5-29-2014

Cedillo v. Farmers Ins. Co. of Idaho Respondent's Brief Dckt. 41683

IN THE SUPREME COURT FOR THE STATE OF IDAHO

PEGGY CEDILLO Plaintiff-Respondent, vs. FARMERS INSURANCE COMPANY OF IDAHO, Defendant-Appellant.	Supreme Court Docket No. 41683-2013 Ada County Docket No. 2013-08697 **RESPONDENT'S BRIEF**

RESPONDENT'S BRIEF

Appeal of Peggy Cedillo v. Farmers Insurance Company of Idaho in the Fourth Judicial District of the State of Idaho, in and for the County of Ada, Case No. CV OC 1308697
Honorable Lynn G. Norton, Presiding District Judge

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INTRODUCTION

Farmers Insurance Company of Idaho ("Farmers") appeals from the district court's denial of its Motion for Modification and/or Correction of Arbitration Award and the district court's award to Peggy Cedillo ("Cedillo") of attorney fees in the amount of $121,007.23. Judgment in favor of Cedillo in the amount of $126,478.01 was entered on December 11, 2013.

II
STATEMENT OF THE CASE

On February 20, 2012, the parties appointed Mr. Merlyn Clark as Arbitrator in this matter. R., pp. 601-603. He was asked to resolve Cedillo's underinsurance claim for bodily injuries suffered by her in a motorcycle crash on May 25, 2008.

On March 1, 2012, attorney Steele provided his Notice of Conflict Disclosure to Farmers and to Arbitrator Clark. R., pp. 605-607. This Notice of Conflict Disclosure states the following:

> Please take notice that it has been previously disclosed to Farmers and to Mr. Clark that Claimant Cedillo is now married to the underinsured motorist, Jon M. Steele, and that Claimant Cedillo is now represented by her husband, attorney Jon M. Steele.
>
> In other words:
>
> - Attorney Jon M. Steele is the underinsured motorist whose negligence caused Cedillo's injuries in the Crash of May 25, 2008.
> - Attorney Jon M. Steele was married to Claimant Cedillo on December 6, 2008.

- Attorney Jon M. Steele represents Claimant Cedillo in this Arbitration.

R., pp. 605-607.

The parties stipulated to the following arbitration procedure:

> That following issuance of the Interim Award, the arbitrator would conduct post Interim Award proceedings to determine what, if any, adjustments would be made in the amount of the Interim award for prejudgment interest, set offs or collateral sources and subrogation issues prior to the issuance of the final award by the arbitrator.
>
> R., p. 66.

The evidentiary hearing took place before Arbitrator Clark and was concluded on November 21, 2012. R., p. 119. The parties stipulated that comparative negligence was not an issue. R., p. 23. Steele was not called as a witness in the evidentiary hearing. Steele did not testify. Arbitrator Clark issued his 38 page Arbitrator's Decision and Interim Award on January 16, 2013. R., pp. 119-156. Cedillo's Interim Award totaled $406,700.00. R., p. 155. The Interim Award of $406,700.00 was a gross award that did not take into account any adjustments, either increasing or decreasing, the damage award.

On April 29, 2013, Arbitrator Clark issued his Final Award (R., pp. 65-78), which accounted for prior payment of $105,000 made to Cedillo by Progressive Insurance (insurance company for tortfeasor/UIM motorist/husband/attorney Steele), prior payment of $25,000.00 and $155,000.00 made to Cedillo by Farmers,[1] and other reductions to the Interim Award that are not

[1] During the past five years, Farmers has made four (4) voluntary payments to Cedillo. The payment dates and amounts are as follows:

- August 25, 2009 $25,000.00

issues in this appeal. R., pp. 65-78. Arbitrator Clark's Final Award of April 29, 2013 was in the amount of $203,468.41, which consisted of the Adjusted Interim Award of $100,332.95 plus accrued prejudgment interest of $103,135.46. R., p. 77.

During the arbitration proceedings, Farmers first challenged the award of prejudgment interest by its contention that Cedillo should be required to file a new proof of loss for each surgery, which would change the starting date for the accrual of interest, resulting in significantly less prejudgment interest. R., p. 73. Arbitrator Clark rejected this argument as "[n]o such requirement is imposed by law or the insurance contract that was issued to [Cedillo] and there is no public policy reason why a new proof of loss should be required for each new medical procedure received by [Cedillo]." R., p. 73.

Arbitrator Clark, in his Arbitrator's Final Award explicitly set forth the "**Methodology for Calculation of Prejudgment Interest**" (bold in original). R., p. 74. After setting out the method of calculation, Arbitrator Clark next, in a section entitled "**Calculation of Prejudgment Interest**" (bold in original) explicitly set forth the calculation of prejudgment interest. R., p. 76.

Arbitrator Clark's Final Award of April 29, 2013 did not account for the third voluntary payment made by Farmers on March 25, 2013 (which was made by Farmers 36 days prior to Arbitrator Clark's Final Award of April 29, 2013) in the amount of $100,332.95 as Arbitrator Clark had no knowledge this amount had been paid by Farmers. R., p. 473. ("The Arbitrator

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- October 18, 2012 $155,000.00
- March 25, 2013 $100,332.95
- September 15, 2013 $101,947.96

R., p. 492

was not informed of this payment (referring to Farmers' March 25, 2013 payment of $100,332.95) and did not consider it in the calculation of prejudgment interest that was made by the Arbitrator and awarded in the Final Award.") R., p. 473.

Arbitrator Clark had no knowledge of Farmers' March 25, 2013 payment because the parties had earlier stipulated that payments made to Cedillo would be inadmissible. R., pp. 21-22. ("Counsel have stipulated that whether or not there have been payments by Respondent to Claimant will not be disclosed nor taken into consideration by the Arbitrator and a written Stipulation so stating shall be provided to the Arbitrator by Counsel.") R., p. 16. *See,* R., pp. 21-22 (Stipulation between Cedillo and Farmers concerning this issue).

Farmers challenged Arbitrator Clark's award of prejudgment interest for a second time on May 20, 2013 in its Motion for Reconsideration of Prejudgment Interest Award. R., pp. 523-532. In its memorandum Farmers requested that Arbitrator Clark reduce the prejudgment interest award of $103,135.46 to $35,719.16. R., pp. 523 and 531. Arbitrator Clark addressed Farmers' Motion in his Amended Final Order No. 12 dated July 24, 2013, which granted in part and denied in part Farmers Motion for Reconsideration. R., pp. 543-563.

In his Amended Final Order No. 12 dated July 24, 2013, Arbitrator Clark first addressed his jurisdiction to consider Farmers' motion. R., pp. 546-553. In his detailed analysis of the question of his jurisdiction, found in the Record at pp. 546 to 553, Arbitrator Clark concludes that Farmers "...did not submit the motion for reconsideration within 14 days from the issuance of the Final Award...." Therefore, Arbitrator Clark concluded he had no jurisdiction to consider Farmers' motion under I.R.C.P. 11(a)(2)(B) because it was not submitted within 14 days from

the issuance of the Final Award. R., p. 553.

Arbitrator Clark then stated the following:

> It is also appropriate to note that even if (Farmers') Motion for Reconsideration would be considered . . . the result would be the same.
>
> R., p. 553.

Whereupon, Arbitrator Clark then addressed the merits of Farmers' Motion for Reconsideration. Arbitrator Clark concluded that Farmers' motion would still be denied under this Court's decisions in *Emery v. United Pacific Insurance Co.*, 120 Idaho 244, 815 P.2d 442 (1991); *Walton v. Hartford Insurance Co.*, 120 Idaho 616, 818 P.2d 320 (1991); *Schilling v. Allstate Insurance Co.*, 132 Idaho 927, 980 P.2d 1014 (1999); and *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho 589, 130 P.3d 1127 (2006). R., pp. 553, 554-560

Moreover, Arbitrator Clark's Amended Final Award issued on July 24, 2013 did include and credit Farmers for the March 25, 2013 payment of $100,332.95.[2] Arbitrator Clark stated this "....payment was applied to the accrued prejudgment interest of $100,135.46, leaving unpaid the award of $100,332.95 plus accrued interest of $2,801.51." R. pp. 173-176. Arbitrator Clark also credited Farmers with $1,187.50 for 36 days of interest at 12% per annum on the Adjusted Interim Award of $100,332.95. This credit further properly reduced the amount of accrued interest to $1,615.01 as of March 25, 2013 (the date of payment by Farmers of $100,332.95). Thus, on March 25, 2013, the corrected and Amended Final Award as stated by Arbitrator Clark was $101,947.96. R., pp. 175 and 561-562.

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[2] At page 2 of Appellant's Brief Farmers mischaracterizes this credit as "...an evident miscalculation of figures. . .."

In his Final Order No. 12 dated July 24, 2013, Arbitrator Clark properly found that he had jurisdiction to award this credit under an exception to the doctrine of *functus officio* under Idaho Code § 7-909, which allows an arbitrator to retain authority to correct clerical, computation or similar errors in a final award. R., pp. 546-549.

Undaunted, on July 30, 2013, Farmers filed a second motion for reconsideration and for the third time challenged Arbitrator Clark's award of prejudgment interest. R., pp. 570-577. And for the third time, Arbitrator Clark rejected Farmers' motion. As a result of this motion, Arbitrator Clark stated the following in his Final Order No. 13 RE: Respondent's Application to Modify or Correct Amended Final Award and/or Motion for Reconsideration dated August 21, 2013:

> The Arbitrator rejects the Respondent's argument that it did not owe prejudgment interest to the Claimant simply because the amount of interest has not been calculated and awarded as of the date of Respondent's payment to Claimant. The law of Idaho clearly provides that the Claimant is entitled to prejudgment interest on unpaid claims. The fact that the actual amount of prejudgment interest that was owed by Respondent to Claimant had not been calculated as of the date of Respondent's payment is immaterial. When calculated by the Arbitrator, it was accurately determined that the amount of accrued prejudgment interest exceeded the amount of the payment by $1,615.01. To follow Respondent's logic and apply the payment to the principle balance, rather than the accrued interest, would leave the Claimant with a balance of accrued interest owed and no right to collect interest on the money owed. This application of the payment would deny Claimant of the right under section 28-22-104 to collect interest at the rate of 12% per annum "on money after the same becomes due." The right to prejudgment interest is "money after the same becomes due." Thus, regardless of whether the payment was applied to principle or accrued interest, the Claimant is entitled to collect interest at the rate of 12% per annum on the amount that was due her on the date of the payment and thereafter until it is fully paid.

R. 588-589.

In order to apply the strict time limitations of the Idaho Uniform Arbitration Act found at Idaho Code §§ 7-909, 7-912, and 7-913, it is important to keep in mind that the Final Award was issued and delivered on April 29, 2013. Idaho Code § 7-909 allows the Arbitrator, on his own or on application of a party, to modify or correct an award. Idaho Code § 7-913(a)(1) and (2). Such a modification or correction is allowed where: (1) there is an evident miscalculation of figures and (3) the award is imperfect in a form not affecting the merits of the controversy.

Idaho Code §§ 7-912 and 7-913 establish a 90-day time limitation that the applicant must meet in order to challenge the arbitrator's award in district court.

Arbitrator Clark issued four written decisions concerning the merits of Cedillo's claim, Farmers' defenses, and adjustments to Cedillo's damage award. Set forth below is a summary of Arbitrator Clark's decisions, the date of delivery and the time limitations of Idaho Code §§ 7-909, 7-912, and 7-913.

1. The Arbitrator's Interim Award issued on January 16, 2013. R., pp. 119-156. The Interim Award of $406,700.12 for economic and noneconomic damages was subject to adjustment for payments that had been made to Cedillo and for prejudgment interest.

2. Cedillo and Farmers then submitted briefing to the Arbitrator concerning adjustment for payments that had been made to Cedillo and for the method to be used for the calculation of prejudgment interest. R., p. 66. This presented Farmers with its first opportunity to challenge the methodology and calculation of prejudgment interest.

3. The Arbitrator's Final Award was issued on April 29, 2013. R., p. 65. The Final Award adjusted the Interim Award for payments that had been received by Cedillo and awarded Cedillo damages in the principle amount of $100,332.95, plus prejudgment interest in the amount of $103,135.46, which

had been properly calculated under the applicable law and facts known to the Arbitrator.

4. Service of the Arbitrator's Final Award was made on the parties by email on April 29, 2013. R., pp. 78 and 171. The service date of the Arbitrator's Final Award is the date on which the time limitations of Idaho Code § 7-909, § 7-912, and § 7-913 commence.

5. Then Farmers, on May 20, 2013, submitted a Motion for Reconsideration of Prejudgment Interest Award in which it sought adjustment of the amount of prejudgment interest that was included in the Final Award to account for a payment made by Farmers to Cedillo that was made after the Interim Award was issued but before the Final Award was issued. R., pp. 523-532. This Motion was Farmers second challenge to the methodology and calculation of prejudgment interest.

6. The Arbitrator found that this motion was not timely made under I.R.C.P. 11(a)(2)(B). R., p. 551. However, it was timely under Idaho Code § 7-909, which requires that an application to modify or correct an award must be brought within twenty (20) days after delivery of the award to the applicant. R., p. 551.

7. The Arbitrator's Final Order No. 12 RE: Respondent's Motion for Reconsideration of Prejudgment Interest Award and Claimant's Motion to Strike Affidavit of Counsel for Respondent and the Amended Final Award were issued on July 24, 2013. R., pp. 562 and 176. In this order the Arbitrator corrected and amended the calculation of prejudgment interest in two ways. First, the arbitrator corrected and amended the calculation of prejudgment interest to account for Farmers' payment of $100,332.95 made on March 25, 2013, which stopped the running of statutory interest on the amount paid and reduced the Final Award of prejudgment interest by $1,187.50. Second, the Arbitrator applied the payment of $100,332.95 to reduce the amount that was owed to Cedillo on that date, the damages of $100,332.95 and interest of $101,947.96. The Arbitrator applied the payment first to accrued interest, which left a balance of interest in the amount of $1,615.01 as of March 25, 2013 and a balance of damages in the amount of $100,332.95 or a total of $101,947.96 as of March 25, 2013. An Amended Final Award was issued to conform to Final Order No. 12. R., pp. 173-176.

8. On July 29, 2013 the 90-day time limitation of Idaho Code § 7-912 in which an applicant may request the district court vacate an award expired.

9. On that same date, July 29, 2013, the 90 day time limitation of Idaho Code § 7-913 in which to ask that the district court modify or correct an award expired.

10. Farmers then, on July 30, 2013, filed in the arbitration its second motion for reconsideration of Arbitrator Clark's award of prejudgment interest. R., pp. 570-577. This was Farmers third challenge to the Arbitrator's award of prejudgment interest, all of which were brought before the Arbitrator.

11. The Arbitrator's Final Order No. 13 RE: Respondent's Application to Modify or Correct Amended Final Award and/or Motion for Reconsideration, issued on August 21, 2013, rejected Farmers' arguments for the third time. R., pp. 585-590.

Meanwhile, following the issuance of Arbitrator Clark's Final Award on April 29, 2013, Cedillo had filed her Petition for Confirmation of Arbitration Award and Award of Attorney Fees in the district court on May 13, 2013. R., pp. 6-88.

As noted above, the district court 90-day limitation period of Idaho Code §§ 7-912 and 7-913 expired on July 29, 2013. On August 16, 2013, Cedillo filed her First Amended Petition for Confirmation of Arbitration Award, Award of Attorney Fees, Unenforceability of Off-set Clause and Bad Faith ("First Amended Petition"). R., pp. 89-186. Also, on August 16, 2013, Cedillo filed her Amended Verified Memorandum of Costs, Attorney Fees and Prejudgment Interest (R., p. 187) and her Motions to Confirm Arbitration Award and for Award of Costs, Attorney Fees and Prejudgment Interest. R., pp. 228-229. Cedillo's First Amended Petition and Motion to Confirm Arbitration Award and for Award of Costs, Attorney Fees, and Prejudgment Interest were served on Farmers on August 20, 2013. R., p. 2.

On August 28, 2013 Farmers filed its Notice of Appearance in the district court. R., p. 2. On September 9, 2013, Farmers filed its Answer to Cedillo's First Amended Petition. R., p. 230.

On September 11, 2013, Farmers made an additional payment of $101,947.96, which Cedillo, again, first applied to outstanding prejudgment interest. R., pp. 595-596. The balance of Farmers' September 11, 2013 payment was applied to the Adjusted Interim Award. R., p. 595.

Despite the fact that the 90-day limitation period of the Idaho Uniform Arbitration Act had expired on July 29, 2013, and that the 14 day limitation period of I.R.C.P. 54(e)(6), in which to object to a claim for attorney fees, had expired, Farmers filed in the district court on September 18, 2013 its Motion for Modification and/or Correction of Arbitration Award and its Motion to Disallow Costs and Attorney Fees. R., pp. 375-377. This Motion, for the fourth time, challenged Arbitrator Clark's award of prejudgment interest.

On November 9, 2013, District Judge Norton issued the court's Memorandum Decision and Order on Motions on Arbitration Award. The district court concluded that it lacked the authority to modify the award of prejudgment interest as Farmers' contentions were not an evident miscalculation of figures or mathematical error for purposes of Idaho Code § 7-913(a)(1). The district court's ruling rejected Farmers contentions concerning the award of prejudgment interest for the fourth time. The district court's decision confirmed the arbitration award and awarded Cedillo attorney fees, costs, and the remaining unpaid damage and prejudgment interest, all totaling $126,478.01. R., pp. 643-653.

On December 11, 2013, District Judge Norton issued the court's Judgment confirming the Arbitrator's Final Award and awarding Cedillo a total of $126,478.01, consisting of $5,608.30 as the unpaid balance of the Adjusted Interim Award, attorney fees of $121,007.23, and $132.48 as interest through November 22, 2013. R., pp. 660-661.

On December 11, 2013 Farmers filed its Notice of Appeal. R., pp. 663-666.

III
FARMERS' STATEMENT OF FACTS

Farmers accurately sets forth the facts in its Appellant's Brief except for the following:

- "Jon Steele was determined to have been the sole cause of the accident." *See,* Appellant's Brief, p. 4. There was no such determination. The parties stipulated that Steele was the negligent driver. R., p. 23. Steele's negligence was not an issue to be resolved or determined.
- Appellant's Brief makes several references to payments that represented Farmers' "evaluation" of damages. *See,* Appellant's Brief, p. 5. Rather there is no support in the Record for Farmers' alleged "evaluation."
- "On October 18, 2012, after receipt for the first time of additional medical bills and medical records related to the belated surgeries, Farmers made an additional payment of $155,000 in UIM benefits. This payment represented Farmers evaluation based on information not previously available. . .." *See,* Appellant's Brief, p. 5. Farmers was provided medical bills and medical

records as soon as they became available after treatment. Rather, there is no support in the recover for these alleged facts.

- "On March 25, 2013, Farmers paid the full amount of the Adjusted Interim Award of UIM benefits ($100,332.95)." *See,* Appellant's Brief, p. 6. In fact, this payment did not pay the Adjusted Interim Award. This payment was first allocated to accrued prejudgment interest, not the Adjusted Interim Award. Rather, there is no support in the Record for this alleged fact.
- "Farmers paid the corrected and amended Final Award of $101,947.96 on September 11, 2013." (R., p. 655) *See,* Appellant's Brief, pp. 6 & 8. In fact, this payment did not pay the corrected and amended Final Award. This payment was first applied to accrued prejudgment interest. R., p. 655. Rather, there is no support in the Record for this alleged fact.

IV
ADDITIONAL ISSUES PRESENTED ON APPEAL

A. Whether there was a timely and proper objection to the district court's confirmation of the arbitration award and whether any objection has been waived?

B. Whether there was a timely and proper objection to the award of attorney fees, the amount of attorney fees or any specific item of attorney fees claimed by Cedillo and whether any objection has been waived?

C. Whether Cedillo is entitled to an award of attorney fees and costs as a result of

Farmers' appeal?

V
STANDARD OF REVIEW FOR BINDING ARBITRATION DECISIONS

As this Court has stated ". . . confirmation proceedings are ordinarily summary affairs that require little time, effort or mental exertion. . .." *Grease Spot, Inc. v. Harnes*, 148 Idaho 582, 588, 226 P.3d 524, 530 (2010). Such was not the case in this confirmation proceeding.

Judicial review of an arbitrator's decision is strictly limited under the Uniform Arbitration Act, Idaho Code § 7-901 et seq., and even if a reviewing court believes some of the arbitrator's rulings are erroneous, it must confirm the arbitrator's award unless it finds one of the enumerated grounds for relief under the Uniform Arbitration Act as set forth in the Idaho Code §§ 7-912 or 7-913. *Norton v. California Ins. Guarantee Ass'n*, 143 Idaho 922, 924, 155 P.3d 1161, 1163 (2007). *See also, American Foreign Ins. Co. v. Reichert*, 140 Idaho 394, 398, 94 P.3d 699, 703 (2004); *Pacific Alaska Seafoods, Inc. v. Vic Hoskins Trucking Inc.,* 139 Idaho 472, 475, 80 P.3d 1073, 1076 (2003); *Reece v. U.S. Bancorp Piper Jaffray, Inc.*, 139 Idaho 487, 490, 80 P.3d 1088, 1091 (2003); *Chicoine v. Bignall*, 127 Idaho 225, 227, 899 P.2d 438, 440 (1995); *Bingham County Com'n v. Interstate Elec. Co.,* 105 Idaho 36, 41-42, 665 P.2d 1046, 1051-1052 (1983); *Hecla Min. Co. v. Bunker Hill Co.,* 101 Idaho 557, 562, 617 P.2d 861, 866 (1980). Limited judicial review of an arbitrator's decision is required to preclude a court from substituting its own judgment for that of the arbitrator. *Chicoine*, 127 Idaho at 227, 899 P.2d at 440. When reviewing a district court's decision to vacate or modify an award of an arbitrator, the Idaho

Supreme Court employs virtually the same standard of review as that of the district court when ruling on the petition. *Moore v. Omnnicare, Inc.*, 141 Idaho 809, 814, 118 P.3d 141, 146 (2005).

A district court may vacate an arbitrator's award only when the challenge is brought within the 90-day limitation period and where:

> (1) the award was procured by corruption, fraud or other undue means; (2) there was evidence partiality by an arbitrator; (3) the arbitrators exceeded their powers; (4) the arbitrators refused to postpone the hearing to the prejudice of a party; or (5) there was no arbitration agreement and the party did not participate in the hearing without objecting.
>
> I.C. § 7-912(a)(1)-(5); *Driver v. SI Corp.*, 139 Idaho 423, 426, 80 P.3d 1024, 1027 (2003).

A district court may modify or correct an arbitrator's award only when the challenge is brought within the 90-day limitation period and where:

> (1) There was an evident miscalculation of figures. . .
> (2) The arbitrator awarded upon a matter not submitted and the award may be corrected without affecting the merits of the decision.
> (3) The award is imperfect in a manner of form, not affecting the merits...
>
> Idaho Code § 7-913(a)

In *Driver v. SI Corp*, 139 Idaho 423, 426, 80 P.3d, 1024, 1027 (2003), this Court reaffirmed that Idaho law encourages the use of arbitration and that two of arbitrations most desirable characteristics are the limited scope of judicial review and the limited time period for that review to take place.

The standard of review of a final and binding arbitration award is among the lowest in the law. *See, e.g. United States v. Park Place Associates, LTD*, 563 F.3d 907, 920 (9th Cir. 2009) (review of an arbitration award is "both limited and highly deferential.") (quoting

Poweragent Inc. v. Electronic Data Systems Corp., 358 F.3d 1187, 1193 (9th Cir. 2004)); *Kyocera Corp. v. Prudential-Bache Trade Services., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003)(arbitrators exceed their powers "not when they merely interpret or apply the governing law incorrectly, but when the award is completely irrational, or exhibits a manifest disregard of the law.") (internal quotation and citation omitted); *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007) (to reverse an arbitration award, it must "be clear from the record that the arbitrators recognized the applicable law and then ignored it. As such, mere allegations of error are insufficient") (internal quotation and citation omitted); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S.Ct. 1920, ____, 131 L.Ed.2d 985, ____ (1995) (under the Federal Arbitration Act, courts may vacate an arbitrator's decision, "only in very unusual circumstances").

VI
ARGUMENT

A. The District Court Did Not Err In Denying Farmers Motion To Modify And/Or Correct The Arbitration Award – There Is No Mathematical Error Or Miscalculation Of Prejudgment Interest.

In this appeal Farmers, for the fifth time, seeks review of Arbitrator Clark's award of prejudgment interest. There has never been any issue that Farmers' is entitled to credit for its voluntary payments to Cedillo. Farmers' only challenge is to the allocation of its March 25 and September 15, 2013 payments to accrued prejudgment interest rather than the Interim Award.

It is important to note what Farmers' does not challenge in this appeal. At p. 14 of

Appellant's Brief, Farmers states that it is not challenging the Arbitrator's award because it either ". . . failed to award prejudgment interest. . ." ". . . or because it awarded prejudgment interest." Nor is Farmers challenging the award of prejudgment interest on amounts that had not yet been incurred as of August 29, 2009 (start date for calculating prejudgment interest). Neither is Farmers' challenging the award of prejudgment interest on amounts that were not mathematically capable of computation or ascertainable. *See*, App. Brief at pp. 14-15. In other words, Farmers does not contest the "proof of loss" date that is the start date for calculating prejudgment interest.

Although Farmers complains that these so called "errors" were made by the Arbitrator, it then concedes that these so called "errors" are beyond review by this Court and that these so called "errors" cannot be challenged. *See*, App. Brief, p. 15, n.1.

Likewise, Farmers does not challenge the Arbitrator's allocation of its first two voluntary payments of $25,000.00 made on August 25, 2009 and $155,000.00 made on October 18, 2012.

Farmers admits Cedillo is entitled to prejudgment interest. During arbitration Farmers first urged Arbitrator Clark to award no more than $3,991.79 in prejudgment interest. R., p. 538. Farmers then contended that Cedillo was entitled to no more than $7,884.61 in prejudgment interest. R., p. 495. Farmers next urged the Arbitrator to award no more than $35,719.16 in prejudgment interest. R., pp. 523, 531. Farmers has repeatedly admitted its obligation to pay prejudgment interest; its only challenge is to the allocation of its third and fourth voluntary payments first to accrued prejudgment interest.

B. Prejudgment Interest In The UIM Context.

Farmers' argument is contrary to Idaho legal precedent awarding prejudgment interest in underinsured motorist cases. Farmers' duty to pay prejudgment interest is a contractual duty. *Brinkman v. Aid Ins. Co*, 115 Idaho 346, 349, 766 P.2d 1227, 1230 (1988).

The long-standing rule with respect to prejudgment interest on underinsured motorist claims is set forth in *Brinkman v. Aid Ins. Co*, 115 Idaho 346, 349, 766 P.2d 1227, 1230 (1988), *overruled on other grounds by Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho 589, 130 P.3d 1127 (2006). In *Greenough* the *Brinkman* rule was modified with respect to when prejudgment interest begins to accrue, but it has not been modified concerning the amounts upon which prejudgment interest is owed. *Id.*

In *Brinkman*, an insured was severely injured in an automobile accident caused by an underinsured motorist. *Id.* at 349, 766 P.2d at 1230. The insurer refused to pay the amount demanded in the proof of loss of $300,000, and the insured filed suit. The insured obtained a favorable jury award of $156,018.16. *Id.* After the trial, the district court awarded prejudgment interest pursuant to Idaho Code § 28-22-104(1) because it was "money due by express contract." *Id.* The district court, however, found that because there were "obvious tort aspects" of the case, it would be inequitable to award prejudgment interest for the entire amount due because many of the damages were not readily ascertainable and were not "liquidated." *Id.* The district court concluded that the insured should not be entitled to prejudgment interest on non-economic damages and should only be entitled to prejudgment interest on the medical bills which became due and owing prior to suit being filed. *Id.*

On appeal, the Idaho Supreme Court overruled the district court's refusal to award prejudgment interest on the entire jury verdict. *Id.* Instead of awarding prejudgment interest only on the past medical bills, the Court held that prejudgment interest should be calculated based **on the amount of the jury verdict**, including general damages. *See, Id.* at 353-54, 766 P.2d at 1234-35 (emphasis added). This rule has not been overturned by the Idaho Supreme Court.[3] Thus, the *Brinkman* rule is that "**the entire verdict is appropriately subject to the accumulation of prejudgment interest" in underinsured motorist cases.** *Id.* (Emphasis added.)

Farmers does not cite any legal authority overruling the *Brinkman* decision that prejudgment interest is based on the entire jury verdict or, in this case, the arbitration award, because there is none.

The Idaho Supreme Court has made it clear that the *Brinkman* rule requiring prejudgment interest be awarded on the entire jury verdict or arbitration award does not apply to all tort and contract actions. *See, Emery v. United Pac. Ins. Co* ., 120 Idaho 244, 248, 815 P.2d 442, 446 (1991). It makes sense to distinguish insurance actions from other types of actions because of the special relationship that exists between an insurer and its insured. The Court explained in *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 730 P.2d 1014 (1986) that a special relationship

[3] There are multiple cases since *Brinkman* that have upheld the rule that prejudgment interest should be awarded on the entire jury verdict or arbitration award. *See, Schilling v. Allstate Ins. Co.*, 132 Idaho 927, 930, 980 P.2d 1014, 1017 (1999); *Emery v. United Pacific Insurance Co.*, 120 Idaho 244, 815 P.2d 442 (1991); *Walton v. Hartford Ins. Co.*, 120 Idaho 616, 622, 818 P.2d 320, 326 (1991). These cases were overruled by *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho 589, 592, 130 P.3d 1127, 1130 (2006) **concerning only** when prejudgment interest should begin to accrue.

exists between an insurer and an insured and that the nature of that relationship makes it particularly susceptible to public policy considerations:

> The adhesionary aspects of the insurance contract, including the lack of bargaining strength of the insured, the contracts standardized terms, the motivation of the insured for entering into the transaction and the nature of the service for which the contract is executed, distinguish this contract [insurance contract] from other non-insurance commercial contracts. These features characteristic of the insurance contract make it particularly susceptible to public policy considerations.
>
> *White*, 112 Idaho at 99, 730 P.2d at 1019 (citations omitted).[4]

The quasi-fiduciary relationship between an insurer and its insured gives rise to the insurer's duty to pay all amounts justly due under an insurance policy within thirty (30) days of receiving a proof of loss. *See*, Idaho Code § 41-1839. Awarding prejudgment interest on amounts owed by an insurer is consistent with this principle. Prejudgment interest serves two important purposes. First, it encourages early settlement of claims, and second, it compensates an injured plaintiff for delay in receiving compensation to which he or she is entitled. *Metropolitan Property and Cas. Ins. Co. v. Barry*, 892 A.2d 915, 919 (R.I. 2006). In this case, the Arbitrator's award of prejudgment interest serves both purposes.

There is no excuse for Farmers failing to pay Cedillo the prejudgment interest amount awarded by the Arbitrator or for its continued over-litigious and contentious behavior. This Court's decision in *Brinkman* implicitly recognizes that people like Cedillo lack bargaining

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[4] *Hill v. Am. Family Mut. Ins. Co.*, 150 Idaho 619, 623,24, 249 P.3d 812, 816-17 (2011), reh'g denied (Apr. 29, 2011) (finding that because the Legislature began requiring insurers to offer underinsured motorist coverage in 2008, public policy considerations are now applicable to UIM coverage policies.)

power when it comes to negotiating with insurers and that the law must take that disparity into consideration. The Arbitrator's award of prejudgment interest in this case will encourage insurers such as Farmers to pay claims promptly and will compensate Cedillo for having to wait from the date she submitted her proof of loss to receive payment of the amounts Farmers owed.

Because the *Brinkman* rule requiring prejudgment interest be awarded on the entire jury verdict or arbitration award in this case is well-justified and is the standing rule in Idaho and is not challenged by Farmers in this appeal, the Court should affirm the district court's confirmation of the Arbitrator's award of prejudgment interest and the application of payments previously received first to accrued prejudgment interest.

C. Farmers' Motions Challenging The Allocation Of Its Voluntary Payments To Accrued Interest Are Frivolous, Unreasonable, And Without Foundation.

The Court is urged to summarily reject Farmer's argument concerning the allocation of its payments first to accrued prejudgment interest. It has been the rule that a voluntary payment will, absent an agreement to the contrary, be applied to accrued interest rather than to the principal of the debt since at least 1839. In that year the Supreme Court of the United States in the case of *Story v. Livingston*, 38 U.S. 359, 10 L. Ed. 200 (1839), announced what has been known as the "United States Rule,"[5] which provides that partial payment of a debt will be applied first to unpaid interest due and thereafter to the principal debt. *See,* WILLISTON ON CONTRACTS, § 72.20 *Application by Court in Absence of Direction; Presumptions; Order of*

[5] *Langton v. Kops*, 41 N.D. 442, 448, 171 N.W. 334, 336 (N.D. 1919) ("Where partial payments are so made, the rule commonly known as the United States Rule is generally applied. That rule is to apply the payment, in the first place, to the discharge of the interest then due.")

Payments, Generally. *See also,* Am. Jur. 2d, *Payments* § 77. *See also, Black's Law Dictionary*, 1286 (Rev. 4th ed. 1968), definition of "partial payments" ("apply the payment, in the first place, to the discharge of the interest then due").

1. Farmers' Subject Motion Was Denied By The Arbitrator As Not Timely.

Arbitrator Clark ruled that Farmers had failed to timely submit its motion concerning the application of its March 25, 2013 payment to accrued interest. The Arbitrator stated the following:

> [Farmers] has asserted that the Motion is properly before the Arbitrator under Rule 11(a)(2)(B) of the Idaho Rules of Civil Procedure because the Parties agreed that this arbitration proceeding is governed by the Idaho Rules of Civil Procedure. Under Rule 11(a)(2)(B), a motion for reconsideration of any interlocutory orders of the trial court may be made at any time before entry of final judgment or a motion for reconsideration of any order of the trial court made after entry of final judgment may be filed within fourteen (14) days from the entry of final judgment, subject to limitations that do not apply to this Motion. Although, a question may be raised whether the Rule would permit a motion for reconsideration of a "final judgment" as opposed to an "order of the trial court made after entry of a final judgment," the question need not be addressed because the motion for reconsideration in this case was not submitted to the Arbitrator within fourteen (14) days as required by the Rule.
>
> R., pp. 550-551.

2. Farmers' Subject Motion Was Then Denied By The Arbitrator On Its Merits Because Farmers' Allegations Did Not Constitute A Mathematical Error.

Farmers' first motion for reconsideration of the Arbitrator's award of prejudgment interest, although untimely under Rule 11(a)(2)(B), was timely under Idaho Code § 7-909, which provides a 20-day limitation period. The Arbitrator then denied Farmers' motion on its merits. The Arbitrator stated the following:

> It is also appropriate to note that even if [Farmers'] Motion for Reconsideration would be considered by the Arbitrator under Rule 11(a)(2)(B), the result would be the same. Under the law of *Emery, Walton, Schilling*, and *Greenough*, as discussed below, the motion to reecalculate prejudgment interest based on the dates each medical expense was incurred or paid, and the date that the amounts of lost income and general damages were determined by the Arbitrator would still be denied.
>
> . . .
>
> "[T]he Arbitrator concludes that the controlling law, as established in *Emery*, *Walton*, *Schilling*, and *Greenough* mandates that prejudgment interest on the Final Award, both for special damages and general damages, be calculated from the date that the insurer had sufficient information to investigate and determine its liability in this matter. Moreover, even if the Arbitrator has erred in this conclusion, the Arbitrator has no authority to correct the error because it is not a mathematical error. *See*, *Cranney v. Mut. of Enumclaw, Inc. Co.*, 145 Idaho 6, 175 P.3d 168 (2007); *Am. Foreign Ins. Co. v. Reichert*, 140 Idaho 394, 94 P.3d 699 (2004).
>
> R., p. 553, 561

3. Farmers' Subject Motion Was Then Denied A Second Time By The Arbitrator On Its Merits And Additionally Because Farmers' Motion Did Not Constitute A Request To Correct An Evident Miscalculation Of Figures.

Farmers' same motion was denied a second time by the Arbitrator. The Arbitrator stated the following:

> It is also the finding and conclusion of the Arbitrator that the application for modification or correction of the Amended Final Award to have the payment applied to the principle balance rather than the accrued interest does not constitute a request to correct an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award, nor a request to correct an award that is imperfect in a matter of form, not affecting the merits of the controversy as required under Sections 7-909 and 7-913(1) and(3).

R., pp. 588-589.

D. The Arbitrator's Prior Rulings Are *Res Judicata.*

The doctrine of *res judicata* mandates the Arbitrator's ruling be upheld. *See*, *Wolfe v. Farm Bureau Ins. Co.*, 128 Idaho 398, 913 P.2d 1168 (1996).

In the case of *H.S. Cramer & Co. v. Washburn-Wilson Seed Co.*, 68 Idaho 416, 422, 195 P.2d 346, 350 (1948) this Court cited the following with approval:

> 'The award of arbitrators, acting within the scope of their authority, determines the rights of the parties as effectually as a judgment secured by regular legal procedure, and is as binding as a judgment, until it is regularly set aside or its validity questioned in a proper manner. Their decision on matters of fact and law is conclusive, and all matters in the award are thenceforth res judicata, on the theory that the matter has been adjudged by a tribunal which the parties have agreed to make final, a tribunal of last resort for that controversy. And this has been held true even in a case in which one of the parties neglected to present portions of his claim. He had his chance, and, after the award, was concluded thereby, and could secure no relief.'
>
> *Hooper v. Pennick,* 102 Or. 382, 202 P. 743 (1921).

Likewise, Farmers had its chance. Its continuing refusal to accept the Arbitrator's decisions, the district court's ruling and the well established principles of Idaho law is vexatious, frivolous and unreasonable.

E. Farmers' Same Motion Made In The District Court On September 18, 2013, Long After The 90-Day Limitation Period Of Idaho Code § 7-913 Expired, Was Not Timely.

Idaho Code § 7-911 states that when a party applies to have an arbitration award confirmed, the district court ". . . shall confirm an award, unless within the time limits hereinafter

imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in section 7-912 and 7-913, Idaho Code."

The applicable district court time limits are imposed by Idaho Code § 7-912(b) and § 7-913(a), which require an application to set aside the award for the specific grounds therein stated to be made within 90 days of entry of the award. A party seeking to vacate an arbitration award must meet these statutory requirements. *Bingham County Commissioners v. Interstate Electric Co.*, 105 Idaho 36, 665 P.2d 1046 (1983).

The Arbitrator's Final Award was entered on April 29, 2013. R., pp. 65-78 and 508-521. As stated by the Arbitrator, ". . . the Final Award was served upon the Parties via email, as stipulated by the parties. . . on April 29, 2013." R., p. 476 (Stipulation found at R., p. 18). Hence, the 90-day time period referred to in Idaho Code §§ 7-912 and 7-913 commenced on April 29, 2013 and expired on July 29, 2013. Farmers' district court Motion for Modification and/or Correction of Arbitration Award was not filed until September 18, 2013. R., pp. 260-262. By that date the 90-day limitation period had long expired. Farmers' repeated motions brought before the Arbitrator did not extend the 90-day time limit for it to make application in the district court to set aside the arbitration award.

Farmers does not address its failure to comply with Idaho Code § 7-912 and § 7-913. To allow Farmers to pursue this appeal would, as stated by the Arbitrator ". . . abrogate the statutory scheme under the Idaho Uniform Arbitration Act that limits the power of arbitrators to change an award under I.C. § 7-909, the power of a court to vacate an award under I.C. § 7-912, and the power of a court to modify or confirm the award." R., p. 551.

The 90-day limitation under Idaho Code § 7-912 and 7-913 must be strictly construed, and acts as an absolute bar to a motion to vacate that fails to meet the time requirements. *Driver v. SI Corp.*, 139 Idaho 423, 428, 80 P.3d 1024, 1029 (2003) citing *Bingham*, 105 Idaho at 39, 665 P.2d at 1049.

For this reason Farmers' challenge to the arbitration must be summarily dismissed.

F. The District Court Had No Authority To Modify Or Change The Arbitrator's Rulings.

Courts possess very limited authority to review arbitration awards under Idaho's Uniform Arbitration Act. Idaho Code § 7-901-922; *Mumford v. Miller*, 143 Idaho 99, 100, 137 P.3d 1021, 1022 (2006). The Arbitrator's decision is binding on the reviewing court both as to questions of law and fact. *Driver v. SI Corp.*, 139 Idaho 423, 426, 80 P.3d 1024, 1027 (2003). The district court properly concluded that it lacked authority to modify or change the Arbitrator's decisions as Farmers' argument was not an evident miscalculation of figures or mathematical error for purposes of Idaho Code § 7-913(a)(1). R., pp. 643-653.

G. The Arbitrator's Ruling Is Correct on both the Facts and the Law.

The *Greenough* case provides that prejudgment interest is calculated from the date that the insured has submitted a sufficient proof of loss which provides the insurer with enough information to allow the insurer a reasonable opportunity to investigate and determine liability. R., p. 71. As the Arbitrator pointed out, *Greenough* overruled that portion of *Brinkman v. Aid Ins. Co.*, 115 Idaho 346, 766 P.2d 1227 (1988) holding that interest is accrued on an award from the date of the accident. *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho 589, 130 P.3d 1127 (2006).

The *Greenough* rule is reasonable for a number of reasons. First, this case is a contract action, not a personal injury action. Although damages are defined as personal injury damages, the underlying relationship is contractual. In *Greenough,* the insurance contract addressed the format of the proof of loss and specified a time period for the insurer to investigate and determine its liability. In this case, neither the format nor the time period for investigation was addressed in the contract of insurance. If those issues had been addressed in Farmers' contract of insurance, the parties would be bound by their agreement. But without those standards the Arbitrator carefully and thoroughly analyzed the proof of loss information submitted and the date that Farmers had been provided sufficient information to investigate and determine its liability. In this case that date was August 25, 2009, the date on which Farmers mailed Cedillo a check for $25,000.

H. <u>The Prejudgment Interest Issue Is Moot.</u>

As previously noted, Farmers has voluntarily made four (4) payments to Cedillo. These voluntary payments render Farmers' appeal moot. When a judgment debtor voluntarily pays the judgment, the debtor's appeal becomes moot, and it will be dismissed. *Quillin v. Quillin*, 141 Idaho 200, 202, 108 P.3d 347, 349 (2005). *See also*, 39 A.L.R.2d 153, § 955, *Defeated Party's Payment or Satisfaction of, or Other Compliance With, Civil Judgment as Barring His Right to Appeal*, cited with approval *International Business Machines Corp. v. Lawhorn*, 106 Idaho 194, 196, 677 P.2d 507, 509 (Ct. App. 1984). When a judgment debtor voluntarily pays the judgment, or in this case the amount justly due, the debtor's appeal becomes moot. *Bob Rice Ford, Inc. v. Donnelly*, 98 Idaho 313, 563 P.2d 37 (1977).

A judgment debtor who wants to preserve the right to appeal can pay the amount due under the judgment to the clerk of the court pursuant to Idaho Code § 10-115 with instructions to pay the money to the person who is determined to be entitled to it by the order of the court. *Quillin* citing *Radioear Corp v. Crouse*, 97 Idaho 501, 547 P.2d 546 (1975).

VII
STANDARD OF REVIEW OF AWARD OF ATTORNEY FEES

The district court, in its Memorandum Decision and Order on Motions on Arbitration Award accurately states the standards to be considered by it in the award of attorney fees. *See*, R., pp. 649-652. *See also, Parsons v. Mutual of Enumclaw Ins. Co.,* 143 Idaho 743, 747, 152 P.3d 614, 619 (2007). The standard of review on appeal is whether the district court abused its discretion. In order to determine whether an award of attorney fees is an abuse of discretion the Court should focus on a three part test as follows: (1) Whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Burns v. Baldwin*, 138 Idaho 480, 486, 65 P.3d 502, 508 (2003).

In addition, appellate court review is limited to the evidence, theories and arguments that were presented in the district court. *Meyers v. Hansen*, 148 Idaho 283, 292, 221 P.3d 81, 90 (2009). In order to preserve an issue for appeal, the issue must be raised in the district court. *St.*

Alphonsus Diversified Care, Inc. v. MRI Associates, LLP, 148 Idaho 479, 491, 224 P.3d 1068, 1080 (2009).

VIII
ARGUMENT

A. Cedillo, As The Prevailing Party, Was Properly Awarded Attorney Fees.

The district court awarded Cedillo $121,007.23 in attorney fees pursuant to Idaho Code § 41-1839. Farmers' claims that Cedillo is not entitled to any attorney fees, or in the alternative that the district court's award of attorney fees should be reduced. Farmers' argument is contrary to the facts of this case and legal precedent. As the district court noted ". . . the Court finds that [Cedillo] is the prevailing party in the arbitration . . .." R., p. 647. Farmers did not and has not disputed that Cedillo is the prevailing party. R., p. 647, n.5. Likewise, on appeal Farmers has made no contention that Cedillo is not the prevailing party.

Neither did Farmers challenge the time and effort devoted to Cedillo's case by Runft & Steele Law Offices and its staff. *See,* R., p. 652. ("Seeing no other argument in opposition to the amount of time and the amount of money that (Cedillo's) counsel billed in this matter and in consideration of all of the factors listed in Rule 54(e)(3), (Cedillo's) request for attorney fees is GRANTED IN PART. . .."

B. Farmers Failed To Preserve Its Alleged Errors Concerning An Illegal, Unenforceable Contract.

As a general rule, this Court will not consider alleged error which was not preserved for appeal through an objection at trial. *State v. Longest*, 149 Idaho 782, 784, 241 P.3d 995, 957

(2010). "[R]equiring a contemporaneous objection prevents the litigant from sandbagging the court, i.e., 'remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.'" *State v. Perry*, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010) quoting *Puckett v. US*, 556 U.S. 129, 129 S.Ct 1423 at 1428, 173, L.Ed.2d 266 at 274 (2009).

Such is the case before the Court. Prior to initiating arbitration, Farmers had knowledge that Steele was the negligent party who caused the motorcycle crash of May 2008; Farmers had knowledge that Cedillo and Steele had married in December of 2008; and that Cedillo was represented by Steele. Farmers chose to remain silent on these issues. Not until September 18, 2013 did Farmers raise an issue concerning Cedillo's representation by Steele.

This is the sandbagging the United States Supreme Court condemns. *See*, *Neff v. Hysen*, 72 Idaho 470, 244 P.2d 146 (1952) ("Appellant complains that 'the court erred in permitting A.L. Merrill, attorney for defendant, who had been attorney for the plaintiff, to testify as a witness against the plaintiff and disclose confidential relations and still continue in the case as attorney, having theretofore cross examined the plaintiff and other witnesses and argued the case.' . . . No objection was made to Mr. Merrill continuing as attorney in the case and no ruling of the court invoked. There is no basis for this assignment of error.")

Likewise, after attorney Steele provided Farmers and the Arbitrator his Notice of Conflict Disclosure (*See*, pp. 1-2 above), Farmers, if it had any objection, made no objection. It now, belatedly, alleges error after it has lost the case. Farmers failed to preserve its alleged error concerning this issue.

As Farmers made no objection to Steele's representation of Cedillo it was reasonable for Cedillo to rely upon that failure to object.

C. Farmers Failed To Preserve Its Alleged Errors Concerning The Amount Of Attorney Fees Awarded By The District Court.

Moreover, as the district court found, "there is no evidence in the record to suggest that [Cedillo's] counsel, Jon Steele, caused the accident in order to initiate a lawsuit against [Farmers]." R., p. 649. Further, the district court correctly determined that "[Cedillo's] contractual claim against [Farmers] was her separate property. Any proceeds acquired from the separate property after marriage, including the arbitration award, are [Cedillo's] separate property as well." R., pp. 649-650. Moreover, Farmers' alleged errors made in this appeal (*see,* Appellant's Brief, p. 22-28) concerning the amount of attorney fees awarded by the district court were not made in the district court. As the district court stated "Seeing no other argument in opposition to the amount of time and the amount of money that Plaintiff's counsel billed in this matter, and in consideration of all of the factors listed in Rule 54(e)(3), the Plaintiff's request for attorney fees is GRANTED IN PART, excepting the Plaintiff's request for one-third of the $25,000.00 payment made on August 25, 2009." R., p. 652.

Farmers has waived these objections under the Idaho Rules of Civil Procedure. There are two rules that require a specific objection to a claim for attorney fees or the objection is waived. Idaho Rule of Civil Procedure 54(e)(6) requires an objection to attorney fees to be made specifically in the same manner as any other objection to costs under I.R.C.P. 54(d)(6). This rule provides as follows:

> Rule 54(e)(6). Objection to Attorney Fees. 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). The court may conduct an evidentiary hearing, if it deems it necessary, regarding the award of attorney fees.

I.R.C.P. 54(d)(6) provides that an objection or a motion to disallow costs and fees must be filed and served on the adverse party within 14 days of service of the memorandum of costs or they are deemed waived by the rule.

If the motion to disallow fees does not comply with this rule, the objection will be denied and the full amount of the request for attorney fees will be granted. *See, Nanney v. Linella, Inc.*, 130 Idaho 477, 943 P.2d 67 (Ct. App. 1997). In *Nanney* the Court of Appeals stated the following:

> Rule 54(d)(6) "is designed to establish a deadline for informing the court of any objection to items claimed in the memorandum of costs" and "enables the trial court expeditiously to rule upon such objections and bring the case to a conclusion." *Operating Engs. Local Union 370 v. Goodwin Const. Co. of Blackfoot*, 104 Idaho 83, 85, 656 P.2d 144, 146 (Ct. App. 1982).

The Idaho Supreme Court and Court of Appeals have consistently held that the failure to make this timely objection results in a waiver of the objection to costs and attorney fees. *See, Conner v. Dake*, 103 Idaho 761, 653 P.2d 1173 (1982). *See also, Hooper v. State*, 127 Idaho 945, 949, 908 P.2d 1252 (Ct. App. 1995); *Fearless Farris Wholesale, Inc. v. Howell*, 105 Idaho 699, 704, 672 P.2d 577 (Ct. App. 1983); *Operating Engineers Local Union 370 v. Goodwin Construction Co. of Blackfoot*, 104 Idaho 83, 85, 656 P.2d 144 (Ct. App. 1982); other citations omitted.

In this case Farmers was served with Cedillo's Amended Verified Motion for Award of Costs, Attorney Fees and Prejudgment Interest on August 20, 2013. R., p. 2. The 14-day time limitation in which to object to Cedillo's claim for attorney fees expired on September 3, 2013. Farmers' Motion to Disallow Costs and Attorney Fees was filed in the district court on September 18, 2013. R., p. 375. Farmers' failure to file its motion to disallow Cedillo's attorney fees was waived as it failed to comply with I.R.C.P. 54(d)(6).

Additionally, Farmers now attempts to raise issues that were not raised or objected to in the district court. At page 23 of its Appellant's Brief, Farmers contends that the district court erroneously awarded attorney fees based upon "UIM benefits paid within 30 days of receipt of information sufficient to support payment." This contention is based upon smoke and mirrors. Farmers made this exact same argument before the Arbitrator and the district court but in regards to the prejudgment interest award. That argument has been continually rejected. Hence, Farmers has now, for the first time, made this argument in regards to the district court's award of attorney fees. This contention was not raised in the district court and has been waived.

Potential grounds for an objection to a cost memorandum are waived if they were not included in the stated basis for the motion to disallow costs and fees filed with the trial court. *Nanney v. Linella*, 130 Idaho 477, 943 P.2d 67 (Ct. App. 1997) and cases cited therein. Farmers has waived its objections to the amount of attorney fees awarded by the district court. Farmers made none of the challenges found in its Appellant's Brief at p. 22-28 in the district court.

Farmers' failure to comply with I.R.C.P. 54(d)(6) is a waiver of any and all objections to Cedillo's claim for attorney fees..

D. Farmers Has No Standing To Allege An Unenforceable, Illegal Contract Between Cedillo And Her Attorney.

Standing is a jurisdictional issue. *Kinghorn v. Clay*, 153 Idaho 462, 465, 283 P.3d 779, 782 (2012). Farmers' contentions concerning the contract between Cedillo and her attorney should be dismissed, because Farmers has no standing to bring this issue before the Court.

The Idaho Appellate Rules authorize an appeal by "[a]ny party aggrieved by an appealable judgment, order or decree . . . of a district. . .court. . .." I.A.R. 4. When an issue of standing is raised the focus is not on the merits of the issues raised, but upon the party who is seeking the relief. *See, Scona, Inc. v. Green Willow Trust,* 133 Idaho 283, 288, 985 P.2d 1145, 1150 (1999). Thus to have standing one must satisfy two requirements: First, one must be a party, and second, one must be "aggrieved." A party "aggrieved" has been defined as "any party injuriously affected by the judgment." *Federal Land Bank of Spokane v. Parsons*, 116 Idaho 545, 548, 777 P.2d 1218, 1221 (Ct. App. 1989).

Just as a third party allegedly injured by an insured is not a party to the insurance contract and has no rights under it (*Brooksby v. Geico General Ins. Co.*, 153 Idaho 546, 548, 286 P.3d 182, 184 (2012)), Farmers is not a party to the contract between Cedillo and her attorney and has no rights under it. Therefore, it follows that Farmers is not an "aggrieved party" and has no standing to bring this issue before the court.

E. Farmers' Contention That Cedillo's Request For Attorney's Fees Is Based Upon An Unenforceable, Illegal Contract Is Frivolous, Unreasonable And Without Foundation.

Whether a contract is illegal is a question of law. *AED, Inc.* v. *KDC Investments, LLC,* 155 Idaho 159, 307 P.3d 176 (2013). Farmers' contentions are meritless. Initially, Farmers

failed to raise this issue in arbitration. Attorney Steele filed his Notice of Conflict Disclosure in the arbitration on March 1, 2012. R., pp. 605-607. Any objection Farmers may have had has been waived.

The district court summarily disposed of this issue. The district court stated the following:

> The Court disagrees with [Farmers'] contentions that [Cedillo] is not entitled to attorney fees because [Cedillo's] counsel's negligence caused the accident. There is no evidence in the record to suggest that [Cedillo's] counsel, Jon Steele, caused the accident in order to initiate a lawsuit against [Farmers]. Additionally, there is no evidence that the underlying contract for representation itself was illegal.
>
> R., p. 649.

Farmers' assertion is based upon faulty reasoning. In *Anderson v. Miller*, 559 N.W.2d 29 (Iowa 1997), cited by Farmers, the Iowa Supreme Court stated public policy bars recovery of a drunk driver in a personal injury case involving negligent entrustment of a pickup to that drunk driver.

Cedillo's UIM claim against Farmers is a contractual claim. Cedillo's claim for attorney fees and costs is statutory. No part of Cedillo's claim is based upon her neglect or upon any of her conduct. Just as its other claims are frivolous, unreasonable and without foundation so is this claim.

F. The District Court's Award of Attorney Fees Pursuant To Idaho Code § 41-1839 Was Proper.

There are only two requirements under Idaho Code § 41-1839 to be met for an award of attorney fees against an insurer: 1) that the plaintiff provided a proof of loss to defendant; and 2)

that defendant failed to pay an amount justly due under the policy within 30 days of such proof of loss. *See*, Idaho Code § 41-1839; *see also, Parsons v. Mutual of Enumclaw Ins. Co.*, 143 Idaho 743, 152 P.3d 614, 617-18 (2007); *Martin v. State Farm Mut. Auto. Ins. Co.*, 138 Idaho 244, 61 P.3d 601 (2002).

In this case, the Arbitrator found that Cedillo provided a proof of loss to Farmers on July 28, 2009. Farmers does not dispute that the proof of loss provided adequate information for it to investigate and evaluate the claim. The Arbitrator returned an award and, after adjustments, the "amount justly due" to Cedillo from Farmers is $382,280.91. R., p. 202.

There is also no dispute that Farmers failed to pay the amount justly due within 30 days. Thus, there is no question that Farmers is required to pay attorney fees in this case.

Cedillo is also entitled to the amount of attorney fees she is required to pay pursuant to the contingent fee agreement. As noted above, Farmers failed to object to the amount of attorney fees claimed by Cedillo.[6] The attorney fee rule under Idaho law is that if the insurance company makes no tender within 30 days, "the insurance company is liable for a reasonable amount of the insured's attorney fees, as compensation to make the insured whole." *Martin v. State Farm Mut. Auto. Ins. Co.*, 138 Idaho 244, 248, 61 P.3d 601, 605, (2002) *citing Halliday v. Farmers Ins. Exchange*, 89 Idaho 293, 404 P.2d 634 (1965).

It is significant that Farmers' duty arose out of an express contract with Cedillo. Cedillo incurred her attorney fees solely because Farmers ". . . improperly refused to pay the claim under

[6] Farmers did object to the claim for 1/3 attorney fees of Farmers August 29, 2008 payment of $25,000, which was adopted by the district court.

the contract of insurance." *See, Brinkman v. Aid Insur. Co.*, 115 Idaho 346, 351, 766 P.2d 1227, 1232 (1988).

There are several reasons why an insured should be entitled to attorney fees under Idaho Code § 41-1839 and that the attorney fee award should be based on the contingent fee contract to make the insured whole. One of the purposes of the statute is to cause the insurance company to timely make a reasonable offer. *Id.* The insurance company acts at its peril in taking the risk not to tender an "amount justly due" and, instead, await the decision of the jury or arbitrator. *Id.* Another purpose of the attorney fee statute is to provide an incentive for insurers to settle just claims in order to reduce the cost of litigation and the high costs associated with litigation. *Id.* The statute, Idaho Code § 41-1839, is also intended to prevent the sum that is due an insured under the policy from being diminished by expenditures for services of an attorney. *Barber v. State Farm Mut. Auto. Ins. Co.*, 129 Idaho 677, 931 P.2d 1195 (1997).

An argument similar to that advanced by Farmers was rejected by the Idaho Supreme Court in another underinsured motorist case. *See*, *Parsons v. Mut. Of Enumclaw Ins. Co.*, 143 Idaho 743, 748, 152 P.3d 614, 619 (2007). In *Parsons*, an insured submitted a proof of loss for underinsured motorist benefits that the insurer failed to pay within 30 days. The insured subsequently filed a lawsuit, and the insurance company ultimately agreed to pay $60,000 before the trial took place. The insured requested an attorney fee award pursuant to the contingent fee agreement in the amount of $20,000 ($60,000 x 1/3). The district court agreed that awarding the fee on a contingency fee basis was reasonable.

On appeal, the Idaho Supreme Court affirmed the district court's determination that the one-third contingency fee award was reasonable. The Court explained: "the district court clearly understood that this was a matter of discretion, and it reached its decision by an exercise of reason." *Id.* The Court, referring to the district court, further explained: "[i]ts decision was within the outer boundaries of its discretion and consistent with the legal standards applicable to specific choices available to it." *Id.*

Farmers could have avoided paying attorney fees in this case if it had simply paid the amount justly due instead of forcing Cedillo to arbitrate the matter. Under Idaho Code § 41-1839, Farmers had a duty to promptly investigate the claim and determine its liability. Farmers also had an obligation to its insured, pursuant to Idaho Code § 41-1839, to pay the amount justly due Cedillo within 30 days. Pursuant to Idaho law, the "amount justly due" from an insurer is ultimately the amount determined by trial, by arbitration or by settlement, before costs, attorney fees and interest.

Farmers' failure to pay the amount justly due pursuant to the underinsured motorist contract required Cedillo to incur the costs of litigation to force her own insurance company to pay the amount justly due to her.

IX
AS A RESULT OF FARMERS' APPEAL, CEDILLO IS ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.

As this Court has noted ". . . confirmation proceedings are ordinarily summary affairs that require little time, effort, or mental exertion, and for which at most only a small fee could be

charged." *Grease Spot, Inc. v. Harnes*, 148 Idaho 582, 226 P.3d 524 (2010). The Court has also noted that the district court ". . . could award fees where the non-prevailing party (in this case Farmers) unjustifiably acts to prolong the litigation by unsuccessfully contesting the confirmation of the award." *Id.* 148 at 588, 226 at 530.

Such is the case before the Court. Farmers, the non-prevailing party, has unjustifiably acted to prolong this litigation by over-litigating and unsuccessfully contesting the confirmation of the award and the award of attorney fees.

A. Cedillo Is Entitled To An Award Of Attorney Fees Pursuant To Idaho Code § 41-1839(1).

The district court awarded Cedillo attorney fees incurred in the arbitration under Idaho Code § 41-1839 and she reasonably expects to prevail on this appeal challenging that award. Cedillo is therefore entitled to an award of attorney fees on appeal under Idaho Code § 41-1839. *Parsons v. Mutual of Enumclaw Ins. Co.*, 143 Idaho 743, 748, 152 P.3d 614, 619 (2007).

Farmers does not dispute that Cedillo provided the proof of loss required by Idaho Code § 41-1839(1) and that it failed to pay the amount justly due within 30 days. Applying the plain language of the statute, Cedillo is entitled to an award of attorney fees incurred as a result of Farmers appeal.

B. Cedillo Is Entitled To An Award Of Attorney Fees Pursuant To Idaho Code § 7-914.

Idaho Code § 7-914 provides, "Costs of the application [to confirm, modify, or correct an award] and of the proceedings *subsequent thereto*, and disbursements may be awarded by the court." (emphasis added) "Disbursements" includes attorney fees and "[a]ttorney fees on appeal

are awardable in the court's discretion." *Driver v. SI Corp.*, 139 Idaho 423, 429-30, 80 P.3d 1024, 1030-31 (2003). Farmers ill-founded appeal should not be allowed to deprive Cedillo of the full benefits the Arbitration award that was confirmed by the district court. *Id.*

Farmers appeal is a proceeding *subsequent* to Cedillo's motion to confirm the arbitration. Farmers has attempted to challenge the district court's confirmation of the arbitration award despite failing to comply with the time limitations of the Idaho Uniform Arbitration Act. Cedillo, who reasonably expects to prevail in this appeal is therefore entitled to an award of attorney fees incurred in defending against Farmers' appeal as this is a proceeding *subsequent* to the district court's confirmation. *See, Harrison v. Certain Underwriters at Lloyd's, London,* 149 Idaho 201, 233 P.3d 132 (2010); *Deelstra v Hagler*, 145 Idaho 922, 925, 188 P.3d 864, 867 (2008) (Affirming award of attorney fees to prevailing party during confirmation proceedings under Idaho Code § 7-914).

C. Cedillo Is Entitled To An Award Of Attorney Fees Pursuant To Idaho Code § 41-1839(4) For The Reason That Farmers Appeal Is Frivolous, Unreasonable, And Without Foundation.

An award of attorney fees may be granted under Idaho Code § 41-1839(4) and I.A.R. 41 to the prevailing party when the Court is left with the abiding belief that the appeal has been brought frivolously, unreasonably and without foundation. Idaho Code § 41-1839(4). Farmers has done nothing but ask this Court to second guess the Arbitrator's and district court's award. *See, Mortensen v. Stewart Title Co.*, 149 Idaho 437, 235 P.3d 387 (2010). A thorough review of the Record demonstrates that Farmers' contentions are untimely and meritless. Its arguments ignore established law and the fact that both the Arbitrator and the district court have considered

its contentions and on the merits ruled against it four times. This appeal has been brought and pursued frivolously and without foundation entitling Cedillo to an award of attorney fees. *See, Dave's, Inc. v. Linford*, 153 Idaho 744, 291 P.3d 427 (2012).

Farmers has made no reasonable concessions, and has continued to make frivolous arguments. When an appeal presents no meaningful questions of law, but simply invites the Court to second-guess the district court's rulings on conflicting evidence, an award of attorney fees is appropriate. *Lettunich v. Lettunich*, 141 Idaho 425, 436, 111 P.3d 110, 121 (2008). *See also, Berkshire Investments, LLC v. Taylor*, 153 Idaho 73, 278 P.3d 943 (2012). (The Court awarded attorney fees on appeal for the appellant's frivolity below and, on appeal "presented no persuasive argument that the district court, in granting attorney fees, abused its discretion or misapplied the law.") *Id.* 278 P.3d at 957.

It is abundantly clear that Farmers has purposely delayed in order to avoid paying under the UIM policy it sold to Cedillo. Farmers has done nothing more than bring, continually, the same issues before the Arbitrator and the district court. It has continued that frivolous, unreasonable conduct before this Court. Its arguments concerning both the award of prejudgment interest and the district court's award of attorney fees distort and ignore the law and facts of this case. For those reasons, Cedillo should be awarded attorney fees pursuant to Idaho Code § 41-1839(4) and I.R.C.P. 54. *See, O'Boskey v. United First Federal Sav. & Loan Ass'n of Boise*, 112 Idaho 1002, 739 P.2d 301 (1987) (This Court affirmed the award of attorney fees in the district court based upon defendants frivolous, unreasonable and without foundation conduct

and awarded attorney fees on appeal for continued frivolous, unreasonable, and without foundation conduct).

X
CONCLUSION

For the foregoing reasons, Cedillo respectfully requests that the Court affirm the district court's confirmation of the arbitration award, affirm the entry of judgment in her favor in the amount of $126,007.23, plus accrued judgment interest from December 11, 2013, and award her attorney fees and costs incurred as a result of this frivolous appeal.

Respectfully submitted this 27th day of May 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 27th day of May 2014, a true and correct copy of the **RESPONDENT'S BRIEF** was served upon opposing counsel as follows:

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