

1-20-2012

# Ferrell v. United Financial Casualty Company Clerk's Record Dckt. 39221

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"Ferrell v. United Financial Casualty Company Clerk's Record Dckt. 39221" (2012). *Idaho Supreme Court Records & Briefs*. 1140.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/1140](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/1140)

This Court Document is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIdaho Law.

Vol. 102

IN THE  
SUPREME COURT

LAW CLERK OF THE  
STATE OF IDAHO

SAM FERRELL and DEVA FERRELL

Plaintiff and

Respondent

COPY

UNITED FINANCIAL CASUALTY COMPANY

Defendant and

Appellant

Appealed from the District Court of the Seventh Judicial

District of the State of Idaho, in and for Bonneville County

Hon. Dane H. Watkins, Jr., District Judge

Jacob Wessel, THOMSEN STEPHENS LAW OFFICE

2635 Channing Way, Idaho falls, ID 83404

*Attorney for Appellant*

John L. Lerma, LERMA LAW OFFICE

PO Box 190719, Boise, ID 83719

*Attorney for Respondent*

FILED - COPY	
Filed this _____ day of _____, 20____	
JAN 20 2012	Clerk
	Deputy

39221

IN THE SUPREME COURT OF THE STATE OF IDAHO

SAM FERRELL AND DEVA FERRELL,	)	
	)	
Plaintiff/Appellant,	)	Case No. CV-2010-7051
	)	
vs.	)	Docket No. 39221-2011
	)	
UNITED FINANCIAL CASUALTY	)	
COMPANY, d.b.a. PROGRESSIVE	)	
INSURANCE COMPANY whose true name	)	
is unknown,	)	
	)	
Defendant/Respondent,	)	
_____	)	

\*\*\*\*\*

CLERK'S RECORD ON APPEAL

\*\*\*\*\*

Appeal from the District Court of the  
Seventh Judicial District of the State of Idaho,  
in and for the County of Bonneville

HONORABLE DANE H. WATKINS, JR., District Judge.

\*\*\*\*\*

*Attorney for Appellant*

*Attorney for Respondent*

Jacob Wessel  
THOMSEN STEPHENS LAW OFFICES  
2635 Channing Way  
Idaho Falls, ID 83404

John L. Lerma  
LERMA LAW OFFICE  
PO Box 190719  
Boise, ID 83719

**TABLE OF CONTENTS**

	Page
ROA Report, printed November 16, 2011 .....	1
Petition for Confirmation of Arbitration Award and Award of Costs and Fees, filed November 16, 2010.....	6
Defendants’ Motion to Stay Proceedings, filed January 3, 2011 .....	21
Memorandum in Support of Defendants’ Motion to Stay, filed January 3, 2011 .....	23
Objection to Motion to Stay, filed January 11, 2011 .....	28
Withdrawal of Defendants’ Motion to Stay Proceedings, filed February 2, 2011 .....	31
Answer to Petition for Confirmation of Arbitration Award and Award of Costs and Fees, filed February 17, 2011 .....	33
Motion for Fees and Costs (Idaho Code § 41-1839, IRCP 54(d)(1)), filed March 11, 2011 .....	40
Memorandum in Support of Motion for Fees and Costs, filed March 11, 2011 .....	43
Affidavit of Jacob S. Wessel in Support of Motion for Fees and Costs, filed March 11, 2011 .....	55
Defendant’s Objection to Plaintiffs’ Motion for Fees and Costs, filed March 24, 2011.....	68
Plaintiffs Memorandum in Reply to Defendants’ Response, filed April 1, 2011 .....	81
Affidavit of Defendants’ Counsel, filed April 6, 2011 .....	88
Objection to Affidavit of Defendants’ Counsel, filed April 11, 2011.....	98
Supplemental Affidavit of Costs and Attorney Fees (after March 11, 2011), filed April 11, 2011 .....	101
Memorandum Decision and Order Re: Motion for Fees and Costs, entered April 29, 2011 .....	107
Defendant’s Motion to Reconsider the Court’s Award of Costs to Plaintiffs, filed May 13, 2011 .....	120
Defendant’s Memorandum in Support of Motion to Reconsider the Court’s Award of Costs to Plaintiffs, filed May 13, 2011 .....	122
Motion to Reconsider, filed May 13, 2011 .....	130

Defendant’s Response in Opposition to Plaintiffs’ Motion to Reconsider, filed May 27, 2011 .....	138
Affidavit of Counsel in Opposition to Plaintiffs’ Motion to Reconsider, filed May 27, 2011 .....	148
Plaintiffs’ Response and Opposition to Defendant’s Motion to Reconsider the Court’s Award of Costs to Plaintiffs, filed Jun 1, 2011.....	155
Memorandum in Reply to Defendant’s Response to Motion to Reconsider, filed June 3, 2011.....	159
Defendant’s Reply in Support of its Motion to Reconsider, filed June 6, 2011.....	165
Second Supplemental Affidavit of Costs and Attorney Fees (after April 11, 2011).....	169
Memorandum Decision and Order Re: Motions to Reconsider, entered June 15, 2011 .....	177
Motion for Confirmation of Arbitrational Award and for Prejudgment Interest, filed July 21, 2011 .....	187
Stipulation for Confirmation of Arbitrational Award and Prejudgment Interest, filed August 5, 2011 ..	190
Judgment, Order and Decree, entered August 12, 2011 .....	192
Notice of Appeal, filed September 20, 2011.....	195
Clerk’s Certificate of Appeal, dated September 23, 2011 .....	201
Respondent’s Request for Additional Records, filed October 3, 2011 .....	202
Clerk’s Certification of Exhibits, dated November 16, 2011 .....	204
Clerk’s Certificate, dated November 16, 2011 .....	205
Certificate of Service .....	207

**INDEX**

	Page
Affidavit of Counsel in Opposition to Plaintiffs’ Motion to Reconsider, filed May 27, 2011 .....	148
Affidavit of Defendants’ Counsel, filed April 6, 2011 .....	88
Affidavit of Jacob S. Wessel in Support of Motion for Fees and Costs, filed March 11, 2011 .....	55
Answer to Petition for Confirmation of Arbitration Award and Award of Costs and Fees, filed February 17, 2011 .....	33
Certificate of Service .....	207
Clerk’s Certificate of Appeal, dated September 23, 2011 .....	201
Clerk’s Certificate, dated November 16, 2011 .....	205
Clerk’s Certification of Exhibits, dated November 16, 2011 .....	204
Defendant’s Memorandum in Support of Motion to Reconsider the Court’s Award of Costs to Plaintiffs, filed May 13, 2011 .....	122
Defendant’s Motion to Reconsider the Court’s Award of Costs to Plaintiffs, filed May 13, 2011 .....	120
Defendant’s Objection to Plaintiffs’ Motion for Fees and Costs, filed March 24, 2011 .....	68
Defendant’s Reply in Support of its Motion to Reconsider, filed June 6, 2011 .....	165
Defendants’ Motion to Stay Proceedings, filed January 3, 2011 .....	21
Judgment, Order and Decree, entered August 12, 2011 .....	192
Memorandum Decision and Order Re: Motion for Fees and Costs, entered April 29, 2011 .....	107
Memorandum Decision and Order Re: Motions to Reconsider, entered June 15, 2011 .....	177
Memorandum in Reply to Defendant’s Response to Motion to Reconsider, filed June 3, 2011 .....	159
Memorandum in Support of Defendants’ Motion to Stay, filed January 3, 2011 .....	23
Memorandum in Support of Motion for Fees and Costs, filed March 11, 2011 .....	43
Motion for Confirmation of Arbitration Award and for Prejudgment Interest, filed July 21, 2011 .....	187

Motion for Fees and Costs (Idaho Code § 41-1839, IRCP 54(d)(1)), filed March 11, 2011 .....	40
Motion to Reconsider, filed May 13, 2011 .....	130
Defendant’s Response in Opposition to Plaintiffs’ Motion to Reconsider, filed May 27, 2011 .....	138
Notice of Appeal, filed September 20, 2011.....	195
Objection to Affidavit of Defendants’ Counsel, filed April 11, 2011.....	98
Objection to Motion to Stay, filed January 11, 2011 .....	28
Petition for Confirmation of Arbitration Award and Award of Costs and Fees, filed November 16, 2010.....	6
Plaintiffs Memorandum in Reply to Defendants’ Response, filed April 1, 2011 .....	81
Plaintiffs’ Response and Opposition to Defendant’s Motion to Reconsider the Court’s Award of Costs to Plaintiffs, filed Jun 1, 2011.....	155
Respondent’s Request for Additional Records, filed October 3, 2011 .....	202
ROA Report, printed November 16, 2011 .....	1
Second Supplemental Affidavit of Costs and Attorney Fees (after April 11, 2011).....	169
Stipulation for Confirmation of Arbitrational Award and Prejudgment Interest, filed August 5, 2011 ..	190
Supplemental Affidavit of Costs and Attorney Fees (after March 11, 2011), filed April 11, 2011 .....	101
Withdrawal of Defendants’ Motion to Stay Proceedings, filed February 2, 2011 .....	31

Sam Ferrell, Deva Ferrell vs. United Financial Casualty Company, Progressive Insurance Company

Date	Code	User	Judge
11/16/2010	SMIS	SBARRERA	Summons Issued Gregory S. Anderson
	NCOC	SBARRERA	New Case Filed-Other Claims Gregory S. Anderson
	NOAP	SBARRERA	Plaintiff: Ferrell, Sam Notice Of Appearance Jacob S. Wessel Gregory S. Anderson
	NOAP	SBARRERA	Plaintiff: Ferrell, Deva Notice Of Appearance Jacob S. Wessel Gregory S. Anderson
		SBARRERA	Filing: A - All initial civil case filings of any type not listed in categories B-H, or the other A listings below Paid by: Wessel, Jacob S. (attorney for Ferrell, Sam) Receipt number: 0053983 Dated: 11/18/2010 Amount: \$88.00 (Check) For: Ferrell, Sam (plaintiff) Gregory S. Anderson
	PETN	SBARRERA	Petition For Confirmation Of Arbitration Award And Award Of Costs And Fees Gregory S. Anderson
12/3/2010	JUDGE	MESSICK	Judge Change (batch process)
1/3/2011	MOTN	SBARRERA	Defendants' Motion To Stay Proceedings Dane H Watkins Jr
	MEMO	SBARRERA	Memorandum In Support Of Defendants' Motion To Stay Dane H Watkins Jr
1/5/2011		SBARRERA	Acceptance Of Service 12/21/2010 United Financial Casualty By Serving John J. Lerma Dane H Watkins Jr
1/11/2011		SBARRERA	Objection To Motion To Stay Dane H Watkins Jr
1/13/2011	HRSC	LMESSICK	Hearing Scheduled (Motion 02/03/2011 09:00 AM) Motion to Stay (telephonic) Dane H Watkins Jr
1/20/2011	NOTH	SOLIS	Notice Of Hearing 02/03/2011 @9:00 AM RE: Motion To Stay Proceedings Dane H Watkins Jr
2/2/2011		LYKE	Withdrawal of Defendants' Motion to Stay Proceedings Dane H Watkins Jr
	NOTH	LYKE	Notice Of Hearing Re: Defendants' Motion to Stay (02/03/11@9:00AM) Dane H Watkins Jr
2/3/2011	MINE	LMESSICK	Minute Entry Hearing type: Status Conference Hearing date: 2/3/2011 Time: 9:05 am Courtroom: Court reporter: Karen Konvalinka Minutes Clerk: Lettie Messick Tape Number: Party: Deva Ferrell, Attorney: Jacob Wessel Party: Progressive Insurance Company Party: Sam Ferrell, Attorney: Jacob Wessel Party: United Financial Casualty Company Dane H Watkins Jr
	DCHH	LMESSICK	Hearing result for Motion held on 02/03/2011 09:00 AM: District Court Hearing Held Court Reporter: Karen Konvalinka Number of Transcript Pages for this hearing estimated: Motion to Stay 50 pages Dane H Watkins Jr
2/4/2011	ORDR	LMESSICK	Order for Status Conference Dane H Watkins Jr



Sam Ferrell, Deva Ferrell vs. United Financial Casualty Company, Progressive Insurance Company

Date	Code	User	Judge
2/4/2011	HRSC	LMESSICK	Hearing Scheduled (Status Conference 05/04/2011 08:30 AM)
2/17/2011	NOAP	DOOLITTL	Defendant: United Financial Casualty Company Notice Of Appearance John J. Lerma
	NOAP	DOOLITTL	Defendant: Progressive Insurance Company Notice Of Appearance John J. Lerma
		DOOLITTL	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Lerma, John J. (attorney for Progressive Insurance Company) Receipt number: 0007897 Dated: 2/18/2011 Amount: \$58.00 (Check) For: Progressive Insurance Company (defendant) and United Financial Casualty Company (defendant)
	ANSW	DOOLITTL	Answer to Petition for Confirmation of Arbitration Award and Award of Costs and Fees
3/11/2011	MOTN	DOOLITTL	Motion for Fees and Costs
	MEMO	DOOLITTL	Memorandum in Support of Motion for Fees and Costs
	AFFD	DOOLITTL	Affidavit of Jacob S. Wessel in Support of Motion for Fees and Costs
3/15/2011	HRSC	LMESSICK	Hearing Scheduled (Motion 04/06/2011 09:00 AM) Attorney Fees and Costs
	NOTH	LYKE	Notice Of Hearing Re: Motion for Fees and Costs (04/06/11@9:00AM)
3/24/2011		DOOLITTL	Defendant's Objection to Plaintiffs' Motion for Fees and Costs (fax)
4/1/2011	MEMO	SOLIS	Plaintiffs Memorandum In Reply To Defendants' Response
4/6/2011	MINE	LMESSICK	Minute Entry Hearing type: Motion Hearing date: 4/6/2011 Time: 9:01 am Courtroom: Court reporter: Minutes Clerk: Lettie Messick Tape Number: Party: Deva Ferrell, Attorney: Jacob Wessel Party: Progressive Insurance Company, Attorney: John Lerma Party: Sam Ferrell, Attorney: Jacob Wessel Party: United Financial Casualty Company, Attorney: John Lerma
	AFFD	DOOLITTL	Affidavit of Defendants' Counsel (fax)
	DCHH	LMESSICK	Hearing result for Motion held on 04/06/2011 09:00 AM: District Court Hearing Held Court Reporter: Karen Konvalinka Number of Transcript Pages for this hearing estimated: Attorney Fees and Costs 50 pages
4/11/2011	AFFD	SBARRERA	Objection To Affidavit Of Defendants' Counsel

Sam Ferrell, Deva Ferrell vs. United Financial Casualty Company, Progressive Insurance Company

Date	Code	User	Judge
4/11/2011	AFFD	SBARRERA	Supplemental Affidavit Of Costs And Attorney Fees (after March 11, 2011)
4/29/2011	MEMO	LMESSICK	Memorandum Decision and Order Re: Motion for Fees and Costs
5/4/2011	DCHH	LMESSICK	Hearing result for Status Conference held on 05/04/2011 08:30 AM: District Court Hearing Held Court Reporter: Karen Konvalinka Number of Transcript Pages for this hearing estimated: 50 pages
	MINE	LMESSICK	Minute Entry Hearing type: Status Conference Hearing date: 5/4/2011 Time: 10:41 am Courtroom: Court reporter: Minutes Clerk: Lettie Messick Tape Number: Party: Deva Ferrell, Attorney: Jacob Wessel Party: Progressive Insurance Company, Attorney: John Lerma Party: Sam Ferrell, Attorney: Jacob Wessel Party: United Financial Casualty Company, Attorney: John Lerma
5/13/2011	MOTN	DOOLITTL	Motion to Reconsider
	MOTN	DOOLITTL	Defendant's Motion to Reconsider the Court's Award of Costs to Plaintiffs (fax)
	MEMO	DOOLITTL	Defendant's Memorandum in Support of Motion to Reconsider the Court's Award of Costs to Plaintiffs (fax)
5/19/2011	HRSC	QUINTANA	Hearing Scheduled (Motion 06/08/2011 10:00 AM) Motion to Reconsider
5/23/2011	NOTH	SOLIS	Notice Of Hearing 06/08/2011 @10:00AM RE:Motion To Reconsider
5/26/2011	NOTH	LYKE	Notice Of Telephonic Hearing Re: Defendant's Motio to Reconsider the Court's Award of Costs to Plaintiffs (06/08/11@10:00AM)
5/27/2011		SOLIS	Defendant's Response In Opposition To Plaintiffs' Motion To Reconsider
	AFFD	SOLIS	Affidavit Of Counsel In Opposition To Plaintiffs' Motion To Reconsider
5/1/2011	RESP	LYKE	Plaintiffs' Response and Opposition to Defendant's Motion to Reconsider the Court's Award of Costs to Plaintiffs
5/3/2011	MEMO	SOLIS	Memorandum In Reply To Defendant's Response To Motion To Reconsider
5/6/2011		DOOLITTL	Defendant's Reply in Support of It's Motion to Reconsider

Sam Ferrell, Deva Ferrell vs. United Financial Casualty Company, Progressive Insurance Company

Date	Code	User	Judge
6/8/2011	DCHH	LMESSICK	Hearing result for Motion held on 06/08/2011 10:00 AM: District Court Hearing Held Court Reporter: Karen Konvalink Number of Transcript Pages for this hearing estimated: Motion to Reconsider 50 pages Lerma to appear by telephone
	MINE	LMESSICK	Minute Entry Hearing type: Motion Hearing date: 6/8/2011 Time: 9:54 am Courtroom: Court reporter: Minutes Clerk: Lettie Messick Tape Number: Party: Deva Ferrell, Attorney: Jacob Wessel Party: Progressive Insurance Company, Attorney: John Lerma Party: Sam Ferrell, Attorney: Jacob Wessel Party: United Financial Casualty Company, Attorney: John Lerma
	AFFD	LYKE	Second Supplemental Affidavit of Costs and Attorney Fees
3/15/2011	MEMO	LMESSICK	Memorandum Decision and Order Re: Motions to Reconsider
7/21/2011	HRSC	LMESSICK	Hearing Scheduled (Motion 08/11/2011 09:00 AM) Confirmation of Arbitration Award
	MOTN	DOOLITTL	Motion for Confirmation of Arbitrational Award and for Prejudgment Interest
	NOTH	DOOLITTL	Notice Of Hearing 8-11-11 @ 9:00 a.m.
3/5/2011	STIP	LYKE	Stipulation for Confirmation of Arbitrational Award and Prejudgment Interest
3/12/2011	HRVC	LMESSICK	Hearing result for Motion scheduled on 08/11/2011 09:00 AM: Hearing Vacated Confirmation of Arbitration Award
	JDMT	LMESSICK	Judgment Order and Decree
	CDIS	LMESSICK	Civil Disposition entered for: Progressive Insurance Company, Defendant; United Financial Casualty Company, Defendant; Ferrell, Deva, Plaintiff; Ferrell, Sam, Plaintiff. Filing date: 8/12/2011
3/23/2011	STJD	SOLIS	Satisfaction Of Judgment
3/12/2011		LYKE	Miscellaneous Payment: For Comparing And Conforming A Prepared Record, Per Page Paid by: Lerma Law Receipt number: 0042077 Dated: 9/12/2011 Amount: \$2.00 (Check)
		LYKE	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Lerma Law Receipt number: 0042077 Dated: 9/12/2011 Amount: \$1.00 (Check)

Sam Ferrell, Deva Ferrell vs. United Financial Casualty Company, Progressive Insurance Company

Date	Code	User	Judge
9/20/2011		DOOLITTL	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Wessel, Jacob S. (attorney for Ferrell, Deva) Receipt number: 0043812 Dated: 9/21/2011 Amount: \$101.00 (Check) For: Ferrell, Deva (plaintiff) and Ferrell, Sam (plaintiff)
	APDC	DOOLITTL	Appeal Filed In District Court to Supreme Court
	NOTC	DOOLITTL	Notice of Appeal
9/23/2011	BNDC	LMESSICK	Bond Posted - Cash (Receipt 44374 Dated 9/23/2011 for 100.00) Deposit on Clerk's Record
	STATUS	LMESSICK	Case Status Changed: Closed pending clerk action
	CERTAP	LMESSICK	Clerk's Certificate of Appeal
10/3/2011		SOLIS	Respondent's Request For Additional Records
10/5/2011		LMESSICK	(SC) Notice of Appeal Filed Record Due 1/11/12
10/13/2011		LMESSICK	(SC) Clerk's Certificate Filed

CASE ASSIGNED TO  
 JUDGE GREGORY S. ANDERSON  
 BONNEVILLE COUNTY  
 2010 NOV 16 PM 4:17

Jacob S. Wessel, ISB #7529  
 THOMSEN STEPHENS LAW OFFICES, PLLC  
 2635 Channing Way  
 Idaho Falls, ID 83404  
 Telephone (208) 522-1230  
 Fax (208) 522-1277  
 jwessel@thomsenstephenslaw.com

Attorneys for Plaintiffs Sam Ferrell and Deva Ferrell

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 UNITED FINANCIAL CASUALTY )  
 COMPANY, d.b.a PROGRESSIVE )  
 INSURANCE COMPANY whose true )  
 name is unknown and PROGRESSIVE )  
 INSURANCE COMPANY whose true )  
 name is unknown )  
 )  
 Defendants. )  
 )

Case No. CV-2010- 7051

PETITION FOR CONFIRMATION OF  
 ARBITRATION AWARD  
 AND AWARD OF COSTS AND FEES

COME NOW Plaintiff's Sam and Deva Ferrell, by and through the undersigned counsel of record and hereby petition this Court for confirmation of the award obtained by Plaintiff's in arbitration on November 4, 2010 and for an award of costs and fees pursuant to Idaho Code §§ 41-1839, 12-120(3) and 12-121 as follows:

1. Plaintiffs are residents of the State of Idaho, County of Bonneville.

1 - PETITION FOR CONFIRMATION OF ARBITRATION AWARD AND AWARD OF COSTS AND FEES

2. Defendant United Financial Casualty Company is an insurance company operating an insurance business in the State of Idaho and is the company that underwrote the policy for Progressive Insurance Company.

4. United Financial Casualty Company's true name is unknown, therefore Plaintiffs reserve the right to amend this petition pursuant to the Idaho Rules of Civil Procedure, Rule 10(a)(4) to substitute the true name.

5. Defendant Progressive Insurance Company is an insurance company operating an insurance business in the State of Idaho, which company issued an uninsured motorist policy to Plaintiffs.

6. Progressive Insurance Company's true name is unknown, therefore Plaintiffs reserve the right to amend this petition pursuant to the Idaho Rules of Civil Procedure, Rule 10(a)(4) to substitute the true name.

7. Plaintiffs and Defendants entered into a contract for a commercial uninsured motorist policy number 02616845-6 (hereinafter "UM Policy"), which contract was in full force and effect at all times material hereto.

8. On December 22, 2008, Plaintiffs were traveling in their work vehicle on the way to work when they were struck from behind by a vehicle driven by an uninsured motorist.

9. In early 2009, Defendant settled with Plaintiffs for their property damage, medical expenses and general damages for \$1,500.00 in the case of Plaintiff Sam Ferrell and \$1,700.00 in the case of Plaintiff Deva Ferrell.

10. The parties could not reach an agreement on their claims for lost wages, so Plaintiffs

hired the firm Thomsen Stephens Law Offices PLLC to pursue these claims.

11. On July 2, 2009, Jacob S. Wessel, attorney for the Plaintiffs, sent a letter to Curtis Neill of the Progress Claims Department demanding payment for all lost wages justly due under the UM Policy. A true and correct copy of this letter is attached hereto as exhibit A.

12. Defendant subsequently requested additional information.

13. On December 22, 2009, Jacob S. Wessel, attorney for the Plaintiffs again sent a letter to Curtis Neill of the Progress Claims Department demanding payment for all lost wages justly due and providing documents proving the loss. A true and correct copy of this letter is attached hereto as exhibit B.

14. In a letter dated January 5, 2010, Defendant tendered \$855.00 to Sam Ferrell and \$862.00 to Deva Ferrell as proposed final settlement of Plaintiffs' lost wages claims, as the amount justly due under the UM Policy. A true and correct copy of this letter is attached hereto as exhibit C.

15. On January 22, 2010, Jacob S. Wessel, attorney for the Plaintiffs, sent a letter to Curtis Neill of the Progress Claims Department rejecting the offer of settlement and demanding arbitration pursuant to the terms of the UM Policy. A true and correct copy of this letter is attached hereto as exhibit D.

16. The parties all agreed to arbitration, underwent informal discovery and formal depositions, and underwent arbitration on November 4, 2010 before a panel of three arbitrators chosen pursuant to the UM Policy.

17. The panel of arbitrators issued an arbitration award on November 4, 2010 awarding

Plaintiff Sam Ferrell \$3,990.80 and awarding Plaintiff Deva Ferrell \$5,134.44, which were the amounts justly due under the policy within the meaning of Idaho Code § 41-1839. A true and correct copy of the Arbitration Award dated November 4, 2010 is attached hereto as exhibit E.

18. This court has jurisdiction to confirm the arbitration award entered in this matter pursuant to the Idaho Uniform Arbitration Act, Idaho Code § 7-901 *et seq.*, specifically Idaho Code §§ 7-911, and 7-917.

19. Pursuant to Idaho Code § 7-918, venue is proper because the arbitration agreement provides that arbitration shall be held in the county of the residence of the insured (Bonneville County) and arbitration was held in Bonneville County.

20. Plaintiffs are entitled to an award of their reasonable attorney fees and costs as the prevailing party in arbitration pursuant to Idaho Code §§ 41-1839, 12-120(3) and 12-121 in such amounts to be proven at trial.

21. Plaintiffs are entitled to pre-judgment interest on the Arbitration Award at the rate of 12% per annum from the date of the accident of December 22, 2008 until the date of confirmation of the Arbitration Award pursuant to Idaho Code §28-22-104, in an amount to be proven at trial.

22. To the date of filing this petition, Plaintiffs have expended \$1,081.92 in costs and \$12,377.50 in attorneys fees in the pursuit of this action.

23. Plaintiffs will expend additional moneys in costs and attorneys fees in the future to pursue this action.

WHEREFORE, Plaintiffs Sam and Deva Ferrell pray for the following relief from the Court:

1. For judgement, order and decree confirming the Arbitration Award entered by the



arbitrators on November 4, 2010;

2. For an order declaring Plaintiffs the prevailing party in arbitration pursuant to Idaho Code § 41-1839;

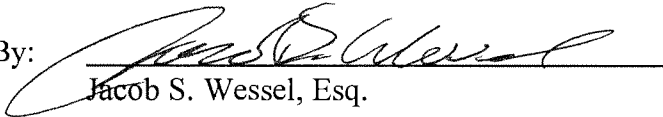
3. For an award of past costs and attorneys fees in the amount of \$13,459.42 and ongoing costs and fees in an amount to be proven at trial;

4. For an award of pre-judgment interest in an amount to be proven at trial; and

5. For such other and further relief as the court deems just and equitable under the circumstances.

DATED this 16 day of November, 2010.

THOMSEN STEPHENS LAW OFFICES, P.L.L.C.

By:   
Jacob S. Wessel, Esq.

JSW  
7083\003 Petition

THOMSEN  STEPHENS  
LAW OFFICES

Alan C. Stephens\*  
Curt R. Thomsen (*Challis Office*)  
James D. Holman\*\*

\*Also Member of Wyoming Bar

\*\*Also Member of Nebraska Bar

J. Michael Wheeler  
Michael J. Whyte  
T. Jason Wood  
Jacob S. Wessel  
Richard Friess

July 2, 2009

CURTIS NEILL  
PROGRESSIVE CLAIMS DEPARTMENT  
2264 SOUTH BONITO WAY STE 100  
MERIDIAN ID 83642-9327

**RE: Insured: Dave Ferrell**  
**Policy No.: 02616845-6**  
**Date of Loss: December 22, 2008**  
**Claim No.: 08-5146644**

**Insured: Samuel Ferrell**  
**Policy No.: 02616845-6**  
**Date of Loss: December 22, 2008**  
**Claim No.: 08-5146644**

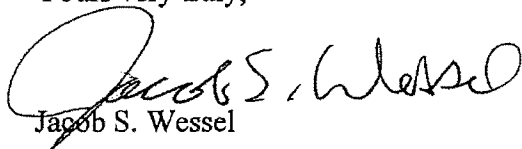
Dear Mr. Neill:

This firm represents Dave and Sam Ferrell in the collection of an uninsured motorist claim under their commercial auto policy for their company, Ferrell Brother's Construction, Policy No. 02616845-6. I am writing to request payment of all monies due and owing under said policy. My clients acknowledge that you have paid part of the monies due, but have not paid all of the benefits due under the policy.

Sam Ferrell hereby demands \$7,000.00 for his lost wages which is the amount justly due under the policy. Dave Ferrell hereby demands \$10,000.00 for his lost wages due to the accident which is the amount justly due under the policy. Please pay these amounts within 30 days to my office.

If you need any additional information reasonably necessary to evaluate these claims, please notify me immediately.

Yours very truly,

  
Jacob S. Wessel

JSW/jd\7083\Progressive

cc: Sam and Dave Ferrell

1083 5  
C

**THOMSEN**  **STEPHENS**

LAW OFFICES

Alan C. Stephens\*  
Curt R. Thomsen (*Challis Office*)  
James D. Holman\*\*

\*Also Member of Wyoming Bar

\*\*Also Member of Nebraska Bar

J. Michael Wheeler  
Michael J. Whyte  
T. Jason Wood  
Jacob S. Wessel  
Richard Friess

December 22, 2009

CURTIS NEILL  
PROGRESSIVE CLAIMS DEPARTMENT  
2264 SOUTH BONITO WAY STE 100  
MERIDIAN ID 83642-9327

**RE: Insured: Dave Ferrell**  
**Policy No.: 02616845-6**  
**Date of Loss: December 22, 2008**  
**Claim No.: 08-5146644**

**Insured: Samuel Ferrell**  
**Policy No.: 02616845-6**  
**Date of Loss: December 22, 2008**  
**Claim No.: 08-5146644**

Dear Mr. Neill:

This firm represents Dave and Sam Ferrell in the collection of an uninsured motorist claim under their commercial auto policy for their company, Ferrell Brother's Construction, Policy No. 02616845-6. Pursuant to our recent telephone conversation, attached are the documents that you requested verifying the amount of money the Ferrell brother's lost because of this accident.

In December, 2008, Dave and Sam Ferrell did work for which they were paid \$24,315.75. The payment for this work was received in January, 2009 although they did the work in December, 2008. This work was done in a month when the weather was similar to January, February and March, 2009 when the Ferrells were unable to work due to the injuries they received in the accident. The Ferrells were out of work from the date of the accident until they were released by their doctor to go back to work in mid-February in the case of Sam and in late March in the case of Dave as his injuries were worse. (See the attached doctor's letters, Exhibit J.)

The Ferrells usually make a net profit of about half of the gross receipts after the cost of materials and wages for the men that they hire are subtracted. (See Exhibit H) As you can see, although they invoiced \$59,186.75 (Exhibit A, F, and G) in the months of December, 2008 and April, 2009. From January, 2009 until April, 2009, they were not able to do any work. This is despite the fact that they would have had the opportunity to do numerous jobs had they been physically able to do them. (See the attached estimates for jobs from January to April, 2009, Exhibits B, C, D, and E.) In January, 2009, they had the opportunity to do \$38,549.00 worth of work that they were not able to do because of their injuries. (Exhibit B) In February, 2009, they had the opportunity to do \$24,218.00 worth of work that they were not able to do because of their injuries. (Exhibit C) In March, 2009, they had

December 22, 2009

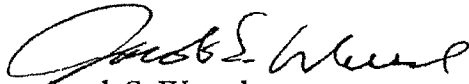
Page 2

the opportunity to do \$122,549.00 worth of work that they were not able to do because of their injuries. (Exhibit D) In April, 2009, they had the opportunity to do \$38,536.00 worth of work that they were not able to do because of their injuries. (Exhibit E) Exhibit I is a copy of Schedule K of th tax returns for 2007 and 2008 for Ferrell Bros. Construction, LLC.

As you can see, the amount that my clients have asked for is well below the amount that they are rightfully due. They therefore demand settlement in the amount of \$25,000.00, which includes the original \$17,000.00 claimed, plus fees. If you do not provide the money within 14 days, we will file a claim in arbitration seeking much more money based upon the documents proving this claim which are attached to this letter. We will also seek attorney fees and costs pursuant to Idaho Code § 41-1839 because you did not tender the money rightfully due within thirty days of my original letter demanding payment.

If you need any additional information reasonably necessary to evaluate these claims, please notify me immediately.

Yours very truly,



Jacob S. Wessel

JSW/jd\7083\Progressive

cc: Sam and Dave Ferrell

THOMSEN STEPHENS LAW OFFICES  
JACOB S WESSEL  
2635 CHANNING WAY  
IDAHO FALLS, ID 83404

**Underwritten By:  
United Financial Casualty Company**

Claim Number: 08-5146644  
Loss Date: December 22, 2008  
Document Date: January 5, 2010  
Page 1 of 1

**claims.progressive.com**

Track the status and details of your claim,  
e-mail your representative or report a  
new claim.

## Claim Information

This letter is in regard to the Uninsured Motorist claim for DEVA FERRELL. You have submitted new information dated December 22, 2009 and it has been fully reviewed.

We have been compliant with code 41-1839 as we had previously advanced the amount justly due to the policy holder (documentation enclosed) within 30 days of receipt of proof of loss. The code specifies that information or proof of loss must be furnished and payment made within 30 days of receipt of same. Simply sending a letter demanding payment but not providing any new documentation as you did on July 2, 2009 does not justify proof of loss.

It is not until December 22, 2009 that we have received new information regarding loss of earnings.

We have now evaluated the claim based on this new information that you have submitted and would like to extend an offer of \$2,562 (Two Thousand Five Hundred Sixty Two Dollars\*\*\*) for full and final settlement of the Uninsured Motorist claim for DEVA FERRELL.

Since we have already sent \$1,700 to the policy holder, the balance of \$862 is enclosed. Please note that all medical expenses were paid under the Medpay provision of the policy.

There are still several questions surrounding the loss of earnings claim. The client was not given prescribed time off beyond December 26, 2008. The impact to the vehicle as well as the documented injury diagnoses and subsequent minimal treatment do not seem to correlate with missing time beyond December 26, 2008 (which has been considered in this offer).

It is not clear what the client's job duties entail or why the work could not have been hired out in lieu of completely missing an opportunity for a new job.

Wage loss claimed for 2009 has not been verified beyond estimates of what the client may have had for work.

In our conversation with the client's accountant, Kirby Forbush, on May 5, 2009, we confirmed that each partner's personal income is most accurately reflected in the figure shown in Part III, Line 1 of tax form "Schedule K." Using the 2007 and 2008 forms, it appears the client earned personal income of \$44,449 and \$32,307, respectively. It is not clear why the client's personal earnings would have increased markedly in the first quarter of 2009, especially in light of the perceived state of the economy in terms of the construction industry.

Moreover, it is not clear why the client missed any work in 2009 based on the injury, impact, and doctor's recommendations.

Please contact me to further discuss the claim. You can see how the questions as outlined above remain an obstacle in our evaluation of the claim; however, we would like to continue to negotiate this claim for our policy holder.

CURTIS NEILL  
Claims Department  
1-208-895-2426  
1-800-PROGRESSIVE (1-800-776-4737)  
Fax: 1-208-895-2407  
CNeill2@Progressive.com

VOID IF NOT PRESENTED WITHIN 6 MONTHS AFTER DATE OF ISSUE

Policy # 02616845 -009	Insured FERRELL BRO THER	Date Issued 1/ 5/2010	Area Code 965	Draft Number 464486629	56-389 412
Claim # 085146644	Claimant FERRELL, SAMUEL	Date of Loss 12/22/2008	State Code ID	Office Issued At MT-MTEFH-BRN-	PAC

Dollars \$ \*\*\*\*\*855.00

PAY EIGHT HUNDRED FIFTY FIVE AND 00/100

In Payment Of UMBI - AMT JUSTLY DUE AND OWING	CDS CODE 05PCL
--	-------------------

Payable through **National City Bank**  
ASHLAND, OHIO 1-877-448-9544

United Financial Casualty Company

Pay To SAMUEL FERRELL, A SINGLE ADULT MALE, AND\*\*\*\*\*  
THOMSEN STEPHENS LAW OFFICES, ONLY\*\*\*\*\*  
2635 CHANNING WAY  
IDAHO FALLS ID 83404

BY *Crawford*  
AUTHORIZED SIGNATURE

⑈464486629⑈ ⑈041203895⑈ 7701870⑈

VOID IF NOT PRESENTED WITHIN 6 MONTHS AFTER DATE OF ISSUE

Policy # 02616845 -009	Insured FERRELL BRO THER	Date Issued 1/ 5/2010	Area Code 965	Draft Number 464486628	56-381 412
Claim # 085146644	Claimant FERRELL, DEVA	Date of Loss 12/22/2008	State Code ID	Office Issued At MT-MTEFH-BRN-	PAC

Dollars \$ \*\*\*\*\*862.00

PAY EIGHT HUNDRED SIXTY TWO AND 00/100

In Payment Of UMBI - AMT JUSTLY DUE AND OWING	CDS CODE 05PCL
--	-------------------

Payable through **National City Bank**  
ASHLAND, OHIO 1-877-448-9544

United Financial Casualty Company

Pay To DEVA FERRELL AND JANELL FERRELL, INDIVIDUALLY AND AS\*\*\*\*\*  
HUSBAND AND WIFE, AND\*\*\*\*\*  
THOMSEN STEPHENS LAW OFFICES, ONLY\*\*\*\*\*  
2635 CHANNING WAY  
IDAHO FALLS ID 83404

BY *Crawford*  
AUTHORIZED SIGNATURE

⑈464486628⑈ ⑈041203895⑈ 7701870⑈

Claim Payment Detail ( 08-5146644 )

<b>Payment Information</b>			
<b>Number:</b>	461082954	<b>Total Amount:</b>	\$1,700.00
<b>EFT Trace Number:</b>			
<b>Paid To:</b>	DEVA FERRELL AND JANELL FERRELL, INDIVIDUALLY AND AS***** HUSBAND AND WIFE, ONLY***		
<b>Payee Address:</b>	2919 BROWNSTONE CIRCLE AMMON, ID 83406 USA		
<b>In Payment Of:</b>	UMBI - AMT JUSTLY DUE AND OWING		

<b>Vendor Information</b>			
<b>1099 Required:</b>	No	<b>Vendor Name:</b>	
		<b>Vendor Type:</b>	

<b>Reviewed Summary</b>			
<b>Issuing Rep:</b>	CEN0004	<b>Approved By:</b>	
<b>Issue Date:</b>	04-20-09	<b>Review Date:</b>	
<b>Last Updated Rep:</b>	CEN0004	<b>Reviewed By:</b>	

<b>Bank Information</b>			
<b>Type:</b>	Loss	<b>CDS Code:</b>	05-PCL
<b>Stop Reason:</b>		<b>Bank Code:</b>	AS2
<b>Stop Date:</b>		<b>State:</b>	ID
<b>Cleared:</b>	05-03-09	<b>Area Code:</b>	761

<b>Exposure Detail: UM</b>			
<b>Party Name:</b>	FERRELL, DEVA	<b>Amount Paid:</b>	\$1,700.00
<b>Exposure:</b>	UM	<b>Deductible Taken:</b>	\$0.00
<b>Payment Type:</b>	PARTIAL PAYMENT	<b>Medical:</b>	\$0.00
<b>Workers Comp Type:</b>		<b>Wage:</b>	\$0.00

PROGRESSIVE CLAIMS  
2264 S BONITO WAY  
SUITE 100  
MERIDIAN, ID 83642

**PROGRESSIVE**

THOMSEN STEPHENS LAW OFFICES  
JACOB S WESSEL  
2635 CHANNING WAY  
IDAHO FALLS, ID 83404

**Underwritten By:**  
**United Financial Casualty Company**

Claim Number: 08-5146644  
Loss Date: December 22, 2008  
Document Date: January 5, 2010  
Page 1 of 1

**claims.progressive.com**

Track the status and details of your claim,  
e-mail your representative or report a  
new claim.

## Claim Information

This letter is in regard to the Uninsured Motorist claim for SAMUEL FERRELL. You have submitted new information dated December 22, 2009 and it has been fully reviewed.

We have been compliant with code 41-1839 as we had previously advanced the amount justly due to the policy holder (documentation enclosed) within 30 days of receipt of proof of loss. The code specifies that information or proof of loss must be furnished and payment made within 30 days of receipt of same. Simply sending a letter demanding payment but not providing any new documentation as you did on July 2, 2009 does not justify proof of loss.

It is not until December 22, 2009 that we have received new information regarding loss of earnings.

We have now evaluated the claim based on this new information that you have submitted and would like to extend an offer of \$2,355 (Two Thousand Three Hundred Fifty Five Dollars\*\*\*) for full and final settlement of the Uninsured Motorist claim for SAMUEL FERRELL.

Since we have already sent \$1,500 to the policy holder, the balance of \$855 is enclosed. Please note that all medical expenses were paid under the Medpay provision of the policy.

There are still several questions surrounding the loss of earnings claim, and I refer you to the other letter of this same date regarding the client's brother, as the same concerns apply.

Please contact me to further discuss the claim. You can see how the questions as outlined remain an obstacle in our evaluation of the claim; however, we would like to continue to negotiate this claim for our policy holder.

CURTIS NEILL  
Claims Department  
1-208-895-2426  
1-800-PROGRESSIVE (1-800-776-4737)  
Fax: 1-208-895-2407  
CNeill2@Progressive.com

Form Z587 XX (01/08) - 1D

017



Claim Payment Detail ( 08-5146644 )

<b>Payment Information</b>			
<b>Number:</b>	461082956	<b>Total Amount:</b>	\$1,500.00
<b>EFT Trace Number:</b>			
<b>Paid To:</b>	SAMUEL FERRELL, A SINGLE ADULT MALE, ONLY*****		
<b>Payee Address:</b>	4167 BRACKEN AVE AMMON, ID 83406 USA		
<b>In Payment Of:</b>	UMBI - AMT JUSTLY DUE AND OWING		

<b>Vendor Information</b>			
<b>1099 Required:</b>	No	<b>Vendor Name:</b>	
		<b>Vendor Type:</b>	

<b>Reviewed Summary</b>			
<b>Issuing Rep:</b>	CEN0004	<b>Approved By:</b>	
<b>Issue Date:</b>	04-20-09	<b>Review Date:</b>	
<b>Last Updated Rep:</b>	CEN0004	<b>Reviewed By:</b>	

<b>Bank Information</b>			
<b>Type:</b>	Loss	<b>CDS Code:</b>	05-PCL
<b>Stop Reason:</b>		<b>Bank Code:</b>	AS2
<b>Stop Date:</b>		<b>State:</b>	ID
<b>Cleared:</b>	04-30-09	<b>Area Code:</b>	761

<b>Exposure Detail: UM</b>			
<b>Party Name:</b>	FERRELL, SAMUEL	<b>Amount Paid:</b>	\$1,500.00
<b>Exposure:</b>	UM	<b>Deductible Taken:</b>	\$0.00
<b>Payment Type:</b>	PARTIAL PAYMENT	<b>Medical:</b>	\$0.00
<b>Workers Comp Type:</b>		<b>Wage:</b>	\$0.00

013

THOMSEN  STEPHENS  
LAW OFFICES

Alan C. Stephens\*  
Curt R. Thomsen (*Challis Office*)  
James D. Holman\*\*

\*Also Member of Wyoming Bar

\*\*Also Member of Nebraska Bar

J. Michael Wheeler  
Michael J. Whyte  
T. Jason Wood  
Jacob S. Wessel  
Richard Friess

January 22, 2010

CURTIS NEILL  
PROGRESSIVE CLAIMS DEPARTMENT  
2264 SOUTH BONITO WAY STE 100  
MERIDIAN ID 83642-9327

**RE: Insured: Dave Ferrell**  
**Policy No.: 02616845-6**  
**Date of Loss: December 22, 2008**  
**Claim No.: 08-5146644**

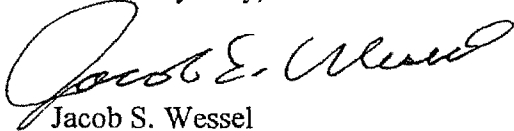
**Insured: Samuel Ferrell**  
**Policy No.: 02616845-6**  
**Date of Loss: December 22, 2008**  
**Claim No.: 08-5146644**

Dear Mr. Neill:

Based upon your most recent letter, it appears that we have reached an impasse in our settlement negotiations. We, therefore, demand arbitration pursuant to my clients' insurance policies. Please have your attorney contact me so that we can discuss nomination of arbitrators.

If you have any questions or concerns, feel free to contact me.

Yours very truly,

  
Jacob S. Wessel

JSW/jd  
7083\Progressive

cc: Sam and Dave Ferrell

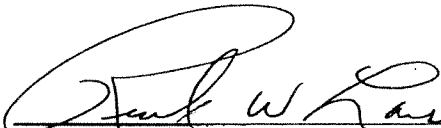
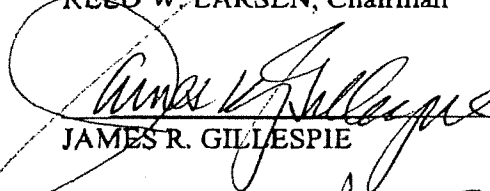
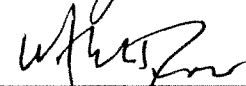
019

In Re: )  
 )  
 The Arbitration of Deva Ferrell and )  
 Sam Ferrell, )  
 )  
 v. )  
 )  
 Progressive Insurance Company. )  
 \_\_\_\_\_ )

**AWARD DECISION**

This matter having come on for arbitration hearing on November 4, 2010, the undersigned arbitrators hereby make the following award: (1) wage loss for Deva Ferrell in the amount of \$5,143.44; and, (2) wage loss for Sam Ferrell in the amount of \$3,990.80. No lawsuit has been filed, but this award is final.

Dated 11/4/2010  
 Dated 11/4/2010  
 Dated 11/4/10

  
 REED W. LARSEN, Chairman  
  
 JAMES R. GILLESPIE  
  
 MICHAEL R. McBRIDE

BONNEVILLE COUNTY  
11 JAN -3 AM 10:40

**LERMA LAW OFFICE, P.A.**  
**John J. Lerma, ISB# 3886**  
**Gary D. Luke, ISB# 8287**  
**El Dorado Business Campus**  
**3045 E. Copper Point Drive**  
**PO Box 190719**  
**Boise ID 83719**  
**TELEPHONE: (208) 288-0608**  
**FACSIMILE: (208) 288-0697**

**Attorneys for Defendants**

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL,  
Plaintiffs,

vs.

UNITED FINANCIAL CASUALTY  
COMPANY, d.b.a. PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown and PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown,

Defendants.

Case No. CV 10-7051


**DEFENDANTS' MOTION TO STAY  
PROCEEDINGS**

COME NOW the Defendants, by and through their attorneys of record, Lerma Law Office, P.A., and move this court for an order staying the proceedings in the above-entitled action pursuant to IRCP 12(b)(8) and Idaho Code 7-902(d). The requested stay should be granted on the

grounds and for the reasons set forth in the accompanying Memorandum in Support of Defendants' Motion to Stay filed simultaneously herewith.

DATED this 30 day of December 2010.

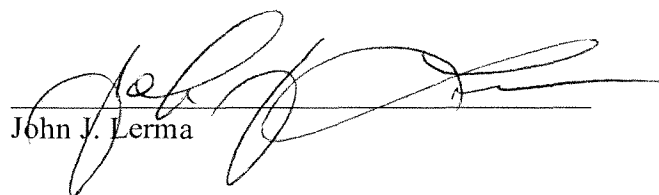
LERMA LAW OFFICE, P.A.

  
\_\_\_\_\_  
John J. Lerma  
Attorney for Defendants

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 30 day of December 2010, I caused a true and correct copy of the foregoing document to be served by U.S. Mail, postage prepaid upon the following person(s):

Jacob S. Wessel  
Thomsen Stephens Law Offices  
2635 Channing Way  
Idaho Falls, ID 83404

  
\_\_\_\_\_  
John J. Lerma

BONNEVILLE COUNTY  
104112

11 JAN -3 AM 10:40

**LERMA LAW OFFICE, P.A.**  
**John J. Lerma, ISB# 3886**  
**Gary D. Luke, ISB# 6450**  
**El Dorado Business Campus**  
**3045 E. Copper Point Drive**  
**PO Box 190719**  
**Boise ID 83719**  
**TELEPHONE: (208) 288-0608**  
**FACSIMILE: (208) 288-0697**

**Attorneys for Samuel Ferrell**

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL,

Plaintiffs,

vs.

UNITED FINANCIAL CASUALTY  
COMPANY, d.b.a. PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown and PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown,

Defendants.

Case No. CV 10-7051

**MEMORANDUM IN SUPPORT  
OF DEFENDANTS' MOTION TO  
STAY**

COME NOW the Defendants, by and through their attorneys of record, Lerma Law Office, P.A., and submit this Memorandum in Support of Defendants' Motion to Stay. As explained herein, the Motion should be granted so that the existing Arbitration Panel can consider and determine an appropriate award of attorneys' fees and legal costs, if any.

**I. STATEMENT OF FACTS**

The parties participated in an arbitration hearing on November 4, 2010. Both parties were represented by counsel and were given full opportunity to present evidence, make arguments, and request relief. At the conclusion of the hearing, the Arbitration Panel issued an Award Decision.

At the arbitration hearing, counsel for Plaintiffs requested that the Arbitration Panel consider and determine appropriate attorneys' fees and recovery of legal costs. Defendants' counsel agreed to submit such issues to the Panel. At that time, the Panel indicated that such issues should be addressed by the Panel at a later date. Accordingly, the Panel postponed full consideration and delayed any decision regarding fees and costs.

Defendants request that the Panel now be allowed to complete its consideration and provide a decision as to fees and costs.

**II. ARGUMENT**

Rule 12(b) of the Idaho Rules of Civil Procedure provides that a party may bring a defensive motion if there is "another action pending between the same parties for the same cause." I.R.C.P. 12(b)(8). Given the parties' decision to proceed via arbitration, and given the existing Arbitration Panel, there is in fact another action pending between these same parties for the same cause. Accordingly, Defendants assert such defense and request that the Court stay any further action in this forum until the Arbitration Panel affirmatively rules on the issue of attorneys' fees and legal costs. Pending a ruling on this Motion, the Defendants reserve any other defenses or objections to the Plaintiffs' filing.

Defendants also rely on Idaho Code § 7-902:

Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only.

I.C. § 7-902(d). See also *Accomazzo v. CEDU Educational Services, Inc.*, 135 Idaho 145, 147, 15 P.3d 1153 (2000) (stays and submissions via § 7-902(d) are within the discretion of the trial court).

Once again, Defendants respectfully request that this Court stay the present proceedings so as to allow the Arbitration Panel a full opportunity to consider and decide the appropriate fees and costs.

A. The Parties Agreed at the Arbitration to Submit the Issue of Attorneys' Fees and Costs to the Arbitration Panel

At the November 4, 2010 arbitration hearing, counsel for Plaintiffs requested that the Panel determine appropriate attorneys' fees and legal costs. Defendants' counsel concurred with submission of such issues to the Panel, but objected to submission pre-award. As such, the issue of fees and costs is within the authority delegated to the Arbitration Panel by the parties.

The Panel accepted such authority and agreed that it could make such determinations. However, the Panel declined to consider such issues that same day. The parties should now be allowed to return to the Arbitration Panel, as previously agreed to, submit full documentation, and explain the requests for fees and costs, and any objection thereto.



B. The Arbitration Panel is the Finder of Fact Most Familiar with the Parties' Evidence, Arguments and Prevailing Status

At the arbitration hearing on November 4, 2010, all parties were represented by counsel and were given full opportunity to present their evidence and make their arguments. The Arbitration Panel considered such, acted as the finder of fact, and accordingly issued an Award Decision.

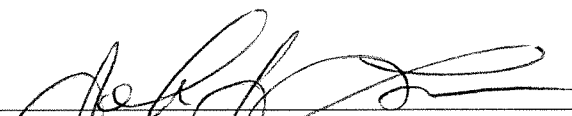
Based on its existing knowledge of relevant facts and the parties' claims and defenses, the Arbitration Panel is well positioned to accurately determine appropriate attorneys' fees and costs. This Court should give the Panel the opportunity to make such determination. Again, this accords with the parties' previous request, it is within the power delegated to the Panel, and it defers to the finder of fact that is familiar with all evidence and the respective legal arguments.

**III. CONCLUSION**

This Court should grant the Defendants' Motion to Stay, and should allow the constituted Arbitration Panel to determine appropriate attorneys' fees and legal costs. Such will be a judicious use of the Court's time and will allow the arbitrators to resolve all issues submitted to the Panel.

DATED this 30 day of December 2010

LERMA LAW OFFICE, P.A.

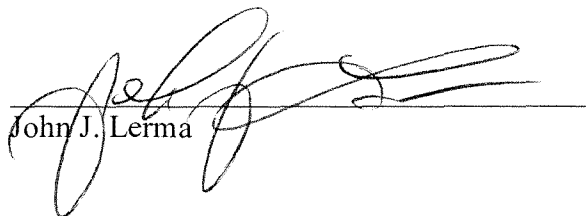
  
\_\_\_\_\_  
John J. Lerma  
Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 30 day of December 2010, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

Jacob S. Wessel  
Thomsen Stephens Law Offices  
2635 Channing Way  
Idaho Falls, ID 83404

U.S. Mail, Postage Prepaid  
 Express Mail  
 Hand Delivery  
 Facsimile Transmission  
 Federal Express

  
John J. Lerma

027

BONNEVILLE COUNTY  
IDAHO

11 JAN 11 PM 4:29

Jacob S. Wessel, ISB #7529  
THOMSEN STEPHENS LAW OFFICES, PLLC  
2635 Channing Way  
Idaho Falls, ID 83404  
Telephone (208) 522-1230  
Fax (208) 522-1277  
jwessel@thomsenstephenslaw.com

Attorneys for Plaintiffs Sam Ferrell and Deva Ferrell

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 UNITED FINANCIAL CASUALTY )  
 COMPANY, d.b.a PROGRESSIVE )  
 INSURANCE COMPANY whose true )  
 name is unknown and PROGRESSIVE )  
 INSURANCE COMPANY whose true )  
 name is unknown, )  
 )  
 Defendants. )  
 )  
 \_\_\_\_\_ )

Case No. CV-2010-7051

OBJECTION TO MOTION TO STAY

COMES NOW Plaintiffs Sam and Deva Ferrell, by and through counsel of record, and hereby object to the Defendant's motion to stay on the following grounds:

1. The parties are not in agreement as to whether the arbitration panel decided not to decide on the issue of attorney fees or whether the panel decided to take up that issue at a later date.
2. Plaintiffs have asked the arbitrators to amend their decision, clarifying the decision

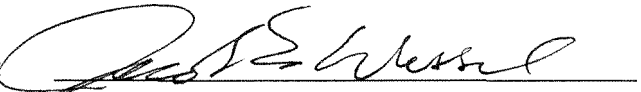
in regards to attorney fees, costs, and interest.

3. As soon as the amended arbitration award is issued it will be clear whether a stay is appropriate at this time.

WHEREFORE, the Plaintiffs pray the Order of this court denying Defendant's Motion to Stay Proceedings.

DATED this 8 day of January, 2011.

THOMSEN STEPHENS LAW OFFICES, P.L.L.C.

By:   
Jacob S. Wessel, Esq.

**CERTIFICATE OF SERVICE**

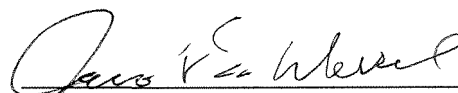
I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 11<sup>th</sup> day of January, 2011, I caused a true and correct copy of the foregoing OBJECTION TO MOTION TO STAY to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

JOHN L. LERMA, ESQ.  
LERMA LAW OFFICE, PA  
3045 E. COPPER POINT DRIVE  
PO BOX 190719  
BOISE, ID 83719

Mail  
 Hand Delivery  
 Facsimile@

THOMSEN STEPHENS LAW OFFICES, PLLC

By:

  
\_\_\_\_\_  
Jacob S. Wessel, Esq.

JSW  
7083\009 Objection to Motion to Stay

BONNEVILLE COUNTY  
IDAHO  
11 FEB -2 PM 4:23

**LERMA LAW OFFICE, P.A.**  
**John J. Lerma, ISB# 3386**  
**El Dorado Business Campus**  
**3045 E. Copper Point Drive**  
**PO Box 190719**  
**Boise ID 83719**  
**TELEPHONE: (208) 288-0608**  
**FACSIMILE: (208) 288-0697**

**Attorneys for Defendants**

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL,  
Plaintiffs,

vs.

UNITED FINANCIAL CASUALTY  
COMPANY, d.b.a. PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown and PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown,

Defendants.


Case No. CV 10-7051

**WITHDRAWAL OF DEFENDANTS'  
MOTION TO STAY PROCEEDINGS**

COME NOW the Defendants, by and through their attorneys of record, Lerma Law  
Office, P.A., and hereby withdraw their Motion to Stay Proceedings, filed on January 3, 2011.

DATED this 2 day of February 2011.

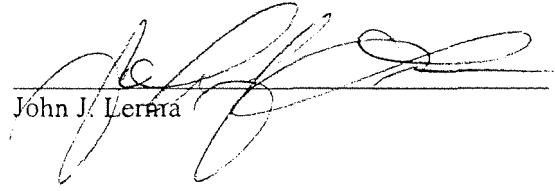
LERMA LAW OFFICE, P.A.

  
John J. Lerma  
Attorney for Defendants

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 2 day of February 2011, I caused a true and correct copy of the foregoing document to be served by Facsimile Transmission upon the following person(s):

Jacob S. Wessel  
Thomsen Stephens Law Offices  
2635 Channing Way  
Idaho Falls, ID 83404

  
\_\_\_\_\_  
John J. Lerra

BONNEVILLE COUNTY  
2011 FEB 17 PM 4:01

**LERMA LAW OFFICE, P.A.**  
**John J. Lerma, ISB# 3886**  
**Gary D. Luke, ISB# 6450**  
**El Dorado Business Campus**  
**3045 E. Copper Point Drive**  
**PO Box 190719**  
**Boise ID 83719**  
**TELEPHONE: (208) 288-0608**  
**FACSIMILE: (208) 288-0697**

**Attorneys for Defendants**

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL and DEVA FERRELL,  
Plaintiffs,

Case No. CV 10-7051

vs.

**ANSWER TO PETITION FOR  
CONFIRMATION OF  
ARBITRATION AWARD AND  
AWARD OF COSTS AND FEES**

UNITED FINANCIAL CASUALTY  
COMPANY, d.b.a. PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown and PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown,

Defendants.

COME NOW the captioned Defendants, UNITED FINANCIAL CASUALTY  
COMPANY and PROGRESSIVE INSURANCE COMPANY, by and through LERMA LAW  
OFFICE, P.A., to answer and respond to the Plaintiffs' Petition.

The captioned Defendant PROGRESSIVE INSURANCE COMPANY is not properly  
named as a defendant inasmuch as it is not the entity that issued or underwrote the policy at



issue. At the appropriate time, the caption should be corrected and Progressive Insurance Company formally dismissed as a named party. For purposes of this Answer to Petition, however, the captioned Defendants have aligned interests and will be jointly responding.

#### **FIRST DEFENSE**

Because captioned Defendant Progressive Insurance Company is not properly named as a defendant, inasmuch as it did not issue or underwrite the applicable policy, Plaintiffs are precluded from obtaining any award confirmation or judgment against Progressive Insurance Company.

#### **SECOND DEFENSE**

Plaintiffs' Petition, and each and every allegation contained therein, fails to state a claim against Defendants upon which relief can be granted.

#### **THIRD DEFENSE**

Defendants deny each and every allegation contained in Plaintiffs' Petition, unless expressly and specifically hereinafter admitted.

1. With regard to Paragraphs 1 and 2 of Plaintiffs' Petition, Defendants admit each and every allegation contained therein.
2. Plaintiffs' Petition does not contain a Paragraph 3.
3. With regard to Paragraph 4 in Plaintiffs' Petition, Defendants deny that United Financial Casualty Company's true name is unknown. Accordingly, Defendants deny any right to substitute a different name or designation. To the extent not explicitly admitted herein, Defendants deny the allegations contained in Paragraph 4.
4. With regard to Paragraph 5 in Plaintiffs' Petition, Defendants deny that

Progressive Insurance Company issued the uninsured motorist policy to the Plaintiffs. As such, Progressive Insurance Company is not a properly named defendant. To the extent not explicitly admitted herein, Defendants deny the allegations contained in Paragraph 5.

5. With regard to Paragraph 6 in Plaintiffs' Petition, Defendants deny that Progressive Insurance Company's true name is unknown. Furthermore, because Progressive Insurance Company did not issue the policy to the Plaintiffs, Defendants deny that Progressive Insurance Company is a properly named defendant or that there is any need to substitute a different name or designation. To the extent not explicitly admitted herein, Defendants deny the allegations contained in Paragraph 6.

6. With regard to Paragraphs 7 and 8 of Plaintiffs' Petition, Defendants admit each and every allegation contained therein.

7. With regard to Paragraph 9 of Plaintiffs' Petition, Defendants admit that the referenced claims were resolved and that the respective payments were tendered to the Plaintiffs. To the extent not explicitly admitted herein, Defendants deny the allegations contained in Paragraph 9.

8. With regard to Paragraph 10 of Plaintiffs' Petition, Defendants admit that Plaintiffs retained Thomsen Stephens Law Offices. To the extent not explicitly admitted herein, Defendants deny the allegations contained in Paragraph 10.

9. With regard to Paragraph 11 of Plaintiffs' Petition, Defendants admit that Mr. Wessel sent a July 2, 2009 letter, and that a true and correct copy of the letter is attached to Plaintiffs' Petition. Defendants assert that the referenced letter speaks for itself. To the extent not explicitly admitted herein, Defendants deny the allegations contained in Paragraph 11.

10. With regard to Paragraph 12 of Plaintiffs' Petition, Defendants admit each and every allegation contained therein.

11. With regard to Paragraph 13 of Plaintiffs' Petition, Defendants admit that Mr. Wessel sent a December 22, 2009 letter, and that a true and correct copy of the letter is attached to Plaintiffs' Petition. Defendants assert that the referenced letter speaks for itself. To the extent not explicitly admitted herein, Defendants deny the allegations contained in Paragraph 13.

12. With regard to Paragraph 14 of Plaintiffs' Petition, Defendants admit that they sent a January 5, 2010 letter, that they tendered the referenced amounts to the Plaintiffs as undisputed claim amounts, and that a true and correct copy of the letter is attached to the Plaintiffs' Petition. Defendants assert that the referenced letter speaks for itself. To the extent not explicitly admitted herein, Defendants deny the allegations contained in Paragraph 14.

13. With regard to Paragraph 15 of Plaintiffs' Petition, Defendants admit that Mr. Wessel sent a January 22, 2010 letter, and that a true and correct copy of the letter is attached to Plaintiffs' Petition. Defendants assert that the referenced letter speaks for itself. Defendants deny that the letter rejected the payment amounts previously tendered to the Plaintiffs. To the extent not explicitly admitted herein, Defendants deny the allegations contained in Paragraph 15.

14. With regard to Paragraph 16 of Plaintiffs' Petition, Defendants admit each and every allegation contained therein.

15. With regard to Paragraph 17 of Plaintiffs' Petition, Defendants admit that the arbitration panel issued an Award Decision on November 4, 2010, that such awarded the referenced amounts to the respective Plaintiffs, and that a true and correct copy of the Award Decision is attached to Plaintiffs' Petition. Defendants assert that the Award Decision speaks for

itself. Defendants deny that there was any determination pertaining to Idaho Code § 41-1839. To the extent not explicitly admitted herein, Defendants deny the allegations contained in Paragraph 17.

16. With regard to Paragraph 18 of Plaintiffs' Petition, Defendants admit that this Court has jurisdiction and that the Uniform Arbitration Act, Idaho Code § 7-901 *et seq.*, is the applicable and controlling statute. To the extent not explicitly admitted herein, Defendants deny the allegations contained in said Paragraph 18.

17. With regard to Paragraph 19 of Plaintiffs' Petition, Defendants admit that venue in Bonneville County is appropriate.

18. With regard to Paragraphs 20 and 21 of Plaintiffs' Petition, Defendants deny each and every allegation contained therein.

19. With regard to Paragraph 22 of Plaintiffs' Petition, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore deny the same.

20. With regard to Paragraph 23 of Plaintiffs' Petition, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore deny the same.

#### **FOURTH DEFENSE**

On or about November 16, 2010, Defendants tendered payment to the Plaintiffs, representing amounts respectively awarded via the Award Decision (with amounts previously tendered subtracted, and with calculated pre-award interest added). As such, the award has been satisfied and any request for confirmation is moot.

037

**FIFTH DEFENSE**

To the extent any relief requested by the Plaintiffs exceeds the parameters of Idaho Code § 7-913, such relief is precluded.

**SIXTH DEFENSE**

Plaintiffs are not entitled to attorneys' fees or costs pursuant to applicable Idaho law as it then existed.

**SEVENTH DEFENSE**

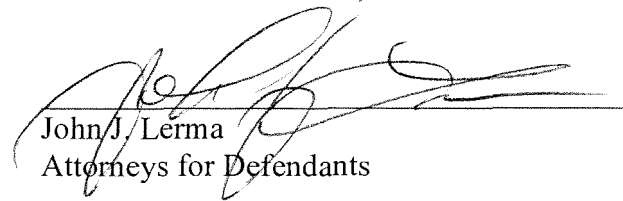
Plaintiffs are not entitled to pre-judgment interest on the amounts previously tendered to the respective Plaintiffs.

**WHEREFORE**, Defendants pray for judgment as follows:

1. That Plaintiffs' Petition be dismissed with prejudice, and that Plaintiffs take nothing thereunder;
2. That Defendants be awarded costs and disbursements necessarily incurred in defending this action, pursuant to Rule 54 of the Idaho Rules of Civil Procedure; and
3. For such other and further relief as the Court may deem just and proper.

DATED this 15 day of February 2011.

LERMA LAW OFFICE, P.A.

  
John J. Lerma  
Attorneys for Defendants

033

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 15 day of February 2011, I caused a true and correct copy of the foregoing document to be served by facsimile transmission upon the following person(s):

Jacob S. Wessel  
Thomsen Stephens Law Offices, PLLC  
2635 Channing Way  
Idaho Falls, ID 83404  
FAX: (208) 522-1277

  
John J. Eerma

039

ORIGINAL

509

COUNTY

IDAHO

MAR 11 PM 4:20

Jacob S. Wessel, ISB #7529  
THOMSEN STEPHENS LAW OFFICES, PLLC  
2635 Channing Way  
Idaho Falls, ID 83404  
Telephone (208) 522-1230  
Fax (208) 522-1277  
jwessel@thomsenstephenslaw.com

Attorneys for Plaintiffs Sam Ferrell and Deva Ferrell

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL, )

Case No. CV-2010-7051

Plaintiffs, )

MOTION FOR FEES AND COSTS

v. )

(Idaho Code § 41-1839, IRCP 54(d)(1))

UNITED FINANCIAL CASUALTY )

COMPANY, d.b.a PROGRESSIVE )

INSURANCE COMPANY whose true )

name is unknown and PROGRESSIVE )

INSURANCE COMPANY whose true )

name is unknown, )

Defendants. )

Plaintiffs Sam and Deva Ferrell, pursuant to Idaho Code § 41-1839 and Idaho Rules of Civil Procedure, Rule 54(d)(1), moves the court for an award of attorney fees and costs and represents to the court as follows:

1. The arbitration panel entered judgment in favor of plaintiffs on the 4<sup>th</sup> day of November, 2010 in the amounts of \$3,990.80 for Sam and \$5,143.44 for Deva; these amounts were more than Defendant tendered to defendants after receiving proof of loss.

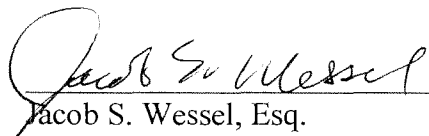
2. Plaintiff is entitled to an award of attorney fees pursuant to Idaho Code § 41-1839 and costs pursuant to I.R.C.P. Rule 54(d)(1).

3. The amount claimed is \$\$21,453.76.

4. This petition is supported by the Affidavit of Jacob S. Wessel and the Memorandum in Support filed herewith.

DATED this 11 day of March, 2011.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:   
Jacob S. Wessel, Esq.



**CERTIFICATE OF SERVICE**

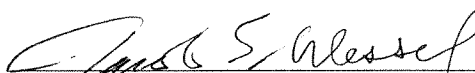
I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 11 day of February, 2011, I caused a true and correct copy of the foregoing **MOTION FOR FEES AND COSTS (Idaho Code § 41-1839, IRCP 54)** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

JOHN LERMA  
LERMA LAW OFFICE, PA  
3045 E COOPER POINT DR.  
MERIDIAN ID 83642  
PO BOX 190719  
BOISE, ID 83719

Mail  
 Hand Delivery  
 Facsimile@

THOMSEN STEPHENS LAW OFFICES, PLLC

By:

  
\_\_\_\_\_  
Jacob S. Wessel, Esq.

JSW  
7083\010 Motion for fees and costs

ORIGINAL

FOURTH JUDICIAL DISTRICT COUNTY

SEP 11 11 PM 1:20

Jacob S. Wessel, ISB #7529  
THOMSEN STEPHENS LAW OFFICES, PLLC  
2635 Channing Way  
Idaho Falls, ID 83404  
Telephone (208) 522-1230  
Fax (208) 522-1277  
jwessel@thomsenstephenslaw.com

Attorneys for Plaintiffs Sam Ferrell and Deva Ferrell

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL,	)	Case No. CV-2010-7051
	)	
Plaintiffs,	)	
	)	MEMORANDUM IN SUPPORT OF MOTION
v.	)	FOR FEES AND COSTS
	)	
UNITED FINANCIAL CASUALTY	)	
COMPANY, d.b.a PROGRESSIVE	)	
INSURANCE COMPANY whose true	)	
name is unknown and PROGRESSIVE	)	
INSURANCE COMPANY whose true	)	
name is unknown,	)	
	)	
Defendants.	)	
	)	

COME NOW Plaintiffs Sam and Deva Ferrell, by and through counsel of record, and hereby submit the following memorandum in support of their motion for award of attorney fees and costs.

## I. INTRODUCTION

This is an uninsured motorist claim pursuant to a UM policy. The parties underwent arbitration in November, 2010, and Plaintiffs are now seeking an award of costs and attorneys fees pursuant to Idaho Code § 41-1839 and I.R.C.P. Rule 54(d)(1).

On December 22, 2009 Plaintiffs sent Defendant a letter with proof of lost income relating to their UM claim requesting \$7,000.00 for Sam Ferrell and \$10,000.00 for Deva Ferrell. Defendants tendered \$855.00 to Sam Ferrell and \$862.00 to Deva Ferrell on January 5, 2010. Without filing a lawsuit, Plaintiffs demanded arbitration pursuant to the UM policy on January 22, 2010. Since that time, two things have happened to alter the Idaho law of attorney fees in arbitration. First, the Idaho Supreme Court decided *The Greasespot, Inc. v. Hanes*, 2010 Slip Opinion No. 10 (February 1, 2010) which held that attorney fees in arbitration were unavailable under Idaho law. Second, effective July, 2010 and in direct reaction to the *Greasespot* opinion, the Idaho legislature amended Idaho Code § 41-1839 to overrule *The Greasespot* and to reinstate the law as set forth in *Emery v. United Pacific Insurance Company*, 120 Idaho 244, 815 P.2d 442 (1991). *Emery* and its progeny held that section 41-1839, Idaho Code applied to require attorney fees incurred in arbitration proceedings to recover amounts justly due, but not paid by the insurance company.

On November 4, 2010, the parties underwent arbitration before a panel of three arbitrators. The arbitrators awarded Plaintiffs more than the amount tendered by the Defendant insurance company. The arbitrators declined to decide the issues of costs and fees in arbitration in deference to this Court. Plaintiffs now seek an award of attorneys fees and costs in the arbitration and in this lawsuit pursuant to Idaho Code § 41-1839 and I.R.C.P. Rule 54(d)(1).

## II. STANDARD OF REVIEW

Fees and Costs are available under Idaho Code § 41-1839:

The statute "contains two requirements for an insured to be entitled to an award of attorney fees: (1) the insured must provide a proof of loss as required by the insurance policy; and (2) the insurer must fail to pay the amount justly due within thirty days after receipt of the proof of loss." *Parsons v. Mutual of Enumclaw Ins. Co.*, 143 Idaho 743, 746-47, 152 P.3d 614, 617-18 (2007).

*Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 233 P.3d 1221, 1249-1250 (Idaho 2010).

## III. UNDISPUTED FACTS

1. Plaintiffs are residents of the State of Idaho, County of Bonneville. *Petition*, ¶ 1, admitted in ¶ 1 of Defendant's Answer.
2. Defendant United Financial Casualty Company is an insurance company operating an insurance business in the State of Idaho and is the company that underwrote the policy for Progressive Insurance Company. *Petition*, ¶ 1, admitted in ¶ 1 of Defendant's Answer.
3. The Defendant United Financial Casualty Company, d.b.a. Progressive Insurance Company is the correct defendant in this action as opposed to Progressive Insurance Company. Admitted in ¶ 3-5 of Defendant's Answer.
4. Plaintiffs and Defendants entered into a contract for a commercial uninsured motorist policy number 02616845-6 (hereinafter "UM Policy"), which contract was in full force and effect at all times material hereto. *Petition*, ¶ 7, admitted in ¶ 6 of Defendant's Answer.
5. On December 22, 2008, Plaintiffs were traveling in their work vehicle on the way to work when they were struck from behind by a vehicle driven by an uninsured motorist. *Petition*, ¶ 8, admitted in ¶ 6 of Defendant's Answer.
6. In early 2009, Defendant settled with Plaintiffs for their property damage, medical

expenses and general damages for \$1,500.00 in the case of Plaintiff Sam Ferrell and \$1,700.00 in the case of Plaintiff Deva Ferrell. *Petition*, ¶ 9, admitted in ¶ 7 of Defendant's Answer.

7. The parties could not reach an agreement on their claims for lost wages, so Plaintiffs hired the firm Thomsen Stephens Law Offices PLLC to pursue these claims. *Petition*, ¶ 10, admitted in ¶ 8 of Defendant's Answer.

8. On July 2, 2009, Jacob S. Wessel, attorney for the Plaintiffs, sent a letter to Curtis Neill of the Progress Claims Department demanding payment for all lost wages justly due under the UM Policy. A true and correct copy of this letter was attached to Plaintiffs' Petition as exhibit A. *Petition*, ¶ 11, admitted in ¶ 9 of Defendant's Answer.

9. Defendant subsequently requested additional information. *Petition*, ¶ 12, admitted in ¶ 10 of Defendant's Answer.

10. On December 22, 2009, Jacob S. Wessel, attorney for the Plaintiffs again sent a letter to Curtis Neill of the Progress Claims Department demanding payment for all lost wages justly due and providing documents proving the loss. A true and correct copy of this letter was attached to Plaintiffs' Petition as exhibit B. *Petition*, ¶ 13, admitted in ¶ 11 of Defendant's Answer.

11. In a letter dated January 5, 2010, Defendant tendered \$855.00 to Sam Ferrell and \$862.00 to Deva Ferrell as proposed final settlement of Plaintiffs' lost wages claims, as the amount justly due under the UM Policy. A true and correct copy of this letter was attached to Plaintiffs' Petition as exhibit C. *Petition*, ¶ 14, admitted in ¶ 12 of Defendant's Answer.

12. On January 22, 2010, Jacob S. Wessel, attorney for the Plaintiffs, sent a letter to

Curtis Neill of the Progress Claims Department rejecting the offer of settlement and demanding arbitration pursuant to the terms of the UM Policy. A true and correct copy of this letter was attached to Plaintiffs' Petition as exhibit D. *Petition*, ¶ 15, admitted in ¶ 13 of Defendant's Answer.

13. The parties all agreed to arbitration, underwent informal discovery and formal depositions, and underwent arbitration on November 4, 2010 before a panel of three arbitrators chosen pursuant to the UM Policy. *Petition*, ¶ 16, admitted in ¶ 14 of Defendant's Answer.

14. The panel of arbitrators issued an arbitration award on November 4, 2010 awarding Plaintiff Sam Ferrell \$3,990.80 and awarding Plaintiff Deva Ferrell \$5,134.44, which were the amounts justly due under the policy. A true and correct copy of the Arbitration Award dated November 4, 2010 was attached to Plaintiffs' Petition as exhibit E. *Petition*, ¶ 17, admitted in ¶ 15 of Defendant's Answer.

15. This court has jurisdiction to confirm the arbitration award entered in this matter pursuant to the Idaho Uniform Arbitration Act, Idaho Code § 7-901 *et seq.*, specifically Idaho Code §§ 7-911, and 7-917. *Petition*, ¶ 18, admitted in ¶ 16 of Defendant's Answer.

16. Pursuant to Idaho Code § 7-918, venue is proper because the arbitration agreement provides that arbitration shall be held in the county of the residence of the insured (Bonneville County) and arbitration was held in Bonneville County. *Petition*, ¶ 19, admitted in ¶ 17 of Defendant's Answer.

17. Defendant denies that Plaintiffs are entitled to an award of their reasonable attorney fees and costs as the prevailing party in arbitration pursuant to Idaho Code §§ 41-1839. Defendant's Answer, ¶ 18.

#### IV. LEGAL ARGUMENT

1. Petitioners are entitled to an award of fees and costs pursuant to Idaho Code § 41-1839 and I.R.C.P. 54(d)(1).
  - A. The plain language of Idaho Code § 41-1839 as amended effective July, 2010, provides for an award of fees and costs in arbitration.

Idaho Code § 41-1839 is entitled “Allowance of attorney’s fees in suits against **or in arbitration** with insurers. It provides as follows:

Any insurer issuing any policy, certificate or contract of insurance, surety, guaranty or indemnity of any kind or nature whatsoever, which shall fail for a period of thirty (30) days after proof of loss has been furnished as provided in such policy, certificate or contract, to pay to the person entitled thereto the amount justly due under such policy, certificate or contract, shall in any action thereafter brought against the insurer in any court in this state **or in any arbitration** for recovery under the terms of the policy, certificate or contract, pay such further amount as the court shall adjudge reasonable as attorney’s fees in such action **or arbitration**.

Idaho Code § 41-1839 (2010) (Emphasis added to show the 2010 amendments.)

There is no longer an argument that the amended statute does not provide for attorney’s fees in arbitration.

- B. The purpose of the amendment of Idaho Code § 41-1839 was to provide for an award of fees in arbitration.

The Idaho Legislature intended the amendment to Idaho Code § 41-1839 to apply to cases such as this where an award was granted in arbitration. In its statement of purpose in passing this amendment, the legislature stated as follows:

Idaho law requires insurance companies to treat their insureds fairly. To prevent insurance companies from unreasonably delaying payment on claims by their insureds, they are required under section 41-1839, Idaho Code, to pay losses justly due to insureds within 30 days after proof of loss has been submitted. In the event the amount justly due is not paid and an action for payment required, the section provides that the insured shall also recover attorney fees.

Almost all insurance contracts require arbitration to resolve a dispute between the insurance company and its insured. In 1991, the Idaho Supreme Court held in *Emery v. United Pacific Insurance Company*, 120 Idaho 244, 815 P.2d 442 (1991), that section 41-1839, Idaho Code applied to require attorney fees incurred in arbitration proceedings to recover amounts justly due, but not paid by the insurance company. The Idaho Supreme Court recently changed the law in *The Greasespot, Inc. v. Hanes*, 2010 Slip Opinion No. 10 (February 1, 2010) reversing the *Emery* decision in a case in which section 41-1839, Idaho Code was not directly at issue.

This bill restores the law as it has been interpreted and applied since 1991. Without this change, insurance companies are able to sidestep the requirement of prompt payment of amounts justly due contained in section 41-1839, Idaho Code, by the contractual requirement that disputes be resolved through arbitration rather than in court. The attorney fee provision at issue only applies to claims by first party insureds (direct customers) of the insurance company, and not to third party claimants who have claims against insureds.

*Statement of Purpose*, RS 19849, online at <http://legislature.idaho.gov/legislation/2010/H0593SOP.pdf>. (Attached hereto.)

- C. The case law from *Emery* in 1991 until *Greasespot* provides for an award of fees pursuant to Idaho Code § 41-1839 when a case is filed in arbitration.

In *Emery v. United Pacific Insurance Company*, 120 Idaho 244, 815 P.2d 442 (1991), the driver of a vehicle insured by United Pacific Insurance Company was rear-ended by an uninsured motorist. Emery, the driver, carried an uninsured motorist policy. Emery filed suit and United Pacific demanded arbitration. Emery received an award in arbitration and filed a motion with the court to confirm the arbitration award, for prejudgment interest, and for attorneys fees pursuant to Idaho Code § 41-1839. *Emery*, 120 Idaho at 246, 815 P.2d at 444. On summary judgment, the trial court ruled pursuant to I.C. § 41-1839 that United Pacific was obligated to pay Emery's attorney fees incurred during the entire litigation process, including the arbitration proceedings. *Id.* United Pacific admitted that Emery was entitled to fees in the litigation, but appealed, reasoning that if a party to a contract, including an insurance contract, invokes the arbitration



clause, attorney fees incurred during the arbitration proceeding are not recoverable. *Id.* United Pacific further argued, citing *Bingham County Comm'n v. Interstate Elec. Co.*, 105 Idaho 36, 665 P.2d 1046 (1983), that with regard to I.C. § 7-910, it is beyond the scope of an arbitrator's powers to award attorney fees to one of the parties absent a contractual agreement to do so. In response, the Idaho Supreme Court made the following rulings:

1. “[T]he general rule of arbitration proceedings is that the parties must bear equally all expenses of arbitration except those expenses of witnesses which are to be paid by the party producing such witnesses. However, as provided in the American Arbitration Rules, the parties may agree to modify this rule in any manner that they choose.” *Emery*, 120 Idaho at 247, 815 P.2d at 445.

2. “[T]he provisions of I.C. § 41-1839 become part of the insurance contract to the same effect as though incorporated therein. *Pendlebury v. Western Casualty & Sur. Co.*, 89 Idaho 456, 406 P.2d 129 (1965).” *Emery*, 120 Idaho at 247, 815 P.2d at 445.

3. “Where the insured is required and compelled to file a lawsuit by reason of an insurer's refusal to pay in order to recover under her insurance contract, we hold it is implicit in I.C. § 41-1839 that the court shall adjudge a reasonable award of attorney fees against the insurer.” *Emery*, 120 Idaho at 247, 815 P.2d at 445.

4. “[T]he attorney fee authorized by I.C. § 41-1839 is not a penalty, but an additional sum rendered as just compensation. *Halliday v. Farmers Ins. Exch.*, 89 Idaho 293, 404 P.2d 634 (1965).” *Emery*, 120 Idaho at 247, 815 P.2d at 445.

After 1991 and up until *The Greasespot* was decided in February, 2010, the Idaho Supreme court decided multiple cases citing *Emery* and following the above principles. *See*

*Moore v. Ominicare, Inc.*, 141 Idaho 809, 118 P.3d 141 (2005); *Barbee v. WMA, Secs., Inc.*, 143 Idaho 391, 146 P.3d 657 (Idaho 2006); *Schilling v. Allstate Ins. Co.*, 132 Idaho 927, 980 P.2d 1014, 1999 Ida. LEXIS 52 (1999).

In passing the amendments to Idaho Code § 41-1839 the Idaho legislature intended for the courts to follow Emery's holdings and line of cases.

D. Public Policy Requires Awards of Fees in Arbitration.

In its statement of the purpose for the amendment to Idaho Code § 41-1839, the Idaho legislature articulated the flaw in not allowing fees in arbitration. "Without this change, insurance companies are able to sidestep the requirement of prompt payment of amounts justly due contained in section 41-1839, Idaho Code, by the contractual requirement that disputes be resolved through arbitration rather than in court." *Statement of Purpose*, RS 19849. Without the change, Idaho Code § 41-1839 would be rendered meaningless because all insurance companies would not be penalized for refusing to promptly pay legitimate claims and requiring all insureds to undergo an expensive and slow arbitration process before being compensated under their policy.

E. Petitioners are the prevailing party.

In *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 979 P.2d 107 (1999) the Idaho Supreme Court held that the insured need not obtain a verdict for the full amount requested in order to be awarded attorney's fees, but only a verdict for an amount greater than that tendered by the insurer. *Id.*; see also *Halliday v. Farmers Ins. Exch.*, 89 Idaho 293, 404 P.2d 634 (1965) (Where the assured recovered less than he claimed, but the insurer had made no tender of the amount found due, the assured was entitled to attorney fees.).

It is undisputed that Plaintiffs sent two letters citing Idaho Code § 41-1839 and submitting proof of loss and demanded \$17,000.00.

"As defined by this Court, a submitted proof of loss is sufficient when the insured provides the insurer with enough information to allow the insurer a reasonable opportunity to investigate and determine its liability." *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho 589, 593, 130 P.3d 1127, 1131 (2006). It must also mention a specific sum so that a tender can be made, *Associates Discount Corp. of Idaho v. Yosemite Ins. Co.*, 96 Idaho 249, 257, 526 P.2d 854, 862 (1973), or provide the basis for calculating the amount of the claimed loss, *Boel v. Stewart Title Guar. Co.*, 137 Idaho 9, 14, 43 P.3d 768, 773 (2002) (demand for payment of existing mortgage sufficient even though amount owing on the mortgage was not mentioned).

*Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 233 P.3d 1221, 1249-1250 (Idaho 2010).

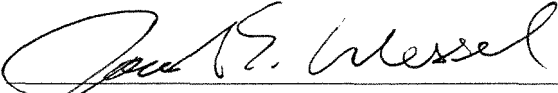
The Defendant obviously had enough information from the documents sent with the proof of loss to determine its liability because two weeks later, Defendant tendered just over \$1,700.00. At the arbitration, Plaintiffs were awarded over \$9,000.00. This became the amount justly due. See *Brinkman v. Aid Ins. Co.*, 115 Idaho 346, 766 P.2d 1227 (1988), overruled on other grounds in *Greenough v. Farm Bureau Ins. Co.*, 142 Idaho 589, 130 P.3d 1127 (2006). Plaintiffs were awarded an amount greater than what was tendered by Defendant and are therefore the prevailing party and entitled to fees pursuant to Idaho Code § 41-1839 and costs pursuant to I.R.C.P. Rule 54(d)(1).

## V. CONCLUSION

Based upon the foregoing, Plaintiffs pray the order of this Court granting their motion for attorney fees and costs pursuant to Idaho Code § 41-1839 and I.R.C.P. 54(d)(1).

DATED this 11 day of March, 2011.

THOMSEN STEPHENS LAW OFFICES, PLLC

  
\_\_\_\_\_  
Jacob S. Wessel, Esq.

**CERTIFICATE OF SERVICE**


I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 10 day of March, 2011, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR FEES AND COSTS** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

JOHN LERMA  
LERMA LAW OFFICE, PA  
3045 E COOPER POINT DR.  
MERIDIAN ID 83642  
PO BOX 190719  
BOISE, ID 83719

Mail  
 Hand Delivery  
 Facsimile@

THOMSEN STEPHENS LAW OFFICES, PLLC

By:

  
\_\_\_\_\_  
Jacob S. Wessel, Esq.

JSW  
7083\011 Memo Fees and Costs

ORIGINAL

BOONE COUNTY  
2011 DEC 11 PM 4:20

Jacob S. Wessel, ISB #7529  
THOMSEN STEPHENS LAW OFFICES, PLLC  
2635 Channing Way  
Idaho Falls, ID 83404  
Telephone (208) 522-1230  
Fax (208) 522-1277  
jwessel@thomsenstephenslaw.com

Attorneys for Plaintiffs Sam Ferrell and Deva Ferrell

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 UNITED FINANCIAL CASUALTY )  
 COMPANY, d.b.a PROGRESSIVE )  
 INSURANCE COMPANY whose true )  
 name is unknown and PROGRESSIVE )  
 INSURANCE COMPANY whose true )  
 name is unknown, )  
 )  
 Defendants. )  
 )  
 \_\_\_\_\_ )

Case No. CV-2010-7051

AFFIDAVIT OF JACOB S. WESSEL IN  
SUPPORT OF MOTION FOR  
FEES AND COSTS

STATE OF IDAHO )  
 ) ss.  
County of Bonneville )

Jacob S. Wessel, being first duly sworn on oath, deposes and says:

1 - AFFIDAVIT OF JACOB S. WESSEL IN SUPPORT OF MOTION FOR FEES AND COSTS

I.

Affiant is a member of the law firm of Thomsen Stephens Law Offices which served as counsel for Plaintiffs Sam and Deva Ferrell in the above entitled action.

II.

This affidavit is made on personal knowledge of affiant, except to the extent of allegations made on information and belief.

III.

Affiant has reviewed the time and cost records of Thomsen Stephens Law Offices maintained on the above matter, and represents that the following items of cost and expense were expended and incurred in the above entitled action and mediation:

1. Costs as a matter of right:
  - a. Court filing fees \$88.00
  - b. Copying fees (1,637x\$.10) \$163.70
  - c. Expert Witness fee (Hunsaker) \$240.00
  - d. Cost of Three Deposition Transcripts \$681.28
2. Discretionary Costs:
  - a. Arbitrators' fees \$2,390.78

These discretionary costs were necessary and exceptional costs reasonably incurred pursuant to the uninsured motorist policy. If these costs are not awarded, plaintiffs will not be made whole for defendant's refusal to pay the claim in a timely manner.

IV.

Thomsen Stephens Law Offices has expended approximately 28.90 hours in the defense of the above entitled action as follows:

1. Jacob S. Wessel 96.4 hours at \$175.00 an hour
2. T. Jason Wood 5.1 hours at \$200.00 an hour

The sum of \$17,890.00 is a reasonable attorneys fee for services of Thomsen Stephens Law Offices provided to Sam and Deva Ferrell to enforce the uninsured motorist policy herein.

V.

The total costs and attorneys fees incurred in the defense of the above entitled action are \$21,453.76.

VI.

A true and correct copy of our record of billings in this matter is attached hereto as exhibit "A."

VII.

Attorneys fees and costs should be awarded for the reasons they were the prevailing party in the arbitration and pursuant to the authority cited in Plaintiffs' memorandum in support of attorneys fees and costs filed herewith.

VIII.

Pursuant to I.R.C.P. 54(d)(5), all items of cost, and expenses, including any attorneys fees set forth in this memorandum, are to the best of your affiants knowledge and belief, correct, are

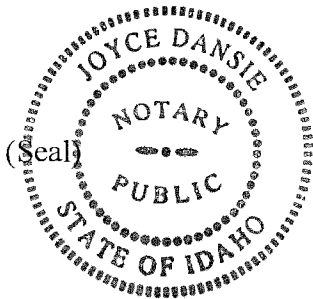


claimed in compliance with said rule, and were reasonably and necessarily expended and incurred in the above entitled action.

DATED this 11 day of March, 2011.

Jacob S. Wessel  
Jacob S. Wessel, Esq.

SUBSCRIBED AND SWORN to upon oath before me this 11<sup>th</sup> day of March, 2011.



Joyce Dansie  
Notary Public for State of Idaho  
Residing at: Idaho Falls  
My Commission Expires: 9-12-12

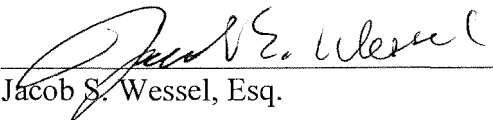
**CERTIFICATE OF SERVICE**

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the  27  day of March, 2011, I caused a true and correct copy of the foregoing **AFFIDAVIT OF JACOB S. WESSEL IN SUPPORT OF MOTION FOR FEES AND COSTS** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

JOHN LERMA  
LERMA LAW OFFICE, PA  
3045 E COOPER POINT DR.  
MERIDIAN ID 83642  
PO BOX 190719  
BOISE, ID 83719

Mail  
 Hand Delivery  
 Facsimile@

THOMSEN STEPHENS LAW OFFICES, PLLC

By:   
\_\_\_\_\_  
Jacob S. Wessel, Esq.

JSW  
7083\012 Affidavit of costs and fees

THOMSEN STEPHENS LAW OFFICES PLLC  
2635 Channing Way  
Idaho Falls, Idaho 83404  
(208) 522-1230 - FAX: (208) 522-1277  
Tax ID #20-0493858

Sam & Deva Ferrell  
P. O. Box 1347  
Idaho Falls ID 83406

Page: 1  
03/11/2011  
ACCOUNT NO: 7083-000C  
STATEMENT NO: 3

SAM & DEVA FERRELL v. Progressive Ins.  
Progressive Agent - Curtis Neil  
Policy No. 02616845-6 D/Loss: 12/22/08

		HOURS
05/21/2009		
JSW	Conference with Ferrell brothers, letter, contingency fee agreement,	0.90
06/01/2009		
JSW	Telephone conference with Dave re update	0.10
06/05/2009		
JSW	Review insurance policy and arbitration agreement and call Mr. Forbush	0.70
06/11/2009		
JSW	Telephone conference with Kirby Forbush and review file	0.20
07/01/2009		
JSW	Telephone conference with Dave re update	0.10
JSW	Letter to Mr. Neill demanding payment	0.30
07/02/2009		
JSW	Review and revise letter to Mr. Neill	0.20
08/11/2009		
JSW	Telephone conference with Dave re update	0.10
09/17/2009		
JSW	Telephone conference with Curtin Neal and Dave re problems with our claim	0.60
09/21/2009		
JSW	Telephone conference with Dave, research police reports	0.50

060

SAM & DEVA FERRELL v. Progressive Ins.  
Progressive Agent - Curtis Neil  
Policy No. 02616845-6 D/Loss: 12/22/08

		HOURS
09/22/2009		
JSW	Telephone conference with Dave re police report and letter to police requesting same	0.20
09/24/2009		
JSW	Telephone conferences with Dave, Sam, and Mr. Phipps	0.30
09/28/2009		
JSW	Telephone conference with Dave and Paul Phipps to try to reschedule the interview	0.20
09/29/2009		
JSW	Telephone conference with Paul and Dave and attend telephone interview	0.50
10/21/2009		
JSW	Telephone conference with Dave and review file.	0.40
12/08/2009		
JSW	Conference with Dave Ferrell to go over work records	0.50
12/09/2009		
JSW	Telephone conference with Dave re more documents	0.10
12/22/2009		
JSW	Review file and draft letter to Mr. Neil with attachments	1.80
JSW	Telephone conference with Mr. Neill re progress on our demand	0.20
12/29/2009		
JSW	Telephone conference with Dave re update	0.20
01/19/2010		
JSW	Telephone conference with Dave re filing a claim in arbitration, letter to Mr. Neil demanding arbitration	0.20
02/02/2010		
JSW	Draft/ revise letter to insurance adjuster re arbitration	0.30
02/11/2010		
JSW	Telephone conference with Mike McBride re being our arbitrator, letter to opposing counsel nominating McBride as arbitrator	0.40
03/22/2010		
JSW	Telephone conference with Dave re update	0.10

SAM & DEVA FERRELL v. Progressive Ins.  
Progressive Agent - Curtis Neil  
Policy No. 02616845-6 D/Loss: 12/22/08

		HOURS
03/31/2010		
JSW	Review policy, call with John Lerna and talk with AI, letter to Mike McBride re arbitration	1.00
04/13/2010		
JSW	Telephone conference with Lerna's office and Dave Ferrell re depositions	0.30
04/14/2010		
JSW	Telephone conference with Dave re update	0.10
04/20/2010		
JSW	Telephone conference with Mr. Forebush and email documents to him re his deposition	0.40
04/28/2010		
JSW	Appearance at depositions	7.70
05/28/2010		
JSW	Draft memo re Forbush deposition	0.50
06/04/2010		
JSW	Telephone conference with Mr. Forbush re documents to bring to his deposition	0.30
07/13/2010		
JSW	Telephone conference with Forebush re deposition date	0.20
07/26/2010		
JSW	Prepare records in response to Progressive's request	1.00
07/27/2010		
JSW	Review and revise documents to send to Lerma	0.30
07/30/2010		
JSW	Appearance at Forebush deposition	4.00
08/30/2010		
JSW	Telephone conference with Dave re getting me the requested documents	0.20
08/31/2010		
JSW	Telephone conference with Mike McBride re arbitration	0.20
09/16/2010		
JSW	Telephone conference with Dave re getting me the requested documents and prepare for arbitration	1.10

SAM & DEVA FERRELL v. Progressive Ins.  
Progressive Agent - Curtis Neil  
Policy No. 02616845-6 D/Loss: 12/22/08

		HOURS
09/17/2010		
JSW	Telephone conference with Dave, and McBride and prepare for arbitration	1.00
09/20/2010		
JSW	Prepare for arbitration hearing, calls with Sam and Dave, call with arbitrator Mr. Larsen	1.80
09/21/2010		
JSW	Prepare for arbitration, calls with Lerma, meet with Dave, calls with McBride	1.50
09/22/2010		
JSW	Telephone conference with Mike McBride re putting off arbitration hearing	0.10
10/13/2010		
JSW	Prepare for November arbitration hearing	0.70
10/14/2010		
JSW	Prepare for arbitration	1.50
10/25/2010		
JSW	Telephone conference with John Lerma re documents he still needs, review documents	0.50
10/29/2010		
JSW	Telephone conference with Deva Ferrell regarding evidence to present at arbitration	0.50
11/01/2010		
JSW	Prepare for arbitration by reviewing Deva's medical records and reviewing tax documents for Deva and Sam	2.50
11/02/2010		
JSW	Telephone conference with Deva regarding a possible settlement offer.	0.10
11/03/2010		
TJW	Conference with Jake re: Grease Spot, new statute, and award of fees (.2)(.3); research same (.5)	1.00
JSW	Prepare exhibits for arbitration, draft arbitration brief including opening and closing arguments and exam questions for Deva, Sam and Dr. Hunsaker, calls with Mr. Lerma, Deva and Hunsaker regarding arbitration procedure.	12.30
11/04/2010		
JSW	Conference with Deva and Sam Ferrell (2) and attend	

SAM & DEVA FERRELL v. Progressive Ins.  
Progressive Agent - Curtis Neil  
Policy No. 02616845-6 D/Loss: 12/22/08

		HOURS
	arbitration (6), Meet with Arbitrator McBride, call clients re award, research fees under Idaho Code 41-1839 (1.5)	9.50
JSW	Research fees in arbitration since Grease Spot was legislatively overruled in the amendments to Idaho Code 41-1839	2.50
11/08/2010		
TJW	conf w/ Jake re: atty fees (.2);(.2); review statute (.2); post query on ITLA list-serve (.2); receipt/review responses (.2)(.2)(.2); email same to jake (.2)(.2)	1.80
11/09/2010		
JSW	Draft petition to confirm arbitration award and for attorney fees	2.60
11/10/2010		
TJW	review/edit complaint (.3); conf w/ Jake re: same (.2)	0.50
11/12/2010		
JSW	Review and revise petition to confirm arbitration award and for costs and fees.	0.80
11/15/2010		
TJW	Post query on list serve re: progressive (.2); search ITLA list serve for IC 41-1839 legislative history (.3); receipt/review progressive responses (.2)(.2); conf w/ Jake re: same (.2)	1.10
JSW	Review and revise petition to include the proper name for the parties and a claim for prejudgment interest	1.40
11/16/2010		
TJW	review/edit complaint (.3); conf w/ Jake re: same (.2); again (.2)	0.70
11/19/2010		
JSW	Telephone conference with Dave re settlement check	0.10
11/23/2010		
JSW	Review and revise petition, prepare exhibits to the petition, conference with TJW re petition, and draft summons	1.80
JSW	Letter to Lerma re satisfaction of award document and interest	0.20
11/24/2010		
JSW	Draft acceptance of service	0.10
11/29/2010		
JSW	Telephone conference with Dave and calculate disbursement amount and letter to clients	0.30

SAM & DEVA FERRELL v. Progressive Ins.  
Progressive Agent - Curtis Neil  
Policy No. 02616845-6 D/Loss: 12/22/08

		HOURS
11/30/2010		
JSW	Telephone conference with Lerma re the amount of interest, review Lerma's letter re same, call with Dave re disbursement of the check	0.40
12/01/2010		
JSW	Review the legislative history of 41-1839, letter to Lerma re interest	1.30
12/02/2010		
JSW	Letter to Lerma re post-judgment interest, calculate disbursement amounts and letter to clients re same	1.00
12/21/2010		
JSW	Telephone conference with Dave re update	0.10
12/30/2010		
JSW	Draft motion for judgment on the pleadings	1.00
01/03/2011		
JSW	Draft memo in support of judgment on the pleadings	2.00
01/04/2011		
JSW	Review and revise memorandum re judgment on the pleadings, review Lerma's motion to stay, talk issues over with Mike	1.20
01/05/2011		
JSW	Draft objection to motion to stay and letter to arbitrators re clarification of their award, included research and argument re attorney fees in arbitration	2.80
01/08/2011		
JSW	Draft objection to stay and letter to arbitration panel with 5 exhibits	1.20
01/11/2011		
JSW	Review and revise arbitration letter and objection to motion to stay	0.30
01/12/2011		
JSW	Telephone conference with Dave re letter to arbitrators and time frame for conclusion	0.20
02/02/2011		
JSW	Research and telephone calls with opposing counsel Lerma and arbitrator Larsen re whether the arbitrators can be forced to decide on attorney fees and the jurisdiction of the court to decide these issues	2.80



SAM & DEVA FERRELL v. Progressive Ins.  
 Progressive Agent - Curtis Neil  
 Policy No. 02616845-6 D/Loss: 12/22/08

		HOURS	
02/04/2011	JSW	Prepare fee calculation and attend status conference, call with Dave re status of the case	0.60
02/05/2011	JSW	Research history of 41-1839 for memo for judgment on the pleadings and calculate interest, research the correct date to calculate interest from in a uninsured motorist claim, letter to Lerma re settlement of the interest issue	1.50
02/07/2011	JSW	Review and revise memorandum re judgment on the pleadings	0.50
02/09/2011	JSW	Research and draft memorandum re attorneys fees and costs	1.40
02/14/2011	JSW	Letter to Lerma re getting and answer and interest, call with lerma re same	0.40
02/15/2011	JSW	Draft and revise memorandum in support of motion for fees and costs	0.50
02/17/2011	JSW	Research Lodestar rule cases on motions for fees	1.00
02/28/2011	JSW	Telephone conference with Deva re update on fees	0.20
03/01/2011	JSW	Review and revise Memorandum in support of motion for fees and costs by inserting citations for undisputed facts and researching law re prevailing party (2.8), letter to Lerma re reminder about our offer to settle the interest issue (.2)	3.00
03/02/2011	JSW	Review and revise Memorandum in support of motion for fees and costs inserting introduction and public policy arguments.	2.40
03/10/2011	JSW	Draft affidavit of Jacob Wessel in support of motion for fees and costs after reviewing rule 54 and law of nondiscretionary costs (1), review billings for corrections and accuracy (.5)	1.50
	JSW	Review and revise memorandum in support of motion for fees and costs to cite the Emery case and supporting authority.	0.90
		FOR CURRENT SERVICES RENDERED	101.50
			17,890.00

SAM & DEVA FERRELL v. Progressive Ins.  
 Progressive Agent - Curtis Neil  
 Policy No. 02616845-6 D/Loss: 12/22/08

## RECAPITULATION

<u>TIMEKEEPER</u>	<u>HOURS</u>	<u>HOURLY RATE</u>	<u>TOTAL</u>
T. Jason Wood	5.10	\$200.00	\$1,020.00
Jacob S. Wessel	96.40	175.00	16,870.00

## EXPENSES

11/03/2010	Photocopies (at 10 cents ea.): 1,565 copies of exhibits for arbitration	156.50
11/16/2010	Photocopies (at 10 cents ea.):	7.20
	<b>TOTAL EXPENSES</b>	<u>163.70</u>

## ADVANCES

05/10/2010	Check to T&T Reporting for deposition transcripts of Sam and Deva	459.90
08/16/2010	Deposition transcript of Kirby Forbush	221.38
11/04/2010	Expert witness fee - check to Nate Hunsaker	240.00
11/17/2010	Court fees - Petition for Confirmation of Arbitration Award and Award of Fees and Costs	88.00
11/23/2010	Check to McBride and Roberts for arbitration fee	1,305.00
12/02/2010	Check to Cooper & Larsen for one-half mediation cost	954.50
03/11/2011	Check to Cooper & Larsen for one-half mediation cost (additional)	131.28
	<b>TOTAL ADVANCES</b>	<u>3,400.06</u>
	<b>TOTAL CURRENT</b>	21,453.76
	<b>BALANCE DUE</b>	<u><u>\$21,453.76</u></u>

Attorney-client privileged and attorney work product privileged information. DO NOT DISCLOSE. Billings are due and payable 30 days from the date of this billing. Unpaid billings accrue interest at the rate of 12% per annum.

BONNEVILLE COUNTY  
MAR 24 PM 4:07

**LERMA LAW OFFICE, P.A.**  
**John J. Lerma, ISB # 3886**  
**Gary D. Luke, ISB # 6450**  
**El Dorado Business Campus**  
**3045 E. Copper Point Drive**  
**PO Box 190719**  
**Boise ID 83719**  
**TELEPHONE: (208) 288-0608**  
**FACSIMILE: (208) 288-0697**

**Attorneys for Defendant**  
**United Financial Casualty Company**

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL and DEVA FERRELL,  
Plaintiff,

vs.

UNITED FINANCIAL CASUALTY  
COMPANY, d/b/a PROGRESSIVE  
INSURANCE COMPANY,  
Defendant.

Case No. CV-2010-7051

**DEFENDANT'S OBJECTION TO  
PLAINTIFFS' MOTION FOR FEES  
AND COSTS**

COMES NOW the Defendant, by and through its counsel of record, and responds in opposition to the Plaintiffs' motion for fees and costs. The motion should be denied because at the time the arbitration process was initiated by the Plaintiffs, there was no statutory or other provision for granting attorney's fees in the absence of a previously filed civil action pending in an Idaho court. Since the Plaintiffs chose to pursue arbitration, they have no basis to subsequently come before the Court to obtain their arbitration-related attorney's fees.

**BRIEF STATEMENT OF  
RELEVANT FACTS**

The facts relevant to the Plaintiffs' present motion are simple and straightforward. Counsel for the Plaintiffs sent a demand for arbitration on January 22, 2010. The parties then began the arbitration process: They conducted certain discovery, selected arbitrators, and proceeded to an arbitration hearing on November 4, 2010. During discovery, preparation for arbitration, and at the arbitration hearing, the Plaintiffs demanded payments from the Defendant totaling \$50,000 (alleged lost wages and lost business income).

At the November 4, 2010 hearing, the arbitrators awarded the Plaintiffs a total of \$9,134.24 (\$5,143.44 and \$3,990.80). Importantly, the arbitration panel included in their decision the following finding of fact: "No lawsuit has been filed, but this award is final." See Award Decision (attached to Plaintiffs' Petition for Confirmation filed with this Court in November 2010).

**2010 LEGISLATIVE AMENDMENT  
TO IDAHO CODE § 41-1839**

At the time Plaintiffs initiated arbitration, Idaho Code § 41-1839 provided as follows:

ALLOWANCE OF ATTORNEY FEES IN SUITS AGAINST INSURERS. (1) Any insurer issuing any policy, certificate or contract of insurance, surety, guaranty or indemnity of any kind or nature whatsoever, which shall fail for a period of thirty (30) days after proof of loss has been furnished as provided in such policy, certificate or contract, to pay to the person entitled thereto the amount justly due under such policy, certificate or contract, shall in any action thereafter brought against the insurer in any court in this state for recovery under the terms of the policy, certificate or contract, pay such further amount as the court shall adjudge reasonable as attorney's fees in such action.

I.C. § 41-1839(1) (emphasis added) (effective until July 1, 2010). As Plaintiffs note in their briefing, the statute was subsequently amended, and the revised statute became effective on July 1, 2010. As amended, the statute provides:

**ALLOWANCE OF ATTORNEY’S FEES IN SUITS AGAINST OR IN ARBITRATION WITH INSURERS.** (1) Any insurer issuing any policy, certificate or contract of insurance, surety, guaranty or indemnity of any kind or nature whatsoever, which shall fail for a period of thirty (30) days after proof of loss has been furnished as provided in such policy, certificate or contract, to pay to the person entitled thereto the amount justly due under such policy, certificate or contract, shall in any action thereafter brought against the insurer in any court in this state or in any arbitration for recovery under the terms of the policy, certificate or contract, pay such further amount as the court shall adjudge reasonable as attorney’s fees in such action or arbitration.

I.C. § 41-1839(1) (emphasis provided to reflect the added language) (effective as of July 1, 2010).

This amendment to § 41-1839 provides a new cause of action: Whereas attorney’s fees were previously available only via a civil lawsuit (“suit” or “action” according to the statute), the amendment extended potential attorney fee recovery to include arbitration proceedings.

**THE IDAHO SUPREME COURT’S GREASE SPOT DECISION IS CONTROLLING FOR ARBITRATION THAT WAS INITIATED PRIOR TO JULY 1, 2010**

Plaintiffs’ motion must be resolved in accordance with the Idaho Supreme Court’s decision in *Grease Spot, Inc. v. Harnes*, 148 Idaho 582, 226 P.3d 525 (2010). *Grease Spot* interprets Idaho Code § 41-1839 as the statute existed at the time the parties commenced arbitration. As such, it represents the controlling law that is pertinent to the Plaintiffs’ present motion.

In *Grease Spot*, the Supreme Court was asked to award attorney’s fees incurred via arbitration. The party seeking fees argued for such based on I.C. § 12-120 and on I.C.

§ 41-1839. In denying fees related to arbitration, the Court noted that both statutory provisions required a “civil action.” In explicitly discussing § 41-1839, *Grease Spot* states as follows:

[T]he plain text of I.C. § 41-1839 is at odds with this Court’s prior readings of the statute. Section 41-1839 only permits insureds to collect attorney fees incurred in a civil “action” to recover under an insurance policy. When a court compels arbitration, it often stays litigation as to all parties, regardless of whether they are to participate in the arbitration, to allow these corollary proceedings to be completed. An arbitration is not part of a civil action, but rather a proceeding separate and apart from litigation based on a contract between the parties. Further, there is no language indicating that § 41-1839 is meant to imply a provision for arbitration attorney fees into every insurance policy. *Emery* was therefore manifestly incorrect in holding to the contrary. To the extent that *Emery* implied into insurance policies a provision granting insureds arbitration attorney fees, it is expressly overruled.

226 P.3d at 528 (emphasis added; the full *Emery* citation is *Emery v. United Pac. Ins. Co.*, 120 Idaho 244, 815 P.2d 442 (1991)). Accordingly, no fees related to arbitration were awarded in *Grease Spot* (a portion of the fees incurred in the civil lawsuit prior to the arbitration proceeding were allowed by the Court). As mentioned above, the decision also went on to preclude award of arbitration-related attorney’s fees pursuant to I.C. § 12-120. See 226 P.3d at 528.

In *Grease Spot*, the Supreme Court had to distinguish between “litigation” attorney’s fees and “arbitration” attorney’s fees. This Court does not have that issue because no litigation was initiated until after the arbitration award. As such, all prior fees are precluded via the *Grease Spot* ruling.

As noted, there was a subsequent change to I.C. § 41-1839: Several months after the *Grease Spot* decision, a revised statute became effective (as of July 1, 2010). However, the arbitration between the present parties and the question of attorney’s fees stem from the statute

as it existed when arbitration commenced. Accordingly, this Court should follow the *Grease Spot* precedent and should deny the Plaintiffs' motion for fees.

**UNLESS THE LEGISLATURE EXPLICITLY  
PROVIDES, AMENDMENTS TO THE  
IDAHO CODE ARE NOT RETROACTIVE**

Based on *Grease Spot* and the two different versions of I.C. § 41-1839, it is evident that the 2010 amendment to the statute provides a new cause of action: Prior to July 1, 2010, attorney's fees were only available in the event of civil litigation; but after July 1, 2010, attorney's fees were extended to include arbitration proceedings (as the Supreme Court acknowledges in *Grease Spot*, it is just enforcing the obvious then-existing statutory language and it is admitting that previous assumptions were unwarranted). Given the new cause of action granted by the Legislature, it is imperative to determine how such pertains to the parties' arbitration and hence how it affects the Plaintiffs' present motion.

In Idaho, statutes and amendments to the Idaho Code are not retroactive unless the Legislature explicitly specifies retroactivity. According to the Code's general "construction of statutes" provision:

No part of these compiled laws is retroactive, unless expressly so declared.

I.C. § 73-101.

The Idaho Supreme Court has strictly applied § 73-101:

Idaho Code § 73-101 provides, "No part of these compiled laws is retroactive, *unless expressly so declared.*" (Emphasis added [by the Supreme Court].) As this Court stated in *Gailey v. Jerome County*, 113 Idaho 430, 432, 745 P.2d 1051, 1053 (1987), "Thus, in Idaho, a statute is not applied retroactively unless there is 'clear legislative intent to that effect.' In the absence of an express declaration of legislative intent that a statute apply retroactively, it will not be so applied." (Internal citations omitted [by the Supreme Court].) In *Unity Light & Power Co. v. City of Burley*,

92 Idaho 499, 445 P.2d 720 (1968), this Court addressed whether the legislature had expressly declared a statute to be applied retroactively. The enactment provided, "This act shall be in full force and effect from and after June 1, 1963." Ch. 269, § 5, 1963 Idaho Sess. Laws 685, 689. In holding that the legislature had not expressly declared the act to be retroactive, this Court stated, "The legislature, in setting the effective date of the new statute, demonstrated an intent that it not be given retrospective effect." 92 Idaho at 504, 445 P.2d at 725.

*State ex rel. Wasden v. Diacel Chemical Industries, Ltd.*, 141 Idaho 102, 105, 106 P.3d 428, 431 (2005) (bracketed [] language added to clarify formatting provided by the decision itself).

The *Unity Light & Power* case referenced in *Diacel* is also pertinent. Therein, the court explains:

Burley filed its answer and counterclaim on February 16, 1962, and therein sought by its third cause of action to exercise the right of eminent domain by condemnation of Unity's property. Even though this case came on for trial in December 1963, subsequent to the declared effective date of S.L. 1963, Ch. 269 (June 1, 1963), Burley's right to exercise the power of eminent domain properly should have been adjudicated in accordance with the law in effect at the time of the filing of its answer and crossclaim. The reason for this conclusion is that unless a contrary intention clearly appears therein, a statute will not be given retrospective effect. *Cook v. Massey*, 38 Idaho 264, 265, 200 P. 1088, 35 A.L.R. 200 (1923). I.C. § 73-101.

92 Idaho at 503-04, 445 P.2d at 724-25 (emphasis added; the decision then provides the statement quoted above in *Diacel*). Pursuant to *Unity Light & Power* and *Diacel*, the Plaintiffs' motion must be determined by the statute as it existed at the time arbitration was initiated.

A review of other laws where retroactivity is "expressly so declared" shows that the underlying legislative bills reference an "emergency," and specify that the new law is "effective immediately" or "effective retroactively." A good example of this is found in Section 6 of Senate Bill 1422, Chapter 326 of the 2010 session laws: "An emergency existing therefor, which emergency is hereby declared to exist, Section 1 of this act shall be in full force and effect on and



after passage and approval, and retroactively to January 1, 2010; Section 2 of this act shall be in full force and effect on and after January 1, 2011; and Sections 3, 4 and 5 shall be in full force and effect on and after July 1, 2010.” Clearly, this would seem to comply with both the statute and case law precedent.

The bill which amended I.C. § 41-1839, however, did not state or imply that it was to be given retroactive or immediate effect. And Plaintiffs acknowledge in their briefing that the revised statute did not become effective until July 1, 2010. Given the fact that the 2010 statutory amendment provides a new cause of action (as evidenced by the Supreme Court’s discussion in *Grease Spot*, and by a comparison of the before and after versions of § 41-1839), it is clear that Plaintiffs did not have a claim for arbitration-related attorney’s fees at the time they initiated arbitration.

By July 1, 2010, when the statutory amendment became effective, the parties had been engaged in the arbitration-preparation process for over five months. Accordingly, without retroactivity being specified by the Legislature, the new statutory cause of action has no relevance to the parties’ arbitration or to the present motion. Plaintiffs are left with the law as it existed when they initiated arbitration, and Defendant cannot be penalized for a statutory change that came into effect in the middle of the arbitration process. In accordance with I.C. § 73-101, I.C. § 41-1839 (as it then existed), *Diacel*, *Unity Light & Power*, and *Grease Spot*, this Court should deny the Plaintiffs’ motion.

**PLAINTIFFS’ RELIANCE ON LEGISLATIVE  
HISTORY IS UNHELPFUL TO ITS MOTION**

Plaintiffs’ reference and reliance on the legislative history for the 2010 changes to I.C. § 41-1839 is misguided. The legislative history is meaningful only because it reinforces the conclusion that the changes to the statute were not in fact “controlling law” at the time that the

parties commenced arbitration. Again, Plaintiffs are left with the statute as it then existed—they are not entitled to benefit from a statutory modification that became effective several months later. If the Idaho Legislature wanted to impose retroactivity, it would have stated such in the bill and likely in the legislative history.

**THE CASES CITED BY THE PLAINTIFF  
DEPEND ON A LAWSUIT BEING FILED TO  
SUSTAIN AN AWARD OF ATTORNEY'S FEES**

In light of the *Grease Spot* decision, and the non-retroactive and hence inapplicable amendment to § 41-1839, the Plaintiffs' reliance on *Emery v. United Pac. Ins. Co.*, 120 Idaho 244, 815 P.2d 442 (1991) is misguided and inapposite. However, in an effort to fully address the Plaintiffs' arguments, it is here pointed out that not even *Emery* or its related cases can provide support for the Plaintiffs' motion. By way of explanation, Defendant respectfully asks the Court to consider the following:

As explained above, the arbitrators' Award Decision included the following finding of fact: "No lawsuit has been filed, but this award is final." This specific statement has relevance and should be given deference by this Court. The relevance is evident because *Emery* and the other pre-*Grease Spot* decisions always required that a lawsuit be filed before arbitration-related attorney's fees could be recovered via the then-existing I.C. § 41-1839. Therefore, "No lawsuit has been filed" means that *Emery* and similar cases are inapplicable and would not provide for an award of attorney's fees.

Plaintiffs' motion incorrectly suggests that attorney's fees incurred solely via arbitration would be recoverable under *Emery*. In *Emery*, however, the plaintiff had filed suit, the litigation was then formally stayed by the court, and the arbitration was allowed to proceed (Plaintiffs'

description of *Emery* is in accord—see page 7 of Plaintiff's Memorandum). In this context of suit being filed and the parties then proceeding with arbitration, the decision states:

Where the insured is required and compelled to file a lawsuit by reason of an insurer's refusal to pay in order to recover under her insurance contract, we hold it is implicit in I.C. § 41-1839 that the court shall adjudge a reasonable award of attorney fees against the insurer.

120 Idaho 244, 247, 815 P.2d 442, 445 (emphasis added; note that Plaintiffs cite this exact same language in their discussion of *Emery*). This language is noteworthy because § 41-1839, at that time, referred to a "suit" or civil action. *See also Emery* at footnote no. 3, where the court specifies that fees under § 41-1839 are limited "to those instances where 1) the insured has provided a proof of loss as required by the insurance policy; 2) the insurance company fails to pay an amount justly due under the policy within 30 days of such proof of loss; and 3) the insured thereafter is compelled to bring suit to recover for his loss." 120 Idaho at 247 (emphasis added).

Because the Plaintiffs in this proceeding did not bring suit prior to proceeding with arbitration, the decision in *Emery* does not provide for an award of fees. And again, this was understood by the arbitration panel, which included the explicit statement that "No lawsuit had been filed."

Similarly, the Idaho Supreme Court's statements in *Weinstein v. Prudential Property and Cas. Ins. Co.*, 149 Idaho 299, 233 P.3d 1221 (2010) do not provide for attorney's fees absent a lawsuit being filed. In *Weinstein*, the court's description of the facts and procedural status make it clear that suit was filed and that the requested fees were incurred during litigation. 233 P.3d at 1250 (in fact, it does not appear that arbitration was involved in *Weinstein* and the discussion of § 41-1839 focuses on the sufficiency of the proof of loss). Accordingly, the *Weinstein* language

quoted by the Plaintiffs as the applicable “Standard of Review” is incorrectly focused and is not controlling.

It is also noted that *Weinstein* comes only four months after *Grease Spot*. This is, therefore, after § 41-1839 was modified by the Legislature, but prior to the amendment becoming effective. Clearly the Court would have been aware of the revised statute, yet *Weinstein* makes no suggestion that *Grease Spot*'s ruling is impaired.

**PLAINTIFFS ARE NOT THE PREVAILING PARTY  
AND THE REQUESTED FEES ARE UNREASONABLE**

At arbitration, Plaintiffs sought damages in an amount totaling \$50,000. Yet the arbitrators' final award totaled \$9,134.24—a small fraction of what was requested. Further, as discussed above, the arbitrators added a statement in their Award Decision indicating finality. In addition to the significant hurdles raised by the arbitrators' Award Decision (foreclosing fees via *Emery*), the then-existing § 41-1839, the *Grease Spot* decision, § 73-101's retroactive restriction, and the other cases and arguments referenced above, Plaintiffs must demonstrate that they are the prevailing party so as to obtain fees or costs pursuant to I.R.C.P. 54(d)(1). Given Plaintiffs' significant claims and the arbitrators' dramatic reduction via the Award Decision, it is clear that Plaintiffs did not substantially prevail and as such they are not the prevailing party in accord with the Civil Rule.

Civil Rule 54(d)(1)(B) states:

In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties.”

I.R.C.P. 54(d)(1)(B) (emphasis added).

There are numerous Idaho cases where courts have determined that a plaintiff was not the prevailing party when the plaintiff obtained reduced or limited recovery, was only partially successful, or achieved mixed success (i.e., both parties prevailing to some extent). See for example: *Ruge v. Posey*, 114 Idaho 890, 761 P.2d 1242 (Ct. App. 1988) (plaintiffs and defendant both prevailed on some claims, so judge's decision that there was no overall prevailing party was not an abuse of discretion); *Harris v. State Ex Rel. Kempthorne*, 147 Idaho 401, 210 P.3d 86 (2009) (plaintiffs and defendants both partially successful, so plaintiffs were not deemed the prevailing party and did not obtain attorney's fees); *Farm Credit Bank v. Wissel*, 122 Idaho 565, 836 P.2d 511 (1992) (when court concluded that both parties prevailed in part and did not prevail in part, the court did not abuse its discretion in determining that neither party prevailed for purposes of awarding costs); and *Adams v. Krueger*, 124 Idaho 74, 856 P.2d 864 (1993) (plaintiffs not deemed prevailing party when they were found to be 49% negligent). The *Slaathaug* case cited by Plaintiffs relies on § 41-1839, meaning that recovery would be precluded per *Grease Spot* and the then-existing statutory language; see *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 711, 979 P.2d 107 (1999).

In this case, the Court should consider "the final judgment or result of the action in relation to the relief sought by the respective parties." I.R.C.P. 54(d)(1)(B). Here, Plaintiffs' significant claims were eliminated and/or substantially reduced, and their final recovery was less than 20% of what they had requested (Plaintiffs' claims in the amount of \$50,000; the arbitrators' award was limited to \$9,134.24). As such, Plaintiffs' claims were largely rejected. Accordingly, Plaintiffs are not the prevailing party for purposes of the Civil Rule, and hence are further barred from recovering per their motion.

The actual amount of requested fees and costs also appears to be excessive (fees and costs in the amount of \$21,453.76—more than double the arbitrators' final award). It is noted that Plaintiff's initial Petition for Confirmation, filed with this Court to commence this proceeding, lists total costs and attorney's fees in the amount of \$13,459.42 (see ¶ 3 of the prayer for relief). This means that Plaintiffs have now increased this claim by nearly \$8,000. This increase is never explained and does not appear to coincide with the actual billing records provided with Plaintiffs' motion.

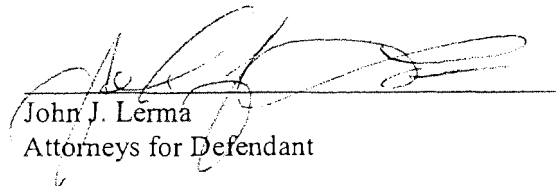
**CONCLUSION**

Plaintiffs' motion for fees and costs should be denied for each of the following reasons: (1) the new cause of action stemming from amended I.C. § 41-1839 is unavailable given the timing of Plaintiffs' arbitration demand; (2) the *Grease Spot* decision unequivocally determines that attorney's fees are unavailable via arbitration; (3) the arbitrator's Award Decision specified that no suit had been filed; (4) even under *Emery*, arbitration-related attorney's fees required an existing lawsuit; (5) there is no indicated exception to the limitation on retroactivity; (6) the legislative history is unhelpful; (7) the Plaintiffs did not substantially prevail and hence are not the prevailing party for I.R.C.P. 54(d)(1) purposes; and (8) the requested fees are excessive.

This Court should deny Plaintiff's motion in accordance with the statutes and case authority cited herein.

DATED this 24 day of March 2011.

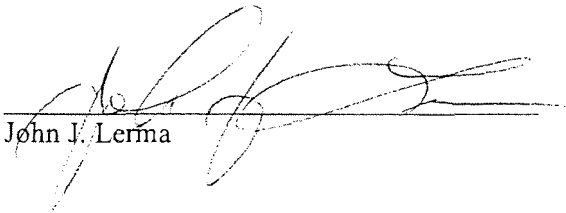
LERMA LAW OFFICE, P.A.

  
 John J. Lerma  
 Attorneys for Defendant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 24 day of March 2011, I caused a true and correct copy of the foregoing document to be served by facsimile transmission upon the following person(s):

Jacob S. Wessel  
Thomsen Stephens Law Offices, PLLC  
2635 Channing Way  
Idaho Falls, ID 83404  
FAX: (208) 522-1277

  
\_\_\_\_\_  
John J. Lerma

ORIGINAL

BONNEVILLE COUNTY  
CLERK OF COURT  
2010-11-11 PM 4:20

Jacob S. Wessel, ISB #7529  
THOMSEN STEPHENS LAW OFFICES, PLLC  
2635 Channing Way  
Idaho Falls, ID 83404  
Telephone (208) 522-1230  
Fax (208) 522-1277  
jwessel@thomsenstephenslaw.com

Attorneys for Plaintiffs Sam Ferrell and Deva Ferrell

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL, )  
)  
Plaintiffs, )  
)  
v. )  
)  
UNITED FINANCIAL CASUALTY )  
COMPANY, d.b.a PROGRESSIVE )  
INSURANCE COMPANY whose true )  
name is unknown and PROGRESSIVE )  
INSURANCE COMPANY whose true )  
name is unknown, )  
)  
Defendants. )  
)  
\_\_\_\_\_ )

Case No. CV-2010-7051

PLAINTIFFS MEMORANDUM IN  
REPLY TO DEFENDANTS' RESPONSE

COMES NOW Plaintiffs Sam and Deva Ferrell, by and through counsel of record, and  
submits the following memorandum in reply to Defendants' Response to Motion for Fees and Costs  
as follows:



## I. INTRODUCTION

Whether this Court applies the law as it existed on January 22, 2010 when Plaintiffs demanded arbitration or the law at the time the arbitration was held in November, 2010 or the law as it existed at the time Plaintiffs filed their complaint or the law now, the result is the same, Plaintiffs are entitled to an award of attorneys fees for all work done either in arbitration or in this litigation. In the history of Idaho law, there were only four months when fees in arbitration were not recoverable. That was from February until July, 2010 when *The Greasespot* was in effect. Now that I.C. 41-1839 has been amended, and *The Greasespot* has been legislatively overturned, the amendments to I.C. 41-1839 are retroactive because attorneys fees statutes are procedural or remedial. Defendant's attempts at cherry-picking case law and defendant's claims that cases before the amendment have no effect are unconvincing and not in accordance with Idaho law.

## II. APPLICABLE LAW

1. The statute "contains two requirements for an insured to be entitled to an award of attorney fees: (1) the insured must provide a proof of loss as required by the insurance policy; and (2) the insurer must fail to pay the amount justly due within thirty days after receipt of the proof of loss." *Parsons v. Mutual of Enumclaw Ins. Co.*, 143 Idaho 743, 746-47, 152 P.3d 614, 617-18 (2007).  
*Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 233 P.3d 1221, 1249-1250 (Idaho 2010).
2. In *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 979 P.2d 107 (1999) the Idaho Supreme Court held that the insured need not obtain a verdict for the full amount requested in order to be awarded attorney's fees, but only a verdict for an amount greater than that tendered by the insurer.
3. Statutes authorizing discretionary awards of attorney fees generally are held to be remedial or procedural; consequently they are given retroactive effect. *Myers v. Vermaas*, 114 Idaho 85, 753 P.2d 296 (Ct. App. 1988).
4. In suit against architects against State Building Authority for breach of contract that provided for architectural and certain other services, 12-120(3) clearly could be

applied to award attorney fees against the Authority because such action involved a contract for services as well as a commercial transaction; further, the fact that the provisions of 12-120(3) regarding contracts relating to services were not added to the section until its 198 amendment and the definition of party did not include the state or political subdivisions thereof until the 1987 amendment of the section, did not prohibit application of such section, since the suit was filed after the passage of either of these amendments, as the proper function is upon the time of the filing, not the time the cause of action arose. *Bott v. Idaho State Bldg. Auth.*, 122 Idaho 471, 835 P.2d 1282 (1992).

5. "The whole purpose of arbitration is to substitute a less expensive and less formal method of settling differences between parties for normal court litigation." *Loomis, Inc. v. Cudahy*, 104 Idaho 106, 108 (1982), citing *City of Madison v. Frank Lloyd Wright Foundation*, [20 Wis.2d 361], 122 N.W.2d 409, 421 (Wis.1963). See also *Pettinaro Constr. Co., Inc. v. Harry C. Partridge, Jr. & Sons, Inc.*, 408 A.2d 957 (Del.Ch.1979); *Bel Pre Medical Center, Inc. v. Frederick Contractors, Inc.*, [21 Md.App. 307], 320 A.2d 558 (Md.Ct.Spec.App.1974), aff'd on other grounds, [274 Md. 307], 334 A.2d 526 (Md.1975); *Layne-Minnesota Co. v. Regents of Univ. of Minnesota*, [266 Minn. 284], 123 N.W.2d 371 (Minn. 1963).
6. The Court should look to the law as it existed at the time of filing of the lawsuit. See *Unity Light & Power Co. v. City of Burley*, 92 Idaho 499, 445 P.2d 720 (1968); *Overman v. Overman*, 102 Idaho 235, 629 P.2d 127.

### III. REPLY TO DEFENDANT'S ARGUMENTS

In its response brief, Defendant makes the following arguments:

1. Defendant argues that the statement on the Arbitration award that, "[n]o lawsuit has been filed, but this award is final" precludes an award of fees.

This argument is disingenuous. After Plaintiffs filed the present lawsuit, Defendant filed a motion to stay the proceedings, alleging that the arbitration panel wanted to decide the issue of fees at a later time. After a conference call with the head arbitrator, we all agreed that the court would decide the issue of fees, and that the arbitrators chose not to decide that issue. We then had a status conference with the court in which Defendant withdrew his motion because the arbitration panel chose to not address the issue of fees.

2. Defendant argues that the timing of demand for arbitration requires the Court to deny fees in arbitration.

When Plaintiffs initiated arbitration on January 22, 2010, the statute (I.C. 41-1839) itself was ambiguous about whether it allowed fees in arbitration. The statute had, however, been interpreted in *Emery* and all other cases following *Emery* to allow for fees in arbitration. *Emery* was overturned in *The Greasespot* after we demanded arbitration. Therefore, at the time Plaintiffs demanded arbitration, the law was that fees in arbitration were available pursuant to I.C. 41-1839.

Defendant now argues that *The Greasespot* controls for arbitration initiated prior to July 1, 2010. It is important to remember that this was only the law for part of February, March, April, May, and June of 2010. Before that, fees in arbitration were available. Therefore, Defendant's best and only plausible argument is that for those four months, Plaintiffs should not get fees. This argument also fails for two reasons: First, the law this Court must look to is the law as it was when the lawsuit was filed, and second because the amendment to I.C. 18-4139 is retroactive.

3. Defendant argues that I.C. 18-4139 is not retroactive.

Defendants cite *State Ex Rel Wasden* (a case involving the amendment to a substantive statute) to support the contention that Amendments to the code are not retroactive unless specifically provided in the section. While this argument is true pursuant to I.C. 73-101, the case law shows that this law only applies to substantive statutes. A statute providing for an award of attorney fees is a procedural or remedial statute, so it is retroactive. *See Myers and Bott*

Under *Unity Light and Power*, we use the law as it existed when the lawsuit or answer was filed, so we use the statute at the time the arbitration was initiated. Therefore, the amended statute that clearly provides for attorneys fees in arbitration, and independent of a lawsuit.

4. Defendant argues that because Plaintiffs filed a lawsuit after arbitration, they are not entitled to fees.

First, this argument is wholly unsupported. The Emery decisions and all other decisions do not hold that a lawsuit must be filed before arbitration-related attorneys fees could be recovered. While most of the decisions factually happened that way, there is no law stating that this is a requirement. Second, Plaintiffs did file a lawsuit in this, they just did it after arbitration. Nothing in any case requires a suit before arbitrating. Finally, arbitration is specifically designed to avoid the costs of litigation if at all possible. *See Loomis, Inc. v. Cudahy*, 104 Idaho 106 (1982)

In addition, *Weinstien*, the case that puts forth the standard for fees under I.C. 41-1839, supports the fact that filing a lawsuit before arbitration is not one of the requirements.

5. Defendant argues that Plaintiffs are not entitled to attorney fees because they are not the prevailing party.

First, under I.C. 41-1839, there is no requirement that the insured prevail in order to get an award of fees. All that is required is that the Plaintiffs receive more than what was tendered by the insurance company. There is no prevailing party analysis required. It is undisputed that defendant tendered less than Plaintiffs recovered, so they are entitled to fees pursuant to I.C. 41-1839.

Idaho Rule of Civil Procedure 54(d)(1)(B) does require a Plaintiff to prevail in order to get costs (not fees). Plaintiffs are entitled to fees because they did prevail. In this case plaintiffs requested to be compensated for their lost income, and defendant sought to pay nothing. Plaintiffs recovered more than half of what they sought. The demand letters attached to our petition show that plaintiffs sought \$17,000.00 initially and then \$17,000.00 plus fees. Plaintiffs recovered more than half of what they sought. It is important to remember that Defendants prevailed on no claims. All of the cases cited by Defendants in support of no prevailing party involved claims by both parties

where each party won on some claims, were based upon statutes that required the high standard of proving a frivolous defense, or a finding of partial fault on the part of plaintiffs. Plaintiffs are clearly the prevailing party pursuant I.R.C.P. 54(d)(1)(B) and are entitled to an award of costs.

6. Lastly Defendant argues that Plaintiffs' requested fees appear to be excessive.

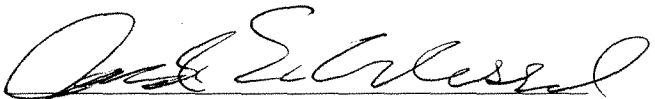
Defendant has made no specific objections to the fees despite all billing records being attached to an affidavit. Plaintiff is therefore entitled to all fees requested pursuant to I.R.C.P. Rule 54.

#### IV. CONCLUSION

Based upon the foregoing, Plaintiffs pray the order of this Court granting their motion for attorney fees and costs pursuant to Idaho Code § 41-1839 and I.R.C.P. 54(d)(1).

DATED this 1 day of April, 2011.

THOMSEN STEPHENS LAW OFFICES, PLLC



Jacob S. Wessel, Esq.

**CERTIFICATE OF SERVICE**

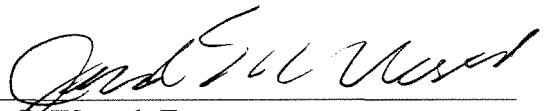
I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the   1   day of April, 2011, I caused a true and correct copy of the foregoing **PLAINTIFFS MEMORANDUM IN REPLY TO DEFENDANTS' RESPONSE** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

JOHN LERMA  
LERMA LAW OFFICE, PA  
3045 E COOPER POINT DR.  
MERIDIAN ID 83642  
PO BOX 190719  
BOISE, ID 83719

Mail  
 Hand Delivery  
 Facsimile@

THOMSEN STEPHENS LAW OFFICES, PLLC

By:

  
\_\_\_\_\_  
Jacob S. Wessel, Esq.

JSW  
7083\014 Reply brief re Fees

Walters  
4/5

BONNEVILLE COUNTY  
APR 6 2011 9:25

**LERMA LAW OFFICE, P.A.**  
**John J. Lerma, ISB# 3386**  
**Gary D. Luke, ISB# 6450**  
**El Dorado Business Campus**  
**3045 E. Copper Point Drive**  
**PO Box 190719**  
**Boise ID 83719**  
**TELEPHONE: (208) 288-0608**  
**FACSIMILE: (208) 288-0697**

**Attorneys for Defendants**

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL,  
Plaintiffs,

vs.

UNITED FINANCIAL CASUALTY  
COMPANY, d.b.a. PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown and PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown,

Defendants.

Case No. CV 10-7051

**AFFIDAVIT OF DEFENDANTS'  
COUNSEL**

STATE OF IDAHO            )  
  ) ss.  
COUNTY OF ADA            )

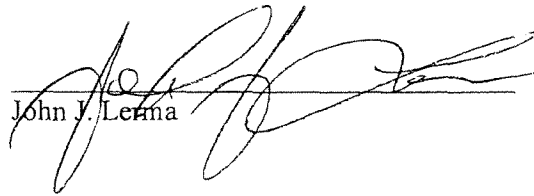
I, John J. Lerma, having been first duly sworn upon oath, depose and state:

1. I am the attorney of record for the Defendants, in the above-entitled matter, and, as such, I am familiar with facts and circumstances surrounding this matter.

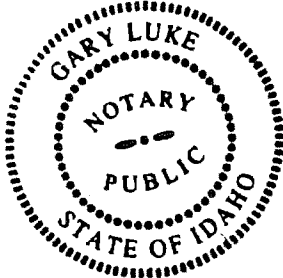
2. The statements contained herein are made of my own personal knowledge and are true and correct to the best of my belief and information.


3. Attached as Exhibit A to this Affidavit is a true and correct copy of the relevant portion of Progressive Insurance Policy number 02616845-9 (specifically, the Uninsured/Underinsured Motorist Coverage Endorsement).

DATED this 6 day of April 2011.

  
John J. Lerma

SWORN AND SUBSCRIBED to before me this 6 day of April 2011.

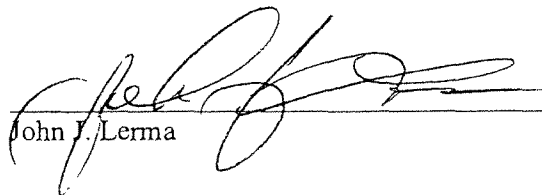


  
Notary Public for the State of Idaho  
Residing at Boise Idaho  
My Commission expires: 11-26-2013

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 6 day of April 2011, I caused a true and correct copy of the foregoing document to be served upon the following person(s) via facsimile:

Jacob Wessel  
Thomsen Stephens Law Offices  
FAX: (208) 522-1277

  
John J. Lerma



HARTWELL CORP  
PO BOX 51019  
IDAHO FALLS, ID 83405

**PROGRESSIVE**

Named insured

I CERTIFY THIS TO BE A  
TRUE AND ACCURATE COPY.  
BY [Signature]  
DATE 1-28-10

FERRELL BROTHERS CONST  
PO BOX 1347  
IDAHO FALLS, ID 83403

**Policy number: 02616845-9**

Underwritten by:  
United Financial Casualty Company  
October 17, 2008  
Policy Period: Oct 16, 2008 - April 16, 2009  
Page 1 of 3

**progressiveagent.com**

**Online Service**

Make payments, check billing activity, print policy documents, or check the status of a claim.

**208-522-5656**

**HARTWELL CORP**

Contact your agent for personalized service.

**800-444-4487**

For customer service if your agent is unavailable or to report a claim.

## Commercial Auto Insurance Coverage Summary

### This is your Renewal Declarations Page

Your coverage began on October 16, 2008 at 12:01 a.m. This policy expires on April 16, 2009 at 12:01 a.m.

This coverage summary replaces your prior one. Your insurance policy and any policy endorsements contain a full explanation of your coverage. The policy limits shown for an auto may not be combined with the limits for the same coverage on another auto, unless the policy contract allows the stacking of limits. The policy contract is form 6912 (03/05). The contract is modified by forms Z435 (12/06), Z228 (07/05), 2852ID (04/05), 4757 (03/05), 4852ID (04/05), 4881ID (04/05), 1890 (02/05) and 1891 (09/04).

The named insured organization type is a corporation.

#### Outline of coverage

Description	Limits	Deductible	Premium
Liability To Others			\$1,636
Bodily Injury and Property Damage Liability	\$1,000,000 combined single limit		
Uninsured Motorist	\$1,000,000 each person/\$1,000,000 each accident		120
Underinsured Motorist	\$1,000,000 each person/\$1,000,000 each accident		120
Medical Payments	\$5,000 each person		70
Comprehensive			367
See Auto Coverage Schedule	Limit of liability less deductible		
Fire And Theft With Combined Additional Coverage			40
See Auto Coverage Schedule	Limit of liability less deductible		
Collision			1,699
See Auto Coverage Schedule	Limit of liability less deductible		
Hired Auto Liability To Others			55
Bodily Injury and Property Damage Liability	\$1,000,000 combined single limit		
Employer Nonowned Auto Liability To Others			33
Bodily Injury and Property Damage Liability	\$1,000,000 combined single limit		
<b>Total 6 month policy premium</b>			<b>\$4,140</b>
Discount if paid in full			-200
<b>Total 6 month policy premium if paid in full</b>			<b>\$3,940</b>
Number of Employees (0 - 10)			

Policy number: D2616845-9  
 FERRELL BROTHERS CONST  
 Page 2 of 3

**Rated drivers**

- 1. SAMUEL FERRELL
- 2. DEVA FERRELL
- 3. JEFFREY SEIBER

**Auto coverage schedule**

1. **2005 Ford F350 Super Duty** Stated Amount: \$30,000  
 VIN: 1FDWW31P25EC22698 Garaging Zip Code: 83440 Radius: 100

Liability Premium	Liability	UM BI	UIM BI	Med Pay	
	\$421	\$30	\$30	\$19	
Physical Damage Premium	Comp Deductible	Comp Premium	Collision Deductible	Collision Premium	Auto Total
	\$250	\$99	\$500	\$407	<b>\$1,006</b>

2. **2006 Wells Cargo Trailer** Stated Amount: \$12,000  
 VIN: 1WC200N2464059635 Garaging Zip Code: 83440 Radius: 100

Liability Premium	Liability				
	\$60				
Physical Damage Premium	FT/CAC Deductible	FT/CAC Premium	Collision Deductible	Collision Premium	Auto Total
	\$250	\$40	\$500	\$189	<b>\$289</b>

3. **2007 Chevrolet K2500hd Silvera** Stated Amount: \$44,000  
 VIN: 1GCHK23D57F150765 Garaging Zip Code: 83440 Radius: 100

Liability Premium	Liability	UM BI	UIM BI	Med Pay	
	\$385	\$30	\$30	\$17	
Physical Damage Premium	Comp Deductible	Comp Premium	Collision Deductible	Collision Premium	Auto Total
	\$250	\$119	\$500	\$505	<b>\$1,086</b>

4. **2007 Chevrolet K2500hd Silvera** Stated Amount: \$25,000  
 VIN: 1GCHK29UX7E199540 Garaging Zip Code: 83440 Radius: 100

Liability Premium	Liability	UM BI	UIM BI	Med Pay	
	\$385	\$30	\$30	\$17	
Physical Damage Premium	Comp Deductible	Comp Premium	Collision Deductible	Collision Premium	Auto Total
	\$250	\$80	\$500	\$323	<b>\$865</b>

Policy number: 02616845-9  
 FERRELL BROTHERS CONST  
 Page 3 of 3

5. **2005 Chevrolet K3500 Silverado**  
 VIN: 1GCHK39U55E328254

Stated Amount: \$20,000  
 Garaging Zip Code: 83440

Radius: 100

Liability Premium	Liability	UM BI	UIM BI	Med Pay	
	\$385	\$30	\$30	\$17	
Physical Damage Premium	Comp Deductible	Comp Premium	Collision Deductible	Collision Premium	Auto Total
	\$250	\$69	\$500	\$275	<b>\$806</b>

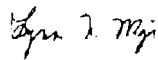
**Premium discount**

Policy	Renewal
02616845-9	

**Loss Payee information**

1.	Loss Payee	Auto 1	BANK OF AMERICA PO BOX 45224 JACKSONVILLE, FL 32203 2005 Ford F350 Super Duty (1FDWW31P25EC22698)
2.	Loss Payee	Auto 2	BANK OF COMMERCE P.O. BOX 1887 IDAHO FALLS, ID 83403 2006 Wells Cargo Trailer (1WC200N2464059635)
3.	Loss Payee	Auto 3	BANK OF COMMERCE PO BOX 1887 IDAHO FALLS, ID 83403 2007 Chevrolet K2500hd Silvera (1GCHK23D57F150765)
4.	Loss Payee	Auto 4	BANK OF COMMERCE PO BOX 175 RIGBY, ID 83442 2007 Chevrolet K2500hd Silvera (1GCHK29UX7E199540)
5.	Loss Payee	Auto 5	BANK OF COMMERCE 463 RIGBY LAKE DR RIGBY, ID 83442 2005 Chevrolet K3500 Silverado (1GCHK39U55E328254)

**Company officers**



Secretary

**UNINSURED/UNDERINSURED**  
**MOTORIST COVERAGE ENDORSEMENT**

Except as specifically modified in this endorsement, all provisions of the Commercial Auto Policy apply.

We agree with you that the insurance provided under your Commercial Auto Policy, and related endorsements, is modified as follows:

**INSURING AGREEMENT – UNINSURED MOTORIST COVERAGE**

Subject to the Limits of Liability, if you pay the premium for Uninsured Motorist Coverage, we will pay for damages, other than punitive or exemplary damages, which an **insured** is legally entitled to recover from the **owner** or operator of an **uninsured auto** because of **bodily injury**:

1. sustained by an **insured**;
2. caused by an **accident**; and
3. arising out of the ownership, maintenance, or use of an **uninsured auto**.

**INSURING AGREEMENT – UNDERINSURED MOTORIST COVERAGE**

Subject to the Limits of Liability, if you pay the premium for Underinsured Motorist Coverage, we will pay for damages, other than punitive or exemplary damages, which an **insured** is legally entitled to recover from the **owner** or operator of an **underinsured auto** because of **bodily injury**:

1. sustained by an **insured**;
2. caused by an **accident**; and
3. arising out of the ownership, maintenance, or use of an **underinsured auto**.

We will pay under this endorsement only after the limits of liability under all applicable **bodily injury** liability bonds and policies have been exhausted by payment of judgments or settlements.

**ADDITIONAL DEFINITIONS**

When used in this endorsement, whether in the singular, plural, or possessive:

1. **"Insured"** means:
  - a. if the named insured shown on the **Declarations Page** is a natural person:
    - (i) **you** or a **relative**;
    - (ii) any person **occupying your insured auto** or a **temporary substitute auto**;  
and
    - (iii) any person who is entitled to recover damages covered by this endorsement because of **bodily injury** sustained by a person described in (i) or (ii) above;  
or
  - b. if the named insured shown on the **Declarations Page** is a corporation, partnership, organization or any other entity that is not a natural person:

- (i) any person **occupying your insured auto** or a **temporary substitute auto**;  
and
  - (ii) any person who is entitled to recover damages covered by this endorsement because of **bodily injury** sustained by a person described in (i) above.
2. "**Non-owned auto**" means any **auto** that is not **owned by you** or furnished for **your** regular use and, if the named insured is a natural person, not **owned by** or furnished for the regular use of the named insured's spouse or **relative**.
3. "**Owned**" means the person or organization:
- a. holds legal title to the vehicle;
  - b. has legal possession of the vehicle that is subject to a written security agreement with an original term of six (6) months or more; or
  - c. has legal possession of the vehicle that is leased to that person or organization under a written agreement for a continuous period of six (6) months or more.
4. "**Owner**" means the person or organization who, with respect to a vehicle:
- a. holds legal title to the vehicle;
  - b. has legal possession of the vehicle that is subject to a written security agreement with an original term of six (6) months or more; or
  - c. has legal possession of the vehicle that is leased to that person or organization under a written agreement for a continuous period of six (6) months or more.
5. "**Underinsured auto**" means an **auto** or trailer of any type to which a **bodily injury** liability bond or policy applies at the time of the **accident**, but the sum of all applicable limits of liability for **bodily injury** is less than the coverage limit for Underinsured Motorist Coverage shown on the **Declarations Page**.

An "**underinsured auto**" does not include any motorized auto or equipment:

- a. **owned by**, furnished to, or available for the regular use of **you** or, if the named insured is a natural person, a **relative**;
  - b. **owned by** any governmental unit or agency;
  - c. designed mainly for use off public roads, while not on public roads;
  - d. while being used as a residence or premises;
  - e. shown on the **Declarations Page** of this policy;
  - f. not required to be registered as a motor vehicle; or
  - g. that is an **uninsured auto**.
6. "**Uninsured auto**" means an **auto** or trailer of any type:
- a. to which no **bodily injury** liability bond or policy applies at the time of the **accident**;
  - b. to which a **bodily injury** liability bond or policy applies at the time of the **accident**, but the bonding or insuring company:
    - (i) denies coverage; or
    - (ii) is or becomes insolvent;
  - c. to which a **bodily injury** liability bond or policy applies at the time of the **accident**, but its limit of liability for **bodily injury** is less than the minimum limit of liability for **bodily injury** specified by the financial responsibility law of the state in which the **insured auto** is principally garaged; or

- d. that is a hit-and-run vehicle whose operator or **owner** cannot be identified and which strikes:
- (i) an **insured auto** or **temporary substitute auto**; or
  - (ii) if the named insured is a natural person:
    - (a) **you** or a **relative**; or
    - (b) a motor vehicle that **you** or a **relative** are occupying,
- provided that the **insured**, or someone on his or her behalf, reports the **accident** to the police or civil authority within twenty-four (24) hours or as soon as practicable after the **accident**.

An "**uninsured auto**" does not include any motorized auto or equipment:

- a. **owned** by, furnished to, or available for the regular use of **you** or, if the named insured is a natural person, a **relative**;
- b. **owned** or operated by a self-insurer under any applicable vehicle law, except a self-insurer that is or becomes insolvent;
- c. **owned** by any governmental unit or agency;
- d. designed mainly for use off public roads, while not on public roads;
- e. while being used as a residence or premises;
- f. shown on the **Declarations Page** of this policy;
- g. not required to be registered as a motor vehicle; or
- h. that is an **underinsured auto**.

**EXCLUSIONS - READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL NOT BE AFFORDED UNDER THIS ENDORSEMENT.**

1. Coverage under this endorsement is not provided for **bodily injury** sustained by any person while using or **occupying**:
  - a. an **insured auto** without the express or implied permission of **you** or, if the named insured is a natural person, a **relative**;
  - b. a **non-owned auto** without the express or implied permission of the **owner**; or
  - c. a **auto** or device of any type designed to be operated on the public roads that is **owned** by, furnished to, or available for the regular use of **you** or, if the named insured is a natural person, a **relative**, other than an **insured auto** or **temporary substitute auto**.
2. Coverage under this endorsement will not apply directly or indirectly to benefit any insurer or self-insurer under any of the following or similar laws:
  - a. workers' compensation law; or
  - b. disability benefits law.

**LIMITS OF LIABILITY**

Regardless of the number of premiums paid, or the number of **insured autos** or trailers shown on the **Declarations Page**, or the number of policies issued by **us**, or the number of vehicles or **insureds** involved in an **accident**, or the number of claims or lawsuits arising out of an **accident**, **we** will pay no more than the Limit of Liability shown for Uninsured/Underinsured Motorist Coverage on the **Declarations Page**.

If the **Declarations Page** shows that "combined single limit" or "CSL" applies, the amount shown is the most we will pay for the total of all damages resulting from any one **accident**. However, without changing this total "each accident" limit of liability, we will comply with any law that requires us to provide any separate limits.

If your **Declarations Page** shows a split limit:

1. the amount shown for "each person" is the most we will pay for all damages due to a **bodily injury** to one person; and
2. subject to the "each person" limit, the amount shown for "each accident" is the most we will pay for all damages due to **bodily injury** sustained by two or more persons in any one **accident**.

The "each person" limit of liability includes the total of all claims made for **bodily injury** to an **insured** and all claims of others derived from such **bodily injury**, including, but not limited to, emotional injury or mental anguish resulting from the **bodily injury** of another or from witnessing the **bodily injury** to another, loss of society, loss of companionship, loss of services, loss of consortium, and wrongful death.

The Limits of Liability under this endorsement shall be reduced by all sums:

1. paid because of **bodily injury** by or on behalf of any persons or organizations that may be legally responsible, including, but not limited to, all sums paid under Part I - Liability To Others;
2. paid or payable under any applicable Medical Payments Coverage Endorsement; and
3. paid, payable, or that should apply, because of **bodily injury** under any of the following or similar laws:
  - a. workers' compensation law; or
  - b. disability benefits law.

Any payment made to a person under this endorsement shall reduce any amount that the person is entitled to recover under Part I - Liability To Others.

No one will be entitled to duplicate payments for the same elements of damages.

Any judgment or settlement for damages against an operator or **owner** of an **uninsured auto** or **underinsured auto** that arises out of a lawsuit brought without **our** written consent is not binding on **us**.

#### **OTHER INSURANCE**

When the named insured is a natural person, if there is other applicable uninsured or underinsured motorist coverage, we will pay only **our** share of the damages. **Our** share is the proportion that **our** limit of liability bears to the total of all available coverage limits. However, any insurance we provide shall be excess over any other uninsured or underinsured motorist coverage, except for **bodily injury** to **you** or a **relative** when occupying an **insured auto**.

When the named insured is a corporation, partnership, organization or any other entity that is not a natural person, if there is other applicable uninsured or underinsured motorist coverage, we will pay only **our** share of the damages. **Our** share is the proportion that **our** limit of liability bears to the total of all available coverage limits. However, any insurance we provide for the occupant of an **insured auto** shall be excess over any other uninsured or underinsured motorist coverage.

We will not pay for any damages that would duplicate any payment made for damages under other insurance.

### ARBITRATION

If we and an **insured** cannot agree on:

1. the legal liability of the operator or **owner** of an **uninsured auto** or **underinsured auto**; or
  2. the amount of the damages sustained by the **insured**;
- this will be determined by arbitration if we or the **insured** make a written demand for arbitration prior to the expiration of the bodily injury statute of limitations in the state in which the **accident** occurred.

If a written demand for arbitration is made, each party shall select an arbitrator. The two arbitrators will select a third. If the two arbitrators cannot agree on a third arbitrator within thirty (30) days, then on joint application by the **insured** and **us**, the third arbitrator will be appointed by a court having jurisdiction.

Each party will pay the costs and fees of its arbitrator and any other expenses it incurs. The costs and fees of the third arbitrator will be shared equally.

Unless both parties agree otherwise, arbitration will take place in the county in which the **insured** resides. Local rules of procedure and evidence will apply.

A decision agreed to by two of the arbitrators will be binding with respect to a determination of:

1. the legal liability of the operator or **owner** of an **uninsured auto** or **underinsured auto**; and
2. the amount of the damages sustained by the **insured**.

The arbitrators shall have no authority to award an amount in excess of the limit of liability. The decision of the arbitrators is binding only if the amount of the award does not exceed the minimum limit of liability specified by the financial responsibility laws of the state listed on **your** application as **your** residence. If the award of the arbitrators is in an amount which exceeds this minimum limit, either party may demand the right to a trial. This demand must be made in writing within sixty (60) days of the arbitrators' decision. If the demand is not made within sixty (60) days, the amount of damages agreed to by the arbitrators will be binding.

**ALL OTHER TERMS, LIMITS AND PROVISIONS OF THE POLICY REMAIN UNCHANGED.**

097



BONNEVILLE COUNTY  
2011 APR 11 PM 4:26

Jacob S. Wessel, ISB #7529  
THOMSEN STEPHENS LAW OFFICES, PLLC  
2635 Channing Way  
Idaho Falls, ID 83404  
Telephone (208) 522-1230  
Fax (208) 522-1277  
jwessel@thomsenstephenslaw.com

Attorneys for Plaintiffs Sam Ferrell and Deva Ferrell

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL,	)	Case No. CV-2010-7051
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
UNITED FINANCIAL CASUALTY	)	OBJECTION TO
COMPANY, d.b.a PROGRESSIVE	)	AFFIDAVIT OF DEFENDANTS' COUNSEL
INSURANCE COMPANY whose true	)	
name is unknown and PROGRESSIVE	)	
INSURANCE COMPANY whose true	)	
name is unknown,	)	
	)	
Defendants.	)	
	)	

COMES NOW, plaintiffs, by and through counsel of record, and hereby objects to the admission of the Affidavit of Defendants' Counsel dated April 6, 2011 for the following reasons:

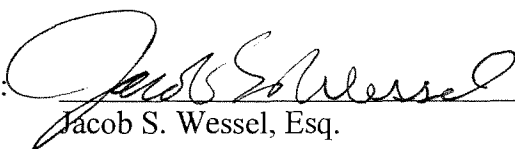
Although plaintiffs have no objection to the Court reviewing the contract, the plaintiffs object to its admission for the purpose of excluding costs and attorney fees set forth in plaintiffs' affidavit of costs and fees. As plaintiffs argued in the hearing on April 6, 2011, defendant has waived any

objection to items in plaintiffs' affidavit of costs and attorney fees because it failed to object in a timely manner as is required pursuant to the Idaho Rules of Civil Procedure Rule 54(d)(6). Rule 54(d)(6) provides that any party may object to the claimed costs of another party set forth in a memorandum of costs by filing and serving on the adverse party a motion to allow part or all of such costs within 14 days of service of the memorandum of costs. While defendant did file an objection to costs and attorney fees, defendant did not point to any cost or attorney fees set forth in plaintiffs' affidavit of costs and attorney fees that were objectionable. Therefore, the plaintiffs did not have a chance to prepare a response to any such objections at the hearing on April 6, 2011. The defendant is required to be specific in his objections to costs and fees. *See Wefco, Inc. v. Monsanto Co.*, 111 Idaho 55, 720 P.2d 643 (Ct. App. 1996), rev'd on other grounds, 112 Idaho 555, 733 P.2d 776 (1987)(Where the defendant appealed the declaratory judgment that costs and fees be awarded to the plaintiff, challenging not the amount of the assessments, but rather the authority of the Court to award fees, the defendant properly preserved the question of awarding costs and fees for appeal, but did not reserve an objection to any particular amount.)

WHEREFORE, the defendant did not timely object to any specific costs or fee or amounts thereof, and still has not done so, plaintiffs pray the order of this Court denying defendant any right to do so based upon the Affidavit of Defendant's Counsel filed April 6, 2011.

DATED this 11 day of April, 2011.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:   
Jacob S. Wessel, Esq.

**CERTIFICATE OF SERVICE**

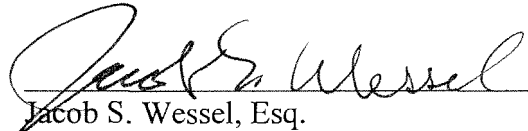
I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 16 day of April, 2011, I caused a true and correct copy of the foregoing **OBJECTION TO AFFIDAVIT OF DEFENDANT'S COUNSEL** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

MARIANNE CASE  
JOHN LERMA  
PROGRESSIVE CLAIMS  
2264 SOUTH BONITO WAY SUITE 100  
MERIDIAN ID 83642

Mail  
 Hand Delivery  
 Facsimile@

THOMSEN STEPHENS LAW OFFICES, PLLC

By:

  
\_\_\_\_\_  
Jacob S. Wessel, Esq.

JSW/jd  
7083\015 obj aff def counsel

7/5 Ferrell  
CC

BONNEVILLE COUNTY  
APR 11 PM 4:26

Jacob S. Wessel, ISB #7529  
THOMSEN STEPHENS LAW OFFICES, PLLC  
2635 Channing Way  
Idaho Falls, ID 83404  
Telephone (208) 522-1230  
Fax (208) 522-1277  
jwessel@thomsenstephenslaw.com  
Attorneys for Plaintiffs Sam Ferrell and Deva Ferrell

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL, )  
)  
Plaintiffs, )  
)  
v. )  
)  
UNITED FINANCIAL CASUALTY )  
COMPANY, d.b.a PROGRESSIVE )  
INSURANCE COMPANY whose true )  
name is unknown and PROGRESSIVE )  
INSURANCE COMPANY whose true )  
name is unknown, )  
)  
Defendants. )  
\_\_\_\_\_ )

Case No. CV-2010-7051

SUPPLEMENTAL AFFIDAVIT OF  
COSTS AND ATTORNEY FEES  
(after March 11, 2011)

STATE OF IDAHO )  
) ss.  
County of Bonneville )

Jacob S. Wessel, being first duly sworn on oath, deposes and says:

I.

Affiant is a member of the law firm of Thomsen Stephens Law Offices which served as  
counsel for Plaintiffs Sam and Deva Ferrell in the above entitled action.

II.

This affidavit is made on personal knowledge of affiant, except to the extent of allegations  
made on information and belief.

III.

Affiant has reviewed the time and cost records of Thomsen Stephens Law Offices maintained on the above matter after the filing of their original affidavit of costs and fees of March 11, 2011, and represents that the following items of cost and expense were expended and incurred in the above entitled action and arbitration after March 11, 2011:

In addition to the costs and fees totaling \$21,453.76 as set forth in Plaintiffs' March 11, 2011 affidavit of costs and fees, since March 11, 2011 Thomsen Stephens Law Offices has expended approximately 17.9 hours in the defense of the above entitled action as follows:

Jacob S. Wessel      17.9 hours at \$175.00 an hour = \$3,132.50

The sum of \$3,132.50 is a reasonable attorneys fee for the services of Thomsen Stephens Law Offices provided to Sam and Deva Ferrell to enforce the uninsured motorist policy after March 11, 2011.

IV.

With the additional sums set forth in this affidavit, the total costs and attorneys fees incurred in the defense of the above entitled action are **\$24,586.26**.

V.

A true and correct copy of our record of billings from March 11, 2011 until the present in this matter is attached hereto as exhibit "A."


VI.

Attorneys fees and costs should be awarded for the reasons cited in Plaintiffs' memorandum in support of attorneys fees and costs filed March 11, 2011.

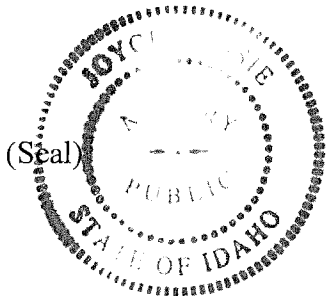
VII.


Pursuant to I.R.C.P. 54(d)(5), all items of cost, and expenses, including any attorneys fees set forth in this memorandum, are to the best of your affiant's knowledge and belief, correct, are claimed in compliance with said rule, and were reasonably and necessarily expended and incurred in the above entitled action.

DATED this 11 day of April, 2011.

  
\_\_\_\_\_  
Jacob S. Wessel, Esq.

SUBSCRIBED AND SWORN to upon oath before me this 11<sup>th</sup> day of April, 2011.



  
\_\_\_\_\_  
Notary Public for State of Idaho  
Residing at: Idaho Falls  
My Commission Expires: 9-12-12

**CERTIFICATE OF SERVICE**

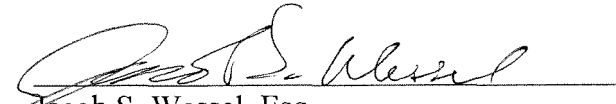
I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 11 day of April, 2011, I caused a true and correct copy of the foregoing **SUPPLEMENTAL AFFIDAVIT FOR COST AND ATTORNEY FEES** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

MARIANNE CASE  
JOHN LERMA  
PROGRESSIVE CLAIMS  
2264 SOUTH BONITO WAY SUITE 100  
MERIDIAN ID 83642

Mail  
 Hand Delivery  
 Facsimile@

THOMSEN STEPHENS LAW OFFICES, PLLC

By:

  
Jacob S. Wessel, Esq.

JSW/jd  
7083\016 supp aff costs fees

THOMSEN STEPHENS LAW OFFICES PLLC  
2635 Channing Way  
Idaho Falls, Idaho 83404  
(208) 522-1230 - FAX: (208) 522-1277  
Tax ID #20-0493858

Sam & Deva Ferrell  
P. O. Box 1347  
Idaho Falls ID 83406

Page: 1  
04/11/2011  
ACCOUNT NO: 7083-000C  
STATEMENT NO: 4

SAM & DEVA FERRELL v. Progressive Ins.  
Progressive Agent - Curtis Neil  
Policy No. 02616845-6 D/Loss: 12/22/08

	HOURS
03/28/2011 JSW Review Defendant's response to plaintiffs' motion for costs and attorney fees (.5), research retrospective application of law (1.4)	1.90
03/29/2011 JSW Begin draft of brief in reply to defendant's response to our motion for costs and fees.	3.40
03/30/2011 JSW Review and revise draft of plaintiffs reply to defendants response brief re fees and costs	2.90
03/31/2011 JSW Review and revise reply brief re costs and fees.	2.10
04/01/2011 JSW Complete draft of brief in reply to defendant's response to our motion for fees and costs	2.80
04/05/2011 JSW Prepare argument for hearing on motion for costs and attorneys fees.	0.90
04/06/2011 JSW Appearance at hearing on motion for costs and attorneys fees, travel to and from Bonneville County courthouse to argue said motion.	1.90
04/08/2011 JSW Draft objection to defendant's affidavit attaching the insurance contract after researching specific objections to costs and	



SAM & DEVA FERRELL v. Progressive Ins.  
Progressive Agent - Curtis Neil  
Policy No. 02616845-6 D/Loss: 12/22/08

		HOURS	
	fees(.8), start draft of supplemental affidavit re costs and attorneys fees.	1.30	
04/11/2011	JSW Review and revise objection to defendant's affidavit with insurance contract, draft and finalize supplemental affidavit re costs and attorneys fees.	0.70	
	FOR CURRENT SERVICES RENDERED	17.90	3,132.50

RECAPITULATION			
<u>TIMEKEEPER</u>	<u>HOURS</u>	<u>HOURLY RATE</u>	<u>TOTAL</u>
Jacob S. Wessel	17.90	\$175.00	\$3,132.50

TOTAL CURRENT	3,132.50
PREVIOUS BALANCE	\$21,453.76
BALANCE DUE	<u>\$24,586.26</u>

Attorney-client privileged and attorney work product privileged information. DO NOT DISCLOSE. Billings are due and payable 30 days from the date of this billing. Unpaid billings accrue interest at the rate of 12% per annum.



\$10,000.00 for Deva Ferrell. On January 5, 2010, Progressive tendered \$855.00 to Sam Ferrell and \$862.00 to Deva Ferrell.

On January 22, 2010, Ferrells demanded arbitration pursuant to the Policy.

On November 4, 2010, the parties underwent arbitration before a panel of three arbitrators. The arbitrators awarded \$3,990.80 to Sam Ferrell and \$5,134.44 to Deva Ferrell.

On November 16, 2010, Ferrells filed a Petition for Confirmation of Arbitration Award and Award of Costs and Fees.

On March 11, 2011, Ferrells filed a Motion for Fees and Costs. On March 24, 2011, Progressive filed Defendant's Objection to Plaintiffs' Motion for Fees and Costs. On April 1, 2011, Ferrells filed Plaintiffs' Memorandum in Reply to Defendant's Response. This Court heard oral argument regarding the matter on April 6, 2011.

## **II. STANDARD OF ADJUDICATION**

An award of attorney's fees must be supported by statutory or other authority. *See Webb v. Webb*, 143 Idaho 521, 526, 148 P.3d 1267, 1272 (2006). The amount of attorney's fees and costs awarded is generally discretionary. *Lettunich v. Lettunich*, 141 Idaho 425, 435, 111 P.3d 110, 120 (2005).

## **III. DISCUSSION**

Ferrells claim they are entitled to an award of fees and costs pursuant to Idaho Code § 41-1839 and Rule 54(d)(1) of the Idaho Rules of Civil Procedure.

Progressive asserts that Ferrells are not entitled to attorney's fees because the current version of § 41-1839, which became effective July 1, 2010, does not apply retrospectively, and under the Idaho Supreme Court's interpretation of pre-amended § 41-1839, Ferrells are not entitled to attorney's fees for arbitration.

The following timeline of events is helpful in understanding this Court's analysis:

- January 22, 2010: Ferrells demanded arbitration
- February 1, 2010: Idaho Supreme Court issued *Grease Spot, Inc. v. Harnes*, 148 Idaho 582, 226 P.3d 525 (2010), which overturned *Emery v. United Pacific Ins. Co.*, 120 Idaho 244, 815 P.2d 442 (1991) and changed the court's interpretation of § 41-1839.
- July 1, 2010: Idaho Legislature amended § 41-1839 to overturn *Grease Spot*.
- November 4, 2010: Ferrells and Progressive engaged in arbitration.

This Court will first address the manner in which § 41-1839(1) should be applied in this case. Second, this Court will discuss the costs and fees, if any, which Ferrells are entitled to recover.

**A. Section 41-1839**

Prior to the Idaho Legislature amending § 41-1839 in 2010, subsection (1) of the statute provided as follows:

Any insurer issuing any policy, certificate or contract of insurance, surety, guaranty or indemnity of any kind or nature whatsoever, which shall fail for a period of thirty (30) days after proof of loss has been furnished as provided in such policy, certificate or contract, to pay to the person entitled thereto the amount justly due under such policy, certificate or contract, shall in any action thereafter brought against the insurer in any court in this state for recovery under the terms of the policy, certificate or contract, pay such further amount as the court shall adjudge reasonable as attorney's fees in such action.

I.C. § 41-1839(1) (effective until July 1, 2010). Section 41-1839(1) now provides as follows:

Any insurer issuing any policy, certificate or contract of insurance, surety, guaranty or indemnity of any kind or nature whatsoever, which shall fail for a period of thirty (30) days after proof of loss has been furnished as provided in such policy, certificate or contract, to pay to the person entitled thereto the amount justly due under such policy, certificate or contract, shall in any action thereafter brought against the insurer in any court in this state **or in any arbitration** for recovery under the terms of the policy, certificate or contract, pay

such further amount as the court shall adjudge reasonable as attorney's fees in such action **or arbitration**.

I.C. § 41-1839(1) (emphasis added).

### 1. Retrospective Application

The parties dispute whether the current § 41-1839(1) can be applied retrospectively.

In *Myers v. Vermaas*, 114 Idaho 85, 753 P.2d 296 (Ct. App. 1988), the Idaho Court of Appeals stated the following with regard to retrospective application of amended statutes:

Unless a contrary legislative intent appears on the face of a statute, retrospective application is disfavored. I.C. § 73-101. *See also University of Utah Hospital v. Pence*, 104 Idaho 172, 657 P.2d 469 (1982). An application is deemed retrospective if it affects substantive rights. *City of Garden City v. City of Boise*, 104 Idaho 512, 660 P.2d 1355 (1983). Among the rights characterized as substantive are those which are "contractual or vested" in nature. *Id.* at 515, 660 P.2d at 1358. Statutes which do not "create, enlarge, diminish or destroy contractual or vested rights" are deemed to be remedial or procedural, as opposed to substantive. *Id.* They may be applied retrospectively.

When this classification scheme is applied to statutes authorizing *discretionary* awards of attorney fees, such statutes generally are held to be remedial or procedural. Consequently, they are given retroactive effect. *See, e.g., Idaho Fair Share v. Idaho Public Utilities Commission*, 113 Idaho 959, 751 P.2d 107 (1988) (applying I.C. § 61-617A); *Jensen v. Shank*, 99 Idaho 565, 585 P.2d 1276 (1978) (applying I.C. § 12-121). Presumably, any amendment to such statutes also would receive retrospective effect.

However, we think a different analysis is required for I.C. § 12-120. Unlike I.C. §§ 12-121 and 61-617A, I.C. § 12-120 provides for a *mandatory*, not discretionary, award of attorney fees to the prevailing party in commercial litigation. The automatic nature of an award under I.C. § 12-120 makes it, in effect, an adjunct to the underlying commercial agreement between the parties. It establishes an entitlement. In this respect, an award under the statute is closely akin to other "contractual or vested" rights contained in the agreement itself. Although the award right is "remedial" in the semantic sense that it relates to a remedy, the same could be said of contract provisions relating to damages or other relief in the event of default.

Accordingly, we think that the 1986 amendment to I.C. § 12-120, which enlarged the scope of entitlement to mandatory attorney fee awards, is more accurately classified as substantive than as merely remedial or procedural. Consequently, the 1986 amendment should not be given retroactive effect.

*Id.* at 87, 753 P.2d at 298.

In an Addendum on Petitions for Rehearing in *Howard v. Blue Cross of Idaho Health Service, Inc.*, 114 Idaho 485, 757 P.2d 1204 (Ct. App. 1987), the court of appeals stated the following regarding its decision in *Myers*:

We also noted in *Myers* that a mandatory fee-shifting statute produces a harsh result for the non-prevailing party whose claim or defense is meritorious but unsuccessful. Such a result can be deemed fair only if the operation of the statute is known in advance and the parties are able to guide their litigation decisions accordingly. *See DeWils Interiors, Inc. v. Dines*, 106 Idaho 288, 293, 678 P.2d 80, 85 (Ct.App.1984). We concluded in *Myers* that “a retrospective application of the 1986 amendment to I.C. § 12-120 would distort this decision-making process. It would profoundly alter—after the fact—the costs and benefits of submitting a meritorious (albeit disputed) claim to the courts for resolution.” 114 Idaho at 87, 753 P.2d at 298.

*Id.* at 493-94, 757 P.2d at 1212-13.

The court of appeals discussed *Myers* again in *Eriksen v. Blue Cross of Idaho Health Services, Inc.*, 116 Idaho 693, 778 P.2d 815 (Ct. App. 1989). The court stated,

In *Myers*, we drew a line against application of I.C. § 12-120(3) to suits filed prior to the 1986 amendment because the parties in such cases had no opportunity to weigh the risk of exposure to mandatory fee awards before deciding to litigate. That is not so here. Although the insurance policy was issued prior to the 1986 amendment, the application of the attorney fee provision was triggered only by the commencement of litigation *after* the amendment had become effective. Thus, unlike the parties in *Myers*, the parties in this case were aware of the attorney fee risk when they chose to litigate. Moreover, we note that our Supreme Court has adopted the risk-weighting rationale of *Myers*. *See Griggs v. Nash*, 116 Idaho 228, 775 P.2d 120 (1989). We conclude that an attorney fee award was authorized by I.C. § 12-120(3) in this case.

*Id.* at 695-96, 778 P.2d at 817-18.

*Myers* and its progeny acknowledge that statutes authorizing awards of attorney’s fees are remedial in nature, but because § 12-120 “more closely resembles a substantive right than a merely procedural right,” the courts declined to apply § 12-120 retrospectively.

The Idaho Supreme Court has stated the attorney fee provision of § 41-1839 is “not a penalty but is an additional sum rendered as compensation when the insured is entitled to recover under the insurance policy, ‘to prevent the sum therein provided from being diminished by expenditures for the services of an attorney . . . .’” *Martin v. State Farm Mut. Auto. Ins. Co.*, 138 Idaho 244, 61 P.3d 601 (2002). “[T]he provisions of I.C. § 41-1839 become part of the insurance contract to the same effect as though incorporated therein.” *Pendlebury v. Western Casualty & Sur. Co.*, 89 Idaho 456, 406 P.2d 129 (1965). Section 41-1839(1) states the insurer “shall” pay attorney’s fees if certain conditions are met. Thus, the right to collect attorney’s fees under § 41-1839(1) is analogous to other vested rights in the underlying contract. Section 41-1839(1) is similar to § 12-120 in that it mandates an attorney fee award rather than simply authorizing a discretionary award.

This Court concludes the entitlement to a mandatory award under § 41-1839(1) resembles a substantive right. However, both the old and the new version of § 41-1839(1) have that characteristic. The 2010 amendment to § 41-1839(1) expanded the breadth of the statute, making the mandatory award of attorney’s fees more broadly available.<sup>1</sup> The amendment did not change the right to collect attorney’s fees from discretionary to mandatory. As a result, this Court believes it is appropriate to consider whether retrospective application would be proper if “the operation of the statute [was] known in advance and the parties [were] able to guide their litigation decisions accordingly.” *Cf. Howard*, at 493-94, 757 P.2d at 1212-13. In other words, if Progressive had the “opportunity to weigh the risk of exposure to mandatory fee awards before deciding to [arbitrate],” then retrospective application of § 41-1839 may be proper. *Cf. Eriksen*, 116 Idaho at 695-96, 778 P.2d at 817-18.

---

<sup>1</sup> The 2010 amendment certainly broadened the scope of § 41-1839(1) as interpreted in *Grease Spot*. However, whether the amendment broadened the scope of § 41-1839(1) as interpreted in *Emory*—or simply restored the statute to the *Emory* era status—is subject to dispute.

## 2. Effect of Suit not being Filed Prior to Arbitration

The parties dispute whether § 41-1839, prior to being amended, required non-prevailing insurers to pay attorney's fees incurred in arbitration if no lawsuit was filed prior to arbitrating the claim. In *Martin*, the Idaho Supreme Court indicated that a prior lawsuit was unnecessary, stating:

Before a plaintiff may recover attorney fees under the statute, it must be shown that: (1) the insured has provided proof of loss as required by the insurance policy; and (2) the insurance company failed to pay an amount justly due under the policy within thirty days of such proof of loss. This Court recently read into the scheme a third requirement, that the insurer's failure to pay must compel the insured to bring suit against the insurer in order to recover for the loss. *Anderson v. Farmers Ins. Co.*, 130 Idaho 755, 758, 947 P.2d 1003, 1005 (1997). Upon further consideration in light of the facts of this case, we withdraw that condition. The concept of compulsion to file an action is not included in the statute and is beyond the provisions established by the legislature for the recovery of attorney fees in the relationship between the insured and an insurer. Because there is no requirement in the statute that the plaintiff be "compelled" to bring an action, our opinion stating otherwise in *Anderson* is inconsistent with the statute and is disapproved.

*Martin*, 138 Idaho at 247, 61 P.3d at 604. However, in *Barbee v. WMA Securities, Inc.*, 143 Idaho 391, 146 P.3d 657 (2006) the court addressed the issue more directly while analyzing whether a party could seek attorney's fees under I.C. § 30-1446 through an award confirmation proceeding when no lawsuit was filed prior to arbitration. The court stated,

### 1. Award confirmation proceedings

The district court determined attorney fees for ISA violations could not be awarded in confirmation proceedings absent an underlying action before the court. Idaho Code section 30-1446 addresses the civil liability of an ISA violator as follows:

Any person who [violates certain ISA provisions] is liable to the person buying the security from him, who shall be entitled to *sue* either at law or in equity to recover the consideration paid for the security, together with interest at six percent (6%) per annum from the date of payment, costs and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security....



. . . . Clearly, the term “sue,” like the term “action,” requires the “filing of a complaint with the court, which may be denominated as a complaint, petition or application.” I.R.C.P. 3. Granted, an award confirmation occurs “upon application of a party.” I.C. § 7-911. Nevertheless, not all applications before a court qualify as an “action” entitling the claimant to pursue an attorney fee award. *Wolfe v. Farm Bureau Ins. Co.*, 128 Idaho 398, 405, 913 P.2d 1168, 1175 (1996) (“An application seeking the confirmation of an arbitration award is not an action in court to recover attorney fees pursuant to I.C. § 41-1839.”). The plain and obvious meaning of the term “sue” contemplates some type of adversarial proceeding beyond a mere motion to confirm an arbitration award. We agree with the district court that an award confirmation proceeding is not the appropriate vehicle for awarding attorney fees under the ISA.

## 2. *Subsequent suit*

As indicated above, I.C. § 30-1446(1) provides for a suit to recover consideration paid, “together with interest ..., costs, and reasonable attorneys’ fees....” The issue of whether this statute supports a suit solely for attorney fees filed after an arbitration award assigning damages has been fully paid is a matter of first impression for Idaho courts. For guidance, the parties refer this Court to many cases involving I.C. § 41-1839, a somewhat analogous statute that allows a claimant to recover attorney fees under certain circumstances in suits against insurers. *See Emery v. United Pac. Ins. Co.*, 120 Idaho 244, 815 P.2d 442 (1991); *Wolfe*, 128 Idaho 398, 913 P.2d 1168; *Martin v. State Farm Mutual Automobile Ins. Co.*, 138 Idaho 244, 61 P.3d 601 (2002); *American Foreign Ins. Co. v. Reichert*, 140 Idaho 394, 94 P.3d 699 (2004). While the Bentleys argue these cases indicate a party may bring a separate lawsuit after arbitration simply to recover attorney fees, we are not persuaded. The common thread flowing through these cases is that attorney fees were awarded where the insured was involved in a lawsuit before he or she received the amount justly due-their damages-from the insurance company. Here, WMA timely paid the arbitration award. The Bentleys were not involved in a lawsuit before they received their damages from WMA. Consequently, to the extent cases interpreting I.C. § 41-1839 apply by analogy, the Bentleys are not entitled to file a separate lawsuit solely for attorney fees.

Furthermore, a fair reading of I.C. § 30-1446 indicates there is no independent cause of action for attorney fees. Under the statute, a claimant is entitled to sue for consideration paid, *together with* interest, costs and fees. There is no basis for simply filing a lawsuit to collect attorney fees when the principal amount claimed has been fully paid and resolved in another proceeding. The statute only addresses an award of fees in a suit filed with the court for an ISA violation.

*Id.* at 394-95, 146 P.3d 660-61 (emphasis added). Although the court was not interpreting § 41-1839 in *Barbee*, the court indicated that attorney’s fees incurred in arbitration could not be awarded under § 41-1839 if a lawsuit had not been filed prior to arbitration.

**1. Conclusion**

Ferrells did not file a lawsuit prior to arbitrating their claim. Even if this Court ignores *Grease Spot*, under the Idaho Supreme Court’s interpretation of pre-amended § 41-1839 as stated in *Barbee*, Progressive would not have been subject to the mandatory fee provision of § 41-1839 for fees incurred in arbitration. As a result, it would be improper for this Court to conclude Progressive had a fair opportunity to weigh the risk of exposure to mandatory fee awards before deciding to arbitrate.

This Court concludes retrospective application of the amendments to § 41-1839 is improper in this case.

**B. Costs and Fees**

**1. Attorney’s Fees**

Having concluded the amendments to § 41-1839 do not apply retrospectively, this Court must determine whether Ferrells are entitled to attorney’s fees under the pre-amended statute.

In the analysis above, this Court concluded § 41-1839, prior to being amended, did not provide for an award of attorney’s fees incurred in arbitration if no lawsuit was filed prior to arbitration. Furthermore, the Idaho Supreme Court indicated in *Barbee* that an award confirmation proceeding or subsequent suit seeking fees is not the type of “action” contemplated by the pre-amended § 41-1839 and cannot serve as a vehicle for seeking attorney’s fees when no suit had been filed prior to arbitration.

Ferrells are not entitled to attorney's fees under § 41-1839. Ferrells have not sought fees under any other statute or theory and their motion for fees must be denied.

## 2. Costs

Ferrells seek \$1,172.98 in costs as a matter of right and \$2,390.78 in discretionary costs. Progressive asserts Ferrells are not entitled to costs because they are not the prevailing party.

### a. Prevailing Party

I.R.C.P. 54(d)(1)(A) states "costs shall be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court." I.R.C.P. 54(d)(1)(B) defines the prevailing party as follows:

(B) Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

In determining which party has prevailed, the Supreme Court of Idaho has held success in a case should be viewed "from an overall standpoint." *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 719, 117 P.3d 130, 133 (2005). Specifically the Court held:

In determining which party prevailed in an action where there are claims and counterclaims between opposing parties, the court determines who prevailed "in the action." That is, the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis.

*Id.*

Ferrells demand letter to Progressive asked for a total of \$17,000 in lost wages. Progressive believed the amount due under the Policy for lost wages was \$1,717.00—the amount tendered in response to Ferrells’ demand letter. The arbitrators determined the amount justly due under the Policy was \$9,125.24.

The arbitration award is substantially larger than what Progressive initially tendered. Having considered the arbitration award in relation to the overall relief sought by Ferrells, this Court finds that Ferrells are the prevailing party because they prevailed on the issue of whether the amount due under the Policy was more than the amount tendered by Progressive. Certain costs should be awarded to Ferrells as the prevailing party.

**b. Costs**

Ferrells filed their Motion for Fees and Costs on March 11, 2011.

On March 24, 2011, Progressive filed its Objection to Plaintiffs’ Motion for Fees and Costs. In its brief, Progressive argued that the fees claimed by Ferrells were excessive and that Ferrells were not the prevailing party. However, Progressive did not object to any of the costs claimed by Ferrells.<sup>2</sup>

I.R.C.P. 54(d)(6) states,

Any party may object to the claimed costs of another party set forth in a memorandum of costs by filing and serving on adverse parties a motion to disallow part or all of such costs within fourteen (14) days of service of the memorandum of cost. Such motion shall not stay execution on the judgment, exclusive of costs, and shall be heard and determined by the court as other motions under these rules. Failure to timely object to the items in the memorandum of costs shall constitute a waiver of all objections to the costs claimed.

---

<sup>2</sup> At the hearing before this Court on April 6, 2011, Progressive objected to some of the costs claimed by Ferrells, but such objection was neither timely nor made in proper form.

Progressive's failure to object, within fourteen days of March 11, 2011, to the items in Ferrells' memorandum of costs constitutes a waiver of all objections Progressive has to those costs.

As the prevailing party and absent a proper objection, Ferrells are awarded costs totaling \$3,563.76.


#### IV. CONCLUSION

Ferrells are not entitled to an award of attorney's fees.

Ferrells are entitled to recover costs in the amount of \$3,563.76.

**IT IS SO ORDERED**

DATED this 29 day of April 2011.

  
DANE H. WATKINS, JR.  
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 29 day of April 2011, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Jacob S. Wessel  
THOMSEN STEPHENS LAW OFFICES, P.L.L.C.  
2635 Channing Way  
Idaho Falls, ID 83404

John J. Lerma  
LERMA LAW OFFICE, P.A.  
El Dorado Business Campus  
3045 E. Copper Point Drive  
P.O. Box 190719  
Boise, ID 83719

RONALD LONGMORE  
Clerk of the District Court  
Bonneville County, Idaho

By   
Deputy Clerk

BOISE COUNTY  
MAY 13 PM 1:33

**LERMA LAW OFFICE, P.A.**  
**John J. Lerma, ISB# 3886**  
**Gary D. Luke, ISB# 6450**  
**El Dorado Business Campus**  
**3045 E. Copper Point Drive**  
**PO Box 190719**  
**Boise ID 83719**  
**TELEPHONE: (208) 288-0608**  
**FACSIMILE: (208) 288-0697**

**Attorneys for Defendant**  
**Progressive Insurance Company**

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL and DEVA FERRELL,  
  
Plaintiffs,  
  
vs.  
  
UNITED FINANCIAL CASUALTY  
COMPANY, d.b.a. PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown and PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown,  
  
Defendant.

Case No. CV 10-7051

**DEFENDANT'S MOTION TO  
RECONSIDER THE COURT'S  
AWARD OF COSTS TO  
PLAINTIFFS**

**Oral Argument Requested**


COMES NOW Defendant Progressive Insurance Company, by and through its attorneys of record, and moves this Court for an order to reconsider that portion of the Court's April 29, 2011 Memorandum Decision and Order which awarded costs to the Plaintiffs. This motion is brought in accordance with Civil Rules 7(b)(1) and 11(a)(2)(B) of the Idaho Rules of Civil Procedure.

Defendant's Motion to Reconsider the  
Court's Award of Costs to Plaintiffs - 1

This Motion is supported by a separately filed Memorandum, and by a previously submitted Affidavit of Defendant's Counsel (which includes relevant portions of the parties' insurance agreement).

DATED this 13 day of May 2011.

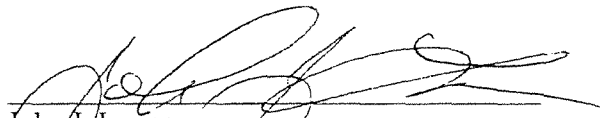
LERMA LAW OFFICE, P.A.

  
John J. Lerma  
Attorney for Defendant  
Progressive Insurance Company

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 13 day of May 2011, I caused a true and correct copy of the foregoing document to be served by Facsimile Transmission upon the following person(s):

Jacob S. Wessel  
Thomsen Stephens Law Offices, PLLC  
Fax: (208) 522-1277

  
John J. Lerma

Defendant's Motion to Reconsider the Court's Award of Costs to Plaintiffs - 2



RECEIVED  
MAY 13 2011 11:03

**LERMA LAW OFFICE, P.A.**  
**John J. Lerma, ISB# 3886**  
**Gary D. Luke, ISB# 6450**  
**El Dorado Business Campus**  
**3045 E. Copper Point Drive**  
**PO Box 190719**  
**Boise ID 83719**  
**TELEPHONE: (208) 288-0608**  
**FACSIMILE: (208) 288-0697**

**Attorneys for Defendant**  
**Progressive Insurance Company**

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL and DEVA FERRELL,  
Plaintiffs,

vs.

UNITED FINANCIAL CASUALTY  
COMPANY, d.b.a. PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown and PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown,

Defendant.

Case No. CV 10-7051

**DEFENDANT'S MEMORANDUM IN  
SUPPORT OF MOTION TO  
RECONSIDER THE COURT'S  
AWARD OF COSTS TO  
PLAINTIFFS**

COMES NOW Defendant Progressive Insurance Company, by and through its attorneys  
of record, and submits this Memorandum in support of the separately filed Motion to Reconsider  
the Court's Award of Costs to Plaintiffs.

Defendant's Memorandum in Support of Motion to  
Reconsider the Court's Award of Costs to Plaintiffs - 1

The motion should be granted because (i) the Court declined to address Defendant's previously asserted arguments pertaining to costs; (ii) Defendant did in fact object and hence did not waive its objection to the requested costs; (iii) an award of costs is precluded by the parties' contractual provision that provided for arbitration; and (iv) the requested costs are precluded under the Uniform Arbitration Act ("UAA") and under Idaho case law which interprets and applies the UAA.

Defendant respectfully requests that the Court reconsider its previous ruling and determine that no costs are appropriately awarded to the Plaintiffs in this proceeding.

**A. DEFENDANT OBJECTED TO ALL COSTS AND DID NOT WAIVE ANY OBJECTION TO PLAINTIFFS' CLAIMED COSTS**

Defendant's initial objection argued that Plaintiffs were entitled to no attorney's fees and no arbitration or litigation costs. The very first line of Defendant's previous briefing specifies that Defendant "responds in opposition to the Plaintiffs' motion for fees and costs." See Defendant's March 24, 2011 Objection to Plaintiffs' Motion for Fees and Costs at page 1. In addition, Defendant's counsel made this same, explicit argument at the previously conducted hearing. Because Defendant objected to all costs, it was neither necessary nor appropriate to make specific arguments pertaining to a portion of those claimed costs.

Accordingly, there was no waiver on the part of Defendant: An objection was timely made wherein Defendant asserted that Plaintiffs were not entitled to any costs. Furthermore, there was no waiver because the arbitration cost issue is not appropriately resolved by reference to Civil Rule 54. Defendant respectfully suggests that the Plaintiffs' reliance on I.R.C.P. 54(d)(6) is misguided for reasons discussed below pertaining to the parties' specific agreement to

Defendant's Memorandum in Support of Motion to  
Reconsider the Court's Award of Costs to Plaintiffs - 2

arbitrate, the Uniform Arbitration Act which takes precedence over general civil litigation cost-shifting provisions, and recent, relevant case law. Based on each and all of these reasons, the Court should reconsider its discussion of waiver and conclude that the Defendant's have maintained a valid objection to the requested costs.

**B. THE ISSUE OF COSTS IS GOVERNED BY THE PARTIES' AGREEMENT TO ARBITRATE**

As the Court is aware, the Plaintiffs made the initial decision to pursue their UIM claims via arbitration. Clearly, the arbitration was initiated, proceeded, and controlled by the parties' contractual insurance agreement (specifically, by the "ARBITRATION" provision found in the "UNINSURED/UNDERINSURED MOTORIST COVERAGE ENDORSEMENT"). For example, the arbitration was initiated by the Plaintiffs via a written demand, each party selected an arbitrator, the two arbitrators then selected a third arbitrator, and the arbitration was held in the county where the insureds reside.

Defendant's counsel has previously provided the relevant portion of the insurance policy. See Affidavit of Defendant's Counsel submitted prior to the April 6, 2011 hearing. Accordingly, this document was before the Court, and Plaintiff's counsel did not object to it being considered or relied on. Further, at the request of Defendant's Counsel during the hearing, the Court stated that it would consider the submitted policy on this issue.

According to the Arbitration provision, costs are to be treated as follows:

Each party will pay the costs and fees of its arbitrator and any other expenses it incurs. The costs and fees of the third arbitrator will be shared equally.

Defendant's Memorandum in Support of Motion to  
Reconsider the Court's Award of Costs to Plaintiffs - 3

124

See “UNINSURED/UNDERINSURED MOTORIST COVERAGE ENDORSEMENT” under heading “ARBITRATION” (emphasis added; document is attached to the previously submitted Affidavit of Defendant’s Counsel; the pages of the Endorsement are not numbered, but the Arbitration provision can be found on the very last page).

Defendant respectfully suggests that this Court is obligated to defer to the plain and unambiguous language of the arbitration provision. Accordingly, this Court should determine that Plaintiffs must pay “the costs and fees of its arbitrator,” “any other expenses it incurs,” and share equally in the “costs and fees of the third arbitrator.” Shifting such costs away from the Plaintiffs would be contrary to the parties’ pre-arbitration understanding and would be an unfair surprise to Defendant. Once again, the Court’s reliance on Civil Rule 54 is suggested to be incorrect.

**C. THE UNIFORM ARBITRATION ACT AND CONTROLLING IDAHO CASE LAW REQUIRES THAT COSTS BE ADDRESSED IN ACCORDANCE WITH THE PARTIES’ AGREEMENT TO ARBITRATE**

Idaho has adopted the Uniform Arbitration Act (see I.C. §§ 7-901 through 7-922). This is the applicable and controlling statute which pertains to most arbitrations. The UAA provides support for and deference to the present parties’ arbitration agreement:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

I.C. § 7-901 (emphasis added; note: the validity and applicability of the insurance contract or the specific arbitration provision have never been questioned or challenged in any way—rather both parties have proceeded in accordance with such).

Defendant’s Memorandum in Support of Motion to  
Reconsider the Court’s Award of Costs to Plaintiffs - 4

As pertaining to fees and costs, the UAA specifies:

Unless otherwise provided in the agreement to arbitrate, the arbitrator's expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.

I.C. § 7-910 (emphasis added). In the present matter, the issue of the arbitrators' "expenses and fees, together with other expenses" is "otherwise provided in the agreement to arbitrate" (as explained in the preceding section). Hence, once again, this Court should defer to such contractual provisions.

Idaho courts have consistently enforced the UAA's deference to an arbitration agreement. For example, in *Deelstra v. Hagler*, 145 Idaho 922, 188 P.3d 864 (2008), the court determined as follows:

Courts possess very limited authority to review arbitration awards under Idaho's Uniform Arbitration Act. I.C. §§ 7-901-922; *Mumford v. Miller*, 143 Idaho 99, 100, 137 P.3d 1021, 1022 (2006). The arbitrator's decision is binding on the reviewing court both as to questions of law and fact. *Driver v. SI Corp.*, 139 Idaho 423, 426, 80 P.3d 1024, 1027 (2003). Even where a reviewing court might consider some of the arbitrator's rulings on questions of law to be error, the arbitrator's decision is nevertheless binding on the reviewing court. *Id.* An inquiry by a district court is limited to an examination of the award to discern if any of the grounds for relief stated in the Uniform Arbitration Act exist. *Id.*

188 P3d at 866 (underlined emphasis added). The present issue of costs would be similarly controlled by the underlying arbitration award and the parties' agreement to arbitrate. The arbitration panel did not provide an award of costs. Such was precluded by the explicit language in the arbitration agreement. And it would now be inappropriate for this Court to shift such costs

Defendant's Memorandum in Support of Motion to  
Reconsider the Court's Award of Costs to Plaintiffs - 5

to the Defendant because such is not provided for in the UAA, in the award, or in the parties' agreement.

Relatedly, in *Moore v. Omnicare, Inc.*, 141 Idaho 809, 118 P.3d 141 (2005), the court stated:

It is beyond the scope of an arbitrator's authority to award attorney fees unless there is a contractual agreement for such an award. I.C. § 7-910; *Emery v. United P. Ins. Co.*, 120 Idaho 244, 246, 815 P.2d 442, 444 (1991); *Bingham County Comm'n [v. Interstate Elec. Corp.]*, 105 Idaho [36] at 42, 665 P.2d [1046] at 1052; *Storrer v. Kier Constr. Corp.*, 129 Idaho 745, 746, 932 P.2d 373, 374 (Ct. App. 1997).

118 P.3d at 148-49 (underlined emphasis added). Again, the relevant issue is the required court deference to the contractual arbitration provision.

And in *Grease Spot, Inc. v. Harnes*, 148 Idaho 582, 226 P.3d 524 (2010), the court cited I.C. § 7-910 and then specified:

This Court has repeatedly interpreted this provision [I.C. § 7-910] to prohibit courts from modifying arbitration awards to provide for attorney fees. *E.g. Barbee v. WMA Sec., Inc.*, 143 Idaho 391, 396, 146 P.3d 657, 662 (2006); *Wolfe v. Farm Bureau Ins. Co.*, 128 Idaho 398, 404, 913 P.2d 1168, 1174 (1996).

226 P.3d at 527 (footnote 2). Similarly, the cost shift from Plaintiffs to Defendant would be precluded because such is unavailable via the UAA and because such is precluded by the parties' arbitration agreement.

*Grease Spot* also stated: "The UAA is to be interpreted 'to make uniform the law of those states which enact it.' I.C. § 7-921." *Id.* at 529. In this context, the court favorably cites decisions from other states wherein it is clear that the UAA, with its provisions specific to arbitration, must take precedence over other, more general litigation cost-shifting provisions.

Defendant's Memorandum in Support of Motion to  
Reconsider the Court's Award of Costs to Plaintiffs - 6

127

For example, the *Grease Spot* court references *Canon Sch. Dist. No. 50 v. W.E.S. Const. Co.*, 180 Ariz. 148, 882 P.2d 1274, 1279-80 (1994) (en banc) (which, according to the Idaho court stands for the proposition that “a general fee-shifting statute did not control over the specific UAA provision”), and *Greenfeld v. Caesar’s Atlantic City Hotel/Casino*, 334 N.J. Super. 149, 756 A.2d 1096, 1102 (Law Div. 2000) (which, again according to the Idaho court holds “that a general rule requiring the court to award costs to the prevailing party does not apply to arbitration”).

Under the UAA and controlling case law, this Court should defer to the cost provision contained in the parties’ arbitration agreement. That provision provides:

Each party will pay the costs and fees of its arbitrator and any other expenses it incurs. The costs and fees of the third arbitrator will be shared equally.

As required, Defendant has already paid one-half of the third arbitrator’s costs and fees.

Accordingly, Defendant has no other expenses that it should be obligated to pay. Pursuant to the quoted arbitration provision, this Court should leave each party with their own incurred costs and expenses. Accordingly, this Court should reverse its previous ruling wherein such costs were shifted from the Plaintiffs to the Defendant.


#### **D. CONCLUSION**

This Court should reconsider its previous ruling which shifted the Plaintiffs’ arbitration costs to the Defendant. That decision should be changed for the following reasons: (a) Defendants did not waive any objection because they opposed all fees and costs requested by the Plaintiffs; (b) the parties’ arbitration occurred pursuant to a contractual provision that precluded the requested shifting of costs; (c) the Uniform Arbitration Act instructs the Court to comply with the

underlying arbitration agreement; and (d) recent and controlling case law demonstrates that Plaintiffs are not entitled to shift such costs to the Defendant. This Court should defer to the parties' arbitration agreement, follow the UAA, and conform its ruling to valid case precedent.

DATED this 13 day of May 2011.

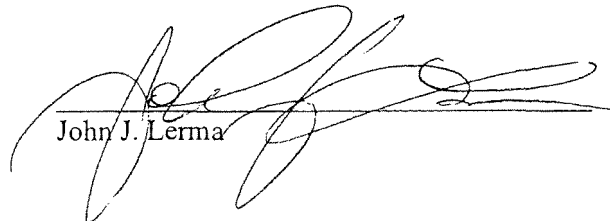
LERMA LAW OFFICE, P.A.

  
John J. Lerma  
Attorney for Defendant  
Progressive Insurance Company

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 13 day of May 2011, I caused a true and correct copy of the foregoing document to be served by Facsimile Transmission upon the following person(s):

Jacob S. Wessel  
Thomsen Stephens Law Offices, PLLC  
Fax: (208) 522-1277

  
John J. Lerma



ORIGINAL BONNEVILLE COUNTY

11/10/10 10:14:25

Jacob S. Wessel, ISB #7529  
THOMSEN STEPHENS LAW OFFICES, PLLC  
2635 Channing Way  
Idaho Falls, ID 83404  
Telephone (208) 522-1230  
Fax (208) 522-1277  
jwessel@thomsenstephenslaw.com

Attorneys for Plaintiffs Sam Ferrell and Deva Ferrell

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL, )

Case No. CV-2010-7051

Plaintiffs, )

MOTION TO RECONSIDER

v. )

UNITED FINANCIAL CASUALTY )

COMPANY, d.b.a PROGRESSIVE )

INSURANCE COMPANY whose true )

name is unknown and PROGRESSIVE )

INSURANCE COMPANY whose true )

name is unknown, )

Defendants. )

COME NOW Plaintiffs Sam and Deva Ferrell, by and through counsel of record, and move this Court pursuant to Rule 11, IRCP to reconsider those portions of its Memorandum Decision and Order Re: Motion for Fees and Costs of April 29, 2011 in which the Court denied Plaintiff's motion for attorney fees. The Court made two errors, either of which, if corrected, would entitle Plaintiffs to an award of their attorney fees.

1. The District Court should have applied the law as it existed at the time the Complaint and the Answer in the above captioned case was filed.

The Court should have looked to the law as it existed at the time of filing of the lawsuit. *See Unity Light & Power Co. v. City of Burley*, 92 Idaho 499, 445 P.2d 720 (1968); *Overman v. Overman*, 102 Idaho 235, 629 P.2d 127. In fact, the Defendant in its briefing on the issues of attorneys fees and costs cited and highlighted the following passage from *State ex Rel Wasden v. Diacel Chemical Industries, Inc.*, 141 Idaho 102, 106 P.3d 428 (2005) in which the *Diacel* court referenced *Unity*: “Burley’s right to exercise the power of eminent domain should have been adjudicated in accordance with the law in effect at the time of the filing of its answer and counterclaim.” 92 Idaho at 503-04, 445 P.2d at 724-25. (Emphasis added by Defendant United Financial in its Objection to Motion for Fees and Costs.) Plaintiffs filed the Petition for Confirmation of Arbitration Award and for Costs and Attorneys fees in this matter on November 18, 2010. Defendant filed its Answer on February 15, 2011. Both of these dates are after the amendment of Idaho Code §41-1839(1) in which the legislature is clear that a plaintiff may recover attorney fees in arbitration.

Inexplicably, in its Memorandum Decision and Order Re: Motion for Fees and Costs the Court herein never addressed the law as it existed at the time the Petition was filed and at the time the Answer was filed. After stating what the current statute provides, the Court immediately discussed retrospective application of Idaho Code §41-1839(1) to decide that the statute could not be applied retrospectively. In doing this the Court also refused to apply the statute prospectively. This was error, and Plaintiffs respectfully request that the Court reconsider its decision not to apply the law as it existed at the time the Petition and Answer were filed herein.

Not applying the law as it existed at the time the parties chose to involve the courts presents a difficult choice for courts. If not the law at the time of filing, what past law should the Court apply? Would it be correct to apply the law as it existed when each individual fee was incurred? Would it be correct to apply the law as it existed when attorneys got involved and fees began incurring? Would it be correct to apply the law as it existed when the arbitration actually happened? Would it be correct to apply that law as it existed when both parties agreed to arbitrate? We do not know which of these is correct because the only guidance the Idaho Supreme Court has given us is that the courts should apply the law as it exists at the time of the filing of the Petition and at the time of the filing of the Answer. *See Diacel and Unity.*

2. In deciding whether the statute requires filing a law suit before the arbitration, this Court should have relied on the *Martin* case and not on the *Barbee* case.

Idaho law provides that a plaintiff is **not** required to file a lawsuit before arbitration in order to recover attorney's fees pursuant to Idaho Code §41-1839. The Court correctly cited *Martin v. State Farm Mut. Auto. Ins. Co.*, for the holding that “[t]he concept of compulsion to file an action is not included in the statute and is beyond the provisions established by the legislature for the recovery of attorney fees in the relationship between the insured and the insurer. Because there is no requirement in the statute that the plaintiff be ‘compelled’ to bring an action, our opinion stating otherwise in *Anderson* is inconsistent with the statute and is disapproved.” *Martin*, 138 Idaho 244, 247, 61 P.3d 601, 657 (2002). ***Martin* has never been overruled.** *Martin* expressly overruled *Anderson v. Farmers Ins. Co.*, 130 Idaho 755, 947 P.2d 1003 which was a case that relied only upon *Wolfe v. Farm Bureau Ins. Co.*, 128 Idaho 398, 405, 913 P.2d 1168, 1175 for the proposition that

compelling the insured to bring suit against the insurer was a requirement under Idaho Code §41-1839. *Id.*

*Martin* is the most similar case to the present one that exists in Idaho. In *Martin*, the insured was involved in an automobile accident and sued the other driver. After the driver's insurance company became insolvent, he notified his own insurance that he was seeking the \$100,000.00 limits under the uninsured motorist provision of his policy. **Before filing a lawsuit, by June, 1997, the parties agreed to arbitrate the dispute and selected three arbitrators.** Two years later, in June, 1999, Martin filed a lawsuit and arbitrated the matter. Martin then filed a motion for costs and attorneys fees pursuant to Idaho Code §41-1839 because the Defendant State Farm offered and payed substantially less than the sum awarded by the arbitrators. The District Court found that the suit was not necessary since the arbitration award had been paid in full and the suit was not brought for recovery under the terms of the policy and thus denied Martin any award of fees. *Martin*, 138 Idaho at 245-6. On appeal, the Defendant State Farm argued that since the parties demanded arbitration and selected arbitrators and only two years later did Martin file a lawsuit, Martin was not entitled to an award of fees under Idaho Code §41-1839. Defendant relied on *Anderson* (*Anderson* relied on *Wolfe* for the proposition that §41-1839 required a plaintiff to be compelled to filed suit.) The Idaho Supreme Court rejected Defendant's arguments on appeal and found that there are only two requirements for recovery under §41-1839; "it must be shown that: (1) the insured has provided proof of loss as required by the insurance policy; and (2) the insurance company failed to pay an amount justly due under the policy within thirty days of such proof of loss. *Id.* There is no other requirement. In order to find that *Martin* is not the law in Idaho, this Court is forced to find that *Martin* has been overruled. *Martin* has never been overruled, and so this Court's finding that *Barbee*

v. *WMA Securities, Inc.*, 143 Idaho 391, 146 P.3d 657 (2006) applies to the present case was error, and Plaintiff respectfully requests this Court to reconsider that finding.

While it is true that *Barbee* was decided after *Martin*, *Barbee* does not overrule *Martin*. *Barbee* was a case under the Idaho Securities Act (ISA), Idaho Code § 30-1446, as it existed prior to the Act being amended in 2004. 143 Idaho at 392, 146 P.3d at 658. In *Barbee*, the Plaintiffs sued their securities broker-dealer and broker for the purchase of unsuitable investments. Their contract had an arbitration provision, and the parties arbitrated the dispute pursuant to that provision. The plaintiffs prevailed in part at arbitration, but the arbitration award expressly stated, “Each party shall bear its own arbitration costs, including attorneys’ fees.” Plaintiffs subsequently filed two lawsuits; one for confirmation of the arbitration award and for the court to modify the award with respect to attorney fees under the ISA, and a second lawsuit simply for attorneys fees under the ISA, Idaho Code § 30-1446 as it existed prior to the Act being amended in 2004.

In deciding to deny attorney fees, the *Barbee* court relied on the language of the ISA, which prior to 2004 stated as follows:

Any person who [violates certain ISA provisions] is liable to the person buying the security from him, who shall be entitled to *sue* either at law or in equity to recover the consideration paid for the security, together with interest at six percent (6%) per annum from the date of payment, costs and attorneys fees, less the amount of any income received on the security.

...

*Barbee*, 143 Idaho at 395, 146 P.3d at 661 (emphasis on *sue* in the original).

It is important to remember two things when applying *Barbee* to Idaho Code § 41-1839 cases. First, the *Barbee* court was construing the ISA statute, and putting emphasis on the word “sue.” The word *sue* is not in § 41-1839 either before or after it was amended. Second, the legislature has since

amended the ISA, and the word “sue” is no longer a part of the ISA statute either, so it is doubtful that *Barbee* is even current law under ISA.

The *Barbee* court then went on to discuss the award confirmation proceeding and decided not to amend the arbitration award to allow for attorneys fees because of the word “sue” in the ISA statute. In support of this, *Barbee* cited only one case: *Wolfe v. Farm Bureau Ins. Co.*, 128 Idaho 398, 405, 913 P.2d 1168, 1175 (1996). *Anderson*, which was expressly overruled by *Martin*, also only relied on this same passage from *Wolfe* to require that suit be compelled under § 41-1839 in order for plaintiff to recover attorneys fees. This exact logic was expressly overruled by the Idaho Supreme Court in *Martin*.

The Idaho Supreme Court showed in *Martin* how it expressly overrules prior case law by stating that *Anderson* was overruled. If the Idaho Supreme Court had wanted to expressly overrule its finding in *Martin* and in essence resurrect *Anderson*, it would have done so by express language. It did not, and so it was error for this Court to rely upon *Barbee* in its holding that the Ferrells are not entitled to attorneys’ fees because they did not file suit before arbitration.

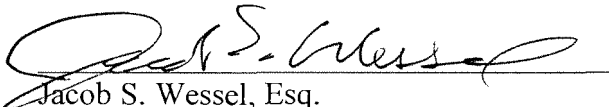
The second portion of *Barbee* that this Court cites is regarding *Barbee*’s second lawsuit in which plaintiffs only requested attorneys fees under the ISA, Idaho Code § 30-1446 as it existed prior to the Act being amended in 2004. Regarding the subsequent lawsuit, the *Barbee* court held only this, “to the extent cases interpreting Idaho Code § 41-1839 apply by analogy, the Bentleys are not entitled to file a separate lawsuit solely for attorney fees.” *Barbee*, 143 Idaho at 395, 146 P.3d at 66. Besides the fact that the court in *Barbee* is construing an entirely different and not longer existing statute, the Ferrells did not file a separate lawsuit solely for attorneys fees, so this holding does not apply.

If an appeal is needed because this Court will not reconsider this decision, the Defendant will have to ask the Supreme Court to overrule *Diacel* and *Unity*, to retrospectively overrule *Martin*, to retrospectively rely on *Barbee*, which would resurrect *Anderson* and would resurrect the old ISA statute, and to ignore the current version of Idaho Code § 41-1839 and the legislature's clear intent to allow attorney fees in arbitration. This is an unlikely result, and the necessity of such an appeal would be a waste of both parties' time and money as well as judicial resources.

WHEREFORE, Plaintiffs respectfully request, based upon the foregoing, that this Court reconsider those portions of its Memorandum Decision and Order Re: Motion for Fees and Costs of April 29, 2011 in which the Court denied Plaintiff's motion for attorney fees.

DATED this 12 day of May, 2011.

THOMSEN STEPHENS LAW OFFICES, PLLC

  
Jacob S. Wessel, Esq.


**CERTIFICATE OF SERVICE**

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 12 day of May, 2011, I caused a true and correct copy of the foregoing **MOTION TO RECONSIDER** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

JOHN LERMA  
LERMA LAW OFFICE, PA  
3045 E COOPER POINT DR.  
MERIDIAN ID 83642  
PO BOX 190719  
BOISE, ID 83719

Mail  
 Hand Delivery  
 Facsimile@

THOMSEN STEPHENS LAW OFFICES, PLLC

By   
\_\_\_\_\_  
Jacob S. Wessel, Esq.

JSW  
7083\017 Mo Reconsider



BOYD COUNTY  
JUL 27 2010 1:18

**LERMA LAW OFFICE, P.A.**  
**John J. Lerma, ISB# 3886**  
**Gary D. Luke, ISB# 6450**  
**El Dorado Business Campus**  
**3045 E. Copper Point Drive**  
**PO Box 190719**  
**Boise ID 83719**  
**TELEPHONE: (208) 288-0608**  
**FACSIMILE: (208) 288-0697**

**Attorneys for Defendant**  
**Progressive Insurance Company**

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL and DEVA FERRELL,  
Plaintiffs,

vs.

UNITED FINANCIAL CASUALTY  
COMPANY, d.b.a. PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown and PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown,  
Defendant.

Case No. CV 10-7051

**DEFENDANT'S RESPONSE IN  
OPPOSITION TO PLAINTIFFS'  
MOTION TO RECONSIDER**

COMES NOW the Defendant, by and through its counsel of record, and responds in opposition to the Plaintiffs' motion to reconsider. Plaintiffs make two arguments in their motion. Neither argument is sufficient to justify a reversal of the Court's previous decision pertaining to attorney fees. Furthermore, the motion fails because Plaintiffs are not entitled to attorney fees

via a request to confirm an arbitration award, and because Defendant's prompt payment of the award makes this proceeding moot. Accordingly, this Court should deny the Plaintiff's motion to reconsider.

**A. PLAINTIFFS MISCONSTRUE *UNITY LIGHT & POWER AND DIACEL CHEMICAL***

Plaintiffs' motion disregards the factual case contexts when it pulls language from *Unity Light & Power v. Burley* and *State ex Rel Wasden v. Diacel Chemical Industries*. Plaintiffs attempt to use limited language from these cases to argue that this Court should apply I.C. § 41-1839 as such existed in November 2010 (i.e., after the arbitration when Plaintiffs filed a request with this Court to confirm the award). Significantly however, neither *Unity Light & Power*, nor *Diacel Chemical* involved arbitration. See 99 Idaho 499, 501 ("Unity instituted the present action . . . ."; text search shows no reference to arbitration); 141 Idaho 102, 104 ("On January 6, 2003, the State filed this action . . . ."; text search shows no reference to arbitration).

Because there was no arbitration in these cases, when the Supreme Court made pronouncements about what was controlling law, it did so in the context of state court litigation being the only forum and proceeding. Hence the statements from the Supreme Court that the law as it existed when the proceeding commenced was controlling (i.e, when litigation was filed in those cases).

It is an immense stretch of the statements and rationale found in *Unity Light & Power* and in *Diacel Chemical* for the Plaintiffs to now argue that their own initiation of arbitration, and indeed the whole arbitration process, should be disregarded in considering the controlling law. If courts accepted such rationale, it would create considerable confusion and preclude a defendant from understanding what law would ultimately control a pending dispute (for example, in the present case controlling law would depend on whether suit was filed before or after arbitration).

This Court appropriately considered and applied the rulings of *Unity Light & Power* and *Diacel Chemical*. Those decisions stand for the principle that the law existing at the commencement of an action should be controlling throughout the course of the proceeding. Defendant agrees and again asserts that the applicable time frame is when arbitration was initiated.

Plaintiffs' motion also cites *Overman v. Overman*, 102 Idaho 235, 629 P.2d 127 (1980). *Overman* is a divorce/child custody case. Defendant's counsel is unable to determine the relevance or why such case is being cited. According to the *Overman* court:

The question presented by this appeal is a narrow one, i.e., whether the district court, on the non-custodial parent's motion to modify the child custody decree, erred in entering an order granting temporary custody of the minor children to the non-custodial parent upon a properly supported ex parte motion pending a full hearing, to be held within ten days.

102 Idaho at 237. Defendant's counsel has not found language in *Overman* that seems to pertain to the present matter (there is no page-specific reference in the cite included in Plaintiffs' briefing). Accordingly, Defendant's counsel does not believe that *Overman* has applicability or that such supports Plaintiffs' motion.

**B. AS THE COURT EXPLAINED IN DETAIL IN ITS PREVIOUS DECISION, MARTIN DOES NOT REPRESENT CURRENT OR CONTROLLING LAW**

In its existing ruling, this Court provided a valid and thorough analysis of *Martin v. State Farm Mut. Auto. Ins. Co.*, 138 Idaho 244, 61 P.4d 601 (2002) and *Barbee v. WMA Securities, Inc.*, 143 Idaho 391, 146 P.3d 657 (2006). The Court properly recognized that *Barbee* was the more recent precedent, that it more directly analyzed the applicable issues, and that it was controlling for purposes of the Court's decision.

Plaintiffs apparently like the language in *Martin* and do not like the language in *Barbee*. So Plaintiffs request that this Court rely on the older, less on-point, and non-controlling case language. To make such argument, the Plaintiffs assert that *Martin* has never been formally overruled.

Once again, this Court appropriately addressed such issues in its previous decision. But as a partial recap in response to the Plaintiffs' present motion, it is noted that *Barbee* does explicitly reference *Martin* and refutes the Plaintiffs' reliance on such. According to *Barbee*:

The issue of whether this statute supports a suit solely for attorney fees filed after an arbitration award assigning damages has been fully paid is a matter of first impression for Idaho courts. For guidance, the parties refer this Court to many cases involving I.C. § 41-1839, a somewhat analogous statute that allows a claimant to recover attorney fees under certain circumstances in suits against insurers. See *Emery v. United P. Ins. Co.*, 120 Idaho 244, 815 P.2d 442 (1991); *Wolfe [v. Farm Bureau Ins. Co.]*, 128 Idaho 398, 913 P.2d 1168 [1996]; *Martin v. State Farm Mutual Automobile Ins. Co.*, 138 Idaho 244, 61 P.3d 601 (2002); *American Foreign Ins. Co. v. Reichert*, 140 Idaho 394, 94 P.3d 699 (2004). While the Bentleys [plaintiffs] argue these cases indicate a party may bring a separate lawsuit after arbitration simply to recover attorney fees, we are not persuaded. The common thread flowing through these cases is that attorney fees were awarded where the insured was involved in a lawsuit before he or she received the amount justly due—their damages—from the insurance company. Here, WMA timely paid the arbitration award. The Bentleys were not involved in a lawsuit before they received their damages from WMA. Consequently, to the extent cases interpreting I.C. § 41-1839 apply by analogy, the Bentleys are not entitled to file a separate lawsuit solely for attorney fees.

Furthermore, a fair reading of I.C. § 60-1446 indicates there is no independent cause of action for attorney fees. Under the statute, a claimant is entitled to sue for consideration paid, *together with* interest, costs and fees. There is no basis for simply filing a lawsuit to collect attorney fees when the principal amount claimed has been fully paid and resolved in another proceeding.

146 P.3d at 661 (italics in original; underlined emphasis added; bracketed language added to complete citations and to identify party status).

Stated simply, the *Barbee* court recognized that *Emery*, *Wolfe*, *Martin*, and *American Foreign Insurance* together indicate that a previous lawsuit to pursue the underlying claim for damages was a critical requirement for a subsequent request for attorney fees. *Id.* And since the insurer in *Barbee* “timely paid the arbitration award,” the plaintiffs were “not entitled to file a separate lawsuit solely for attorney fees.” *Id.* In the present case, unlike in *Barbee*, the cases “interpreting I.C. § 41-1839” need not be applied “by analogy”—rather direct application of those cases based on the same statutory provision is appropriate. *Id.*

The Plaintiffs’ motion arguments are flawed: While there may not be an express statement that says “*Martin* is hereby overruled,” that portion of *Martin* that is now relied on by the Plaintiffs has been discussed and refuted by a subsequent Idaho Supreme Court ruling. Accordingly, it is not good law, it is not binding, and it demonstrates that this Court was correct in its initial ruling.

In addition to *Barbee*, the *Grease Spot* decision went even further in its rejection of the Plaintiffs’ *Martin*-based arguments. See *Grease Spot, Inc. v. Harnes*, 148 Idaho 582, 226 P.3d 524 (2010). This Court previously found it unnecessary to address *Grease Spot* at any length (Page 9 of the Memorandum Decision: “Even if this Court ignores *Grease Spot*, under the Idaho Supreme Court’s interpretation of pre-amended § 41-1839 as stated in *Barbee*, Progressive would not have been subject to the mandatory fee provision of § 41-1839 for fees incurred in arbitration.”). Nevertheless, it is evident that *Grease Spot* reinforces the conclusion that the referenced language from *Martin* cannot be relied on.

As previously cited by the Defendant, *Grease Spot* states as follows:

[T]he plain text of I.C. § 41-1839 is at odds with this Court's prior readings of the statute. Section 41-1839 only permits insureds to collect attorney fees incurred in a civil "action" to recover under an insurance policy. When a court compels arbitration, it often stays litigation as to all parties, regardless of whether they are to participate in the arbitration, to allow these corollary proceedings to be completed. An arbitration is not part of a civil action, but rather a proceeding separate and apart from litigation based on a contract between the parties. Further, there is no language indicating that § 41-1839 is meant to imply a provision for arbitration attorney fees into every insurance policy. *Emery* was therefore manifestly incorrect in holding to the contrary. To the extent that *Emery* implied into insurance policies a provision granting insureds arbitration attorney fees, it is expressly overruled.

226 P.3d at 528 (*see also Wolfe v. Farm Bureau Ins. Co.*, 128 Idaho 398, 405, 913 P.2d 1168, 1175 (1996) ("before an insured can recover attorney fees under the statute [I.C. § 41-1839], an action in court must be brought to recover under the terms of the insurance policy")). Simply stated, even if *Martin* survived *Barbee*, the Supreme Court's unequivocal statements in *Grease Spot* demonstrate that *Martin* is not controlling law.

Once again, this Court got it right in analyzing *Martin* and *Barbee*, and in recognizing that *Barbee* is more recent, addresses the issue more directly, and is the relevant and controlling precedent. This Court should sustain its previous ruling on the issue of attorney fees.

### **C. PLAINTIFFS' REQUEST FOR RECONSIDERATION CONCEDES MOST OF THE COURT'S PREVIOUS MEMORANDUM OF DECISION**

As indicated initially in this response, Plaintiffs make only two arguments in support of their motion for reconsideration. It is therefore worth noting that most of the Court's existing ruling is left uncontested. For example, Plaintiffs do not now challenge the Court's rulings regarding statutory retroactivity (and specifically how such pertains to I.C. § 41-1839). Clearly this topic was a substantial and important part of the Court's ruling. Defendant believes that the

Court was correct on these unchallenged issues, but since such are not being maintained by the Plaintiffs, this briefing will not make additional, supporting arguments pertaining to such.

**D. PLAINTIFFS' REQUEST TO CONFIRM AN ARBITRATION AWARD IS NOT AN ACTION IN COURT SUFFICIENT TO RECOVER ATTORNEY FEES UNDER I.C. § 41-1839**

Plaintiffs' action before this Court is allegedly to "confirm the arbitration award."

However, the Plaintiffs' pleadings and motions have obviously focused on pursuing attorney fees. The Idaho Supreme Court has made it clear that a post-arbitration request to confirm an award does not suffice as a basis to recover attorney fees under I.C. § 41-1839.

In *Wolfe v. Farm Bureau Ins. Co.*, 128 Idaho 398, 913 P.2d 1168 (1996), the court explains and rules as follows:

Wolfe argues that he is entitled to attorney fees incurred during arbitration under his motion to the district court for confirmation of the arbitration award. Wolfe contends that when an insured is required to enter into arbitration under his insurance contract, due to his insurance company's failure to pay what is justly due, then he is entitled to attorney fees under Idaho Code § 41-1839. Wolfe cites *Emery* and *Walton v Hartford Ins. Co.*, 120 Idaho 616, 818 P.2d 320 (1991), as authority for his argument. We disagree with Wolfe's assertions. Neither *Emery* nor *Walton* is helpful or instructive to the resolution of the present case.

Idaho Code 41-1839 provides for the award of attorney fees if the insurance company fails to pay an amount justly due under the policy within thirty days after proof of loss. But, before an insured can recover attorney fees under the statute, an action in court must be brought to recover under the terms of the insurance policy. I.C. § 41-1839; see *Pendlebury v. Western Casualty & Sur. Co.*, 89 Idaho 456, 465, 406 P.2d 129, 134 (1965) ("An insurer which fails for a period of thirty days after proof of loss to pay the person entitled thereto the amount justly due under the policy, shall in any action thereafter pay such further amount as the court shall adjudge reasonable as attorney's fees in such action."). In both *Emery* and *Walton*, suits were filed in court prior to arbitration, which brought those cases squarely within the purview of I.C. § 41-1839. In the present case, a motion for confirmation of an arbitration award is

being used as a vehicle to assert a claim for attorney fees where no prior court action was filed.

No Idaho Supreme Court case has previously addressed the issue of whether a motion for confirmation of an arbitration award constitutes an action in court to recover attorney fees incurred in arbitration under I.C. § 41-1839. . . .

\* \* \*

On its face Idaho Code § 41-1839 requires that an action in court be filed. The Idaho Rules of Civil Procedure mandate that “[t]here shall be one form of action to be known as ‘civil action.’” I.R.C.P. 2; see also Idaho Const. art. V, § 1. Rule 3(a) of the Idaho Rules of Civil Procedure requires that a civil action commence with the filing of a complaint, petition, or application with the court and that no dispute may be submitted to the court without the filing of a complaint, petition, or application. I.R.C.P. 3(a). A confirmation application is presented to the court through a motion or application for the purpose of confirming an arbitration award. An application seeking the confirmation of an arbitration award is not an action in court to recover attorney fees pursuant to I.C. § 41-1839. Wolfe filed a motion for confirmation of arbitration award, pursuant to I.C. § 7-911, seeking attorney fees. Because the confirmation motion is not an action in court pursuant to I.C. § 41-1839, Wolfe is not entitled to attorney fees.

128 Idaho at 403-04, 405 (underlined emphasis added).

In addition to strengthening the other arguments asserted by the Defendant, *Wolfe* makes it clear that the Plaintiffs have no basis to obtain attorney fees via a post-arbitration proceeding that is only being brought to “confirm” the arbitration award. Since this is exactly what the Plaintiffs are attempting to do, this Court should sustain its previous ruling and again deny any award of attorney fees in accordance with *Wolfe*.

**E. BECAUSE DEFENDANT HAS ALREADY PAID THE ARBITRATION AWARD, THE PRESENT PROCEEDING IS MOOT**

There is another issue that becomes evident in reviewing the cases cited by both parties and previously relied on by the Court: This proceeding is moot because Progressive Insurance



acted promptly to pay the arbitration award soon after such was issued. Idaho courts have stated that confirmation of an arbitration award is only needed if it is necessary to convert such to a judgment for future collection efforts. *See Bingham County Com'n v. Interstate Elec. Co.*, 108 Idaho 181, 183, 697 P.2d 1195 (Idaho App. 1985) (“Such an award requires the imprimatur of a court to be enforced.”). Here the award is already paid—meaning that a judgment is unnecessary, confirmation is meaningless, and this proceeding is therefore moot.

*Barbee* is again instructive:

Here, WMA timely paid the arbitration award [WMA was the party against whom the arbitration award was issued]. The Bentleys [the plaintiffs] were not involved in a lawsuit before they received their damages from WMA. Consequently, to the extent cases interpreting I.C. § 41-1839 apply by analogy, the Bentleys are not entitled to file a separate lawsuit solely for attorney fees.

146 P.3d at 661 (bracketed language added to identify the involved entities).

In the present case, Defendant Progressive Insurance acted promptly to pay the full amount of the arbitration award. Checks were immediately requested, timely processed, and Defendant’s counsel forwarded such on November 19, 2010 (only two weeks after the award was issued). *See* Affidavit of Counsel in Opposition to Plaintiffs’ Motion to Reconsider at ¶¶ 3-7. Notwithstanding this prompt timing, and with the understanding that checks were being issued, Plaintiffs submitted their initial filing with this Court on November 16, 2010 (such was not, however, received by Defendant’s counsel until November 29, 2010). *Id.* at ¶¶ 5 and 8.

Because Progressive “timely paid the arbitration award,” the Plaintiffs need not have been “involved in a lawsuit before they received their damages.” *Barbee*, 146 P.3d at 661. Hence, the Plaintiffs’ present suit effectively seeking “solely attorney fees” is unnecessary and moot. *Id.*


**F. CONCLUSION**

The arguments asserted in Plaintiffs' motion to reconsider have already been substantially addressed by this Court. Plaintiffs' first argument fails because the rulings from *Unity Light & Power* and *Diacel Chemical* are misapplied. Those cases did not involve arbitration. Such cases simply assert that the law existing at the commencement of an action should be controlling throughout the course of the proceeding. Plaintiffs' second argument is invalid because it asks the Court to ignore subsequent Supreme Court rulings (*Barbee* and *Grease Spot*). The Court fully addressed such issues in its initial ruling.

Finally, the Plaintiffs' present motion should be denied because a request for award confirmation does not suffice as a basis for attorney fees, and because any award confirmation is unnecessary since the award was paid soon after it was issued. This Court should sustain its previous ruling on attorney fees, and deny the Plaintiffs' motion for reconsideration.

DATED this 24 day of May 2011.


LERMA LAW OFFICE, P.A.

  
\_\_\_\_\_  
John J. Lerma  
Attorneys for Defendant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 24 day of May 2011, I caused a true and correct copy of the foregoing document to be served by facsimile transmission upon the following person(s):

Jacob S. Wessel  
Thomsen Stephens Law Offices, PLLC  
FAX: (208) 522-1277

  
\_\_\_\_\_  
John J. Lerma

500 201077  
MAY 27 2011

**LERMA LAW OFFICE, P.A.**  
**John J. Lerma, ISB# 3386**  
**Gary D. Luke, ISB # 6450**  
**El Dorado Business Campus**  
**3045 E. Copper Point Drive**  
**PO Box 190719**  
**Boise ID 83719**  
**TELEPHONE: (208) 288-0608**  
**FACSIMILE: (208) 288-0697**

**Attorneys for Defendant**  
**Progressive Insurance Company**

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL,  
Plaintiffs,

vs.

UNITED FINANCIAL CASUALTY  
COMPANY, d.b.a. PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown and PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown,

Defendant.

Case No. CV 10-7051

**AFFIDAVIT OF COUNSEL IN  
OPPOSITION TO PLAINTIFFS'  
MOTION TO RECONSIDER**

STATE OF IDAHO            )  
                                  ) ss.  
COUNTY OF ADA         )

I, John J. Lerma, having been first duly sworn upon oath, depose and state:

1. I am an attorney of record for Defendant Progressive Insurance Company, in the above-entitled matter, and, as such, I am familiar with the facts and circumstances surrounding this matter.

2. The statements contained herein are made of my own personal knowledge and are true and correct to the best of my belief and information.

3. I represented the Defendant in the arbitration that occurred on November 4, 2010.

4. Upon receipt of the arbitration award, I requested that my client issue checks to the Plaintiffs in the amounts indicated via the award.

5. During conversations with Plaintiffs' counsel subsequent to the arbitration, I informed him that checks had been requested and would be forwarded to him upon receipt.

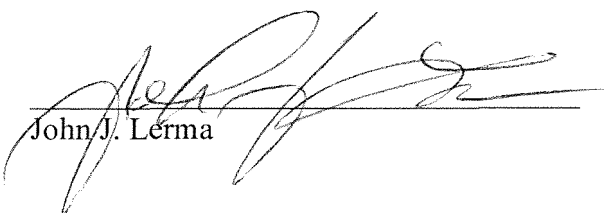
6. On November 19, 2010, I received the requested checks.

7. On November 19, 2010, I forwarded the checks, with a cover letter, and a satisfaction of award document to counsel for the Plaintiffs. True and correct copies of the letter, the draft satisfaction of award, and the two checks are attached to this Affidavit as Exhibit A.

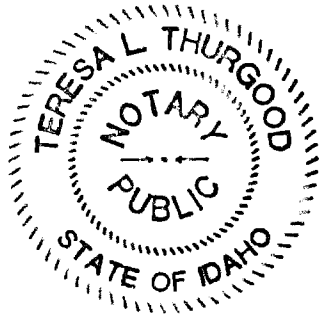
8. On November 29, 2010, my office received a mailed copy of the Plaintiffs' Petition for Confirmation of Arbitration Award and Award of Costs and Fees.

9. As of November 29, 2010, it was my understanding that Plaintiffs' counsel had received the referenced checks made payable to the Plaintiffs.

DATED this 24 day of May 2011.

  
John J. Lerma

SWORN AND SUBSCRIBED to before me this 24<sup>th</sup> day of May 2011.



Teresa L. Thurgood  
Notary Public for the State of Idaho  
Residing at Mampa Idaho  
My Commission expires: 3/17/15

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 24 day of May 2011, I caused a true and correct copy of the foregoing document to be served upon the following person(s) via facsimile:

Jacob Wessel  
Thomsen Stephens Law Offices  
FAX: (208) 522-1277

John J. Lerma  
John J. Lerma

# LERMA LAW OFFICE, P.A.

John J. Lerma  
Gary D. Luke  
Kenley E. Grover

Representation Throughout Idaho

El Dorado Business Campus  
3045 E. Copper Point Drive  
Meridian ID 83642  
Mailing Address: PO Box 190719, Boise ID 83719

Telephone: (208) 288-0608  
Facsimile: (208) 288-0697  
E-mail: info@lermalawoffice.com

November 19, 2010

Jacob S. Wessel  
Thomsen Stephens Law Offices  
2635 Channing Way  
Idaho Falls, ID 83404

RE: Progressive / Ferrell Brothers Construction  
Our File No.: 10-00010

Dear Mr. Wessel:

Enclosed please find the following documents:

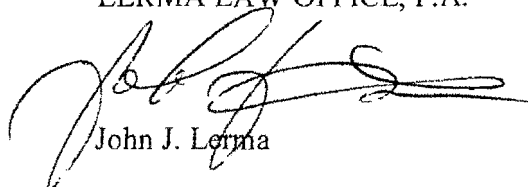
1. Original Satisfaction of Award;
2. United Financial Casualty Company's check no. 468298926, in the amount of \$5,357.07, and
3. United Financial Casualty Company's check no. 468298927, in the amount of \$4,147.27.

By submission of these settlement funds, we believe our client has satisfied the arbitration award. Please be advised you are not authorized to disburse the proceeds of this settlement until the original Satisfaction of Award has been signed and returned to our office.

We appreciate your cooperation in this matter.

Yours very truly,

LERMA LAW OFFICE, P.A.



John J. Lerma

JJL:tl  
Enc.

151

Exhibit A

In Re:

The Arbitration of Deva Ferrell and  
Sam Ferrell,

v.

United Financial Casualty  
Company, a Progressive Insurance  
Company,

**SATISFACTION OF AWARD**

For and in consideration of the sum of FIVE THOUSAND THREE HUNDRED FIFTY-SEVEN AND 07/100 (\$5,357.07), paid to Thomsen Stephens Law Offices in Trust for Deva Ferrell, and FOUR THOUSAND ONE HUNDRED FORTY-SEVEN AND 27/100 (\$4,147.27), paid to Thomsen Stephens Law Offices in Trust for Sam Ferrell, by United Financial Casualty Company, a Progressive Insurance Company, full and complete satisfaction is hereby acknowledged of that certain Award Decision in the amount of \$5,143.44 awarded to Deva Ferrell and \$3,990.80 awarded to Sam Ferrell, together with accrued interest, signed on November 4, 2010, in the above-entitled action.

This Satisfaction of Award may be filed with the Clerk of the Court in any action subsequently filed by either party to this arbitration.

DATED this \_\_\_\_\_ day of November 2010.

THOMSEN STEPHENS LAW OFFICES

---

Jacob S. Wessel  
Attorney for Deva and Sam Ferrell

152

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the \_\_\_\_ day of November 2010, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

John J. Lerma  
Lerma Law Office, P.A.  
P.O. Box 190719  
Boise, ID 83719

U.S. Mail, Postage Prepaid  
 Express Mail  
 Hand Delivery  
 Facsimile Transmission  
 Federal Express

---

Jacob S. Wessel



RECEIVED NOV 19 2010

VOID IF NOT PRESENTED WITHIN 6 MONTHS AFTER DATE OF ISSUE

Policy # 02616845 -009	Insured FERRELL BRO THER	Date Issued 11/16/2010	Area Code 965	Draft Number 468298927	56-389 412
Claim # 085146644	Claimant FERRELL, SAMUEL	Date of Loss 12/22/2008	State Code ID	Office Issued At NE-NGPLR-ADM-	PAC

Dollars \$\*\*\*\*\*4,147.27

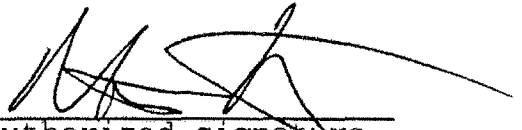
Pay FOUR THOUSAND ONE HUNDRED FORTY SEVEN AND 27/100

In Payment Of FINAL ARB AWARD FOR WAGE LOSS	CDS CODE 05PCL
--	-------------------

Payable through **PNC Bank, N.A. 070**  
Ashland, Ohio 1-877-448-9544

United Financial Casualty Company

Pay THOMSEN STEPHENS LAW OFFICES IN TRUST FOR SAM FERRELL, ONLY  
To 2635 CHANNING WAY  
The IDAHO FALLS ID 83404  
Order  
Of

By   
Authorized signature

⑈468298927⑈ ⑆041203895⑆ 4239694508⑈

VOID IF NOT PRESENTED WITHIN 6 MONTHS AFTER DATE OF ISSUE

Policy # 02616845 -009	Insured FERRELL BRO THER	Date Issued 11/16/2010	Area Code 965	Draft Number 468298926	56-389 412
Claim # 085146644	Claimant FERRELL, DEVA	Date of Loss 12/22/2008	State Code ID	Office Issued At NE-NGPLR-ADM-	PAC

Dollars \$\*\*\*\*\*5,357.07

Pay FIVE THOUSAND THREE HUNDRED FIFTY SEVEN AND 07/100

In Payment Of FINAL ARB AWARD FOR WAGE LOSS	CDS CODE 05PCL
--	-------------------

Payable through **PNC Bank, N.A. 070**  
Ashland, Ohio 1-877-448-9544

United Financial Casualty Company

Pay THOMSEN STEPHENS LAW OFFICES IN TRUST FOR DEVA FERRELL, ONLY  
To 2635 CHANNING WAY  
The IDAHO FALLS ID 83404  
Order  
Of

By   
Authorized signature

⑈468298926⑈ ⑆041203895⑆ 4239694508⑈

Watkins

BONNEVILLE COUNTY  
11 JUN -1 PM 4:27

Jacob S. Wessel, ISB #7529  
THOMSEN STEPHENS LAW OFFICES, PLLC  
2635 Channing Way  
Idaho Falls, ID 83404  
Telephone (208) 522-1230  
Fax (208) 522-1277  
jwessel@thomsenstephenslaw.com

Attorneys for Plaintiffs Sam Ferrell and Deva Ferrell

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL,	)	Case No. CV-2010-7051
	)	
Plaintiffs,	)	
	)	PLAINTIFFS' RESPONSE AND OPPOSITION
v.	)	TO DEFENDANT'S MOTION TO
	)	RECONSIDER THE COURT'S AWARD
UNITED FINANCIAL CASUALTY	)	OF COSTS TO PLAINTIFFS
COMPANY, d.b.a PROGRESSIVE	)	
INSURANCE COMPANY whose true	)	
name is unknown and PROGRESSIVE	)	
INSURANCE COMPANY whose true	)	
name is unknown,	)	
	)	
Defendants.	)	
	)	

COME NOW Plaintiffs Deva and Sam Ferrell, by and through counsel of record, and hereby submit the following memorandum in response and opposition to Defendant's motion to reconsider the Court's award of costs to Plaintiffs:

In its motion to reconsider, the Defendant makes three arguments in support of their motion to reconsider. The Court addressed the first arguments in its Memorandum Decision and Order Re:

- 1 - PLAINTIFFS' RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER THE COURT'S AWARD OF COSTS TO PLAINTIFFS

Motion for Fees and Costs the other arguments were not brought up in Defendant's original objection to fees and costs or within fourteen days of the filing of Plaintiff's memorandum of costs and fees. Defendant's first argument has no merit as discussed below, and Defendants other two arguments were not timely submitted and thus were waived.

1. Defendant objected to an award of costs on the sole basis that Plaintiffs were not the prevailing party.

In its March 24, 2011 brief, Defendant objected to Plaintiffs' claim for costs as follows, "COMES NOW the Defendant, by and through counsel of record, and responds in opposition to Plaintiff's motion for fees and costs." The remainder of its briefing discusses fees, except for a mention on pages ten through twelve of the briefing where Defendant claims that Plaintiffs should not be awarded fees and costs because they were not the prevailing party pursuant to IRCP Rule 54. In its objection, Defendant offered no other reason for denying costs.

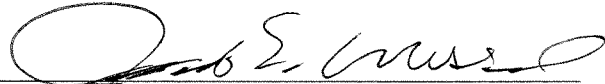
In its Memorandum Decision and Order Re: Motion for Fees and Costs, this Court initially made its finding of fact that Plaintiffs were the prevailing party in arbitration, responding specifically to the arguments regarding the prevailing party set forth in Defendant's briefing. This disposed of Defendant's only argument for the Court to deny costs. The Court then went on to note that Defendant failed to object to any specific cost set forth in Plaintiffs' affidavits of fees and costs.

In its motion to reconsider, Defendant fails to mention the fact that it argued for a denial of costs based upon prevailing party analysis and that the Court found that Defendant was not the prevailing party. It was therefore proper for the court to award costs to Plaintiffs. The rest of the arguments set forth in Defendant's motion to reconsider are new arguments that Defendant failed to raise in its briefing and therefore should not be considered by this Court. The very first objection

to costs made based upon any ground other than Plaintiff not being the prevailing party was made more than fourteen days after the service of Plaintiffs memorandum of cost on March 11, 2011. Therefore, pursuant to IRCP Rule 54(d)(6), Defendant waived any other objection to costs.

DATED this 1 day of June, 2011.

THOMSEN STEPHENS LAW OFFICES, PLLC



Jacob S. Wessel, Esq.

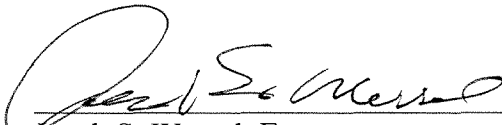
**CERTIFICATE OF SERVICE**

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 1 day of June, 2011, I caused a true and correct copy of the foregoing **PLAINTIFFS' RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER THE COURT'S AWARD OF COSTS TO PLAINTIFFS** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

JOHN J LERMA ESQ  
GARY D LUKE ESQ  
LERMA LAW OFFICE PA  
EL DORADO BUSINESS CAMPUS  
3045 E COPPER POINT DRIVE  
PO BOX 190719  
BOISE ID 83719

Mail  
 Hand Delivery  
 Facsimile@208-288-0697

THOMSEN STEPHENS LAW OFFICES, PLLC

By:   
Jacob S. Wessel, Esq.

JSW  
7083\019 Resp mo reconsider costs award

4 - **PLAINTIFFS' RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER THE COURT'S AWARD OF COSTS TO PLAINTIFFS**

BONNEVILLE COUNTY  
11 JUN 2011 11:4:35

Jacob S. Wessel, ISB #7529  
THOMSEN STEPHENS LAW OFFICES, PLLC  
2635 Channing Way  
Idaho Falls, ID 83404  
Telephone (208) 522-1230  
Fax (208) 522-1277  
jwessel@thomsenstephenslaw.com

Attorneys for Plaintiffs Sam Ferrell and Deva Ferrell

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL, )  
)  
Plaintiffs, )  
)  
v. )  
)  
UNITED FINANCIAL CASUALTY )  
COMPANY, d.b.a PROGRESSIVE )  
INSURANCE COMPANY whose true )  
name is unknown and PROGRESSIVE )  
INSURANCE COMPANY whose true )  
name is unknown, )  
)  
Defendants. )  
)  
\_\_\_\_\_ )

Case No. CV-2010-7051

MEMORANDUM IN REPLY TO  
DEFENDANT'S RESPONSE TO MOTION  
TO RECONSIDER

COME NOW Plaintiffs Sam and Deva Ferrell, by and through counsel of record, and hereby submit the following memorandum in reply to Defendant's memorandum in response to Plaintiffs' motion to reconsider the Court's order of April 29, 2011 as follows:

1. Defendant can cite no authority that *Unity Light & Power* and *Diacel Chemical* do not apply to arbitration cases.

1 - MEMORANDUM IN REPLY TO DEFENDANT'S RESPONSE TO MOTION TO RECONSIDER

Defendant's entire section A of its Response in Opposition to Plaintiff's Motion to Reconsider is not supported by any authority. Defendant cannot and did not cite even one case or statute to support its contention that the Court should not apply the law as it existed when the complaint was filed. Therefore, this Court must apply the law as it existed at the time we filed in the complaint in late 2010. The law at the time of filing the complaint clearly provides for attorneys fees in arbitration. See IC § 41-1839 as amended in July 2010.

2. *Martin* is controlling and not *Barbee* because a district court must apply the law as set forth in the statutes and/or by the Supreme Court unless said law is overruled, and should not apply dictum.

*Martin* and *Barbee* seemingly directly contradict each other. Therefore, the question for this Court is whether to apply the law as set forth by the Supreme Court in a case directly on point (*Martin*) or to apply newer dicta (*Barbee*). Black's Law Dictionary, 8<sup>th</sup> Ed., Bryan A. Garner, ed. (2004) defines "obiter dictum" as follows:

**A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential** (although it may be considered persuasive). Strictly speaking an 'obiter dictum' is a remark made or opinion expressed by a judge, in his decision upon a cause, 'by the way' – that is, incidentally or collaterally, and not directly upon the question before the court; **or it is any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy, or suggestion. . .**

*Id.* at 1102 (emphasis added).

The Idaho Supreme Court in *Barbee v. VMA Securities, Inc.*, 143 Idaho 391, 146 P.3d 657 (2006) applied the law of I.C. § 41-1839 **by analogy** to I.C. § 30-1446(1) in dictum. The Court stated, "Consequently, to the extent cases interpreting I.C. § 41-1839 apply **by analogy**, the Bentleys are not entitled to file a separate lawsuit solely for attorney fees." 143 Idaho at 395, 246 P.3d at 661.

2 - MEMORANDUM IN REPLY TO DEFENDANT'S RESPONSE TO MOTION TO RECONSIDER

In addition, the *Barbee* court's analogy to I.C. § 41-1839 was unnecessary to its decision in the ISA case. After discussing the I.C. § 41-1839 cases, the Idaho Supreme Court in *Barbee* stated three additional reasons for denying attorney fees under the ISA statute, I.C. § 30-1446:

Furthermore, a fair reading of I.C. § 30-1446 indicates there is no independent cause of action for attorney fees.

...

Also, we are not persuaded by the Bentley's equitable arguments they were precluded from filing a pre-arbitration suit by their contract with VMA.

...

Moreover, **even if Bentley's had filed a suit prior to the arbitration, their request for attorney fees would have been unavailable** once the cause was submitted to arbitration.

143 Idaho at 395-6, 246 P.3d at 661-2 (emphasis added).

The statements in *Barbee* regarding I.C. § 41-1839 are clearly dicta because they are applied by the court only by analogy, and they are not essential to determine the outcome of the case, therefore they are not precedential. The Idaho Supreme Court cannot apply dicta as binding precedent. In *St. Luke's Magic Valley Reg'l Med. Ctr., LTD v. Bd. of County Comm'rs*, 149 Idaho 584, 595 (2010), the Idaho Supreme Court stated, "Second, this Court found that Carpenter was indigent regardless of his employment status, thus, **the language from Carpenter that the district court relies on is dicta because it was not necessary or essential to determine the outcome of the case.** See *Smith v. Angell*, 122 Idaho 25, 35, 830 P.2d 1163, 1173 (1992). **Such dicta "cannot be relied upon as binding precedent."** *Shrives v. Talbot*, 91 Idaho 338, 346, 421 P.2d 133, 141 (1966)." 149 Idaho at 595. (emphasis added). See also *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 586 (1993); *City of Weippe v. Yarno*, 96 Idaho 319, 323, 528 P.2d 201, 205 (1974), citing *Petersen*, 87 Idaho 361, 393 P.2d 585 (1964); *Long v. State Ins. Fund*, 60 Idaho 257, 90 P.2d 973 (1939); and *Bashore*, 41 Idaho 84, 238 P. 534 (1925).



If the Idaho Supreme Court cannot rely on such dicta as binding precedent, it is certainly inappropriate for the District Court to do so.

3. A plaintiff may file a motion to confirm an arbitration award even if it has already been paid, so the present proceeding is not moot.

Idaho Code § 7-911 provides that “[u]pon application of a party, the court **shall** confirm an award. . . (emphasis added). In interpreting this statute, the Idaho Supreme Court in *Wolfe v. Farm Bureau Ins. Co.* 128 Idaho 398, 913 P.2d 1168 (1996) found that the insurer’s payment of the arbitration award did not preclude the insured from seeking confirmation of the award; confirmation request after payment did not create a moot question between insured and insurer and did not divest jurisdiction from the court to confirm the award.

In its Response in Opposition to Plaintiff’s Motion to Reconsider section D, Defendant quotes the reasoning of the Wolfe decision that has clearly been overruled by *Martin v. State Farm Mut. Auto. Ins. Co.* 138 Idaho 244, 247, 61 P3d. 601, 657 (2002), and then argues in section E that the matter is moot. This is in direct contradiction to the ruling in *Wolfe* that has never been overruled that paying the award does not make the case moot.

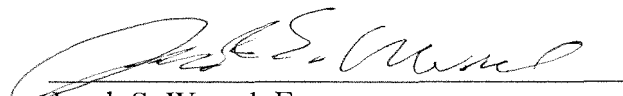
In conclusion, no case in Idaho supports Defendant’s contention that the Court should apply the law at some time before the Court became involved in the lawsuit. In fact the cases expressly contradict this assertion. See *Unity Light & Power Co. v. City of Burley*, 92 Idaho 499, 445 P.2d 720 (1968) and *State ex Rel Wasden v. Diacel Chemical Industries, Inc.*, 141 Idaho 102, 106 P.3d 428 (2005). In addition, no on-point, current case that has not been overruled by either statute or subsequent case law supports Defendant’s position that one must file a lawsuit before arbitration in order to recover attorney fees pursuant to I.C. § 41-1839. Defendant is therefore forced to cite dicta

and overruled cases in its Response in Opposition to Plaintiffs' Motion to Reconsider. Defendant relies only on three cases that are not binding law: (1) *Barbee v. VMA Securities, Inc.*, 143 Idaho 391, 146 P.3d 657 (2006) (not binding because it's dicta), (2) *The Greasespot, Inc. v. Hanes*, 148 Idaho 582, 226 P.3d 524 (2010)(expressly overruled by the Idaho legislature in its amendment to I.C. § 41-1839), and (3) *Wolfe v. Farm Bureau Ins. Co.* 128 Idaho 398, 913 P.2d 1168 (1996) *Martin v. State Farm Mut. Auto. Ins. Co.* 138 Idaho 244, 247, 61 P3d. 601, 657 (2002) expressly overruled *Anderson v. Farmers Ins. Co.*, 130 Idaho 755, 947 P.2d 1003 which was a case that relied only upon *Wolfe v. Farm Bureau Ins. Co.*, 128 Idaho 398, 405, 913 P.2d 1168, 1175 for the proposition that compelling the insured to bring suit against the insurer was a requirement under Idaho Code §41-1839). It would be inappropriate for the Court to rely upon any one of these cases, therefore, even if the Court does not apply the law as it existed when the parties involved the Court entitling Plaintiffs to attorney fees under the amended statute, Plaintiff's are still entitled to attorneys fees pursuant to the holding in *Martin*.

WHEREFORE, based upon the foregoing, Plaintiffs request that this Court reconsider those portions of its Memorandum Decision and Order Re: Motion for Fees and Costs of April 29, 2011 in which the Court denied Plaintiff's motion for attorney fees.

DATED this 3 day of June, 2011.

THOMSEN STEPHENS LAW OFFICES, PLLC

  
\_\_\_\_\_  
Jacob S. Wessel, Esq.

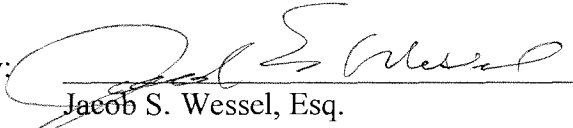
**CERTIFICATE OF SERVICE**

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 3 day of June, 2011, I caused a true and correct copy of the foregoing **MEMORANDUM IN REPLY TO DEFENDANT'S RESPONSE TO MOTION TO RECONSIDER** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

JOHN J LERMA ESQ  
GARY D LUKE ESQ  
LERMA LAW OFFICE PA  
EL DORADO BUSINESS CAMPUS  
3045 E COPPER POINT DRIVE  
PO BOX 190719  
BOISE ID 83719

Mail  
 Hand Delivery  
 Facsimile@208-288-0697

THOMSEN STEPHENS LAW OFFICES, PLLC

By:   
Jacob S. Wessel, Esq.

JSW  
7083\020 Reply Mo Reconsider

6 - MEMORANDUM IN REPLY TO DEFENDANT'S RESPONSE TO MOTION TO RECONSIDER

BONNEVILLE COUNTY  
11 JUN -6 PM 1:43

**LERMA LAW OFFICE, P.A.**  
**John J. Lerma, ISB# 3886**  
**Gary D. Luke, ISB# 6450**  
**El Dorado Business Campus**  
**3045 E. Copper Point Drive**  
**PO Box 190719**  
**Boise ID 83719**  
**TELEPHONE: (208) 288-0608**  
**FACSIMILE: (208) 288-0697**

**Attorneys for Defendant**  
**Progressive Insurance Company**

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL and DEVA FERRELL,

Plaintiffs,

vs.

UNITED FINANCIAL CASUALTY  
COMPANY, d.b.a. PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown and PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown,

Defendant.

Case No. CV 10-7051

**DEFENDANT'S REPLY IN  
SUPPORT OF ITS MOTION TO  
RECONSIDER**

COMES NOW the Defendant, by and through its counsel of record, and replies in support of its Motion for Reconsideration. The motion should be granted because Plaintiffs are not entitled to shift their arbitration costs to the Defendant according to the parties' arbitration agreement, the Uniform Arbitration Act, and established case law.

### I. Plaintiffs' Response Incorrectly Focuses on Civil Rule 54

Plaintiffs' response asserts that Rule 54 of the Idaho Rules of Civil Procedure is controlling. However, courts in Idaho and elsewhere have made it clear that such a civil rule provision will not override the parties' arbitration agreement or the provisions of the Uniform Arbitration Act. Because the arbitration agreement and the UAA do not warrant the shifting of costs, the focus on Civil Rule 54 is unhelpful.

For example, in 2010, the Idaho Supreme Court favorably cited a New Jersey case which addressed the interaction between arbitration and civil rule cost shifting provisions. The New Jersey case stated as follows:

This court holds that the provisions of *R. 4:42-8* [New Jersey civil rule] providing for an award of costs in favor of a prevailing party are not intended to apply to proceedings resolved through the confirmation of an arbitrator's award arising out of mandatory non-binding arbitration conducted pursuant to *R. 4:21A-1*, unless such a claim is specifically preserved in the arbitrator's award.

*See Greenfeld v. Caesar's Atlantic City Hotel/Casino*, 334 N.J. Super. 149, 756 A.2d 1096, 1102 (Law Div. 2000) (underlined emphasis added; bracketed explanatory language added) (*cited in Grease Spot, Inc. v. Harnes*, 148 Idaho 582, 226 P.3d 524, 529 (2010)). Similarly, the Idaho court also cites an Arizona decision to assert that "a general fee-shifting statute did not control over the specific UAA provision." *Id. (citing Canon Sch. Dist. No. 50 v. W.E.S. Const. Co.*, 180 Ariz. 148, 882 P.2d 1274, 1279-80 (1994)). Note: These same cases were cited in Defendant's Motion for Reconsideration, and Plaintiffs do not contest such rulings or provide contrasting case law.

Pursuant to this case law, the applicable statute is the Uniform Arbitration Act (I.C. §§ 7-901 through 7-922), the controlling document is the parties' arbitration agreement, and Civil Rule 54 does not preempt these provisions. The UAA simply requires deference to an existing

arbitration agreement. I.C. § 7-910. This Court should therefore recognize and defer to the cost provision contained in the arbitration agreement. As cited in previous briefing, that provision provides:

Each party will pay the costs and fees of its arbitrator and any other expenses it incurs. The costs and fees of the third arbitrator will be shared equally.

See “UNINSURED/UNDERINSURED MOTORIST COVERAGE ENDORSEMENT” under heading “ARBITRATION” (document is attached to the previously submitted Affidavit of Defendant’s Counsel).

Plaintiffs’ reliance on Civil Rule 54 is misplaced because of the arbitration-specific UAA code provisions, the favorable case law, and the explicit language in the arbitration agreement. Accordingly, there was no “waiver” of any objection pursuant to I.R.C.P. 54 because that rule is not controlling. Similarly, the discussion of “prevailing party” is unhelpful because of the explicit contractual arbitration document. Accordingly, this Court should reverse its previous ruling and disallow any shifting of costs from the Plaintiffs to the Defendant.

## **II. Defendant Previously Relied on the Arbitration Agreement**


Plaintiffs initiated this proceeding to confirm an arbitration award. That award arose from the parties’ previously existing agreement to arbitrate. The underlying arbitration agreement has been provided to the Court and was relied on by Defendant’s counsel at the initial hearing. Once again, there was no objection raised by Plaintiffs’ counsel when such was submitted, and this Court indicated that such would be considered in its decision.

Plaintiffs have benefitted from the arbitration agreement: Based on such, they obtained an award which has been paid. Accordingly, Plaintiffs ought to be subject to all of the provisions specified in the agreement. As cited above, this means that costs cannot be shifted to the

Defendant. This Court should reconsider and reverse its previous ruling regarding costs to accord with the parties' arbitration agreement, the Uniform Arbitration Act, and the cited case law.

DATED this 6 day of June 2011.


LERMA LAW OFFICE, P.A.

  
John J. Lerma  
Attorney for Defendant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 6 day of June 2011, I caused a true and correct copy of the foregoing document to be served by Facsimile Transmission upon the following person(s):

Jacob S. Wessel  
Thomsen Stephens Law Offices, PLLC  
Fax: (208) 522-1277

  
John J. Lerma

5116 Watkins st

BONNEVILLE COUNTY

11 JUN -8 PM 4:21

Jacob S. Wessel, ISB #7529  
THOMSEN STEPHENS LAW OFFICES, PLLC  
2635 Channing Way  
Idaho Falls, ID 83404  
Telephone (208) 522-1230  
Fax (208) 522-1277  
jwessel@thomsenstephenslaw.com

Attorneys for Plaintiffs Sam Ferrell and Deva Ferrell

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL, )

Case No. CV-2010-7051

Plaintiffs, )

v. )

SECOND SUPPLEMENTAL AFFIDAVIT OF  
COSTS AND ATTORNEY FEES  
(after April 11, 2011)

UNITED FINANCIAL CASUALTY )  
COMPANY, d.b.a PROGRESSIVE )  
INSURANCE COMPANY whose true )  
name is unknown and PROGRESSIVE )  
INSURANCE COMPANY whose true )  
name is unknown, )

Defendants. )

STATE OF IDAHO )  
 ) ss.  
County of Bonneville )

Jacob S. Wessel, being first duly sworn on oath, deposes and says:

I.

Affiant is a member of the law firm of Thomsen Stephens Law Offices which served as  
counsel for Plaintiffs Sam and Deva Ferrell in the above entitled action.

II.

This affidavit is made on personal knowledge of affiant, except to the extent of allegations  
made on information and belief.



III.

Affiant has reviewed the time and cost records of Thomsen Stephens Law Offices maintained on the above matter after the filing of their original affidavit of costs and fees of March 11, 2011 and after filing of the supplemental affidavit of costs and fees of April 11, 2011, and represents that the following items of cost and expense were expended and incurred in the above entitled action and arbitration after April 11, 2011:

In addition to the costs and fees totaling \$24,586.26 as set forth in Plaintiffs' March 11, 2011 affidavit of costs and fees and supplemental affidavit of costs and fees of April 11, 2011, since April 11, 2011 Thomsen Stephens Law Offices has expended approximately 25 hours in the above entitled action as follows:

Jacob S. Wessel      24.5 hours at \$175.00 per hour = \$4,287.50

T. Jason Wood      .5 hours at \$200.00 per hour = \$100.00

TOTAL after April 11, 2011: \$4,387.50

The sum of \$4,387.50 is a reasonable attorneys fee for the services of Thomsen Stephens Law Offices provided to Sam and Deva Ferrell to enforce the uninsured motorist policy after April 11, 2011.

IV.

With the additional sums set forth in this affidavit, the total costs and attorneys fees incurred in the defense of the above entitled action are **\$28,973.76.**

V.

A true and correct copy of our record of billings from April 11, 2011 until the present in this matter is attached hereto as exhibit "A."

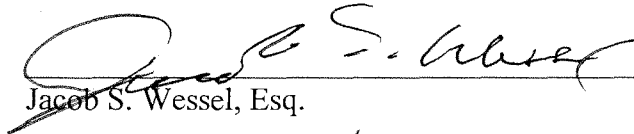
VI.

Attorneys fees and costs should be awarded for the reasons cited in Plaintiffs' memorandum in support of attorneys fees and costs filed March 11, 2011.

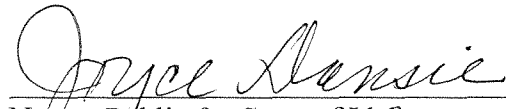
VII.

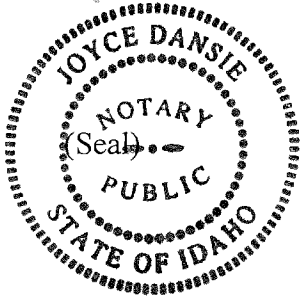
Pursuant to I.R.C.P. 54(d)(5), all items of cost, and expenses, including any attorneys fees set forth in this memorandum, are to the best of your affiant's knowledge and belief, correct, are claimed in compliance with said rule, and were reasonably and necessarily expended and incurred in the above entitled action.

DATED this 8 day of June, 2011.

  
\_\_\_\_\_  
Jacob S. Wessel, Esq.

SUBSCRIBED AND SWORN to upon oath before me this 8<sup>th</sup> day of June, 2011.

  
\_\_\_\_\_  
Notary Public for State of Idaho  
Residing at: Idaho Falls  
My Commission Expires: 9-12-12




**CERTIFICATE OF SERVICE**

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 8 day of June, 2011, I caused a true and correct copy of the foregoing **SECOND SUPPLEMENTAL AFFIDAVIT OF COSTS AND ATTORNEY FEES** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

JOHN J LERMA ESQ  
GARY D LUKE ESQ  
LERMA LAW OFFICE PA  
EL DORADO BUSINESS CAMPUS  
3045 E COPPER POINT DRIVE  
PO BOX 190719  
BOISE ID 83719

Mail  
 Hand Delivery  
 Facsimile@

THOMSEN STEPHENS LAW OFFICES, PLLC

By:   
Jacob S. Wessel, Esq.

JSW/jd  
7083\021 Second supp aff costs fees

# EXHIBIT “A”

THOMSEN STEPHENS LAW OFFICES PLLC  
2635 Channing Way  
Idaho Falls, Idaho 83404  
(208) 522-1230 - FAX: (208) 522-1277  
Tax ID #20-0493858

Sam & Deva Ferrell  
P. O. Box 1347  
Idaho Falls ID 83406

Page: 1  
06/08/2011  
ACCOUNT NO: 7083-000C  
STATEMENT NO: 6

SAM & DEVA FERRELL v. Progressive Ins.  
Progressive Agent - Curtis Neil  
Policy No. 02616845-6 D/Loss: 12/22/08

	HOURS
04/28/2011 JSW Telephone conference with Dave re update and check the repository	0.30
04/29/2011 JSW Review Judge Watkins' decision	0.40
05/02/2011 TJW conf w/ Jake and review case law re: attorney fees	0.50
JSW Research opinions cited in Watkins' decision	3.00
05/03/2011 JSW Draft motion to reconsider (start) and call Dave re update	1.50
05/09/2011 JSW Telephone conferences with Lerma and Dave re settling for costs, no answer from Dave	0.20
05/12/2011 JSW Review and revise motion to reconsider	2.80
05/14/2011 JSW Travel to and from courthouse and attend status conference, review, revise and finish motion to reconsider, call with Dave re update	2.30
05/16/2011 JSW Telephone conference with Dave re update and future filings	0.20

SAM & DEVA FERRELL v. Progressive Ins.  
 Progressive Agent - Curtis Neil  
 Policy No. 02616845-6 D/Loss: 12/22/08

		HOURS		
05/17/2011	JSW	Begin draft of reply to defendant's motion to reconsider award of costs	1.50	
05/25/2011	JSW	Review defendant's objection to plaintiffs motion to reconsider non-award of fees, review cases	0.50	
05/26/2011	JSW	Telephone conference with Lisa at Mr. Lerma's office re setting his motion to reconsider on same day as ours	0.10	
06/01/2011	JSW	Draft Plaintiff's response to defendant's motion to reconsider award of costs	1.50	
	JSW	Begin draft of reply to defendant's response to plaintiff's motion to reconsider denial of fees	2.30	
06/02/2011	JSW	Review and revise plaintiff's reply to defendant's response to plaintiff's motion to reconsider denial of fees	0.80	
06/03/2011	JSW	Complete draft of reply to defendant's response to plaintiffs' motion to reconsider denial of fees	3.60	
06/07/2011	JSW	Prepare memo of argument for hearing on plaintiffs' motion to reconsider denial of fees and defendant's motion to reconsider award of costs	1.80	
06/08/2011	JSW	Review memorandum and cases and briefing for hearing on motions to reconsider, travel to and from the Bonneville County Courthouse, and appear at hearing on motions to reconsider	1.50	
	JSW	Draft second supplemental affidavit of costs and fees	0.20	
		FOR CURRENT SERVICES RENDERED	25.00	4,387.50

RECAPITULATION

<u>TIMEKEEPER</u>	<u>HOURS</u>	<u>HOURLY RATE</u>	<u>TOTAL</u>
T. Jason Wood	0.50	\$200.00	\$100.00
Jacob S. Wessel	24.50	175.00	4,287.50

TOTAL CURRENT 4,387.50

Sam & Deva Ferrell

Page: 3

06/08/2011

ACCOUNT NO: 7083-000C  
STATEMENT NO: 6

SAM & DEVA FERRELL v. Progressive Ins.  
Progressive Agent - Curtis Neil  
Policy No. 02616845-6 D/Loss: 12/22/08

PREVIOUS BALANCE \$24,586.26

BALANCE DUE \$28,973.76

Attorney-client privileged and attorney work product privileged information. DO NOT DISCLOSE. Billings are due and payable 30 days from the date of this billing. Unpaid billings accrue interest at the rate of 12% per annum.

176

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

NOV 15 AM 10:25  
DISTRICT COURT  
SEVENTH JUDICIAL DISTRICT  
BONNEVILLE COUNTY ID

SAM FERRELL AND DEVA FERRELL, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 UNITED FINANCIAL CASUALTY )  
 COMPANY, d.b.a. PROGRESSIVE )  
 INSURANCE COMPANY, )  
 )  
 Defendant. )  
 )  
 \_\_\_\_\_ )

Case No. CV-2010-7051

MEMORANDUM DECISION AND  
ORDER RE: MOTIONS TO  
RECONSIDER

**I. FACTUAL AND PROCEDURAL BACKGROUND**

On December 22, 2008, Sam and Deva Ferrell (hereafter, “Ferrells”) were struck by an uninsured motorist. Prior to the accident, Ferrells purchased an uninsured motorist insurance policy (hereafter, “Policy”) from Progressive Insurance Company (hereafter, “Progressive”).

In early 2009, Progressive settled with Ferrells regarding property damage, medical expenses, and general damages. The parties did not reach a settlement agreement regarding Ferrells’ claim for lost wages.

On July 2, 2009, and December 22, 2009, Ferrells sent demand letters and proof of loss to Progressive regarding lost wages. Ferrells requested \$7,000.00 for Sam and \$10,000.00 for Deva. On January 5, 2010, Progressive tendered \$855.00 for Sam’s lost wages and \$862.00 for Deva’s.

On January 22, 2010, Ferrells demanded arbitration pursuant to the Policy. On November 4, 2010, the parties underwent arbitration. The arbitrators awarded \$3,990.80 to Sam



and \$5,134.44 to Deva for lost wages.<sup>1</sup> Prior to arbitrating, Ferrells never filed a law suit to recover under their Policy.

On November 16, 2010, Ferrells filed this Petition for Confirmation of Arbitration Award and Award of Costs and Fees. On March 11, 2011, Ferrells filed a Motion for Fees and Costs. On April 29, 2011, this Court issued a Memorandum Decision and Order Re: Motion for Fees and Costs (hereafter, "Decision and Order") which awarded costs to Ferrells but denied their request for attorney's fees.

On May 13, 2011, Progressive filed a Motion to Reconsider the Court's award of costs to Ferrells, and Ferrells filed a Motion to Reconsider the Courts denial of their request for attorney's fees. On May 27, 2011, Progressive filed a brief in opposition to Ferrells' motion to reconsider. On June 1, 2011, Ferrells filed a brief in opposition to Progressive's motion to reconsider. On June 3, 2011, Ferrells filed a reply brief in support of their motion to reconsider. On June 6, 2011, Progressive filed a reply brief in support of their motion to reconsider. This Court heard oral argument on June 8, 2011.

## II. STANDARD OF ADJUDICATION

The decision or grant to deny relief pursuant to a motion to reconsider is within the sound discretion of the trial court and, absent a manifest abuse of discretion, will not ordinarily be disturbed on appeal. *Win of Michigan, Inc. v. Yrekd United, Inc.*, 137 Idaho 747, 754, 53 P.3d 330, 337 (2002); *Kirkland v. State*, 143 Idaho 544, 547, 149 P.3d 819, 822 (2006).

An award of attorney's fees must be supported by statutory or other authority. *See Webb v. Webb*, 143 Idaho 521, 526, 148 P.3d 1267, 1272 (2006). The amount of attorney's fees and

---

<sup>1</sup> Progressive paid the full amount of the arbitration award on November 19, 2010.

costs awarded is generally discretionary. *Lettunich v. Lettunich*, 141 Idaho 425, 435, 111 P.3d 110, 120 (2005).

### III. DISCUSSION

Ferrells believe they are entitled to attorney's fees pursuant to Idaho Code § 41-1839(1) and costs pursuant to Rule 54(d)(1) of the Idaho Rules of Civil Procedure.

Progressive asserts Ferrells are not entitled to attorney's fees under § 41-1839 and Ferrells are not the prevailing party under Rule 54(d)(1)(B).

This Court's Decision and Order denied Ferrells' request for attorney's fees but granted their request for costs. Not surprisingly, on reconsideration Ferrells ask this Court to uphold its decision on costs and reverse its decision on attorney's fees. Progressive asks this Court to uphold its decision on attorney's fees and reverse its decision on costs.

#### A. Attorney's Fees

Ferrells maintain their argument that Progressive is obligated to pay arbitration attorney fees under Idaho Code § 41-1839. As previously discussed in the Decision and Order, the Idaho Legislature amended § 41-1839 in July 2010. Prior to that amendment, subsection (1) provided as follows:

Any insurer issuing any policy, certificate or contract of insurance, surety, guaranty or indemnity of any kind or nature whatsoever, which shall fail for a period of thirty (30) days after proof of loss has been furnished as provided in such policy, certificate or contract, to pay to the person entitled thereto the amount justly due under such policy, certificate or contract, shall in any action thereafter brought against the insurer in any court in this state for recovery under the terms of the policy, certificate or contract, pay such further amount as the court shall adjudge reasonable as attorney's fees in such action.

Section 41-1839(1) now provides as follows:

Any insurer issuing any policy, certificate or contract of insurance, surety, guaranty or indemnity of any kind or nature whatsoever, which shall fail for a period of thirty (30) days after proof of loss has been furnished as provided in

such policy, certificate or contract, to pay to the person entitled thereto the amount justly due under such policy, certificate or contract, shall in any action thereafter brought against the insurer in any court in this state **or in any arbitration** for recovery under the terms of the policy, certificate or contract, pay such further amount as the court shall adjudge reasonable as attorney's fees in such action **or arbitration**.

I.C. § 41-1839(1) (emphasis added).

### 1. Application of § 41-1839 to *This Action*

In its Decision and Order, this Court determined the July 2010 amendments to § 41-1839(1) should not apply retrospectively because the amendment took effect after arbitration commenced between the parties. Ferrells argue this Court should apply the current version of § 41-1839(1) because the current version was in effect at the time they filed *this* action in the district court.

This Court believes the commencement date of *this* action is irrelevant for purposes of determining which version of the statute applies to the arbitration proceeding. Section 41-1839 provides for attorney's fees in "any action . . . or arbitration for recovery under the terms of the policy." *This* action is a petition to confirm the arbitration award (which Progressive already paid in full) and a request for attorney's fees and costs. *This* is not an action or arbitration for recovery under the Policy.

Arbitration for recovery under the Policy commenced more than five months prior to the amendment of § 41-1839. Thus, the current version of § 41-1839 cannot be applied to that arbitration proceeding without being applied retrospectively. *See Wheeler v. Idaho Dept. of Health and Welfare*, 147 Idaho 257, 207 P.3d 988 (2009) ("A retrospective or retroactive law is one which takes away or impairs vested rights acquired under existing laws, *or creates a new obligation*, imposes a new duty, or attaches a new disability *in respect to transactions or considerations already past*." (emphasis added)).

## 2. Retrospective Application of § 41-1839

Ferrells have not persuaded this Court to change its opinion regarding retrospective application of § 41-1839.

“Unless a contrary legislative intent appears on the face of a statute, retrospective application is disfavored.” *Myers v. Vermaas*, 114 Idaho 85, 753 P.2d 296 (Ct. App. 1988). “Statutes which do not ‘create, enlarge, diminish or destroy contractual or vested rights’ are deemed to be remedial or procedural, as opposed to substantive” and “may be applied retrospectively.” *Id.*

There is nothing on the face of § 41-1839(1) to indicate the Idaho Legislature intended retrospective application of the statute. While § 41-1839(1) is remedial in some respect, this Court previously concluded entitlement to a mandatory award under § 41-1839(1) resembles a substantive right. As a result, retrospective application of § 41-1839(1) is disfavored. Nevertheless, in an effort to fully explore Ferrells alleged entitlement to attorney’s fees, this Court discussed the possibility of applying § 41-1839(1) retrospectively if Progressive had the opportunity to weigh the risk of exposure to mandatory fee awards before deciding to arbitrate.

In making that determination, this Court looked at § 41-1839(1) and the Idaho Supreme Court’s interpretation of that statute at the time arbitration commenced between the parties. This Court concluded Progressive was not subject to a mandatory fee provision when arbitration commenced because Ferrells did not file suit prior to demanding arbitration. In support of that conclusion, this Court quoted statements from *Barbee v. WMA Securities, Inc.*, 143 Idaho 391, 146 P.3d 657 (2006). Ferrells assert this Court’s reliance on *Barbee* was improper.

In *Barbee*, the Idaho Supreme Court analyzed whether a party could seek attorney's fees under Idaho Code § 30-1446 through an award confirmation proceeding when no lawsuit was filed prior to arbitration. Because § 41-1839(1) was "somewhat analogous" to the statute at issue, the *Barbee* court relied on cases discussing § 41-1839(1). *Id.* at 395, 146 P.3d at 661.

In *Barbee*, after citing *Emery v. United Pac. Ins. Co.*, 120 Idaho 244, 815 P.2d 442 (1991); *Wolfe v. Farm Bureau Ins. Co.*, 128 Idaho 398, 913 P.2d 1168, (1996); *Martin v. State Farm Mutual Automobile Ins. Co.*, 138 Idaho 244, 61 P.3d 601 (2002); and *American Foreign Ins. Co. v. Reichert*, 140 Idaho 394, 94 P.3d 699 (2004) the court stated "to the extent cases interpreting I.C. § 41-1839 apply by analogy, the Bentleys are not entitled to file a separate lawsuit solely for attorney fees." *Id.* In each of the cited cases, arbitration attorney fees were awarded under § 41-1839, but "[t]he common thread flowing through [those] cases [was] that attorney fees were awarded where the insured was involved in a lawsuit before he or she received the amount justly due—their damages—from the insurance company." *Id.*

While Ferrells correctly point out that arbitration attorney fees were available under § 41-1839 when arbitration commenced on January 22, 2010, Ferrells ignore the dispute that existed at that time regarding the necessity of filing suit prior to arbitration.

Progressive has always argued Ferrells were not entitled to attorney's fees under the pre-amended § 41-1839 because they did not file suit prior to demanding arbitration.

This Court realizes § 41-1839 was not at issue in *Barbee* and the holding in *Barbee* could not have changed the interpretation of § 41-1839. Acknowledging the dispute over the need to file suit prior to arbitrating, this Court used relevant statements from *Barbee* as persuasive authority on that issue. This Court could have reached the same conclusion based on its own independent analysis of *Emery*, *Wolfe*, *Martin*, and *Reichert*.

In addition to the fact that *Grease Spot, Inc. v. Harnes*, 148 Idaho 582, 586, 226 P.3d 524, 528 (2010) came down after arbitration commenced, this Court did not need to rely on *Grease Spot* to reach its conclusion. Prior to *Grease Spot*, arbitration attorney fees were available under § 41-1839 if the insured filed suit for recovery under the terms of an insurance policy before receiving the amount justly due. See *Emery*, 120 Idaho 244, 815 P.2d 442; *Wolfe*, 128 Idaho 398, 913 P.2d 1168; *Martin*, 138 Idaho 244, 61 P.3d 601; *Reichert*, 140 Idaho 394, 94 P.3d 699; see also *Barbee*, 143 Idaho 391, 146 P.3d 657.

### 3. Conclusion

The analysis up to this point leads to two conclusions. First, the July 2010 amendments to § 41-1839(1) should not be applied retrospectively. Second, prior to being amended in July 2010, § 41-1839 did not provide for arbitration attorney's fees if no lawsuit was filed prior to arbitration.

Ferrells did not file suit for recovery under their Policy prior to arbitrating their dispute over lost wages. Accordingly, this Court reaffirms its conclusion that Ferrells are not entitled to arbitration attorney fees under the pre-amended § 41-1839.

Ferrells' motion to reconsider is denied.

#### B. Costs

This Court concluded in its Decision and Order that Ferrells were the prevailing party in the arbitration proceeding. This Court also concluded Progressive had waived any other argument regarding costs. Thus, this Court awarded costs to Ferrells in the amount of \$3,563.76 (\$1,172.98 as a matter of right and \$2,390.78 discretionary).

In footnote 2 of the Decision and Order, this Court acknowledged that Progressive made additional arguments at the April 6, 2011 hearing in opposition to Ferrells' motion for costs.

This Court, however, did not entertain those arguments because they were not timely under Rule 54(d)(6).

On reconsideration, Progressive argues each party should bear its own costs as specified in the Policy. Progressive asserts it did not waive that argument because it submitted the Policy to the Court on April 6, 2011, and Ferrells did not object to this Court considering it.<sup>2</sup>

After reviewing the record, this Court acknowledges Progressive submitted the Policy on April 6, 2011, and this court indicated it would consider the Policy in its decision. Ferrells did not object. This Court, therefore, should not have concluded Progressive waived its argument.

Paragraph three of the “Arbitration” section of the Policy provides as follows: “Each party will pay the costs and fees of its arbitrator and any other expenses it incurs. The Costs and fees of the third arbitrator will be shared equally.”

Idaho Code § 7-910 provides, “Unless otherwise provided in the agreement to arbitrate, the arbitrators’ expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.”

The arbitration agreement in this case specifies that the parties will bear their own costs. Furthermore, in *Grease Spot*, the Idaho Supreme Court discussed the Uniform Arbitration Act (Idaho Code §§ 7-901 through 7-922) and pointed out that a procedural “rule requiring the court to award costs to the prevailing party does not apply to arbitration confirmation proceedings.” *Grease Spot*, at 587, 226 P.3d at 529 (citing *Greenfeld v. Caesar's Atlantic City Hotel/Casino*, 334 N.J.Super. 149, 756 A.2d 1096, 1102 (Law Div.2000)).

---

<sup>2</sup> Progressive filed the Policy with an affidavit of counsel the morning of April 6, 2011. The hearing on fees and costs also occurred that morning, but the Policy was not in the court file at the time of the hearing.

This Court concludes the arbitration agreement of the Policy should control. Pursuant to that agreement, the parties are to bear their own costs. Progressive's motion for reconsideration, therefore, should be granted.


**IV. CONCLUSION**

Ferrells' motion to reconsider is denied.

Progressive's motion to reconsider is granted. Ferrells are not entitled to recover costs.

**IT IS SO ORDERED**

DATED this 14 day of June 2011.



DANE H. WATKINS, JR.  
District Judge



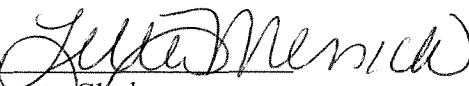
CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of June 2011, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Jacob S. Wessel  
THOMSEN STEPHENS LAW OFFICES, P.L.L.C.  
2635 Channing Way  
Idaho Falls, ID 83404

John J. Lerma  
LERMA LAW OFFICE, P.A.  
El Dorado Business Campus  
3045 E. Copper Point Drive  
P.O. Box 190719  
Boise, ID 83719

RONALD LONGMORE  
Clerk of the District Court  
Bonneville County, Idaho

By   
Deputy Clerk

11 JUL 21 11:4:57

Jacob S. Wessel, ISB #7529  
THOMSEN STEPHENS LAW OFFICES, PLLC  
2635 Channing Way  
Idaho Falls, ID 83404  
Telephone (208) 522-1230  
Fax (208) 522-1277  
jwessel@thomsenstephenslaw.com

Attorneys for Plaintiffs Sam Ferrell and Deva Ferrell

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 UNITED FINANCIAL CASUALTY )  
 COMPANY, d.b.a PROGRESSIVE )  
 INSURANCE COMPANY whose true )  
 name is unknown and PROGRESSIVE )  
 INSURANCE COMPANY whose true )  
 name is unknown, )  
 )  
 Defendants. )  
 )

Case No. CV-2010-7051

MOTION FOR  
CONFIRMATION OF  
ARBITRATIONAL AWARD  
AND FOR PREJUDGMENT INTEREST

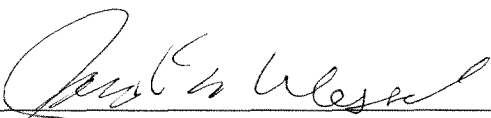
COMES NOW, Plaintiffs Sam and Dave Ferrell, by and through counsel of record, and prays this Court for its order, judgment and decree confirming the arbitrational award dated November 4, 2010 and for award of prejudgment interest in the amount of \$1,001.90. This motion for prejudgment interest is made pursuant to Idaho Code § 28-22-104(1) and *Greenough v. Farm Bureau Mutual Insurance Co.*, 142 Idaho 589, 130 P.2d 1124 (2006) in the amount of 12% per annum from

the date that proof of loss was provided on December 22, 2009 until the date that the arbitration award was received by the plaintiffs on November 16, 2010. Based upon the amount of the judgment, Plaintiff Dave Ferrell is entitled to \$571.55 in interest and Plaintiff Sam Ferrell is entitled to \$430.35 in interest, for a total of prejudgment interest award of \$1,001.90.

Oral argument is requested.

DATED this 21 day of July, 2011.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:   
\_\_\_\_\_  
Jacob S. Wessel, Esq.

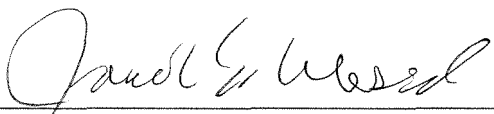
**CERTIFICATE OF SERVICE**

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 21 day of July, 2011, I caused a true and correct copy of the foregoing **MOTION FOR CONFIRMATION OF ARBITRATION AWARD AND FOR PREJUDGMENT INTEREST** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

JOHN J LERMA ESQ  
GARY D LUKE ESQ  
LERMA LAW OFFICE PA  
EL DORADO BUSINESS CAMPUS  
3045 E COPPER POINT DRIVE  
PO BOX 190719  
BOISE ID 83719

Mail  
 Hand Delivery  
 Facsimile@208-288-0697

THOMSEN STEPHENS LAW OFFICES, PLLC

By:   
Jacob S. Wessel, Esq.

JSW/jd  
7083\022 mot confirm award interest

3 - MOTION FOR CONFIRMATION OF ARBITRATION AWARD AND FOR  
PREJUDGMENT INTEREST

2011 AUG -5 PM 4: 21

Jacob S. Wessel, ISB #7529  
THOMSEN STEPHENS LAW OFFICES, PLLC  
2635 Channing Way  
Idaho Falls, ID 83404  
Telephone (208) 522-1230  
Fax (208) 522-1277  
jwessel@ts-lawoffice.com

Attorneys for Plaintiffs Sam Ferrell and Deva Ferrell

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL, )  
)  
Plaintiffs, )  
)  
v. )  
)  
UNITED FINANCIAL CASUALTY )  
COMPANY, d.b.a PROGRESSIVE )  
INSURANCE COMPANY whose true )  
name is unknown and PROGRESSIVE )  
INSURANCE COMPANY whose true )  
name is unknown, )  
)  
Defendants. )  
\_\_\_\_\_ )

Case No. CV-2010-7051

STIPULATION FOR  
CONFIRMATION OF  
ARBITRATIONAL AWARD AND  
PREJUDGMENT INTEREST

COME NOW the plaintiffs, by and through their attorney of record, Jacob S. Wessel, Esq. of the firm of Thomsen Stephens Law Offices, PLLC, and defendant, by and through its attorney, John Lerma, Esq. of the firm of Lerma Law Office, P.A., and hereby STIPULATE and AGREE to the Court entering final judgment, order and decree granting to plaintiffs confirmation of the arbitrational award entered November 4, 2010, which has previously been satisfied by payment on

1 - STIPULATION FOR CONFIRMATION OF ARBITRATIONAL AWARD AND  
PREJUDGMENT INTEREST

November 18, 2010 and awarding plaintiffs \$1,001.90 in prejudgment interest of which \$370.10 has already of been paid, leaving a balance of \$631.80 due and owing.

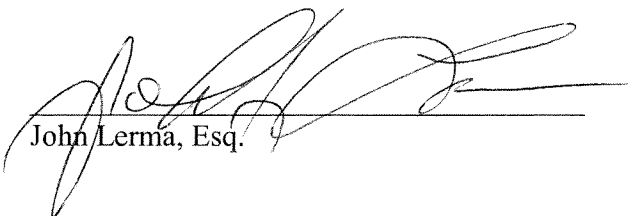
DATED this 5 day of August, 2011.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:   
Jacob S. Wessel, Esq.

DATED this 2 day of August, 2011.

LERMA LAW OFFICE, PA

By:   
John Lerma, Esq.

JSW/jd  
7083\024 stipulation confirm award interest

AUG 12 AM 11:06  
DISTRICT COURT  
7TH JUDICIAL DISTRICT  
BONNEVILLE COUNTY ID

Jacob S. Wessel, ISB #7529  
THOMSEN STEPHENS LAW OFFICES, PLLC  
2635 Channing Way  
Idaho Falls, ID 83404  
Telephone (208) 522-1230  
Fax (208) 522-1277  
jwessel@ts-lawoffice.com

Attorneys for Plaintiffs Sam Ferrell and Deva Ferrell

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL, )

Case No. CV-2010-7051

Plaintiffs, )

v. )

JUDGMENT, ORDER  
AND DECREE

UNITED FINANCIAL CASUALTY )  
COMPANY, d.b.a PROGRESSIVE )  
INSURANCE COMPANY whose true )  
name is unknown and PROGRESSIVE )  
INSURANCE COMPANY whose true )  
name is unknown, )

Defendants. )

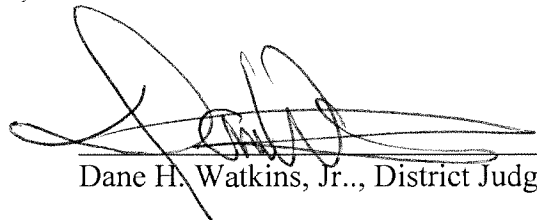
The Court, having received a Stipulation for Confirmation of Arbitrational Award and Prejudgment Interest of the parties herein, and good cause appearing therefor,

IT IS HEREBY ORDERED, AND THIS DOES ORDER, that the provisions, terms and conditions of the Stipulation of the parties be, and the same are, incorporated herein by reference as the order of this Court, to wit, the Arbitrational Award entered November 4, 2010 is hereby confirmed and Defendant is hereby ordered to pay to Plaintiffs the additional amount of \$630.80

RECEIVED  
AUG 13 2011

in prejudgment interest. A copy of said Stipulation for Confirmation of Arbitrational Award and Prejudgment Interest is attached hereto and made a part hereof.

DATED this 12 day of August, 2011.



Dane H. Watkins, Jr., District Judge



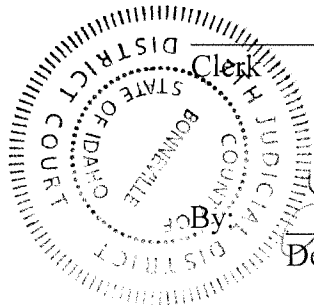
**CLERK'S CERTIFICATE OF MAILING**

I certify that I am the duly elected and qualified Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville; that I mailed [or delivered by courthouse box] a copy of the foregoing **JUDGMENT, ORDER AND DECREE** to the following attorneys this 10 day of August 2011.

JOHN J LERMA ESQ  
LERMA LAW OFFICE PA  
P O BOX 190719  
BOISE ID 83719

JACOB S WESSEL ESQ  
THOMSEN STEPHENS LAW OFFICES, PLLC  
2635 CHANNING WAY  
IDAHO FALLS ID 83404

*Ronald Longman*



*Letitia Merida*  
Deputy Clerk

JSW/jd  
7083\025 judgment order decree

2011 SEP 20 PM 4:25

Jacob S. Wessel, ISB #7529  
THOMSEN STEPHENS LAW OFFICES, PLLC  
2635 Channing Way  
Idaho Falls, ID 83404  
Telephone (208) 522-1230  
Fax (208) 522-1277  
jwessel@ts-lawoffice.com

Attorneys for Plaintiffs Sam Ferrell and Deva Ferrell

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL, )  
 )  
 Plaintiffs/Appellants, )  
 )  
 v. )  
 )  
 UNITED FINANCIAL CASUALTY )  
 COMPANY, d.b.a PROGRESSIVE )  
 INSURANCE COMPANY whose true )  
 name is unknown and PROGRESSIVE )  
 INSURANCE COMPANY whose true )  
 name is unknown, )  
 )  
 Defendants/Respondents. )  
 )

Case No. CV-2010-7051

NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENTS UNITED FINANCIAL CASUALTY COMPANY,  
d.b.a. PROGRESSIVE INSURANCE COMPANY AND ITS ATTORNEY JOHN J.  
LERMA, LERMA LAW OFFICE, P.A., AND THE CLERK OF THE ABOVE ENTITLED  
COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellants, SAM FERRELL AND DEVA FERRELL, appeals against  
the above named Respondents, UNITED FINANCIAL CASUALTY COMPANY, d.b.a.

PROGRESSIVE INSURANCE COMPANY to the Idaho Supreme Court from the Memorandum Decision and Order Re: Motion for Fees and Costs entered in the above entitled action on April 29, 2011, and the Memorandum Decision and Order Re: Motions to Reconsider entered in the above entitled action on June 14, 2011, entered by the Honorable Dane H. Watkins, Jr.

2. This appeal is taken on issues of law and fact. It is generally submitted that the issues on appeal will include the following:

- a. the District Court's decision on April 29, 2011 denying Ferrells' Motion for an award of attorneys fees pursuant to Idaho Code § 41-1839; and
- b. the District Court's decision on June 14, 2011 denying Ferrells' Motion to Reconsider and granting Defendant's Motion to Reconsider.

A more specific detailing of the issues on appeal will be supplied upon the briefing of this matter.

3. That Appellants are aggrieved parties as a result of a final, appealable Judgment, Order and Decree entered August 12, 2011 in proceedings before the Honorable Dane H. Watkins, Jr. and therefore have a right to appeal to the Idaho Supreme Court.

4. The judgments and orders described above are appealable pursuant to Idaho Appellate Rules 11(a)(1) and 11(a)(7).

5. There is no order sealing any portion of the record.

6. The Appellants request the preparation of the reporter's standard transcript, pursuant to Idaho Appellate Rule 25, from the hearings held on February 4, 2011 (Telephonic Status Conference), April 6, 2011 (Plaintiffs' Motion for Fees and Costs), and on June 8, 2011 (Plaintiffs' Motion to Reconsider) conducted before the Honorable Dane H. Watkins, Jr.

7. Appellants request the clerk's standard record to be prepared pursuant to Idaho Appellate Rule 28, with the addition of the following documents:

- a. Defendant's Motion to Stay Proceedings filed December 30, 2010.
- b. Plaintiffs' Objection to Motion to Stay filed January 8, 2011.
- c. Withdrawal of Motion to Stay Proceedings filed February 2, 2011.
- d. Plaintiffs' Motion for Fees and Costs (Idaho Code §41-1839 and IRCP 54(d)(1)) filed March 11, 2011.
- e. Plaintiffs' Memorandum in Support of Motion for Fees and Costs filed March 11, 2011.
- f. Affidavit of Jacob S. Wessel in Support of Motion for Fees and Costs filed March 11, 2011.
- g. Defendant's Objection to Plaintiffs' Motion for Fees and Costs filed March 24, 2011.
- h. Plaintiffs' Memorandum in Reply to Defendant's Response filed April 1, 2011.
- i. Plaintiffs' Objection to the Affidavit of Defendant's Counsel filed April 11, 2011.
- j. Supplemental Affidavit of Costs and Attorneys Fees (after March 11, 2011) filed April 11, 2011.
- k. Plaintiffs' Motion to Reconsider filed May 12, 2011.
- l. Defendant's Motion to Reconsider the Court's Award of Costs to Plaintiffs filed May 13, 2011.

- m. Defendant's Memorandum in Support of Motion to Reconsider the Court's Award of Costs to Plaintiffs filed May 13, 2011.
- n. Defendant's Response in Opposition to Plaintiffs' Motion to Reconsider filed May 24, 2011.
- o. Affidavit of Counsel in Opposition to Plaintiffs' Motion to Reconsider filed May 24, 2011.
- p. Plaintiffs' Response in Opposition to Defendant's Motion to Reconsider the Court's Award of Costs to Plaintiffs filed June 1, 2011.
- q. Memorandum in Reply to Defendant's Response to Motion to Reconsider filed June 3, 2011.
- r. Defendant's Reply in Support of its Motion to Reconsider filed June 6, 2011.
- s. Second Supplemental Affidavit of Costs and Attorneys Fees (after April 11, 2011) filed June 8, 2011.
- t. Motion to Confirm Arbitration Award and for Prejudgment Interest filed July 21, 2011.
- u. Stipulation for Confirmation of Arbitration Award and for Prejudgment Interest filed August 5, 2011.

8. I certify:

- a. That a copy of this Notice of Appeal has been served upon each reporter of

whom a transcript has been requested as named below at the address set forth below:

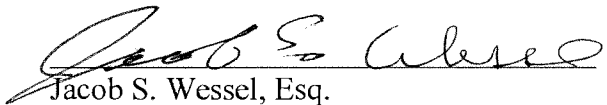
Karen Konvalinka  
Certified Court Reporter  
605 N. Capital Avenue

Idaho Falls, ID 83402

- b. That the clerk of the District Court has been paid the estimated fee for preparation of the reporter's transcript.
- c. That the clerk of the District Court has been paid the estimated fee for preparation of the clerk's record
- d. That the clerk of the District Court has been paid the appellate filing fee.
- e. That service has been made upon all parties required to be served pursuant to Appellate Rule 20.

DATED this 20 day of September, 2011.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:   
Jacob S. Wessel, Esq.

**CERTIFICATE OF SERVICE**

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 20 day of September, 2011, I caused a true and correct copy of the foregoing **NOTICE OF APPEAL** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

JOHN J LERMA ESQ  
GARY D LUKE ESQ  
LERMA LAW OFFICE PA  
EL DORADO BUSINESS CAMPUS  
3045 E COPPER POINT DRIVE  
PO BOX 190719  
BOISE ID 83719

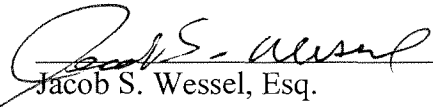
Mail  
 Hand Delivery  
 Facsimile@208-288-0697

Karen Konvalinka  
Certified Court Reporter  
605 N. Capital Avenue  
Idaho Falls, ID 83402

Mail  
 Hand Delivery  
 Facsimile  
 Courthouse Box

THOMSEN STEPHENS LAW OFFICES, PLLC

By:

  
\_\_\_\_\_  
Jacob S. Wessel, Esq.

JSW  
7083\001 Notice of Appeal

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

2011-09-07 10:02

SAM FERRELL AND DEVA FERRELL, )  
 )  
 Plaintiff/Appellant, )  
 )  
 vs. )  
 )  
 UNITED FINANCIAL CASUALTY )  
 COMPANY, d.b.a. PROGRESSIVE )  
 INSURANCE COMPANY whose true name )  
 is unknown, )  
 )  
 Defendant/Respondent, )  
 )

Case No. CV-2010-7051

Docket No. 39221-2011

**CLERK'S CERTIFICATE  
OF APPEAL**

Appeal from: Seventh Judicial District, Bonneville County

Honorable Dane H. Watkins, Jr., District Judge, presiding.

Case number from Court: CV-2010-7051

Order or Judgment appealed from: Memorandum Decision and Order Re: Motion for Fees and Costs, entered April 29, 2011, and the Memorandum Decision and Order Re: Motions to Reconsider, entered June 14, 2011.

Attorney for Appellant: Jacob Wessel, 2635 Channing Way,  
Idaho Falls, ID 83404

Attorney for Respondent: John Lerma, PO Box 190719,  
Boise, ID 83719

Appealed by: Sam Ferrell and Deva Ferrell

Appealed against: United Financial Casualty Company, d.b.a.  
Progressive Insurance Company

Notice of Appeal Filed: September 20, 2011

Appellate Fee Paid: Yes

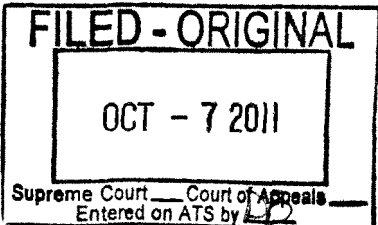
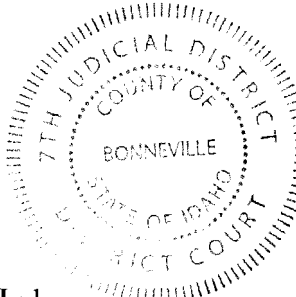
Was District Court Reporter's Transcript requested? Yes, estimated 150 pages

If so, name of reporter: Karen Konvalinka

Dated: September 23, 2011

RONALD LONGMORE  
Clerk of the District Court

By: *Seena M. ...*  
Deputy Clerk





1/21  
Lerma

BONNEVILLE COUNTY  
IDAHO

2011 OCT -3 PM 4:36

**LERMA LAW OFFICE, P.A.**  
**John J. Lerma, ISB# 3886**  
**Kenley E. Grover, ISB# 8287**  
**El Dorado Business Campus**  
**3045 E. Copper Point Drive**  
**PO Box 190719**  
**Boise ID 83719**  
**TELEPHONE: (208) 288-0608**  
**FACSIMILE: (208) 288-0697**

**Attorneys for Respondent United Financial Casualty Company**

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SAM FERRELL AND DEVA FERRELL,  
Plaintiffs/Appellants,

vs.

UNITED FINANCIAL CASUALTY  
COMPANY, d.b.a. PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown and PROGRESSIVE  
INSURANCE COMPANY whose true  
name is unknown,

Defendants/Respondents.

Case No. CV 10-7051

**RESPONDENT'S REQUEST FOR  
ADDITIONAL RECORDS**

TO: THE ABOVE NAMED APPELLANTS SAM FERREL AND DEVA FERRELL AND  
THE PARTYS' ATTORNEY JACOB S. WESSEL, THOMSEN STEPHENS LAW OFFICES,  
PLLC, AND THE CLERK OF THE ABOVE ENTITLED COURT:

NOTICE IS HEREBY GIVEN, That the Respondent in the above entitled proceeding hereby  
request pursuant to Rule 19, I.A.R., the inclusion of the following material in the clerk's record  
in addition to that required to be included by the I.A.R. 28 and the notice of appeal. Any  
additional transcript is to be provided in hard copy and electronic format.

1. Respondent requests the clerk's standard record, as requested by Appellants,  
include the following additional documents:

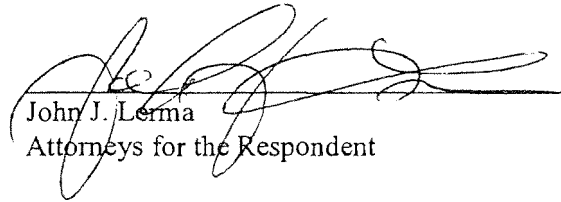
Respondent's Request for Additional Records - 1

202

- a. Memorandum in Support of Defendants' Motion to Stay filed December 30, 2010.
  - b. Affidavit of Defendants' Counsel filed on April 6, 2011.
2. I certify that this request for additional records has been served upon the clerk of the district court and upon all parties required to be served pursuant to Rule 20.

DATED this 3 day of October 2011.

LERMA LAW OFFICE, P.A.

  
 John J. Lerma  
 Attorneys for the Respondent

**CERTIFICATE OF SERVICE**

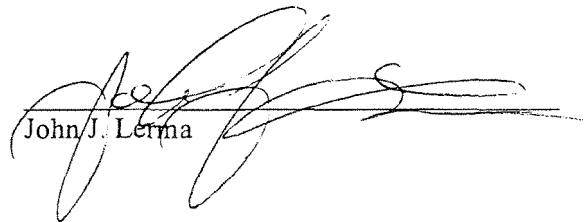
I HEREBY CERTIFY that on the 3 day of October 2011, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

Jacob S. Wessel  
 Thomas Stephens Law Office, PLLC  
 2635 Channing Way  
 Idaho Falls, Idaho 83404

- U.S. Mail, Postage Prepaid
- Express Mail
- Hand Delivery
- Facsimile Transmission
- Federal Express

Clerk of the Court  
 Bonneville County Courthouse  
 605 N Capital Ave.  
 Idaho Falls, Idaho 83402

- U.S. Mail, Postage Prepaid
- Express Mail
- Hand Delivery
- Facsimile Transmission
- Federal Express

  
 John J. Lerma

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

SAM FERRELL AND DEVA FERRELL, )  
 )  
 Plaintiff/Appellant, )  
 )  
 vs. )  
 )  
 UNITED FINANCIAL CASUALTY )  
 COMPANY, d.b.a. PROGRESSIVE )  
 INSURANCE COMPANY whose true name )  
 is unknown, )  
 )  
 Defendant/Respondent, )  
 )  
 \_\_\_\_\_ )

Case No. CV-2010-7051

Docket No. 39221-2011

**CLERK'S CERTIFICATION  
OF EXHIBITS**

STATE OF IDAHO )  
 )  
 County of Bonneville )

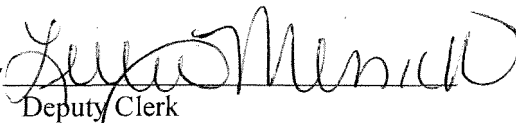
I, Ronald Longmore, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the foregoing Exhibits were marked for identification and offered in evidence, admitted, and used and considered by the Court in its determination: please see attached sheets (0 pages).

NO EXHIBITS

And I further certify that all of said Exhibits are on file in my office and are part of this record on Appeal in this cause, and are hereby transmitted to the Supreme Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the District Court  
this 16<sup>th</sup> day of November, 2011.

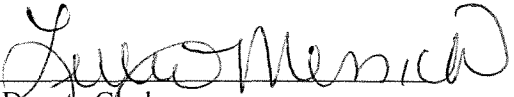
RONALD LONGMORE  
Clerk of the District Court

By   
Deputy Clerk



at Idaho Falls, Idaho, this 16<sup>th</sup> day of November, 2011.

RONALD LONGMORE  
Clerk of the District Court

By:   
Deputy Clerk

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

SAM FERRELL AND DEVA FERRELL, )  
)  
Plaintiff/Appellant, )  
)  
vs. )  
)  
UNITED FINANCIAL CASUALTY )  
COMPANY, d.b.a. PROGRESSIVE )  
INSURANCE COMPANY whose true name )  
is unknown, )  
)  
Defendant/Respondent, )  
\_\_\_\_\_ )

Case No. CV-2010-7051

Docket No. 39221-2011

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the \_\_\_\_\_ day of November, 2011, I served a copy of the Reporter's Transcript (if requested) and the Clerk's Record in the Appeal to the Supreme Court in the above entitled cause upon the following attorneys:

Jacob Wessel  
THOMSEN STEPHENS LAW OFFICES  
2635 Channing Way  
Idaho Falls, ID 83404

John Lerma  
LERMA LAW OFFICE  
PO Box 190719  
Boise, ID 83719

by depositing a copy of each thereof in the United States mail, postage prepaid, in an envelope addressed to said attorneys at the foregoing address, which is the last address of said attorneys known to me.

RONALD LONGMORE  
Clerk of the District Court

By: \_\_\_\_\_  
Deputy Clerk