont Cty.*, 152 Idaho 207, 210, 268 P.3d 1159, 1162 (2012) (citing *Schneider v. Howe,* 142 Idaho 767, 770–71, 133 P.3d 1232, 1235–36 (2006)). As such, summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute

exists, must support that assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute or that an adverse party cannot produce admissible evidence to support the fact." I.R.C.P. 56(c).

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
>
> (1) give an opportunity to properly support or address the fact;
> (2) consider the fact undisputed for purposes of the motion;
> (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
> (4) issue any other appropriate order.

I.R.C.P. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party" to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). To do so, the non-moving party "must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009). "Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a

mere scintilla of evidence." *Shea*, 156 Idaho at 545, 328 P.3d at 525 (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

> In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep't of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

III. ANALYSIS.

A. Statement of the Parties' Positions.

United Financial seeks summary judgment on its claim that is has no duty to defend or indemnify NWCS against the Estate's claim of "automobile negligence" in the underlying civil lawsuit. Mem. Supp. Pl.'s Mot. Summ. J. and Decl. Non-Coverage 7–8. United Financial contends that it is not obligated under its commercial auto insurance policy with NWCS because in the underlying civil action against NWCS the Estate failed to name an indispensable party. *Id.* More specifically, United Financial argues that Idaho Code § 49-2417 requires the Estate to name Schultz as a party defendant in its Complaint because he was the operator of the bus at the time of the accident; the Estate did not name Schultz as a party defendant in its original Complaint; the Estate cannot now name Schultz as a party defendant because the statute of limitations bars the Estate from doing so; because the Estate did not name Schultz as a party defendant and cannot amend its Complaint to do so, the Estate cannot maintain or bring a claim against NWCS for "automobile negligence"; and, since the Estate cannot maintain a claim for

"automobile negligence" against NWCS, United Financial has no to duty to defend or indemnify NWCS in the underlying civil lawsuit. *Id.*

The Estate, as intervenor in the instant case, takes issue with several of United Financial's factual assertions and makes five arguments in response. First, the Estate argues that Idaho Code § 49-2417 does not require Schultz to be named a defendant party in their underlying civil tort action against NWCS. Intervenor's Resp. Pl.'s Mot. Summ. J. 3–4. Second, it contends that even if Schultz is an indispensable party pursuant to Idaho Code § 49-2417 or, alternatively, Schultz was not negligent in operating the bus, NWCS as the owner of the bus, "can either be negligent under an imputed negligence theory and the respondeat superior doctrine or the owner can be expressly negligent for what they had the driver do with the vehicle." *Id.* at 4–5. Third, the Estate asserts that their Complaint in the underlying civil action does allege that "John Doe Bus Driver" was negligent, and, therefore, the possibility of coverage exists. *Id.* at 5. Fourth, the Estate takes issue with the fact that they were not provided notice of the Motion for Default and Stipulation filed against NWCS. *Id.* at 6. Lastly, the Estate argues that United Financial is not prejudiced by NWCS's alleged breach of the insurance policy. *Id.* at 6–7.

The Court begins by noting that the Declaratory Judgment Act empowers Idaho courts to "declare rights, status, and other legal relations" of persons interested in or affected by contracts. I.C. §§ 10-1201, 10-1202. As such, an insurer is usually entitled to have its liability and obligations to its insured under an insurance contract determined by means of declaratory judgment. *Temperance Ins. Exch. v. Carver*, 83 Idaho 487, 492–93, 365 P.2d 824, 826–27 (1961). However, a "court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or

entered, would not terminate the uncertainty or controversy giving rise to the proceeding." I.C. § 10-1206. Further, the Idaho Supreme Court has held that the Declaratory Judgment Act "cannot be invoked merely to try issues and determine questions which are uncertain or hypothetical[,]" and "a declaratory judgment should be refused where the questions presented should be the subject of judicial investigation in a regular action." *Ennis v. Casey*, 72 Idaho 181, 185, 238 P.2d 435, 438 (1951); *Nelson v. Whitesides*, 103 Idaho 374, 376, 647 P.2d 1246, 1248 (1982) (quoting *Ennis*, 72 Idaho 181, 238 P.2d 435).

At first glance, United Financial's request for a declaration of non-coverage under its commercial auto insurance policy with NWCS seems well-suited for a declaratory judgment. *See Temperance Ins. Exch. v. Carver*, 83 Idaho at 492–93, 365 P.2d at 826–27; I.R.C.P. 57(b); I.C. §§ 10-1201, 10-1202, 10-1203. In the Introduction to its Memorandum, United Financial explains that the commercial auto insurance policy provided insurance coverage for NWCS under certain conditions, and "[i]n this instance, the policy of automobile insurance does not cover or specifically excludes coverage for Defendant NWCS under the facts of the underlying accident . . . ." Mem. Supp. Pl.'s Mot. Summ. J. and Decl. Non-Coverage 2. However, rather than directing the Court to the policy exclusion and corresponding facts that trigger an exclusion, United Financial points the Court to the Estate's Complaint in the underlying wrongful death case and asks the Court to do two things: 1) determine whether the Estate failed to join an indispensable party in the underlying civil action against NWCS, and 2) decide whether United Financial is excused from defending or indemnifying NWCS in that litigation as a result of the Estate's failure to join an indispensable party. *Id.* The difficulty with United Financial's argument is that it appears to be asking this Court to decide several issues that seem

uncertain, hypothetical, and that should be litigated between the Estate and NWCS in the underlying wrongful death action (i.e., subject to judicial investigation in that wrongful death action as set forth above in *Ennis* and *Nelson,* and not this declaratory judgment action).

B. Failure to Join an Indispensable Party and Interpretation of I.C. § 49-2417.

If the Estate in fact failed to join an indispensable party in the underlying wrongful death action, NWCS is entitled to make that argument in its pleading or by motion in that underlying wrongful death action. *See* I.R.C.P. 12(b)(7), (h)(2). Further, United Financial has cited no authority for the proposition that a declaratory judgment action can be used to determine the merits of its insured's potential defense(s) in the underlying civil tort action, and persuasive authority suggests that the Court cannot issue a declaratory judgment in United Financial's favor on that basis. *See Cunningham Bros., Inc. v. Bail*, 407 F.2d 1165, 1168 (7th Cir. 1969) (questioning the plaintiff's use of a declaratory judgment action to determine the validity of defenses in pending cases); *State Farm Fire & Cas. Co. v. Finney*, 244 Kan. 545, 550–52, 770 P.2d 460, 464–66 (Kan. 1989) (upholding the district court's decision that a declaratory judgment cannot be used to decide key factual issues in the underlying tort suit).

While this Court finds this declaratory judgment case is not the proper case within which to decide a failure to join an indispensable party issue (and that the wrongful death action is the proper case), the Court finds this declaratory judgment case is the appropriate case in which a determination of the import of I.C. § 49-2417(3) should be made. Idaho Code § 49-2417 reads in pertinent part:

> **Owner's tort liability for negligence of another –**
> (1) Every owner of a motor vehicle is liable and responsible for the death of or injury to a person or property resulting from negligence in the operation of his motor vehicle, in the business of the owner or otherwise, by any

> person using or operating the vehicle with the permission, expressed or implied, of the owner, and the negligence of the person shall be imputed to the owner for all purposes of civil damages.
>
> * * *
>
> (3) In any action against an owner for imputed negligence as imposed by the provisions of this section the operator of the vehicle whose negligence is imputed to the owner shall be made a defendant party if personal service of process can be had upon that operator within Idaho. Upon recovery of a judgment, resource shall first be had against the property of the operator so served.

United Financial argues that the Estate/intervenors failed to name Schultz as the driver in the wrongful death action, that Schultz is an indispensable party to that action, and that since the time period in which to name Schultz as a defendant in that action has expired, the Estate/intervenors have violated I.C. § 49-2417(3) by not making Schultz a party in that wrongful death action. Mem. Supp. of Pl.'s Mot. Summ. J. and Decl. of Non-Coverage 7-8. United Financial concludes its briefing with the following claim: "It is undisputed that I.C. § 49-2417(3) requires the operator of the vehicle be made a defendant party if negligence is to be imputed to the owner of a vehicle for ownership or use of the vehicle." Pl.'s Reply to Intervenor's Resp. to Pl.'s Mot. Summ. J. 3-4. This Court disagrees with United Financial's "undisputed" interpretation. This Court finds that it is "undisputed" such statute does not specify ***who*** must make the operator of the vehicle a party if negligence is to be imputed to the owner. This Court also finds that under this statute, imputed negligence is the standard relationship as between the owner of the vehicle and its operator. In other words, under I.C. § 49-2417(1), the negligence of the operator is *always* going to be imputed to the owner as long as the operator had permission. In the present case, Schultz obviously had NWCS' permission, he was their employee. Under I.C. § 49-2417(3), some party, either the plaintiff or the owner, must bring in the operator if one of those parties wants to hold the operator financially

responsible for first dollars for any damages sustained. The Idaho Supreme Court has held:

> The purpose of statutory interpretation is to ascertain and "give effect to legislative intent." *Id.* at 328, 208 P.3d at 732. Statutory interpretation begins with the literal words of a statute, which are the best guide to determining legislative intent. *Id.* The words of a statute should be given their plain meaning, unless a contrary legislative purpose is expressed or the plain meaning creates an absurd result. *Id.* If the words of the statute are subject to more than one meaning, it is ambiguous and we must construe the statute "to mean what the legislature intended it to mean. To determine that intent, we examine not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history."

KGF Development, LLC v. City of Ketchum, 149 Idaho 524, 527-28, 236 P.3d 1284, 1287-88 (2010) (citing *State v. Doe,* 147 Idaho 326, 327, 208 P.3d 730, 731 (2009)). The literal words of I.C. § 49-2417(3), given their plain meaning, make it clear that some party, either the plaintiff or the owner, must bring in the operator, if one of those parties wants to hold the operator financially responsible for first dollars for any damages sustained. There is no ambiguity in the words used by the legislature.

Subsection (3) of that statute does not mandate *which* existing party in the wrongful death action shall make the operator of the vehicle a party. The Idaho legislature did not mandate that the plaintiff (the injured party or the estate of the decedent in a wrongful death action) bring in the operator of the vehicle as a party, nor did the legislature mandate that the defendant owner of the vehicle bring in the operator as a party. Not having called out which party "shall" make the operator of the vehicle "a defendant party", it is assumed the Idaho legislature meant that either the plaintiff could name the operator of the vehicle a party defendant, or, that the existing defendant owner of the vehicle could make the operator of the vehicle a party defendant. Since the statute would provide the owner of the vehicle (or the owner's insurance company) a benefit by

having the first dollars of any award coming from the operator of the vehicle, there is certainly equal if not more incentive for the owner of the vehicle to bring in the operator, as opposed to the plaintiff, the injured party. It can only be assumed the Idaho legislature required either the plaintiff to make a direct claim against the operator of the vehicle and make him or her a defendant, or the defendant owner of the vehicle is required to bring in the operator of the vehicle as a co-defendant via a counterclaim. The Estate/intervenor has essentially made this argument, noting that the owner may make a counterclaim against the operator of its vehicle. Intervenor's Resp. Pl.'s Mot. Summ. J. 3-4. United Financial did not respond to this argument in Plaintiff's Reply to Intervenor's Response to Plaintiff's Motion for Summary Judgment. United Financial's interpretation that, because the Estate/intervenors did not name Schultz in the wrongful death lawsuit, under I.C. § 49-2417(3), there is no coverage and no duty to defend, is absurd. Such interpretation is not supported by a plain reading of the unambiguous words of that statute.

At oral argument, the Court asked counsel for United Financial, why the owner of the vehicle in the wrongful death action (NWCS) could not bring in the operator, Schultz. Counsel for United Financial's response is that to do so would be frivolous because there is no evidence that Schultz was negligent. Counsel for United Financial stated that the Idaho State Police and OSHA found there was no negligence on the part of Schultz. First of all, the Court has read the material from OSHA. Aff. of Robert T. Wetherell Supp. of Pl.'s Mot. Summ. J. 2, ¶ 3, Ex. B. That report reads:

> The employer did not furnish employment and a place of employment which was free from recognized hazards that were causing or likely to cause death and/or serious physical harm to employees in that employees were exposed to hazards of tripping and being struck by or run over by a motor vehicle. * * *
> The employees approached moving busses and their vision was diminished during this nighttime event due to the darkness, protective face shields, being struck by paintballs, costume masks, and distracting lighting. * * *

> The employees approached moving busses on dirt ground that was uneven, rutted and littered with props and debris, all of which contributed to the potential to trip.

Id. All these conditions would have been patently apparent to Schultz, and his failure to drive according to those risks would be evidence of negligence. Second, the only Idaho State Police evidence before the Court is the report of the incident in which the investigating officer found "no criminal intent." *Id.* No finding regarding negligence was made. *Id.* Third, and most importantly, it must be kept in mind that this is a coverage question in a declaratory judgment action, and whether there is a lot of evidence of the driver's negligence, some evidence, or no evidence, the fact remains that the *allegation* was made in the wrongful death case, that Schultz was negligent. Counsel for United Financial's claim that there was no evidence of Schultz negligence falls on deaf ears. Additionally, attached to Intervenor's Response to Plaintiff's Motion for Summary Judgment is a Declaration of Joellen Gill, apparently filed in the wrongful death case. Gill is a human factors engineer, and rendered an opinion in that Declaration that:

> Based on my review of the records it is my opinion that the bus was used in a negligent and reckless manner by the owners, NW Creative Solutions, LLC, regardless of how it was driven by the bus driver, aka Tyeson Schultz.

Intervenor's Resp. Pl.'s Mot. Summ. J. Ex. 6, at 2. In spite of counsel for United Financial's unsubstantiated argument that bringing in Schultz in the wrongful death action would be frivolous, there appears to be at the very least a dispute of fact as to the negligence of the operator Schultz.

In any event, if in the underlying wrongful death case, the operator of the vehicle which caused the injury/death was not brought in by either the injured party/estate nor the owner of the vehicle which caused the injury, Idaho Code § 49-2417 clearly does not call for *dismissal* of the wrongful death case as the remedy for that failure. That statute does

not mention dismissal at all. The statute merely mandates "the operator of the vehicle whose negligence is imputed to the owner shall be made a defendant party if personal service of process can be had upon that operator within Idaho", without stating who shall make the operator a party. Dismissal is not mentioned anyplace in that statute. Additionally, there are two logical reasons why dismissal should never be the remedy for failure of either the owner or the injured party (or both) to bring in the operator. The first requires looking at the purpose of the statute. The only purpose of the statute is to put responsibility for the first dollars in any recovery upon the operator of the vehicle, the person who actually caused the damage, and then, any remaining recovery upon the owner of the vehicle. Even if it were only the injured party's responsibility to bring in the operator of the vehicle, there is no logical reason for the injured party's failure to do so to absolve the owner of *all* financial responsibility. The second logical reason is, the owner of the vehicle is more likely to know the identity of the operator of the owner's vehicle, and thus more likely to be able to accomplish service of process upon the operator, as compared to the injured party or his or her estate in a wrongful death case. If the injured party files a lawsuit against the owner of the vehicle and the injured party fails to name the operator of the vehicle, the owner of the vehicle may immediately make the operator of the vehicle a party and serve that party with ease, without having to resort to naming "John Does" and finding out the operator's identity and whereabouts through discovery with the owner.

Without deciding the indispensable party issue (which this Court specifically leaves for the underlying wrongful death lawsuit), this Court specifically finds that I.C. § 49-2417(1) and (3) do not mandate a finding of non-coverage on the part of United Financial. For that reason alone, summary judgment must be denied.

C. At Least a Question of Fact Remains that Estate/intervenors in this Action (Plaintiff in the Underlying Wrongful Death Action) Can Likely Amend their Complaint in that Wrongful Death Action.

Assuming that Schultz is an indispensable party in the underlying civil tort action and the Estate failed to join him as required, this Court cannot say that the Estate is precluded from amending its Complaint in that civil tort action. United Financial asserts that the Estate will be unable to amend its complaint because the statute of limitations has expired. However, at a minimum, United Financial's conclusory assertion fails to take into account Rule 15(c) and the "relation back doctrine." *See* I.R.C.P. 15(c)(1)(C); *Allied Bail Bonds, Inc. v. Cty. of Kootenai*, 151 Idaho 405, 411, 258 P.3d 340, 346 (2011) ("This 'relation back doctrine' protects claims from expiration of the statute of limitations, provided the defendant has sufficient notice."). Similarly, United Financial also fails to address whether this Court in this declaratory judgment action has the authority to find that the Estate cannot amend its Complaint in the underlying civil action. Rather, it seems that such a determination should be made by the district judge in the underlying civil action when (or if) the Estate decides to file a motion to amend its complaint. Certainly at that time NWCS will have the opportunity to oppose such a motion and raise the statute of limitations as a possible means of stopping any proposed amendment.

At oral argument, counsel for United Financial pointed out that Estate/intervenors only named the operator Schultz as a John Doe party in this declaratory judgment action, not in the underlying wrongful death action. The Court finds that to be of no legal significance for two reasons. First, that is an argument to be made before the Court in the wrongful death action, as set forth in the section immediately above. Second, in that wrongful death complaint the Estate/intervenors did mention the negligence of the John Doe driver, and the failure to add that John Doe driver in the caption as a party in that wrongful death action is not significant to this Court in this declaratory judgment action.

D. The Possibility of Coverage Exists.

The Estate/intervenors assert that their Complaint in the underlying civil action alleges that "John Doe Bus Driver" was negligent, and, therefore, the possibility of coverage exists. Intervenor's Resp. Pl.'s Mot. Summ. J. 5, Ex. A, 3-4. Indeed, in the wrongful death Complaint, Estate/intervenors in this declaratory judgment action alleges, "As a result of negligent driving, John Doe Bus Driver ran over Mr. McSpadden causing his death." *Id.* at 4, ¶ 18.

To the extent that United Financial is arguing that it has no duty to defend because the Complaint in the underlying civil tort action discloses no possibility of coverage, United Financial has done a poor job in making that argument. In fact, in the Court's view, that argument only appears in United Financial's Reply to Intervenor's Response. Pl.'s Reply Intervenor's Resp. Pl.'s Mot. Summ. J. 2. Even then, United Financial makes assertions unsupported by legal authority and quotes policy language (for the first time) in the form of a sentence fragment that makes no sense, provides no context, and includes no citation to the commercial auto insurance policy. *Id. See* I.R.C.P. 56(c)(1)(A) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by[] citing to particular parts of materials in the record . . . ."). Specifically, United Financial in its reply brief states:

> The policy language at issue here states in pertinent part:
> "…arising out of the ownership, maintenance or use of that insured auto."
>
> * * *
>
> The only issue is once it is established that there is ownership and use of an insured automobile, how does one sue the owner of said automobile for negligence if the owner was not the operator of the insured automobile at the time of the accident. The days of a Master/Servant and Principle/Agent analysis are over. As in the products liability area, automobile negligence and liability has been codified and provides strict liability for automobile negligence of a permissive user and the owner of the automobile, provided the statutory requirements of IC § 49-2417 et sec. are

> met. I.C. § 49-2417(3) is clear, the only way to sue an owner of a vehicle for automobile negligence, is to sue the actual operator of the vehicle[.]

Pl.'s Reply Intervenor's Resp. Pl.'s Mot. Summ. J. 2. United Financial does not cite any Idaho case law for that proposition and, as a result, the Court is not convinced that United Financial's legal argument is correct. *See, e.g.*, *Finholt v. Cresto*, 143 Idaho 894, 155 P.3d 695 (2007) (recognizing that an employer can be liable in tort for the tortious conduct of an employee under the doctrine of respondeat superior).

At oral argument, counsel for United Financial mentioned a "*Kootenai County*" case, which was not mentioned in briefing by United Financial, and counsel at oral argument could not provide a citation for that case. According to counsel for United Financial, the Idaho Supreme Court in that case cited *Hoyle v. Utica Mutual Insurance Co.,* 137 Idaho 367, 48 P.3d 1256 (2002). This Court can find no Idaho appellate court case citing *Hoyle* with "Kootenai County" as a party. Perhaps counsel for United Financial meant *County of Boise v. Idaho Counties Risk Management Program, Underwriters,* 151 Idaho 901, 265 P.3d 514 (2011), a case cited by counsel for United Financial in its opening brief. Mem. Supp. Pl.'s Mot. Summ. J. 7. Both *Hoyle* and *County of Boise* stand for the proposition that, "The insurer need only look at the words of the complaint 'to determine if a possibility of coverage exists.'" *Cty. of Boise v. Idaho Ctys. Risk Mgmt. Program, Underwriters,* 151 Idaho 901, 904, 265 P.3d 514, 517 (citing *Hoyle v. Utica Mutual Ins. Co.,* 137 Idaho 367, 371-72, 48 P.3d 1256, 1262 (2002)). Counsel for United Financial is correct in asserting that proposition. Pl.'s Reply to Intervenor's Resp. Pl.'s Mot. Summ. J. 1-2; Mem. Supp. Pl.'s Mot. Summ. J. 7. The disconnect occurs when counsel for United Financial intentionally conflates this as an issue of policy language interpretation (which it is not), with an issue of statutory interpretation (which it is). Counsel for United Financial wants this Court to use case law standards from *Hoyle*

and *County of Boise* which are used to interpret insurance policies, (looking only at the words of the complaint), and apply that standard to a statute, specifically Idaho Code § 49-2417(3). The intentional conflation is set forth above, when counsel for United Financial writes:

> The policy language at issue here states in pertinent part:
> "…arising out of the ownership, maintenance or use of that insured auto."
>
> * * *
>
> The only issue is once it is established that there is ownership and use of an insured automobile, how does one sue the owner of said automobile for negligence if the owner was not the operator of the insured automobile at the time of the accident.

Pl.'s Reply Intervenor's Resp. Pl.'s Mot. Summ. J. 2. The Court specifically finds there is no policy language to be interpreted. The Court finds there are no factual issues in dispute under that policy language, as ownership of NWCS' bus is undisputed, as is the permissive use by Schultz, NWCS' employee. The only language to be interpreted is the language of the statute, Idaho Code § 49-2417(3), and this Court finds that to use policy contract interpretation case law would be legal error.

The only way United Financial makes its argument that there is no possibility of coverage is with its interpretation of I.C. § 49-2417(3), and this Court in section "B" above explained why it is not adopting United Financial's interpretation of that statute.

In summary, United Financial has not presented a clear argument as to how the commercial auto insurance policy itself provides a basis for excluding coverage in the underlying civil lawsuit, and, as a result, the Court is unable to determine as a matter of law at this summary judgment whether the Complaint in the underlying civil action discloses no possibility of coverage.

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E. United Financial has not Shown it has been Prejudiced.

The Estate/intervenors argue that United Financial is not prejudiced by NWCS's alleged breach of the insurance policy. Intervenor's Resp. Pl.'s Mot. Summ. J. 6–7. Estate/intervenors are correct that there must be a "substantial breach" of the conditions of coverage that result in "prejudice to the insurer" in order for there to be conduct which would void coverage. *Union Warehouse and Supply Co., Inc. v. Illinois R. B. Jones, Inc.,* 128 Idaho 660, 666, 917 P.2d 1300, 1306 (1990). However, counsel for Estate/intervenors has been mesmerized by counsel for United Financial's argument that this case is about policy interpretation when it is actually about statutory interpretation. United Financial is not really claiming a breach of the conditions of coverage, but rather, a breach of statute. If prejudice need be shown (and this Court finds that it does not, because this is not a failure to comply with a policy provision issue), United Financial has not shown prejudice.

F. United Financial has Failed to Provide Estate/Intervenors Notice.

The Estate/intervenors take issue with the fact that they were not provided notice of the Motion for Default and Stipulation filed against NWCS. Intervenor's Resp. Pl.'s Mot. Summ. J. 6. As mentioned above, no Summons was issued for the Estate in this case. Under I.R.C.P. 57(b), United Financial had a duty to give notice of this declaratory judgment action to the Estate. Idaho Rule of Civil Procedure 57(b) reads:

> (b) **Coverage under insurance policy.** A party seeking a declaratory judgment as to coverage under a policy of insurance must give notice of the action to any person known to have a claim against the insured relating to the incident that is the subject of the declaratory action.

At oral argument, counsel for United Financial claimed that prior to filing this declaratory judgment lawsuit, he had a discussion with an attorney in Seattle (he could not remember who that attorney was) who was purportedly representing the Estate at the time. In any

event, on May 4, 2017, the Estate filed a Notice of Appearance and Motion to Intervene in the instant case. The Court issued an Order for Intervention in favor of the Estate on May 9, 2017. That order allowed McSpadden and Millspaugh to intervene in this declaratory judgment action and required the case caption to name both parents, McSpadden and Millspaugh, as intervenors pursuant to I.R.C.P. 24(a)(2). Order for Intervention 1. To date, counsel for United Financial and counsel for the Estate/intervenors, have ignored that order by not adding the Estate/intervenors to the caption of their pleadings. More important than failure to include the Estate/intervenors on the caption, United Financial kept Estate/intervenors completely in the dark on its Motion for Entry of Default and Stipulated Motion for Entry of Default against NWCS which it filed on August 16, 2017. No notice of this Motion for Entry of Default and Stipulated Motion for Entry of Default against NWCS was sent by counsel for United Financial to counsel for Estate/intervenors. An Order for Entry of Default against NWCS was issued by this Court the next day, August 17, 2017. On the certificate of mailing prepared by counsel for United Financial, the Estate was not provided notice of this Court's subsequent Order for Entry of Default. Counsel for the Estate/intervenors claims, "Intervenor was not notified nor to this day have we received a copy of Plaintiff's Motion for Default." Intervenor's Resp. to Pl.'s Mot. Summ. J. 2, ¶ e. Because the Motion for Entry of Default and Stipulated Motion for Entry of Default against NWCS was filed without notice to the Estate/intervenors, and because the Order for Entry of Default Against NWCS was filed without notice to the Estate/intervenors, the Order for Entry of Default must be set aside and rescinded.

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IV. CONCLUSION AND ORDER.

The Court must deny United Financial's Motion for Summary Judgment. Additionally, the Order for Entry of Default Judgment must be set aside as counsel for Plaintiff United Financial failed to provide notice to the Estate/intervenors.

IT IS HEREBY ORDERED Plaintiff United Financial's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that the Order for Entry of Default Judgment entered on August 16, 2017, against Defendant NW Creative Solutions, LLC, is RESCINDED; all claims against NW Creative Solutions remain intact.

Entered this 3rd day of January, 2018.

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John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of January, 2018, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Robert T. Wetherell	208-424-8874	Drew D. Dalton	509-927-1301

Hon. Cynthia C.K. Meyer

Suzie Dunn
NW Creative Solutions
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_____
Jeanne Clausen, Deputy Clerk