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Estate of Holland v. Metropolitan Property and Cas. Ins. Co. Appellant's Brief Dckt. 38157

IN THE SUPREME COURT FOR THE STATE OF IDAHO

The ESTATE of BENJAMIN HOLLAND, DECEASED, GREGORY HOLLAND, and KATHLEEN HOLLAND, Plaintiffs-Appellants, v. METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY, and METLIFE AUTO & HOME Defendants-Respondents.	Supreme Court No. 2010-38157 APPELLANTS' BRIEF

APPELLANTS' BRIEF

Appeal from the District Court of the First Judicial District in and for Kootenai County, Idaho.

Honorable John T. Mitchell presiding.

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III. STATEMENT OF THE CASE

a. **Nature of the Case.**

This case is about money, specifically attorney's fees. The case involves a settled dispute over under-insured motorist (UIM) coverage, with the issue of fees still in dispute. This case is about a family that lost its only son in a tragic accident and who were forced to file a lawsuit before their insurer made them an offer on disputed policies. This case is also about what an Idahoan must provide to an insurer in order to collect amounts justly due on an insurance policy.

b. **Course of Proceedings.**

On January 26, 2010, the Hollands filed a complaint against Metropolitan Property and Casualty Insurance Co. and MetLife Auto and Home (collectively "MetLife"). R., pp. 8-15 On February 9, 2010, the Hollands filed a motion for attorney's fees, memorandum, and affidavit of counsel.[1] R., pp. 16-41 On March 2, 2010, MetLife noticed its appearance and filed the parties' stipulated I.R.C.P. 41(a)(1) motion. R., pp. 42-44 On March 3, 2010, the court dismissed the underlying claims, with prejudice, based upon the parties' stipulated motion. R., pp. 45-48

On April 12, 2010, MetLife answered the Hollands' complaint. R., pp. 49-53 Thereafter, MetLife moved to enforce a February 3, 2010 agreement and dismiss the case. R., pp. 78-80

On June 2, 2010, oral argument was held on the parties' motions. Tr., p. 4, l. 1

[1] Hollands acknowledge the awkward procedural posture of the motion having been filed before MetLife's appearance in the case; however, would ask this Court to note the unique factual development of this case in that MetLife made an offer almost immediately after being sued, and this offer lead to the settlement of all underlying claims in the lawsuit. R., pp. 45-48; *see also* R., pp. 54-58 The Hollands would also ask the Court to note that they attempted to work with MetLife to resolve the fees issue short of court involvement and set the motion for hearing after they were told the issue could only be resolved by the court. R., pp. 63-63, ¶ 14; *see also* R., pp. 380-81

On July 20, 2010, the district court entered an opinion and order which enforced the agreement, denied the motion for attorney's fees, and dismissed the case. R., pp. 385-416 On August 2, 2010, the Hollands filed a motion for reconsideration. R., pp. 465-546 The court heard oral argument on the motion to reconsider on September 29, 2010. Tr., p. 44

On October 6, 2010, the court issued its opinion and order denying reconsideration and entered a final judgment in favor of MetLife. R., pp. 668-94 The court's decision was based upon three facts: 1) the Hollands' claims constituted a "moving target," 2) there was no case law cited to support the argument that the time frames under the policies could be aggregated, and finally 3) that it was MetLife or Paukert who came up with the coverage theory. R., p. 693

On October 12, 2010, the Hollands timely appealed. R., pp. 700-704

c. **Statement of Facts.**

On October 25, 2009, Benjamin Charles Holland ("Ben") tragically passed away due to a violent auto accident, when an under-insured motorist fell asleep at the wheel, left the road, and collided with a tree at a high rate of speed. R., p 10, ¶ 6, *see also* R., p. 158

On or about November 10, 2009, the Hollands, through their attorney Kinzo Mihara ("Mihara"), tendered notice of claim and proof of loss under Ben's UIM auto policy to MetLife. *Id.*, ¶¶ 9, 10, and 16; *see also* R., pp. 466-67, ¶ 7 The proof of loss was verbal, and Mihara provided MetLife a copy of the police report for the accident, which contained all of the accident's particulars. Tr., p. 76, l. 9-22; *see also* R. pp. 466-67, ¶ 7 This claim was issued claim number FRD 373130 (the "initial" claim). R., p. 91, ¶ 3 The same day, MetLife agent, Daneice

Davis, ("Davis") sent Mihara a letter which requested further "pertinent" information she needed to process the claim. *Id.*; *see also* R., pp. 148-49; *see also* R., p. 91, ¶ 3

On November 17th, 2009, Mihara provided documentation in response to Davis' request. R., p. 133, ¶ 7; *see also* R, pp. 151-178 On December 1, 2009, Mihara supplemented his response with an Allstate letter tendering the limits of the tortfeasor's auto policy. R., pp. 180-88

On December 7, 2009, Davis and Mihara had a telephone conversation where Davis told Mihara that she believed the "initial" claim could be concluded with MetLife paying "policy limits." R., p. 91, ¶ 3 Mihara told Davis that the matter could not be concluded as the Hollands were making "additional" claims under other policies. *Id.* The other policies were Greg and Kathy Hollands' automobile policy and a motorcycle policy. R., p. 92, ¶ 6; *see also* R, p. 499; *see also* R., p. 220 The motorcycle policy covered Ben's motorcycle and listed him as the only driver. *Id.* Both policies had significantly higher UIM coverage limits than Ben's auto policy but which were also governed by MetLife policy MPL 6010-000, the same policy that governed the "initial claim." R., pp. 497-502 The two "additional" claims were assigned claim numbers FRD 408440 and FRD 408370. R., p. 92, ¶ 6 Ben was listed as a household driver for both policies, and again, was the motorcycle policy's only listed driver. R., p. 494

On January 8, 2010, Davis determined she could not affirm or deny coverage and retained Kathleen Paukert ("Paukert"), to provide a coverage opinion.[2] R., p. 92, ¶ 5 Importantly,

[2] MetLife may argue that there was agreement that Davis would not begin to review the "additional" claims until her return; however, the argument is immaterial, the argument has no impact on the timing of payment for the "initial" claim, nor does it explain why other MetLife personnel were working the claims in her absence. R., pp. 639-44 January 8th is a mere two days after Davis returned from vacation, and one day after Davis received Mihara's letter demanding a coverage decision. R., pp. 91-92, ¶¶¶ 4, 5, 6 The claim file entry of December 9, 2009 states: "Daneice

Davis had enough documentation to send Paukert material for her to produce a coverage opinion for the "additional" claims. *Id.* As of January 8, 2010, MetLife requested no further information, documentation, or explanation of the loss or the claims.

On January 14, 2010, Paukert agreed that MetLife would make a coverage decision by January 22, 2010. R., p. 192 The same day, Mihara sent Paukert a 17 page memo via email that memorialized that he would not to take action against MetLife until after January 22, 2010, and which detailed several theories of coverage.[3] R., p. 60, ¶ 5 The subject line of the email read: "Holland v. MetLife (Unfiled)."[4] Mihara copied Davis via fax. *Id.* R., p. 211 The memo requested payment of undisputed amounts. R., p.192 Mihara requested payment of an hourly fee in consideration for agreeing not to take action against MetLife. R., pp. 190-91 Paukert quickly denied Mihara's fee request.[5] R., p. 211

January 22, 2010 came and went without a coverage decision or payment for either the "initial" or "additional" claims.[6] R., p. 11, ¶¶ 7-8 Importantly, on January 22, 2010, Paukert requested more time in order to come to a coverage decision. R., p. 392 Mihara denied her

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is ordering certified copies... and referring to defense counsel to review to assist in determining coverage" R., p. 510 The one month delay in referral to defense counsel is unexplained.

[3] MetLife's claim file acknowledges that there could be coverage under at least one theory advocated by Mihara. R., p. 643 ("is a "resident relative" of the parents' policies by virtues of having some factors related to a residence...") In essence, Mihara's coverage analysis determined that because Ben was listed as a household driver, he was a resident of the Hollands' household and therefore entitled to coverage under one or both of the other two policies by virtue of being a "resident relative" – Ben was also a named insured under the motorcycle policy by virtue of being the lone driver named in the declarations, and by paying the policy's premiums. R., pp. 202-04; *see also* R., p. 206 MetLife has claimed privilege and withheld its theories. R., p. 636

[4] The subject line of the emails Mihara sent to Paukert should clear any dispute as to what the Hollands' intentions were if no coverage answer were received by January 22, 2010.

[5] "...I do not think Met has taken an unreasonable amount of time looking at this issue. Also, I have no idea why you think they would pay your attorney fees." R., p. 211

[6] The foregoing is despite the fact that the Hollands had, in writing, asked for payments of amounts not in dispute on January 14, 2010. R., p. 192 ("please forward the amounts uncontested to my care at the address above...")

request. *Id.* On January 25, 2010, Paukert stated that it was her "final opinion" that the policies did not provide coverage. R., pp. 61-62, ¶ 8 It became apparent that the Hollands could soon become defendants in a declaratory judgment action. Tr., p. 23, l. 11-14; *see also* R., p. 118-19 Interestingly, MetLife, intentionally chose not to bring such an action. Tr., p. 23, l. 11-14

On January 26, 2010, the Hollands promptly filed suit. R., pp. 8-15 The Hollands claimed entitlement to statutory attorney's fees. *Id.* The Hollands made several averments of fact to support their entitlement. *Id.* On January 29, 2010, Davis, was told by another MetLife agent that MetLife had been sued. R., p. 92, ¶ 8 Davis requested Paukert check on this fact. *Id.* Paukert affirms that she did follow up, but that *her assistant* was unable to find the lawsuit. R., p. 98, ¶ 25 Neither Davis nor Paukert bothered to ask Mihara about the lawsuit. R., p. 399 Incredibly, on January 29, 2010, Paukert and MetLife realized that MetLife had UIM exposure under the motorcycle policy and Ben's auto policy.[7] R., p. 517 The claim file states:

> reviewed (sic) this matter once again. I concur with DC Paukert that we have a $150k new UIM exposure under the mtorocyle (sic) file and am willing to tender it at this time. this (sic) is in addition to the $50k new UIM exposure under Ben's own Auto policy. I do not believe there is any coverage under the parent's Auto policy, but if there was, the payout would still be capped to the higher limit and it would not create an additional liability for us.

Id. (emphasis added) On February 2, 2010, Paukert made Mihara the following offer via email:

> This letter confirms Met is offering your client the limits of the **motorcycle policy** minus the offset. It is my understanding, the **Motorcycle policy** is $250,000.00 and you received $50,000.00 from the tortfeasor. Therefore, Mets offer is $200,000.00. Obviously, we will require a full release.

[7] *C.f.* "Were the Defendants in this matter seeking to settle with the Plaintiffs in response to the lawsuit, there might be an argument that attorney's fees are applicable." R., p. 363; *see also* Tr., p. 28, l. 14 to l. 18 Further, Paukert had finished her "coverage opinion" on January 27, 2010 – thus, the notice of suit on January 29, 2010 impacted MetLife's coverage opinion for new UIM exposure. R., p. 97, ¶ 4; *see also* R., p. 517; *see also* R., p. 636

R., pp.67-68 (**emphasis added**) The offer was for the two disputed "additional" claims. R., p. ¶¶ 26, 27 The offer was silent as to attorney's fees. R., pp. 67-68 The email did not attach a draft release or set forth whether the term "full release" envisioned release of any legal fees. *Id.* Upon receipt of the offer, Mihara made Paukert aware the Hollands had recently entered a fee agreement with him. R., p. 62, ¶ 9 Paukert admits that Mihara could have also advised her on February 2, 2010 that he had filed a lawsuit. R., p. 63, ¶ 12 Paukert did not thereafter set forth that her offer was inclusive of fees. The next day, on February 3, 2010, Mihara sent Paukert an acceptance: "Please let this letter confirm that my clients accept MetLife's offer of $200,000. My clients will sign a full release of their claims against MetLife..." R., pp. 62-63, ¶ 11 The two attorneys immediately began to dispute whether the agreement was inclusive of fees. *Id.*, at ¶ 12; *see also* R., pp. R., p. 224-25 Despite the dispute, MetLife agreed to pay the $200,000. R., p. 224

On February 9, 2010, MetLife issued two checks in the amounts of $150,000 and $50,000, for claims FRD 408370 (motorcycle policy) and FRD 370130 (Ben's auto policy), respectively. R., pp. 235-36 Each check contained a notation that the checks were for, "PAYMENT OF BENEFITS UNDER UNDERINSURED MOTORIST COVERAGE FOR LOSS OF 10-25-09." *Id.* (emphasis added) The same day, Mihara filed the Hollands' motion seeking attorney's fees, supported by a memorandum that incorporated his affidavit. R., pp. 16-41

On February 12, 2010, the two checks dated February 9, 2010 were delivered to Mihara along with a draft release. R., p. 230 MetLife retained another attorney, William Schroeder ("Schroeder"), for the defense of the lawsuit. R., pp. 238-58; *see also* R., pp. 376-77 While not in

agreement on each other's release language, Schroeder and Mihara quickly realized that the remaining issue could be that of fees. R., p. 258 On February 16, 2010, Schroeder asked that Mihara not disburse the checks until both attorneys had an opportunity to draft a "mutually-agreeable," "full release," which they were later able to do.[8] R., p. 258; *see also* R., pp. 54-56

The release expressly reserved the issue of the Hollands' entitlement to attorney's fees. *Id.* Mihara continuously expressed interest in resolving the issue short of court involvement. R., p. 64, ¶ 15; *see also* R., pp. 227-28; *see also* R., pp. 238-39; *see also* R., pp. 376-77 In addition to recovering $200,000 ($150,000 on the motorcycle policy and $50,000 on Ben's auto policy), the Hollands recovered a complete subrogation waiver from MetLife. R., pp. 54-56 On February 23, 2010, Schroeder authorized distribution of the checks once the release was signed. R., p. 241

On March 1, 2010, Schroeder entered an appearance. R., p. 243; *see also* R., pp. 42-43 On March 2, 2010, Schroeder filed the parties' Rule 41(a)(1)(ii) stipulated motion. *Id.* The stipulation was for dismissal with prejudice while reserving the issue of fees. *Id.*, at pp. 45-47 The stipulation was based upon the fact that, "...the parties have fully resolved all claims in this matter except for the pending motion for attorney fees. . ." *Id.* The court signed the stipulated order, and the clerk entered it the next day. *Id.* Mihara agreed to allow Schroeder until March 15, 2010 to conduct legal research.[9] R., p. 243 On March 16, 2010, Schroeder advised Mihara that

[8] At oral argument, Schroeder revealed that MetLife's true purpose in obtaining the release was to protect itself from potential liability for bad faith. Tr., p. 21, l. 7 to l. 23

[9] It is important to note that Schroeder requested time to do research as the theory that fees were precluded by the earlier February 2 and 3, 2010 emails was not developed until after the parties' attorneys had jointly drafted and agreed upon a release and signed a joint motion and stipulated order. It is also important to note that the parties had resolved the issue of what the term "full release" meant through the negotiation and drafting of the settlement release attached to MetLife's answer. R., p. 258

the fee issue could only be resolved by the court. R., p. 381 On April 6, 2010, Mihara told Schroeder that he had waived all objections by not timely objecting. R., p. 384

Six days later, on April 12, 2010, MetLife filed its answer. R., pp. 49-58 The answer did not deny paragraphs 1 to 33 of the Hollands' complaint or even contain a general denial. *Id.* The parties' jointly negotiated and drafted release was attached to the answer. *Id.*

Oral argument was held on June 2, 2010. Tr., p. 3 Schroeder addressed I.R.C.P. 54, and despite having signed a Rule 41(a)(1)(ii) stipulation, he asserted that there had never been a judgment entered. Tr., p. 28, l. 19 to p. 30, l. 6

On July 20, 2010, the district court issued its initial memorandum decision and order. R., pp. 385-416 In essence, the court held that it would enforce the settlement agreement because, in its view, the Hollands provided "proof of loss," but failed to provide sufficient "proof of loss." R., p. 412 The Hollands moved the court to reconsider. R, pp. 465-546 The Hollands asked the court to rule on their Rule 54 argument.[10] R., p. 538; *see also* R., p. 611

In the memorandum and affidavit in support of their motion for the court to reconsider, the Hollands pointed out the voluminous amount of information they provided to MetLife in support of their claims. *Id.* The Hollands also provided the declarations pages of the policies and a copy of the policy terms that governed all the claims made. R., pp. 469-502

On October 6, 2010, the district court issued its memorandum decision and order denying reconsideration. R., pp. 668-94 The court held that its decision was discretionary. R., p. 674 Based on the information provided, the court retreated from its initial ruling and held that this

[10] The court intentionally did not rule on the argument before it. R., p. 689

was not a "proof of loss" case, but was now a "coverage" case, and the Hollands could not recover because the coverage theory had been created by MetLife or Paukert. R., pp. 676-683 The Hollands timely appealed. R., pp. 700-704

IV. ISSUES PRESENTED ON APPEAL

(a) Did the district court err when it held that the Hollands had failed to prove entitlement to attorney's fees pursuant to I.C. § 41-1839(1) and/or (2)?

(b) Did the district court err by granting MetLife's motion to enforce the settlement agreement?

(c) Did the district court err when it held that MetLife had not waived objection to the Hollands' claim to attorney's fees pursuant to I.R.C.P. 54(e)(6)?

(d) Did the district court err when it denied the Hollands summary judgment and held that the factual allegations set forth in the complaint were not admitted pursuant to I.R.C.P. 8(d)?

(e) Whether the Hollands are entitled to attorney's fees pursuant to I.C. § 41-1839(1) and/or (2) and the I.A.R. for this appeal?

V. STANDARD OF REVIEW

Interpreting an attorney-fee statute and whether it applies to the facts of a specific case are issues of law that an appellate court freely reviews. *Martin v. State Farm Mut. Auto. Ins. Co.*, 138 Idaho 244, 246, 61 P.3d 601, 603 (2002) In construing a statute, a court may examine the language used, the reasonableness of proposed interpretations, and the policy behind it. *Id.* On appeal, a reviewing court is not bound by legal conclusions of a lower court and is free to draw its own conclusions from the facts presented. *Mutual of Enumclaw v. Box*, 127 Idaho 851, 852, 908 P.2d 153, 154 (1995)

Interpretation of a contract, and whether a contract is ambiguous is also an issue of law. *Cannon v. Perry*, 144 Idaho 728, 731, 170 P.3d 393, 396 (2007)

Likewise, the question of compliance with the rules of procedure is one of law. *Harney v. Weatherby*, 116 Idaho 904, 906-07, 781 P.2d 241, 243-44 (Ct.App.1989)

Summary judgment is appropriate when there is no dispute of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); see also *Callies v. O'Neal*, 147 Idaho 841, 216 P.3d 130 (2009) A mere scintilla of evidence or slight doubt of the facts is not sufficient to create an issue. *Id.* In an appeal from a summary judgment decision, the appellate standard of review is the same standard used by the lower court. *Id.* In any case which will be tried to the court, a trial judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, but instead, can arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Lawrence v. Hutchinson,* 146 Idaho 892, 897, 204 P.3d 532, 537 (Ct. App. 2009) An appeals court freely reviews inferences drawn by a lower court to determine whether the record reasonably supports those inferences. *Id.* If the evidence reveals no disputes of material fact, what remains is a question of law. *Cordova v. Bonneville Co. Joint Sch. Dis. No. 93*, 144 Idaho 637, 639, 167 P.3d 774, 776 (2007) An appellate court freely reviews a lower court's resolution of whether a genuine issue of material fact exists and whether a party was entitled to judgment as a matter of law." *Callies*, supra, 216 P.3d at 135 If undisputed facts exist that lead to disposition as a matter of law, summary judgment is appropriate. *Id.*

Mere denials unaccompanied by admissible facts, and affidavits of counsel based upon hearsay rather than upon personal knowledge, are insufficient to raise genuine issues of material fact. *Camp v. Jiminez*, 107 Idaho 878, 882, 693 P.2d 1080, 1084 (Ct. App. 1984)

The decision to grant or deny a motion for reconsideration is discretionary. *Coeur d'Alene Mining Co. v. First Nat'l Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990) When considering a motion to reconsider, a court should take into account new facts or information that bear on the correctness of its prior order. *Id.* When a court's discretionary decision is reviewed on appeal, the appellate court conducts an inquiry to determine: (1) whether the court perceived the issue as one of discretion; (2) whether the court acted within the boundaries of its discretion, consistent with legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)

VI. ARGUMENT

(a) The district court erred to hold that the Hollands were not entitled to attorney's fees pursuant to I.C. § 41-1839(1) and/or (2).

1. The Hollands complied with I.C. § 41-1839(1) and are thus entitled to recover a reasonable attorney's fee.

The real issues in this case are what proof of loss is an insured Idahoan required to provide to an insurer under Idaho law, and whether there are any public policy implications?

The applicable statute reads:

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

I.C. § 41-1839(1)[11] (emphasis added) The starting point of statutory interpretation is the wording of the statute, and a court will give the statute's language its plain, obvious and rational meaning. *Martin*, supra, at 246, 603 The legislature's use of the word "shall" denotes the statute's mandatory nature. *Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995)

The statute does not require an insured provide legal theory as part of a proof of loss. I.C. § 41-1839(1) Likewise, the 30 days is not tolled while a benevolent insurer pushes for more coverage and its attorneys struggle with the interpretation of its own policies. *Id.* There are no burden-shifting provisions in the statute. *Id.* There is no requirement to make a claim. *Id.* There is no requirement that the insurer have notice of the lawsuit. *Id.*

Before a plaintiff may recover fees under the statute, it must be shown that: (1) the insured provided proof of loss as required by the policy; and (2) the insurer failed to pay the amount justly due within 30 days after receiving proof of loss. *Martin*, supra at 247, 604 The purpose of I.C. § 41-1839 is to provide incentive for insurers to timely settle just claims, without the insured's need for an attorney's services. *Id.* at 247-48, 604-05 The statute merely provides compensation to prevent a recovery from being diminished by legal fees. *Id.*

The Supreme Court in *Brinkman* stated:

> The documentation is the "proof." The explanation of physical and/or financial injury is the "loss." The insurer will determine its liability with the knowledge that it must be fair and accurate or suffer the consequences.

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[11] I.C. § 41-1839, was amended in 2010 by the Legislature to add that attorney's fees incurred in arbitration, prior to a lawsuit being filed, were recoverable. *See* H.B. 593: Minutes of House Judiciary, Rules, and Administration Committee on February 25, 2010. (Representative Luker's comments); *see also* Statement of Purpose

Brinkman v. Aid Ins. Co., 115 Idaho 346, 350-51, 766 P.2d 1227, 1230-31 (1988) Further, if an insurer does not request a specific "proof of loss," the insured is under no duty to provide one. *Anderson v. Farmers Ins. Co. of Idaho*, 130 Idaho 755, 758, 947 P.2d 1003, 1006 (1997) (citing *Brinkman*) In fact, it is the insurer's duty to affirm or deny "coverage," and the failure to do so within a reasonable time is an unfair claim settlement practice or possibly even an act of bad faith. I.C. § 41-1329(5); see also *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 98, 730 P.2d 1014, 2018 (1986) ("The insurer evaluates the claim, determines whether it falls within the coverage provided...") The insured-insurer relationship is one "characterized by elements of public interest, adhesion and fiduciary responsibility." *White*, supra at 99 (quotes in original)

The Supreme Court has explained that a proof of loss need not prove damages with precision nor conclusively prove the insurer's liability for the loss. *Boel v. Stewart Title Guar. Co.*, 137 Idaho 9, 14, 43 P.3d 768, 773 (2002) In *Boel*, a single explanatory letter was enough proof of loss to give the insurer an opportunity to investigate and determine its liability. *Id.*

If an insured has more than one policy with the company, satisfactory notice or proofs given with respect to one policy constitute compliance with the requirement of notice or proofs as to the others. C.J.S., INSURANCE § 1787 (2007) Likewise, an insurer may not object to a proof of loss for the first time after a complaint has been filed. *Id.*

The material facts related to this issue are: 1) what proof of loss does the policy require, 2) what information was provided, 3) when was the information provided, 4) when did MetLife pay, and 5) what standard and reasoning did the court apply to deny the Hollands' motions?

The policy in this case provides, in relation to "proof of loss:"

> You or someone on your behalf must notify us as soon as possible of any accident or loss. The notification should include as many details as possible, including the names and addresses of drivers, injured persons and witnesses, the time, place, and circumstances of the accident or loss. We may require it in writing.

R., p. 490 The policy language does not require a legal "theory of coverage." R., p. 490 Thus, under the language of *Anderson*, supra, the Hollands had no duty to provide one.

Oral proof of loss of Ben's death and other necessary information was given to MetLife on or about November 10, 2009. R, p. 10, ¶¶ 9, 10; *see also* R., pp. 466-67, ¶ 7; *see also* R., p. 91, ¶ 3 The oral proof of loss was followed with a copy of the accident's police report. *Id.*; *see also* Tr., p. 76, l. 15 to l. 20 MetLife asked for further "pertinent" information, in writing, the same day. R., p. 91, ¶ 3; *see also* R., pp. 148-49 MetLife's request recognizes the accident, the date of loss, and the fact of Ben's death. R., pp. 148-49 Davis provided Mihara with a form dated November 10, 2009 related to Ben's salary. R., p. 144; *see also* R., p. 161; *see also* R., p. 166 It is undisputed that Mihara, gave Davis the information that she asked for on November 17, 2009. R., p. 151-78 Mihara's letter set forth the date and time of death, the name of the negligent party (the driver and also an injured person and witness), and the negligent party's insurance carrier. R., pp. 153-54 The enclosed death certificate noted the location, date, time, and circumstances of the death (as a result of a "once vehicle crash into a tree"), and that the cause of death was severe head, neck, and chest trauma. R., p. 158 The accident was extremely violent and Ben's death occurred almost immediately; hence there was no medical treatment or any bills outstanding. R., p. 153 MetLife's employment form was completed and returned. R., p. 166 This was enough information and documentation that Davis was ready to discuss tender of the limits of the "initial

claim" policy when the "additional claims" were made on December 7, 2009. R., p. 91, ¶ 3 Further, Davis had enough material to request a coverage opinion from Paukert for the "additional" claims on January 8, 2010. R., p. 92, ¶¶ 5 and 6

It is important to note that MetLife has not alleged the Hollands failed to provide any information requested, or otherwise failed to comply with any of the applicable policies' provisions. The court, likewise, discussed the policy language related to proof of loss in its decisions but could not cite to a single policy provision that the Hollands failed to comply with. Upon being faced with the policy in the record, MetLife's argument was, incredibly, that the policy's provisions did not control and that the information required was merely preliminary:

> The various provisions noted by Plaintiffs ask for information, including, but not limited to: (a) details of the accident and/or injuries, or death, (b) names and addresses of drivers, (c) injured persons and witnesses, and (d) circumstances of the accident... Thus, the foregoing provisions ask for notice of the incident, preliminary documents, and information, while at the same time reserving various rights, including but not limited to: (a) the right to review medical records, reports, and expenses, (b) the right to have the insurer's physicians examine the insured, and importantly, (c) the right to require Plaintiffs to "submit to and provide all details concerning loss information through written or recorded statements or examinations under oath as often as [MetLife] reasonably may require" (Ibid.)
>
> Ultimately, the policy provisions cited by Plaintiffs provide for preliminary documents and information needed by the insurer, but at the same time recognize that further documentation, information, and details may be necessary...

R., pp. 559-60 (emphasis added)[12] MetLife's argument discounts the fact that it exercised its reserved rights through Davis' November 10, 2009 letter requesting the death certificate, funeral bills, wage information, tax records, adverse carrier's tender of policy limits, etc. R., pp. 148-49

[12] Please note that it was the Hollands who put policy MPL 6010-000 in the record. R., p. 466, ¶ 3 MetLife did not put the policy in the record because the Hollands had complied with all of its terms. MetLife's argument cited above

The only evidence that MetLife has marshaled to oppose the Hollands' contention that they supplied adequate proof of loss in November, 2009 are the affidavits of Paukert and Davis. R., pp. 59-66; *see also* R., pp. 90-94; *see also* R., pp. 95-99; *see also* R., pp. 128-31 Davis' affidavits do not state the Hollands failed provide adequate proof of loss. R., p. 91, ¶ 3 Paukert admits that she was not retained until January 8, 2010, and therefore, she could not have first-hand knowledge as to the events of November of 2009. R., p. 60, ¶ 3 None of the affidavits show there is dispute as to the adequacy of information given in November, 2009. Therefore, there is no dispute of material fact, and this is an issue of law.

In this case, the proof of loss undisputedly sufficient for the "initial" claim should have sufficed for the "additional" claims as well. C.J.S. INSURANCE § 1787 (2007) All three claims were governed by the same policy language and were based upon the same loss. R., p. 497-502 (policy MPL 6010-000 governed – for policy nos. 1193308780 (Greg and Kathy's auto policy), 1193308771 (Ben's motorcycle policy), and 0234338980 (Ben's auto policy)) Intuitively, the same proof of loss should apply to all claims. Again, the "initial claim" was made on November 10, 2009, and "additional claims" were made December 7, 2009. R., p. 91, ¶ 3

In this case, the district court's July and October, 2010 memorandum opinions and orders set forth the standard that the court used to rule on the motions before it. The court wrote:

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is contrary to Idaho law in that an insurer cannot delay payment of a claim based upon an alleged need for further documentation that would otherwise contain the same information. I.C. § 41-1329(12) MetLife has still not expounded upon what Mihara should have provided or how such information otherwise affected its coverage theory. An insurer should timely notify the insured as to what the proper proof of loss should be so that the insured could have time to correct it. C.J.S. INSURANCE § 1779 (2007) Likewise, an insurer may not claim that a proof of loss is insufficient for the first time after a complaint has been filed. *Id.* Further, at no point prior to the lawsuit did MetLife allege that the "proof of loss" was deficient.

> The district court's decision to award attorney's fees is a discretionary decision, subject to the abuse of discretion standard of review. *Bailey v. Sanford...*

R., p. 390; *see also* R., p. 674 (emphasis added) Thus, the court erred from the very outset of its analysis and did not recognize that the application of the statute was mandatory.[13]

In its initial memorandum decision and order, the court set forth three reasons why it refused to award the Hollands statutory attorney's fees: first, there were separate claims made under separate policies at separate times (moving target) (R., p. 397), second, Mihara provided no law to support that the time from November to December, 2009 should be aggregated with the time from January to February, 2010 (because of the separate claims on separate policies) (R., p. 398), and lastly, if Paukert came up with the theory of coverage, there was no "unreasonable" refusal to pay by MetLife and the Hollands would have therefore failed to meet the "proof of loss" burden of *Brinkman* and *Greenough* (*Id.*; see also R., p. 415).[14]

In its decision and order denying the Hollands' motion for reconsideration, the court switched the basis of its reasoning for denying the Hollands relief under the statute from inadequate "proof of loss" to a "coverage" issue. R., p. 460, *c.f.* R., pp. 680-81 Apparently and incredibly, the court's "coverage" approach is that if an insurer denies coverage, or otherwise does not affirm coverage, the burden shifts back to the insured to come up with another coverage

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[13] Again, the court's decision to grant the motion to enforce the "settlement," and dismiss the attorney's fees, was not based upon contractual construction principles, or upon any factor enumerated by statute, case law, but rather that: "[t]he following had everything to do with the Court's decision: 1) moving target by Hollands, 2) no case law supporting aggregating the time periods for the three policies and 3) theory of additional coverage was arrived at by Pauker (sic) or at least MetLife and not by Mihara on behalf of Hollands." R., p. 693

[14] The court was bound to come to its conclusions from uncontroverted evidentiary facts. *Lawrence v. Hutchinson,* supra, 897, 537 The fact of who came up with the theory of recovery is irrelevant as the parties settled the coverage issue prior to litigating the fees issue, and the issue of which attorney came up with the correct theory is clearly disputed. R., pp. 54-56 Therefore, the court's findings are inconsistent with applicable legal standards.

theory the insurer would agree with before the thirty days would begin to run. Tr. P. 71, l. 4 to P. 72, l. 6 The court stated at oral argument on reconsideration:

> THE COURT: They told you that their initial assessment had indicated that there was no coverage. **It's up to you under this – under the statute that shifts the burden back and forth to come up with a theory** –
> MR. MIHARA: I –
> THE COURT: **to start the thirty days running**. Proof of loss is what starts the thirty days running, and they're saying that you identified these policies. That's great. **They put the ball back in your court**, **saying we're not seeing the theory that would allow for this**, **the theory you're advocating**, but they went to work and tried to find some other theory. I mean if you look at 41-1839 and what it takes to start the clock ticking and it's – it's on the insured to submit the proof of loss. **Since they're the ones that were creative in coming up with the theory that would allow for recovery, it seems to me arguably the thirty days never began to run**.
> MR. MIHARA: I would submit the opposite, Your Honor. I would submit under case law that **liability and coverage are synonymous**, Your Honor. If there's no coverage, there's no liability.

Id. (**emphasis added**) The court wrote in its opinion and order denying reconsideration:

> . . . **this is not a "lack of information case"**, **this is not a "proof of loss" case**, **this is a coverage case**. And it is not facts or information or funeral bills that create any lack of information, **it is Hollands' attorney Mihara not coming up with the theory of coverage** under the policies, the interpretation of the policies that would lead to greater recovery for his client... it was Paukert who did this... or at least it was **MetLife that came up with these theories**.

R., pp. 673-74 (**emphasis added**)[15] In addition, despite recognizing undisputed facts that adequate proof of loss was provided for the "initial" claim, and that the claim was not paid within 30 days, the court still refused to award fees. R., p. 685-86 Thus, the court did not act in accordance with applicable legal standards by failing to comply with the statute's mandate.

[15] *C.f.* The July, 2010 opinion read: "This Court is simply unable to find that Hollands have met their burden... because Hollands submitted "proof of loss" but not a proof of loss which was "sufficient... to provide the insurer with enough information to allow... a reasonable opportunity to investigate and determine its liability."" R., p. 460

The court did not cite any legal authority for how the alleged fact that Paukert came up with a coverage theory, as opposed to a theory offered by Mihara, impacted its analysis.[16] Likewise, the court failed to cite to any case law or other legal authority that would imply that its "multiple claims, multiple policies" factor or that legal argument must be made for the aggregation of time had any rational relationship to the statute in question. Thus, the court improperly required an insured to conclusively prove liability, prior to filing a lawsuit.[17]

At oral argument, Schroeder argued that "proof of loss" in coverage disputes, under Idaho law, equates to "proof of liability:"

> In the setting where you have coverage there's no question as to what it means. It means proof of damages because coverage is accepted. In a coverage dispute, proof of loss really equates to proof of liability, the fact that there's liability under the policy to pay anything.

Tr., p. 24, l. 6-11 Incredibly, Schroeder stated that he could not find a case discussing "proof of loss" in a "coverage" matter and that this issue, in this case, was an issue of first impression. Tr., p. 21, l.24 to p. 22, l. 16 MetLife's argument is relevant to *Brinkman* in that it is the insurer's duty to determine its "liability," and must do so with the knowledge that it must be fair and accurate or suffer the consequences. *Brinkman*, 766 P.2d at 1231 Both the district court's reasoning and Schroeder's arguments are directly at odds with U.S. Bankruptcy Judge Pappas' rejection of the idea that an insurer could determine one of I.C. § 41-1839(1)'s requirements:

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[16] The Hollands' attorney's theories of coverage are in the record. R., pp. 192-208 The claim file reflects that MetLife thought at least one of Mihara's theories was tenable. R., p. 643 The issue of who came up with the theory of coverage is really irrelevant as MetLife concedes that there was coverage for at least one of the "additional" claims. R., p. 93; *see also* R., p. 98, ¶ 27 MetLife's actual theories are withheld under claim of privilege. R., p. 636

[17] *Boel* sets forth explicitly that an insured need not conclusively establish the insurer's liability (i.e., coverage) with or through its proof of loss. *Boel*, supra, at 14, 773 Because none of the factors the court cited have any rational relationship to the statute in question or any case law, the court failed to come to its decision by an exercise of reason.

> Accepting Defendant's interpretation would basically render Idaho Code § 41-1839(1) a toothless statutory tiger. Under Defendant's view, an insurer could simply decline to agree with its insured about the amount justly due, and then argue that lacking such an agreement, the statutory payment deadline did not operate. The Court declines to presume this sort of result was intended by the Idaho legislature in adopting Idaho Code § 41-1839(1).

In re Jones, 401 B.R. 456, 460 (Bankr. D. Idaho 2009)

The court's written opinions and Schroeder's statements also disregard the case of *Greenough* that has been so voluminously cited by both parties and the court.

Greenough was clearly a "proof of loss," "coverage" case. *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho 589, 593, 130 P.3d 1127, 1131 (2006) The only issue was whether Mr. Greenough was the driver, and hence, whether coverage applied. *Id.* The insurer demanded arbitration to determine the coverage issue. *Id.* Once the insurer determined that its theory of the case was incorrect, it tendered the policy's remaining limits. *Id.* Prior to the tender, the plaintiff filed suit. *Id.* In fact, the lone footnote to *Greenough* cites I.C. 18-1329 for the proposition that it is the insurer's duty to investigate and determine its liability (i.e., whether there is "coverage") when claims are made. *Id.* at FN1 The insured in *Greenough* was properly awarded attorney's fees on summary judgment pursuant to I.C. § 41-1839(1). *Id.* The only issue in *Greenough* was the date upon which interest ran.[18] *Id.* Like *Greenough*, the sole issue in *Martin* was coverage - whether the insurer had any "liability" to its insured, i.e., liability to pay anything due to the insured filing the complaint late. *Martin*, supra, at 247 Again, the insured in Martin was properly awarded attorney's fees upon appeal of the lower court's denial of fees. *Id.*

[18] Further, an insurer who fails to defend, or denies a claim, based upon a faulty theory of coverage is liable to its insureds. See *Greenough*; see also *Pendlebury*, infra, at 470 The *Greenough* insurer didn't contest the proof of loss on the coverage because, like in this case, coverage issue was settled via tender. *Greenough*, supra at 592

In this case, MetLife has argued, and the court has held, because MetLife eventually did what it had a duty to do, a duty to determine whether coverage applies and timely pay claims, it escapes liability for fees. This result is completely contrary to the purpose of the statute.

To rule that an insured is required to produce a legal theory of recovery under a policy's terms would be to undo the very purpose and public policy of the statute. For instance, if a lay Idahoan were to make a claim under a policy; should that person be required or forced by law to come up with an applicable legal theory of coverage? If a lay person were to be required to do so, that person would likely retain an attorney to help come up with an applicable legal theory. If the insured were required to obtain counsel before the thirty day clock were to begin to run, then logically the attorney's fees incurred in coming up with the legal theory could not be recovered as the thirty day clock would not have started to run. Any fees incurred would likely be paid out of the eventual recovery, contrary to the purpose of the statute.

To require that legal theory be supplied in support of a claim also would pre-suppose the insured would have knowledge of all applicable policies. In this case, we have an instance whereby a policy was obtained and paid for solely by a decedent. R., p. 644; *see also* R., pp. 511-15 If the decedent's heirs did not know about the policy, but otherwise provided proper proof of loss to the insurer, the insurer should be required to pay on all applicable policies.[19]

If this Court were to let this decision were to stand, it would have an adverse impact upon future Idahoan insureds. The decision would be controlling precedent in the First Judicial

[19] As stated above, where an insured has more than one policy with the insurer, notice or proofs given as to one policy, if otherwise satisfactory, constitute compliance with the requirement of notice or proofs as to the others. C.J.S., INSURANCE § 1787 (2007) There is no requirement that an insured make a claim. I.C. §41-1839 (1)

District, and could be cited as persuasive authority in other Judicial Districts. This Court cannot let insurers fail to pay past 30 days and require insureds bear the burden of legal fees they incur out of insurance proceeds they should have received within 30 days of providing proof of loss. If the Court were to uphold the court's decision, insurers would be able to dodge liability for attorney's fees by explicitly inserting provisions requiring legal theory in their policies.

If the court's decision were to stand, the decision would effectively do away with the work product doctrine and require that otherwise protected theory be divulged to the insurer at least 30 days before litigation. This would put insureds on an unequal footing with insurers as insurers would have an extra 30 days, at least, to prepare opposition to their insureds' theories.

In conclusion, because application of the statute is mandatory but was decided under a discretionary standard, the district court erred and applied an incorrect legal standard both on summary judgment and on reconsideration. Further, because the information and documentation, and the dates that they were provided to MetLife in November of 2009 are undisputed, application of the law to those facts is a matter of law that this Court freely reviews.

As a matter of law, the Hollands would submit that they complied with I.C. § 41-1839(1) and MetLife has failed to produce any admissible evidence to contradict the averments that the Hollands provided proper proof of loss prior to 30 days from when they were paid.

2. MetLife could have avoided liability by complying with I.C. § 41-1839(2).

The issue is whether MetLife could have avoided attorney's fees by simply availing itself to the safeguard built into the statute?

The applicable statute states:

> In any such action, if it is alleged that before the commencement thereof, a tender of the full amount justly due was made to the person entitled thereto, and such amount is thereupon deposited in the court, and if the allegation is found to be true, or if it is determined in such action that no amount is justly due, then no such attorney's fees may be recovered.

I.C. § 41-1839(2) The Supreme Court in *Martin*, supra, interpreted sub-section two:

> The proper focus in this case is that a claim submitted to the insurer by its insured should be timely resolved. Under the statute, the insurance company has thirty days to tender an "amount justly due." The thirty days is not delayed or extended while the insurer invokes the right to arbitration under the insurance contract. The insurer should respond by tender of an amount within thirty days... But if the insurance company makes no tender within thirty days, or makes a tender that is substantially less than the arbitrators' eventual award, the insurance company is liable for a reasonable amount of the insured's attorney fees, as compensation to make the insured whole. *Halliday v. Farmers Ins. Exchange*, 89 Idaho 293, 404 P.2d 634 (1965). The purpose of the statute is to cause the insurance company to timely make a reasonable offer and is not dependent on the arbitrators' eventual award. The insurance company acts at its peril in taking the risk not to tender an "amount justly due" but, instead, await the arbitration determination...

Martin, supra, at 248 (emphasis added) The Supreme Court in *Anderson*, supra, stated:

> **Even in a disputed claim**, however, **the insurer must tender to the insured, or into court**, the amount it feels is justly due. I.C. § 41-1839(2). Thereafter, "[s]hould the insured fail to recover a sum in excess of the tender, then and in that event attorney fees are not assessable." *Halliday v. Farmers Ins. Exch.*, 89 Idaho 293, 301, 404 P.2d 634, 639 (1965). In this case, there was no tender at all.

Anderson, supra, at 758 (over-ruled on other grounds) (**emphasis added**)

In *Pendlebury*, supra, the Supreme Court held that an award under I.C. § 41-1839(2) was mandatory unless it is alleged that before lawsuit, the insurer tendered the full amount justly due into the court. *Pendlebury v. Western Cas. & Sur. Co.*, 89 Idaho 456, 465, 406 P.2d 129, 138 (1965)

The only material facts related to this issue are 1) whether MetLife paid within 30 days of receiving proof of loss, and 2) whether MetLife paid any amount into court.

In this case, MetLife made no tender prior the lawsuit and has still evaded paying fees. MetLife concedes at the time the lawsuit was filed, coverage and liability were at issue for the "additional" claims made in December of 2009. R., p. 113; *see also* R., p. 315 MetLife admits that it failed to tender the amount recovered, at any time prior to the lawsuit. R., p. 249 (RFA No. 9) Likewise, there is no evidence that MetLife tendered any amount into the court.

If this Court were to uphold the decision of the district court, insurers could fail to tender amounts justly due to their insureds, fail to tender any amount into the court, and wait until a lawsuit is filed before they pay – and evade statutory attorney's fees by simply alleging that coverage was found under their legal theory versus the insureds.[20] Insurers could also delay payment by continuously requesting more information in support of proofs of loss. Insurers with potential policy limits liability would be encouraged to delay payment, possibly up until the eve of trial, then make an offer of policy limits contingent upon the insureds waiving their entitlement to statutory fees. Thus, insurers could pocket the interest on large sums for years without paying amounts justly due, and use litigation risk to bolster their investments.

In sum, the Hollands are entitled to an award of statutory attorney's fees under I.C. § 41-1839(2) because there is no dispute that MetLife did not tender the amount justly due to the Hollands prior to the case, and absent agreement, into the court prior to this lawsuit.

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[20] Again, MetLife's theories are actually unknown as it has withheld them under a claim of privilege. R., p. 636 Coincidently, MetLife's final coverage theory was developed the day MetLife was told that it had been sued. *Id. C.f.* "Were the Defendants in this matter seeking to settle with the Plaintiffs in response to the lawsuit, there might be an argument that attorney's fees are applicable." R., p. 363; *see also* Tr., p. 28, l. 14 to l. 18

3. The Hollands clearly "prevailed" in the underlying litigation.

The issue is whether the district court erred to find that there was a dispute as to material fact on the issue of whether the Hollands prevailed within the meaning of the statute?

To prevail for the purposes of I.C. § 41-1839, an insured must simply recover an amount greater than that tendered by the insurer prior to suit. *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 711, 979 P.2d 107, 113 (1999) An insured can recover by virtue of a settlement. *Parsons v. Mutual of Enumclaw Ins. Co.*, 143 Idaho 743, 745, 152 P.3d 614, 616 (2007) An appellate court can hold that a party prevailed as a matter of law. *Daisy Manufacturing Co., Inc. v. Paintball Sports*, Inc., 134 Idaho 259, 262, 999 P.2d 914, 917 (Ct. App. 2000)

The material facts in relation to this issue are: 1) what amount did MetLife tender prior to the lawsuit, and 2) what did the Hollands recover?

In this case, MetLife conceded at oral argument that under *Parsons*, supra, a settlement could fix the amount due and owning. Tr., p. 22, l. 14 to l. 16 Likewise, MetLife admits that it did not tender any amount for UIM coverage prior to this lawsuit. R., p. 249 (RFA 9) Coverage for the "additional" claims was at issue at the time the lawsuit was filed. R., p. 113; *see also* R., p. 315 The "initial" claim, apparently, was not disputed. R., p. 113 When this suit was filed, UIM benefits for the "initial" claim had not been paid, despite a request in writing. R., p. 192 After filing, the Hollands recovered $200,000, plus a subrogation waiver from MetLife. R., p. 54-55

Because the Hollands had not been paid a penny for UIM coverage benefits before this lawsuit was filed, and because they recovered $200,000, plus a waiver of MetLife's subrogation interests, after filing, the Hollands have "prevailed," as a matter of law, in this litigation.

(b) The district court erred by dismissing the attorney's fees issue by virtue of granting MetLife's motion to enforce the settlement.

The issues are: 1) what was the language used by the parties in their agreements, 2) what was the parties' intent, and 3) whether there are there any public policy concerns?

It has long been held that, if possible, a court should stay within a contract's four corners to determine its meaning. *Burke Land & Livestock Co. v. Wells*, 7 Idaho 42, 57, 60 P. 87, 102 (1900) In construing agreements set forth in multiple documents, the Court of Appeals stated:

> It is well settled that the terms of a written contract may be varied, modified, waived, annulled, or wholly set aside by any subsequently executed contract, whether that contract be in writing or parol. [citations omitted]
> ....
> [T]he two instruments must be read and construed as one in order to determine the intent of the parties and what portion of the agreements are still enforceable. [Citations omitted.]

Olmstead v. Heidelberg Inn, Inc., 105 Idaho 774, 778-79, 673 P.2d 76, 80-81 (Ct. App. 1983) (emphasis added) An agreement's written terms are the best indication of the parties' intent. *Straub,* infra at 145 Idaho, at758 If parties enter into an agreement to end litigation, and the areement, or stipulation is silent as to the issue of attorney's fees, no waiver will be implied. *Id.* Further, the scope of any release would be limited to matters not contrary to public policy. 66 Am. Jur. 2d RELEASE § 3 (2011) Public policy is found in Idaho's insurance statutes. *Hill v. American Fam. Mut. Ins. Co.*, Docket No. 36311, p. 4 (S.Ct. 2011) (discussion of UIM policies) The duty to raise policy issues is so strong that a court should do so *sua sponte*. *Id.*, p. 13

The material facts in relation to this issue are: 1) the language used by the parties' agreements, 2) the parties' intent, and 3) whether there are any public policy issues?

It is undisputed that upon acceptance, the parties' attorneys immediately began to dispute what the term, "full release" meant. R., p. 63, ¶ 12 The parties' attorneys sent each other draft releases that each wished to fulfill the February 2 and 3 agreement. R., pp. 230-33; *see also* R., pp. 258 Each party's release was unacceptable to the other party for various reasons. *Id.* The parties' resolution of the scope of the term "full release" came by virtue of the jointly-negotiated, "mutually agreeable" release.[21] R., p. 258 Importantly, on February 23, 2010, Schroeder, authorized disbursal of the settlement checks once the Hollands executed the release. R., p. 241

In this case, the final terms of the parties' agreement can be found in three documents: the first is the February 2 and 3, 2010 email exchange between counsel, the second is the jointly negotiated and drafted release, and the third is the parties' joint motion and stipulated order. R., pp. 54-58; *see also* R., pp. 45-48 The intent of the parties, as evidenced by the express terms contained in both the release and stipulation, clearly show that attorney's fees were not contemplated within the scope of the term "full release."

The language of the "mutually-agreeable" release expressly reserves the fees issue:

> ... that this Release also covers all claims that were or could have been made... except for Plaintiffs' Motion for Attorney Fees Pursuant to I.C. § 41-1839 filed on or about February 9, 2010...

R., pp. 54-55 (emphasis in original) Likewise, the parties' stipulation to dismiss states:

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[21] "Bill: This letter is in follow up to our telephone conference of today's date. Please let this letter memorialize that you have requested, and I have agreed, that I will not disburse the checks in my possession... at least until you and I have had a change to attempt to find some mutually-agreeable release language that is acceptable to both our clients... Also, you had specifically requested that I send you a copy of the proposed release referenced in my earlier letter to you of today's date. To that end, please see the enclosed draft full release. I believe the enclosure, once signed, would satisfy the requirement that my clients provide a "full release" to MetLife... Should my understanding of the situation be incorrect, please let me know immediately." (emphasis added) R., p. 258

> COME NOW the parties, by and through their counsel of record and hereby move this Court to dismiss, with prejudice, all claims in the above-captioned matter, except for Plaintiff's Motion for Attorney Fees Pursuant to I.C. § 41-1839 filed on February 9, 2010. ... This motion is made pursuant to I.R.C.P. 41(a)(1)(ii). The basis of this motion is that the parties have fully resolved all claims in this matter except for the pending motion for attorney fees referenced above.

R., p. 46 (emphasis added) The court's March 3, 2010 order also expressly excepted Plaintiffs' Motion for Attorney's fees from its order granting the joint motion to dismiss. R., pp. 46-47

In regards to the parties' intent, the district court wrote: "... MetLife argues attorney fees were not contemplated in the February 3, 2010, [email] agreement." R., pp. 455 Therefore, the court found that MetLife did not intend the email exchange to be inclusive of the entitlement to attorney's fees. The court continued, in regards to the Hollands' intent:

> Hollands believed they were settling a matter after suit had been filed and after their counsel had entered into a contingency fee agreement with them, so that an entitlement for attorney's fees under I.C. § 41-1839 existed.

Id. Thus, neither party intended the issue of fees to be included in the email exchange.

MetLife may argue that the February 2 and 3 email exchange was operative to over-ride the subsequent release. Such an argument would ignore that it was the email exchange simply that gave rise to the other two documents. Such argument also ignores explicit language found in the release and the joint stipulation. R., pp. 54-56

Further, it has long been Idaho's public policy that insurers pay their insureds' attorney's fees if the insurer does not pay within 30 days of receiving a proof of loss. I.C. § 41-1839(1); see also *Penrose v. Commercial Travelers Ins. Co.*, 75 Idaho 524, 529, 537-40, 275 P.2d 969, 974, 982-85 (1954) It is also Idaho's public policy that insured, injured victims of negligent drivers be

compensated. *DeWils Interiors, Inc. v. Dines*, 106 Idaho 288, 294, 678 P.2d 80, 86 (Ct. App. 1984) (stating that a case under I.C. § 41-1839 is a case with a "strong public policy favoring a certain type of litigant") Thus, it is public policy that insurers pay insureds' legal fees if they fail to pay the amounts justly due within 30 days of receiving proof of loss, and because legal fees are compensation to ensure that a recovery is not diminished by legal fees, any release could not include legal fees in its scope. 66 Am. Jur. 2d RELEASE § 3 (2011)

In this case, Mihara represented the Hollands *pro bono* through the insurance claims process. R., pp. 143-44 He only entered a fee agreement after MetLife told him that there was no coverage for the "additional" claims and after Paukert failed to honor her agreement that a coverage decision would be made by January 22, 2010. R., p. 62, ¶ 9 The fee agreement only applied to recoveries from MetLife. R., p. 127 Mihara has recovered over $50,000 outside of this litigation for the Hollands and has obtained a subrogation waiver from MetLife. R., p. 29, ¶ 10; *see also* R., pp. 54-55 The argument that pro-bono work is no reason to depart downward from a statutory award of fees was the only argument Mihara made that the court favored. R., pp. 401-402 The court stated, "The arguments set forth by MetLife find no support in Idaho statutes, rules, or case law." R., p. 402 It would be consistent with public policy to award statutory attorney's fees to encourage *pro bono* work and so that portions of such recoveries can be donated to causes dedicated to persons of limited means.[22] R, pp. 351-52

In sum, the district court over-stepped its discretion when it enforced the February agreement simply because it incorrectly determined that the Hollands had not met their burden

[22] The I.R.P.C. gives guidance to attorneys who receive awards of statutory attorney's fees in cases that they originally take *pro bono*. I.R.P.C. 6.1 (Note 4); *see also* R., p. 353

under *Greenough* and *Brinkman*. R., p. 412 Further, the court never took into account the public policy against legal fees eating into a recovery of insurance proceeds.

(c) The district court erred to hold that MetLife had not waived objection to attorney's fees claimed by the Hollands pursuant to I.R.C.P. 54(e)(6).

The issue is whether the district court erred when it held that MetLife had not waived objection to the attorney's fees claimed by the Hollands pursuant to I.R.C.P. 54(e)(6)?

The applicable Idaho rule of civil procedure states: "Any objection to the allowance of attorney's fees, or the amount thereof, shall be made in the same manner as an objection to costs as provided by Rule 54(d)(6). . ." I.R.C.P. 54(e)(6) (emphasis added) Rule 54(d)(6) requires objection to be made within 14 days. I.R.C.P. 54(d)(6) The rule provides:

> Any party may object to the claimed costs of another party. . . by filing and serving on adverse parties a motion to disallow part or all such costs **within fourteen (14) days** of service of the memorandum of costs. . . **Failure to timely object** . . . **shall constitute a waiver of all objections to the costs claimed**.

Id. (**emphasis added**)

It is well established that a request for attorney's fees filed prematurely shall be deemed filed timely. *Crowley v. Lafayette Life Ins. Co.*, 106 Idaho 818, 683 P.2d 854 (1984) A failure to timely object to a claimed entitlement to attorney's fees waives any objection to the requested entitlement as well as the amount sought. *Connor v. Dake*, 103 Idaho 761, 653 P.2d 1173 (1982)

A stipulated motion to dismiss a case and order pursuant to I.R.C.P. 41(a)(1), with prejudice, acts as final judgment on the merits of the claims. I.R.C.P. 41(a)(1); see also *Straub*, supra 145 Idaho at 73, 762

The material facts related to this issue are, 1) the date that the Hollands filed their motion seeking entitlement to statutory attorney's fees, 2) the date that the district court entered judgment, and 3) the date that MetLife filed its objections to the Hollands' motion.

Mihara filed the Hollands' motion, memorandum, and submitted an affidavit of counsel seeking entitlement to statutory attorney's fees on February 9, 2010. R., pp. 16-41 Schroeder filed his initial appearance on March 1, 2010. R., pp. 42-44 Schroeder filed the parties' I.R.C.P. 41(a)(1)(ii) stipulated motion the same day. *Id.* The motion was based upon the fact that, "the parties have fully resolved all claims in this matter except for the pending motion for attorney's fees." R., pp. 45-48 The court entered a corresponding order on March 3, 2010. *Id.*

Mihara had agreed not take action against MetLife until March 15, 2010 in order to give Schroeder time to research the attorney's fees issue. R., p. 243 On March 16, 2010, Schroeder told Mihara that the fees issue could only be resolved by the court. R., p. 381

Pursuant to *Crowley* and *Straub*, supra, the motion filed on February 9, 2010 was deemed timely when the clerk entered the court's order on March 3, 2010. The forbearance agreed to by Mihara expired on March 15, 2010. As stated above, on March 16, 2010, Schroeder advised Mihara that the issue could only be resolved by the court. It was not until April 12, 2010, that MetLife filed its answer. Even if the time which Mihara agreed to not take action against MetLife was tolled, MetLife still took over 14 days to object to an award or amount of fees.

Simply put, because MetLife's answer came after 14 days from when the Hollands' motion seeking statutory attorney's fees became at issue, MetLife waived all objections thereto.

(d) The district court erred by denying the Hollands' motion for summary judgment pursuant to I.R.C.P. 8(d).

The issue is whether averments of fact, which an answer does not deny, are admitted?

The applicable rule of civil procedure sets forth that, "[a]verments in a pleading to which a responsive pleading is required... are admitted when not denied in the responsive pleading..." I.R.C.P. 8(d) The rules provide that there shall be an answer to a complaint. I.R.C.P. 7(a)

An answer that states the averments of the plaintiff are immaterial and do not require an answer has the same effect of admitting the averments. 61A Am Jur 2d PLEADING § 296 (2011) Facts admitted by pleadings need not be proved. *Pendlebury*, supra, at 465; *see also* 44A Am Jur 2d INSURANCE § 1950 (2011)

The material facts in relation to this issue are, 1) what averments were plead in the complaint, and 2) what denials, if any, were contained in the answer?

In this case, the Hollands made several averments of fact in the complaint that would support their entitlement to attorney's fees. R., pp. 8-15 Specifically, the Hollands averred that it had been beyond 30 days since they had furnished proof of loss as provided by their policies (on or about November 10 to 17, 2009), and MetLife had failed to pay amounts justly due. *Id.*, ¶¶¶ 9, 10, 13, 18 The Hollands averred that they had fully complied the terms of their policies before bringing suit. *Id.*, ¶¶ 10 and 16 These averments were explicitly incorporated into paragraph 34 – the paragraph setting forth the entitlement to attorney's fees, and which both the court and MetLife recognized as being at issue. *Id.*, ¶ 23

MetLife's answer did not deny any averments contained in paragraphs 1 to 33 of the complaint. R., pp. 49-53 It did not even contain a general denial. *Id.* The answer reads:

> ... no Answer is required as to paragraphs 1 through 33, as all claims, except the claim for I.C. § 41-1839 attorney's fees, alleged in paragraph 34 of the Complaint, have been dismissed with prejudice...
> As to the Plaintiffs' sole remaining claim, in answer to paragraph 34 of Plaintiffs' complaint, the Defendants deny that the Plaintiffs are entitled to attorney's fees pursuant to I.C. § 41-1839. All other allegations contained in paragraph 34 have been dismissed, with prejudice, and therefore, no answer is required...

R., p. 50 (emphasis added) At oral argument, Schroeder conceded the answer did not contain any denials to factual averments contained in paragraphs 1 to 33. Tr., p. 30, l. 7 to p. 31, l. 17 He argued that the Rule 41(a)(1)(ii) stipulated motion and order only required MetLife to respond to paragraph 34 of the complaint and the motion for fees. R., pp. 312 The court wrote in July, 2010:

> **It follows that only paragraph 34 on page 7 of the Complaint remained at issue**... The plain language of this Court's Order excepts only "Plaintiff's Motion for Attorney fees filed on February 9, 2010"; **therefore, no averments in the Complaint, even if deemed true, remain before the Court**. In effect, **all of the Complaint was dismissed with prejudice on February 3, 2010** (sic)...

R., p. 404-05 [23] (**emphasis added**) The court's July, 2010 decision and order must be contrasted with its March 3, 2010 order. No language contained in the March 3, 2010 order says anything about dismissing the complaint, any part of the complaint, or any of its factual averments. R., pp. 45-47 The words "complaint," "averments," and "factual allegations" are conspicuously absent from the court's order. *Id.* The court's later opinions and orders ignore the plain language of the release and stipulation, and corresponding March order that expressly reserves the fees issue.

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[23] *C.f.* The date of the court's order cited above was March 3, 2010 versus the February 3, 2010 date noted in excerpt cited. R., p. 47 The court later stated on October 6, 2010, "[h]owever, no portion of this Court's July 20, 2010, Memorandum Decision and Order... in any way finds no factual allegations remained after the Order granting the Joint Motion to Dismiss was entered..." (emphasis added) R., pp. 687-88

Further, to the extent that averments were admitted via the pleadings, pursuant to *Pendlebury*, supra, it was error for the court to require the Hollands prove them, i.e., that they had provided sufficient proof of loss, and MetLife failed to timely pay the claims.

In conclusion, the applicable rule says that factual averments made in a pleading must be answered by a pleading – the failure to do so results in a judicial admission of those facts. Simply put, the court erred, as a matter of law, when it denied the Hollands summary judgment.

(e) The Hollands are entitled to attorney's fees, costs, and interest for this appeal.

The Hollands seek attorney's fees, and related costs for this appeal pursuant to I.C. § 41-1839(1), I.C. § 41-1839(2), I.A.R. rules 35, 40, and 41.

The appellate rules provide that a party claiming attorney's fees should do so in its initial brief. I.A.R. 35(a)(5) The rules provide for the costs of filing fees, the transcript, the record, and production of briefs. I.A.R. 40 If the Court decides a party is entitled to fees and costs, that party shall submit a memorandum of costs within 14 days of the Court's decision. I.A.R. 41 The Court will decide the fee amount or will remand the issue for determination. *Id.*

If an insurer fails to pay the amount justly due under an insurance policy within 30 days of receipt of a proof of loss then the insurer is liable for the insureds' attorney's fees in any action thereafter filed against it. I.C. § 41-1839(1) Attorney's fees are allowed for an appeal to recover an award of fees in order to make the insured whole. *Martin,* supra, at 248, 605

The basis of the Hollands' entitlement to fees is that they provided proper proof of loss to MetLife as discussed above and MetLife failed to timely pay. The Hollands are also entitled to judgment based on the procedural arguments set forth above. The contingency fee agreement in

this case provides that the Hollands will compensate their attorney with 40% of monies received after any appeals. R., p. 146 To date, the Hollands have received $200,000, and a complete subrogation waiver from MetLife. R., pp. 235-36

In this case, an award of $80,000, plus interest, and related costs for this appeal is warranted due to the recovery obtained by the Hollands, the terms of the contingency agreement noted above, and the amount of work necessary to prosecute this matter.

VIII. CONCLUSION

As in *Martin*, the proper focus of this case is that MetLife should have paid the Hollands' claims within thirty days of the Hollands' proof of loss. A family that has lost its only son should not be asked to compensate their attorney out of proceeds they should have received prior to having to file a lawsuit. The Hollands paid good money for their policies and had a right to have their claims be timely paid.

The Hollands pray this Court vacate the district court's entry of judgment, reverse and overrule the court to the extent that the court did not apply Idaho law, to find that the Hollands submitted adequate proof of loss prior to thirty days of being paid by MetLife, to find the Hollands the prevailing parties in this litigation, to award a reasonable attorney's fee in the amount of $80,000.00 pursuant to I.C. § 41-1839(1) and (2), IAR Rules 35, 40, and 41, for costs of this appeal, and for any other relief this Court feels is proper.

Respectfully submitted to the Court this 26th day of August, 2011.

Kinzo H. Mihara, ISB 7940
Attorney for Appellants