STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

_____
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

JASON ROYLANCE and TEDDY SUE ROYLANCE, *Plaintiffs*, vs. **JOHN ALDEN LIFE INSURANCE COMPANY, dba ASSURANT HEALTH, and PROGRESSIVE INSURANCE COMPANY,** *Defendants*.	Case No. **CV 2006 9218** **MEMORANDUM DECISION AND ORDER DENYING DEFENDANT JOHN ALDEN LIFE INSURANCE COMPANY'S (JALIC) MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION AND BACKGROUND.

On December 17, 2005, plaintiff Jason Roylance (Jason) was injured in a motor vehicle accident in British Columbia. Jason and his wife filed their Complaint in this lawsuit on December 11, 2006, alleging bad faith breach of contract against their medical insurance carrier defendant John Alden Life Insurance Company (JALIC). They amended their Complaint on September 21, 2007, to include Progressive, their automobile insurance carrier. They amended their Complaint again on March 26, 2008, to include a negligence claim against JALIC.

Before commencing this action, on August 21, 2006, Jason filed a lawsuit in British Columbia for damages against the truck driver who injured him. On December 6, 2007, Jason's British Columbia counsel filed a second lawsuit against three insurers, including two Canadian insurers and Progressive. In response, Progressive filed a 12(b)(8) Motion to Dismiss in this present case. When Jason's British Columbia

counsel learned of the instant suit, involving Progressive, the second lawsuit was dismissed as to all three defendant insurers. This Court denied Progressive's 12(b)(8) motion and the alternative motion to stay on June 18, 2008.

JALIC filed a Motion for Summary Judgment in this present case on January 22, 2008, however that motion was not heard until July 15, 2008. This is the motion that is presently at issue.

JALIC argues that: 1) due to its exclusionary clause, coupled with 2) the fact that Progressive has now admitted liability, Jason's action for breach of contract against JALIC is precluded, and that since Jason never had a valid, covered claim, there can be no tortious bad faith by JALIC.

II. STANDARD OF REVIEW.

The standard of review on appeal from an order granting summary judgment is the same standard that is used by the District Court in ruling on the summary judgment motion. *Baxter v. Craney,* 135 Idaho 166, 170, 16 P.3d 263, 267 (2000). All disputed facts are liberally construed in favor of the non-moving party and all reasonable inferences are drawn in favor of the non-moving party. *AMCO Ins. Co. v. Tri-Spur Inv. Co.,* 140 Idaho 733, 736-737, 101 P.3d 226, 229-230 (2004). Summary judgment is appropriate only where the pleadings, depositions, affidavits, and admissions show that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. I.R.C.P. 56(c).

III. ANALYSIS.

A. Breach of Contract.

Jason argues JALIC breached its policy with he and his wife between December 20, 2005 and February 2007, and again after May 31, 2007, by JALIC's relying on the

express contractual right of exclusion in the policy, which Jason claims is inapplicable. Plaintiff's Response to JALIC's Motion for Summary Judgment, p. 6. Jason argues the exclusionary clause only entitles JALIC to deny payment where an automobile or liability insurer is *actively and continually* paying Plaintiff's medical bills. *Id.,* p. 7. (emphasis in original).

The language at issue in the JALIC policy is found at page 19 under the heading "Exclusions":

> We will not pay benefits for any of the following:… [c]harges for which there is automobile or liability insurance providing medical payments.

Jason argues this language is clear, and that the phrase "for which there is automobile or liability insurance providing medical payments" is "to be read in the present tense and denotes continuing and progressive action." Plaintiff's Response to JALIC's Motion for Summary Judgment, p. 7. Thus, Jason argues, because no other insurer was providing payment between December 20, 2005 and February 2007, and again after May 31, 2007, the exclusionary clause does not apply in the instant case.

JALIC argues that the phrase, as interpreted by Jason, is a "tortured construction of the language of an insurance contract in order to create an ambiguity and thereby provide an avenue for coverage where none exists." Defendant JALIC's Reply Re: Its Motion for Summary Judgment, p. 4.

Insurance policies are a matter of contract between the insurer and the insured. *Gordon v. Three Rivers Agency, Inc.,* 127 Idaho 539, 542, 903 P.2d 128, 131 (Ct. App. 1995) (citing *Brinkman v. Aid Ins. Co.,* 115 Idaho 346, 352, 766 P.2d 1227, 1233 (1988)). In construing an insurance policy, the court must look at the plain meaning of the words used to determine if there is any ambiguity. *Cascade Auto Glass, Inc. v.*

Idaho Farm Bureau Ins. Co., 141 Idaho 660, 663, 115 P.3d 751, 754 (2005). Where the policy language is clear, the court must determine coverage according to the plain meaning of the words used. *Id.* at 662-663. Whether a contract is ambiguous is a matter of law subject to free review by the Supreme Court. *AMCO,* 140 Idaho 733, 739, 101 P.3d 226, 230.

Courts will not enforce unambiguous contracts which violate public policy; such contracts are illegal and unenforceable. *American Foreign Ins. Co. v. Reichert,* 140 Idaho 394, 399, 94 P.3d 699, 704 (2004). When a policy provides only an illusion of coverage for its premiums, the policy will be considered void for violating public policy. *Martinez v. Idaho Counties Reciprocal Management Program,* 134 Idaho 247, 525, 999 P.2d 902, 907 (2000). The Court, in *Martinez,* defines illusory coverage: a policy is illusory if it appears that, if any actual coverage exists, it is extremely minimal and affords no realistic protection to any group or class of injured persons. *Id.* The Court will not allow policy limitations and exclusions to defeat the precise purpose for which the insurance is purchased. *Id.* Where coverage is not minimal and does provide realistic protection to those defines as insured, the policy is not illusory. *National Union Fire Ins. Co. of Pittsburgh, PA v. Dixon,* 141 Idaho 537, 542, 112 P.3d 825, 830 (2005). Jason does not argue the policy at issue is violative of public policy or is illusory. Rather, Jason argues the exclusionary clause unambiguously points to JALIC having a contractual duty to cover him. Plaintiff's Response to JALIC's Motion for Summary Judgment, p. 9.

Ambiguity exists where a contract term is reasonably susceptible to more than one interpretation. *Cascade,* 141 Idaho 660, 663, 115 P.3d 751, 754. "The general rule is that, because insurance contracts are adhesion contracts, typically not subject to

negotiations between the parties, any ambiguity that exists in the contract must be construed most strongly against the insurer." *Farmers Ins. Co. of Idaho v. Talbot,* 133 Idaho 428, 435, 987 P.2d 1043, 1050 (1999). When confronted with ambiguous language, the Court must determine what a reasonable person would have understood the language used to mean. *Allstate Ins. Co. v. Mocaby,* 133 Idaho 593, 597, 990 P.2d 1204, 1207 (1999). And unless contrary intent is shown, in order to effectuate the intent of the parties, common non-technical words are given the meaning that laymen in daily usage apply, as opposed to meaning derived from legal use. *Mutual of Enumclaw v. Box,* 127 Idaho 851, 853, 908 P.2d 153, 155 (1995).

It is well settled that a court may not create a liability not assumed by the insurer, may not make a new contract for the parties, may not make a contract different from the one plainly intended, or add words to insurance contracts that either create or avoid liability. *Anderson v. Title Ins. Co.,* 103 Idaho 875, 878-79, 655 P.2d 82, 85-86 (1982). Further, an insurance contract is to be construed as a whole by the courts. *Andrae v. Idaho Counties Risk Management Program Underwriters,* 145 Idaho 33, ___, 175 P.3d 195, 198 (2007). In construing the Exclusionary Clause at issue here, this Court notes two other exclusions in Jason's policy with JALIC, for which JALIC will not pay benefits:

- Illness or injury eligible for benefits under Worker's Compensation, Employer's Liability or similar laws even when you do not file a claim for benefits.

…

- Charges that are payable or reimbursable by:
    - A plan or program of any governmental agency (except Medicaid), or
    - Medicare Part A or Part B (where permitted by law). If you do not enroll in Medicare we will estimate benefits.

Any possible ambiguity in the exclusionary clause should be construed in favor of the non-moving/insured party, Jason in this case. The exclusionary clause applicable to

the accident in British Columbia is:

> We will not pay benefits for any of the following:… [c]harges for which there is automobile or liability insurance providing medical payments.

Jason argues this language "for which there is automobile or liability insurance providing medical payments" is "to be read in the present tense and denotes continuing and progressive action." Plaintiff's Response to JALIC's Motion for Summary Judgment, p. 7. This Court agrees that the word "providing" is connotes action, and must be read in the present tense. Jason further argues: "…the exclusionary clause only applies when another insurer is actively and continually paying the insured's medical bills." *Id.* This Court does not necessarily agree with that proposition, nor is such agreement necessary to decide JALIC's motion for summary judgment. A plain reading of this exclusionary clause is that JALIC will not pay benefits for charges for which there is automobile or liability insurance *providing* medical payments, and "providing" is an active and present tense word. Note that the language does not read "for which there is automobile or liability insurance *coverage*". Note that the language does not read "for which there is automobile or liability insurance under which you are 'eligible for benefits'", such as the language JALIC uses in its exclusionary clause for Worker's Compensation claims. Note that the language does not read "for which there are 'charges that are payable or reimbursable by" automobile or liability insurance", such as the language JALIC uses in its exclusionary clause for Medicaid. Had JALIC used such language, than the mere presence of the Progressive Insurance coverage (or even potential coverage), without more, would be enough for JALIC to invoke and legitimately rely upon its exclusionary clause. But JALIC did not use such language in this exclusionary clause. JALIC used the words:

> We will not pay benefits for any of the following:… [c]harges for which there is automobile or liability insurance providing medical payments.

Since the policy is to be construed in Jason's favor, and against the drafter of the language, JALIC, it must be assumed that JALIC *meant* to use the different language it used in these other clauses *for a reason.* Since JALIC used the word "provided" in the exclusionary clause at issue, there must be something more than the mere presence of the Progressive insurance coverage. That something more, under the express language of the exclusionary clause, is "providing medical payments." And while Progressive provid***ed*** medical payments at two discrete and known periods of time, it refused to provide medical payments at other periods of time. Thus, at least during those periods of time, Progressive was not "providing medical payments", and, accordingly, JALIC could not rely on its exclusionary clause which it drafted, to deny its payments to Jason. In the absence of any ambiguity, the Court must give the words of the insurance contract their ordinary, plain meaning. *See Mutual of Enumclaw,* 127 Idaho 851, 853, 908 P.2d 153, 155. Here, the plain meaning of the clause does not allow JALIC to deny liability. There is at least an issue of fact as to the meaning of the applicable exclusionary clause.

B. Tortious Bad Faith.

In *Selkirk Seed Co. v. State Ins. Fund,* the Idaho Supreme Court recognized that an action against one's own insurer (first party bad faith), independent of breach of contract, is limited to intentional or negligent denial or delay of payment. 135 Idaho 649, 652, 22 P.3d 1028, 1031 (2000); *see also White v. Unigard Mut. Ins. Co.,* 112 Idaho 94, 97, 730 P.2d 1014, 1017 (1986). An independent tort action arises only where the insured can show that the insurer intentionally and unreasonably denied or withheld

payment and as a result of the insurer's conduct, the plaintiff was harmed in a way not fully compensable by contract damages. *Robinson v. State Farm Mutual Auto Ins.,* 137 Idaho 173, 178, 45 P. 3d 829, 834 (2002). Specifically, the Court stated in *Robinson* that, to establish a *prima facie* case, the plaintiff would have to establish that: (1) the coverage of the claim was not fairly debatable, (2) the coverage is proven to the point that based on evidence the insurer had, the insurer intentionally and unreasonably withheld benefits, (3) the delay in payment was not the result of a good faith mistake, and (4) the resulting harm to the plaintiff is not fully compensable by contract damages. *Id.*

JALIC has argued that because Jason has claimed that the exclusionary clause is ambiguous, there can be no bad faith as such ambiguity in essence makes coverage of Jason's claim "fairly debatable". JALIC's Reply Re: Its Motion for Summary Judgment, p. 8. That has certainly been Jason's position. JALIC's argument based on that position is very persuasive from a common sense, factual standpoint. But at this summary judgment juncture, this Court cannot find, nor has it been cited to any case law that would indicate such would be the case as a matter of *law*. Based on this Court's interpretation of the exclusionary clause, it would at least be an issue of fact as to whether JALIC's coverage of the claim was fairly debatable, whether JALIC unreasonably withheld benefits and that the delay was not the result of a good faith mistake.

C. Negligence.

In its response to JALIC's Motion for Summary Judgment, defendant Progressive does not object to entry of summary judgment subject to such entry not prejudicing Progressive's right to establish that it is not the primary (and that, rather, the at-fault

driver's insurance is the primary) and subject to Progressive's right to seek reimbursement from JALIC for any payments Progressive has/will make to JALIC. Defendant Progressive's Response to JALIC's Motion for Summary Judgment, pp. 2-3. Progressive's Response is the first brief to mention that JALIC's motion does not address the negligence cause of action in plaintiff's amended complaint. JALIC replies by asking this Court, if it should find that there was no valid, covered claim, to also grant JALIC summary judgment with respect to Plaintiff's negligence cause of action. JALIC's Reply Re: Its Motion for Summary Judgment, p. 9. That request is answered by this Court's interpretation of the exclusionary clause as noted above. There is at least a question of fact as to whether there was a valid, covered claim, given JALIC's language it used in its exclusionary clause.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court must DENY defendant JALIC's Motion for Summary Judgment;

IT IS HEREBY ORDERED defendant JALIC's Motion for Summary Judgment is DENIED.

Entered this 22nd day of August, 2008.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2008, 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 #
David Ducharrme	208 765-6795	Troy Y. Nelson	509 838-0007
Robert Wetherell	208 344-7077		

_____

Deputy Clerk