

IN THE SUPREME COURT OF THE STATE OF IDAHO

COUNTY OF BOISE, a political
subdivision of the State of Idaho,

Plaintiff/Appellant,

vs.

IDAHO COUNTIES RISK
MANAGEMENT PROGRAM,
UNDERWRITERS (ICRMP), and
DOES I through X,

Defendant/Respondent.

Supreme Court No. 37861-2010

District Court No. 2009-20083

APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County

Honorable Cheri C. Copsey, Presiding

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I.

STATEMENT OF THE CASE

A. Nature of the Case.

This case arises from a coverage dispute between Idaho Counties Risk Management Program Underwriters ("ICRMP") and its insured, the County of Boise. Boise County filed a Complaint for Declaratory Relief in relation to ICRMP's decision to deny coverage for the County of Boise, for both defense and indemnity, for the cause of action brought by Alamar Ranch, LLC against County of Boise in United States District Court for the District of Idaho, Case No. 1:09-CV-00004 BLW ("Alamar Litigation"). Boise County alleges that ICRMP has a duty to defend it in the Alamar Litigation as the plain language of the ICRMP Policy provides coverage or, at the very least, there is an arguable potential for the coverage under the policy and a duty to defend is owed.

B. Course of Proceedings.

In January of 2009, Alamar Ranch LLC ("Alamar") filed a civil rights Complaint against County of Boise ("Boise County"), a political subdivision of the state of Idaho, alleging civil rights violations of the Fair Housing Act, 42 U.S.C. §3601 *et seq.* R. Vol. I, p. 89-96. Boise County tendered the lawsuit to its insurer, ICRMP, and requested that ICRMP defend the lawsuit under Boise County's Public Entity Multi-Lines Insurance Policy in effect during the relevant time periods, Policy No. 28A01008100108 (hereinafter referred to as "the ICRMP Policy" or "the Policy"). ICRMP denied coverage and refused to defend the Alamar Litigation, claiming that the allegations in Alamar's Complaint were not covered under the terms of the ICRMP insurance policy. Boise

County then filed a Complaint for Declaratory Relief on October 21, 2009, seeking a declaration that ICRMP had a duty to defend Boise County against Alamar's lawsuit. R. Vol. I, p. 5-12.

ICRMP filed a Motion for Summary Judgment on February 10, 2010. On March 24, 2010, Boise County filed a Motion for Partial Summary Judgment Regarding the Duty to Defend and in Opposition to Defendant's Motion for Summary Judgment, a corresponding memorandum, and Affidavits of Robert T. Wetherell and Timothy McNeese in support of the same. R. Vol. I, p. 80-183. Plaintiff filed a Second Affidavit of Robert T. Wetherell on May 17, 2010. R. Vol. I, p. 184-210. On May 20, 2010, the district court held oral argument on the parties' cross motions for summary judgment. *See* Tr. Vol. I, p. 1-47. The district court granted Defendant's Motion for Summary Judgment on May 28, 2010. R. Vol. I, p. 211. This timely appeal followed. R. Vol. I, p. 232-236.

C. Statement of Facts.

1. General Allegations of the Underlying Complaint.

On or about January 8, 2009, Alamar filed a *Complaint and Demand for Jury Trial* against Boise County in United States District Court for the District of Idaho. R. Vol. I, p. 89-96. After setting forth the parties, jurisdiction and venue requirements of the Complaint, the Plaintiff makes "general allegations" beginning at Paragraph 4. R. Vol. I, p. 90. The very first paragraph of the general allegations section states: "This case arises out of Boise County's violations of the Fair Housing Act, 42 U.S.C. §3601 *et seq.* ("FHA")." R. Vol. I, p. 90.

Alamar makes this allegation in connection with a request of Boise County Commissioners to allow Alamar to operate a residential treatment facility and private school on a portion of a 123-

acre parcel located in Boise County, Idaho. R. Vol. I, p. 89-90. The residential treatment facility was designed to house individuals allegedly protected under the Fair Housing Act, namely teenage males suffering from mental and/or emotional illnesses and/or drug/alcohol addiction. R. Vol. I, p. 90.

Alamar submitted its application for a conditional use permit to Boise County Planning and Zoning Commission ("P&Z") on April 19, 2007, and public hearings on that application were held on August 2, 2007 and August 15, 2007. R. Vol. I, p. 90-91. At the conclusion of the August 15, 2007 hearing, P&Z arrived at a 3-3 tie vote on the motion, which was deemed by Boise County to be a denial of the application. R. Vol. I, p. 91. In its written decision denying Alamar's application, issued on September 28, 2007, P&Z stated that the residential treatment facility was not appropriate in the proposed location at that time and that the County lacked sufficient infrastructure or money to monitor and enforce the conditions proposed for approval of the application. R. Vol. I, p. 91-92, ¶11. Subsequently, Alamar challenged the decision as a civil rights violation before the Boise County Board of Commissioners. R. Vol. I, p. 92.

Alamar appealed to Boise County Board of Commissioners ("Board") on October 18, 2007, and informed the Board of County Commissioners that it had a duty under the Fair Housing Act to approve the conditional use permit and allow the project in order to make housing available to the "handicapped" youth the facility was designed to serve. R. Vol. I, p. 92, ¶12. Furthermore, Alamar requested Boise County make reasonable accommodations under Title VIII of the 1968 Civil Rights statute to allow the residential treatment facility to be built. R. Vol. I, p. 92, ¶12.

On January 28, 2008, the Board held a public hearing and deliberated on the record on March 10, 2008. R. Vol. I, p. 92, ¶¶13-14. The Board reversed the denial of the application but imposed various restrictions on the project, which Alamar claims violated the civil rights of the handicapped by making the proposed use of the property impossible. R. Vol. I, p. 92-93.

Other allegations in the Alamar Complaint include claims: 1) that Boise County violated Title VIII of the Civil Rights Act of 1968 by refusing to make reasonable and necessary accommodations to allow the treatment facility to be built by "placing onerous, arbitrary and unreasonable conditions on the approval of the application which destroyed the feasibility of the project" (Count One) R. Vol. I, p. 94, ¶¶23-25; 2) that Boise County effectively denied the permit by "placing onerous, arbitrary and unreasonable conditions on the permit"(Count Two) R. Vol. I, p. 94, ¶29; and 3) that Boise County unlawfully interfered with the exercise of the civil rights of would-be residents to housing under the FHA by obstructing the construction or availability of housing to them (Count Three) R. Vol. I, p. 95, ¶¶35-36.

2. The ICRMP Policy.

The Errors and Omissions Insuring Agreement of the ICRMP Policy (hereinafter "Section IV") provides:

We agree, subject to the terms and conditions of this Coverage, to pay on your behalf all sums which you shall become legally obligated to pay as damages because of any claim which is first made against you during this Policy Period, arising out of any wrongful act by you.¹

¹Boldfaced terms found in original.

R. Vol. I, p. 128. The relevant terms of that provision are defined as follows:

"Claim" means a demand received by you for money damages alleging a wrongful act of a tortious nature by you . . .

"Wrongful Act" means the negligent performance of or failure to perform a legal duty or responsibility in a tortious manner pursuant to the Idaho Tort Claims Act or be *premised upon allegations of unlawful violations of civil rights pursuant to Federal law* arising out of public office or position.

R. Vol. I, p. 128 (italics added).

The following exclusions contained in the ICRMP Policy are relevant to a determination of whether there is coverage for the civil rights Complaint filed by Alamar:

Exclusions Applicable to Errors and Omissions Insuring Agreement

The Errors and Omissions Insuring Agreement does not cover any claim:

...

2. Arising out of any dishonest, fraudulent, criminal, malicious, deliberate or intended **wrongful act** committed by you or at your direction.

...

4. Resulting from a **wrongful act** intended or expected from the standpoint of any **insured** to cause damages. This exclusion applies even if the **damages** claimed are of a different kind or degree than that intended or expected.

...

12. To any **claim** of liability arising out of or in any way connected with the operation of principles of eminent domain, condemnation proceedings, inverse condemnation, annexation, regulatory takings, land use regulation or planning and zoning activities or proceedings, however characterized, whether such liability accrues directly against you or by virtue of any agreement entered into by or on your behalf.

...

16. No **claim** exists where the alleged harm for which compensation is sought derives from the performance or nonperformance of terms of a contract, concerns the measure of nonperformance or payment related to contract performance, derives from fines, penalties or administrative sanction imposed by a governmental agency, or is generated by intergovernmental handling or allocation of funds according to the law. The claims for which this section provides defense and indemnification must arise

12/
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out of conduct of a tortious nature or be premised upon allegations of unlawful violation of civil rights pursuant to state or federal law.

R. Vol. I, p. 129-130.

II.
ISSUES PRESENTED ON APPEAL

A. Did the trial court err in granting Defendant's Motion for Summary Judgment and in denying Plaintiff's Motion for Partial Summary Judgment Regarding the Duty to Defend?

1. Did the trial court err in finding that ICRMP had no duty to defend its insured, Boise County, in the Alamar Litigation under the Errors and Omissions Section of the ICRMP Policy?

a. Did the trial court err in finding that a comparison of the underlying complaint with the insurance policy did not reveal a potential for coverage?

b. Did the trial court err in finding that the ICRMP Policy clearly and unambiguously excludes coverage for all of the claims alleged by Alamar against Boise County?

i. Did the trial court err in finding that the Alamar Complaint only alleged intentional wrongful acts against Boise County, which were excluded from coverage under the ICRMP Policy's intentional act exclusions?

ii. Did the trial court err in interpreting the planning and zoning exclusion of the Errors and Omissions Section of the ICRMP Policy too broadly

and in a manner that excluded the claims alleged against Boise County from coverage under the ICRMP Policy?

- iii. Did the district court err in finding that the exclusions under the Errors and Omissions Section of the ICRMP Policy, including the provision under that Section that resurrected coverage for some excluded claims, were unambiguous as applied to the facts of this case?

III. ARGUMENTS AND AUTHORITY

A. Standard of Review.

When reviewing a motion for summary judgment, the Supreme Court's review is the same as that required of the district court when ruling on the motion. *Brooks v. Logan*, 130 Idaho 574, 576, 944 P.2d 709, 711 (1997). That is, the Court should liberally construe all controverted facts in favor of the non-moving party and draw all reasonable inferences in favor of that party. *Mitchell v. Siqueiros*, 99 Idaho 396, 398, 582 P.2d 1074, 1076 (1978). Under Idaho Rule of Civil Procedure 56(c), a grant of summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A motion for summary judgment must be denied, however, if the Court determines that reasonable people could reach different conclusions or draw conflicting inferences from the evidence. *Brooks*, 130 Idaho at 576, 944 P.2d at 711 (citation omitted).

B. Interpretation of Insurance Policies in Idaho.

In Idaho, insurance policies are to be interpreted in accordance with general rules of contract law "subject to certain special canons of construction." *Arreguin v. Farmers Insurance Company of Idaho*, 145 Idaho 459, 461, 180 P.3d 498, 500 (2008) (quoting *Clark v. Prudential Prop. & Cas. Ins. Co.*, 138 Idaho 538, 540, 66 P.3d 242, 244 (2003)). When reviewing and interpreting contracts of insurance drafted by an insurance company, "any ambiguity that exists in the contract 'must be construed most strongly against the insurer.'" *Arreguin*, 145 Idaho at 461, 180 P.3d at 500 (quoting *Farmers Ins. Co. of Idaho v. Talbot*, 133 Idaho 428, 432, 987 P.2d 1043, 1047 (1999)). A provision that seeks to exclude coverage must be strictly construed in favor of the insured. *Moss v. Mid-America Fire and Marine Ins. Co.*, 103 Idaho 298, 300, 647 P.2d 754, 756 (1982). Since an insurance policy is typically drafted by the insurer, the insurer has the burden of using "clear and precise language if it wishes to restrict the scope of coverage and exclusions not stated with specificity will not be presumed or inferred." *Clark*, 138 Idaho at 541, 66 P.3d at 245. *See also Harman v. Northwestern Mut. Life Ins. Co.*, 91 Idaho 719, 721, 429 P.2d 849, 851 (1967) (concluding that "the burden was upon the defendant to show that the loss or injury was from a risk or cause excepted from the insuring provision.").

It is a question of law as to whether an insurance policy is ambiguous. *Purvis v. Progressive Cas. Ins. Co.*, 142 Idaho 213, 216, 127 P.3d 116, 119 (2005). In determining whether a policy is ambiguous, the relevant inquiry is whether the language is "reasonably subject to differing

interpretations.” *Clark*, 138 Idaho at 541, 66 P.3d at 245 (citing *Moss*, 103 Idaho at 300, 647 P.2d at 756).

In the absence of ambiguity, interpretation of the unambiguous contract is a question of law. *DeLancey v. DeLancey*, 110 Idaho 63, 65, 714 P.2d 32, 34 (1986). The court in *Stein-McMurray Insurance Inc., v. Highlands Ins. Co.*, 95 Idaho 818, 820, 520 P.2d 865, 867 (1974) held that “where a word or phrase used in an insurance contract has a settled legal meaning or interpretation, that meaning or interpretation will be given [effect] even though other interpretations are possible.” If there is no settled legal meaning, courts will determine coverage “according to the plain meaning of the words employed.” *Kromrei v. AID Ins. Co. (Mut.)*, 110 Idaho 549, 551, 716 P.2d 1321, 1323 (1986). These general rules of interpretation are tempered by the following:

It is a long established precedent of this Court to view insurance contracts in favor of their general objectives rather than on a basis of strict technical interpretation of the language found therein . . . [A]n insurance contract is to be construed most favorably to the insured and in such a manner as to provide full coverage for the indicated risks rather than to narrow protection. This Court will not sanction a construction of the insurer's language that will defeat the very purpose or object of the insurance.

Bonner County v. Panhandle Rodeo Ass'n, Inc., 101 Idaho 772, 776, 620 P.2d 1102, 1106 (1980).

Under Idaho law, an insurer's duty to defend is separate from its duty to indemnify. *Hirst v. St. Paul Fire & Marine Ins. Co.*, 106 Idaho 792, 798, 683 P.2d 440, 446 (Ct. App. 1984). The duty to defend is much broader than the duty to pay damages under an insurance policy. *Id.*

C. The Trial Court Erred in Finding That ICRMP Had No Duty To Defend Its Insured, Boise County, in the Alamar Litigation Under the Errors and Omissions Section of the ICRMP Policy.

In Idaho, an insurance company's duty to defend "arises upon the filing of a complaint whose allegations, in whole or in part, read broadly, reveal a potential for liability that would be covered by the insured's policy." *Hoyle v. Utica Mutual Ins. Co.*, 137 Idaho 367, 371-72, 48 P.3d 1256, 1260-61 (2002). The Idaho Supreme Court has further elaborated:

[W]here there is doubt as to whether a theory of recovery within the policy coverage has been pleaded in the underlying complaint, or which is potentially included in the underlying complaint, the insurer must defend regardless of potential defenses arising under the policy or potential defenses arising under the substantive law under which the claim is brought against the insured . . . The proper procedure for the insurer to take is to evaluate the claims and determine whether an arguable potential exists for a claim to be covered by the policy; if so, then the insurer must immediately step in and defend the suit.

Hoyle, 137 Idaho at 372, 48 P.3d at 1261 (quoting *Kootenai County v. Western Cas. and Sur. Co.*, 113 Idaho 908, 910-11, 750 P.2d 87, 89-90 (1988)).

Idaho courts have demonstrated a "progressive attitude" in their treatment of claims for breach of the duty to defend. *Black v. Fireman's Fund American Insurance Co.*, 115 Idaho 449, 455, 767 P.2d 824, 830 (Ct. App. 1989). While an insurer's duty to defend is "framed" by the allegations of a plaintiff's complaint, "those pleadings are not to be read narrowly. Rather, a court must look at the full breadth of the plaintiff's claim." *Hirst*, 106 Idaho at 798, 683 P.2d at 446.

In accordance with the canons of insurance contract interpretation, any doubts as to whether there is coverage must be resolved in favor of the insured, and therefore, an insurer seeking to

establish that it has no duty to defend confronts a difficult burden. *See Construction Management Systems, Inc. v. Assurance Co. of America*, 135 Idaho 680, 683, 23 P.3d 142, 145 (2001). Even if an insurer believes that the policy itself provides a basis for noncoverage, i.e., an exclusion, it may seek declaratory relief, but “**this does not abrogate the necessity of defending the lawsuit until a determination of noncoverage is made.**” The insurer should not be allowed to “guess wrong” as to the potential for coverage.” *Kootenai County*, 113 Idaho at 911, 750 P.2d at 90 (emphasis added). *Compare with Village of Waterford v. Reliance Ins. Co.*, 226 A.D.2d 887, 889-890 (N.Y. App. Div. 1996) (Appellate Division affirmed decision of lower court that liability insurer did not have a duty to indemnify its insured based on policy exclusions, where insurer initially paid counsel fees for its insured under reservation of rights to deny coverage and only later, as a result of decision of district court that found insured guilty of violation of FHA, disclaimed coverage based on said exclusions).

1. **A comparison of the insuring agreement with the underlying complaint in the instant case reveals a potential for coverage.**

In determining whether a duty to defend exists, a majority of courts have adopted the Four Corners Rule, also known as the Eight Corners Rule, which requires the court to compare the four corners of the insurance policy against the four corners of the underlying complaint. *See generally* John B. Mumford & Kathryn E. Kransdorf, *CAIC Int'l, Inc. v. St. Paul Fire & Marine Ins. Co.—Courts Continue to Struggle with the Boundaries of the “Eight Corners Rule,”* COVERAGE, Nov/Dec 2009, at 18 (discussing the issues surrounding the application of this rule). R. Vol. 1, p. 155-159. If any of the claims in the underlying complaint are potentially covered by the policy, the

insurer is obligated to provide a defense. In many states, courts struggle over the application of this rule, and there is disagreement over whether the court should be allowed to look to documents outside of the Four Corners in deciding the duty to defend. In applying the rule in Idaho, the Idaho Supreme Court has generally focused on the allegations found in the underlying complaint but has also looked to matters intrinsic to the complaint, such as the elements of an underlying cause of action, in determining whether a duty to defend exists. *See Hoyle*, 137 Idaho at 373, 48 P.3d at 1262 (discussed *infra*).

a. Claims of the Underlying Complaint.

The very first paragraph of the General Allegations section of the Alamar Complaint states: “This case arises out of Boise County’s violations of the Fair Housing Act, 42 U.S.C. §3601 *et seq.* (“FHA”).” R. Vol. I, p. 90, ¶4. Accordingly, in order to understand the claims being made against Boise County, and thus to determine if those claims are potentially covered by the ICRMP Policy, a brief summary of Title VIII of the 1968 Civil Rights Act is necessary.

Title VIII of the Civil Rights Act of 1968 (“Title VIII”), popularly known as the Fair Housing Act (“FHA”), was enacted to prohibit housing discrimination based on race, color, religion, or national origin. H.R. Rep. No. 100-711, at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2176. While the Fair Housing Act of 1968 expressed a clear national policy against discrimination in housing, it provided only limited means for enforcing the law. *Id.* The shortcomings of the FHA were addressed by the Fair Housing Amendments Act of 1988 (“FHAA”), 42 U.S.C. §§ 3601-3616, which strengthened enforcement mechanisms and also expanded civil rights protection partly to

include people with disabilities. *Id.* As amended by the FHAA, the FHA provides, in part, that it is unlawful to:

discriminate in the sale or rental, *or to otherwise make unavailable* or deny, a dwelling to any buyer or renter because of a handicap of--

- (A) that buyer or renter;
- (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
- (C) any person associated with that buyer or renter.

42 U.S.C. §3604(f)(1) (emphasis added). In passing the FHAA, Congress recognized that housing discrimination is not limited to intentional acts of discrimination and that “[a]cts that have the effect of causing discrimination can be just as devastating as intentional discrimination.” H.R. Rep. No. 100-711, at 25, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2186. Similarly, the United States Supreme Court has observed that discrimination against the handicapped is primarily the result “not of invidious animus, but rather of thoughtlessness and indifference— of benign neglect.” *Alexander v. Choate*, 469 U.S. 287, 295, 105 S.Ct. 712, 717 (1985).

In interpreting Title VIII, Courts have recognized that Congress did not contemplate an intent requirement for violations of the Act. *See Larkin v. State of Michigan Dep't of Social Services*, 89 F.3d 285 (6th Cir. 1996). Analogizing Title VIII to Title VII of the Civil Rights Act of 1964, most courts have concluded that a violation can be established with a showing (1) that the defendants were motivated by an intent to discriminate against the handicapped (“disparate treatment” or

“discriminatory intent”) or (2) that the defendant’s otherwise neutral action has an unnecessarily discriminatory effect (“disparate impact”). *Larkin*, 89 F.3d at 289.

b. The ICRMP Policy.

The Errors and Omissions Insuring Agreement of the ICRMP Policy (hereinafter “Section IV”) provides:

We agree, subject to the terms and conditions of this Coverage, to pay on your behalf all sums which you shall become legally obligated to pay as damages because of any claim which is **first made** against you during this Policy Period, arising out of any wrongful act by you.

...

“Claim” means a demand received by you for money damages alleging a wrongful act of a tortious nature by you . . .

...

“Wrongful Act” means the negligent performance of or failure to perform a legal duty or responsibility in a tortious manner pursuant to the Idaho Tort Claims Act or be premised upon allegations of unlawful violations of civil rights pursuant to Federal law arising out of public office or position.

R. Vol. I, p. 128 (emphasis added).

As set forth *supra*, Alamar’s Complaint alleges that Boise County violated civil rights pursuant to the Fair Housing Act, and therefore, the allegations fall squarely within the definition of “wrongful act” under Section IV of the ICRMP Policy. At this stage of the analysis, Alamar’s civil rights Complaint clearly falls within Policy coverage.

2. The Errors and Omissions Insuring Agreement does not contain an exclusion for claims arising under Title VIII of the Civil Rights Act of 1968 and the Court should not infer one.

The Errors and Omissions Insuring Agreement of the ICRMP Policy does not exclude violations of civil rights or claims alleging discrimination from coverage. R. Vol. I, p. 129-130. It is the position of Boise County that if ICRMP wanted to exclude such claims, it should have done so. Idaho courts have held that an insurer has the burden of using "clear and precise language if it wishes to restrict the scope of coverage and exclusions not stated with specificity will not be presumed or inferred." *Clark*, 138 Idaho at 541, 66 P.3d at 245. For example, in *Abbie Uriguen Oldsmobile Buick, Inc. v. United States Fire Insurance Company*, 95 Idaho 501, 507, 511 P.2d 783, 789 (1973), the Idaho Supreme Court found that an insurance policy that did not specifically exclude liability for punitive damages covered such damages. The Court concluded that absent any public policy to the contrary, the controversy over whether punitive damages were covered should be resolved in favor of the insured. *Id.*

Similarly, the ICRMP Policy at issue did not exclude claims of discrimination from coverage even though such claims could have been contemplated when the policy was drafted. In the absence of such an exclusion the Court should not infer one. *See Clark*, 138 Idaho at 541, 66 P.3d at 245. Following the Court's reasoning in *Abbie Uriguen Oldsmobile Buick, Inc.*, the controversy over whether civil rights claims are covered under the ICRMP Policy, when they were not excluded by the plain language of the policy, should be resolved in favor of Boise County. *See Abbie Uriguen Oldsmobile Buick, Inc.*, 95 Idaho at 507, 511 P.2d at 789.

3. The claims asserted in Alamar's Complaint are not subject to any of the exclusions from Errors and Omissions coverage under the ICRMP Policy.

Even though civil rights and discrimination claims are not excluded specifically from the ICRMP Policy, ICRMP argues that they are not entitled to coverage under a strained or inferred interpretation of other exclusions. The Idaho Supreme Court has found that "an insurer seeking to defeat a claim because of an exception or limitation in the policy has the burden of proving that the loss, or a part thereof, comes within the purview of the exception or limitation set up . . ." *Harman*, 91 Idaho at 721, 429 P.2d at 851 (quoting 29A Am. Jur. *Insurance* § 1854, p. 918). As set forth below, in the present case ICRMP has not met the burden of proving that Alamar's civil rights claims fall within any of the exclusions from coverage found in the ICRMP Policy.

a. The intentional act exclusions do not preclude coverage for the claims asserted by Alamar against Boise County.

The district court determined that the intentional act exclusions of the ICRMP Policy precluded coverage. R. Vol. I, p. 218-220. Boise County submits that this decision was error. The ICRMP Policy specifically excludes from coverage under Section IV of the Policy claims arising from intended wrongful acts or wrongful acts expected by the insured to cause damage. It states in pertinent part:

The Errors and Omissions Insuring Agreement does not cover any claim:

...

2. Arising out of any dishonest, fraudulent, criminal, malicious, deliberate or intended wrongful act committed by you or at your direction.

...

4. Resulting from a **wrongful act** intended or expected from the standpoint of any insured to cause damages. This exclusion applies even if the damages claimed are of a different kind or degree than that intended or expected.

R. Vol. I, p. 129. ICRMP claims that Alamar's Complaint alleges only intentional conduct on the part of Boise County and therefore the claims are excluded from coverage, and the district court agreed. This conclusion is not supported by the plain language of the Alamar Complaint.

As set forth *supra*, a violation of Title VIII of the 1968 Civil Rights Act can be either intentional or unintentional. At the outset of the "General Allegations" section of its Complaint, Alamar states: "This case arises out of Boise County's violations of the Fair Housing Act, 42 U.S.C. §3601 *et seq.* ("FHA")." R. Vol. I, p. 90. Under notice pleading, Alamar is putting Boise County on "notice" that it has violated all sections of the Fair Housing Act, 42 U.S.C. §3601 *et seq.* Nowhere does that allegation state that the violations were intentional. R. Vol. I, p. 90. As more fully explored below, the Alamar Complaint broadly alleges that Boise County violated civil rights and includes causes of action based on unintentional conduct.

Under the Plaintiff's First Count (COUNT ONE, VIOLATION OF THE FHA: REASONABLE ACCOMMODATION), the Plaintiff realleges Paragraphs 1 through 19. R. Vol. I, p. 93. After that, Alamar sets forth its claims against Defendant, Boise County. Paragraph 21 states that Alamar submitted an application to develop a residential treatment center for handicapped individuals. R. Vol. I, p. 94. Paragraph 22 specifically states that "Boise County knew or reasonably should have known the application was for housing for handicapped individuals." R. Vol. I, p. 94. The legal term of art "knew or should have known" sets out a negligence standard. *See Steed v.*

Grand Teton Council of the Boy Scouts of America, Inc., 144 Idaho 848, 854, 172 P.3d 1123, 1129 (2007).

Furthermore, the specific activity that Boise County is accused of engaging in is placing “onerous, arbitrary, and unreasonable conditions on the approval of the application which destroyed the feasibility of the project,” thereby violating the civil rights of the handicapped. R. Vol. I, p. 94. The phrase “arbitrary and unreasonable” clearly sets forth a negligence standard. By way of analogy, not every District Judge who is reversed by the Idaho Supreme Court for making an arbitrary and unreasonable decision is guilty of intentional conduct, nor is that Judge accused of intentionally attempting to harm one of the litigants before it.

The closest to any “intentional” conduct alleged on the part of Boise County is contained in Plaintiff’s Second Count (COUNT TWO: VIOLATION OF THE FHA DISPARATE TREATMENT). R. Vol. I, p. 94-95. As set forth above, a violation of the FHA can be established by a showing of disparate treatment, which is intentional, or disparate impact, which is unintentional and neutral on its face. *See Larkin*, 89 F.3d 285. Count Two of the Complaint generally alleges a disparate treatment claim, which does require intent. However, the first paragraph of that Count states: “The allegations included in the above paragraphs are incorporated by reference and made a part hereof.” R. Vol. I, p. 94, ¶27. By Paragraph 27, Alamar has reincorporated a broad based allegation of violations of civil rights and has included paragraphs under this Count which clearly implicate the negligence of disparate impact.

Additionally, even what initially seems to be an allegation of intentional conduct under Count Two fades as the Count is further examined. Paragraph 29 states that Boise County "effectively denied the permit by placing onerous, arbitrary and unreasonable conditions on the permit." R. Vol. I, p. 94. Once again, the Plaintiff uses language that sounds in negligence.

Alamar itself shows that it is on shaky ground in alleging intentional conduct under Count Two of its civil rights Complaint. In fact, it would be hard to fashion a weaker allegation of intentional conduct. Paragraph 31 of Count Two states: "Upon information and belief, a discriminatory reason more likely than not motivated the challenged decision of Boise County." R. Vol. I, p. 95. To state that somebody did some intentional act "upon information and belief" and that the motivation was "more likely than not" a result of intentional conduct, would not meet muster when presenting the case to the Court unless there was some factual basis for such an allegation. Such statements certainly do not meet the clear and convincing standard required to prove claims alleging intentional conduct and requesting punitive damages. Even if the language in Count Two is deemed to allege intentional conduct, it does not overcome the incorporating language of Paragraph 27 as discussed *supra*, which realleges allegations of negligent conduct. R. Vol. I, p. 94.

The first paragraph of Count Three of the Alamar Complaint, (COUNT THREE: VIOLATION OF THE FHA PROHIBITION AGAINST INTERFERENCE), again incorporates all previous paragraphs as set forth above. R. Vol. I, p. 95, ¶33. The primary allegation of that Count simply states that Boise County unlawfully interfered with the exercise of the rights of would-be

residents of Alamar's facility to housing under the FHA by obstructing the availability of housing to the handicapped. R. Vol. I, p. 95, ¶¶35-36.

Finally, in its Complaint, Alamar requests punitive damages pursuant to 42 U.S.C. § 3613(c). R. Vol. I, p. 95, ¶38. Interestingly, however, this final count of the Complaint does not reallege any of the preceding paragraphs or incorporate them by reference. R. Vol. I, p. 95. Clearly, punitive damages would require intentional conduct on the part of Boise County. It is significant that Alamar, which controlled the drafting of the Complaint, failed to incorporate the preceding paragraphs of the Complaint in its punitive damage request and implies that Alamar was aware of the possibility that prior allegations described activities that implicate only negligent conduct, which would be used to defeat a claim for punitive damages.

In fact, the Complaint ends with a request that the Court award Alamar "damages in an amount to be proven at trial" and "such other and further relief as the Court deems just and proper." R. Vol. I, p. 96, ¶39. This leaves the door wide open for Alamar to seek damages against Boise County for unintentional conduct under the Civil Rights Act of 1968.

Under the liberal notice pleading standard, there is no doubt the Alamar Complaint contains the factual basis and the necessary allegations to put Boise County on notice of a disparate impact claim under Title VIII. Based on the Complaint, Alamar would be able to argue that Boise County was fully on notice that claims for unintentional civil rights violations were being pursued in addition to a disparate treatment claim. Accordingly, the allegations of the underlying complaint reveal a potential for coverage under the ICRMP Policy and trigger ICRMP's duty to defend.

The Idaho Supreme Court's holding in *Hoyle* supports this conclusion. In that case, every claim in the underlying complaint alleged the acts in question were committed in a "fraudulent, improper and illegal manner." *Hoyle*, 137 Idaho at 373, 48 P.3d at 1262. *Hoyle* argued that the insurance company had a duty to defend, despite the insurance policy's exclusion for intentional acts, because facts behind the complaint revealed negligent acts. *Id.* The Court held the facts behind the complaint were irrelevant and that coverage under the insurance policy did not give rise to a duty to defend because the underlying complaint clearly only contained claims for fraudulent, improper, and illegal acts. *Id.*

While the Idaho Supreme Court did not look to the facts behind the complaint in reaching its conclusion, it did look to the basis of the underlying claims and the elements needed to prove those causes of action. *See Hoyle*, 137 Idaho at 373, 48 P.3d at 1262. For instance, the Court noted that an implied covenant of good faith and fair dealing claim sounds in contract. *Id.* Furthermore, looking at the claim for breach of fiduciary duty the Court stated, "although the breach of a fiduciary duty sounds in tort, and can be actionable for either intentional or negligent breaches of such duties, it is clear from the complaint that [the plaintiff] is not alleging breach of these duties were committed in a negligent manner." *Id.* Rather, the plaintiff specifically alleged in its complaint that the duties were breached in an intentional manner. *Id.*

Similarly, the Court in the instant case must review the elements of a Title VIII claim to determine if ICRMP has an obligation to defend. Violations of the 1968 Civil Rights Act can be actionable for both intentional and negligent conduct. Unlike *Hoyle*, however, the claims asserted

in the instant case do not clearly allege only intentional conduct. To the contrary, the gravamen of Alamar's Complaint is a general allegation that Boise County violated Title VIII of the Civil Rights Act of 1968, and unintentional claims are included in the allegations of the Complaint.

Furthermore, any doubt as to whether Alamar has asserted claims for unintentional conduct must be resolved in favor of Boise County, and ICRMP must defend the suit. This duty to defend exists despite the fact that intentional conduct is a required element of Alamar's claim for punitive damages; the broad, sweeping allegations of Alamar's Complaint reveal the basis for claims based on unintentional conduct. If one claim for relief is covered all claims must be defended. *See Kootenai County*, 113 Idaho at 910, 750 P.2d at 89 ("The duty to defend arises upon the filing of a complaint whose allegation, in whole or in part, read broadly, reveal a potential for liability that would be covered by the insured's policy.").

b. Alamar's claims are not subject to the so called "planning and zoning" exclusion of the ICRMP Policy.

ICRMP also argued, and the district court agreed, that there is no coverage under the Policy due to the operation of another exclusion of the ICRMP Policy. R. Vol. I, p. 220-221. The district court decision is in error.

The relevant provision states that there is no Errors and Omissions coverage:

12. To any claim of liability arising out of or in any way connected with the operation of principles of eminent domain, condemnation proceedings, inverse condemnation, annexation, regulatory takings, land use regulation or planning and zoning activities or proceedings, however characterized, whether such liability accrues directly against you or by virtue of any agreement entered into by or on your behalf.

R. Vol. I, p. 130. As an exclusively government entity insurer, ICRMP clearly could have contemplated the possibility that claims could be brought against its insureds under Title VIII of the Civil Rights Act of 1968, yet such claims were not specifically excluded by the ICRMP Policy. Instead, ICRMP asks the Court to stretch the exclusion found in Paragraph 12 to include the civil rights claims alleged against Boise County in the instant case, not simply standard planning and zoning decisions appealed to a district court.

Idaho has rejected the doctrine of reasonable expectations in interpreting insurance contracts, and instead, such contracts are to be “understood in their plain, ordinary and proper sense, according to the meaning derived from the plain wording of the contract.” *Casey v. Highlands Ins. Co.*, 100 Idaho 505, 509, 600 P.2d 1387, 1391 (1979). Therefore, to determine what claims are specifically excluded by this provision, we turn to the plain meaning of the words used. *See Kromrei*, 110 Idaho at 551, 716 P.2d at 1323. The relevant terms of that exclusion are defined in pertinent part as follows:

Eminent Domain:

- The right of a government to appropriate private property for public use. *The American Heritage Dictionary* (4th ed. 2001).
- The inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking. *Black's Law Dictionary* (2nd pocket ed.).

Condemnation:

- To appropriate (property) for public use. *The American Heritage Dictionary* (4th ed. 2001).
- The determination or declaration that certain property (esp. land) is assigned to public use, subject to reasonable compensation; the exercise of eminent domain by a governmental entity. *Black's Law Dictionary* (2nd pocket ed.).

Inverse Condemnation:

- An action brought by a property owner for compensation from a governmental entity that has taken the owner's property without bringing formal condemnation proceedings. *Black's Law Dictionary* (2nd pocket ed.).

Annexation:

- To incorporate (territory) into a larger existing political unit. *The American Heritage Dictionary* (4th ed. 2001).
- The point at which a fixture becomes part of the realty to which it is attached. . . . A formal act by which a nation, state, or municipality incorporates land within its dominion. *Black's Law Dictionary* (2nd pocket ed.).

Taking:

- To get possession of; capture; seize. *The American Heritage Dictionary* (4th ed. 2001).
- The act of seizing an article, with or without removing it, but with an implicit transfer of possession or control. *Black's Law Dictionary* (2nd pocket ed.).

Land use planning:

- The deliberate systematic development of real estate through methods such as zoning, environmental-impact studies, and the like. *Black's Law Dictionary* (2nd pocket ed.).

Planning:

- To formulate, draw up, or make a plan or plans. *The American Heritage Dictionary* (4th ed. 2001).

Zoning:

- To divide into zones. *The American Heritage Dictionary* (4th ed. 2001).
- The legislative division of a regions, esp. a municipality, into separate districts with different regulations within the districts for land use, building size, and the like. *Black's Law Dictionary* (2nd pocket ed.).

A review of the relevant definitions clearly reveals that claims for a violation of Title VIII of the 1968 Civil Rights Act are not included in the plain language of the exclusion. *See Clark*, 138 Idaho at 541, 66 P.3d at 245 (insurer has the burden of using "clear and precise language if it wishes to restrict the scope of coverage and exclusions not stated with specificity will not be presumed or

inferred.”). Furthermore, all the principles specifically listed in Paragraph 12 relate to real property and the claims thereunder derive from constitutional rights. R. Vol. I, p. 130. While it seems the Policy is attempting to exclude constitutional claims from coverage, the same cannot be said of statutory civil rights claims. There is a huge difference between a property claim brought under the Constitution (taking, condemnation, etc.) and a claim brought under a federal statutory law first enacted in 1968. There is absolutely no indication that such civil rights claims are excepted from coverage under this provision. *See Harman*, 91 Idaho at 721, 429 P.2d at 851 (the burden is on the insurer to show that the loss or injury was from a risk or cause excepted from the insuring provision). ICRMP’s interpretation would create an ever expanding exclusion regardless of legislative enactments. Boise County is not saying that ICRMP cannot make such an exclusion as part of its policy but that such an exclusion would need to be specifically stated in order to be given effect. Interpreting Paragraph 12 by looking at the plain meaning of the words used, this exclusion clearly only covers typical land use and planning and zoning issues such as those stated in the exclusion (i.e. eminent domain, condemnation, annexation, takings, etc.). R. Vol. I, p. 130. It would be improper for the Court to “infer” an exclusion for statutory discrimination and civil rights under a provision that only references claims arising from constitutional rights. *See Clark*, 138 Idaho at 541, 66 P.3d at 245.

In presenting its case to the Boise County Board of Commissioners, Alamar did not ask Boise County Board of Commissioners to decide a planning and zoning issue. R. Vol. I, p. 92, ¶12.

The fact that Boise County Planning and Zoning Commission made the initial decision on Alamar's application does not turn a civil rights claim into a traditional real property cause of action excluded from coverage by Paragraph 12 of Section IV of the ICRMP Policy. If a civil rights claim is made for jail overcrowding, is the claim excluded because the suit "arose out of" a planning and zoning decision approving the jail's construction? If a claim is brought under the Idaho Tort Claims Act for negligent road design, is the claim denied because the claim "arose out of" a planning and zoning decision approving the design and construction of the road? It is hard to imagine any local government activity that cannot be traced back to an activity that "arose out of" a planning and zoning decision. Under the interpretation of the Policy which ICRMP sought and the district court accepted, the exclusion could be used to deny coverage in any of these cases and innumerable others.

In fact, in the instant case, ICRMP used this exclusion to deny coverage for a prosecuting attorney fulfilling his statutory duties. Idaho Code § 31-2604 and § 31-2607. I.C. § 31-2604 states in part: "It is the duty of the prosecuting attorney . . . 3.) To give advice to the board of county commissioners, and other public officers of his county, when requested in all public matters arising in the conduct of the public business entrusted to the care of such officers." I.C. § 31-2607 further clarifies this duty: "The prosecuting attorney is the legal adviser of the board of commissioners; he must attend their meetings when required, and must attend and oppose all claims and accounts against the county when he deems them unjust or illegal." Pursuant to his duties under these sections, then Boise County Deputy Prosecutor Tim McNeese advised Boise County Board of Commissioners on many matters, including planning and zoning matters. After Alamar filed suit

against Boise County, Mr. McNeese inquired of ICRMP to determine if he was entitled to have an attorney represent him at his deposition but was told he would not be provided with an attorney because his activities "arose out of" planning and zoning issues. R. Vol. I, p.82-84. To stretch the "planning and zoning" exclusion in this manner could have very serious ramifications, virtually crippling prosecuting attorneys in their role as legal advisers to county commissioners in any of the innumerable circumstances that might be said to "arise" from a planning and zoning decision. Due to the fear that any professional negligence would not be covered by professional liability insurance, lawyers working for ICRMP's insureds would be well advised to keep their advice to themselves. Citizen volunteers on Planning and Zoning boards, if sued, are totally uninsured under the stretched ICRMP interpretation of the policy. ICRMP insureds are entitled to know, with specific and precise language, that they are uninsured if they are sued in Federal Court for alleged activities which have nothing to do with traditional Planning and Zoning functions. Such a broad interpretation of the "planning and zoning" exclusion defeats the very purpose or object of Errors and Omissions insurance, a construction that this Court cannot sanction. *See Bonner County*, 101 Idaho at 776, 620 P.2d at 1106. To be given effect, therefore, the Court must look to the plain language used in the exclusion and apply it only to traditional planning and zoning claims pursuant to Idaho's statutory scheme.

- c. In the event that Alamar's claims are subject to exclusions from Errors and Omissions coverage under the ICRMP Policy, an exception to that exclusion resurrects coverage for civil rights claims.

Even assuming, *arguendo*, that the claims in Alamar's Complaint are excluded from coverage by any of the exclusions in the Errors and Omissions section of the ICRMP Policy, an exception to an exclusion found in Paragraph 16 of Section IV of the ICRMP Policy resurrects coverage for torts and civil rights claims. R. Vol. I, p. 130. The relevant provision of Section IV states:

SECTION IV- ERRORS AND OMISSIONS INSURANCE

...

16. No claim exists where the alleged harm for which compensation is sought derives from the performance or nonperformance of terms of a contract, concerns the measure of nonperformance or payment related to contract performance, derives from fines, penalties or administrative sanction imposed by a governmental agency, or is generated by intergovernmental handling or allocation of funds according to the law. *The claims for which this section provides defense and indemnification must arise out of conduct of a tortious nature or be premised upon allegations of unlawful violation of civil rights pursuant to state or federal law.*

R. Vol. I, p. 130 (italics added).

The last full sentence of this exclusion further explains, modifies and expands the rest of Section IV when it states in the last sentence: "The claims for which this section provides defense and indemnification must arise out of conduct of a tortious nature or be premised upon allegations of unlawful violation of civil rights pursuant to state or federal law." R. Vol. I, p. 130, ¶16. This sentence unequivocally states that Section IV of the ICRMP Policy provides coverage for claims arising from tortious conduct or premised on allegations of violations of federal or state civil rights law. This is stated in an unqualified manner. It is not uncommon for an insurance policy to resurrect

coverage for an excluded matter by providing a later stated exception to the exclusion. R. Vol. I, p. 86, 151.

That ICRMP chose to use the word "section" in this sentence is significant and indicates that the exception was intended to apply to the entire errors and omission section, not simply paragraph 16. This is especially true when one reviews the ICRMP Policy in its entirety. Throughout the Policy, there are multiple instances where ICRMP clearly limits or expands a specific paragraph or exclusion. *See* Tr. Vol. I, p.24-28. For example, under Section I of the ICRMP Policy on Property Insuring Agreements, there is an exclusion that states: "An act or omission intended or reasonably expected from the standpoint of any insured to cause property damage. This *exclusion* applies even if the property damage is of a different kind or degree than that intended or reasonably expected." R. Vol. I, p. 117, ¶i (italics added). Such specific language is also found in the definition of "personal injury" applicable to Section II of the Policy regarding General Liability Insurance and Premises Medical Payments. R. Vol. I, p. 120, ¶10. After providing a general definition of personal injury, the Policy states: "*As respects Coverage C [Law Enforcement Liability] only, personal injury shall also mean false arrest, false imprisonment, detention, unlawful discrimination and violation of civil rights arising out of law enforcement activities.*" R. Vol. I, p. 120, ¶10 (italics added). An exclusion applicable to the General Liability Insurance and Premises Medical Payments Insuring Agreements also demonstrates ICRMP's understanding of the importance of semantics in limiting coverage under its Policy. The last sentence of the exclusion found in paragraph 17 states: "However, this *exclusion* shall not apply to liability of an insured for Incidental Medical Liability coverage, as provided in

the Specific Conditions to this *Section*.” R. Vol. I, p. 123, ¶17 (italics added). A similar example is found in an exclusion to the Automobile Liability Insurance and Automobile Medical Payments Agreements:

B. With Respect to Coverage A [Automobile Liability]:

1. To **bodily injury** or **property damage** resulting from an act or omission intended or reasonably expected from the standpoint of any **insured** to cause **bodily injury** or **property damage**. This *exclusion* applies even if the **bodily injury** or **property damage** is of a different kind or degree, or is sustained by a different person or property, than that intended or reasonable expected. This *exclusion* shall not apply to **bodily injury** and **property damage** resulting from the use of reasonable force to protect persons or property, or in the performance of your duties.

R. Vol. I, p. 127, ¶17 (italics added).

Clearly, as demonstrated throughout the Policy, a sophisticated entity like ICRMP will use specific language to refer to a paragraph or exclusion if that is what it intends. This is not, however what it did in the last sentence of paragraph 16, which instead uses the term “section”: “The claims for which this *section* provides defense and indemnification must arise out of conduct of a tortious nature or be premised upon allegations of unlawful violation of civil rights pursuant to state or federal law.” R. Vol. I, p. 130, ¶16 (italics added). Accordingly, it would be reasonable to interpret this provision as resurrecting coverage for claims such as those of the underlying complaint that allege violations of civil rights pursuant to federal law and removing such claims from the scope of the exclusions. This is especially true when one considers that the only time that civil rights claims are mentioned under “Section IV, Errors and Omissions Insurance” of the Policy, (claims clearly

anticipated by this exclusively Idaho governmental entity insurer), such claims are mentioned in the context of providing coverage under the Policy. R. Vol. 1, p. 24, ¶7 and p. 26, ¶16. At the very least, the last sentence of paragraph 16 results in an ambiguity that must be resolved in favor of the insured. *See Arreguin*, 145 Idaho at 461, 180 P.3d at 500. By resurrecting coverage under “this section” and not limiting the language to a specific paragraph or exclusion, the reader of the Policy is sent directly to the coverage language of section IV, which clearly provides coverage for the present claim.

D. ICRMP's Duty to Defend Boise County Under the ICRMP Policy Is Separate From and Unrelated to Its Duty to Indemnify.

The claims in Alamar's civil rights Complaint, in part, are covered under the Errors and Omissions Insuring Agreement of the ICRMP Policy and are not subject to the operation of any of the exclusions found therein. Accordingly, ICRMP has a duty to defend Boise County in the Alamar litigation.

“Once it is determined that an insurer owes a duty to defend, that duty to defend and pay defense costs continues until such time as the insurer can show that the claim against the insured cannot be said to fall within the policy's scope.” *Kootenai County*, 113 Idaho at 911, 750 P.2d at 90. In the case at hand, though ICRMP has a duty to defend Boise County based on the allegations in the Alamar Complaint, ICRMP's duty to indemnify Boise County may be limited depending on facts determined through the course of litigation and the damages, if any, awarded to Alamar. *Cf. Kootenai County*, 113 Idaho at 911, 750 P.2d at 90 (citing *C. Raymond Davis & Sons, Inc. v. Liberty*

Mutual Ins. Co., 467 F.Supp. 17, 19 (E.D.Pa.1979)) ("if coverage (indemnification) depends upon the existence or nonexistence of facts outside of the complaint that have yet to be determined, the insurer must provide a defense until such time as those facts are determined, and the claim is narrowed to one patently outside the coverage."). As to the duty to indemnify under the Policy, such a decision is premature as the duty to indemnify requires a more complete record regarding the actual damages and facts of the underlying action.

IV.
CONCLUSION

Based upon the foregoing, the Court should reverse the district court's decision regarding both defense and indemnity. The allegations made against Boise County in the Alamar Litigation require ICRMP to defend Boise County, and the district court's decision on the duty to indemnify was premature and not supported by the current record.

DATED this 29 day of November, 2010.

BRASSEY, WETHERELL & CRAWFORD

By: _____

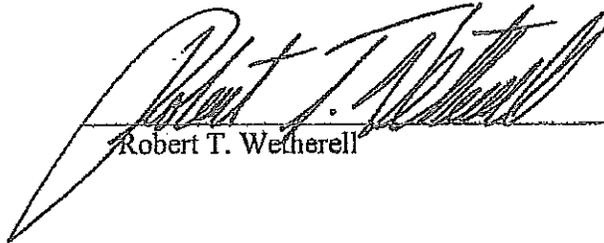
Robert T. Wetherell, of the firm
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29 day of November, 2010, I served a true and correct copy of the foregoing APPELLANT'S BRIEF upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Phillip J. Collaer
Anderson, Julian, & Hull
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U.S. Mail, postage prepaid
 Hand-Delivered
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Robert T. Wetherell

