3-1-2012

Ferrell v. United Financial Casualty Company Appellant's Brief Dckt. 39221

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

****

Supreme Court No. 39221-2011

SAM FERRELL AND DEVAL FERRELL,

Plaintiffs/Appellants,

v.

UNITED FINANCIAL CASUALTY COMPANY,

Defendant/Respondent.

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APPELLANT'S BRIEF

Appeal from the District Court of the Seventh Judicial District for Bonneville County.

Honorable Dane Watkins, Jr., District Judge, presiding.

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Counsel for Appellants: Jacob S. Wessel
THOMSEN STEPHENS LAW OFFICES, PLLC
2635 Channing Way
Idaho Falls, ID 83404

Counsel for Respondents: John J. Lerma
LERMA LAW OFFICE, PA
3045 E. Copper Point Dr.
PO BOX 190719
Boise, ID 83719

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a. Nature of the Case.

This is an uninsured motorist claim pursuant to a UM policy issued by Respondent United Financial Casualty Companty (hereinafter "United Financial'). The parties underwent arbitration in November, 2010, and then Appellants (hereinafter "Ferrells") sued in District Court for confirmation of the arbitration award, interest, and an award of costs and attorneys fees pursuant to Idaho Code § 41-1839 and I.R.C.P. Rule 54(d)(1). The Court ordered confirmation of the arbitration award and interest based upon an agreement of the parties. After hearing on Ferrells' motion for an award of costs and fees, the District Court found that Ferrells were the prevailing party. Initially, the Court ordered United Financial to pay the Ferrells' costs, but denied Ferrells' motion for attorneys fees. After cross motions for reconsideration, the Court ordered that United Financial owed neither fees nor costs.

b. Procedural History.

On December 22, 2009 Ferrells sent United Financial 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. United Financials tendered $855.00 to Sam Ferrell and $862.00 to Deva Ferrell on January 5, 2010. Without filing a lawsuit, Ferrells 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 *Grease Spot, Inc. v. Harnes,* 148 Idaho 582, 226 P.3d 525 (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 Ferrells more than the amount tendered by United Financial. The arbitrators declined to decide the issues of costs and fees in arbitration in deference to the Court.

On November 18, 2010 Ferrells filed a lawsuit in District Court for the County of Bonneville, seeking four things: (1) confirmation of the arbitration award, (2) and award of interest on the arbitration award, (3) an award of attorneys in the arbitration and in the lawsuit fees pursuant to Idaho Code § 41-1839, a nd (4) an award of costs in the arbitration and in the lawsuit pursuant to I.R.C.P. Rule 54(d)(1).

On January 3, 2011, United Financial filed its Motion to Stay Proceedings in order to allow the arbitrators to decide the issues of fees and costs. R. p. 021. After the attorneys for both parties met with the neutral arbitrator, on February 2, 2011 United Financial withdrew its Motion to Stay Proceedings, allowing the District Court to decide these issues. R. p. 031.

On March 11, 2011, the Ferrels filed their Motion for Fees and Costs (R. p. 040) along with an affidavit setting forth the fees and costs incurred up to March 11, 2011 (R. p. 055) and a memorandum in support thereof (R. p. 043). The District Court heard oral argument on the Ferrells' Motion for Fees and Costs on April 6, 2011 Tr. pp. 11-40. On April 29, 2011, the District Court issued its Memorandum Decision and Order Re: Motion for Fees and Costs (R. p. 107) in which it found the following: (1) that the amended statute 41-1839 could not be applied retrospectively because 41-1839 is substantive and not remedial in nature; (2) that the law that

applies to this case is the law that existed on January 22, 2010 when Ferrells demanded arbitration and not the law as it existed at the time of the filing of the Petition on November 18, 2010; (3) that Ferrells were not entitled to an award of attorneys fees based upon this Court's decision in *Barbee v. WMA Securities, Inc.*, 143 Idaho 391, 146 P.3d 657 (2006) because they did not file a lawsuit before requesting arbitration; (4) that the Ferrells were the prevailing party because the amount justly due was the amount of the arbitration award ($9,125.24) and this amount was more than United Financial tendered ($1,717.00); and (5) that the Ferrells were entitled to an award of all of their costs pursuant to I.R.C.P. 54(d)(1)(A) and 54(d)(6) because United Financial failed to object to any of the costs within 14 days of March 11, 2011. R. pp. 107-19.

The parties then filed cross motions to reconsider. On June 6, 2011, the Court heard oral argument on the parties' cross motions to reconsider. Tr. pp. 41-56. On June 15, 2011, the District Court issued its Memorandum Decision and Order Re: Motions to Reconsider in which it again found that the Ferrells were not entitled to attorneys fees and reconsidered its ruling on costs and found that the Ferrells were also not entitled to an award of costs. R. pp. 177-186.

At no time did United Financial object to Ferrells' attorney's hourly rate or to any specific fee as set forth in the Memoranda of fees and costs filed by Ferrells. At no time did United Financial object to the cost sought by Ferrells.

On, August 5, 2011 the parties entered into a Stipulation for Confirmation of Arbitration Award and Prejudgment Interest. R. p. 190. The Court issued its Judgment, Order, and Decree on August 12, 2011. R. p. 192. Plaintiff's filed their Notice of Appeal on September 20, 2011. R. p. 195.

c. Factual Statement.

The facts in this case are generally not in contention and are as follows:

1. Ferrells are residents of the State of Idaho, County of Bonneville. *Petition,* ¶ 1, admitted in ¶ 1 of United Financial's Answer, R. p. 034.

2. United Financial 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 United Financial's Answer, R. p. 034..

3. The United Financial Casualty Company, d.b.a. Progressive Insurance Company is the correct United Financial in this action as opposed to Progressive Insurance Company. Admitted in ¶ 3-5 of United Financial's Answer, R. pp. 034-035.

4. Ferrells and United Financial 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 United Financial's Answer, R. p. 035.

5. On December 22, 2008, Ferrells 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 United Financial's Answer, R. p. 035.

6. In early 2009, United Financial settled with Ferrells 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 United Financial's Answer, R. p. 035.

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

hired the firm Thomsen Stephens Law Offices PLLC to pursue these claims. *Petition,* ¶ 10, admitted in ¶ 8 of United Financial's Answer, R. p. 035.

8. On July 2, 2009, Jacob S. Wessel, attorney for the Ferrells, 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 Ferrells' Petition as exhibit A. *Petition,* ¶ 11, admitted in ¶ 9 of United Financial's Answer, R. p. 035.

9. United Financial subsequently requested additional information. *Petition,* ¶ 12, admitted in ¶ 10 of United Financial's Answer, R. p. 036.

10. On December 22, 2009, Jacob S. Wessel, attorney for the Ferrells 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 Ferrells' Petition as exhibit B. *Petition,* ¶ 13, admitted in ¶ 11 of United Financial's Answer, R. p. 036.

11. In a letter dated January 5, 2010, United Financial tendered $855.00 to Sam Ferrell and $862.00 to Deva Ferrell as proposed final settlement of Ferrells' lost wages claims, as the amount justly due under the UM Policy. A true and correct copy of this letter was attached to Ferrells' Petition as exhibit C. *Petition,* ¶ 14, admitted in ¶ 12 of United Financial's Answer, R. p. 036.

12. On January 22, 2010, Jacob S. Wessel, attorney for the Ferrells, 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 Ferrells' Petition as exhibit D. *Petition,* ¶ 15, admitted in ¶ 13 of United Financial's Answer, R. p. 036.

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 United Financial's Answer, R. p. 036.

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 Ferrells' Petition as exhibit E. *Petition,* ¶ 17, admitted in ¶ 15 of United Financial's Answer, R. p. 036.

15. The District Court had 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 United Financial's Answer, R. p. 037.

16. Pursuant to Idaho Code § 7-918, venue was 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 United Financial's Answer, R. p. 037.

II. ISSUES ON APPEAL

The Ferrells will address the following issues on appeal:

1. The District Court erred in denying the Ferrells an award of attorney fees pursuant to Idaho Code § 41-1839.

2. The District Court erred in denying the Ferrells an award of costs pursuant to the Idaho Rules of Civil Procedure, Rule 54.

3. The Ferrels are seeking and are entitled to an award of attorneys fees on appeal pursuant to Idaho Code § 41-1839.

III. STANDARDS OF REVIEW

When an award of attorney fees depends on the interpretation of a statute, the standard of review for statutory interpretation applies. *Beco Constr. Co. v. J-U-B Eng'rs, Inc.*, 145 Idaho 719, 726, 184 P.3d 844, 851 (2008). The interpretation of a statute is a question of law over which this Court exercises free review. *State v. Hart*, 135 Idaho 827, 829, 25 P.3d 850, 852 (2001).

Fees 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).

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)(6) states in part that "[f]ailure to timely object to the items in the memorandum of costs shall constitute a waiver of *all* objections to the costs claimed." Emphasis added.

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 titled "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.

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 Unite 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. Omincare, Inc.*, 141 Idaho 809, 118 P.3d 141 (2005); *Martin v. State Farm Mut. Auto. Isn. Co.,* 138 Idaho 244, 61 P.3d 601 (2002); *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.

The District Court correctly found that Ferrells were the prevailing party in arbitration. R. pp. 116-117.

F. The District Court should have applied the law as it existed at the time the Ferrells filed their Petition in the District Court instead of looking at the law as it existed at some time before.

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, United Financial 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; *see also Grease Spot, Inc. v. Harnes,* 148 Idaho 582, 226 P.3d 525 at 582 (2010) (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.)(Emphases added by United Financial in its Objection to Motion for Fees and Costs.) R. p. 071-073. Ferrells filed the Petition for Confirmation of Arbitration Award and for Costs and Attorneys fees in this matter on November 18, 2010. United Financial 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; the District Court should have applied 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 District Court 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.*

G. In deciding whether the statute requires filing a law suit before the arbitration, the District 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. *Martin v. State Farm Mut. Auto. Isn. Co.,* 138 Idaho 244, 61 P.3d 601 (2002) holds 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 (State Farm) 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 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, 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. State Farm 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 State Farm'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 the District Court's finding that

Barbee v. WMA Securities, Inc., 143 Idaho 391, 146 P.3d 657 (2006) applies to the present case was error.

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." Plaintiff 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 at395, 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 the District 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 the District Court cited in its Memorandum Decision and Order re: Motion for Fees and Costs (R. p. 120) 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 at395, 146 P.3d at 66. This holding is by definition only dicta, and therefore cannot be applied to overrule existing Idaho Code § 41-1839 case law, i.e. *Martin.* In addition, besides the fact that the court *in Barbee* is

construing an entirely different and no longer existing statute, the Ferrells did not file a separate lawsuit solely for attorneys fees, so this holding does not apply.

To come to the District Court's decision that the Ferrells are not entitled to attorney fees, it will be necessary for 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.

H. The District Court erred in relying on United Financial's late submission of evidence regarding costs to reconsider its award of costs.

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)(6) states in part that "[f]ailure to timely object to the items in the memorandum of costs shall constitute a waiver of all objections to the costs claimed." Emphasis added. The record is clear that United Financial failed to timely object to Ferrells' Memorandum of Costs. R. pp. 68, 117, 183. In its decision re: motions to reconsider, the District Court denied Ferrells an award of costs despite United Financial's failure to comply with I.R.C.P. 54(d)(6) for the following reason: "After review of 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."

Oral argument on the motion for fees and costs was held on April 6, 2011. Tr. pp. 11-40. This was 26 days after Ferrells filed their Affidavit of Fees and Costs setting forth their requested fees and costs with billings attached. R. p. 55. For the first time, United Financial brought up the

argument that the insurance contract provided that the parties would pay their own fees[1]. The District Court found that Ferrells did not object to the admission of the insurance contract and to this new argument at the hearing on April 6, 2011. Based upon this the District Court reconsidered its award of costs and denied Ferrells costs.

In fact, although the on April 6, 2011, the insurance contract had not been submitted into evidence, and counsel for Ferrells had not seen what United Financial was trying to put into evidence, Ferrells did object. Ferrells argued in regards to costs under I.R.C.P. 54(d)(1)(A) as follows:

> MR. WESSEL: And, in fact, under 54(d)(6), they need to do an objection to costs within 14 days of service of memorandum of costs, and failure to timely object to items of memorandum of costs shall constitute a waiver of all objections to the costs. Tr. p. 21, l.25-p. 22, l. 4.
> THE COURT: And I take it there was no objection to the Court considering the contract?[2]
> MR. WESSEL: Well, I don't know what he has put – I haven't seen it, so if it's the contract, I wouldn't have an objection to the Court looking at it. I'd like to look at it first and make sure it's what Mr. Lerma says it is.
> THE COURT: Okay. If you see it and you have any problem with it, notify the Court. Otherwise the Court will consider it and issue a written decision. Tr. p. 39, l.13-20, p.39, l. 25- p. 40, l. 2.

In considering United Financial's argument that the terms of the statute trump the law of costs to the prevailing party, the District Court erred. In support of its argument that the agreement

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[1]Ferrells did not have a chance to contest this argument in the briefing because it was not brought up until oral argument, but at oral argument Ferrells argued off the cuff that the *Emery* decision overruled the contract. Tr. p.

[2]The District Court posed the question this way because we had had a discussion off the record regarding this document in which Ferrells argued that they wouldn't object to the Court looking at it for background in the case, but still objected to the arguments being considered on the motion for costs because United Financial failed to comply with IRCP Rule 54(d)(6).

of the parties trumps Rule 54(d)(6), the District Court cites only one case: *Grease Spot, Inc. v. Harnes,* 148 Idaho 582, 226 P.3d 525 at 582 (2010) in which the Court found that the "rule requiring the court to award costs to the prevailing party does not apply to arbitration confirmation proceedings." 148 Idaho at 587, 226 P.3d at 529. This is the case that was decided after arbitration was demanded and was overruled by statute before arbitration was conducted and before suit was filed in this case. It should therefore not apply to this case. The law before *Grease Spot* was stated by this court in *Emery.* "[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. This Court should apply this principal by analogy to I.R.C.P. 54(d)(1)(A).

Even if the District Court was correct in its analysis that the insurance contract should trump the Idaho Court Rules, a late submission of the contract does not satisfy the requirements of I.R.C.P. 54(d)(6). This Court has found many times that failure to object to costs within 14 days constitutes waiver of **all** objections to costs. *See Bagley v. Thomason,* 149 Idaho 799, 241 P.3d 972 (2010); *Conner v. Dake,* 103 Idaho 761, 653 P.2d 11; *Long v. Hendricks,* 109 Idaho 73, 705 P.2d 78 (Ct. App. 1985); *Griffin v. Griffin,* 102 Idaho 858, 642 P.2d 949 (Ct. App. 1982).

I. Attorney Fees and Costs on Appeal

As the prevailing party, Ferrells are entitled to an award of reasonable attorney fees on appeal pursuant to Idaho Code § 41-1839 and reasonable costs on appeal pursuant to I.A.R. Rule 41.

V. CONCLUSION

The District Court found them to be the prevailing party at arbitration. They are therefore entitled to Fees and costs pursuant to Idaho Code § 41-1839, I.R.C.P. 54(d)(1)(A), and I.A.R. Rule

41. The District Court erred in its application of the law, and Ferrells pray this Court to overturn the District Courts findings in its free review of these issues of statutory interpretation.

DATED this 27 day of February, 2012.

THOMSEN STEPHENS LAW OFFICES, PLLC

By: _____
Jacob S. Wessel, Esq.
Attorneys for Ferrells

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 February, 2011, I caused two true and correct copies of the foregoing **APPELLANT'S BRIEF** 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
LERMA LAW OFFICE, PA
3045 E. Copper Point Dr.
PO BOX 190719
Boise, ID 83719

[X] Mail
[ ] Hand Delivery
[ ] Facsimile

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

By: Jacob S. Wessel

Jacob S. Wessel, Esq.

JSW
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