3-27-2012

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

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Docket No. 39221-2011
Case No. CV-2010-7051

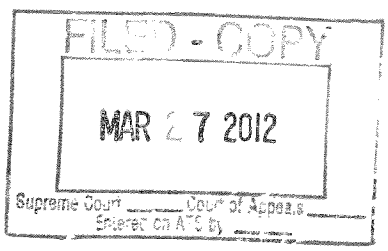
SAM FERRELL and DEVA FERRELL,

Plaintiff/Appellant,

v.

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

Defendant/Respondent.



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RESPONDENT'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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I. STATEMENT OF THE CASE

Respondent offers the following statement of this case to the extent that it disagrees with or supplements the history offered by the Appellants, pursuant to Rule 35(b)(3) of the Idaho Appellate Rules.

A. Nature of the Case

The nature of this matter revolves around Appellants' claim for attorney fees in an arbitration proceeding. Appellants, Sam and Deva Ferrell ("Ferrells"), filed an uninsured motorist claim pursuant to their commercial auto policy. The policy was issued by United Financial Casualty Company ("United Financial"). United Financial settled and paid all of the claims submitted by the Ferrells with the exception of the wage loss claim prior to the initiation of arbitration. The lost wage claim was disputed. The Ferrells demanded arbitration under the Arbitration Clause of the insurance policy. The claim was arbitrated in November of 2010 and an award given. Ferrells filed a Petition for Confirmation of the arbitration award and requested attorney fees and costs. An order was issued by the District Court awarding costs to the Ferrells but not attorney fees. Upon reconsideration the Court again determined the Ferrells were not entitled to attorney fees. Also, upon reconsideration, the Court reversed its decision regarding costs and held that each party should bear their own costs in accordance with the arbitration agreement between the parties.

B. Procedural History

The Ferrells first notified United Financial of their wage loss through a letter dated July 9, 2009. R. p. 011. The Ferrells formally demanded payment of their wage loss claim and provided documentation of their losses by letter dated December 22, 2009. R. p. 012.

United Financial tendered payment of the undisputed amount of wage loss on January 5, 2010. R. p. 014.

Without filing suit, the Ferrells demanded arbitration pursuant to the uninsured motorist provision of their policy by letter dated January 22, 2010. R. p. 019.

The arbitration hearing was conducted on November 4, 2010. Each party had previously designated their respective arbitrator and had jointly agreed on a third arbitrator. The arbitrators awarded lost wages in favor of the Ferrells and specifically found that no lawsuit had been filed prior to demanding arbitration. R. p. 020. United Financial sent payment in full per the award on November 19, 2010 as provided for in Affidavit of Counsel in Opposition to Plaintiffs' Motion to Reconsider. R. p. 148.

On January 3, 2011, United Financial filed a motion to stay the proceedings to allow the Arbitration panel to address the issue of costs and fees. R. p. 021. The panel declined to address the issue of costs and fees, and the Motion to Stay was withdrawn. R. p. 031.

United Financial filed its Answer to the Petition for Confirmation of Arbitration Award and Award of Costs and Fees on February 17, 2011. R. p. 033.

The Ferrells filed a Motion for Fees and Costs on March 11, 2011. R. p. 040. United Financial filed Defendant's Objection to Plaintiffs' Motion for Fees and Costs on March 24,

2011. R. p. 068. United Financial also filed the relevant portion of the insurance policy by Affidavit of Defendants' Counsel on April 6, 2011. R. p. 088. The matter was heard before the District Court on April 6, 2011. Tr. Pp. 11-40. The court issued its Memorandum Decision and Order Re: Motion for Fees and Costs in which it denied the Ferrells attorney fees, but, it did award costs to the Ferrells. The decision failed to consider the insurance policy and ruled that Rule 54 governed the costs. R. p. 107.

Both parties moved to reconsider and filed responding briefs and affidavits. R. pp. 120-69. The court heard these motions on June 8, 2011. Tr. pp. 41-56. The District Court issued its decision that the Ferrells were not entitled to attorney fees. R. pp. 179-83. The court further reversed its previous award of costs because the insurance policy specifically designates that each party should bear the burden of their respective costs and the policy was controlling on this issue. R. pp. 183-84.

II. ADDITIONAL ISSUES PRESENTED

1. The District Court properly applied Idaho Code § 41-1839 and the common law in denying the Ferrells' request for attorney fees.

2. The Ferrells should not be awarded costs because the controlling language is found in the insurance policy.

3. Ferrells' request for attorney fees and cost on appeal should be denied.

III. STANDARD OF REVIEW

This appeal for attorney fees is based on the application of Idaho Code § 41-1839. The interpretation of a statute is a question of law over which the court exercises free review.

Harrison v. Binnion, 147 Idaho 645, 214 P.3d 631 (2009). It must begin with the literal words of the statute. *Thomson v. City of Lewiston,* 137 Idaho 473, 50 P.3d 488 (2002).

The matter of reviewing an award of costs pursuant to arbitration requires the interpretation of the Uniform Arbitration Act. The interpretation of a statute is a question of law subject to free review. *Harrison*, 147 Idaho at 649, 214 P.3d at 635. The Uniform Arbitration Act can be found in Title 7, chapter 9 of the Idaho Code. An evaluation of the statutes in question must determine the literal words; those words must be given the plain, usual and ordinary meaning. *Id.* If the language is not ambiguous, the court must simply follow the law. *Id.* (quoting *McLean v. Maverick Country Stores, Inc.*, 142 Idaho 810, 813, 135 P.3d 756, 759 (2006)).

IV. ARGUMENT

A. The District Court properly applied I.C. § 41-1839 in this action.

The District Court held that the Ferrells are not allowed to recover under I.C. § 41-1839 as it existed at the time of arbitration. At the time the Ferrells initiated arbitration, § 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 the Ferrells noted in their brief, the statute was subsequently amended, and the revised statute became effective on July 1, 2010. Appellants' Brief p. 8 ("A. Brief"). This was six months after the Ferrells demanded arbitration. The District Court recognized the amendment and the possible effect it would have on this action in its Memorandum Decision and Order Re: Motion for Fees and Costs. R. p. 109. United Financial argued against the application of the amended statute and the District Court agreed.

1. § 41-1839, as amended, cannot be retrospectively applied.

The Ferrells incorrectly claim that § 41-1839 should be applied retrospectively to this action. The Ferrells appeal to public policy and the legislative statement of purpose in hopes that they will sway the court. A. Brief p. 8-9, 11. However, both arguments fail to cite authority on which they rely. More importantly, the statute and statement of purpose lacked retrospective language or reference that the legislature intended the amended statute to apply retroactively.

United Financial argued against the application of the amended statute retrospectively. In support of this argument, United Financial offered *Myers v. Vermaas*, 114 Idaho 85, 753 P.2d 296 (Ct. App. 1988), as instructive on this issue. Tr. p. 26, L. 12-17. The District Court agreed with United Financial and provided an extensive and persuasive analysis on why the amended statute should not apply retrospectively. R. p. 110-12. The Court cited *Myers*, wherein the Idaho Court of Appeals provided clarification regarding retrospective application of amended statutes as follows:

> 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."

Id. at 493-94,757 P.2d at 1212-13. (Emphasis added)

The court of appeals again discussed *Myers* 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-weighing 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 show that statutes authorizing mandatory awards of attorney's fees are substantive in nature. Because § 12-120 "more closely resembles a substantive right than a merely procedural right," the courts refused retrospective application. United Financial had a meritorious defense because the arbitration award for wage loss was significantly less than the Ferrells' demand. R. p. 12 (Demand Letter); R. p. 20 (Award Decision). Applying the reasoning of *Myers* to this case; application of the law retrospectively would subject United Financial to a harsh result when it had a proven meritorious defense.

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, 247, 61 P.3d 601, 604 (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 specific 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. R. p. 112.

The Supreme Court found in *Grease Spot*, "there is no language indicating that § 41-1839 is meant to imply a provision for arbitration attorney fees into every insurance policy." *Grease Spot, Inc. v. Harnes*, 148 Idaho 582, 226 P.3d 524, 528 (2010). The amendment to § 41-1839

provided a substantive change to its prior version to include mandatory attorney fees in arbitration.

The District Court properly concluded the entitlement to a mandatory award under § 41-1839(1) was a substantive right. This substantive right was found in both the original and amended versions for lawsuits; however, the amended statute made attorney fees more broadly available to include arbitration. The Court went on to say that:

> 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 [United Financial] 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.

R. p. 112.

The application of respective mandatory attorney fees under § 41-1839 in arbitration alters a substantive right. The statute should not be used to award attorney fees in this case because United Financial did not have a fair opportunity to weigh the risk of exposure to mandatory fee awards in arbitration before deciding to arbitrate.

2. Filing suit prior to arbitration was required for § 41-1839 to apply to this action.

For § 41-1839 to apply to this action, the Ferrells were required to file suit prior to arbitration. The District Court agreed and provided support through 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). R. p. 113-15. 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.

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

Once again, the District Court appropriately addressed the Ferrells' position in its decisions. For clarification on the issue, the language found in *Barbee* does explicitly reference *Martin* and refutes the Ferrells' argument. 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. 146 P.3d at 661. And since WMA 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 Ferrells' 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 Ferrells has been discussed and refuted by a subsequent Idaho Supreme Court ruling. Accordingly, it is no longer valid law, it is not binding, and it demonstrates that the District Court was correct in its initial ruling.

In addition to *Barbee*, the *Grease Spot* decision went even further in its rejection of the Ferrells' *Martin*-based arguments. *Grease Spot*, 226 P.3d at 526-30. The District Court initially found it unnecessary to address *Grease Spot* at any length stating: "Even if this Court ignores

Grease Spot, under the Idaho Supreme Court's interpretation of pre-amended § 41-1839 as stated in *Barbee*, [United Financial] would not have been subject to the mandatory fee provision of § 41-1839 for fees incurred in arbitration." R. p. 115 (brackets added to properly name Respondent). Nevertheless, it is evident that *Grease Spot* reinforces the conclusion that the referenced language from *Martin* cannot be relied on. *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 on this issue.

The District Court properly denied attorney fees because the *Barbee* analysis replaced *Martin*. The District Court properly recognizing that *Barbee* is more recent, addresses the issue more directly, and is the relevant and controlling precedent.

3. The Ferrells misconstrue *Unity Light & Power* and *Diacel Chemical.*

The Ferrells' brief disregards the factual case contexts when it pulls language from *Unity Light & Power v. Burley*, 92 Idaho 499, 445 P.2d 720 (1968); and *State ex Rel Wasden v. Diacel Chemical Industries*, 141 Idaho 102, 106 P.3d 428, (2005). A. Brief p. 11-13. The Ferrells attempt to use limited language from these cases to argue that this Court should apply § 41-1839 as such existed in November 2010 (i.e., when the Ferrells filed a request with the District Court to confirm the arbitration award). Significantly however, neither *Unity Light & Power*, nor *Diacel Chemical* involved arbitration. *See Unity Light & Power*, 92 Idaho at 501 ("Unity instituted the present action..."; text search shows no reference to arbitration); *Diacel Chemical*, 141 Idaho at 104 ("On January 6, 2003, the State filed this action..."; text search shows no reference to arbitration). Because there was no arbitration involved 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.

It is an immense stretch of the statements and rationale found in *Unity Light & Power* and in *Diacel Chemical* for the Ferrells 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.

The District 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. R. p.

180. United Financial agrees and again asserts that the proceeding commenced when arbitration was initiated.

The Ferrells' brief also cites *Overman v. Overman*, 102 Idaho 235, 629 P.2d 127 (1980). A. Brief p. 12. *Overman* is a divorce/child custody case. United Financial 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, 629 P.2d at 129. United Financial 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 the Ferrells' briefing). Accordingly, United Financial does not believe that *Overman* has applicability or that it supports the Ferrells' arguments.

4. The Ferrells' request to confirm an arbitration award is not an action in court sufficient to recover attorney fees under § 41-1839.

The Ferrells' action before the District Court was allegedly to "confirm the arbitration award." However, the Ferrells' 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, 913 P.2d at 1173-74, 1175 (underlined emphasis added).

In addition to strengthening the other arguments asserted by United Financial, *Wolfe* makes it clear that the Ferrells 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 Ferrells are attempting to do, this Court should sustain both of the District Court's rulings and again deny any award of attorney fees in accordance with *Wolfe*. R. pp. 107 and 177.

5. Because United Financial 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 United Financial acted promptly to pay the arbitration award soon after such was issued. R. p. 148. 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, 1197 (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, United Financial acted promptly to pay the full amount of the arbitration award. Checks were immediately requested, timely processed, and United Financial's counsel forwarded such on November 19, 2010 (only two weeks after the award was issued). R. p. 151-54. Notwithstanding this prompt timing, and with the understanding that checks were being issued, the Ferrells submitted their initial Petition with the District Court on November 16, 2010 (however, the Petition was received by United Financial's counsel after payment was issued and received by the Ferrells). R. p. 149.

Because United Financial "timely paid the arbitration award," the Ferrells need not have been "involved in a lawsuit before they received their damages." *Barbee*, 146 P.3d at 661. Hence, the Ferrells' lawsuit effectively seeking "solely attorney fees" is unnecessary and moot. *Id.*

B. The District Court properly overturned its previous award of costs.

1. The Ferrells' incorrectly focus on rule 54 as determinative.

The Ferrells' brief asserts that I.R.C.P. Rule 54 is controlling. A. Brief p. 17-19. 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.

I.C. §§ 7-901 through 7-922. 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 Greenfield 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*. The Idaho Supreme Court ruled in *Grease Spot*: "a general fee-shifting statute did not control over the specific UAA provision." *Id.* 226 P.3d at 529. (*citing Canon Sch. Dist. No. 50 v. W.E.S. Const. Co.*, 180 Ariz. 148, 882 P.2d 1274, 1279-80 (1994)).

Pursuant to this case law, the applicable statute is the Uniform Arbitration Act, 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. This Court should therefore recognize and defer to the cost provision contained in the arbitration agreement. The relevant portion of the insurance policy 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."

R. p. 097.

The Ferrells' brief attempts to limit the application of the *Grease Spot* decision by arguing that this case was decided after arbitration began and was overruled by statute. A. Brief p. 19. The brief then cites *Emery* and § 41-1839 as the relevant authority and that their arguments regarding attorney fees should be analogously applied to Rule 54. A. Brief p. 19. However, the law regarding costs was the same at the time the Ferrells demanded arbitration and when they filed suit. The Arbitration Clause of the insurance policy was ever present and the UAA was in force during all relevant times. While *Grease Spot* has been limited in the application of attorney fees in arbitration, the legislature did not amend § 41-1839 to include costs or overturn *Grease Spot* as a whole. See § 41-1839(1)(as effective July 1, 2010). *Grease Spot* provided clarity to the law regarding costs as it existed before and after the commencement of these proceedings. 226 P.3d at 529.

The Ferrells' reliance on Civil Rule 54 is misplaced because of the UAA, the favorable case law, and the explicit language in the Arbitration Clause. Accordingly, there was no "waiver" of any objection pursuant to Rule 54 because that rule is not controlling. Similarly, the discussion of "prevailing party" is unhelpful because of the explicit contractual arbitration document. Accordingly, the District Court properly determined that the parties are to bear their own cost.

2. The Arbitration Clause contained in the policy was exercised by the Ferrells and is controlling.

The Ferrells initiated this proceeding to confirm an arbitration award. R. p. 006. The award arose from the parties' previously existing agreement to apply the Arbitration Clause of the insurance policy. The Ferrells filed their Petition in the District Court citing the Arbitration

Clause. R. p. 008, L. 15-16. The Ferrells went even further in referencing the UAA as the statutory framework under which their action arose. R. p. 009, L. 18-19. The Ferrells conceded that the Arbitration Clause provided the procedures and relief they were seeking to confirm. However, the Ferrells did not provide the District Court with a copy of the insurance policy with the Arbitration Clause.

Furthermore, when the Ferrells filed their Motion for Fees and Costs, they did not cite the Arbitration Clause as the authority governing relief because it did not grant them all of the costs they were requesting. R. p. 040. Subsequently, the Ferrells asked the District Court to disregard the Arbitration Clause because they believed Rule 54 should be the authority regarding costs. R. p. 156. The underlying arbitration agreement was provided to the Court and was relied on by United Financial's counsel at the initial hearing. R. p. 088; Tr. p. 33, L. 8-16. There was no objection raised by the Ferrells' counsel when such was submitted, and the District Court indicated that such would be considered in its decision. Tr. p. 39, L. 16-20. The Ferrells' contend that they objected to the court considering the Arbitration Clause by citing a discussion held off the record. A. Brief p. 18, footnote 2.

The Ferrells were afforded an opportunity to file an objection to the submission and consideration of the Arbitration Clause. Tr. p. 39, L. 25; p. 40, L. 1-2. They filed their Objection to Affidavit of Defendants' Counsel on April 11, 2011. R. p. 098. This filing and all subsequent filings, including the Ferrells' Appellant's Brief, object to the timeliness of bringing the Arbitration Clause to the District Courts attention, and not whether it is the binding authority.

When the issue of costs was being reconsidered by the District Court, the Ferrells had opportunity to present their objections to the application of the Arbitration Clause. Again, the Ferrells relied on Rule 54 as a shield against the Arbitration Clause. Tr. p. 48, L. 4-19.

The District Court determined that § 7-910 provides the necessary instruction:

> "**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."

R. p. 184 (Emphasis added). The District Court's ruling denying costs was correct because the statute clearly provides that the Arbitration Clause properly controls the issue of costs.

The Ferrells have benefitted from the Arbitration Clause. Based on such, they obtained an award which has been paid. Accordingly, the Ferrells 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 United Financial. This Court should uphold the District Court's ruling regarding costs to accord with the parties' arbitration agreement, the Uniform Arbitration Act, and the cited case law.

C. Attorney fees and cost on appeal.

The Ferrells have requested attorney fees and costs on appeal in their brief. A. Brief p.19. The same arguments expressed above apply equally to the Ferrells' request for attorney fees on appeal.

Furthermore, Rule 35(a)(5) of the Idaho Appellate Rules states:

> Attorney Fees on Appeal. If the appellant is claiming attorney fees on appeal **the appellant must so indicate in the division of issues on appeal** that appellant is claiming attorney fees and state the basis for the claim. (emphasis added)

The Ferrells' brief does have a section listed as issues on appeal. A. Brief p. 7. This section regarding issues on appeal does not include a request for attorney fees on appeal as required by the above rule. The Ferrells' request for attorney fees on appeal should be denied because they have failed to properly plead their requests under Rule 35(a)(5) of the Idaho Appellate Rules. United Financial requests the Ferrells' request for attorney fees and costs on appeal be denied.

V. CONCLUSION

According to the foregoing arguments, This Court should hold that the District Court properly determined that the Ferrells are not entitled to attorney fees under § 41-1839 and the parties are to bear the burden of their own costs pursuant to Arbitration Clause of the insurance policy.

DATED this 27 day of March 2012.

LERMA LAW OFFICE, P.A.

John J. Lerma
Attorneys for Defendants/Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27 day of March 2012, 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 Office 2635 Channing Way Idaho Falls, ID 83404	_x_ ___ ___ ___ ___	U.S. Mail, Postage Prepaid Express Mail Hand Delivery Facsimile Transmission Federal Express

John J. Lerma