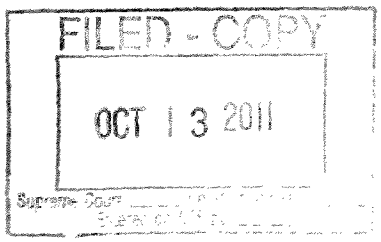
10-13-2011

Estate of Holland v. Metropolitan Property and Cas. Ins. Co. Appellant's Reply 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' REPLY BRIEF



APPELLANTS' REPLY 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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* To aid in the Court's review of this Reply Brief and the Appellants' Brief, the Hollands note I.A.R. 35(e) in that citation to the Volume of the Clerk's Record is usually required, however, the Hollands would ask the Court to note that they were provided an electronic record by the District Court Clerk's office which did not delineate between volumes, but rather was one continuous record, hence, only page numbers are identified in the Hollands' briefing.

II. TABLE OF CASES AND AUTHORITIES

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III. REPLY ARGUMENT

A. The standard of review set forth in the Appellants' Brief is correct.

MetLife asserts the proper standard of review is one of abuse of discretion. Respondent's Brief ("Resp. Brief"), p. 19 Perhaps MetLife would be the correct if this were an appeal of an *award* of attorney's fees, however, the standard set forth by Idaho case law for a *denial* of attorney's fees sets forth that a trial court's interpretation of a statute's terms denying a party's entitlement to attorney's fees would be freely reviewed. *Martin v. State Farm Ins. Co.*, 138 Idaho 244, 61 P.3d 601 (2002) ("The starting point for any statutory interpretation..."); see also *In re Death of Cole*, 113 Idaho 98, 99-100, 741 P.2d 734, 735-36 (Ct. App. 1987) (engaging in statutory analysis to determine whether an insured provided proper proof of loss under I.C. § 41-1839(1) on appeal from a *denial* of attorney's fees pursuant to the statute) If a trial court adds a requirement not contained within the statute (e.g., the insured must provide legal theory as part of a "proof of loss") the issue is one of "statutory construction." *Parsons v. Mutual of Enumclaw Ins. Co.*, 143 Idaho 743, 746-47, 152 P.2d 614, 617-18 (2007)

An appellate court will also freely review whether a trial court has correctly determined whether there is, or is not, material issues of fact that preclude summary judgment. *Camp v. Jiminez*, 107 Idaho 878, 881-82, 693 P.2d 1080 (Ct. App.1984)

In the alternative, and for argument's sake only, should this Court find the abuse of discretion standard proper, the Court should still vacate the entry of judgment and reverse and overrule the trial court's opinions and orders on the basis that they did not rest upon applicable legal standards, nor were they reached by exercise of reason, as discussed below.

B. **The parties' joint motion and stipulated order to dismiss does not preclude summary judgment pursuant to I.R.C.P. 56(a) because MetLife admits it did not answer the complaint's averments.**

MetLife argues that the parties' joint motion and stipulated order excused it from answering the factual averments of the complaint. Resp. Brief., pp. 39-40

The Idaho Rules of Civil Procedure require a party to set forth factual bases of its requested relief. I.R.C.P. 8(a)(1) Averments 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); see also *Lindgren v. Martin*, 130 Idaho 854, 856-57, 949 P.2d 1061, 1063-64 (1997) There shall be a complaint and an answer. I.R.C.P. 7(a) Thus, an answer is the required, responsive pleading to a complaint. *Id.*

Given the similarity between the Idaho rules and their counterparts in the Federal Rules of Civil Procedure, and the lack of case law in Idaho, it is appropriate for Idaho courts to turn to federal authority for guidance. *Herrera v. Estay*, 146 Idaho 674, 678, 201 P.3d 647, 651 (2009)

An answer that states the plaintiffs' averments are immaterial and do not require an answer has the same effect of admitting those averments. 61A Am Jur 2d PLEADING § 296 (2011) Facts admitted by the pleadings need not be proved. 44A Am Jur 2d INSURANCE § 1950 (2011); see also *Pendlebury v. Western Cas. & Surety Co.*, 89 Idaho 456, 464, 406 P.2d 129, 137 (1965)

At least one federal case held the comparable federal civil rule operated to bind a party to a judicial admission – even in the face of contrary evidence it later entered to contest the issue. *Missouri Housing Development Com'n v. Brice*, 919 F.2d 1306, 18 Fed. R. Serv. 3d 427 (8th Cir. 1990) The *Brice* court observed:

As a rule, "[a]dmissions in the pleadings... are in the nature of judicial

> **admissions binding upon the parties, unless withdrawn or amended**." ... Thus, the question presented is whether admissions contained in pleadings are binding where, as here, the admitting party later produced evidence contrary to those admissions. We hold that Timilty's admissions in his answer are binding.
> ...
> The court went on to hold that, "**this factual dispute does not render summary judgment inappropriate**. Irrespective of which document contains the more accurate accounts, the [plaintiffs] are bound by the admissions in their pleadings, and thus no factual issue can be evoked by comparing their pleadings with [the] affidavit." Id. at 108 Thus, *Davis* stands for the proposition that **even if the post-pleading evidence conflicts with the evidence in the pleadings, admissions in the pleadings are binding on the parties and may support summary judgment against the party making such admissions**...

Brice, supra, 919 F.2d at 1314-15 (**emphasis added**) (internal citations omitted); *see also* 35A C.J.S. FEDERAL CIVIL PROCEDURE § 371 (2011) Hence, federal case law is consistent with Idaho law, and summary judgment would be a proper basis for addressing admissions in the pleadings.

The Hollands' motion for summary judgment in this case was made upon I.R.C.P. 56(a) and cited to their verified complaint and MetLife's answer. R., pp. 266-67; see also *Camp v. Jiminez*, 107 Idaho 878, 881, 693 P.2d 1080, 1083 (Ct. App. 1984) (citing I.R.C.P. 56(a) as a proper basis for summary judgment upon the pleadings) The complaint expressly incorporated the averments of paragraphs 1 to 21 into paragraph 34, the paragraph at issue here. R., p. 12, ¶ 23

MetLife acknowledges in its briefing, "[g]enerally, the Hollands are correct that all averments in a complaint not denied are deemed admitted." Resp. Brief, p. 39 MetLife admits, "MetLife's Answer sets forth the reason **such paragraphs were not addressed** – namely "[n]o Answer is required as to paragraphs 1 to 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."" Resp. Brief, p. 40 (**emphasis added**) Again, there was no general denial contained in the answer.

Contrary to MetLife's position, the stipulation did not provide for relief from the duty of answering the complaint's averments. The trial court granted the parties' stipulated motion:

> **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.

R., pp. 46-47 (**emphasis added**) Like the stipulation it was based upon, the trial court's March 3, 2010 order did not even include the words, "averments," "allegations," or "complaint," nor did it excuse MetLife's obligation to answer the remaining averments of the complaint. *Id.*

In response to MetLife's arguments, the trial court initially held on July 20, 2010:

> **It follows that only paragraph 34 on page 7 of the Complaint remained at issue** ... 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., pp. 404-05 (**emphasis added**) The trial court directly contradicted itself on October 6, 2010:

> However, **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. **The Court dismissed with prejudice all claims other than the claim for fees.**

R., pp. 687-88 (**emphasis added**) If factual averments remained in the complaint, as would be inferred from the October 6, 2010 opinion, such averments would be deemed admitted, and therefore the proper basis for summary judgment. The trial court erred by not reconsidering this.

The term "claims" used in the March 3, 2010 stipulated motion and order, and the term "averments" used in I.R.C.P.(8)(d) have different meaning. Black's Law Dictionary, 2d Pocket Ed., West Publishing, 2001, pp. 55, 102 If all the "averments" were dismissed as suggested by

MetLife, the Hollands' motion for fees would have to be dismissed as well under Rule 8(a), as there would be no factual bases for the entitlement to rest. This is an absurd result, and the likely basis of the trial court's October, 2010 retreat from its July, 2010 memorandum.

It is anti-intuitive for the parties to stipulate, and the trial court to reserve an issue – and then dismiss, with prejudice, the very factual averments upon which the issue rests. To uphold the trial court and find for MetLife, this Court would have to disregard the language in the trial court's October 6, 2010 opinion while at the same time delete the term "claims" and insert the word "averments" into the March 3, 2010 stipulated motion and order.

Because the trial court's decisions were contrary to *Pendlebury*, supra, 89 Idaho at 464, by virtue of it requiring the Hollands to prove matters admitted by the pleadings, the trial court's decisions were not consistent with applicable legal standards. Further, because the trial court directly contradicted itself, it did not reach its decision by an exercise of reason. Even if such averments were denied, MetLife waived all of its objections pursuant to I.R.C.P. 54(e).

C. **Rule 54(e) is applicable to all requests for statutory awards of attorney's fees.**

MetLife argues that I.R.C.P. 7(b)(3) governs the timing of its response and takes issue with the form of the fee request. Resp. Brief, p. 36 MetLife argues, despite entering into a Rule 41(a)(1)(ii) stipulation of dismissal, with prejudice, there was no judgment in this case until October 6, 2010. *Id.* at 37 MetLife also claims to have been "sandbagged." *Id.* at 35 (FN 11)

MetLife and the trial court's reliance on Rule 7(b)(3) is misplaced. The rule is inapplicable to a motion for attorney's fees by its very terms. The Rule provides:

> **Unless otherwise ordered by the court**, which order for cause shown be made

on ex parte application, or **specified elsewhere in these rules**...

I.R.C.P. 7(b)(3) (**emphasis added**) The rules specify elsewhere, in Rule 54(e):

> **Any objection to the allowance of attorney 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) Rule 54 (d)(6) provides any objection come within 14 days of the service of the cost memorandum. I.R.C.P. 54(d)(6) In addition, Rule 54(e)(8) states:

> **The provisions of this Rule 54(e)** relating to attorney fees **shall be applicable to all claims for attorney fees** made pursuant to section 12-121 Idaho Code, **and to any claim for attorney fees made pursuant to any other statute**...

I.R.C.P. 54(e)(8) (**emphasis added**) Thus, Rule 54(e) applied to the Hollands' motion for fees.

Contrary to MetLife's argument, a memorandum of costs under Rule 54(e) need not be titled, "memorandum of costs." *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 775, 979 P.2d 627 (1999) Under the case of *Straub*, this Court held that a Rule 41(a)(1)(ii) dismissal with prejudice is a final judgment on the merits of the case. *Straub v. Smith*, 145 Idaho 65, 71, 181, P.3d 754, 760 (2007) ("The dismissal was a final judgment ...") Justice Eismann (the then Chief Justice) wrote in his concurrence:

> Indeed, there can be no prevailing party until the merits of the lawsuit have been decided and there is a final judgment... A dismissal of an action "with prejudice" is simply an adjudication on the merits of the plaintiff's claim... In the instant case, there was no final judgment until the action was dismissed with prejudice. The dismissal of Straub's action with prejudice was a precondition to the Smiths' right to recover court costs and attorney fees, not a denial of that right.

Straub, supra, 181 P.3d at 761-62 (internal citations omitted) While it acknowledges the motion for fees remained, MetLife offers no substantive discussion of *Straub* on this issue, and merely

mentions Rule 41(a)(1) in a footnote. Resp. Brief, pp. 32, 35 (FN12)

Contrary to the argument set forth by MetLife, in *Crowley*, like this case, the request for fees came prematurely, before the entry of judgment. *Crowley v. Lafayette Life Ins. Co.*, 106 Idaho 818, 823, 683 P.2d 854, 859 (1984) The *Crowley* Court held:

> ... the strict ten-day period of I.R.C.P. 54(d)(6) may be enlarged at the discretion of the trial court. **In a similar vein, we can conceive of no prejudice to any party which would result from considering a memorandum of costs filed prior to a decision of the court to become valid upon the date the clerk of the court files the decision**... Consequently, we hold that the premature filing of the memorandum of costs in this case does not constitute a ground for striking the memorandum of costs. Therefore, we affirm the district court's denial of Lafayette's motion to strike the memorandum of costs.

Id. (**emphasis added**)

Like *Crowley*, in this case, the motion for fees became valid the day the district clerk filed the March 3, 2010 order. If MetLife had objection to the content or form of the motion, it could have made proper objection and moved to strike within 14 days per Rule 54(e).[1] *Id.*; see also *Tolmie Farms v. J.R. Simplot, Inc.,* 124 Idaho 607, 610, 862 P.2d 299, 302 (1993) The trial court intentionally did not rule on this issue in its first order. R., p. 689-92 On reconsideration, the trial court did not note the timing of MetLife's filings, but rather the timing of Rule 7(b)(3). R., p. 692

The Hollands acknowledge Mihara granted Schroeder's request for a voluntary forbearance against taking action against MetLife until March 15, 2010. R., p. 243 However, on March 16, 2010, Schroeder advised Mihara the remaining issue of fees could only be resolved through litigation. R., p. 381 On March 16, 2010, MetLife knew there was a request for an award of fees,

[1] The form used for a request for fees is subject to timely objection, but lack of proper form is not jurisdictionally fatal. *Camp v. Jiminez*, 107 Idaho at 883-84 If a party has an objection with compliance to Rule 54(e) it must object and move to strike or otherwise its objection is waived. *Tolmie Farms*, 124 Idaho at 610

and it knew there was a judgment, i.e., dismissal with prejudice of the underlying claims. Like in *Straub*, the dismissal was a precondition of the Hollands' right to fees, not a denial of that right. Under the rules, MetLife then had 14 days to prepare and file a response if it objected to either the substance or form of the fee request. MetLife did not do so, and thus it waived its objections.

Finally, as to MetLife's argument that it was "sandbagged:" MetLife makes this argument in the same portion of its brief whereby it acknowledges its attorney, Schroeder, was told almost two months in advance of oral argument that Mihara intended to make the Rule 54 argument. Resp. Brief, pp. 34-35 MetLife's argument discounts the fact it filed a sur-reply, hence the trial court had MetLife's written briefing on the issue before it to consider. R., pp. 355-72 The Hollands did not move to strike the filing. Although it seems to new find importance with the issue, MetLife fails to note it did not even brief the matter on reconsideration. R., pp. 688-89 Even if MetLife hadn't admitted facts necessary for summary judgment, or waived all objections thereto, the Hollands are entitled to recover fees because they complied with I.C. § 41-1839(1).

D. **The Hollands are entitled to attorney's fees under I.C. § 41-1839(1).**

1. **Under treatise and federal law, an insured is not, and should not be, required to provide legal theory to an insurer.**

The trial court held, and MetLife argues the Hollands' proof of loss was insufficient to provide it a reasonable opportunity to investigate and determine its liability. Resp. Brief, p. 21 In reply, the Hollands would offer that the notion that an insured is required to give legal theory as part of a proof of loss to an insurer has been flatly rejected by at least one federal court:

> **To ask an insured to foresee all potential claims arising out of an "occurrence," and to spell them out in order to satisfy the notice provision of**

> **the insurance policy, would be to ask that an insured retain the kind of expertise for which it pays the insurer.**
> ...
> **Defendants' contractual obligation was to give "notice" of "an occurrence," identifying the "insured," the "time," the "place," the "circumstances," and the "names and addresses of witnesses." This information was related to Mr. Williams within a short time after the accident herein** as evidenced by the payment of the Athey Beaman Company, Inc. claims. Mr. Williams, with a C.P.C.U. degree in insurance, is an expert in processing this information; Mr. Williams knew the relationship between the companies; Mr. Williams had drawn up the policies; Mr. Williams viewed the scene of the accident; and Mr. Williams testified in his deposition concerning what claims were brought to John Putman's attention. **Just where the communications broke down in the processing of the claims arising from this "occurrence" is beyond the scope of this inquiry. However, it is quite apparent that the ball was somewhere in Aetna's court after defendant Samson related the information concerning the "occurrence"** and Aetna appeared to act thereon by investigating and subsequently paying the Athey Beaman claims. **Defendants herein had a right to rely on the expertise of Mr. Williams and the insurance company that defendants had been paying premiums to since their inception.**

Aetna Cas. & Sur. Co. v. Samson, 471 F.Supp. 1041, 1049-50 (Dist. Colo. 1979)[2] (**emphasis added**) MetLife's arguments and the trial court's reasoning have been summarily rejected by at least one other state. The Kansas Court of Appeals explained:

> Transportation asserted that Barlett breached the policy provision requiring an insured to give the company prompt notice of a claim. Transportation argues that Barlett's accident notice was insufficient to notify Transportation that Barlett was making an **underinsured motorist coverage claim. The argument is unsupported by law, contract language, or <u>common sense</u>.**
>
> The contract provides that an insured "must give us or our authorized representative prompt notice of the 'accident' or 'loss' " and directs the insured to include: **(1) <u>how, when, and where the accident or loss occurred</u>; (2) <u>the name and address of the insured</u>; and (3) <u>the names and addresses of any injured persons and witnesses</u>, <u>to the extent possible</u>. <u>The notice provisions of the</u>**

[2] The very references to the insureds' contractual obligations in *Aetna Cas. & Sur. Co. v. Samson*, cited above, are eerily similar to the Hollands' contractual obligations in this case. Resp. Brief, p. 24 (FN 8) Again, neither MetLife nor the trial court ever alleged the Hollands, in any way, failed to comply with the terms of their policies.

> **policy do not require the insured to identify for his or her company the coverage provision which will be applicable to the claim.**
>
> **One would expect the insurance company, which drafted the insurance policy, to have a greater knowledge of the applicability of the various coverages contained in the policy than a person who purchases the policy. To suggest that the insured has to identify the precise coverage that will apply to an accident is totally unpersuasive. Upon being notified of an accident, it is incumbent on the insurance company to investigate the applicability of its insurance policy provisions. Transportation's contentions to the contrary fail as a matter of law.**

Bartlett v. CNA and Transp. Ins. Co., 33 Kan.App.2d 519, 526, 104 P.3d 1011, 1017 (Kan.App. 2005)[3] (**emphasis added**)

On reconsideration, the trial court cited *In re Jones* (which in turn cited to *Brinkman*) as authority to support a new basis of its denial of the Hollands' entitlement to attorney's fees and held, "coverage questions are contemplated under I.C. § 49-1839" (sic). R., p. 682 The trial court erred by failing to appreciate the remaining portion of the *Brinkman* excerpt:

> The insured when required to do so under his policy, should provide the **information** reasonably available to him **regarding his injury** and the **circumstances of the accident.**
>
> The amount of information provided should be proportional to the amount reasonably available to the insured. **If the information provided is insufficient to give the insurer an opportunity to investigate and determine its liability, the insurer may deny coverage. Otherwise, the insurer must investigate and/or determine its rights and liabilities.** The **documentation** is the "**proof.**" The **explanation of physical and/or financial injury** is the "**loss.**" "Loss" must be distinguished from liability. **The insurer will determine its liability with the knowledge that it must be fair and accurate or suffer the consequences.**

[3] Again, the very references to the insureds' contractual obligations in *Bartlett*, cited above, are eerily similar to the Hollands' contractual obligations in this case. Resp. Brief, p. 24 (FN 8) Again, neither MetLife nor the trial court has ever alleged that the Hollands, in any way, failed to comply with the terms of their policies.

> **Although it did not define "proof of loss," Aid's insurance policy did state that a person seeking coverage must submit a proof of loss when required by Aid. In the instant case, Aid never demanded or requested a proof of loss from Brinkman. Hence, by the contractual terms of Aid's own policy, Brinkman was not required to submit a proof of loss as a condition to receipt of payment from Aid.**

Brinkman, 115 Idaho 346, 350, 766 P.2d 1227, 1231 (1988) (**emphasis added**)

The trial court erred by failing to acknowledge that *Brinkman* actually places the obligation to produce the theory of coverage on the insurer – not the insured. *Id.* This result is consistent with other statutes, such as I.C. § 41-1329(5), which require insurers make timely coverage decisions once proof of loss is submitted. An insured is required to produce only explanation and documentation of the loss – not a legal theory of coverage. *Brinkman*, supra, 766 P.2d at 1231

In this case, MetLife argues, and the trial court held because MetLife eventually did what it otherwise had a duty to do in a timely manner, a duty to determine coverage and timely pay a claim, it escapes liability for fees. Neither the policy nor I.C. § 41-1839(1) or (2), nor any reported case law, requires the Hollands to produce legal theory as part of their proof of loss.

Neither the trial court nor MetLife suggest the Hollands failed to comply with the terms of their policies. The Hollands averred in their complaint they complied with all requests for information and documentation, and had complied with their policies before bringing suit. R., p. 11, ¶ 16 Like the other factual averments of the complaint, MetLife did not deny this fact in its answer. MetLife attempts to circumvent the policies' requirements by characterizing the information required by the policies as being merely "preliminary." Resp. Brief, pp. 23-24

The Hollands' policies allow oral proofs of loss. R., p. 490, ¶ 5 There is nothing in the

record to contradict the evidence that proper proof of loss was submitted on or about November 10, 2009. R., p. 466-67, ¶ 7 Again, the writings in the record show MetLife knew the details and circumstances of the accident and death, the name and addresses of the driver, the injured persons, and witnesses. *Id.*; *see also* R., pp. 148-78; *see also* Tr., p. 76, l.9 to l.22 MetLife began investigating the matter immediately as evidenced by its request, in writing, on November 10, 2009 in response to the oral submission. R., pp. 148-49 The record reflects the information requested by MetLife on November 10, 2009 was provided to it on November 17, 2009. R., pp. 152-78 MetLife was prepared to "conclude the matter" on December 7, 2009. R., p. 91, ¶ 3 In fact, Davis had enough material on January 8, 2010 to send the file to Paukert for her to conduct a coverage opinion for the "additional" claims based on the existing submissions. R., p. 92, ¶ 5 MetLife did not point out anything in the record that would support the trial court's finding the Hollands' proof of loss was insufficient. The trial court found it was MetLife that came up with the legal theory despite the fact that its actual theories were withheld. R., p. 636 The trial court failed, and MetLife still fails, to expound upon what could have been provided but wasn't. *Id.*

Under MetLife's theory that such submissions were merely "preliminary," an insured holding a MPL 6010-000 policy could never submit adequate "proof of loss." An insured could provide everything required by the policy, provide everything asked for by the insurer – yet still fail to provide adequate "proof of loss." It was MetLife and its attorneys who couldn't figure out whether coverage applied under the terms of its own policies. R., p. 678 Despite the foregoing, the trial court ruled, as a matter of law, the Hollands failed to provide adequate proof of loss because they did not provide legal theory. R., pp. 442-43

Under MetLife's argument, an insured can provide everything required by their policy, provide everything asked for by the insurer, and the insurer can continue to evade liability by simply asking for "further information." Hence, the very purpose of the statute requiring swift payment of claims would be defeated. If this Court were to allow the trial court's ruling to stand, this Court would inject a requirement into the statute that is not contained therein, i.e., that an insured must provide legal theory as part of a proof of loss before the thirty days begins to run.

Here we have an instance where the insureds provided everything required under their policies, provided everything their insurer asked for, yet the trial court held that the Hollands failed to provide adequate proof of loss, as a matter of law. This result achieved by the trial court is simply unacceptable. What remains is an issue of law to be freely reviewed by this Court.[4]

2. ***In re Death of Cole*** **does not require that the term "proof of loss" be defined in the policy, only that the insured comply with any standards or requirements set forth in the policy.**

Next, MetLife argues the policies do not contain a definition of "proof of loss" and therefore the amorphous standard in *Brinkman* controls.[5] Resp. Brief, pp. 23-25 Upon reviewing *Brinkman*, it is apparent that this Court did not deny the insured's right to recover fees based upon a requirement the insured submit legal theory. *Brinkman*, 115 Idaho at 350 The *Brinkman* Court cited to *In re Death of Cole* as guidance for what should be provided in a proof of loss. *Id.*

In Re Death of Cole, was also a case where the policy at issue did not provide for a specific

[4] See *Cordova v. Bonneville Co., Joint Sch. Dist. No. 93*, 144 Idaho 637, 640, 167 P.3d 774, 777 (2007) ("If the evidence reveals no disputed issues of material fact, what remains is a question of law, over which this Court exercises free review...") (emphasis added) Essentially, application of the facts to the law is an question of law.

[5] This argument is provided for argument's sake only and the Hollands would submit that the policy at issue did provide an adequate standard of proof of loss, as set forth in their Appellant's Brief. App. Brief, pp. 13-14

"proof of loss." *In re Death of Cole*, 113 Idaho at 101 The Court of Appeals noted the insured's declaration complied with other Idaho code sections to prove that a person was legally dead. *Id.* The Court of Appeals noted the insurer argued, like in this case, that the 30 days of the statute was not enough time for a reasonable investigation. *Id.* The Court of Appeals noted the insured made a prior claim for the same loss, under the same policy, and the insurer had time from the "initial" claim to investigate. *Id.* As stated above, both claims were based on the same loss - the legal presumption of death of the insured's husband by virtue of his disappearance. *Id.* The Court of Appeals thought it noteworthy the insurer, like in this case, offered no evidence to contradict the sufficiency of the insured's proof of loss. *Id.* The Court of Appeals was explicit to lay out that a reviewing court should look to other standards or requirements in the policy that might shed light on what an appropriate "proof of loss" would be. *Id.*

Despite MetLife's argument the Hollands had submitted no legal authority that the time periods of the "initial" claim and the "additional" claims could be aggregated, *In re Death of Cole* was cited in the Hollands' reply brief on reconsideration, at cited at oral argument. R., pp. 595-96, 603; *see also* Tr., p. 49, l. 14 to p. 51, l. 17 The analysis of *In re Death of Cole* would support finding time periods of two separate submissions, for the same loss, could be aggregated.

Brinkman simply stated an insured should give the insurer that amount of information that is reasonably available to the insured regarding his injury and the circumstances of the accident. *Brinkman*, supra, 115 Idaho at 350 *Brinkman* said nothing about providing legal theory. *Id.*

MetLife's argument and the trial court's ruling that the amorphous standard in *Brinkman* should control over explicit requests for information and documentation in the policy is in error.

If this Court were to give MetLife's argument credence, insurers could delete the definitions of "proof of loss" or simply label such headings "preliminary documents required" and evade the 30 day requirement of I.C. § 41-1839(1) by simply making the argument that the term "proof of loss" is not defined. If an insurer asks for specific pieces of information and documentation, as acknowledged by MetLife in this case (Resp. Brief, p. 24, FN 8), insureds should be able to rely on such express provisions in their policies in making their proofs of loss.

3. **Under treatise and federal law, proof of loss for the "initial" claim was sufficient for the "additional" claims as well.**

MetLife offers no argument or authority as to why proof of loss for the "initial" claim was not sufficient for the "additional" claims. As cited in the Appellants' Brief ("App. Brief"):

> 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 requirements of notice or proof as to the others.

46A C.J.S., INSURANCE § 1787 (2007) The First Circuit Court of Appeals ruled:

> Assuming, despite our observations about appellee's letters, that both parties acted in complete ignorance or forgetfulness of the existence of the second policy, who should pay the piper? The plight of appellee is, as the district judge pointed out, a real one. An insurer needs more than merely to know how the accident occurred, or the extent of injuries suffered. Its job in court is to try to prove non-liability or to mitigate damages. Its job out of court is to seek a reasonable settlement. And in this latter task its effectiveness is vastly enhanced if it knows that its exposure is large rather than small. **On the other hand, once a notice of claim is filed, is it too much to ask that an insurer have a reasonable filing system, that its employees check the files for more than one policy covering the same insured for the same risk, and that, if questions arise over coverage, its surface them and, while reserving such rights as it sees fit to assert, proceed both to preserve the rights of its policyholder and itself**? Cf. *Restighini v. Hanagan*, 302 Mass. 151, 153-154, 18 N.E.2d 1007 (1939). **We think not. And we are confident that contemporary office systems and management are up to the task**.

> **As for the insured**, we ask only whether there are many **laymen** who can answer correctly the question: for just what risks are you covered by your various policies, or, how comprehensive is a comprehensive policy? We grant that basic commitments are to be undertaken seriously by policyholders. **And one of the most important is to inform the insurer when and how-- and soon-- something has happened that has or might hurt them. This done, we think they have fulfilled their initial duty.**

Duggan v. Traveler's Indemnity Co., 383 F.2d 871, 874 (1st Cir. 1967) (**emphasis added**)

In this case, the "initial" claim and both "additional" claims were based upon the same loss, and all three policies contained the same policy language. R., pp. 469-95; *see also* R., pp. 497-502 (MetLife Policy "MPL 6010-000" and declarations pages for all three Holland policies showing that Policy MPL 6010-000 governed all three policies) Intuitively, because the policies contained the same policy language, and all claims were based upon the same loss, one proof of loss should have been adequate. MetLife never challenged the adequacy of the proof of loss prior to this lawsuit. The only meaningful change in the policies and declarations pages between the "initial" claim and the "additional" claims was the amount of coverage available.

4. **Under *Brinkman*, the "amount justly due" is not related to "proof of loss."**

The trial court held, and MetLife argues, "the amount justly due" in this case hinges on a coverage question, not a "proof of loss" question. Resp. Brief, p. 25 The Hollands agree. This has always been a "policy limits," "coverage case." Mihara had been seeking the higher limits of the "additional" policies since December 7, 2009. R., p. 91, ¶ 3 The "coverage" issue was settled.

A proof of loss must mention a specific sum or provide a basis for calculating the amount of the claimed loss. *Weinstein v. Prudential Property and Cas. Ins. Co.*, 149 Idaho 299, 328, 233 P.3d 1221, 1250 (2010) But proof of loss need not prove damages with precision or conclusively

prove the insurer's liability (i.e. whether there is coverage) for the loss. *Boel,* 137 Idaho at 14

Conversely, the question of the "amount justly due" is not related to "proof of loss," but rather relates to damages. *Brinkman*, 115 Idaho at 350 The *Brinkman* Court held:

> Does **amount justly due mean an amount that is somehow ascertained upon the insurance company's receipt of the proof of loss**, or **is it the amount ultimately determined by the jury**? **We hold that it is the amount ultimately determined by the jury**.
> ...
> **The question of "what amount is 'just'" only arises when the plaintiff and the insurance company cannot agree**. If the plaintiff chooses to pursue the matter, the matter goes to court. The jury determines what amount is justly due. If the insurance company was right, no attorney fees will be charged. **If the plaintiff was right, attorney fees will be charged**....

Id. (**emphasis added**) The *Parsons* Court implicitly acknowledged that settlement after litigation has commenced can also determine the "amount justly due" under I.C. § 41-1839(1):

> On November 12, 2004, Mutual of Enumclaw tendered $60,000 to Parsons, which she accepted as the full payment of her personal injury claim under the underinsured motorist coverage.
>
> On October 3, 2005, **Parsons filed a motion seeking an award of attorney fees pursuant to Idaho Code § 41-1839**. The district court awarded her attorney fees in the amount of $20,000, and Mutual of Enumclaw appealed.

Parsons, supra, 143 Idaho at 745 (**emphasis added**) (upholding an award of attorney's fees under I.C. § 41-1839(1) based on settlement after a lawsuit had been filed); accord *In re Jones*, 401 B.R. at 466-67 (awarding attorney's fees under I.C. § 41-1839(1) based on settlement after a lawsuit had been filed))[6] And while it is the insurer's duty to come to a coverage decision, the U.S. Bankruptcy Court for the District of Idaho, in *In re Jones* expressly disavowed an insurer's

[6] MetLife conceded at oral argument that settlement could set the "amount justly due." Tr., p. 22, l. 14 to l. 16

ability to unilaterally set the "amount justly due:"

> Defendant, on the other hand, insists that it never agreed with Plaintiff about what amount was justly due to Plaintiff under the Policy, that Defendant voluntarily paid Plaintiff the $35,000, and thus, the clock in Idaho Code § 41-1839 never began to run.
>
> **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). ...
>
> **The statute and case law do not require an agreement by insured and insurer in advance of the payment. If the insurer tenders an amount that is accepted by the insured, the amount justly due is decided at that moment**.

In re Jones, 401 B.R. at 466-67 (**emphasis added**)

The MetLife noted the trial court's reasoning:

> **Accordingly, the Court was not [sic], 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 "whether the **proof of loss** Hollands provided MetLife was sufficient for 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, "**the amount justly due,' hinges on a coverage question, not a 'proof of loss' question**." (R. Vol. III, p. 552)

Resp. Brief, pp. 24-25 (**emphasis added**) Where the trial court erred, and where MetLife misses the point, is the "proof of loss" is what allows an insurer to determine its liability (i.e., coverage). Damages (i.e., "amount justly due"), on the other hand, are a completely separate issue.

No appellate or trial court of this state, to counsel's knowledge (with the exception of the

trial court in this case), has ever held that an insured must provide legal theory as part of a proof of loss. None has been cited by either the trial court or MetLife.

At all times in this case, the "initial" and "additional" claims were "policy limits" claims based on Ben's wrongful death at the hands of an under-insured motorist. Written demand was made for policy limits in the December 1, 2009 letter to Davis. R., pp. 182-83 Davis admits that she discussed a possible tender of policy limits on the "initial claim" in an attempt to conclude the matter on December 7, 2009. R., p. 91, ¶ 3 The policy limits discussed were $50,000. Resp. Brief, p. 28 Although MetLife consented to settlement with the tortfeasor, it never tended the $50,000 due on the "initial" claim. R., p. 192; *see also* R., p. 686 ("...no tender was made...")

It is apparent from the record that the Hollands' proof of loss given to MetLife mentioned both a specific sum and a basis upon which MetLife could calculate the claimed loss - policy limits as a result of Ben's wrongful death at the hands of an under-insured motorist. R., p. 466-67, ¶ 7; *see also* R., pp. 182-83 MetLife knew this was a "policy limits" case on November 10, 2009 when it was advised of Ben's death and it never argued otherwise before this lawsuit.

MetLife did not actually pay the Hollands until it tendered two checks, both dated February 9, 2010, and both delivered to Mihara on February 12, 2010. R., p. 230; *see also* R., pp. 235-36 It was not until February 23, 2010 that Schroeder authorized disbursal of the checks, but only after the Hollands signed the "mutually-agreeable" release.[7] R., p. 241

In this case, it was Mihara, not MetLife, who raised the issue of coverage under the "additional" policies. R., p. 91, ¶ 3 "But for" the actions of Mihara, MetLife would not have

[7] Again, MetLife's intent in obtaining the release was to protect itself against bad faith claims. Tr., p. 21, l. 7 to l. 23

addressed the "additional" claims – it certainly hadn't up to December 7, 2009.

5. **The 30 days of I.C. § 41-1839(1) runs from the date that the insured provides proof of loss as provided in the policy.**

MetLife argues the statute's 30 days never ran. Resp. Brief., p. 25 The statute provides:

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

I.C. § 41-1839(1) (**emphasis added**) The trial court recognized this. Tr., p. 71, l. 10 to l. 12 ("Proof of loss is what starts the thirty days running...")

If an insurer thinks a proof of loss is inadequate, it should timely notify the insured as to what the proper proof of loss should be so that the insured can correct it, and likewise, may not claim proof of loss is insufficient for the first time after a complaint has been filed. 46A C.J.S. INSURANCE § 1779 (2007) (emphasis added)

In this case the 30 day time limit of I.C. § 41-1839(1) began to run when Mihara, on behalf of the Hollands, tendered proof of loss to MetLife on November 10, 2009 and November 17, 2009, or at the very latest when he augmented those submissions on December 1, 2009.

There is no evidence in the record MetLife ever advised the Hollands they submitted inadequate proof of loss. The evidence in the record shows Mihara repeatedly advised MetLife it was past 30 days since proof of loss had been submitted, and there is no evidence in the record

that MetLife ever took a contrary position prior to this lawsuit. R., p. 262; *see also* R., p. 191

In fact, conspicuously absent from the alleged findings MetLife cited is the fact that the trial court found Paukert requested an "extension" until January 22, 2010 to come to a coverage decision. R., p. 392 MetLife also alleges Mihara granted Davis an extension until January 6, 2010 to begin to review the "additional" claims. Resp. Brief, p. 4 Davis states in her affidavit:

> ...I advised Mr. Mihara that I was getting ready to leave on a three week vacation and would not return to my office until January 6, 2010. As a result, **I would not be able to review the two new claims until after I returned**. I asked him if the delay was acceptable and he assured me it would. **I usually send out a confirmation letter for such extensions**, but with the press of business getting ready for a lengthy vacation, I did not. However, at that time, I had no reason to believe I could not take Mr. Mihara at his word. If Mr. Mihara had indicated that such a **delay** was not acceptable, **I would have had the new claims assigned to another adjustor**.
> 4. On January 7, 2010, the day after I returned from vacation, a faxed letter from Mr. Mihara was in my mail box. In the letter, Mr. Mihara references the fact that I had been on vacation and suggest that MetLife should have a response to the two new claims by the end of the week. I was surprised by the letter since I had told Mr. Mihara **I would not be able to look at the new claims until my return** and he had assured me that that was acceptable. I called Mr. Mihara and reminded him of this fact and told him I was sending the policies to coverage counsel **and she would need time** to review the matter.

R., p. 91, ¶¶ 3 and 4 (**emphasis added**) Amazingly, despite Davis' understanding that she would not be able to begin to "look at the new claims until my return," Davis immediately began to review the two new claims on December 8, 2009, and spent several hours doing so. R., pp. 508-510; *see also* R., pp. 639-643 Regardless that Davis admits she did not confirm her alleged extension, MetLife does not attempt explain why Davis did not even make a claim file entry to memorialize her understanding of it to let others at MetLife know what was going on, or that other adjustors were, in fact, reviewing the claims in her absence. R., pp. 642-43; *see also* R., pp.

504-06 Like Mihara, other MetLife personnel expressed concern with the delay. R., pp. 642-43

MetLife does not explain why a claim file entry on December 9, 2009, memorializes the fact that another MetLife adjustor knew that the matter needed to be referred to defense counsel to assist in determining coverage – yet the matter was not referred to counsel until a month later. R., p. 642 The delay in referring the file to Paukert is unexplained. Again, despite Davis' alleged understanding, MetLife does not attempt to explain why she called Mihara on January 7, 2010 instead of writing, to confirm her alleged further extension as was her admitted practice. The entries are consistent with Mihara's understanding evidenced by his letter in the record. R., p. 262 Davis received no "extension" to begin to determine coverage - a coverage decision was due on January 6, 2010.

MetLife has yet to expound on how the information it requested on January 27, 2010 had any impact whatsoever on its withheld analysis. R., p. 636 Paukert didn't even know Davis had asked for the "title;" Paukert "believed" that Davis had asked for the "registration." R., p. 62, ¶ 8; *c.f.* R., p. 92, ¶ 7 One would imagine that the attorney who had – EUREKA! - just "discovered" the elusive legal theory of coverage would know exactly the crucial nugget of evidence needed to support that theory.[8] MetLife's argument that proof of loss may be asked for after a lawsuit is filed would, again, defeat the purpose of the statute. If insurers were able to request one more "crucial" nugget of information after a lawsuit had been filed in order for the insured to submit adequate proof of loss, then no insured would ever be able to collect under I.C. § 41-1839(1).

[8] The evidence in the record is that MetLife was advised of the lawsuit by its agent on January 29, 2010, Davis then contacted Paukert, and then MetLife immediately acknowledged liability. R., p. 516-17 The claim file entry reflects MetLife had "new" liability on January 29, 2010. *Id.* at 517 Paukert allegedly completed her coverage opinion on January 27, 2010. R., p. 97, ¶ 4 The only difference is MetLife is aware a lawsuit had been filed against it.

Idaho law provides that insurers 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)

The rhetorical question becomes: if MetLife asserts the 30 days never ran, why were its adjustor and attorney requesting "extensions" in order to come to a coverage decision? If MetLife was within the 30 days of the statute, no "extension" would be needed. The admitted requests for "extension" are consistent with MetLife acknowledging that the thirty days had run.

6. **Application of I.C. § 41-1839(1) is appropriate for at least the "initial" claim.**

MetLife argues that it should not be subject to liability for the "initial" claim because Mihara "refused" payment on the lesser policy limit. Resp. Brief, p. 28 MetLife's argument is patently fallacious. In making this argument, MetLife fails to mention the fact that the trial court expressly found that no tender was ever made on the "initial" claim. R., p. 686 ("no tender was made on December 7, 2009 (as found by this Court)") The Hollands asked, in writing, that MetLife pay them any amounts not in dispute. R., p. 192 ("please forward any amounts not in dispute to my care...") Although the "initial" claim was not in dispute, the check tendered by MetLife for the "initial" claim was not issued until February 9, 2010, and was not delivered until February 12, 2010. R., p. 230; *see also* R., p. 236 Both the dates of issuance and delivery of the check are well after 30 days of the November, 2009, proof of loss for the "initial" claim.

The trial court and MetLife also fail to appreciate that an offer to tender is only operative to act as "payment" if it is in writing. I.C. § 9-1501 In this case, there is absolutely no evidence in the record that there was ever a writing offering to pay on the "initial" claim.

Davis' own affidavit states that the discussion was via a telephone call. R., p. 91, ¶ 3

Further, Davis' affidavit does not state Mihara would not accept payment or had refused payment, but rather that he would simply not "consider the matter concluded." *Id.* There was nothing to preclude Davis from sending Mihara a letter or even an email offering to tender the limits of the "initial" claim on December 7, 2009. Paukert was not retained until January 8, 2010, and thus could not have first-hand knowledge of the matter. R., p. 60, ¶ 3 Also, neither Paukert's original affidavit, nor her supplemental affidavit state Mihara ever refused payment, only that he wanted the higher limits of the "additional" policies to apply. R., pp. 59-65; *see also* R., pp. 95-99 If payment was not tendered, as found by the trial court, it could not have been refused.

The evidence in the record is that Mihara accepted payment on the "initial" claim for Med Pay coverage when it was tendered by MetLife on December 29, 2009.[9] R., pp. 504-05

Even if payment had been refused, again for argument's sake only, the statute itself requires MetLife to deposit such amounts into the court:

> In any such action or arbitration, 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 or arbitration that no amount is justly due, **then no such attorney's fees may be recovered**.

I.C. § 41-1839(2) (**emphasis added**) This Court in *Anderson* explained:

> **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 v. Farmers Ins. Co. of Idaho, 130 Idaho 755, 947 P.2d 1003 (1997) (overruled on other

[9] Again, another MetLife adjustor was working the "initial" claim in Davis' absence and paid the MedPay portion. R., p. 504-05 Mihara did not refuse this payment. UIM payment was not issued until February 9, 2010. R., p. 236

grounds by *Martin*, supra) (**emphasis added**) Likewise, in *Martin*, supra, this Court stated:

> **If the amount is not accepted**, however, and arbitrators later find that a lesser amount is due, then under I.C. § 41-1839(2), the insurance company is not liable for the insured's attorney fees. **But if the insurance company makes no tender within thirty days... the insurance company is liable for a reasonable amount of the insured's attorney fees, as compensation to make the insured whole**.

Martin, supra 138 Idaho at 248 (**emphasis added**)

Simply put, not willing to consider a matter concluded does not equate to refusing payment. All MetLife had to do prior to January 26, 2010 was deposit any amount it allegedly tendered to Mihara into the court to escape liability for fees. Like *Anderson*, in this case, there was no tender at all. Likewise, there is no requirement in the statute that the insurer know of an imminent lawsuit before the statute's terms are applicable.[10] The statute's very plain terms require the amount to be deposited before a lawsuit is filed. I.C. § 41-1839(2)

7. **I.C. § 41-1839(1) requires actual payment within 30 days of proof of loss.**

MetLife argues the 30 day clock began to run on January 6, 2010, because Mihara granted MetLife an "extension" to begin to review the "additional" claims, or the clock began on January 27, 2010 because Mihara and Paukert had discussed coverage up until that date, thus, the February 3, 2010 "settlement" was timely. Resp. Brief, p. 26 MetLife has continually attempted to characterize Paukert's February 2, 2010 email as a "tender," making it compliant with I.C. § 41-1839(1). Resp. Brief, *passim* MetLife argues Davis because discussed tendering policy limits

[10] MetLife argues that, "[i]t 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." Resp. Brief, p. 29 As noted in the argument above, because no tender was made, no payment could have been refused by Mihara. Further, this argument does not take into account that on January 14, 2010 (12 days before the lawsuit was filed), Mihara requested MetLife, "...forward the amounts uncontested to my care..." R., p. 192

on December 7, 2009, MetLife was within thirty days of the November 10, 2009 proof of loss. Resp. Brief, pp. 28-29 Again, MetLife's arguments go against the plain language of the statute:

> Any insurer... 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... shall in any action thereafter brought against the insurer... pay such further amount as the court shall adjudge reasonable as attorney's fees...

I.C. § 41-1839(1) (**emphasis added**) The statute requires payment. *Id.* The statute does not require the insurer be prepared to settle. *Id.* The statute does not require the insurer discuss tendering limits. *Id.* The statute does not require attorneys discuss coverage. *Id.* The statute does not require the parties reach a settlement. *Id.* The wording of the statute is crystal clear that payment is required within 30 days of the proof of loss.

This Court has held that the term "payment" means exactly what it says in the terms of the UM context. *Weinstein*, supra 233 P.3d at 1238 Actual tender requires physical delivery of money. *Diamond v. Sandpoint Title Ins.,* 132 Idaho 145, 149-50, 968 P.2d 240, 244-45 (1998)

If insurers could stop the 30 day clock via a mere offer to pay, they could make an offer and then delay payment indefinitely based on any number of other reasons. As noted in *Weinstein*, if insurers could delay paying without financial repercussion beyond the amount justly due, *incentive* to delay would exist. *Weinstein*, supra, 233 P.3d at 1262

For argument's sake only, if the clock were to begin on January 6, 2010, MetLife still was past the statutory 30 days as the settlement checks were issued on February 9, 2010. R., pp. 235-36 The checks were delivered to Mihara on February 12, 2010. R., p. 230 Because of the dispute over the meaning of what the term "full release" meant, actual disbursal (i.e. "payment") was not

authorized until February 23, 2010 – after the Hollands had signed the "mutually-agreeable" release that Schroeder and Mihara were able to negotiate and draft. R., p. 241

The evidence in the record shows Mihara requested MetLife pay amounts not in dispute on January 14, 2010, and authorized an extension for it to come to a coverage decision until January 22, 2010. R., p. 192 MetLife paid nothing, and suit was filed on January 26, 2010. R., pp. 8-15

8. **The Hollands prevailed within the meaning of I.C. § 41-1839(1).**

Next, MetLife argues dispute over material issues of fact preclude finding the Hollands the prevailing party in this matter. Resp. Brief, pp. 29 to 31 MetLife notes the correct standard for determining a prevailing party under I.C. § 41-1839(1). *Id.* at p. 30 (citing *Halliday v. Farmers Ins. Exch.*, 89 Idaho 293, 301, 404 P.2d 634 (1965)) Under *Halliday*, in order to prevail, an insured need not obtain the full amount requested, only an amount greater than that tendered by the insurer prior to the lawsuit. *Id.* MetLife argues that fees may be awarded only if it acted unreasonably. Resp. Brief, p. 30 MetLife also claims the issue of its knowledge of the lawsuit precludes finding the Hollands the prevailing party. Resp. Brief, p. 31 MetLife's arguments fail.

i. **The Hollands have met the *Halliday* criteria for prevailing.**

In order to prevail, the Hollands simply needed to prove they recovered more than that tendered by MetLife prior to the lawsuit. *Halliday*, supra, 89 Idaho at 301 The trial court found there was no tender at all prior to the lawsuit. R., p. 686 It is undisputed the Hollands recovered $200,000 from MetLife after filing their complaint – and after MetLife knew of the lawsuit and the claims made therein. R., p. 224 ("I do not agree with your position on attorney's fees and we will discuss that. Regardless, we wish to pay your clients the settlement we agreed on.")

Because the Hollands have met the *Halliday* criteria for prevailing, they have "prevailed."

ii. **The requirement that an insurer must act unreasonably has been overruled by *Associates Discount Corp. of Idaho.***

MetLife seemingly asks this Court to resurrect the rule in *Dawson v. Olson*, 94 Idaho 636, 496 P.2d 97 (1972) insofar as "the insurer is obligated to pay attorney's fees only if its initial refusal to pay the claim were unreasonable." Resp. Brief, p. 30 (emphasis in original); see also *Dawson*, supra, 94 Idaho at 641 As the Hollands pointed out to the trial court, *Dawson* cited to *Carter v. Cascade Ins. Co.*, 92 Idaho 136, 140, 438 P.2d 566, 570 (1968) for the proposition that an insurer is only liable for attorney's fees if its actions were unreasonable. R., p. 529 That very proposition as discussed by *Carter*, was overruled in 1973 by *Associates Discount Corp. of Idaho v. Yosemite Ins. Co.*, 96 Idaho 249, 257, 526 P.2d 854, 862 (1973). *Id.* This Court rejected a request to resurrect the same requirement as recently as 2007. *Parsons v. Mutual of Enumclaw Ins. Co.*, 143 Idaho 743, 152 P.2d 614 (2007) The *Parsons* Court ruled:

> In *Carter v. Cascade Insurance Company*, 92 Idaho 136, 140, 438 P.2d 566, 570 (1968), we added to Idaho Code § 41-1839 a requirement that "**there must be evidence that an insurer has acted unreasonably or unjustly before a court may award attorney's fees under I.C. § 41-1839.**" **Five years later in *Associates Discount Corp. of Idaho v. Yosemite Insurance Co.*, 96 Idaho 249, 257, 526 P.2d 854, 862 (1973), we overruled that portion of the *Cascade Insurance* opinion because it "engrafts upon the statute a requirement which we now feel is unwarranted**." Mutual of Enumclaw asks us to revive that portion of the Cascade Insurance opinion that we overruled.
>
> We had also engrafted another requirement upon the statute. In *Anderson v. Farmers Insurance Co.*, 130 Idaho 755, 759, 947 P.2d 1003, 1007 (1997), we held, "Attorney fees may be awarded to an insured under I.C. § 41-1839 only when the insured had no other option other than to file suit against his or her insurer in order to recover his or her loss." Four years ago in *Martin v. State Farm Mutual Automobile Insurance Co.*, 138 Idaho 244, 61 P.3d 601 (2002), we

disapproved that portion of Anderson because it **added a requirement not contained in the statutory language**. We stated in *Martin*:

> ... **A cardinal rule of statutory construction is that where a statute is plain, clear and unambiguous, courts are constrained to follow that plain meaning, and neither add to the statute or take away by judicial construction.**

Id. at 247, 61 P.3d at 604.

> In *Martin v. State Farm Mutual Automobile Insurance Co.*, 138 Idaho 244, 61 P.3d 601 (2002), we held that Idaho Code § 41-1839(1) contains two requirements for an insured to be entitled to an award of attorney fees: (1) the insured must provide a proof of loss as required by the insurance policy; and (2) the insurer must fail to pay the amount justly due within thirty days after receipt of the proof of loss. ***Martin* also made it clear that any argument regarding the requirements for obtaining an award of attorney fees under Idaho Code § 41-1839(1) must be based upon the wording of the statute. The issue is one of statutory construction**. [*c.f.* standard of review argument above] **Arguments for additional requirements not contained in the statutory language must be made to the legislature, not this Court.**

Id., 152 P.3d 617-18 (**emphasis added**) Thus, MetLife's has made an argument that has been rejected by this Court multiple times, and one that should be rejected again.

iii. **Under *Williams*, knowledge of the lawsuit is imputed to MetLife.**

MetLife argues the Hollands could not have prevailed because it did not have knowledge of the lawsuit at the time its offer was tendered. Resp. Brief, p. 31 MetLife's argument ignores the plain terms of the statute. No portion of I.C. § 41-1839(1) or (2) requires an insurer have knowledge of a lawsuit before the statute is applicable. I.C. § 41-1839(1)/(2) It is well established that notice to an agent is notice to the principle. *Williams v. Continental Life & Accident Co.*, 100 Idaho 71, 72-73, 593 P.2d 708, 709-710 (1978) Likewise, knowledge acquired during the agency relationship, and while the agent is not acting adverse the principle, is imputed

to the principle, even if the principle did not have actual knowledge. *Id.*

MetLife's offer of February 2, 2010 was made with knowledge of the lawsuit. This lawsuit was filed on January 26, 2010. R., p. 8 On January 29, 2010, MetLife agent, Joe Foredyce, alerted MetLife agent, Davis, that a lawsuit had been filed against MetLife. R., p. 92, ¶ 8 Davis, investigated this fact by contacting Paukert. *Id.* Paukert asserts she was told that by *her assistant* a lawsuit could not be found. R., p. 98, ¶ 25 The evidence in the record precludes finding MetLife did not know about the lawsuit at the time of the offer as it offers evidence that its agents had knowledge of the lawsuit before the offer was made. *Id.*; *see also* R., p. 92, ¶ 8

MetLife was also on notice that a lawsuit could be filed any time after January 22, 2010. Mihara and Paukert agreed on January 14, 2010 that Mihara would not "take any further action in this case against MetLife until after Friday, January 22, 2010," in order to allow Paukert to conduct her coverage review and MetLife make a coverage decision. R., p. 192 On January 22, 2010, Paukert requested another extension because she had not fulfilled her part of the bargain. R., p. 392 It was denied. *Id.* Despite MetLife's allegation that it was attempting to work in good faith with Mihara, after being told of a lawsuit, and failing in its attempt to find it, neither Paukert nor Davis attempted to contact Mihara to ask about whether one was filed. R., p. 399

The 17 page memo sent on January 14, 2010 that memorialized the "extension," also contained several references to the Hollands resorting to litigation. R., p. 201; *see also* R., p. 208 Thus, for argument's sake – because the facts show MetLife had knowledge, or is otherwise charged with having knowledge of the lawsuit when the offer was made – even if MetLife did not know, it should have known that a lawsuit was possible any time after January 22, 2010.

E. **MetLife failed to follow the proper procedure in coverage question cases.**

Attorney's fees are awardable in cases where coverage is at issue, and that issue has been resolved in favor of the insured. I.C. § 41-1839(1) and (2) MetLife concedes coverage and liability were at issue when this lawsuit was filed. R., p. 113; *see also* R., p. 315 The issue of coverage and the "amount justly due" was settled by the parties. R., p. 385; *see also* R., p. 668

This Court has held that in cases involving questions of coverage the proper procedure would be to file a declaratory judgment action:

> **The proper procedure for the insurer to take is to evaluate the claims and determine whether an arguable potential exists for a claim covered by the policy**; ... if the insurer believes that the policy itself provides a basis, i.e., an exclusion, for noncoverage, **it may seek declaratory relief**.
>
> **... State Farm failed to seek declaratory relief... Its failure in this regard is highlighted by Allstate's withdrawal from representing Kramsky only after it sought and obtained a declaratory ruling that its policy did not cover Deluna's injuries. State Farm would have been well advised to have done the same... This Court has held an insurer is not allowed to "guess wrong" when it determines the potential for coverage under a policy**. *Id.*

Deluna v. State Farm Fire and Cas. Co., 149 Idaho 81, 233 P.3d 12 (2008) (**emphasis added**)

MetLife could have brought a declaratory judgment action to determine coverage. Tr., p. 23, l. 11-14; *see also* R., p. 113 Interestingly, MetLife consciously and intentionally chose not to. Tr., p. 23, l. 11-14; *see also* R., p. 113 The issue of who comes up with the theory of coverage irrelevant. In a contested case where coverage is an issue, if coverage is found, and proper proof of loss was given fees are assessable. *Brinkman*, supra, 115 Idaho at 350

F. **An agreement cannot be enforced contrary to the parties' intent.**

MetLife argues that the trial court correctly granted its motion to enforce the settlement

agreement on the grounds that the Hollands failed to prove they had provided adequate proof of loss in order to allow MetLife a reasonable opportunity to investigate and determine its liabilty. Resp. Brief, pp. 31-34 MetLife acknowledged that *Straub*, infra, held that there is a presumption that if an agreement is silent on attorney's fees, they are outside the agreement. Resp. Brief, p. 32

Like the trial court, MetLife offers no legal support for the idea that an agreement can be enforced to an end that was not within the intent of the parties. A prerequisite to the valid formation of a contract is a meeting of the minds evidencing a mutual intent to contract. *Inland Title Co. v. Comstock*, 116 Idaho 701, 703, 779 P.2d 15, 17 (1989) To be enforceable, an agreement must be "sufficiently definite and certain in its terms and requirements so that it can be determined what acts are to be performed and when performance is complete." *Dale's Service Co., Inc. v. Jones*, 96 Idaho 662, 664, 534 P.2d 1102, 1004 (1975)

In this case, the writings evidencing the parties' intent are undisputed. R., pp. 57-58 The offer and acceptance are both silent as to fees. *Id.* The trial court found neither party intended for fees to be covered by the agreement. R., pp. 455-56 Further, the Hollands fully performed their part of any alleged "agreement" by executing the "mutually-agreeable" release that was jointly drafted by the parties' counsel. R., p. 258 The trial court essentially dismissed the Hollands' entitlement to fees based solely on the alleged facts that this was a hard case with multiple policies and it was Paukert who came up with the theory of coverage:

> **The date of "tender" has nothing to do with the Court's decision** to grant the motion to enforce the settlement agreement. **The 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 coverage was arrived at by Paukert or at least by MetLife and not Mihara on

behalf of Hollands.

R., p. 693 **(emphasis added)** The court erred by failing to reach its decision by an exercise of reason because it enforced the "agreement" based upon an alleged fact to which it found a question of fact remained. R., p. 399; *c.f.* R., p. 412; *c.f.*, R., p. 593 Neither the court nor MetLife offer a legal basis for its action. Simply put, if a contract is not formed, it cannot be "enforced."

G. MetLife does not discuss the adequacy of the evidence in the record and raises peripheral issues not relevant to the statutory analysis.

The information contained in the affidavits of Paukert and Davis are insufficient to raise an issue of fact whether the proof of loss supplied to MetLife in November of 2009 was adequate. Davis does not contest the adequacy of the proof of loss in her affidavit. R., pp. 90-94 Paukert was not retained until January 8, 2010, and thus could not have first-hand personal knowledge of matters between the Hollands and MetLife in November of 2009. R., p. 60, ¶ 3 Because there is no dispute as to material fact, this matter was ripe for summary judgment.

MetLife claims it is unclear why Mihara contacted Davis directly since he knew MetLife was "represented" and he had been dealing directly with Paukert. Resp. Brief, p. 7 (FN2) The evidence in the record establishes that Mihara and Davis were dealing directly on settlement negotiations, and upon being asked, Paukert had previously represented that she only had authority to provide a coverage opinion – not represent MetLife in settlement negotiations. R., p. 91, ¶ 3; *see also* R., p. 615, ¶ 4 Further, MetLife's confusion is unfounded as a letter from Davis to Mihara dated January 27, 2010 requests he contact her directly. R., p. 215 It was not until February 5, 2010 that Paukert officially represented she had authority from MetLife in this

matter. R., p. 224 Afterwards, copies of all litigation documents were promptly delivered to her. R., p. 227-28 In fact, MetLife introduced evidence into the record that reflects that MetLife attempted to contact Mihara, and he would not deal with them directly until he had permission to do so from its attorneys – and such permission was given. R., pp. 380-81 The record shows that despite knowing that Mihara represented the Hollands, it was MetLife who was contacting the Hollands asking for further payment of policy premiums and threatening cancellation of at least one of the policies and would not stop until it received a "cease and desist" letter from Mihara. R., p. 219 MetLife raises this issue in a lone footnote without any further citation or argument and as such is indicative of the lack of substance behind the confusion it attempts to raise.

In addition, MetLife cavalierly uses incendiary terms, such as "renege" and "breach," in its Reply Brief. Resp. Brief, pp. 11, 18 MetLife attempts to smear the Hollands and their counsel, while at the same time offering no discussion of the fact that the trial court could not enforce the very "agreement" MetLife sought to enforce via "a contract or waiver theory." Resp. Brief, p. 32 Simply put, if a contract is not formed, it cannot be enforced, reneged, or breached.

Despite MetLife's continual attempted characterization of the February 2 and 3, 2010 email exchange as a "compromise settlement of disputed claims," MetLife fails to mention that it acknowledged liability for at least one "additional," "contested" claim prior to the email. R., p. 517 Suit was only filed after the "extension" to find coverage expired and Paukert stated it was her "final opinion" that there was no coverage for the "additional" claims. R., pp. 61-61, ¶¶ 7, 8

H. **MetLife is not entitled to attorney's fees for this appeal under I.C. § 12-121.**

MetLife claims entitlement to fees on appeal pursuant to I.C. § 12–121. Resp. Brief, p. 41

The Hollands object. An award of attorney fees under I.C. § 12–121 is appropriate if the Court is left with "the abiding belief the appeal was brought, pursued or defended frivolously, unreasonably or without foundation." *Smith v. USAA Property and Cas. Ins. Co.*, 132 Idaho 466, 974 P.2d 1095(1999) MetLife does not set forth any cogent reason why the Hollands' arguments are frivolous, unreasonable, or without foundation. MetLife's sole reason for requesting an award was, "[a]s the trial court noted in several places throughout its orders, many of the Hollands' theories of recovery are "without merit."" Resp. Brief, p. 41 The Hollands would ask this Court to observe that most, if not all, appeals follow from arguments that a trial court found to be "without merit," and sometimes trial courts get reversed.

Under the statute and case law, I.C. § 41-1839 is the exclusive basis for fees in actions between insureds and insurers involving controversies arising under policies of insurance. I.C. 41-1839(4); see also *Deluna*, supra, 49 Idaho at 86, 233 P.3d at 17 I.C. 41-1839(4) states:

> **Notwithstanding any other provision of statute to the contrary, this section** and section 12-123, Idaho Code, **shall provide the exclusive remedy for the award of statutory attorney's fees in all actions or arbitrations between insureds and insurers involving disputes arising under policies of insurance**. Provided, attorney's fees may be awarded by the court when it finds, from the facts presented to it that a case was brought, pursued or defended frivolously, unreasonably or without foundation...

I.C. 41-1839(4) (**emphasis added**) It is undisputed that this is a case that arose under policies of insurance. R., pp. 8-15 Again, MetLife offers no independent support or argument for its bald assertion that the Hollands' arguments are frivolous, unreasonable, or without foundation.

Finally, the Court will not award fees pursuant to I.C. § 12-121 when the case involves novel issues of first impression. *Twin Lakes Canal Co. v. Choules*, 151 Idaho 214, ___, 254 P.3d

1210, 1216 (2011) MetLife has argued this case involves novel issues of first impression. Tr., p. 21, l.24 to p. 22, l. 16 Therefore, MetLife should either be estopped from arguing attorney's fees under I.C. § 12-121, or this Court should decline to award fees.

I. **MetLife does not challenge the reasonableness of the Hollands' claimed attorney's fees for this appeal, and thus they should be awarded pursuant to *Halliday*.**

Should the Hollands prevail on this appeal, MetLife offers no argument or justification as to why this Court should not award $80,000 as a reasonable fee for this appeal.

This Court may either decide to award attorney's fees on appeal or remand the issue. I.A.R. 41(d) As stated above, MetLife has waived all right to challenge the Hollands' claimed entitlement to attorney's fees pursuant to I.R.C.P. 54(e)(6) and 54(e)(8). As stated above, MetLife offers no argument or suggestion in its briefing as to why the Hollands' claimed entitlement to $80,000 worth of attorney's fees is unreasonable. Resp. Brief, p. 41 When a party does not object to the reasonableness of the requested amount of attorney's fees on appeal, the requested amount can be awarded by an appellate court. *Halliday*, supra, 89 Idaho at 301, 404 P.2d at 639 ("Appellants did not object to the reasonableness of the $500 attorney fee requested on appeal and that sum is allowed...") Likewise, the statute in question does not require the trial court to be the court that "shall" award the total fee sought. I.C. § 41-1839(1)

The contingency fee agreement in this case states the Hollands will compensate Mihara with 40% of monies recovered from MetLife should there be any appeals. R., p. 146 The Hollands have recovered $200,000, and a complete subrogation waiver, from MetLife to date. R., pp. 235-36 Mihara recovered over $50,000 for the Hollands from sources outside of this

litigation and has not charged for his services for that recovery. R., pp. 29-30, ¶ 10 Mihara also appeared in another case as a victims' advocate, and did not charge for his services therein either. R., p. 138, ¶ 24 As the trial court noted, MetLife's previous objections to the reasonableness of the fees, "find no support in Idaho statutes, rules, or case law." R., p. 402 For the reasons stated herein this Court should exercise its authority to make a full award of attorney's fees.

IV. CONCLUSION

The Hollands assert MetLife's judicial admissions, and the facts in the record, establish the Hollands submitted adequate proof of loss and payment from MetLife was not made within thirty days. As in *Martin*, the proper focus of this case is that MetLife should have paid the Hollands the amount justly due within thirty days of the Hollands providing proof of their loss.

Again, the Hollands pray this Court vacate the trial court's entry of judgment, reverse and overrule the trial court to the extent that it did not correctly apply Idaho law, to find 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 Rule 41, for statutory interest, for costs of this appeal, and for any other relief this Court feels is proper.

Respectfully submitted to the Court this 11th day of October, 2011.

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