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

CRAIG A. GROTH,

Plaintiff,

vs.

NATIONWIDE ASSURANCE COMPANY, a foreign corporation, d/b/a ALLIED INSURANCE.

Defendant.

Case No. **CV 2007 7685**

MEMORANDUM DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION AND BACKGROUND.

On November 19, 2005, plaintiff Craig Groth (Groth) was involved in an automobile accident wherein he was struck from behind and was injured. The 1995 BMW that struck Groth was owned by Anna Getz (Getz) and was being driven by Robert Card (Card). Card was drunk at the time and later Card was convicted of Driving Under the Influence.

Getz insured her vehicles through defendant Nationwide (Nationwide) via a six-month Nationwide policy number 72 46 3 018756, issued on April 15, 2005. The six-month period ran from May 18, 2005, to November 18, 2005. Affidavit of Counsel (Matthew F. McColl) in Support of Memorandum in Opposition to Plaintiff's Motion for Summary Judgment filed December 8, 2008, p. 2, ¶1; Exhibit A. At its inception, the policy only covered Getz' 1994 Mercedes-Benz C280. *Id.* On July 6, 2005, Getz bought a 1995 BMW 32I [325i] from Soupy's Auto Sales in Post Falls, Idaho. Affidavit

of Counsel (Matthew F. McColl) in Support of Defendant Nationwide Assurance Company's Motion for Summary Judgment filed September 18, 2008, p. 2, ¶ 1; Exhibit A. On that same day, Getz applied for an Idaho Title for that vehicle. *Id.* The car was registered in Kootenai County, Idaho, and the only address Getz listed for her official registration and title documentation was 520 Circle Drive, Coeur d'Alene, Idaho. *Id.* On September 29, 2005, registration was issued. On September 26, 2005, Nationwide issued a Declarations page re-insuring the 1995 BMW from September 26, 2005, through November 18, 2005. *Id.,* Exhibit C. It is assumed the 1995 BMW was already insured by Nationwide, as the Declaration page issued September 26,2005, indicates the lienholder changed to Numerica. *Id.* It is not known when the BMW was first insured, nor when it was first taken off the policy, but there is a Nationwide Declaration page for the same policy that was issued on August 24, 2005, which added a 2003 Cadillac CTS and "Removed 1995 BMW 325." *Id.,* Exhibit D.

In any event, the latest Declarations page that discusses the 1995 BMW is the one issued on September 28, 2005, which covers a "Policy Period From: SEP 26, 2005 to NOV 18, 2005." *Id.,* Exhibit C. On September 28, 2005, Nationwide sent Getz a letter regarding her policy number 72 46 3 018756, stating:

> We are unable to continue your coverage. This is required notice that your policy is terminated effective 12:01 a.m. local time on November 18, 2005.
> The reason(s) for this action is:
> You have moved out of our operating territory.

Affidavit of Counsel (Matthew McColl) in Support of Defendant Nationwide Assurance Company's Motion for Summary Judgment, p. 2, ¶ 5, filed September 13, 2008, Exhibit E, Affidavit of Michele O'Sullivan, Exhibit A. This was sent by regular U.S. Mail to Getz at her last address on file with Nationwide, that being 520 Scenic Heights, Cheney,

Washington, 99004. *Id.* On November 19, 2005, at 1:54 a.m., Card collided with Groth. Complaint, p. 3, ¶2.6.

Regarding Getz' Nationwide policy number 72 46 3 018756, from the time it was first issued on April 15, 2005, where the six-month period ran from May 18, 2005, to November 18, 2005, (Affidavit of Counsel (Matthew F. McColl) in Support of Memorandum in Opposition to Plaintiff's Motion for Summary Judgment filed December 8, 2008, p. 2, ¶1; Exhibit A) to the last Declarations page issued on September 28, 2005, which covered a "Policy Period From: SEP 26, 2005 to NOV 18, 2005" (Affidavit of Counsel (Matthew F. McColl) in Support of Defendant Nationwide Assurance Company's Motion for Summary Judgment filed September 13, 2008, Exhibit C), **every Declarations page sent by Nationwide to Getz shows the policy terminating on November 18, 2005**. *See* Declarations page Issued August 24, 2005, Policy Period From AUG 23, 2005 to NOV 18, 2005, which added the 2003 Cadillac CTS to the 2002 Infiniti G20 and removed the 1995 BMW 325 (*Id.,* Exhibit D, Frame K, L, M, 22); Declarations page Issued September 6, 2005, Policy Period From SEP 2, 2005 to NOV 18, 2005, which removed the 2003 Cadillac CTS and left only the 2002 Infiniti G20 (*Id.,* Frame E, F 10). **Also, the letter Nationwide sent to Getz on September 28, 2005, informed Getz her policy terminated on November 18, 2005.** *Id.,* Exhibit E. Finally, in the September 26, 2005, telephone conversation, Getz was told by Nationwide's representative "Jonathan", that:

> Thank you for holding. Okay so this little, this change will be uh for the, for the remainder of the policy term. Um. Your term ends on November 18th, so that…

Affidavit of Counsel (Jeffrey R. Owens) in Support of Plaintiff's Brief in Opposition to Defendant Nationwide Assurance Company's Motion for Summary Judgment and In

Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 4, Exhibit 2, page 6.

On December 8, 2005, Nationwide sent Getz a letter regarding the reported loss to her BMW, stating that the claim was currently under investigation. Affidavit of Counsel (Jeffrey R. Owens) in Support of Plaintiff's Brief in Opposition to Defendant Nationwide Assurance Company's Motion for Summary Judgment and In Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 5, Exhibit 3. On January 25, 2006, Nationwide sent Getz another letter informing her that the insurance coverage had terminated on November 18, 2005. *Id.,* ¶ 7, Exhibit 5. Getz' BMW had been financed through Numerica Credit Union. Although Nationwide denied defense and damages to their insured, Getz, Nationwide agreed to pay off the Numerica loan because Nationwide had not given proper notice of the cancellation to the lienholder, Numerica. Nationwide paid Numerica $9,607.63, and informed Getz by letter on February 16, 2006, that there would be no coverage for the loss other than the loan payoff, minus a $500 deductible for which Getz would be responsible. *Id.,* ¶ 8, Exhibit 6.

Nationwide refused to defend or indemnify Getz, basing its decision on the policy having terminated on November 18, 2005, at 12:01 a.m. Complaint, p. 3, ¶ 2.7. On June 5, 2006, Groth filed suit against Getz and Card, Kootenai County Case No. CV 2006-4457. *Id.,* ¶ 2.9. Getz answered the Complaint on July 17, 2006, stating Card had driven her BMW without her permission at the time of the accident. In that lawsuit, Getz let Groth take judgment against her in the amount of $300,000.00, and Judge Hosack entered Judgment against Getz in that amount on July 18, 2007. *Id.,* pp. 3, 4, ¶ 2.11. In exchange for Getz' signing the stipulation for Consent Judgment, Groth signed a Covenant not to Execute against Getz on anything but the Nationwide policy. *Id.* The amount of the stipulated judgment greatly exceeded the $25,000 coverage for bodily

injury provided for in Getz' policy.

On October 18, 2007, based on Getz' assignment of her rights under her policy, Groth filed this lawsuit against Nationwide. Groth alleges Nationwide: 1) breached its contract with Getz, and 2) breached its covenant of good faith and fair dealing it had with Getz. Complaint, pp. 5-7, ¶¶ 4.1-5.6.

On September 18, 2008, Nationwide filed its motion for summary judgment. On November 18, 2008, Groth objected to Nationwide's motion for summary judgment and Groth filed his own motion for summary judgment. Groth's motion for summary judgment was supported by counsel's Affidavit, attached to which is an exhibit consisting of the Affidavit of Irving "Buddy" Paul (Paul). Paul is an attorney with expertise in insurance law, but his affidavit did not contain any references or citations as to why he held the opinions he set forth in his affidavit. Nationwide objected to Paul's affidavit on December 3, 2008, and moved to strike it. At the December 17, 2008, oral argument on the cross-motions for summary judgment, this Court on the record denied the motion to strike. The Court indicated that while it would not ignore the affidavit of Paul, it would not be given much weight due to the lack of attribution as to the source of Paul's opinions, and instead, it would be treated more as additional briefing on behalf of Groth. The cross-motions for summary judgment are now at issue.

These cross-motions for summary judgment hinge on the Nationwide policy language in Getz' policy. Nationwide filed its motion first and claims: 1) Getz had no coverage with Nationwide on November 19, 2005, the date of the accident, as the policy expired the day before; 2) even if there was coverage, Getz admitted she did not give Card permission to drive her 1995 BMW, and thus, there is an exclusion on coverage; 3) even if there is coverage and no exclusion, Getz cannot assign her rights; and 4)

even if there is coverage and no exclusion and Getz can assign her rights, she can *only* assign the rights she has, and those rights are limited at the policy limit of $25,000.00. Memorandum in Support of Defendant Nationwide Assurance Company's Motion for Summary Judgment, p. 2, generally pp. 1-12. Groth claims it is entitled to summary judgment that Nationwide: 1) breached its contract with its insured Getz; 2) Nationwide acted in bad faith in denying Getz a defense and is estopped from denying coverage and is liable for the full amount of the judgment entered against Getz in favor of Groth; and 3) that Groth has standing to bring the bad faith action based on Getz' assignment of her first-party claims to Groth. Plaintiff's Motion for Summary Judgment, pp. 1-2.

II. ANALYSIS.

A. 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). Idaho Rule of Civil Procedure 56 sets forth that in considering a motion for summary judgment, summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.,* 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester &*

Lezamiz, Inc., 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

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. 141 Idaho 662-663, 115 P.3d 751, 753-54. Whether a contract is ambiguous is a matter of law subject to free review by the court. *AMCO Ins. Co. v. Tri-Spur Inv. Co.,* 140 Idaho 733, 739 101 P.3d 226, 232 (2004). Ambiguity exists when a contract term is reasonably susceptible to more than one interpretation. *Id.* If a policy term is ambiguous, the court construes it liberally in favor of recovery, with all ambiguities being resolved against the insurer. *Id.* (citations omitted).

B. Choice of Law.

1. Interpretation of the Contract.

While citing predominantly Idaho law in its Memorandum in Support of Defendant Nationwide Assurant Company's Motion for Summary Judgment, Nationwide agrees with Groth's attorney and Groth's expert Irving "Buddy" Paul that Washington law governs the non-renewal clause. Defendant Nationwide Assurant Company's Reply Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 4. This Court finds Washington

law applies to the analysis of Nationwide's non-renewal clause in Getz' policy and to Groth's breach of contract claims.

2. Bad Faith.

At various points, Groth argues various grounds for bad faith on the part of Nationwide: the cancellation of the policy mid-term, the determination that Getz had moved outside the coverage area, the failure to clarify whether its action was a cancellation or a non-renewal, the denial of defense, and the refusal to reasonably settle a third-party claim against the insured. Groth contends Washington law governs its bad faith claim. Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, p. 15; *see also* Affidavit of Counsel (Jeffrey R. Owens) in Support of Plaintiff's Brief in Opposition to Defendant Nationwide Assurance Company's Motion for Summary Judgment and In Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 3, Exhibit 1, p. 9, ¶ 21. Paul cites no legal basis for his opinion that Washington's bad faith law should apply to this case, nor does he provide any analysis of the factors this Court must consider in making such a determination as to the choice of law..

Nationwide argues Idaho law applies to Groth's bad faith claim. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 5. Regarding the bad faith claims themselves, Nationwide only addresses the refusal to defend and/or indemnify claims. *Id.* at pp. 9-10.

In determining whether Idaho or Washington law applies to the bad faith claim regarding the contract in this case, the Court considers the "most significant relationship" test of the Restatement Second of Conflict of Laws. *Unigard Ins. Group v. Royal Globe Ins. Co.,* 100 Idaho 123, 126, 594 P.2d 633, 636 (1979); *Ryals v. State Farm Mutual Automobile Insurance Co.,* 134 Idaho 302, 305, 1 P.3d 803, 806 (2000);

Mulcahy v. Farmers Ins. Co. of Washington, 152 Wash.2d 92,100-101, 95 P.3d 313, 317-318 (Wash. 2004). The determination and application of the appropriate choice of law to be applied in a case is itself a question of law. *Ryals,* 134 Idaho 302, 304, 1 P.3d 803, 805. The contacts to consider in determining which state had the most significant relationship to the transaction are:

> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> (d) the location of the subject matter of the contract, and
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

Restatement (Second) of Conflict of Laws, § 188. These contacts are considered in applying the principles of § 6:

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6(2). *Unigard Insurance Group v. Royal Globe Insurance Co.,* 100 Idaho 123, 126, 594 P.2d 633, 636. Here, Groth and Nationwide both urge this Court to balance the factors in their favor. Groth argues that the contract was negotiated and issued in Washington and that Nationwide would have justifiably expected Washington law to apply. Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, p. 16. Nationwide argues the underlying cause of action was filed in Idaho, the accident took place in Idaho, Getz claimed Idaho residency when registering the vehicle, the vehicle was registered and titled in Idaho, and Groth lived in Idaho at the time of the accident. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 7.

While the contracting factors in Restatement (Second) of Conflict of Laws, § 188 weigh in favor of Groth's argument, the underlying contract is not all this Court must consider. The factors of Restatement (Second) of Conflict of Laws § 6(2) weigh in favor of Nationwide. Nationwide's argument for Idaho law is also well-taken as the accident underlying this claim occurred in Idaho. However, an action against an insurer for bad faith sounds in tort, not contract, in both Washington and Idaho law. *Butler,* 118 Wash.2d 383,389, 823 P.2d 499 (1992); *Robinson v. State Farm Mutual Auto Ins.,* 137 Idaho 173, 178, 45 P. 3d 829, 834 (2002). Thus, the factors enumerated by Nationwide are persuasive and this Court will apply Idaho law to the bad faith claims.

C. Propriety of Nationwide's Non-Renewal or Cancellation of the Policy

1. Introduction.

The most logical way to analyze these cross-motions for summary judgment is as follows: 1) "Did Nationwide "terminate" or "cancel" Getz' policy as Nationwide claims, or did Nationwide "non-renew" Getz' policy as Groth claims?"; and if the answer to that question is "non-renew" as Groth claims, then; 2) "What was the "term" or period of time that the policy covered?", so that it can be determined if Nationwide non-renewed the policy in "mid-term", as claimed by Groth.

2. It Does Not Matter if Nationwide "Cancelled" Getz' Policy or "Non-Renewed" Getz' Policy, Because in Either Event, Nationwide Gave Getz the Requisite Number of Days Notice, and Nationwide Gave Getz its Reason for Cancelling/Non-Renewing Getz' Policy.

Nationwide argues its policy coverage on Getz' vehicles properly expired at 12:01 a.m. on November 18, 2008, because Nationwide previously provided Getz with notification that it would no longer insure her vehicles as of that date. Memorandum in Support of Defendant Nationwide Assurance Company's Motion for Summary Judgment, p. 6. The policy states:

a) At the end of each policy period after the effective date of the policy, we will have the right to refuse to renew the entire policy or any of its coverages.

b) If we elect not to renew, we will mail or deliver written notice to the policyholder 20 days in advance of the date our action will take effect. Our notice will include the reason for our action. Mailing of this notice to the last known address or delivery of it to the policyholder will be considered proof of notice.

Affidavit of Counsel (Matthew F. McColl) in Support of Defendant Nationwide Assurance Company's Motion for Summary Judgment, filed September 18, 2008, Exhibit C, p. G1.

Nationwide argues Washington law governs the non-renewal clause and pursuant to RCW 48.18.291 (Cancellation of private automobile insurance by insurer - Notice - Requirements), proper 20-day notice was provided to Getz via written notice mailed to her last known address in Cheney, Washington, on September 28, 2005. That notice stated the reason for its action; "that she was moving out of its coverage area", and advised Getz that Nationwide was not renewing the policy upon the expiration of the date specified in the contract. Memorandum in Support of Defendant Nationwide Assurance Company's Motion for Summary Judgment, p. 7; Affidavit of Counsel (Matthew F. McColl) in Support of Defendant Nationwide Assurance Company's Motion for summary Judgment, filed September 18, 2008, p. 2, ¶ 5, Exhibit E, Affidavit of Michele O'Sullivan, Exhibit A. Nationwide argues that because it did not insure the vehicle on the date of the accident and had provided Getz with notice pursuant to statutory requirements, its motion for summary judgment should be granted. Memorandum in Support of Defendant Nationwide Assurance Company's Motion for Summary Judgment, p. 7.

RCW 48.18.291 allows cancellation of insurance predicated upon the use of a private passenger automobile after at least (no less than) 20 days following mailing of written notice of cancellation to the insured at the last address filed with the insurer, accompanied by the reason for cancellation. The pertinent portion of that statute reads:

> **Cancellation of private automobile insurance by insurer — Notice — Requirements**
>
> (1) A contract of insurance predicated wholly or in part upon the use of a private passenger automobile may not be terminated by cancellation by the insurer until at least twenty days after mailing written notice of cancellation to the named insured at the latest address filed with the insurer by or on behalf of the named insured, accompanied by the reason therefor.

That is the notice required for cancellation. Some confusion arises as RCW 48.18.290 would seem to require forty-five days' notice of cancellation. That confusion has been clarified as the Washington Court of Appeals has held that cancellation of private automobile insurance is specifically addressed in RCW 48.18.291 while RCW 48.18.290 addresses insurance cancellation in general, therefore, as the more specific rule, RCW 48.18.291 would prevail. *Bailey v. Allstate Ins. Co.,* 73 Wash.App. 442, 446, 869 P.2d 1110, 1113 (1994). In *Bailey,* the insured was granted summary judgment because Allstate had failed to give 45 days' notice of cancellation as required by RCW 48.18.290. 73 Wash.App. 442, 444, 869 P.2d 1110, 1112. On appeal, the trial court was reversed; the Court of Appeals held that RCW 48.18.291 governs notification requirements for the cancellation of all private automobile insurance policies and this statute required 20 days' notice "so there was never any confusion as to how much cancellation notice an insurer had to give." 73 Wash.App. 442, 447, 869 P.2d 1110, 1114.

Groth argues Nationwide's attempt to cancel Getz' policy was a breach of the insurance contract and an act of bad faith. Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment and Brief in Support of Plaintiff's Motion for Summary Judgment, p. 5. Groth urges that because the policy was written for a six-month period and the clause referenced by Nationwide falls under the sub-heading "Non-Renewal", the policy issued on September 26, 2005, would not have been eligible for non-renewal until

six months later, on March 26, 2006. *Id.* Groth argues the Washington statute cited by Nationwide deals with cancellation, not non-renewal, and that RCW § 48.18.2901 is applicable as it concerns non-renewal. RCW 48.18.2901 (Renewal Required- Exceptions) states:

> (1) Each insurer must renew any insurance policy subject to RCW 48.18.290 unless one of the following situations exists:
> (a)(i) For all insurance policies subject to RCW 48.18.290(1)(a):
> (A) The insurer must deliver or mail written notice of nonrenewal to the named insured at least forty-five days before the expiration of the policy; and
> (B) The notice must include the insurer's actual reason for refusing to renew the policy…

Groth argues the reason for Nationwide's focus on the code section dealing with cancellation, as opposed to non-renewal, is that non-renewal of a policy mid-term is simply not permitted. Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment and Brief in Support of Plaintiff's Motion for Summary Judgment, p. 6. The issue of mid-term non-renewal will be discussed in the next section of this opinion. Groth supports his argument with the Affidavit of Irving "Buddy" Paul [Affidavit of Counsel in Support of Plaintiff's Brief in Opposition to Defendant Nationwide Assurance Company's Motion for Summary Judgment and In Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 3, Exhibit 1.] Paul is an attorney currently licensed to practice in Idaho, who "For over fifteen years, the majority of my practice has been devoted to issues of coverage, claims handling and bad faith." *Id.,* pp. 1-2, ¶¶ 3, 4. Paul's expertise is detailed in paragraphs 1-8 of his affidavit. There is no doubt about Paul's qualifications.

However, Paul's affidavit is problematic. The opinions expressed by Paul in his affidavit are in large part unsupported by the evidence in this case, and his opinions as to the law are without citation and, likewise, are unsupported. While the lack of citation

and support is the primary problem, another issue is Paul's affidavit suffers from a lack of credibility because some of Paul's statements border on the incredible. For example, after discussing the fact that Nationwide's counsel in his summary judgment brief had stated, "The letter advised that Ms. Getz's policy would not renew as she was moving out of the subject service area", Paul opines: "In my opinion counsel misstates the letter and thereby adds to Nationwide's bad faith." *Id.,* p. 6, ¶ 15. First of all, this Court finds the statement of Nationwide's counsel to be a fair representation of Nationwide's September 28, 2005, letter to Getz. The letter tells Getz her policy is "terminated" because "you have moved out of our operating territory." Affidavit of Counsel (Matthew F. McColl) in Support of Defendant Nationwide Assurance Company's Motion for Summary Judgment, filed September 18, 2008, Exhibit E, Affidavit of Michele O'Sullivan, Exhibit A. Second, even if this Court could somehow find Nationwide's counsel "misstates the letter", Paul cites no authority and this Court can find no authority supporting Paul's proposition that a claim made by counsel for the insurance company in briefing can support a claim for bad faith.

If this is a "non-renewal" situation, RCW 48.18.2901 would apply, and Nationwide would have been required to deliver or mail written notice of nonrenewal to the insured at least 45 days before the expiration date, including in the notice the insurer's actual reason for refusing to renew the policy.

Either the twenty or forty-five day notice requirement was met as the September 28, 2005, letter regarding the November 18, 2005, expiration, provided a fifty-one days.

3. The Term of the Policy Was Six-Months, So There Was No "Mid-Term" Non-Renewal.

In his affidavit, Paul states that this type of unusual, atypical cancellation of a policy mid-term amounts to bad faith. Affidavit of Counsel in Support of Plaintiff's Brief

in Opposition to Defendant Nationwide Assurance Company's Motion for Summary Judgment and In Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 3, Exhibit 1 [Affidavit of Irving "Buddy" Paul, pp. 4-5, ¶¶ 12-14]. Specifically, Paul states:

> In my opinion Nationwide acted in bad faith, and violated both the terms of the policy and the law of the State of Washington, when it "nonrenewed" the Getz policy at a juncture not at the end of a six month term.

Id., p. 5, ¶ 14.

Giving Groth every benefit of the doubt that there was in fact a mid-term cancellation, the paramount problem in Paul's Affidavit is not once does he tell this Court what Washington insurance statute is violated by a mid-term cancellation. The closest Paul comes is:

> In addition to violating Washington's law with respect to proper nonrenewal of a policy, in my opinion Nationwide's conduct violated the following provisions of WAC 284-30-330, violation of which is a per se violation of Washington's Consumer Protection Actions: (1)(3)(4)(13).

Id., p. 5, ¶ 14. Washington Code § 284-30-330 lists "…unfair methods of competition and unfair or deceptive acts or practices in the business of insurance, specifically applicable to the settlement of claims." As specified by Paul, these practices include: "(1) Misrepresenting pertinent facts or insurance policy provisions", "(3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies", "(4) Refusing to pay claims without conducting a reasonable investigation", and "(13) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement." None of these discuss "mid-term cancellation".

Paul at no point in his lengthy affidavit tells us what the Washington statute is regarding "proper nonrenewal of a policy". The only statute Groth's attorney cites

regarding renewal/non-renewal is RCW 48.18.2901 (Renewal Required- Exceptions), which states:

> (2) Each insurer must renew any insurance policy subject to RCW 48.18.290 unless one of the following situations exists:
> (a)(i) For all insurance policies subject to RCW 48.18.290(1)(a):
> (A) The insurer must deliver or mail written notice of nonrenewal to the named insured at least forty-five days before the expiration of the policy; and
> (B) The notice must include the insurer's actual reason for refusing to renew the policy…

Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment and Brief in Support of Plaintiff's Motion for Summary Judgment, p. 5. Groth's argument is that since the Nationwide policy reads "[t]his policy is written for a six-month period" (citing page G1 of the policy, found at Affidavit of Counsel in Support of Defendant Nationwide Assurance Company's Motion for Summary Judgment, Exhibit C) and since the:

> …[d]eclarations page gives the effective date of the policy as September 26th, 2005", "Therefore, a six month policy beginning on September 26th, 2005 would not be eligible for non-renewal until March 26th, 2006. *See Affidavit of Irving "Buddy" Paul, Exhibit 1, ¶¶11, 12, 13.*

Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment and Brief in Support of Plaintiff's Motion for Summary Judgment, p. 5. While Paul does not directly state such in his affidavit, it is obviously inferred by Paul's statement that: "An insurance policy running from September 26 – November 18 is not a six month policy.!" Affidavit of Counsel in Support of Plaintiff's Brief in Opposition to Defendant Nationwide Assurance Company's Motion for Summary Judgment and In Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 3, Exhibit 1 [Affidavit of Irving "Buddy" Paul, p. 5, ¶ 13]. There are four things patently wrong with Groth's argument that because the policy is a six-month policy and the declarations page gives the policy effective date of September 26, 2005, the policy is ineligible for non-renewal until March 26, 2006.

First, while the "Renewal" section of "General Policy Conditions" of the policy reads: "This policy is written for a six month policy period", the Declarations sheet reads: "Policy Period From: Sep 26, 2005 to Nov 18, 2005." The declarations page defines the scope and breadth of the insurance contract. *See e.g., Olivine Corp. v. United Capitol Ins. Co.,* 147 Wn.2d 148, 156, 52 P.3d 494, 498 (2002) ("'insured' includes any person or organization designated as such in the declarations page"); *Smith v. Cont'l Cas. Co.,* 128 Wn.2d 73, 80, 904 P.2d 749, 752 (Wash. 1995); *Kelly v. Aetna Cas. & Sur. Co.,* 100 Wn.2d 401, 403, 670 P.2d 267, 268 (Wash. 1983).

The Nationwide policy itself states the "…Declarations, which are a part of this policy contract." Affidavit of Counsel in Support of Defendant Nationwide Assurance Company's Motion for Summary Judgment, Exhibit C, p. D1. The pertinent "declarations" page submitted begins with the language: "These Declarations are a part of the policy named above and identified by policy number below." *Id.,* p. 2, As mentioned above, that pertinent declarations page states: "Policy Period From: Sep 26, 2005 to Nov 18, 2005." *Id.* To place this in context, that pertinent declarations page reads:

> These Declarations are a part of the policy named above and identified by policy number below. They supersede any Declarations issued earlier. Your policy provides the coverages and limits shown in the schedule of coverages. They apply to each insured vehicle as indicated. Your policy complies with the motorists' financial responsibility laws of your state only for vehicles for which Property Damage and Bodily Injury Liability coverages are provided.
>
> Policy Number:
> 72 46 3 018756
>
> Issued:
> Sep 28, 2005
>
> Policyholder:
> (Named Insured)
> Anna Getz
> 620 Scenic Heights
> Cheney, WA
> 99004-1143
>
> Policy Period From:
> SEP 26, 2005 to NOV 18, 2005

Id. The most recent (and last) Declarations page issued on this policy clearly has the policy ending on November 18, 2005, the day before this accident.

Second, Paul's Affidavit goes on to claim: Moreover, no combination of the three declaration pages provided by Nationwide in support of its motion total six months." Affidavit of Counsel in Support of Plaintiff's Brief in Opposition to Defendant Nationwide Assurance Company's Motion for Summary Judgment and In Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 3, Exhibit 1 [Affidavit of Irving "Buddy" Paul, p. 5, ¶ 13]. That might have been true when Paul signed his Affidavit on November 5, 2008, but on December 8, 2008, Nationwide filed its "Affidavit of Counsel (Matthew F. McColl) in Support of Memorandum in Opposition to Plaintiff's Motion for Summary Judgment", which has attached as Exhibit A the initial Declarations page regarding Policy number 72 46 3 018756, insuring just Groth's 1994 Mercedes-Benz C280, which was issued on April 15, 2005, and states a "Policy Period From: MAY 18, 2005 to NOV 18, 2005"…**a six-month period**. On December 11, 2008, Groth filed the *Supplemental* Affidavit of Irving "Buddy" Paul, which simply states: "I have reviewed Defendant Nationwide's most recent discovery responses, including the most recently produced declarations page (See attached Exhibit 1), and have concluded that my opinions as contained in the initial Affidavit of Irving "Buddy" Paul remain unchanged." *Supplemental* Affidavit of Irving "Buddy" Paul, p. 1, ¶ 2.

In filing these affidavits about a week before oral argument on cross-motions for summary judgment, both parties have violated I.R.C.P. 56(c). However, no party has objected to the other party's untimely filing. Accordingly, both affidavits will be considered by this Court.

The fact that Paul's opinion that "no combination of the three declaration pages

provided by Nationwide in support of its motion total six months" did not change even when confronted with the original Declarations sheet which shows the policy ran for exactly six months does nothing to enhance Paul's credibility. Essentially, Paul's opinion is that every new Declarations sheet is a new policy and creates a new six-month policy period. Paul provides absolutely no legal basis for that opinion.

Third, Paul goes on to state that such would be "a violation of Idaho Code 41-1329(1)(3)(4)(10) and (14)" (*Id.,* p. 5, ¶ 14), but does not explain "why" this would be so. A thorough review of that statute and its subsections provides no support for Paul's assertions. Idaho Code § 41-1329 is Idaho's Unfair Claims Settlement Practices statute, which enumerates fourteen "unfair method[s] of competition or an unfair or deceptive act or practice" for those in "the business of insurance." I.C. § 41-1329. The subsections of that statue cited by Paul are: "(1) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue"; "(3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies"; "(4) Refusing to pay claims without conducting a reasonable investigation based upon all available information"; "(10) Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which the payments are being made" and "(14) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement." Not once does Paul tie any of these subsections into the facts of this case. More importantly, none of these subsections prohibit a "mid term cancellation".

Fourth, even Groth's expert Paul provides the basis for awarding summary judgment in favor of Nationwide and against Groth. Paul opines:

> 12. In my experience when a company issues a new declaration page showing the policy period beginning on the date of issuing the declaration page, this is treated as a new policy. In my experience, when a company intends to simply change vehicles on an existing policy it issues a notice of change and possibly a revised declarations page.

Id., p. 4, ¶ 12. This Court finds this is exactly what happened in the present case throughout 2005. No new policy was created by Nationwide. Other than the initial declarations page which establishes this as a six-month policy, none of the subsequent Declaration pages the Court has reviewed show "the policy period beginning on the date of issuing [that new] declaration page." Each of the subsequent Declaration pages reviewed by the Court are solely for the purpose of adding vehicles, deleting vehicles or changing the lienholder. All of those Declarations pages show the policy ending on November 18, 2005, consistent with the date shown at the inception of the policy. All the evidence reviewed by this Court indicates precisely the situation Paul outlines when he states: "In my experience, when a company intends to simply change vehicles on an existing policy it issues a notice of change and possibly a revised declarations page." *Id.* That is exactly what happened here. For Paul to continue to hold fast to his opinion that there was a mid-term policy non-renewal or termination in light of the facts and in light of this statement by Paul is simply incredible.

In Groth's briefing and at oral argument, Groth seems to fixate on what Nationwide did after the accident, and what Nationwide did according to its claims file to try to create a breach of contract and to try to create bad faith. In the claims file, someone from Nationwide on January 19, 2006, entered the following:

> ANNA'S POL CX EFF 11/18/05 – WAS A MID-TERM NON-RENEWAL DUE TO INDICATION SHE WAS MOVING TO IDAHO. NON-STD NOT SUPPORTED THERE.

Affidavit of Counsel (Jeffrey R. Owens) in Support of Plaintiff's Brief in Opposition to

Defendant Nationwide Assurance Company's Motion for Summary Judgment and In Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 11, Exhibit 9, page 42. There is no further information before the Court as to what all of that exactly means, but even taking the entry "…was a mid-term non-renewal…" as being self-defining, that entry does not create a dispute of material fact. The policy might have non-renewed due to Getz' move to Idaho, but it was not a "mid-term" non-renewal. All the evidence shows this was a non-renewal at the end of Getz' policy term. This cryptic entry in Nationwide's claim file does not create a disputed issue of fact.

4. Miscellaneous Arguments by Groth.

a. Nationwide's Duty to Get the Reason for Termination Right.

Groth also contends Nationwide's reason for non-renewal varied between Getz moving out of the coverage area and having already moved out of the coverage area. Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, p. 7. This is echoed in Paul's Affidavit:

> 16. The letter allegedly sent to Ms. Getz also indicates the reason for termination: "you have moved out of our operating territory." I have seen nothing whatsoever indicating that Ms. Getz moved or that there was any change in her residency status between her phone conversation with Nationwide on September 26 and Nationwide sending out its termination two days later. In fact, on page 6 of the transcript of the phone conversation between Ms. Getz and Nationwide she specifically states [sic] tells Nationwide:
>
> > I am planning on buying a house somewhere in Idaho or Washington. I am not sure yet. But all my stuff is in Cheney. That's my physical address at this point.
>
> There is noting to indicate that Ms. Getz did in fact buy a house in Idaho in those two days. Even more significant is the fact that Jonathon specifically told Ms. Getz that Nationwide WOULD USE the Washington address until Ms. Getz established a permanent address. In my opinion it is bad faith for Nationwide to raise Ms Getz's residency as an excuse for terminating a policy when a full conversation was had with respect to the status of such residency two days earlier and Nationwide has specifically agreed to her status.

Affidavit of Counsel in Support of Plaintiff's Brief in Opposition to Defendant Nationwide Assurance Company's Motion for Summary Judgment and In Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 3, Exhibit 1 [Affidavit of Irving "Buddy" Paul, p. 7, ¶ 16]. No facts or law (cases or statutes) are given by Paul to support his bald conclusion that: "In my opinion it is bad faith for Nationwide to raise Ms Getz's residency as an excuse for terminating a policy when a full conversation was had with respect to the status of such residency two days earlier and Nationwide has specifically agreed to her status." *Id.* This Court has found no authority that indicates that it is either a breach of contract or bad faith for an insurance company to state a wrong reason for termination. Even if that were the law, that every insurance company has a duty to "get it right", there is certainly evidence that Nationwide "got it right", as Getz bought the BMW in Idaho, titled it in Idaho, registered it in Idaho and used an Idaho address in doing so.

In response, Nationwide states Getz's policy was non-renewed at the expiration of the term, "which never changed, despite Getz' repetitive additions and subtractions of vehicles to the Policy." Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 2. Nationwide has provided the Court with Exhibits C and D to counsel's Affidavit in Support of Defendant's Motion for Summary Judgment, showing that policy number 72 46 3 018756 went through numerous changes regarding the vehicles covered, but the expiration date of November 18, 2005, remained constant. **That undisputed fact is crucial.**

b. Paul's Opinion that Nationwide's File is Incomplete.

Here, Getz was insured under policy number 72 46 3 018756 for various vehicles (an Infiniti, Cadillac, Mercedes, and the BMW at issue in this case) at various times

during the policy's term. As pointed out in Paul's Affidavit, missing from Nationwide's submitted exhibits is the "initial application".

> 10. The materials presented to me for review do not appear to constitute the entire file with respect to automobile insurance for Anna Getz. There is no indication of an application, and it is not possible to tell what coverage was in place at what time in the past.

Affidavit of Counsel in Support of Plaintiff's Brief in Opposition to Defendant Nationwide Assurance Company's Motion for Summary Judgment and In Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 3, Exhibit 1 (Affidavit of Irving "Buddy" Paul, p. 4, ¶ 10). Nowhere in Paul's affidavit does he ever state *why* not having Getz' "application" would in any way be relevant to the issue at hand. Paul does not explain *why* he has the opinion that "…it is not possible to tell what coverage was in place at what time in the past." Paul's opinion is directly contradicted by the declarations pages. All the declarations pages submitted clearly indicate the coverage for policy number 72 46 3 018756 would expire on November 18, 2005. *See* Affidavit of Counsel in Support of Defendant's Motion for Summary Judgment, Exhibits C and D. Exhibit C to the Affidavit of Counsel in Support of Defendant's Motion for Summary Judgment is the Affidavit of Michele O'Sullivan, Senior Personal Lines Underwriter for Nationwide Assurance Company. Attached to O'Sullivan's affidavit is "a true and accurate copy of the Nationwide Assurance Company policy in effect from September 26, 2005 to 12:01 a.m. Pacific Standard Time, November 18, 2005 for ANNA GETZ." Exhibit A to the Affidavit of Counsel in Support of Defendant's Motion for Summary Judgment, are the "declarations" pages of Getz' policy number 72 46 3 018756. The first declarations page was issued April 15, 2005, covering the policy period from May 18, 2005 to November 18, 2005, and only covering the "1994 Benz C280". While that declarations page does not mention the BMW (because Getz had not yet purchased it), the

declarations page sets out the period of the policy. The declarations page defines the scope and breadth of the insurance contract. *See e.g., Olivine Corp. v. United Capitol Ins. Co.,* 147 Wn.2d 148, 52 P.3d 494 (2002); *Smith v. Cont'l Cas. Co.,* 128 Wn.2d 73, 80, 904 P.2d 749, 752 (Wash. 1995); *Kelly v. Aetna Cas. & Sur. Co.,* 100 Wn.2d 401, 403, 670 P.2d 267, 268 (Wash. 1983). Next is the declarations page issued July 22, 2005, covering the policy period from July 19, 2005 to November 18, 2005, and covering two added cars, a "2002 Infi G20" and "1995 BMW 325" (the car which is the subject of this dispute).

Paul's opinion that the Nationwide's file incomplete lacks merit. While Paul's statement that "There is no indication of an application…" is true, Paul has failed to tell this Court why that fact has any legal significance. Paul's opinion that "…it is not possible to tell what coverage was in place at what time in the past" is simply false.

c. Lack of Bold Print in the September 28, 2005 Letter.

Groth first argues that the notice of cancellation/non-renewal does not comply with Washington law because the notice fails to state the policy will non-renew. Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, p. 8. Groth's claim is simply false, as the September 28, 2005, Nationwide letter to Getz tells her "We are unable to continue your coverage. This is required notice that your policy is terminated effective 12:01 a.m. local time on November 18, 2005." Affidavit of Counsel (Matthew McColl) in Support of Defendant Nationwide Assurance Company's Motion for Summary Judgment, p. 2, ¶ 5, filed September 13, 2008, Exhibit E, Affidavit of Michele O'Sullivan, Exhibit A. Then Groth argues that there is no bold print warning the policyholder of what is happening, and the letter fails to clarify whether this is a cancellation or non-renewal. Plaintiff's Brief in Opposition to Defendant's Motion for

Summary Judgment, p. 8. Groth states that "such conduct is in violation of Idaho's bad faith law and Washington's law with respect to proper nonrenewal, which is therefore a per se violation of Washington's Consumer Protection Actions." *Id.,* citing Affidavit of Paul at ¶¶ 14-15. Paul's Affidavit states:

> I have seen and reviewed dozens of notices of nonrenewal and cancellation issued by very many insurance companies. Each of these has the word "notice" in bold letters. Each of these specifically advises the policyholder whether the document represents a cancellation or a nonrenewal. Most such notices come in an envelope with bold type warning the policyholder that the envelope contains a significant notice. In my opinion the letter allegedly sent to Ms. Getz by Nationwide is not the typed notice required by both the policy and Washington law for either cancellation or non-renewal. To conform with these requirements it is my opinion that the word "Notice" be used, that the document contain bold print warning the policyholder what is happening, and that the document specify whether the company is non-renewing or cancelling.

Affidavit of Counsel in Support of Plaintiff's Brief in Opposition to Defendant Nationwide Assurance Company's Motion for Summary Judgment and In Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 3, Exhibit 1 [Affidavit of Irving "Buddy" Paul, pp. 6-7, ¶¶ 14].

While Paul states "To conform with these requirements [the policy and Washington law]', Paul cites to no requirement in Washington law (or Idaho law or the law from any other state or federal court), nor does he cite to any portion of the policy, which would demand bold print. Nor does Paul cite any Washington law or the law of any jurisdiction requiring clarification between cancellation versus non-renewal.

The only section in Nationwide's Policies dealing with cancellation is entitled: "Cancellation During Policy Period". Affidavit of Counsel (Matthew F. McColl) in Support of Defendant Nationwide Assurance Company's Motion for Summary Judgment filed September 18, 2008, Exhibit C, p. G2. That being the only section, it would certainly take care of any confusion between cancellation and non-renewal. Nothing in that section

requires bold print. That section parrots the Washington statutes discussed above, RCW § 48.18.2901 and RCW § 48.18.291, and states "Our notice will include the reason for our action." That is all that is required by Washington law, and it is all that is required under Getz' Nationwide policy. Nationwide has complied with Washington law and its own General Policy Conditions.

As mentioned above, at every juncture, with every Declarations page given to Getz by Nationwide (and there were several due to Getz' adding, substituting and deleting vehicles), and even in the September 26, 2005, telephone conversation (where Getz was told by Nationwide's representative "Jonathan", that: "Your term ends on November 18th, so that…") (Affidavit of Counsel (Jeffrey R. Owens) in Support of Plaintiff's Brief in Opposition to Defendant Nationwide Assurance Company's Motion for Summary Judgment and In Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 4, Exhibit 2, page 6), **Nationwide consistently told Getz her policy ended on November 18, 2005.** This Court wonders what benefit would be obtained by Nationwide using bold print in the September 28, 2005, letter to Getz, telling her that her policy ends on November 18, 2005, when that is the **only thing Getz had ever been told by Nationwide!**

D. Conclusion RE: Propriety of Nationwide's Non-Renewal or Cancellation of the Policy (No Breach of Contract by Naitonwide).

Even taking all facts and inferences in the light most favorable to the non-moving party, Groth, as this Court must do, as to all breach of contract claims brought by Groth, Nationwide is entitled to judgment as a matter of law, and Groth is not entitled to judgment as a matter of law. Nationwide has complied with Washington law and its own policy regarding non-renewal by providing Getz with timely written notice and the reason for its action.

E. Third-Party Recovery From Nationwide is Allowable.

Nationwide also argues that, even if Nationwide insured Getz' vehicle at the time of the accident, Groth, a third party, is estopped from recovering. Memorandum in Support of Defendant's Motion for Summary Judgment, p. 8. In support of its estoppel argument, Nationwide cites *Stonewall Surplus Lines Ins. C. v. Farmers Ins. Co.,* 132 Idaho 318, 322, 971 P.2d 1142, 1146 (1998) (a third party cannot directly sue an insurance company in an attempt to obtain the coverage allegedly due the insurer's policyholder). *See also, Pocatello Indus. Park Co. v. Steel West, Inc.,* 101 Idaho 783, 791, 621 P.2d 399, 407 (1980) ("It is well established that absent a contractual or statutory provision authorizing the action, an [employer's] insurance carrier cannot be sued directly and cannot be joined as a party defendant [in an action by industrial park and its liability insurer for indemnity] … We are aware of no direct action statute in Idaho."). Neither *Stonewall* nor *Steel West* concerned an assignment of a bad-faith cause of action, but instead, concerned a *direct action* by one party against another party's insurance company, which is not allowed under privity of contract. *Stonewall,* 132 Idaho 318, 230, 621 P.2d 399, 401; *Steel West,* 101 Idaho 783, 791, 621 P.2d 399, 407.

However, Groth has an assignment of Getz' bad faith claim against Nationwide. Groth essentially steps into whatever claim Getz might have. This was exactly what occurred in *Truck Insurance Exchange v. Bishara*, 128 Idaho 550, 555, 916 P.2d 1275, 1280 (1996). At least implicitly, *Bishara* seems to allow this assignment, given the fact that the majority opinion did not comment on Justice Schroeder's concurring opinion, which reads in its entirety:

> I concur in the result in this case without implying that an assignment of an insured's bad faith claim to a third party is valid. A third party could not

> bring a bad faith claim directly against the insurer, and there are considerations which may make it bad policy to allow the third party to bring that claim by way of assignment-for example the incentive to present settlement offers that are questionable to create a rejection by the insurance company that may thereafter be challenged as bad faith, thus bootstrapping a very limited policy to an open-ended policy. However, this question has not been presented in this appeal, and the result should not be read as approving assignment of bad faith claims by an insured to a third party.

128 Idaho 550, 559, 916 P.2d 1275, 1284. It would appear Idaho law still allows Getz to assign to Groth (or anyone else), whatever claim she might have against Nationwide.

Even though Nationwide has cited "direct action" cases, Nationwide's argument is that Card did not have permission to use Getz' BMW, and, under the terms of Nationwide's contract with Getz', there is no coverage in that situation. Memroandum in Support of Defendant Nationwide Assurance Company's Motion for Summary Judgment, pp. 8-9. Essentially, Nationwide argues since Card had no permission, there was no insurance available to Getz, and Groth is "estopped" from claiming any assigned rights from Getz. Another way of looking at this is that under *Bishara,* Getz can assign any claim she has to Groth (or anyone else), but what claim does she have to assign if there is no coverage due to Card not having permission to drive her car? Nationwide states that they are not obligated to provide coverage for Groth's injury because, at the time of the accident, Card was driving without Getz' permission. *Id.* In support of its argument Nationwide cites *Allied Group Ins. Co. v. Garcia,* 123 Idaho 733, 735, 852 P.2d 485, 487 (1993). However, in its Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, at p. 3, Nationwide states: "… as Plaintiff is likely correct that there are potential issues of fact relating to the permissive or non-permissive use of the vehicle…. Nationwide withdraws from its Motion, those claims." This dispute of fact regarding permissive versus non-permissive use makes resolution of Nationwide's "estoppel" argument impossible at summary judgment.

Groth argues that Getz' assignment of her claims entitles Groth to enforce any breach of contract claim Getz had against Nationwide. Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, p. 10. But, Groth's argument appears to be that Nationwide breached the contract at issue by failing to defend Getz regarding Groth's cause of action against her. *See* Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, pp. 10-11. This argument is not altogether logical and Groth does not set forth any legal basis in support of his argument (other than Paul's Affidavit which cites no authority either) for the proposition that Groth stands in the shoes of Getz, who in turn has a claim against Nationwide for failing to consider Groth's lawsuit brought against Getz and in failing to defend and compromised the claims brought against her. As discussed *supra,* Nationwide did not insure Getz at the time of the accident, and as Nationwide points out, there is no evidence in the record that Getz ever sought coverage or disputed denial of coverage. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 8.

While this Court finds Groth can take an assignment of Getz' rights, if Getz never sought out coverage for this accident from Nationwide (at least not initially as she knew she had no coverage on the date of the accident), then Groth's claim starts to look like a third party direct bad faith action which is not allowed. Groth may be pushing *Bishara* to the breaking point. This Court finds it need not decide whether that breaking point has been reached.

This Court finds Nationwide's argument that Groth, a third-party, is estopped from recovery is without merit. Groth steps into Getz' shoes and takes whatever claims Getz might have. However, as this Court has set forth above, Getz has no breach of contract claims against Nationwide, and as set forth immediately below, Getz has no

bad faith claims against Nationwide.

F. No Bad Faith By Nationwide.

An insurer's duty to indemnify is only triggered when the insurance company would be obligated to pay the underlying action regardless of how it fulfilled its duty to defend. *Hirst v. St. Paul Fire and Marine Ins. Co.,* 106 Idaho 792, 798, 683 P.2d 44, 446 (Ct.App. 1984). Its duty to defend, however, arises "where a complaint, read broadly, reveals a potential for liability that would be covered in the insured's policy." *Kootenai County v. Western Cas. & Sur.,* 113 Idaho 908, 910, 750 P.2d 97, 89 (1988). And this duty to defend exists as long as there is genuine dispute over facts bearing on the coverage under the policy or application of the policy's language to the facts. *Black v. Fireman's Fund Am. Ins.,* 115 Idaho 449, 455, 767 P.2d 824, 830 (Ct. App. 1989).

> The proper procedure for the insurer to take is to evaluate the claims and determine whether an arguable potential exists for a claim covered by the policy; if so, then the insurer must immediately step in and defend the suit. At the same time, if the insurer believes that the policy itself provides a basis, i.e. an exclusion, for noncoverage, it may seek declaratory relief.

Kootenai County, 113 Idaho 908, 911, 750 P.2d 97, 100. Any duty to defend is premised on a complaint revealing a potential for liability that would have been covered by the policy. Importantly, 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). Groth's argument, that his Complaint specifically alleged Getz had permitted Card to use the vehicle, does not reveal a potential for liability pursuant to which Nationwide owed a duty to defend and must fail. *See* Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, p. 12. Any potential for the claims to be

covered by the policy ceased to exist on November 18, 2005, when the policy was non-renewed. Having not renewed Getz' policy beyond 12:01a.m., on November 18, 2005, no policy was in place which would have arguably covered Groth's claim against Getz.

Because Groth steps into Getz' shoes on her bad faith claim, Groth has the burden of proof in demonstrating Getz' first-party bad faith insurance claim. *Robinson v. State Farm Mut. Auto Ins. Co.,* 137 Idaho 173, 176-78, 45 P.3d 829, 832-34 (2002), citing *White v. Unigard Mut. Ins. Co.,* 112 Idaho 94, 730 P.2d 1014 (1986). The elements Groth must prove are:

1) Nationwide intentionally and unreasonably denied or withheld payment;
2) the claim was not fairly debatable
3) the denial or failure to pay was not the result of a good faith mistake; and
4) the resulting harm is not compensable by contract damages.

Id. (they are only claiming failure to defend). In either an unreasonable denial or unreasonable delay first-party bad faith case, the insured (now Groth) must prove coverage in order to establish the *prima facie* case. 137 Idaho 173, 178, 45 P.3d 829, 834. Groth thus has to prove: "1) that coverage of her [Getz'] claim was not fairly debatable; 2) that she had proven coverage to the point that based on the evidence the insurer had before it, the insurer intentionally and unreasonably withheld her benefits; 3) that the delay in payment was not the result of a good faith mistake; and 4) that the resulting harm was not fully compensable by contract damages." *Id.* Groth has not proved any of these *prima facie* elements.

G. Getz' Assignment to Groth Limited to $25,000 Policy Limits.

Nationwide's final argument is that, even assuming that the policy covered Getz' BMW on the date of the accident, even if Getz gave Card permission to drive, and if

Getz has given a valid assignment of Getz' rights, such assignment would be limited to the $25,000 policy coverage. Memorandum in Support of Defendant's Motion for Summary Judgment, p. 9. Nationwide argues where an insurance company's contractual liability limitation is consistent with public policy, such a limitation is permitted, citing *Buckley v. Orem,* 112 Idaho 117, 123, 730 P.2d 1037, 1043 (Ct.App. 1996). Memorandum in Support of Defendant's Motion for Summary Judgment, p. 10. Nationwide states because its coverage was limited to the statutory minimum of $25,000 under I.C. § 49-117, the limitation was consistent with public policy and, therefore, proper and any extra-contractual amount sought under a third-party bad faith claim is not permitted. *Id.*

In response, Groth does not directly address this contention, and rather argues that Washington Law applies and allows recovery of the full amount of any reasonable settlement regardless of policy limits, citing *Safeco Ins. Co. of Am. v. Butler,* 118 Wash.2d 383, 392, 823 P.2d 499, 505 (1992).

As stated above, insurance policies are a matter of contract between the insurer and the insured. *Brinkman v. Aid Ins. Co.,* 115 Idaho 346, 352, 766 P.2d 1227, 1233 (1988). In *Mutual of Enumclaw v. Harvey,* 115 Idaho 1009, 772 P.2d 216 (1989), the Idaho Supreme Court held that a judgment creditor who secured a judgment against an insured was entitled to recover from the insurer under a homeowner's policy to the extent that the insurance afforded by the policy encompassed that judgment. 115 Idaho 1009, 1011, 772 P.2d 216, 218. Similarly, Washington courts give language in insurance policies a fair, reasonable and sensible construction and enforce it as written where it is not ambiguous; courts will not modify the contract or create ambiguity where none exists. *Pemco Mutual Ins. Co. v. Utterback,* 91 Wash.App 764, 767, 960 P.2d

453, 454 (1998).

Buckley involved an insurance company seeking determination of its liability on an unapportioned verdict against the insured, for a husband and wife, where the husband's damages alone could have exceeded the per-person limit of the policy. The Idaho Court of Appeals stated, in *dicta,* that an insurance company may limit its liability, as long as the limitation is clear, precise, and not inconsistent with public policy. 112 Idaho 117, 120, 730 P.2d 1037, 1040. In *Meckert v. Transamerica Ins. Co.,* 108 Idaho 597, 600, 701 P.2d 217, 220 (1985), the Idaho Supreme Court definitively stated that "an insurance carrier has the right to limit its coverage of risk and its liability, and in doing so may impose conditions and restrictions upon its contractual obligations which are not inconsistent with public policy."

In Washington, as Groth contends, an insurer who in bad faith refuses to settle a claim within the policy limits with the injured party may be held liable for the excess judgment. *See Greer v. Northwestern Nat. Ins. Co.,* 109 Wash.2d 191, 203 n. 6, 743 P.2d 1244, 1250. But this exception to the rule that liability for the amount of judgment entered in an underlying action extends only to the policy limit must be considered in light of the fact that "alleged claims which are clearly not covered by the policy relieve the insurer of its right and duty to defend." 109 Wash.2d, 191, 197, 743 P.2d 1244, 1247. Further, *Safeco* involved an insured's suit against the insurer, although the injured third-party agreed to limit their satisfaction of judgment to any proceeds from the insurer and any proceeds recoverable from a bad faith claim against the insurer which the Butler's assigned to them, it was the insureds, the Butlers, who alleged Safeco had acted in bad faith. 118 Wash.2d 383, 388, 823 P.2d 499, 502.

Groth, having not proven bad faith on the part of Nationwide as a matter of law,

has not demonstrated that Nationwide is liable for the entire $300,000.00 judgment. There are no disputed material facts concerning the policy limit was $25,000.00 and that such amount is at the statutory minimum limits for Idaho and Washington. I.C. § 49-117; RCW 46.29.090.

III. CONCLUSION AND ORDER.

For the reasons set forth above, this Court finds as a matter of law, that summary judgment in favor of Nationwide is appropriate as to the following issues: 1) Getz had no coverage with Nationwide on November 19, 2005, the date of the accident, as the policy expired the day before; and 2) even if there was coverage, Getz can assign her rights, but she can *only* assign the rights she has, and those rights are limited at the policy limit of $25,000.00. Memorandum in Support of Defendant Nationwide Assurance Company's Motion for Summary Judgment, p. 2, generally pp. 1-12. Because there is a dispute of fact, Nationwide is not entitled to summary judgment on the issue of whether Getz gave Card permission to drive her 1995 BMW. The issue of whether Getz can assign her rights is decided against Nationwide.

For the reasons set forth above, Groth is not entitled to summary judgment on his claims that Nationwide: 1) breached its contract with its insured Getz, and 2) Nationwide acted in bad faith in denying Getz a defense and is estopped from denying coverage and is liable for the full amount of the judgment entered against Getz in favor of Groth. Groth is entitled to summary judgment on the issue that Groth has standing to bring the bad faith action based on Getz' assignment of her first-party claims to Groth.

This Court's rulings that Nationwide did not breach its contract with Getz and did not commit bad faith with Getz, due to the fact that there was no coverage on November 19, 2005, are dispositive of all issues. Accordingly, this Court finds Nationwide is the

prevailing party.

IT IS HERBY ORDERED summary judgment in favor of Nationwide is GRANTED as to: 1) Getz had no coverage with Nationwide on November 19, 2005, the date of the accident, as the policy expired the day before; and 2) Getz can assign her rights, but she can *only* assign the rights she has, and those rights are limited at the policy limit of $25,000.00. Because there is a dispute of fact, Nationwide's motion for summary judgment on the issue of whether Getz gave Card permission to drive her 1995 BMW is DENIED. As a matter of law, Nationwide's issue of whether Getz can assign her rights to Groth is decided against Nationwide and in favor of Groth.

IT IS FURTHER ORDERED Groth's motion for summary judgment on his claims that Nationwide: 1) breached its contract with its insured Getz, and 2) Nationwide acted in bad faith in denying Getz a defense and is estopped from denying coverage and is liable for the full amount of the judgment entered against Getz in favor of Groth is DENIED. Groth's motion for summary judgment on the issue that Groth has standing to bring the bad faith action based on Getz' assignment of her first-party claims to Groth is GRANTED. As stated above, Groth prevails as a matter of law against Nationwide on the issue raised by Nationwide that Getz can assign her rights to Groth.

IT IS FURTHER ORDERED that this Court's rulings that Nationwide did not breach its contract with Getz and did not commit bad faith with Getz, due to the fact that there was no coverage at the time of the November 19, 2005, accident are dispositive of all issues, and that Nationwide is the prevailing party.

Entered this 9th day of February, 2009.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of January, 2009, 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 #**
Jeffrey R. Owens	664-1939	Jeremiah A. Quane/ Matthew F. McColl	208-345-8660

_____
Jeanne Clausen, Deputy Clerk