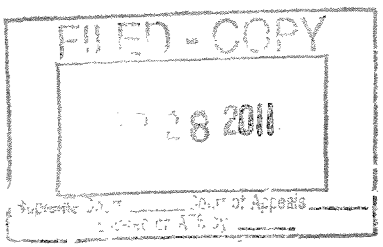
9-28-2011

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

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



RESPONDENTS' BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County

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Honorable John T. Mitchell, District Judge, Presiding

William J. Schroeder
Patrick E. Miller
PAINE HAMBLEN LLP
701 Front Avenue, Suite 101
P.O. Box E
Coeur d' Alene, Idaho 83816-0328

Mailing Address:
717 West Sprague Avenue, Suite 1200
Spokane, Washington 99201-3505
Telephone: (509) 455-6000
Facsimile: (509) 838-0007
Attorneys for Respondents

Kinzo H. Mihara, Esq.
424 Sherman Ave., Ste. 308
P.O. Box 969
Coeur d' Alene, Idaho 83816-0969
Telephone: (208) 667-5486
Facsimile: (208) 667-4695
Attorney for Appellants

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"This is a case of the surety expending effort to try to find coverage where the insured's efforts had failed. Basically, the surety MetLife was doing what its insured Hollands (through its attorney Mihara) should have done, following which, no good deed going unpunished, Hollands seek to obtain attorney fees against MetLife." (John T. Mitchell, District Judge, R. Vol. III, p. 549)

A. Introduction.

This matter comes before the Court on the appeal of Plaintiffs, the Estate of Benjamin Holland, Gregory Holland, and Kathleen Holland ("Hollands") from a July 20, 2010 Order of the District Court of the First Judicial District, State of Idaho, for the County of Kootenai: (1) denying Hollands' Motion for Attorney's Fees under I.C. § 41-1839; (2) denying Hollands' Motion for Summary Judgment; and (3) granting Defendants, Metropolitan Property and Casualty Insurance Company, and MetLife Auto & Home's ("MetLife") Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney Fees. (R. Vol. III, pp. 570-573)

On August 2, 2010, Hollands' filed a Motion for Reconsideration of the trial court's July 20, 2010 Order. (R. Vol. II, pp. 403-404) On September 29, 2010, the trial court heard oral argument from the parties on the Hollands' Motion for Reconsideration, taking the Motion under advisement. (R. Vol. III, p. 543) On October 1, 2010, prior to receiving the trial court's ruling on Hollands' first Motion for Reconsideration, the Hollands filed a Second Motion for Reconsideration of the July 20, 2010 Order. (R. Vol. III, pp. 524-525)

On October 6, 2010, the trial court entered MetLife's Judgment of Dismissal with Prejudice, denied the Hollands' Motion for Reconsideration, and dismissed this action with

prejudice. (R. Vol. III, pp. 565-567) On October 8, 2010, the Hollands withdrew their Second Motion for Reconsideration. (R. Vol. III, pp. 568-569) The Hollands also appeal the October 6, 2010 Order denying Hollands' Motion for Reconsideration of the trial court's July 20, 2010 Order. (R. Vol. III, pp. 570-573)

Briefly stated, the Hollands contend that they are entitled to attorney's fees under I.C. § 41-1839. (Appellants' Opening Brief, at 11-30) The trial court concluded that the Hollands failed to meet their burden of proof under I.C. § 41-1839 because they failed to submit proof of loss sufficient to provide MetLife with enough information to allow it a reasonable opportunity to investigate and determine its liability. (R. Vol. II, p. 348) In doing so, the trial court also granted MetLife's Motion to Enforce the Parties' pre-existing Settlement Agreement. (R. Vol. II, pp. 348-352; R. Vol. III, p. 550)

The Hollands further contend that MetLife waived its objection to the Hollands' claim for attorney's fees under Idaho Civil Rule 54(e)(6), by failing to object within 14-days of the Hollands' Motion for Attorney's Fees. (Appellants' Opening Brief, at 30-31) To that end, the trial court ruled that Idaho Civil Rule 54(e)(6) deals with post-judgment issues, not attorney's fees sought prior to judgment, and thus concluded that the Hollands' claim was "completely without merit." (R. Vol. III, pp. 561-562)

The Hollands finally contend that, although they filed a "Joint Motion and Stipulated Order to Dismiss All Claims Except for the Pending Motion for Attorney's Fees," the trial court erred in denying the Hollands' Motion for Summary Judgment on the grounds that MetLife's failure to deny certain allegations in the Hollands' Complaint amounted to an admission, entitling

the Hollands to summary judgment. (Appellants' Opening Brief, at 32-34) The trial court ruled that this claim is "without merit," as the plain language of the Stipulated Order to Dismiss All Claims Except for the Pending Motion for Attorney's Fees, in effect, dismissed all of the Complaint with prejudice, leaving only the Hollands' previously filed Motion for Attorney's Fees to be addressed. (R. Vol. II, pp. 340-341)

MetLife respectfully requests that this Court affirm the trial court's July 20, 2010 Order denying the Hollands' Motion for Attorney's Fees and Motion for Summary Judgment, and granting MetLife's Motion to Compel Performance Under the Settlement and Dismiss Hollands' Motion for Attorney Fees. Likewise, MetLife respectfully requests that this court affirm the trial court's October 6, 2010 Order denying the Hollands' Motion for Reconsideration of the same.

B. The Hollands' Initial Claim.

On October 25, 2009, Benjamin Charles Holland passed away as a result of a motor vehicle accident. (R. Vol. I, p. 008) On November 10, 2009, Gregory and Kathleen Holland, on behalf of the Estate of Benjamin Holland, submitted their initial claim against a MetLife insurance policy ("Initial Claim"). MetLife designated the Initial Claim as Claim No. FRD 373130 and assigned the matter to MetLife insurance adjuster, Daneice Davis. (R. Vol. I, p. 074) Benjamin Holland is the named insured on the policy involved in the Initial Claim. (Ibid.)

C. MetLife Seeks to Settle the Initial Claim, but is Informed the Hollands are Making Additional Claims.

On December 7, 2009, Ms. Davis contacted the Hollands' attorney, Kinzo Mihara, to inform him that the matter could be concluded with MetLife paying the requested policy limits

on the Initial Claim. (R. Vol. I, p. 074) However, during that telephone conversation, Mr. Mihara advised Ms. Davis that the matter could not be concluded because the Hollands had decided to make claims against two additional MetLife policies in which only Benjamin Holland's parents, Gregory and Kathleen Holland, were the named insureds ("Additional Claims"). (R. Vol. I, p. 074) Specifically, the Additional Claims included a claim against an auto policy for Gregory and Kathleen Holland, assigned Claim No. FRD 408440, and a claim against a motorcycle policy for Gregory and Kathleen Holland, assigned Claim No. FRD 408370. (R. Vol. I, p. 075)

D. Mr. Mihara Advised Ms. Davis that Her Pre-Scheduled Vacation Would Not be an Issue.

That same day, December 7, 2009, Ms. Davis advised Mr. Mihara that she was preparing to leave on a three-week vacation and would not return to her office until January 6, 2010. As a result, she told Mr. Mihara that she would be unable to review the Additional Claims until she returned. Ms. Davis asked if the delay would be acceptable and Mr. Mihara assured her it would. Ms. Davis relied upon Mr. Mihara's representation. Notably, if Mr. Mihara had indicated to Ms. Davis that such delay was unacceptable, she would have had the Additional Claims assigned to another adjuster at MetLife to handle during her absence. (R. Vol. I, pp. 074, 076)

E. Review of the Additional Claims by Ms. Davis.

Ms. Davis returned from vacation on Thursday, January 6, 2010. On January 7, 2010, a faxed letter from Mr. Mihara was in her mail box. Inexplicably, contrary to his prior representations, the letter suggested that Ms. Davis should have a response to the Additional

Claims by the end of the week. Ms. Davis called Mr. Mihara to remind him that she had just returned from vacation and to inform him that she was sending the policies to coverage counsel for review. (R. Vol. I, pp. 074-075)

On January 8, 2010, Attorney Kathleen H. Paukert was retained by MetLife to provide a coverage opinion concerning the Additional Claims. (R. Vol. I, p. 043) On January 12, 2010, Ms. Davis e-mailed Ms. Paukert the policies at issue for her review. (R. Vol. I, p. 075) On January 13, 2010, Ms. Paukert received a telephone call from Mr. Mihara, who indicated that he represented the Hollands. (R. Vol. I, p. 043) During that conversation, and in several follow-up conversations, Mr. Mihara informed Ms. Paukert that he was handling the matter for the Hollands family pro bono, to which he was commended. (R. Vol. I, pp. 043, 047)

F. MetLife Searched for Coverage and Requested Additional Proof of Loss.

By letter dated January 14, 2010, Mr. Mihara made a demand for the policy limits on all three MetLife policies – including, the Initial Claim for which Benjamin Holland was the named insured (MetLife had agreed to pay the policy limits on the Initial Claim on December 7, 2009) and the Additional Claims for which Gregory and Kathleen Holland were the named insureds (also referred to hereinafter as "Parents' Policies"). (R. Vol. I, p. 086)

From January 14, 2010 through February 2, 2010, Mr. Mihara and Ms. Paukert had numerous conversations regarding whether the Parents' Policies provided coverage. (R. Vol. I, pp. 043-045) During such review, Mr. Mihara provided Ms. Paukert with a 17-page memorandum outlining his theories for coverage under the Parents' Policies. (R. Vol. I, p. 043) Although not in agreement with Mr. Mihara's theories of recovery under the Parents' Policies,

Ms. Paukert, with the authority and encouragement of MetLife, sought coverage for the Hollands under alternative theories than those proffered by Mr. Mihara. (R. Vol. I, pp. 044-045, 047)

Notably, during Ms. Paukert's discussions with Mr. Mihara, he indicated that he knew MetLife had agreed to pay the policy limits on the Initial Claim. However, Mr. Mihara continued to assert that there was coverage under the Parents' Policies, as he wanted coverage under the higher limit policies. Mr. Mihara was clear that he did not want the policy limits under the Initial Claim. Ms. Paukert had no discussions about sending him the policy limits for the Initial Claim because Mr. Mihara was waiting for MetLife's decision on coverage under the Parents' Policies (the higher limit policies). (R. Vol. I, p. 079)

Mr. Mihara never provided an adequate proof of loss concerning coverage on the Additional Claims. Specifically, none of the cases nor material Mr. Mihara sent Ms. Paukert were apropos to the issues at hand. In fact, based upon the case law, it was Ms. Paukert's opinion that MetLife could deny coverage on the two Additional Claims/Parents' Policies. Nevertheless, MetLife authorized and encouraged Ms. Paukert to locate an alternative theory for coverage on the Additional Claims. (R. Vol. I, p. 079)

On January 21, 2010, Mr. Mihara sent Ms. Paukert cases on "stacking" of insurance policies. In a later telephone conversation, Mr. Mihara acknowledged that he knew he had a weak legal argument on the "stacking" issue. (R. Vol. I, pp. 079-080) Thus, Mr. Mihara was still providing Ms. Paukert with additional material in late January 2010. (R. Vol. I, p. 080)

On January 25, 2010, Mr. Mihara called Ms. Paukert to inquire about the status of her research. Ms. Paukert informed him there was another theory for coverage that she was

researching. During that conversation, Mr. Mihara made no mention that he was filing a lawsuit the next day.[1] (R. Vol. I, p. 080)

On January 27, 2010, Ms. Davis received a telephone call from Mr. Mihara asking whether a coverage opinion had been issued. Ms. Davis advised Mr. Mihara that she had not received a final report from Ms. Paukert on the coverage issue, but was working diligently on getting things wrapped up promptly.[2] With respect to the motorcycle policy, Ms. Davis requested additional proof of loss in the form of a legible copy of the title to the motorcycle at issue, as the prior copy was not legible. During that conversation, Mr. Mihara made no mention that he had filed a lawsuit against MetLife on January 26, 2010. Mr. Mihara faxed a copy of the motorcycle title to Ms. Davis that day. (R. Vol. I, p. 075) Ms. Paukert completed her coverage opinion and e-mailed it to Ms. Davis on January 27, 2010. (R. Vol. I, pp. 076, 080)

On January 29, 2010, Ms. Davis called MetLife agent, Joe Fodeyece, and inquired about what Benjamin Holland had told him concerning who would be listed on the motorcycle title. During that conversation, Mr. Fodeyece told her that he saw in the COEUR D' ALENE PRESS that the Estate of Benjamin Holland had filed suit against MetLife. (R. Vol. I, p. 075) Ms. Davis

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[1] Despite Mr. Mihara's apparent claim to the contrary, Ms. Paukert is adamant that Mr. Mihara did not contact her on January 26, 2010 to tell her that he had filed a lawsuit, or was going to do so. Moreover, Ms. Paukert searched her computer, and had a technical consultant search her computer, and there are no e-mails from Mr. Mihara dated January 26, 2010. (R. Vol. I, p. 080)

[2] It is unclear as to why Mr. Mihara contacted Ms. Davis directly since he knew MetLife was represented and he had been dealing directly with MetLife's attorney, Kathleen Paukert.

contacted Ms. Paukert and asked that they check if a lawsuit had been filed. Ms. Paukert's assistant informed Ms. Davis that she was unable to find such a lawsuit. (R. Vol. I, pp. 075, 081)

G. Compromise Settlement Reached.

On February 2, 2010, with a legible copy of the motorcycle title and Ms. Paukert's January 27, 2010 coverage opinion letter, Ms. Davis authorized Ms. Paukert to convey a compromise settlement offer to the Hollands. (R. Vol. I, p. 076) That same day, Ms. Paukert advised Mr. Mihara that, based on her research, there was no coverage on the Parents' Policies under the theories set forth by Mr. Mihara because Benjamin Holland was not a household resident. However, Ms. Paukert informed Mr. Mihara that there was possible coverage on the motorcycle policy under an alternative theory, developed and researched by Ms. Paukert, although the holdings in a majority of the cases in the United States on this issue found there to be no coverage. Thus, Ms. Paukert told Mr. Mihara that MetLife was willing to settle the matter for payment of the motorcycle policy limit, provided the Hollands sign a full release. During that conversation, Mr. Mihara advised Ms. Paukert that he was no longer handling the matter pro bono, as he had recently entered into a contingency fee agreement. (R. Vol. I, p. 045)

In follow up to their conversation, on February 2, 2010, Ms. Paukert sent the following confirming e-mail offer to Mr. Mihara:

> Subject: Offer
> Dear Mr. Mihara:
> 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.
> Sincerely,
> Kathleen H. Paukert

(R. Vol. I, pp. 045, 050-051)

On February 3, 2010, at 8:43 a.m., Ms. Paukert received the following e-mail acceptance from Mr. Mihara:

> Subject: [SPAM] Acceptance
> Ms. Paukert:
> 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. At your earliest convenience, please send certified funds payable to:
> Gregory and Kathleen Holland
> . . .
> Yours very truly and sincerely,
> Kinzo H. Mihara

(R. Vol. I, pp. 045-046, 050)

On February 3, 2010, following Mr. Mihara's confirmation that his clients had accepted MetLife's compromise settlement terms, Ms. Paukert called Mr. Mihara to confirm that his clients would provide MetLife with a full release. Mr. Mihara said that his clients would provide a full release; however, for the first time, Mr. Mihara indicated that he was now making a claim for attorney's fees under Idaho Code § 41-1839. Ms. Paukert reminded Mr. Mihara that he had represented that his clients would provide a full release. Mr. Mihara responded that they would, but that he was personally going to sue MetLife for attorney's fees. (R. Vol. I, p. 046)

That same day, on February 3, 2010, Mr. Mihara informed Ms. Paukert, for the first time, that he had filed a Civil Complaint ("Complaint") on January 26, 2010, prior to the settlement.[3] (R. Vol. I, pp. 046, 080) At the time settlement was reached on February 3, 2010, Ms. Davis was

[3] The Summons and Complaint had not been served. (R. Vol. I, p. 091)

also unaware that a lawsuit had been filed. (R. Vol. I, p. 076) In fact, Ms. Davis never saw the Complaint nor the purported January 27, 2010 letter concerning the lawsuit until Ms. Paukert forwarded them to her on February 8, 2010, after Ms. Paukert received them from Mr. Mihara. (R. Vol. I, pp. 046, 076) The Complaint was filed by Mr. Mihara during the parties' settlement negotiations, without notice to Ms. Paukert or Ms. Davis. (R. Vol. I, p. 047)

Significantly, the settlement reached on February 3, 2010 was not prompted by the lawsuit, as both Ms. Davis and Ms. Paukert were unaware that a lawsuit had been filed until after a settlement was reached. Specifically, the compromise settlement was that, of the two Additional Claims/Parents' Policies, MetLife would provide coverage under the motorcycle policy, but not under the auto policy of Gregory and Kathleen Holland. (R. Vol. I, p. 081) On February 8, 2010, Mr. Mihara faxed Ms. Paukert a copy of the Complaint. (R. Vol. I, p. 046)

H. The Complaint.

The January 26, 2010 Complaint alleged that MetLife failed to tender amounts justly due within 30 days after receiving proof of loss, and that, pursuant to I.C. § 41-1839, the Hollands were entitled to an award of reasonable attorney's fees. (R. Vol. I, pp. 006-013)

I. The First Motion – the Hollands' Motion for Attorney's Fees.[4]

On February 9, 2010, despite the parties' settlement, Mr. Mihara mailed Ms. Paukert a letter that included a Motion for Attorney's Fees Pursuant to I.C. § 41-1839 and other supporting

[4] As discussed below, three Motions were set before the trial court for determination: (1) the Hollands' Motion for Attorney's Fees Pursuant to I.C. § 41-1839; (2) the Hollands' Motion for Summary Judgment; and (3) MetLife's Motion to Enforce the Settlement Agreement and Dismiss Plaintiffs' Motion for Attorney Fees.

documents. (R. Vol. I, pp. 014-015, 046-047) The Motion alleged that MetLife failed to pay the Hollands amounts justly due under the Additional Claims/Parents' Policies within thirty (30) days after receiving proof of loss. (R. Vol. I, pp. 014-015) On March 1, 2010, Attorney William Schroeder was retained by MetLife to handle the litigation. (R. Vol. I, pp. 025-026)

Following the filing of the Hollands' Motion for Attorney's Fees, Mr. Mihara and Mr. Schroeder exchanged several communications seeking a mutually agreeable hearing date for the Motion. (*See, e.g.,* February 12, 2010 Letter from Mr. Mihara to Mr. Schroeder (R. Supp., pp. 089, 091-092); February 22, 2010 E-Mail from Mr. Mihara to Mr. Schroeder (R. Supp., pp. 089, 093); February 25, 2010 Letter from Mr. Mihara to Mr. Schroeder (R. Supp., pp. 089, 094); March 16th and 17th E-Mail Exchange Between Mr. Mihara and Mr. Schroeder (R. Supp., pp. 089, 095-096))

J. Dismissal of All Claims, Except for the Hollands' Motion for Attorney's Fees.

Following the Hollands' effort to renege on the settlement, as well as their agreement to sign a full release of their claims against MetLife, on March 3, 2010, the parties filed a "Joint Motion and Stipulated Order to Dismiss all Claims Except for the Pending Motion for Attorney Fees." It is important to note the precise language used in the Motion:

> 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.** The parties further stipulate to the Order below. 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**.
>
> ...

> THE COURT, pursuant to the joint motion of the parties above, and upon good cause appearing, **does ORDER that all claims in the above-captioned matter, except for Plaintiffs' Motion for Attorney Fees filed on February 9, 2010,** are dismissed with prejudice and without cost to either party.

(emphasis added) Consequently, by its terms, the Stipulated Order to Dismiss dismissed all claims with prejudice except the Hollands' previously filed motion for attorney's fees pursuant to I.C. § 41-1839. (R. Vol. I, pp. 028-030)

K. <u>The Hollands' Claim for Attorney's Fees Under Idaho Civil Rule 54.</u>

On March 26, 2010, the Hollands noted their Motion for Attorney's Fees for an evidentiary hearing scheduled for May 12, 2010. (R. Supp., pp. 089, 097-098) The parties then proceeded with discovery. Despite prior representations, including the multiple correspondence between counsel seeking an agreeable hearing date, on April 6, 2010, Mr. Mihara advised Mr. Schroeder that he was taking the position that, under Idaho Civil Rule 54(e)(6), MetLife's objection to the Hollands' Motion for Attorney's Fees was due within 14 days of the filing of the motion (February 9, 2010) and, as a result, any objection was waived. In response, on April 12, 2010, Mr. Schroeder sent an e-mail to Mr. Mihara advising that, in his view, Idaho Civil Rule 54 dealt with post-judgment proceedings and was inapplicable to the case at hand, as no judgment had been entered. Moreover, Mr. Schroeder, stated in pertinent part:

> Putting to one side the fact that IRCP 54 is inapplicable since a judgment has not been entered, your new position is inconsistent with the request in your motion, your numerous written and oral representations to me, your Notice of Hearing and the discovery request you served

(R. Supp., pp. 089, 099)

L. MeLife's Answer.

No Answer was technically required to the Hollands' Complaint because all claims had been dismissed by the trial court with prejudice except for the Hollands' pending Motion for Attorneys' Fees. Nonetheless, on April 12, 2010,[5] out of an abundance of caution and to crystallize the sole remaining issue for adjudication, MetLife answered Section IV, paragraph 34, of the Hollands' Complaint by denying that the Hollands are entitled to attorney's fees pursuant to I.C. § 41-1839 and asserting affirmative defenses regarding the same. This intention is further expressed in the Preamble to MetLife's Answer which states, in relevant part:

> 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.

(R. Vol. I, pp. 032-035) As an Affirmative Defense to the sole remaining attorney's fees claim in the Hollands' Complaint, MetLife alleged that "Plaintiffs' claim for attorney fees under I.C. § 41-1839 are barred because Plaintiffs agreed to sign a full release of their claims against MetLife." (R. Vol. I, p. 034)

M. The Second Motion - MetLife's Motion to Enforce the Settlement Agreement and Dismiss the Hollands' Motion for Attorney's Fees.

On April 28, 2010, MetLife filed a "Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees." (R. Vol. I, pp. 061-062)

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[5] As only the Hollands' Motion for Attorney's Fees remained, MetLife was subject to Idaho Rule of Civil Procedure 7(b)(3)'s briefing schedule. Specifically, MetLife was required to file a Response to Hollands' Motion for Attorney's Fees seven (7) days prior to the scheduled hearing. I.R.C.P. 7(b)(3)(E).

N. The Third Motion – the Hollands' Motion for Summary Judgment.

On May 17, 2010, the Hollands filed a Motion for Summary Judgment on the grounds that, because MetLife's Answer addressed only the attorney's fee dispute, all allegations in the Complaint should be deemed admitted. (R. Vol. I, pp. 240-241)

O. The Hearing on the Three Motions.

With this background in mind, three Motions were set before the trial court for determination: (1) the Hollands' Motion for Attorney's Fees Pursuant to I.C. § 41-1839; (2) the Hollands' Motion for Summary Judgment; and (3) MetLife's Motion to Enforce the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees. On June 2, 2010, the trial court heard oral argument and, due to the extensive briefing and argument, took the Motions under advisement.

P. The Ruling of the Trial Court.

On July 20, 2010, after extensive briefing and full consideration of the record, the trial court entered a 32-page Memorandum Decision and Order: (1) denying the Hollands' Motion for Attorney's Fees under I.C. § 41-1839; (2) denying the Hollands' Motion for Summary Judgment; and (3) granting MetLife's Motion to Enforce the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees. (R. Vol. II, pp. 321-352) In granting MetLife's Motion to Enforce the Settlement, the trial court determined that the Hollands had failed to meet their burden of proving they provided MetLife with sufficient proof of loss to allow MetLife "a reasonable opportunity to investigate and determine its liability," as required under Idaho law. (R. Vol. II, pp. 348-352) Consequently, the Hollands were not entitled to attorney's fees under I.C. § 41-1839. (R. Vol. II, p. 352) In doing so, the trial court emphasized the following pertinent facts:

- On December 7, 2009, MetLife was prepared to tender the policy limits on the Initial Claim, $50,000.00. However, upon informing Mr. Mihara of the same, MetLife was advised that the Hollands were making Additional Claims.

- The Additional Claims and Initial Claim were given separate claim numbers.

- Upon being informed of the Additional Claims, Ms. Davis advised Mr. Mihara that she was going on a three-week vacation and would not return until January 6, 2010, at which time she would review the Additional Claims.

- Mr. Mihara informed Ms. Davis that the delay was acceptable.

- On January 8, 2010, Ms. Davis told Mr. Mihara that MetLife could not determine whether coverage was available under the Additional Claims, and that a coverage opinion would be sought.

- On January 8, 2010, MetLife retained attorney, Ms. Paukert, to provide a coverage opinion on the Additional Claims.

- MetLife directed Ms. Paukert to be creative in finding coverage for the Hollands' Additional Claims.

- The theories of coverage for the Additional Claims proffered by Mr. Mihara were determined by MetLife to be without merit.

- On January 26, 2010, Mr. Mihara, without disclosing this fact to Ms. Paukert or MetLife, filed a Complaint on behalf of the Hollands.

- From January 13, 2010 through February 2, 2010, Ms. Paukert had regular contact with Mr. Mihara to discuss potential theories of coverage for the Additional Claims.

- On February 2, 2010, Ms. Paukert informed Mr. Mihara that, based on her research, there was no coverage under the theories set forth by Mr. Mihara, but that there was possible coverage on the motorcycle policy under a theory researched by MetLife.

- That same day, Ms. Paukert, on behalf of MetLife, offered the Hollands $200,000.00, provided that they signed a full release. A settlement was reached for that amount on February 3, 2010.

- Thus, there were separate offers made on the Initial Claim and Additional Claims, at separate times and under separate policies.

(R. Vol. II, pp. 348-352)

Based on the foregoing facts, the trial court held that the Hollands had failed to provide MetLife with sufficient proof of loss to allow MetLife "a reasonable opportunity to investigate and determine its liability," and thus, the Hollands were not entitled to attorney's fees under I.C. § 41-1839 (R. Vol. II, p. 350) In doing so, the trial court made the following findings:

(1) That MetLife was subject to a "moving target" in discussing separate offers made at separate times on separate policies.

(2) That there was no basis for the Hollands' argument that "time periods on these separate offers made at separate times on separate policies should be aggregated." Specifically, the trial court found no authority for the argument that the period from November 10, 2009 to December 7, 2009 could be added to the period from January 7, 2010 to January 26, 2010 in order to meet the thirty (30) day tender requirement after proof of loss is provided. As the trial court observed, "[d]ue to the fact that these are separate offers made at separate times on separate policies, there certainly is no factual basis to aggregate these two discrete time periods."

(3) That it is difficult to conclude that MetLife was provided "a reasonable opportunity to investigate and determine its liability," where the theory providing the larger tender to the Hollands was discovered by Ms. Paukert, and the Hollands accepted that higher amount based on Ms. Paukert's theory.[6]

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[6] As stated by the trial court, "Mihara's clients the Hollands recovered a great deal more than if Paukert hadn't done the creative leg work. **But that is no reason to tag on attorney fees against MetLife when they did that creative work.**" (emphasis added by the trial court) As further emphasized by the trial court, "[w]hat Mihara lacked was the end result, the creativity to come up with theories of recovery, policy interpretations that led to higher recovery for Mihara's clients the Hollands. Whether that end result of additional coverage was due to a lack of experience in policy interpretation by Mihara, Paukert having more experience, or simply a benevolent MetLife pushing for more coverage, is not known, nor does it matter. Mihara had the policies, so did MetLife. It was Paukert and MetLife that came up with the policy interpretation on coverage that led to additional recovery." (R. Vol. III, p. 551)

(R. Vol. II, pp. 350-351)

Given the foregoing, the trial court concluded that the Hollands had failed to meet their burden of demonstrating that they submitted proof of loss with sufficient information to allow MetLife a reasonable opportunity to investigate and determine its liability, when it was MetLife that came up with the creative theory for additional coverage. (R. Vol. II, pp. 351-352) Consequently, the trial court granted MetLife's Motion to Compel Performance Under the Settlement, denied the Hollands' Motion for Summary Judgment, and held that the Hollands are not entitled to attorney's fees pursuant to I.C. § 41-1839. (R. Vol. II, p. 352)

Q. The Hollands' Motion for Reconsideration.

On August 2, 2010, the Hollands filed a Motion for Reconsideration of the trial court's July 20, 2010 Order. (R. Vol. II, pp. 403-404) On September 29, 2010, the trial court heard oral argument from the Parties on the Motion for Reconsideration. Due to the extensive briefing and argument, the trial court again took this Motion under advisement. (R. Vol. III, p. 543)

R. The Hollands' Second Motion for Reconsideration.

Despite having not received the trial court's ruling on the Hollands' first Motion for Reconsideration on October 1, 2010, the Hollands filed a second Motion for Reconsideration. (R. Vol. III, pp. 524-525)

S. MetLife's Request for Status Conference.

On October 4, 2010, MetLife filed a Request for Status Conference to address issues that had arisen since the Hollands' first Motion for Reconsideration. (R. Vol. I, pp. 141-143)

Specifically, MetLife sought direction from the trial court on Mr. Mihara's attempt to circumvent the Idaho Civil Rules by submitting a post-hearing brief, *i.e,* the Second Motion for Reconsideration, and the Hollands' post-hearing attempt to seek an additional $50,000.00 payment from MetLife in breach of the parties' settlement. (R. Vol. I, pp. 141-143)

T. Trial Court's Ruling Denying the Hollands' Motion for Reconsideration and Entering MetLife's Judgment of Dismissal with Prejudice.

On October 6, 2010, the trial court entered a 27-page Memorandum Decision and Order denying the Hollands' Motion for Reconsideration of its July 20, 2010 Order. (R. Vol. III, pp. 538-564) That same day, the trial court entered MetLife's Judgment of Dismissal with Prejudice, dismissing this action with prejudice. (R. Vol. III, pp. 565-567)

U. The Hollands' Withdrawal of Their Second Motion for Reconsideration.

On October 8, 2010, the Hollands withdrew their Second Motion for Reconsideration and requested that the status conference be cancelled. MetLife agreed. (R. Vol. III, pp. 568-569)

V. The Hollands' Notice of Appeal.

On October 12, 2010, the Hollands appealed the trial court's July 20, 2010 Order denying the Hollands' Motion for Attorney's Fees and Motion for Summary Judgment, and granting MetLife's Motion to Compel Performance Under the Settlement. The Hollands further appealed the trial court's October 6, 2010 Order the denying Hollands' Motion for Reconsideration of the same. (R. Vol. III, pp. 570-573)

IV. ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Whether MetLife is entitled to attorney's fees on appeal.

V. ARGUMENT

A. The Trial Court Correctly Concluded that the Hollands Were Not Entitled to Attorney's Fees Pursuant to I.C. § 41-1839.

1. The Trial Court's Decision on Attorney's Fees Pursuant to I.C. § 41-1839 is Reviewed for Abuse of Discretion.

On appeal, the Hollands have assigned error to the trial court's determination that they are not entitled to attorney's fees under I.C. § 41-1839. (Appellants' Opening Brief, at 11-30) On this issue, the trial court correctly granted MetLife's Motion to Compel Performance Under the Settlement, and ruled that the Hollands were not entitled to attorney's fees. (R. Vol. II, p. 352)

As noted by the trial court, it's decision on attorney's fees is a discretionary decision subject to an *abuse of discretion* standard of review.[7] (R. Vol. II, p. 326; R. Vol. III, p. 544) Bailey v. Sanford, 139 Idaho 744, 753, 86 P.3d 458 (2004), *citing* Perkins v. U.S. Transformer West, 132 Idaho 427, 429, 974 P.2d 73 (1999); Vaught v. Dairyland Ins. Co., 131 Idaho 357, 360, 956 P.2d 674 (1998) ("[t]his Court also uses the abuse of discretion standard to review. . . the award of attorney fees under I.C. § 41-1839"); Young v. State Farm Mut. Auto. Ins. Co., 127 Idaho 122, 128, 898 P.2d 53 (1995); Manduca Datsun, Inc. v. Universal Underwriters Ins. Co., 106 Idaho 163, 168, 676 P.2d 1274 (1984). The burden is on the party opposing the trial court's ruling to demonstrate an abuse of the trial court's discretion. Perkins, 132 Idaho at 431, *citing* Zimmerman v. Volkswagen of Am., Inc., 128 Idaho 851, 857, 920 P.2d 67 (1996).

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[7] The Hollands suggest that *de novo* is the proper standard of review under I.C. § 41-1839, attempting to cast the attorney's fees issue as one of statutory construction. (Appellants' Opening Brief, at 9) However, as noted by the trial court, this issue is not one of statutory construction, but of application of the statute to the facts before the trial court.

In the present case, the trial court's ruling that the Hollands were not entitled to attorney's fees under I.C. § 41-1839 must be upheld if (1) the trial court correctly perceived the attorney's fees issue as one of discretion; (2) the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason. Perkins, 132 Idaho at 431, *citing* Sun Valley Shopping Ctr. v. Idaho Power Co., 119 Idaho 87, 94, 803 P.2d 993 (1991). To that end, the trial court correctly identified the decision on attorney's fees under I.C. § 41-1839 as a matter of discretion. (R. Vol. II, p. 326; R. Vol. III, p. 544) Likewise, the trial court acted within the boundaries of that discretion, applying the applicable legal standard of I.C. § 41-1839 to the various theories proffered by the Hollands through a series of two reasoned Orders – 32 pages and 27 pages in length. (R. Vol. II, pp. 321-352; R. Vol. III, pp. 538-564) On the record before it, therefore, the trial court did not err in concluding that the Hollands' were not entitled to attorney's fees under I.C. § 41-1839.

2. The Trial Court Correctly Concluded That This is a Coverage Case, Not a Proof of Loss Case.

The Hollands argue that the issue in this case is "what proof of loss is an insured Idahoan required to provide to an insurer under Idaho law." (Appellants' Opening Brief, at 11) However, as noted by the trial court, the "Hollands cannot grasp that this is not a 'lack of information case,' this is not a 'proof of loss' case, this is a coverage case." (R. Vol. III, p. 550) As further noted by the trial court, the Hollands attempt to focus on proof of loss, intentionally disregarding the remaining consideration under I.C. § 41-1839, the "amount justly due." (R. Vol. III, p. 552)

"An insured is entitled to an award of attorney fees only if (1) he has provided proof of loss as required by the insurance policy; (2) the insurance company fails to pay an amount justly due under the policy within thirty days of such proof of loss . . ." Hansen v. State Farm Mut. Auto. Ins. Co., 112 Idaho 663, 671, 735 P.2d 974 (1987). The trial court noted that in the case at bar, the "'amount justly due' is a coverage question, not a 'proof of loss' question." (R. Vol. III, p. 552) As the court stated, in relevant part, in In re Jones, 401 B.R. 456, 463-64 (2009), *quoting* from Brinkman v. Aid Ins. Co., 115 Idaho 346, 766 P.2d 1227 (1988), *overruled on other grounds*, Greenough v. Farm Bureau Mut. Ins. Co. of Idaho, 142 Idaho 589, 593, 130 P.3d 1127 (2006):

> The purpose of a provision for notice and proofs of loss is to allow the insurer to form an intelligent estimate of its rights and liabilities, to afford an opportunity for investigation, and to prevent fraud and imposition upon it.
>
> Brinkman, 115 Idaho at 349-50 (citing 44 Am.Jur.2d, "Insurance," § 1323, p. 250). The Brinkman court later reiterated that '[t]he purpose of proof of loss statements, in general, is to furnish the insurer with the *particulars of the loss and all data necessary to determine its liability and the amount thereof, if any.*'

(emphasis added) Accordingly, as noted by the trial court, the italicized portion demonstrates that "coverage questions are contemplated under I.C. 41-1839." (R. Vol. III, p. 552) "[A] submitted proof of loss is sufficient when an insured provides the insurer with enough information to allow the insurer a reasonable opportunity to investigate and determine its liability." Greenough, 142 Idaho at 593, *citing* Brinkman, 115 Idaho at 349-50.

In the present case, applying the foregoing standard, the trial court correctly concluded that the Hollands failed to meet their burden under I.C. § 41-1839, Greenough, and Brinkman,

because the "Hollands 'submitted proof of loss' but not a proof of loss which was 'sufficient to provide the insurer with enough information to allow the insurer a reasonable opportunity to investigate and determine its liability.'" (R. Vol. II, p. 348) In particular, the trial court noted:

(1) That the parties were subject to a "moving target" in discussing separate offers made at separate times on separate policies.

(2) That there was no basis for the Hollands' argument that "time periods on these separate offers made at separate times on separate policies should be aggregated." Specifically, the trial court found no authority for the argument that the period from November 10, 2009 to December 7, 2009 could be added to the period from January 7, 2010 to January 26, 2010 in order to meet the 30-day tender requirement after proof of loss is provided. As the Court correctly observed, "[d]ue to the fact that these are separate offers made at separate times on separate policies, there certainly is no factual basis to aggregate these two discrete time periods."

(3) That it is difficult for the Hollands to argue that MetLife was provided "a reasonable opportunity to investigate and determine its liability," where the coverage theory providing the larger tender to the Hollands was discovered by Ms. Paukert, and the Hollands accepted that higher amount based on Ms. Paukert's theory.

(R. Vol. II, pp. 350-351)

The trial court held that these reasons alone provide a sufficient bases to conclude that the Hollands failed to meet their burden under I.C. § 41-1839, Greenough, and Brinkman because the "Hollands failed to prove they submitted proof of loss with sufficient information to allow the MetLife a reasonable opportunity to investigate and determine its liability, when it was MetLife that came up with the creative theory for additional coverage." (R. Vol. II, pp. 351-352) As stated by the trial court, "enforcement of the settlement agreement [is] proper in light of Paukert's theories, as opposed to those of Hollands' counsel, being the ones providing for larger

recovery; thus, it follows that Hollands did not provide MetLife with a reasonable opportunity to investigate and determine liability and the settlement agreement was proper because I.C. § 41-1839 was not a proper basis for fees given the facts of this case." (R. Vol. III, p. 556) To that end, the trial court also stated, "those theories, developed only by MetLife and not by Mihara, resulted in additional coverage which in turned resulted in settlement on February 2, 2010. Hollands have provided no facts which would counter such findings. In light of such, Hollands, through Mihara, did not provide MetLife with "a reasonable opportunity to investigate and determine its liability." (R. Vol. II, p. 350)

3. The Proof of Loss Provided by the Hollands Was Insufficient.

The Hollands erroneously argue that the proof of loss provided by them was sufficient under the language of the policies at issue. (Appellants' Opening Brief, at 13-22) In doing so, the Hollands cite to various portions of the insurance policies at issue for the novel and unfounded proposition that, although the policies do not define "proof of loss," they nonetheless control over the standard set forth in In re Jones, Greenough and Brinkman. *See, e.g.,* In re Jones, 401 B.R. at 463-64; Greenough, 142 Idaho at 593; Brinkman, 115 Idaho at 349-50. Those cases stand for the proposition that where proof of loss is not defined in the policy, the insured is required to provide a proof of loss with sufficient information to allow the insurer a reasonable opportunity to investigate and determine its liability. (Ibid.) Ultimately the policy provisions cited by the Hollands provide for preliminary documents and information needed by MetLife, but at the same time, recognize that further documentation, information, and details may be

necessary.[8] As such, the Hollands' suggestion that these provisions define "proof of loss" for purposes of triggering the 30-day time limitation of I.C. § 41-1839 is in error. Moreover, the Hollands' approach would severely prejudice MetLife's ability to fairly address claims under the policy, as it would prohibit it from requesting any preliminary details, documents or information for fear that such request would constitute a binding "proof of loss" and thereby start the 30-day time limitation, even when it lacks sufficient information to reasonably investigate and determine its liability.

In the present case, the trial court properly concluded, after finding that proof of loss was not defined in the policies at issue, that the Hollands had failed to meet their burden pursuant to Greenough and Brinkman by failing to "prove they submitted proof of loss with sufficient information to allow the MetLife a reasonable opportunity to investigate and determine its liability, when it was MetLife that came up with the creative theory for additional coverage." (R. Vol. II, pp. 351-352) Accordingly, the Court was not, and did not, find a complete failure by the Hollands to provide a proof of loss, but instead concluded that the proof of loss was insufficient to permit MetLife to investigate and determine its liability. Specifically, the trial court held that

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[8] The various provisions noted by the Hollands 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." (R. Vol. II, pp. 378-379)

"whether the proof of loss Hollands provided MetLife was sufficient to allow it to investigate and determine its liability remains a question of fact and precludes an award of fees pursuant to I.C. § 41-1839." (R. Vol. II, p. 549; R. Vol. III, p. 546) In that regard, the Hollands' citation to various documents provided to MetLife again, misses the point, as the trial court stated, "'amount justly due,' hinges on a coverage question, not a 'proof of loss' question." (R. Vol. III, p. 552)

4. Even Assuming, Arguendo, the Hollands Had No Duty to Furnish MetLife with Sufficient Proof of Loss to Determine Liability, the 30-Day Time Limitation Under I.C. § 41-1839 Never Ran.

Assuming, *arguendo*, that the Hollands were under no duty to provide MetLife with proof of loss sufficient to determine its liability, the trial court correctly concluded that disputed issues of fact remain as to whether the thirty (30)-day time limitation under I.C. § 41-1839 ever ran. (R. Vol. II, p. 332-335) In that regard, the following facts are pertinent:

- On December 7, 2009, MetLife was prepared to settle Hollands' the Initial Claim. (R. Vol. I, p. 074)
- That same day, after receiving that information, Mr. Mihara reversed course and advised MetLife that the matter could not be concluded because the Hollands were making Additional Claims. (Ibid.)
- Ms. Davis advised Mr. Mihara she was leaving on a three-week vacation and would not return to her office until January 6, 2010, and asked Mr. Mihara for an extension so she could begin review of the Additional Claims upon her return. Mr. Mihara indicated that was acceptable. (R. Vol. I, pp. 074, 076)
- The Initial Claim and the Additional Claims were separate policies, assigned separate claim numbers. (R. Vol. II, pp. 350-351)
- On January 7, 2010, Ms. Davis advised Mr. Mihara that she had just returned from vacation and was sending the Parents' Policies to coverage counsel for review. (R. Vol. I, pp. 074-075)

- On January 8, 2010, Ms. Paukert was retained by MetLife to provide a coverage opinion. (R. Vol. I, p. 043)

- On January 13, 2010, Ms. Paukert received a telephone call from Mr. Mihara who indicated he represented the Hollands. (R. Vol. I, p. 043)

- From January 14, 2010 through February 2, 2010, research and discussions between Ms. Paukert and Mr. Mihara took place. (R. Vol. I, pp. 043-045)

- Mr. Mihara never provided an adequate proof of loss concerning coverage on the Additional Claims. (R. Vol. I, p. 079)

- On January 27, 2010, MetLife requested additional proof of loss documentation in the form of a legible copy of the title to the motorcycle at issue. (R. Vol. I, p. 075)

- On February 3, 2010, the parties reached a compromise settlement. (R. Vol. I, p. 046)

Given the facts, the extension granted by Mr. Mihara extended, until at least February 3, 2010, the date on which the parties reached settlement. At the earliest, the 30-day clock began to run on January 6, 2010, because Mr. Mihara had granted MetLife an extension to begin review of the Additional Claims to that date; thus, rendering the February 3, 2010 settlement timely. Moreover, during the time in which Mr. Mihara and Ms. Paukert discussed additional theories of recovery, such research and theories necessitated additional proof of loss documentation, including up to January 27, 2010. Thus, the 30-day clock did not run until January 27, 2010.

Assuming, *arguendo*, that the Hollands were under no duty to provide MetLife with proof of loss sufficient to determine its liability, the 30-day limitation under I.C. § 41-1839 never ran, and the trial court's denial of attorney's fees should be upheld.[9]

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[9] The trial court found disputed issues of fact as to whether the 30-day time limitation under I.C. § 41-1839 ever began, and if so, when, if ever. (R. Vol. II, p. 332-335, 338; R. Vol. III, p. 546)

5. *The Hollands' Citation to In re Jones and Greenough is in Error, as Those Cases Support the Trial Court's Ruling that Adequate Proof of Loss Was Not Provided.*

As noted by the trial court, and contrary to the Hollands' assertion, In re Jones is not a coverage case and is distinguishable from the present matter. (R. Vol. III, pp. 547-48) That case involved an insurer's request for the insured's bankruptcy documents, which documents were available to the insured online. 401 B.R. at 464-65. The bankruptcy court found the insurer's insistence on being provided with the insured's bankruptcy documents in hard copy form would not defeat the 30-day requirement under I.C. § 41-1839. In re Jones, 401 B.R. at 464. In other words, the bankruptcy court was unwilling to penalize the insured for the insurer's laziness.

Likewise, as noted by the trial court, Greenough is also distinguishable from the present matter. (R. Vol. III, pp. 549) In that case, the Idaho Supreme Court remanded the issue of sufficiency of proof of loss, and held that "[a]s defined by this Court, a submitted proof of loss is sufficient when the insured provides the insurer with enough information to allow the insurer a reasonable opportunity to investigate and determine its liability." Greenough, 142 Idaho at 583, *citing* Brinkman, 115 Idaho at 349-50.

Relying in part on the In re Jones and Greenough cases, the trial court correctly concluded that "whether the proof of loss Hollands provided MetLife was sufficient to allow it to investigate and determine its liability remains a question of fact and precludes an award of fees pursuant to I.C. § 41-1839." (R. Vol. II, p. 549) Consequently, the Hollands are unable to demonstrate a basis for attorney's fees relying on these cases, and their motion for the same was appropriately denied.

B. The Trial Court Correctly Held that the Hollands Were Not Entitled to Attorney's Fees on the Grounds MetLife did not Tender the Policy Limits on the Initial Claim, Where the Hollands' Attorney Refused Payment on the Lesser Policy Limit.

On November 10, 2009, the Hollands submitted their Initial Claim to MetLife. On December 7, 2009, Ms. Davis contacted Mr. Mihara to inform him that she believed the matter could be concluded with MetLife paying the policy limits for the Initial Claim, $50,000.00. During that conversation, Mr. Mihara advised Ms. Davis that the matter could not be concluded because the Hollands had decided to make two Additional Claims. (R. Vol. I, p. 074) On January 8, 2010, Ms. Paukert was retained by MetLife to provide a coverage opinion concerning the Additional Claims. (R. Vol. I, p. 043)

During Ms. Paukert's discussions with Mr. Mihara over the next month, he indicated that he knew that MetLife had agreed to pay the policy limits on the Initial Claim. However, Mr. Mihara continued to assert that there was coverage under the Parents' Policies, as he wanted coverage under the higher limit policies. To that end, Mr. Mihara was clear that he did not want the policy limits under the Initial Claim. Therefore, Ms. Paukert had no discussions about sending him the policy limits for the Initial Claim, because Mr. Mihara was waiting for MetLife's decision on coverage under the policies with the higher limits. (R. Vol. I, p. 079)

Despite the above, inexplicably Mr. Mihara now takes the position that the Hollands are entitled to attorney's fees under I.C. § 41-1839 because the Initial Claim was submitted on November 10, 2009, no tender was made for the Initial Claim on December 7, 2009, and MetLife

failed to tender the amount due on the Initial Claim–$50,000.00–to the Hollands or the court, as permitted under I.C. § 41-1839(2). (Appellants' Opening Brief, at 22-24)

The trial court's ruling that the Hollands are not entitled to attorney's fees under I.C. § 41-1839 on the grounds that MetLife did not tender payment of $50,000.00 on the Initial Claim, does not constitute an abuse of discretion. As the trial court explained:

> This Court, as discussed supra, found that the December 7, 2009, offer by Daneice Davis was met by Hollands' counsel with the statement that the matter would not be concluded as claims against two other policies would be made. . . . The Court does not now find that MetLife failed to pay the initial claim within the meaning of I.C. § 41-1839.

(R. Vol. III, p. 556) Thus, the trial court acted within the bounds of its discretion finding that MetLife offered to tender the $50,000.00 on the Initial Claim, which tender was denied by Mr. Mihara. This is particularly true, given that MetLife was not even aware that the Hollands had in fact filed a lawsuit on January 26, 2010, when they settled with the Hollands on February 3, 2010. (R. Vol. I, pp. 046-047, 076, 080-081) It stands to reason that MetLife would not deposit money in the court on a lawsuit it was unaware of nor would MetLife tender payment where such payment was refused by the Hollands' attorney.

C. The Trial Court Correctly Ruled that Issues of Fact Remain as to Whether the Hollands Prevailed Under I.C. § 41-1839.

"An insured is entitled to an award of attorney fees only if (1) he has provided proof of loss as required by the insurance policy; (2) the insurance company fails to pay an amount justly due under the policy within thirty days of such proof of loss . . ." Hansen, 112 Idaho at 671. However, the Idaho Supreme court explained that "[t]o be entitled to such an award,

consequently, an insured must prevail." Slaathaug v. Allstate Insur. Co., 132 Idaho 705, 711, 979 P.2d 107 (1999), *citing* Manduca Datsun, Inc., 106 Idaho at 169. In order to prevail, the insured need not obtain a verdict for the full amount requested, only an amount greater than that tendered by the insurer. Halliday v. Farmers Ins. Exch., 89 Idaho 293, 301, 404 P.2d 634 (1965). The determination as to which party prevails is within the discretion of the trial court. Zimmerman, 128 Idaho at 857; Parsons v. Mutual of Enumclaw Ins., 143 Idaho 743, 746, 152 P.3d 614 (2007). As the trial court noted, "[w]here the insurer sued for attorney fees incurred in a separate successful action . . . the insurer is obligated to pay attorney's fees only if its initial refusal to pay the claim were unreasonable." Dawson v. Olson, 94 Idaho 636, 641, 496 P.2d 97 (1972) (discussing uninsured motorist insurance cases) (emphasis added).

In the present case, the trial court found the following facts important as to whether the Hollands "prevailed" within the meaning of I.C. § 41-1839:

- On December 7, 2009, MetLife was prepared to tender policy limits of $50,000.00 on the Initial Claim, but the Hollands indicated the matter could not be concluded because they were making Additional Claims on separate policies. (R. Vol. I, p. 074)
- MetLife was not served with a Complaint at the time the offer was made on the Initial Claim. (R. Vol. I, p. 081)
- The Additional Claims were assigned separate claim numbers, and not contemplated within the terms of the offer on the Initial Claim. (R. Vol. I, p. 075)
- The Hollands filed a lawsuit on January 26, 2010. (R. Vol. I, pp. 006-013)
- MetLife was not aware that a lawsuit had been filed at the time it reached settlement with the Hollands, on February 3, 2010 for $200,000.00. (R. Vol. I, pp. 046, 080)
- As the court stated, "[w]hile the $200,000.00 for which this case ultimately settled is greater than that offered by MetLife in [the Initial Claim], claims under the two

> policies held by Gregory and Kathleen Holland were thereafter assigned Claim Numbers FRD 408440 and 408370 [the Additional Claims/Parents' Policies] and not contemplated within the initial $50,000.00 offer." (R. Vol. III, p. 545)

The Hollands claim that they prevailed under I.C. § 41-1839 because, prior to the lawsuit, MetLife offered the Hollands $50,000.00 on the Initial Claim, that amount was not paid, and later all of the Hollands' claims were settled for $200,000.00. (Appellants' Opening Brief, at 25) However, the trial court concluded that, even if the disputed issues of fact were construed in the Hollands' favor, the "Hollands face a daunting task trying to prove Hollands prevailed within the meaning of I.C. § 41-1839 and Parsons where 1) there was no initial refusal by MetLife to pay, and 2) were MetLife was not served with a Summons and Complaint in this matter at the time their offer was tendered, and arguably had no knowledge at all of Hollands' lawsuit at the time their offer was tendered." (R. Vol. II, pp. 331-332) Consequently, the trial court did not abuse its discretion in ruling that issues of fact remain as to MetLife's knowledge of the lawsuit and the facts surrounding the reasonableness MetLife's failure to pay on the Initial Claim, precluding a determination that the Hollands "prevailed" within the meaning of I.C. § 41-1839. *See, e.g.,* Zimmerman, 128 Idaho at 857; Parsons, 143 Idaho at 746. Likewise, as noted by the trial court, "these are separate offers made at separate times on separate policies." (R. Vol. II, p. 351)

D. The Trial Court Correctly Granted MetLife's Motion to Enforce the Settlement, on the Grounds that Hollands Failed to Meet their Burden of Proving they Provided MetLife with Sufficient Proof of Loss, as Required in Greenough, Brinkman, and I.C. § 41-1839.

On April 28, 2010, MetLife filed a Motion Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees, seeking enforcement of the settlement entered

into by the parties on February 3, 2010, and dismissal of the Hollands' Motion for Attorney's Fees. (R. Vol. I, pp. 061-062) As noted by the trial court, the main issue of contention between the parties was whether attorney's fees were covered in the settlement. (R. Vol. II, p. 343) The trial court found that, based on Straub v. Smith, 145 Idaho 65, 175 P.3d 754 (2007), there is a presumption that where the agreement is silent on attorney's fees, they are outside the agreement. Thus, the trial court did not grant MetLife's Motion to Compel Performance Under the Settlement based on MetLife's argument that attorney's fees were contemplated within the settlement agreement, under either a contract or waiver theory. (R. Vol. II, p. 346)

However, the trial court, after recognizing the foregoing issues of disputed fact did not provide grounds to enforce the settlement agreement, determined that MetLife's Motion to Compel Performance Under the Settlement Agreement must be granted on the grounds that the Hollands' failed to meet their burden of proving they provided MetLife with sufficient proof of loss to allow MetLife "a reasonable opportunity to investigate and determine its liability," as required by Greenough, Brinkman, and I.C. § 41-1839, as the foregoing issues of fact are not germane to that analysis. (R. Vol. II, pp. 348-352; R. Vol. III, p. 550)

As the trial court noted in its ruling, and as discussed in depth in Section A(2) above, the following three (3) reasons alone demonstrate that the Hollands' failed to meet their burden in Greenough, Brinkman, and I.C. § 41-1839:

(1) MetLife was subject to a moving target with separate offers made at separate times on separate policies. Specifically, that MetLife was prepared to pay the policy limits on the Initial Claim. Upon being informed of the same, Mr. Mihara told MetLife that the Hollands were making Additional Claims. The Additional Claims were assigned separate claim numbers from the Initial Claim. The Additional Claims were not

contemplated within the tender offer on the Initial Claim. Upon being informed of the Additional Claims, Ms. Davis told Mr. Mihara she was going on a three-week vacation and would not return until January 6, 2010, at which time she would review the Additional Claims. Mr. Mihara informed Ms. Davis that the delay was acceptable. On January 8, 2010, MetLife retained Ms. Paukert to provide a coverage opinion on the Additional Claims. From January 13, 2010, through February 2, 2010, Ms. Paukert had regular contact with Mr. Mihara to discuss potential theories of coverage for the Additional Claims. (R. Vol. II, pp. 350-351)

(2) The Hollands have provided no law supporting their argument that "time periods on these separate offers made at separate times on separate policies should be aggregated." The trial court found that there was no case law supporting the argument that the period from November 10, 2009 to December 7, 2009 can be added to the period from January 7, 2010 to January 26, 2010, in order to meet the thirty (30) day tender requirement after proof of loss is provided. As the Court recognized, "[d]ue to the fact that these are separate offers made at separate times on separate policies, there certainly is no factual basis to aggregate these two discrete time periods." (R. Vol. II, p. 351)

(3) It is difficult for the Hollands to argue that MetLife was provided "a reasonable opportunity to investigate and determine its liability," where the theory providing the larger tender to the Hollands was discovered by Ms. Paukert, and the Hollands accepted that higher amount based on Ms. Paukert's theory. (R. Vol. I, p. 351)

The trial court held that these three reasons alone provide a basis for the trial court's determination that the Hollands failed to meet their burden of proving they provided MetLife with sufficient proof of loss." In doing so, the trial court noted that questions of fact remain as to whether MetLife had knowledge of the lawsuit and whether the emails amounted to an enforceable contract. (R. Vol. II, pp. 347-348) Ultimately, the trial court correctly granted MetLife's Motion to Enforce the Settlement Agreement, determining that the Hollands failed to meet their burden of proving they provided MetLife with sufficient proof of loss to allow

MetLife "a reasonable opportunity to investigate and determine its liability," as required in Greenough, Brinkman, and I.C. § 41-1839.[10] (R. Vol. II, pp. 348-352; R. Vol. III, p. 550)

E. The Trial Court Correctly Ruled that Idaho Civil Rule 54 Applies to Post-Judgment Issues and is Inapplicable to this Matter.

On February 9, 2010, the Hollands' filed their Motion for Attorney's Fees pursuant to I.C. § 41-1839. (R. Vol. I, pp. 014-015, 046-047) Thereafter, the Hollands' counsel, Mr. Mihara, represented that the hearing on that Motion would be scheduled for a date convenient to both counsel, as evidenced by counsels' correspondence from the dates February 12, February 22, February 25, March 16 and March 17, 2010. (R. Supp., pp. 088-096) On March 26, 2010, the Hollands noted their Motion for Attorney's Fees for an evidentiary hearing scheduled for May 12, 2010, as that fit both counsel's schedule. (R. Supp., pp. 089, 097-098) The parties then proceeded with discovery.

Despite these prior representations, on April 6, 2010, the Hollands' counsel took a disappointing stance, advising Mr. Schroeder of his new position that, under Idaho Civil Rule 54(e)(6), a response to the Hollands' Motion for Attorney's Fees was past due, and thus, waived.

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[10] The Hollands' argument fails to address the trial court's reasoning in granting MetLife's Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees, on the grounds that the Hollands failed to meet their burden of proving they provided MetLife with sufficient proof of loss to allow MetLife "a reasonable opportunity to investigate and determine its liability," as required by Greenough, Brinkman, and I.C. § 41-1839. Instead, the Hollands side-step the trial court's reasoning, arguing simply, that attorney's fees were not contemplated within the scope of the parties' agreement, focusing on the disputed issues of fact, that the trial court dismissed as not relevant to its analysis. (Appellants' Opening Brief, at 26-30; R. Vol. II, pp. 348-352) Thus, the Hollands' argument is without merit, and does not impact the trial court's reasoning.

In response, on April 12, 2010, Mr. Schroeder sent an e-mail to Mr. Mihara – stating in pertinent part: "Putting to one side the fact that I.R.C.P. 54 is inapplicable since a judgment has not been entered, your new position is inconsistent with the request in your motion, your numerous written and oral representations to me, your Notice of Hearing, and the discovery request you served." (R. Supp., pp. 089, 099)

On May 17, 2010,[11] in their Reply on their Motion for Attorney's Fees, the Hollands argued for the first time that:

> "Defendants have waived any and all objections to Plaintiffs' entitlement to attorney's fees along with the amount claimed by failing to timely object." Plaintiffs would note that I.R.C.P. 54(e)(6) requires any objection to the allowance of attorney's fees to be made within 14 days. I.R.C.P. 54(e)(6).

(R. Vol. II, pp. 276-278) Likewise, the Hollands' argue that "MetLife's answer came after 14 days from when the Hollands' motion seeking statutory attorneys' fees became at issue, MetLife waived all objections thereto."[12] (Appellants' Opening Brief, at 30-31)

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[11] As noted by the trial court, Mr. Mihara essentially "sandbagged" MetLife by raising this argument for the first time in the Hollands' Reply brief. (R. Vol. III, p. 559)

[12] The Hollands cite the Crowley v. Lafayette Life Ins. Co., 106 Idaho 818, 823, 683 P.2d 854 (1984) case for the proposition that Idaho Civil Rule 54 applies pre-judgment as well as post-judgment. (Appellants' Opening Brief, at p. 30) However, as noted by the trial court, a "cursory reading of Crowley" demonstrates that such claim is unsubstantiated. In that regard, and as further noted by the trial court, the Hollands' cannot even cite to the section in Crowley that stands for that proposition that Idaho Civil Rule 54 applies pre-judgment. (R. Vol. III, p. 561) Likewise, the Hollands' argument that the parties March 3, 2010 "Joint Motion and Stipulated Order to Dismiss All Claims Except for the Pending Motion for Attorney Fees" acts as a final judgment under Idaho Civil Rule 41(a)(1), is also without merit. (Appellants' Opening Brief, at pp. 30-31) Simply stated, the Motion for Attorneys Fees, *i.e.,* the basis for the Hollands' argument under Idaho Civil Rule 54, was not dismissed under that Order and remained pending. (R. Vol. I, pp. 028-030)

Even putting aside Mr. Mihara's inconsistent representations, Idaho Civil Rule 54 is inapplicable. To wit—instead of filing and serving on MetLife a "memorandum of costs," the Hollands' noted their Motion for Attorney's Fees for an evidentiary hearing, reserving the right to introduce evidence and/or call witnesses. These actions triggered MetLife's responsive briefing schedule. I.R.C.P. § 7(b)(3). The Hollands' actions are not contemplated by Idaho Civil Rule 54 – namely, they Hollands noted their motion for hearing (rather than submitting a cost memorandum), reserved the right to introduce evidence and/or call witnesses (rather than submitting a cost memorandum and permitting the opposing party to object), and triggered responsive briefing (rather than submitting a cost memorandum and permitting the opposing party to object within 14 days). In sum, the Hollands' actions are inconsistent with the Idaho Civil Rule 54 – essentially, because such Rule is inapplicable to the case at hand. Therefore, the Hollands' argument under Idaho Civil Rule 54 fails.

Moreover, Idaho Civil Rule 54 applies to post-judgment issues; consequently, such rule is inapplicable here because no judgment has been entered. Idaho Civil Rule 54(e)(6), "Objection to Attorney Fees," and cited by the Hollands, states, in pertinent part that:

> Any objection to the allowance of attorney fees, or to the amount thereof, shall be made in the same manner as an objection to costs as provided by Rule 54(d)(6).

Idaho Civil Rule 54(d)(6), "Objection to Costs," states in relevant part:

> A party may object to the claimed costs of another party set forth in a memorandum of costs by filing and serving on the adverse parties a motion to disallow part or all of such costs within fourteen (14) days of service of the memorandum of cost.

Idaho Rule 54(d)(5), "Memorandum of Costs," states:

> At any time after the verdict of a jury or a decision of the court, any party who claims costs may file and serve on adverse parties a memorandum of costs, itemizing each claimed expense, but such memorandum of costs may not be filed later than fourteen (14) days after entry of judgment.

Thus, Idaho Civil Rule 54 is inapplicable where no judgment has been entered, as was the case here at that time. Along these lines, in each case cited by the Hollands there was a judgment.[13] A Judgment in this matter was not entered until October 6, 2010, after the Hollands' Motion for Attorney's Fees and corresponding Reconsideration was ruled on by the trial court. (R. Vol. III, pp. 565-567) Moreover, as noted by the trial court, each case cited by the Hollands discusses attorney's fees after the case had been resolved, not a claim for attorney's fees at the inception of the case. (R. Vol. III, pp. 559-560)

In sum, Idaho Civil Rule 54 applies to post-judgment issues and is inapplicable to the case at hand. As noted by the trial court, "[t]here is nothing in I.R.C.P. 54 or 55 that deals with attorney fees prior to judgment," as sought by the Hollands and appealed herein. (R. Vol. III, p.

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[13] *See e.g.,* Conner v. Dake, 103 Idaho 761, 761, 653 P.2d 1173 (1982) ("In the proceedings below, Judgment was entered against the appellants . . . "); Fearless Farris Wholesale v. Howell, 105 Idaho 699, 701, 672 P.2d 577 (1983) ("The trial court entered judgment in favor of Fearless Farris"); Farber v. Howell, 111 Idaho 132, 136, 721 P.2d 731 (1986) ("Thus, the Howells had ten days (now fourteen days) following such service to object to the costs and attorney fees awarded in the judgment"); Great Plains Equip. v. N.W. Pipeline, 132 Idaho 754, 759, 979 P.2d 627 (1999) ("The collective amount of the final judgment . . . "); Crowley, 106 Idaho at 823 ("Thereafter . . . the trial court filed its Memorandum Decision and Judgment"); Operating Eng. Local Union 370 v. Goodwin, 104 Idaho 83, 84, 656 P.2d 144 (1982) ("The judgment, entered the same date as the order . . ."); Ada County High. Dist. v. Acarrequi, 105 Idaho 873, 673 P.2d 1067 (1983) ("This is an appeal from only that portion of a judgment awarding attorneys' fees and costs . . . "); Camp v. Jiminez, 107 Idaho 878, 693 P.2d 1080 (1984) ("The district court entered a summary judgment . . . ").

561) To that end, the trial court correctly ruled that the Hollands' timeliness argument under Idaho Civil Rule 54 is "completely without merit." (R. Vol. III, p. 562)

F. The Trial Court Properly Concluded that the Parties' Stipulated Order to Dismiss Precludes Summary Judgment.

1. The Appellate Court Applies the Standard of Review Applied by the Trial Court.

When faced with an appeal from summary judgment, the appellate court employs the standard of review properly applied by the trial court when originally ruling on the motion. Farm Credit Bank of Spokane v. Stevenson, 125 Idaho 270, 272, 869 P.2d 1365 (1994). On review, as when the summary judgment is initially considered by the trial court, the appellate court liberally construes the record in the light most favorable to the party opposing the summary judgment motion, drawing all reasonable inferences and conclusions in that party's favor. Ibid. If a party moves from summary judgment on the basis that no genuine issue of material fact exists with regard to an element or elements in the non-moving party's case, the non-moving party must prove the existence of an issue of fact regarding that element or elements. Ibid., at 272-73.

"The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment." Smith v. Meridian Joint School Dist. No. 2, 128 Idaho 714, 719, 918 P.2d 583 (1996), *citing,* I.R.C.P 56(c); Tingley v. Harrison, 125 Idaho 86, 89, 867 P.2d 960 (1994). "If the record contains any conflicting inferences upon which reasonable minds might reach different conclusions, summary judgment must be denied." Harris v. Dep't of Health & Welfare, 123 Idaho 295, 298, 847 P.2d 1156 (1992). The appellate court

can affirm the denial of a summary judgment on alternative grounds if one of the grounds relied upon by the trial court was in error. MacLeod v. Reed, 126 Idaho 669, 671, 889 P.2d 103 (1995).

2. The Trial Court Properly Denied Summary Judgment.

On May 17, 2010, the Hollands moved for summary judgment on the question of their entitlement to attorney's fees, claiming that MetLife's failure to deny certain allegations in the Complaint amounted to an admission such that the Hollands are entitled to summary judgment on all issues. (R. Vol. II, pp. 242-253) In doing so, rather than address the merits of this action, Hollands take the position that they may: (1) enter into a Stipulated Order dismissing "all claims" with prejudice and leaving only their pending Motion for Attorney's Fees; (2) accept settlement; (3) observe MetLife's Answer addressing the sole remaining claim for attorney's fees; (4) say nothing; and (5) then argue that MetLife's failure to answer certain paragraphs renders summary judgment appropriate. (Appellants' Opening Brief, at 33-34)

Generally, the Hollands are correct that all averments in a complaint not denied are deemed admitted. Jacobsen v. State, 99 Idaho 45, 48, 577 P.2d 24 (1978), *quoting* I.R.C.P. 8(d). Here, however, by Joint Motion, the parties dismissed "all claims" with prejudice, leaving only the Hollands' pending Motion for Attorney's Fees. (R. Vol. I, pp. 028-030) Thus, no Answer was required to the Hollands' Complaint, and the only responsive pleading required was in response to the Hollands' Motion for Attorney's Fees.[14]

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[14] As only the Hollands' Motion for Attorney's Fees remained, the briefing schedule was triggered and MetLife was required to file a Response to the Hollands' Motion for Attorney's Fees seven (7) days prior to the scheduled hearing. I.R.C.P. 7(b)(3)(E).

Nonetheless, out of an abundance of caution and to crystallize the sole remaining issue for adjudication, MetLife submitted an Answer to the sole remaining claim for attorney's fees. (R. Supp., pp. 032-035) Specifically, MetLife's Answer sets forth the reason such paragraphs were not addressed – namely, "[n]o 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." (R. Supp., p. 033) Consistent with the foregoing, the trial court correctly made the following findings:

> This Court dismissed all claims "except for Plaintiffs' Motion for attorney fees filed on February 9, 2010, . . . with prejudice and without costs to either party. Joint Motion and Stipulated Order to Dismiss all Claims Except for the Pending Motion for Attorney Fees, pp. 2-3. It follows that only paragraph 34 on page 7 of the Complaint remained at issue and, because the February 9, 2010, motion only addressed fees under I.C. § 41-1839, this statute would be the only possible basis for recovery by Hollands. Hollands' argument that MetLife's failure to deny paragraphs 9, 10, 13, 16, 17 and 18 of the Complaint operates as admissions is without merit. 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, and Hollands' are not entitled to judgment as a matter of law on this issue.

(R. Vol. II, pp. 340-341) (emphasis added). Accordingly, the trial court correctly concluded that issues of fact preclude Hollands' Motion for Summary Judgment.[15]

[15] Notably, given the unique circumstances of this case, MetLife requested that, should the trial court find that additional paragraphs in the Hollands' Complaint needed to be addressed by MetLife, that MetLife be given leave of court to file an Amended Answer addressing the same. (R. Vol. II, p. 287) This request was never addressed by the trial court, as it found the Hollands' claim of summary judgment to be without merit.

G. MetLife's Attorney's Fees and Costs on Appeal

Should MetLife prevail on this appeal, MetLife is entitled costs as the prevailing party pursuant Idaho Appellate Rule 40 and attorney's fees under Idaho Code § 12-121 and Idaho Appellate Rule 41. These rules allow an award of attorney's fees to the prevailing party, where the appeal has been brought "frivolously, unreasonably, or without foundation." Rendon v. Paskett, 126 Idaho 944, 945, 894 P.2d 775 (1995), *citing* Excel Leasing Co. v. Christensen, 115 Idaho 708, 769 P.2d 585 (1989). As the trial court noted in several places throughout its orders, many of the Hollands' theories of recovery are "without merit." (R. Vol. II, pp. 340-341; R. Vol. III, pp. 561-562)

H. The Hollands' Requested Attorney's Fees

Conversely, even assuming, *arguendo,* that this court reverses the trial court's ruling that the Hollands were not entitled to attorney's fees under I.C. § 41-1839, the Hollands are not entitled to attorney's fees unless this court also finds an amount is "justly due." Wolfe v. Farm Bureau Ins. Co., 128 Idaho 398, 407, 913 P.2d 1168 (1996), *citing* Halliday, 89 Idaho at 301 ("[a]ttorney fees on appeal are permitted under I.C. § 41-1839 if it is determined that an amount is justly due under the insurance contract.") Likewise, should this court reverse the trial court's ruling and find an amount is "justly due," this matter should be remanded back to the trial court to determine the reasonable amount of attorney's fees. Martin v. State Farm Mut. Auto. Ins. Co., 138 Idaho 244, 248, 61 P.3d 601 (2002) (holding that the trial court erred in denying plaintiff's claim for attorney's fees, and remanding the matter back to the trial court to determine the reasonable amount of attorney's fees to be awarded)

VI. CONCLUSION

For the foregoing reasons, MetLife requests that the July 20, 2010 Order of the trial court denying the Hollands' Motion for Attorney's Fees under I.C. § 41-1839, denying the Hollands' Motion for Summary Judgment, and granting MetLife's Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney Fees be affirmed. Likewise, MetLife requests that the October 6, 2010 Order of the trial court denying the Hollands' Motion for Reconsideration of its July 20, 2010 Order in its entirety, be affirmed.

DATED this 26 day of September, 2011.

PAINE HAMBLEN LLP

By: William J. Schroeder
William J. Schroeder
Patrick E. Miller
Attorneys for Defendants/Respondents