

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**

LAKELAND TRUE VALUE HARDWARE, LLC,)
)
 Plaintiffs,)
 vs.)
)
 THE HARTFORD FIRE INSURANCE COMPANY.)
)
 Defendants.)
)

Case No. **CV 2008 7069**

**MEMORANDUM DECISION AND
ORDER RE: LAKELAND TRUE
VALUE HARDWARE'S MOTION TO
RECONSIDER AND MOTION TO
CONSOLIDATE**

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

Plaintiff Lakeland True Value Hardware, LLC (Lakeland) owned a hardware store in Rathdrum, Idaho. Complaint, p. 1, ¶¶ 1, 4. On January 28, 2008, due to snow load, the roof of the hardware store collapsed, causing immediate cessation of the hardware store business. *Id.*, p. 2, ¶ 5. Lakeland was insured by The Hartford (Hartford). Lakeland made a claim under its policy with Hartford for Lakeland's loss. *Id.*, ¶ 6.

On September 4, 2008, Lakeland filed this lawsuit against Hartford, alleging delay in payment of the claim, bad faith and breach of contract. *Id.*, ¶¶ 7, 8. On August 20, 2009, Hartford filed a Motion for Summary Judgment, claiming there was no dispute of material fact that Hartford had paid Lakeland what was owed under the policy, both for the Business Personal Property loss and under the Business Income portion of the policy, and thus, both Lakeland's breach of contract claim and bad faith claim should be dismissed.

Memorandum in Support of Hartford's Motion for Summary Judgment, pp. 2-4. Oral

argument on the Hartford's Summary Judgment motion was held on November 4, 2009. At the conclusion of that hearing, the Court held Lakeland's bad faith (breach of the duty of good faith) claim must be dismissed, and summary judgment was granted in favor of Hartford because Lakeland had failed to prove the claim was not fairly debatable, primarily due to the fact that Lakeland's demands for amounts due under the policy kept changing. Lakeland's breach of contract claims relating to Hartford's determination of the "period of restoration" survived summary judgment and remained for determination at the jury trial. November 23, 2009, Order Granting Defendant's Motion to Compel and Order Granting Defendant's Summary Judgment in Part and Denying in Part, pp. 1-2.

On December 16, 2009, Lakeland filed a Motion for Reconsideration. The basis of Lakeland's motion to reconsider was because Hartford's motion for summary judgment was based on the theme that the Hartford had paid all that was owed Lakeland under the policy, such theme wasn't the primary issue; the primary issue was delay in making payments under the policy. Memorandum in Support of Motion for Reconsideration, pp. 1-2. On January 13, 2010, oral argument was held on Lakeland's Motion for Reconsideration. At the conclusion of that hearing, the Court denied Lakeland's Motion for Reconsideration, finding that the Court had considered Lakeland's claims of alleged delay in making payments at the summary judgment hearing and decision, and that the dispute in value of the claims was caused by Lakeland in the first instance, due to: 1) inconsistent and different figures at different times, and 2) due to Lakeland's failure to timely provide Hartford with material it had requested. At the conclusion of the Court's decision, counsel for Lakeland claimed "the Court just said...the Court is making a finding of fact that it is Lakeland's fault that Hartford didn't timely make payments...that is a finding of fact." Digital record, 12:33:08-27. The Court pointed out that the Court was finding that Lakeland had

not proven that the claim was not fairly debatable due to Lakeland's unsupported, inconsistent and changing demands upon Hartford.

In spite of that clarification by the Court, on February 4, 2010, Lakeland filed "Plaintiff's Second Motion for Reconsideration." This time Lakeland claimed: "The Court made findings of fact which it cannot do as a matter of law." Plaintiff's Memorandum in Support of Second Motion for Summary Judgment, p. 2. Lakeland states: "This appears to be a finding of fact that the delay was Lakeland's fault." *Id.* Lakeland then made the following argument which not only ignores this Court's findings, but shows complete misunderstanding of the law of bad faith in Idaho, the elements of that tort, and which party bears the burden of proof as to those elements:

The Court said it was not finding that it was Lakeland's fault, which only leaves that the Court found that the issues surrounding the information being provided to Hartford at least made it fairly debatable as to whether the claim was timely paid. Another way to say it is that the Court found that it is at least fairly debatable as to whether or not Hartford was reasonable to withhold payment given that a dispute about whether the information was being provided exists. Under the Court's holding, there could never be a bad faith case if there is a dispute centered on whether the insured provided the necessary information for the insurance company to timely pay the claim.

Id. It is unknown how Lakeland can make the claim that "...Hartford at least made it fairly debatable as to whether the claim was timely paid". In an insurance claim, the ball starts rolling with the insured making a claim upon the insurer, putting the insurer on notice of the claim. Then the insurer must evaluate that claim and act in good faith. But to prove bad faith, the insured must prove that: 1) the insurer denied a claim in which coverage was not fairly debatable, and 2) that the insured had proven coverage to the point that based on the evidence the insurer had before it, the insurer intentionally and unreasonably withheld the insured's benefits. *Robinson v. State Farm Mutual Automobile Insurance Company*, 137 Idaho 173, 178, 45 P.2d 829, 834 (2002). In the present case, this Court has found that

when Lakeland started the ball rolling by making its claim, Lakeland made unsupported, inconsistent and changing claim demands upon Hartford. It is entirely Lakeland's business for Lakeland to characterize that as this Court laying "fault" upon Lakeland, but such exercise is not productive. At summary judgment on Lakeland's bad faith claim, *fault* upon Lakeland is wholly *irrelevant*. However, proving the claim was *not* fairly debatable and proving coverage to the point that based on the evidence before the insurer, the insurer then intentionally and unreasonably withheld benefits is not only *relevant*, it is *dispositive*, and, most importantly, it is *Lakeland's burden* to prove at summary judgment. Because Lakeland made unsupported, inconsistent and changing claim demands upon Hartford, at summary judgment Lakeland could not prove its own claim was not fairly debatable, and Lakeland could not prove coverage to the point that based on the evidence Lakeland had given to Hartford that Hartford then intentionally and unreasonably withheld benefits.

This matter came before the Court for oral argument on February 22, 2010. At the conclusion of that hearing, this Court denied "Plaintiff's Second Motion for Reconsideration."

On March 9, 2010, Lakeland filed its Third Motion to Reconsider. That motion, in its entirety, reads:

Pursuant to I.R.C.P. 11, Plaintiff moves this Court for an Order reconsidering its prior order dismissing Plaintiff's bad faith claims in this matter. This Motion is based on every affidavit in the file, all memorandum filed by Plaintiff in support of any motions before this Court, including, but not limited to, Plaintiff's most recent Memorandum in Support [of] its motion to consolidate.

That same afternoon of March 9, 2010, the parties had a hearing on other pre-trial matters. At the time, the trial was scheduled for March 22, 2010. Lakeland had not noticed for hearing its Third Motion to Reconsider. However, at the March 9, 2010, hearing, counsel for the Hartford had no objection to hearing the motion on the limited issue of this

Court reconsidering its ruling regarding Dan Harper's testimony. March 9, 2010, hearing, Tr. p. 9, Ll. 5-16. At the conclusion of that hearing, this Court granted in part the motion to allow Dan Harper, plaintiff's expert, to testify that plaintiff's damages in this action total no more than \$19,052.00, the amount listed in Lakeland's 28-day disclosure. An order to that effect was signed by the Court on March 13, 2010. All other portions of Lakeland's Third Motion to Reconsider filed March 9, 2010, were denied at that time.

On April 6, 2010, Lakeland filed a "Motion to Reconsider (Amended)", which reads in its entirety:

Pursuant to I.R.C.P. 11, Plaintiff moves this Court for an Order reconsidering its prior order dismissing Plaintiff's bad faith claims in this matter, *and its order limiting the testimony pertaining to damages to the period ending January 28th, 2009.* This Motion is based on *the supporting memorandum and every affidavit* in the file, and all memorandum filed by Plaintiff in support of any motions before this Court.

The italicized is the only portions that were added to Lakeland's Third Motion to Reconsider filed March 9, 2010. Also on April 6, 2010, Lakeland filed "Plaintiff's Memorandum in Support of Motion to Reconsider Dismissal of Plaintiff's Bad Faith Claims." On April 14, 2010, Hartford filed "Hartford's Opposition to Plaintiff's Fourth Motion for Reconsideration."

On April 26, 2010, the day before oral argument, Lakeland filed a "Reply to Objection to Motion to Reconsider."

Lakeland also filed on April 6, 2010, an "Amended Motion to Consolidate (replaces motion filed 3-8-10)", a "Memorandum in Support of Motion to Consolidate", and an "Affidavit of Dan Harper in Support of Motion to Consolidate." On April 12, 2010, Hartford filed an "Affidavit of Counsel in Support of Defendant's Memorandum in Opposition to Plaintiff's Motion to Consolidate", an "Amended Affidavit of Counsel in Support of Defendant's Memorandum in Opposition to Plaintiff's Motion to Consolidate", and "Defendant's Memorandum in Opposition to Plaintiff's Motion to Consolidate".

On April 27, 2010, this Court heard oral argument on Lakeland's Motion to Reconsider and Motion to Consolidate.

This lawsuit is presently scheduled for a seven-day jury trial beginning May 25, 2010.

II. STANDARD OF REVIEW.

A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 472, 147 P.3d 100, 104 (Ct.App. 2006). The moving party has the burden of bringing new facts bearing on the correctness of the interlocutory order. *Devil Creek Ranch, Inc. v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 205, 879 P.2d 1135, 1138 (1994). If no new facts are presented, the party moving for reconsideration must demonstrate errors of law or fact in the initial decision. *Johnson v. Lambros*, 143 Idaho 468, 472-73, 147 P.3d 100, 104-05.

III. ANALYSIS.

A. LAKELAND'S MOTION TO RECONSIDER.

Lakeland asks this Court to reconsider two issues: 1) this Court's dismissal of Lakeland's bad faith delay claim (Plaintiff's Memorandum in Support of Motion to Reconsider Dismissal of Plaintiff's Bad Faith Claims, pp. 1-6); and 2) this Court's determination that Lakeland is limited at trial to damages incurred prior to January 28, 2009 (one year after the roof collapse), pursuant to the policy language. *Id.*, pp. 6-7.

1. Dismissal of Lakeland's Bad Faith Claims Against Hartford.

Lakeland argues that Hartford delayed payment because information had not been

given to their accountants, and not due to changing claims demands by Lakeland to Hartford. Plaintiff's Memorandum in Support of Motion to Reconsider Dismissal of Plaintiff's Bad Faith Claims, pp. 1-3. Lakeland argues there is no explanation for this delay by Hartford in the record. *Id.*, p. 2. Lakeland argues that at summary judgment Hartford did not raise the delay claim, so Lakeland was under no duty to put on evidence of the delay claim. *Id.* Lakeland claims Hartford had the information from Lakeland's accountants in March 2008. *Id.*, p. 3. Lakeland claims this Court's decision that "This Court has found that when Lakeland started the ball rolling by making its claim, Lakeland made unsupported, inconsistent and changing claim demands upon Hartford", has no support in the record and is not why Hartford withheld payment according to their own adjuster's (Ms. Reynolds) testimony. *Id.*, p. 5.

Hartford argues, as it did at summary judgment, that Dan Harper, Lakeland's expert, has "...admitted he cannot testify as to reasonableness." Hartford's Opposition to Plaintiff's Fourth Motion for Reconsideration, pp. 6-9. This Court agrees with this claim. Harper cannot testify as to reasonableness.

Hartford argues this Court did not err in finding Lakeland had failed to establish a bad faith claim. *Id.*, p. 9. In making that finding, Lakeland correctly notes this Court "...primarily focused on the inability of plaintiff to prove that its claim was not fairly debatable." *Id.* Nothing on reconsideration has changed this Court's opinion on that element of bad faith. Hartford also argues that Lakeland has not proven the next element of bad faith "coverage to the point that based on evidence Hartford had before it, Hartford intentionally and unreasonably withheld benefits." *Id.*, p. 10-13. As noted by the Hartford, it is on this element that Lakeland's failure to value its own claim causes it to be unable to prevail on Lakeland's burden of proof on this issue. Hartford at summary judgment, and

again on defending against this motion for reconsideration, points out the exact information requested by Hartford's accountants. *Id.*, p. 11; Affidavit of Melanie Copley, filed August 20, 2009, Exhibit C, bates stamp H00051-52, July 30, 2008, email from Ms. Kohler to plaintiff's counsel Art Bistline. Hartford also points out other evidence of record at summary judgment regarding information requested by Hartford. *Id.*, pp. 11-12, *citing* H00054-55; H00060-61; Affidavit of Arthur M. Bistline, September 4, 2009, Exhibit K. Finally, Hartford notes that Lakeland's own expert noted the Inventory Valuation Report was requested from Lakeland on numerous occasions by Hartford, and that Lakeland failed to create such until November 10, 2009. *Id.*, p. 13, *citing* Affidavit of Dan Harper in Support of Motion to Reconsider, filed February 4, 2010, at Exhibit C (January 15, 2010 Report), Tab 6. Lakeland replies simply that such is not evidence, but is simply argument. Reply to Objection to Motion to Reconsider, p. 2. That argument is not persuasive. The evidence is quoted immediately above.

Lakeland argues *Inland Group of Companies, Inc. v. Providence Washington Insurance Company*, 133 Idaho 249, 256, 985 P.2d 674, 681 (1999), states "...it is for a jury to determine whether the missing information justified the delay in payment." Nothing in *Inland Group* contains any such statement. *Inland Group* went to a jury trial on the issue of bad faith. The present case will not go to the jury on the bad faith issue because plaintiffs have failed in their burden of proof both at summary judgment and on reconsideration. Misstating *Inland Group* will not change this Court's decision in that regard.

Hartford argues Lakeland's claim was fairly debatable. *Id.*, pp. 13-15. The burden is on Lakeland to prove that their claim was not fairly debatable by Hartford. *Robinson v. State Farm Mutual Auto Ins. Co.*, 137 Idaho 173, 177, 45 P.3d 829, 833 (1999). While

Robinson certainly made it much more difficult to prove a bad faith claim (breach of the covenant of good faith) against an insured's own insurance company, that burden has always been on the insured. *Greene v. Truck Ins. Exchange*, 114 Idaho 63, 68, 753 P.2d 274, 279 (Ct.App. 1988). This Court finds nothing has changed on reconsideration in regard to this element of the tort of breach of the covenant of good faith.

Finally, Hartford argues that Lakeland has failed to address the remaining elements of bad faith: any improper delay was not the result of a good faith mistake by Hartford, and failure by Lakeland to prove extracontractual damages. The burden is likewise on Lakeland on these two elements. Lakeland did not prove these two elements at summary judgment and has failed to do so on reconsideration.

Lakeland's Motion for Reconsideration as to this Court's dismissal of Lakeland's bad faith claims against Hartford must be denied.

2. Limitation of Contract Damages to January 28, 2009.

The other issue Lakeland raises in its Motion for Reconsideration is:

Lakeland should be allowed to present evidence of damages incurred after January 28th, 2009 because the policy pays lost business income during the period of restoration and that the length of that period is a question of fact.

Plaintiff's Memorandum in Support of Motion to Reconsider Dismissal of Plaintiff's Bad

Faith Claims, p. 6. The argument continues:

The policy here provides that it will pay lost business income during the period of restoration. The period of restoration is not limited to any specific time, but is determined based on the existence of a set of facts pertaining to the reasonable to [sic] time [to] repair, replacement or rebuild the property at the damaged store or when the insured opens a new store elsewhere. A different section of the policy provides that Hartford will only pay lost business income for 12 months. These are two different limitations on the time frame during which lost business income will be paid and this renders the insurance contract subject to conflicting interpretations which must be resolved in favor of Lakeland.

Id., pp. 6-7. In conclusion, Lakeland argues: "In this case, coverage for lost business

income is granted in one place and then limited in two different ways—one by a time of 12 months and a second that is related to when the business could reasonably resume operations.” *Id.*, p. 7. Since the policy is ambiguous, it should be for the jury to determine which definition of “period of restoration” applies under the policy. *Id.*

Hartford correctly notes this is a wholly new argument by Lakeland, and thus, is incorrectly described a “Motion to Reconsider” by Lakeland. Hartford’s Opposition to Plaintiff’s Fourth Motion for Reconsideration, p. 16. This Court agrees. This argument has not been made by Lakeland prior to Lakeland’s current Motion for Reconsideration. As such, this aspect of Lakeland’s Motion for Reconsideration violates this Court’s statement that the Court will not consider any new issues and would consider no issues other than the Motion to Reconsider already filed by the March 9, 2010, hearing. March 9, 2010, hearing, Tr. p. 42, Ll. 12-16; March 24, 2010, hearing, Tr. p. 23, Ll. 6-11. This Court denies Lakeland’s Motion to Reconsider the limitation of damages to January 28, 2009, on the ground that Lakeland violated this Court’s order.

Additionally and alternatively, this Court denies Lakeland’s Motion to Reconsider the limitation of damages to January 28, 2009, on the merits. Such motion has no merit. There is no ambiguity in the policy, and this Court so finds as a matter of law. The policy simply and clearly limits the length of the “Period of Restoration” to no more than twelve months. Lakeland’s interpretation is not reasonable, and this Court so finds as a matter of law. *Armstrong v. Farmers Ins. Co. of Idaho*, 143 Idaho 135, 137, 139 P.3d 737, 739 (2006). Lakeland’s interpretation is but “...a tortured construction of an insurance contract in order to create an ambiguity and thus provide an avenue for coverage where none exists.” *Id.*, quoting *Mutual of Enumclaw Ins. Co. v. Roberts*, 128 Idaho 232, 236, 912 P.2d 119, 123 (1996).

Hartford cited three cases which support this conclusion: *Streamline Capital, LLC v. Hartford Cas. Ins. Co.*, 2003 WL 22004888, at n. 1 (S.D.N.Y. 2003); *Lava Trading Inc. v. Hartford Fire Ins. Co.*, 365 F.Supp.2d 434, 447 (S.D.N.Y. 2005); and *Optica, Inc., v. Metro Public Adjustment, Inc.*, 2005 WL 1719134 (D.N.J. 2005). Hartford's Opposition to Plaintiff's Fourth Motion for Reconsideration, p. 19. Counsel for Lakeland should be conversant with *Streamline* and *Lava Trading*, as both cases were discussed extensively in this Court's "Memorandum Decision and Order Re: Hartford's Motions in Limine", filed in this case on March 8, 2010. Hartford's Motion to "Reconsider" Limitation of Contract Damages to January 28, 2009, must be denied.

B. LAKELAND'S MOTION TO CONSOLIDATE.

Lakeland argues Kootenai County Case No. CV 2010-774 was filed by the employees of Lakeland because they did not receive the payroll they would have received had the store been operating. Memorandum in Support of Motion to Consolidate, p. 1. Lakeland argues its employees are third-party beneficiaries under the insurance contract Lakeland has with Hartford. *Id.*, p. 2. Lakeland claims its expert Dan Harper opines the employees are entitled to \$129,000.00 in damages.

Hartford argues I.R.C.P. 42(a) precludes consolidation. Defendant's Memorandum in Opposition to Plaintiff's Motion to Consolidate, p. 3. Hartford argues there are no common questions of fact involved with this new case and there are different questions of law. *Id.* Hartford points out there are only six weeks between the time the motion to consolidate was made and trial (now one week). *Id.*, p. 4. Hartford argues: the new case is not viable because third parties have no rights against an insurer as set forth in *Hettwer v. Farmers Ins. Co. of Idaho*, 118 Idaho 373, 797 P.2d 81 (1990) (*Id.*, pp. 5-6); the new case is not viable because Hartford has already paid all payroll expenses (*Id.*, pp.6-7); and

consolidation would unduly prejudice Hartford (*Id.*, p. 7). Hartford requests attorney fees under I.R.C.P. 11 and I.C. § 12-123 for having to defend against this motion, especially in light of the fact that Hartford's counsel had made Lakeland's counsel aware of the *Hettwer* decision prior to Lakeland filing its Motion to Consolidate. *Id.*, pp. 7-9; Exhibit A attached to Defendant's Memorandum in Opposition to Plaintiff's Motion to Consolidate, the March 2, 2010, letter from Keely Duke [Hartford's counsel] to Arthur Bistline [Lakeland's counsel].

At the time of oral argument on April 27, 2010, this Court did not have the benefit of having viewed the file in CV 2010-774. The Court has now reviewed that file, which consists only of a two-page Complaint and a summons.

At oral argument, counsel for Lakeland argued the cases it cited "Say that I can bring that direct action" on behalf of the employees against Hartford. Lakeland cited *Downing v. Travelers Ins. Co.*, 107 Idaho 511, 691 P.2d 375 (1984), for its holding that "...a beneficiary of such an insurance contract may maintain an action thereon, though not named therein, when it appears by fair and reasonable intendment that his rights and interests were in the contemplation of the parties, and were being provided for at the time of making the contract." Memorandum in Support of Motion to Consolidate, p. 3; *citing Downing*, 107 Idaho 511, 525, 691 P.2d 375, 389. "That intent must appear from the contract itself or be shown by necessary implication." *Id.* Lakeland argues "A provision in a contract which provides that employees will be paid the full amount they would have earned if the store would have been operating clearly was intended to benefit the employees." *Id.*

Kootenai County Case No. CV 2010-774 involves the employees of Lakeland as the plaintiffs, suing Hartford, alleging that Lakeland had a contract for insurance with Hartford,

and that such “policy provided that Defendant [Hartford] would pay payroll during the period of any restoration.” Complaint, p. 2. The Complaint alleges “Plaintiffs are third party beneficiaries of that contract.” Following the roof collapse on January 28, 2008,

Defendant [Hartford] was obligated to pay Plaintiffs [Lakeland’s employees] pending resumption of operations the payroll they would have earned if the store had been operating. Defendant has refused to do so which is a breach of the agreement.

Id. Lakeland cites no policy language in its Complaint in that case, nor in its Motion to Consolidate in the present case, which would show, as *Downing* requires: “That intent must appear from the contract itself or be shown by necessary implication.” 107 Idaho 511, 525, 691 P.2d 375, 389. In *Downing*, the Idaho Supreme Court disallowed the third party action because there was nothing under the contract between the employer and the insurance company that gave the employees or the heirs of employees any rights under the policy.

The plaintiff cannot point to any language in the policy to indicate that an employee or his heirs have any rights under the policy. The policy expressly provides otherwise. All payments are expressly made payable to the employer. Accordingly, there is no third party beneficiary claim available to plaintiff under our cases.

107 Idaho 511, 515, 691 P.2d 375, 379. Lakeland cites no policy language in its Complaint in Kootenai County Case No. CV 2010 774, nor in its Motion to Consolidate in the present case, giving the employees of Lakeland a third party claim against Hartford.

Even if Lakeland had pointed to some contract language in their policy with Hartford that supports their position, *Hettwer* is dispositive. The *Downing* case is dispositive as well.

After discussing a Maryland case (*Bean v. Allstate Ins. Co.*, 285 Md. 572, 403 A.2d 793, 796 (1979)), the Idaho Supreme Court in *Hettwer* wrote:

The court in *Bean* refused to allow a third-party claim against an insurer “in the absence of explicit authorization to that effect.” *Id.* at 796. The holding is consistent with our decisions on the question. *Pocatello Indus. Park Co. v.*

Steel West, Inc., 101 Idaho 783, 791, 621 P.2d 399, 407 (1980); *Downing v. Travelers Ins. Co.*, 107 Idaho 511, 514, 691 P.2d 375, 378 (1984). This is no basis for the Hettwers' third-party action against Farmers.

118 Idaho 373, 374, 797 P.2d 81, 82. While it will be up to Judge Haynes at a later time to decide the fate of Kootenai County Case No. CV 2010-774, for purposes of the Motion to Consolidate in this case, *Steel West*, *Downing*, and especially *Hettwer* make it quite clear there is no direct action that can be brought by Lakeland's employees against Hartford.

Regarding Hartford's request for attorney fees under I.R.C.P. 11 and I.C. § 12-123 for having to defend against the motion to consolidate, this Court finds such to be well taken. This Court grants attorney fees against Lakeland and in favor of Hartford for several reasons. First, due to the fact that Hartford's counsel had made Lakeland's counsel aware of the *Hettwer* decision prior to Lakeland filing its Motion to Consolidate. Defendant's Memorandum in Opposition to Plaintiff's Motion to Consolidate, pp. 7-9; Exhibit A attached to Defendant's Memorandum in Opposition to Plaintiff's Motion to Consolidate, the March 2, 2010, letter from Keely Duke [Hartford's counsel] to Arthur Bistline [Lakeland's counsel]. Second, even the case cited by Lakeland, *Downing*, not only cuts against its Motion to Consolidate, but is dispositive: "This type of direct action has never been recognized." 107 Idaho 511, 514, 691 P.2d 375, 378. Third, because Lakeland has cited no language in the policy which would allow this third party beneficiary action. Thus, Lakeland's Motion to Consolidate is not supported by fact or by law.

IV. ORDER.

IT IS HERBY ORDERED Lakeland's Motion to Reconsider this Court's dismissal of Lakeland's bad faith claims against Hartford on summary judgment is **DENIED**.

IT IS FURTHER ORDERED Lakeland's Motion to "Reconsider" this Court's prior ruling on limitation of contract damages to January 28, 2009 (really a *new* motion to exceed

that prior ruling on limitation of contract damages due to a *newly* claimed ambiguity in the insurance contract) is **DENIED**.

IT IS FURTHER ORDERED Lakeland's Motion to Consolidate is **DENIED**.

IT IS FURTHER ORDERED Hartford's request for attorney fees for defending Lakeland's Motion to Consolidate is **GRANTED**.

Entered this 17th day of May, 2010.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 17th day of May, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>		
Arthur Bistline	676-8680	Hon. Lansing Haynes	Re: CV 2010 774
Keely E. Duke	208-395-8585		

Jeanne Clausen, Deputy Clerk