6-19-2014

# Cedillo v. Farmers Ins. Co. of Idaho Appellant's Reply Brief Dckt. 41683

IN THE SUPREME COURT OF THE STATE OF IDAHO

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| PEGGY CEDILLO, an individual,<br><br>Plaintiff-Respondent,<br><br>vs.<br><br>FARMERS INSURANCE COMPANY OF IDAHO,<br><br>Defendant-Appellant. | Docket No. 41683-2013 |

# APPELLANT'S REPLY BRIEF

Appealed from the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, Honorable Lynn G. Norton, District Judge, Presiding


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes



### Rules

## I. STATEMENT OF THE CASE

### A. Nature of the Case.

Based on Cedillo-Steele's arguments in her Respondent's Brief it appears that the nature and scope of Farmers' appeal requires clarification.

#### 1. Prejudgment Interest Calculation.

First, Farmers is not appealing the district court's (or, for that matter, the Arbitrator's) rulings on when prejudgment interest begins to accrue and/or on what amounts prejudgment interest accrues. As conceded in the Appellant's Brief, the errors in awarding prejudgment interest on medical expenses and damages that had not yet been incurred or wages that had not yet been lost or were not mathematically ascertainable prior to the Arbitrator's award are beyond review. Cedillo-Steele's briefing and arguments relating to those issues are irrelevant.

Second, the only amounts Farmers is appealing is the district court's award of $5,608.30 as the "unpaid balance" of the Interim Award and accruing prejudgment interest of $132.48 on that "unpaid balance." (R., p. 666.) Farmers is not appealing confirmation of the Arbitrator's amended Final Award of prejudgment interest in the amount of $101,947.96 or the Arbitrator's Adjusted Interim Award of damages in the amount of $100,332.95. Farmers paid the full amount of the damage award of $100,332.95 on March 25, 2013, thirty-six (36) days before the Arbitrator's Final Award was issued. (R., pp. 284-287.) Farmers paid the corrected and amended award of prejudgment interest of $101,947.96 in full on September 11, 2013. (R., pp. 175, 655.) In other words, Farmers paid the undisputed damage amount before it was awarded and Farmers paid the undisputed Prejudgment Interest Award after it was corrected and amended. What Farmers appeals from is the district court's characterization of the Amended

Final Award of $101,947.96 as the sum of the $100,332.95 damage award and unpaid prejudgment interest of $1,615.01, which characterization leads to the so-called unpaid balance of damages in the amount of $5,608.30 and the continuing accrual of prejudgment interest. (R., p. 645, n. 3.)[1] Farmers specifically appeals from the district court's characterization of the calculations leading to this alleged unpaid balance of damages as unreviewable legal error instead of reviewable and correctable miscalculations of figures. (R., p. 646.)

Third, Farmers' Motion for Modification and/or Correction of Arbitration Award was based on the Amended Final Award issued on July 24, 2013. The Motion was filed on September 18, 2013, well within the ninety (90) day time limitation for petitions to correct or modify an arbitration award. The Motion was timely.

Finally, Farmers agrees that it has made payments to Cedillo-Steele totaling $382,280.91, including payment of every penny of the Corrected and Amended Final Award ($202,280.91). Farmers has not, however, paid the additional prejudgment interest in the amount of $5,740.78, awarded by the district court. (R., p. 660.) It is this small amount ($5,740.78) that is the subject of this appeal and therefore the appeal is not moot based on the other payments made by Farmers in good faith.

**2. Erroneous Award of Attorney Fees.**

The district court's award of attorney fees was based on Idaho Code § 41-1839 and the contingency fee agreement. If the contingency fee agreement is an unenforceable, illegal

[1] These figures were determined by calculating accrued prejudgment interest of $7,223.31 (the prejudgment interest balance of $1,615.01 plus prejudgment interest accruing from March 15, 2013) on the so-called "unpaid damage award" and applying payment first to that alleged prejudgment interest balance and then to the remaining amount to the "unpaid" damage award leaving a balance of damages awarded in the amount of $5,608.30 plus prejudgment interest accruing on that amount at $1.84 per diem. (R., p. 655.)

contract, the district court abused its discretion in awarding attorney fees. The contingency fee agreement is itself illegal because one of the parties is seeking to benefit from his own wrongdoing. Here, the attorney, Jon Steele, is to be paid attorney fees which are based upon the damages he caused. If the contingency fee agreement is determined to be illegal and unenforceable, then Cedillo-Steele does not owe those attorney fees. If Cedillo-Steele does not owe the attorney fees, then neither would Farmers.

If the contingency fee agreement does not apply to attorney fees incurred in arbitration, then the award of attorney fees incurred in arbitration would be an abuse of discretion. Farmers analyzed the terms of the contingency fee agreement and showed that the fee agreement does not apply to any recovery made in arbitration. Cedillo-Steele has failed to respond in any manner to this argument. Either or both of these arguments support no award of attorney fees.

Idaho Code § 41-1839 entitles an insured to attorney fees only if "the amount justly due under [the insurance] policy is not paid within 30 days after a proof of loss." The amount justly due under the Farmers policy was $100,332.95, the Adjusted Interim Award of damages equating to the amount of UIM benefits determined to be owed to Cedillo-Steele. As Cedillo-Steele herself argues, "[p]ursuant 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." (Respondent's Brief, p. 37.) The "amount justly due" was not determined by the Arbitrator until he issued the Final Award on April 29, 2013. (R., pp. 173-176.) Farmers paid this "amount justly due" thirty-six (36) days before the "amount justly due" was awarded. (R., pp. 284-287.) No attorney fees are owed under Idaho Code § 41-1839.

Even if this Court determines that the "amount justly due" was not paid within thirty (30) days of a Proof of Loss, the most that could be awarded in attorney fees under Idaho Code § 41-1839 and the contingency fee agreement is $33,444.32, which represents one-third (1/3) of the amount justly due of $100,332.95.

At a minimum, prejudgment interest is not an amount due under the insurance contract and therefore is not an amount upon which attorney fees should be awarded pursuant to Idaho Code § 41-1839. Consequently, the district court abused its discretion in awarding attorney fees on the awards of prejudgment interest.

Finally, the district court awarded attorney fees on the same amount, twice. Cedillo-Steele was awarded attorney fees on the entire damage award of $100,332.95. She was again awarded attorney fees on $5,608.30 of that damage award. This double award was an abuse of discretion.

**B. Course of Proceedings.**

Cedillo-Steele's additional Course of Proceedings are, for the most part, irrelevant to the issues on appeal. Farmers further notes that the parties stipulated that payments would not be revealed to the Arbitrator before or during the arbitration but that no such stipulation prevented the parties from disclosing payments after arbitration. (R., p. 21.) In fact, the process agreed to by the parties specifically anticipated advising the Arbitrator of payments once the Arbitrator determined the gross award in order to allow the Arbitrator to determine the Adjusted Interim Award. (R., pp. 160-162.)

Cedillo-Steele's arguments that the Arbitrator denied Farmers' Motion to Correct and/or Modify Arbitration Award are not entirely accurate. (Respondent's Brief, p. 5.) The Arbitrator

granted, in part, Farmers' Motion to Correct and/or Modify the Final Award when he determined that his original prejudgment interest award was not correctly calculated given the prepayment of the damage award. (R., p. 174.)

Cedillo-Steele's argument that Farmers had its first opportunity to challenge the methodology and calculation of prejudgment interest in response to the Arbitrator's Interim Award of $406,700.12 is also inaccurate. (Respondent's Brief, p. 7.) There was no discussion by the Arbitrator in that award of prejudgment interest, let alone what methodology or calculation he would use, because prejudgment interest was an issue yet to be decided.

Cedillo-Steele calculates the expiration of the ninety (90) day time limit for petitioning the district court to modify or correct an arbitration award to have expired on July 29, 2013. (Respondent's Brief, pp. 8-9.) This expiration date is calculated from the date of the Arbitrator's original award issued on April 29, 2013. Farmers' Motion to Modify and/or Correct the Arbitration Award was based on the Amended Final Award issued on July 24, 2013. The ninety (90) day time limitation to modify or correct the Amended Final Award did not expire until October 24, 2013. Farmers' Motion was filed on September 18, 2013, well within the applicable ninety (90) day period.

**C. Statement of Facts.**

Cedillo-Steele claims that there was no determination that "Jon Steele was determined to have been the sole cause of the accident." (Respondent's Brief, p. 11.) The Arbitrator, in fact, made the following finding:

> Steele's actions were the sole cause of the accident because he failed to control the cycle and allowed it to drift to right and into the barrier.

(R., p. 121.) The district court also found "the accident was the result of Mr. Steele's failure to control the motorcycle." (R., p. 644.)

Cedillo-Steele claims that there is no support in the record of Farmers' "evaluation" of damages. (Respondent's Brief, p. 11.) The Arbitrator discusses, on numerous occasions, Farmers' evaluation/valuation of Cedillo-Steele's UIM claim. (R., p. 73 ("In the letter, Farmers explained that the check represented Farmers' valuation of the amount due Claimant under the underinsured motorist coverage of her policy based upon her letter dated July 28, 2009, and the information provided."); *Id.* ("Farmers informed Claimant that she had provided no information about a wage loss claim, so none was included in the valuation."); *Id.* (". . . which is the date that Farmers provided Claimant with its valuation of the amount due under the underinsured motorist coverage of her policy."); R., p. 278, 644 (The district court held "On August 29, 2009, Defendant sent Claimant a check for $25,000.00 as well as a letter stating that the check represented its valuation of her UIM claim.").)

Cedillo-Steele claims there is no support in the record that "on March 25, 2013, Farmers paid the full amount of the Adjusted Interim Award of UIM benefits ($100,332.95)." (Respondent's Brief, p. 12.) It cannot be disputed that the Adjusted Interim Award of damages (UIM benefits) was $100,332.95. (R., p. 163.) In the Arbitrator's Final Award, under the heading "9, the Adjusted Interim Award." the Arbitrator ruled ". . . that after making the adjustments, the Adjusted Interim Award is $100,332.95 plus the award of prejudgment interest." *Id.* It cannot be disputed that on March 25, 2013, Farmers paid $100,332.95. (R., pp. 284-87.) The record is, therefore, undisputed that on March 25, 2013, Farmers paid the full amount of the Adjusted Interim Award of UIM benefits ($100,332.95). The fact that Cedillo-

Steele applied that payment to prejudgment interest rather than the Adjusted Interim Award does not change the fact that Farmers fully paid the UIM damage award.

Cedillo-Steele claims there is no support in the record that "Farmers paid the corrected and Amended Final Award of $101,947.96 on September 11, 2013." (Respondent's Brief, p. 12.) It is undisputed that the Arbitrator determined ". . . on March 25, 2013, the corrected and Amended Final Award is $101,947.96." (R., p. 175.) It is also undisputed, and Mr. Steele has stated in his own affidavit seeking attorney fees, that Farmers paid $101,947.96 to Cedillo-Steele on September 11, 2013. (R., p. 655.) It is therefore undisputed that Farmers paid the corrected and Amended Final Award of $101,947.96 on September 11, 2013. The fact that Cedillo-Steele first applied payment to prejudgment interest that accrued only because of the prior misallocation of the first payment to the prejudgment interest award does not change the undisputed fact that Farmers fully paid the Amended Final Award.

## II. ADDITIONAL ISSUES PRESENTED ON APPEAL

Cedillo-Steele has introduced three additional issues on appeal. The additional issues relating to timeliness and waiver are addressed at pages 9-11; 13-14; and 20-21. The issue regarding entitlement to attorney fees on appeal is addressed at pages 24-25.

## III. ARGUMENT

### A. Grounds for Relief Existed Under Idaho Code § 7-913 – There was an Evident Miscalculation of Prejudgment Interest and/or the Award was Imperfect in a Matter of Form Not Affecting the Merits.

Under the standard of review, the single issue raised by Farmers' appeal from the confirmation of the Arbitrator's award is whether any grounds for relief exist under Idaho Code § 7-913. *See Cranney v. Mutual of Enumclaw Ins. Co.*, 145 Idaho 6, 8, 175 P.3d 168, 170

(2007). Specifically, Farmers asserts that the district court erred when it determined there was no evident miscalculation of figures and that the arbitration award was not imperfect in a matter of form, not affecting the merits of the controversy under Idaho Code §§ 7-913(a)(1) and (3). If either of these grounds exist, then the district court erred in denying the Motion to Modify and/or Correct the Award and confirming the Award and both rulings should be reversed.

Farmers specifically identified the miscalculation of figures leading to an arbitration award imperfect in a matter of form not affecting the merits of the controversy. Farmers expressly and specifically paid the award of damages (Adjusted Interim Award) of $100,332.95 and then, after paying off this principal amount, challenged the award of prejudgment interest. Farmers was partially successful in its challenge to the Arbitrator of the Prejudgment Interest Award when the Arbitrator recognized that the award of prejudgment interest included thirty-six (36) days of accrued interest in the amount of $1,187.50 on the damage award which was earlier paid by Farmers. Despite this success, Farmers ended off in a worse position when the Arbitrator applied the payment of damages to the award of prejudgment interest, leaving an unpaid balance on the Prejudgment Interest Award of $1,615.01 and leaving unpaid the entire balance of the damage award in the amount of $100,332.95 upon which prejudgment interest continued to accrue.

Farmers distinguished this mathematical error by the Arbitrator from the larger legal errors made when the Arbitrator awarded prejudgment interest in the amount of $67,416.30 on medical expenses and lost wages not yet incurred and on general damages not yet suffered or not mathematically calculable until they were awarded by the Arbitrator, which legal errors were wrong as a matter of law but are not reviewable on appeal.

Farmers set forth numerous analogous cases analyzing evident miscalculations of arbitration awards and showed how the misapplication of payment by the Arbitrator in this case was an evident miscalculation of figures leading to an award imperfect in a matter of form not affecting the merits of the controversy.

Cedillo-Steele, in response, never addresses this case law or Farmers' analysis that what the Arbitrator did was an evident miscalculation of figures. Instead, Cedillo-Steele summarily relies upon the prior rulings of the Arbitrator and the ruling of the district court and then spends the majority of her argument addressing legal issues not on appeal (i.e., the so-called "*Brinkman*" rule) and making erroneous procedural arguments based on timeliness and waiver. The narrow issue on appeal is whether what the Arbitrator did was an evident miscalculation of figures. If it was then the district court was required to modify and/or correct the award. *See* Idaho Code § 7-913 ("Upon application made within 90 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where: . . ."). (Emphasis added.) Cedillo-Steel has done nothing to show that the application of payment to prejudgment interest rather than to the damage award was not an evident miscalculation of figures leading to an award imperfect in a matter of form, not affecting the merits of the controversy. Moreover, Cedillo-Steele's procedural arguments are without merit.

**1. Farmers' Motion to Modify and/or Correct the Award was Timely Filed.**

Cedillo-Steele argues on appeal that the ninety (90) day time limit set forth in Idaho Code § 7-913 began to run when the Final Award was issued on April 29, 2013, and expired on July 29, 2013. Cedillo-Steele concludes that Farmers' Motion to Modify and/or Correct the Arbitration Award filed on September 18, 2013, was untimely. First, this is an issue raised, for

the first time, on appeal. Although Cedillo-Steele made a timeliness argument to the district court, it was based on Idaho Code §§ 7-911 and 7-912. (R., p. 497.) Farmers' Motion for Modification and/or Correction of the Arbitration Award was based on Idaho Code § 7-913, not Idaho Code § 7-912. (R., p. 260.) Idaho Code § 7-913 has its own, separate and distinct, ninety (90) day limit from Idaho Code § 7-912. Consequently, Cedillo-Steele failed to make a proper timeliness objection to the district court, making the current timeliness objection based on Idaho Code § 7-913, an issue raised, for the first time, on appeal. This Court does not accept review of issues raised, for the first time, on appeal. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 812, 252 P.3d 71, 93 (2011).

Regardless, Farmers' Motion was timely filed. Farmers moved to modify and/or correct the Amended Final Award. (R., p. 260.) The Amended Final Award was not issued until July 24, 2013. (R., p. 176.) Farmers' Motion for Modification and/or Correction of Arbitration Award was filed on September 18, 2013. (R., p. 260.) The Motion was filed well within ninety (90) days from the award sought to be modified and/or corrected.

Idaho Code § 7-913 speaks in terms of "the award." The statute does not specify that "the award" be the initial award, final award or any other specific award. In context, "the award" to which the statute speaks is the award sought to be modified and/or corrected. Farmers sought to modify and/or correct the Amended Final Award. Indeed, Cedillo-Steele did not seek confirmation of the Final Award issued on April 29, 2013, but instead sought confirmation of the Amended Final Award. (R., p. 92.)[2] Notably, Cedillo-Steele's Motion to Confirm Arbitration

[2] Although Cedillo-Steele points to the Petition for Confirmation of Arbitration Award and Award of Attorney Fees filed on May 13, 2013, that Petition was not served on, nor answered by, Farmers. (R., pp. 6-88.) Cedillo-Steele filed and served her First Amended Petition for

Award specifically sought confirmation of the arbitration award entered on July 24, 2013, which was the Amended Final Award. (R., p. 229.) It is disingenuous for Cedillo-Steele to suggest that the ninety (90) day time limit for seeking modification or correction began when the Final Award was issued on April 29, 2013, when Cedillo-Steele herself did not seek confirmation of that Final Award but instead sought confirmation of the Amended Final Award issued on July 24, 2013. It is disingenuous for Cedillo-Steele to suggest that Farmers' Motion to Modify and/or Correct the Amended Final Award was untimely because it was not filed within ninety (90) days of an award Cedillo-Steele did not even seek to confirm.

Farmers' Motion to Modify and/or Correct the Amended Final Award was timely.[3]

### 2. Res Judicata Does Not Bar Farmers' Motion to the District Court Seeking to Modify and/or Correct the Arbitration Award.

Cedillo-Steele argues that res judicata mandates the Arbitrator's ruling be upheld and refusal to accept the Arbitrator's decision makes the appeal vexatious, frivolous and unreasonable. (Respondent's Brief, p. 23.) Cedillo-Steele's proposed application of res judicata to the Arbitrator's "rulings" would, of course, make Idaho Code § 7-913 superfluous and without effect. The entire purpose of this statute is to allow a party to challenge an arbitration award if any of the grounds for relief therein exist.

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Confirmation of Arbitration Award on August 16, 2013, two weeks after the Amended Final Award and it was the First Amended Petition for Confirmation of Arbitration Award that was answered by Farmers. (R., pp. 89-186; 230-244.)

[3] Cedillo-Steele revisits the Arbitrator's determination that Farmers' Motion for Reconsideration was untimely under Idaho Rules of Civil Procedure, Rule 11. This is not an issue on appeal and is therefore irrelevant. Regardless, the Arbitrator's determination was directed at the larger error made by the Arbitrator in awarding prejudgment interest on damages not yet incurred or accrued or mathematically calculable.

Regardless, res judicata does not apply. Res judicata only applies when there is a subsequent civil action/lawsuit between the same parties upon the same claim or demand as raised in a prior civil action/lawsuit that has reached final judgment. *Wolfe v. Farm Bureau Ins. Co.*, 128 Idaho 398, 402, 913 P.2d 1168, 1172 (1996). There has been no prior lawsuit. An arbitration is not considered a civil action/lawsuit for purposes of Idaho Code § 41-1839, so it cannot be considered one for purposes of res judicata. *See The Grease Spot, Inc. v. Harnes*, 148 Idaho 582, 226 P.3d 524 (2010). Nor was the arbitration upon the same claims or demands. The arbitration addressed the amount owed under the UIM provision of Plaintiff's automobile policy. The current action is one to confirm the arbitration award and request attorney fees and costs, none of which were, or could be, issues presented in the arbitration.

Finally, not until there is a final judgment entered is there a judgment entitled to res judicata as to all other judgment. *Western Industrial v. Kaldvar Associates, Inc.*, 126 Idaho 541, 544, 887 P.2d 1048, 1051 (1994). There has been no final judgment entered, therefore res judicata does not apply.

### 3. Cedillo-Steele's Argument Regarding Prejudgment Interest in the UIM Context is Irrelevant to the Issues on Appeal.

Cedillo-Steele spends several pages arguing that the Arbitrator's award of prejudgment interest on medical expenses and lost wages not yet incurred and on general damages not yet suffered or incapable of mathematical calculation was not in fact erroneous but instead was consistent with the "*Brinkman*" rule. (Respondent's Brief, pp. 17-20.) Cedillo-Steele even chastises Farmers for failing to pay the prejudgment interest amount awarded by the Arbitrator and for its continued over-litigious and contentious behavior.

First, the Arbitrator's error in awarding over $67,0000.00 in prejudgment interest on amounts not yet incurred or capable of mathematical calculation is not an issue on appeal. If it were, the creation and application of Cedillo-Steele's "*Brinkman*" rule would be shown to be in error. *See Cranney v. Mut'l of Enumclaw Ins. Co.*, 145 Idaho 6, 175 P.3d 168 (2007).

Second, Farmers has never taken the position that it does not owe prejudgment interest and in fact paid, in full, the Amended Final Award of prejudgment interest in the amount of $101,947.96. (R., p. 655.)[4]

**4. The Prejudgment Interest Issue is Not Moot.**

Cedillo-Steele argues that Farmers' previous payments to her render the appeal moot. (Respondent's Brief, pp. 26-27.) She even suggests that Farmers erred in making payment directly to her and should have made payment to the Clerk of the Court with instructions to the Clerk to hold the money until it was determined who was entitled to it by order of the court. (*Id.*, p. 27.) This latest argument is consistent with Cedillo-Steele's position from the outset of punishing Farmers for making payments to her. Rather than crediting Farmers for paying the entire damage award before it was awarded, Cedillo-Steele applied that payment to the prejudgment interest so that the damage award could continue to accrue prejudgment interest. Then, instead of crediting Farmers for paying the entire corrected Amended Final Award and declaring that Farmers had satisfied the entire arbitration award, Cedillo-Steele applied payment in a manner that created an unpaid balance of damages upon which prejudgment interest would

[4] It should be noted that there was an Amended Final Award because even the Arbitrator recognized that the original Prejudgment Interest Award was in error and reduced that award in favor of Farmers. Unfortunately, in reducing the amount of the Prejudgment Interest Award the Arbitrator erroneously miscalculated the balance owed by Farmers, creating an amount upon which prejudgment interest is still accruing.

continue to accrue. Now, Cedillo-Steele argues that Farmers should not have made any payment to her and that in doing so it waived its right to an appeal.

The appeal is from the Arbitrator's evident miscalculation and the district court's confirmation of an arbitration award that failed to properly apply the payments made by Farmers to Cedillo-Steele. Ironically, the only way Cedillo-Steele's waiver argument has merit is if the Arbitrator had properly applied those payments. It is because the payments were not properly applied that there is an alleged unpaid amount in dispute which, by definition, has not been paid and therefore Farmers has not waived its appeal as to that amount. Cedillo-Steele cannot have it both ways. If she wants to argue that prior payments act as a waiver or make the appeal moot, she must agree that the so-called third payment should have been applied to the damage award and the so-called fourth payment applied to the Prejudgment Interest Award for a total satisfaction of the Amended Final Award. Absent that concession, the appeal is not moot.

### 5. The Challenge to the Allocation of Payments to Accrued Interest is Neither Frivolous, Unreasonable nor Without Foundation.

Cedillo-Steele argues that partial payment of a debt, absent an agreement to the contrary, is properly applied to accrued interest rather than the principal of the debt, relying primarily on a U.S. Supreme Court case from 1839, and Farmers' position to the contrary is frivolous. (Respondent's Brief, pp. 20-21.) First, this is another issue raised, for the first time, on appeal. At no time did Cedillo-Steele raise this issue before the district court and this Court should refuse to review this issue.

Second, if this issue is reviewed, Cedillo-Steele's position is without merit. The so-called United States rule applies only in the absence of an agreement to the contrary. Here, Farmers'

payment was expressly for the damage award and was not payment of prejudgment interest, which Farmers was disputing. (R., pp. 284-288.)

Third, the so-called United States rule applies only to voluntary payment of a debt. When Farmers made its payment there was no debt, there was not even a Final Award. This rule does not apply.

Fourth, there was no "partial payment." On March 25, 2013, Farmers tendered to Cedillo-Steele the amount of $100,332.95. (R., pp. 284-287.) This payment was in the exact amount of the damage award. This payment was made before the initial erroneous award of prejudgment interest of $103,135.46. (R., p. 170.) Farmers' tender of this amount was made in two checks: one in the amount of $44,638.01 made out to Peggy Cedillo and Regence BlueShield; the other in the amount of $55,694.94 made out to Peggy Cedillo and Runft & Steele Law Offices. (R., pp. 286-288.) The first check was cashed on April 19, 2013, ten days before the Prejudgment Interest Award. *Id.*[5] The second check was cashed on March 28, 2013, an entire month before the Prejudgment Interest Award. *Id.* When Farmers made payment there was no prejudgment interest award to which the payment could be applied, yet that is what the Arbitrator did. Farmers intended to and did pay off the damage award, not prejudgment interest. Prejudgment interest was not awarded until thirty-six (36) days after payment of the damage award and therefore the only allocation that could be made was to damages.

Finally, the so-called United States rule, even when it does not apply, is not of universal application. In *Ferrellgas, Inc. v. American Premier Underwriters, Inc.*, 79 F.Supp.2d 1160 (C.

[5] The reason this check included Regence BlueShield was because Regence BlueShield had a subrogation interest in Cedillo-Steele's recovery. This subrogation interest was based on medical expenses it had paid and for which Cedillo-Steele was awarded damages. This is further evidence that Farmers' payment on March 25, 2013, was of damages, no prejudgment interest.

D. California 1999). The Court found that an insurer's payments on indemnity liability to the insured would be applied to principal first, not to accrued prejudgment interest. As that Court reasoned:

> Moreover, if the partial payments were applied first to interest, and only then to principal, as advocated by plaintiffs, the effect would be to overcompensate plaintiffs by giving the use and benefit of interest payments before the expiration of the prejudgment period.

*Ferrellgas*, 79 F.Supp.2d at 1168.

**6. Summary.**

Farmers has timely and properly brought to this Court error by the district court when it denied Farmers' Motion to Modify and/or Correct the Arbitration Award and confirmed the arbitration award based on an evident miscalculation of figures and/or an award imperfect in a matter of form, not affecting the merits of the controversy when it miscalculated prejudgment interest by applying payment to the prejudgment interest rather than the damage award. The district court should be reversed with instructions on remand to confirm the Amended Final Award in the amount of $101,947.96 with a further finding that the award has been paid in full with no further principal or interest amount owed.

**B. The District Court Erred in Awarding Attorney Fees.**

The district court abused its discretion awarding any attorney fees incurred in arbitration, either because the award was based on an illegal contract or the contract did not provide for attorney fees on recovery in arbitration. Alternatively, the district court abused its discretion in awarding the amount of attorney fees awarded by not awarding fees on the "amount justly due" or by awarding fees on the award of prejudgment interest or awarding fees on the same recovery, twice.

1. **It was an Abuse of Discretion to Award Attorney Fees Based on an Unenforceable, Illegal Contract.**

Cedillo-Steele argues that Farmers failed to preserve its alleged errors relating to the illegality doctrine because Farmers did not object to attorney Steele's representation of Cedillo-Steele during the arbitration. (Respondent's Brief, pp. 28-30.) Cedillo-Steele misses the point. Farmers is claiming that the contingency fee agreement seeking to be paid for representing Cedillo-Steele at arbitration is illegal and unenforceable.

Farmers did not waive any right to challenge a request for attorney fees by not raising the issue in arbitration. Farmers was barred from raising any such issues at arbitration. The parties stipulated that there would be no "reference whatsoever to attorney fees which might be received by Cedillo-Steele's attorneys." (Supplemental Record, Reply Memorandum in Support of Motion to Disallow Costs and Attorney Fees, Stipulation, p. 3, Ex. 1 thereto.) In addition, Cedillo-Steele stipulated that "[a]ny award of attorney fees and costs" is not within the arbitrator's jurisdiction. (*Id.*, p. 2.) The Arbitrator clearly rejected any authority to award attorney fees. (R., p. 120.) There was never a failure to preserve error based on the illegality doctrine during the arbitration for the simple reason that attorney fees were never at issue in the arbitration, were specifically reserved for the post-arbitration district court proceedings and were properly and timely raised when the issue of attorney fees were first raised in those proceedings.

Cedillo-Steele further argues that Farmers has no standing to allege that the contingency fee agreement is illegal because it is neither a party to that contract nor an aggrieved party. (Respondent's Brief, p. 33.) This is an issue raised, for the first time, on appeal and therefore should not be reviewed. Regardless, Farmers is an aggrieved party even under Cedillo-Steele's definition. Farmers is a party to this litigation and is aggrieved by the district court's award of

attorney fees. *See* Idaho Appellate Rule, Rule 4. The aggrieved party requirement of standing refers to a party to the litigation, not a party to a contract.

Cedillo-Steele again misses the point when she argues that Farmers is not a party to the contingency fee agreement, has no rights under it and therefore no standing to bring the illegality doctrine. Farmers is not seeking to enforce the contingency fee agreement but rather is seeking to have it voided. If the contract is found to be illegal and unenforceable, it is Cedillo-Steele and attorney Settle who cannot enforce the contract or otherwise maintain a cause of action based on the illegal contract. Farmers has standing to raise the illegality doctrine and, in fact, this Court must raise it sua sponte if Farmers did not.

The contingency fee agreement is itself illegal because one of the parties seeks to be paid attorney fees that were incurred because of attorney Steele's wrongful conduct in injuring his client and victim and which are specifically calculated based on the very damages he caused. Because the contingency fee agreement is illegal, the district court was required to leave the parties where it found them. Here, Cedillo-Steele has not yet paid the attorney fees under the contingency fee agreement and therefore would not be required to do so. If Cedillo-Steele does not owe attorney fees under the contingency fee agreement then neither would Farmers. *See Employers Mut'l Casualty Co. v. Donnelly*, 151 Idaho 499, 300 P.3d 31 (2013). If Cedillo-Steele was not required to pay the attorney fees then the salutary purpose of 41-1839 has been met because she would not be in need of being made whole by Farmers paying those attorney fees. It was an abuse of discretion to award attorney fees under this illegal contract.

2. **The District Court Erred in Awarding Attorney Fees Under the Contingency Fee Agreement Which Does Not Apply to Recoveries Made in Arbitration.**

Cedillo-Steele failed to address this issue in her Respondent's Brief. Farmers has set forth the general rule that written fee agreements are contracts that must be construed against the drafter. The contingency fee agreement only allows for legal fees if Cedillo-Steele recovers money damages by settlement or by a decision of the district court. Here, the recovery came as a result of arbitration for which no legal fees are owed under that agreement. The district court therefore erred in awarding attorney fees under the contingency fee agreement.

3. **If Attorney Fees are Owed, the District Court Erred in Awarding $121,007.23; the Most that Can Be Awarded is $33,444.43.**

Cedillo-Steele argues that Farmers failed to preserve its alleged errors regarding the amount of the attorney fees awarded because: (1) these alleged errors were not made in the district court and were raised for the first time on appeal; and (2) Farmers' Motion to Disallow Attorney Fees was untimely. (Respondent's Brief, pp. 30-32.)

On appeal, Farmers raised the following issues regarding the amount of attorney fees awarded: (1) no attorney fees are owed under Idaho Code § 41-1839 on payments made within thirty (30) days of a sufficient Proof of Loss; (2) no attorney fees are owed under Idaho Code § 41-1839 based on recovery of prejudgment interest; (3) no attorney fees are owed under Idaho Code § 41-1839 on prejudgment interest accrued and/or accruing on outstanding unpaid balances created by the Arbitrator's mathematical errors (otherwise, there is a double recovery); and (4) attorney fees are only owed, if at all, on the amount justly due of $100,332.95. Each of these issues was raised before the district court and are not issues raised for the first time on appeal. As to issue number 1, *see* Supplemental Record, Reply Memorandum in Support of Motion to

Disallow Costs and Attorney Fees, pp. 6-7. As to issue number 2, *see* Supplemental Record, Memorandum in Support of Motion to Disallow Costs and Attorney Fees, p. 9. As to issue number 3, *see* Supplemental Record, *id.* As to issue number 4, Farmers generally challenged the amount of attorney fees sought as unreasonable. (R., p. 376.) Farmers further specifically challenged the award of attorney fees based on amounts to which Idaho Code § 41-1839 did not apply. (Supplemental Record, Memorandum in Support of Motion to Disallow Costs and Attorney Fees, pp. 8-9; Reply Memorandum, p. 7.) These are not issues raised for the first time on appeal.

Farmers' Motion to Disallow Costs and Attorney Fees was not untimely and therefore Farmers did not waive its objections. First, this is an issue raised for the time on appeal. Cedillo-Steele did not argue at the district court level that the motion to disallow attorney fees was untimely.

Regardless, Farmers' motion was not untimely. In fact, Cedillo-Steele's Memorandum of Costs was premature. Cedillo-Steele claims that Farmers was required to file its Motion to Disallow Attorney Fees within fourteen (14) days of service of the Memorandum of Costs pursuant to Idaho Rule of Civil Procedure, Rule 54(d)(6). However, Rule 54(d)(5) of the Idaho Rules of Civil Procedure requires a jury verdict or decision of a court before a party can file and serve a Memorandum of Costs. I.R.C.P., Rule 54(d)(5).

Cedillo-Steele filed an Amended Verified Memorandum of Costs, Attorney Fees and Prejudgment Interest on August 18, 2013. (R., p. 187.) As of that date there was no jury verdict or decision of the court and therefore the Memorandum of Costs was prematurely filed. The Amended Verified Memorandum of Costs, Attorney Fees and Prejudgment Interest was not

served until August 20, 2013. (R., p. 2.) Farmers' Answer to Plaintiffs First Amended Petition for Confirmation of Arbitration Award was not due until September 9, 2013, some six days after Cedillo-Steele claims the fourteen (14) day limit to respond to the Memorandum of Costs had expired. By Cedillo-Steele's reasoning. Farmers was required to respond to a Memorandum of Costs and Fees before the Petition for Confirmation of Arbitration Award was at issue. Farmers timely filed its Answer to the First Amended Petition for Confirmation of Arbitration Award, Award of Attorney Fees, Unenforceability of Offset Clause and Bad Faith and Demand for Jury Trial. (R., p. 230.) Farmers' Motion to Disallow Costs and Attorney Fees was filed shortly thereafter on September 18, 2013. (R., p. 375.) There still was no jury verdict or decision of the court and Farmers objected to the Memorandum of Costs as premature. (Supplemental Record, Memorandum in Support of Motion to Disallow Costs and Attorney Fees, p. 2.) Farmers' Motion to Disallow was not untimely. The fourteen (14) day limitation of Rule 54(b)(6) did not apply and, in fact, Cedillo-Steele's Memorandum of Costs was premature.

Cedillo-Steele argues that the district court's award of attorney fees pursuant to Idaho Code § 41-1839 was proper because there was a Proof of Loss on July 28, 2009; the arbitration award established an "amount justly due" of $382,280.91; and Farmers failed to pay the amount justly due within thirty (30) days. (Respondent's Brief, pp. 34-37.)

There was no Proof of Loss as to all damages suffered by Cedillo-Steele on July 28, 2009. A Proof of Loss is deemed to be sufficient when it provides the insurer a reasonable opportunity to investigate and determine its liability and provides the basis for calculating the amount of the claimed loss. *Holland v. Metropolitan Property & Casualty Co.*, 158 Idaho 94, 279 P.3d 80 (2012). When Farmers paid the original $25,000.00 payment, the "Proof of Loss"

was for medical bills in the approximate amount of $53,000.00 relating to a single surgery upon which Plaintiff demanded payment of UIM limits of $500,000.00. (R., p. 165.) Plaintiff made no claim for lost wages, past or future. (R., p. 166.) She makes no specific claim for future medical expenses. (R., pp. 165-166.) Based on this information, Farmers evaluated her UIM claim to be $130,000.00 and tendered $25,000.00 in UIM benefits based on offset language in the insurance policy for amounts paid by or on behalf of the tortfeasor (Mr. Steele), here $105,000.00. *Id.*

On that date, there was a sufficient Proof of Loss for the UIM claim as it then existed. But there was no Proof of Loss sufficient to trigger Idaho Code § 41-1839 with respect to medical bills after July 25, 2009, for two more surgeries, lost wages, past and future, or future general damages. This original Proof of Loss was not sufficient because: (1) the two surgeries did not occur until three and a half and four years after the motorcycle accident; (2) no medical bills incurred after the original Proof of Loss were provided by Plaintiff until September 18, 2012; and (3) Plaintiff had not yet suffered pain and suffering or other general damages as a result of these new surgeries. When Farmers received the new information and medical bills relating to the two new surgeries, it paid an additional amount of $155,000.00 within thirty (30) days of receipt. This brought the total evaluation of her UIM claim to $285,000.00. At arbitration, Plaintiff put on her proof as to lost wages, past and future, and general damages. Before the damage award was entered, Farmers paid the remaining UIM benefits.

For purposes of Idaho Code § 41-1839, Farmers paid "the amount justly due" within thirty (30) days of recovery sufficient information for it to calculate the amount of additional damages. Farmers paid the amount justly due ($25,000.00) within thirty (30) days of the original July 25, 2009 Proof of Loss as to those expenses and damages incurred or suffered to that date.

Farmers paid within thirty (30) days of receipt of medical bills and information regarding the two new surgeries which was the amount justly due as of that date. Finally, Farmers paid the remaining damages before they were awarded, clearly well within thirty (30) days. Plaintiff is not entitled to any attorney fees under Idaho Code § 41-1839.

The "amount justly due" is not $382,280.91 as claimed by Respondent in her brief (Respondent's Brief, p. 35.) At a minimum, this figure continues to contain the $25,000.00 paid by Farmers before attorney Steele was hired, for which the district court already denied attorney fees. The amount justly due under the terms of the UIM coverage is the Adjusted Interim Award of $100,332.95. This is the amount of UIM benefits that was ultimately determined to be owed after the Arbitrator accounted for offsets, payments, contractual adjustments and apportionment. Attorney fees are owed under Idaho Code § 41-1839 only on the amount justly due under the insurance policy. Cedillo-Steele should not be allowed to collect attorney fees on amounts already paid by Farmers or on awards of prejudgment interest.[6] One-third (1/3) of the Adjusted

[6] Prejudgment interest is not a benefit owed under the insurance policy. Rather, it is owed pursuant to Idaho Code § 28-22-104 which applies when there is no contract provision regarding interest. As this Court has previously held:

> Stated differently, the amount "justly due" within the meaning of § 41-1839 is the amount determined to be properly owing by the insurer to the insured, excluding the sum that might additionally be awarded as attorney fees under that provision.

*Wolfe v. Farm Bureau Ins. Co.*, 128 Idaho 398, 406, 913 P.2d 1168, 1176 (1996). The same analysis should apply to prejudgment interest – it is not an amount justly due under Idaho Code § 41-1839.

Interim Award of $100,332.95 is $33,444.32.[7] This is the most that can be owed in attorney fees under Idaho Code § 41-1839 and the contingency fee agreement (assuming it is not illegal).[8]

In fact, however, this amount was paid thirty-six (36) days before it was awarded and therefore there was no amount justly due that was not paid within thirty (30) days. Under this analysis, no attorney fees would be owed.

**C. Cedillo-Steel is Not Entitled to an Award of Attorney Fees on Appeal.**

Cedillo-Steele seeks attorney fees on appeal under Idaho Code §§ 41-1839(1) and (4) and under Idaho Code § 7-914. (Respondent's Brief, pp. 37-41.) Fees on appeal are only awarded if a party prevails on appeal. *Villa Highlands, LLC v. Western Community Ins. Co.*, 148 Idaho 598, 226 P.3d 540 (2010). If Cedillo-Steele does not prevail she is not entitled to any attorney fees under any statutory provision.

Idaho Code § 41-1839 and Idaho Code § 12-123 are the exclusive remedies for obtaining attorney fees in insurance disputes. *Mortensen v. Stewart Title Guaranty Co.*, 149 Idaho 437, 235 P.3d 387 (2010). Cedillo-Steele is not, therefore, entitled to attorney fees on appeal pursuant to Idaho Code § 7-914. Regardless, an appeal is not a proceeding subsequent to Cedillo-Steele's motion to confirm the arbitration as contemplated by Idaho Code § 7-914, which does not apply on its face.

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[7] In fact, however, this amount was paid thirty-six (36) days before it was awarded and therefor there was no amount justly due that was not paid within thirty (30) days. Under this analysis, no attorney fees would be owed.

[8] It should be noted that Cedillo-Steele makes no argument in response to Farmers' argument that no attorney fees can be awarded under Idaho Code § 41-1839 on an award of prejudgment interest. *See Bouton Construction Co v. H.F. Magnuson Co.*, 133 Idaho 756, 767-68, 992 P.2d 751, 762-63 (1999). (District court erroneously awarded attorney fees on prejudgment interest and on attorney fees.)

If it is determined that the district court erred in not correcting and/or modifying the arbitration award before confirming it, or that the district court erred in awarding attorney fees at all or in the amount awarded, Cedillo-Steele is not entitled to attorney fees under Idaho Code §§ 41-1839(1) or (4). Even if Farmers does not prevail on any issues, the appeal was not brought frivolously, unreasonably or without foundation. Farmers did not ask this Court to second guess the district court on conflicting evidence. Farmers' appeal was brought based on questions of law, statutory interpretation and issues of first impression. Farmers did not appeal from the legal errors made by the Arbitrator in calculating prejudgment interest in recognition that, even if erroneous, the errors are beyond this Court's review. Nor did Farmers purposely delay in order to avoid paying under the UIM policy as argued by Cedillo-Steele. In fact. Farmers acted in ultimate good faith in making an initial UIM payment within thirty (30) days of the original Proof of Loss; making an additional payment of $155,000.00 within thirty (30) days of receiving medical information and medical bills relating to surgeries occurring three and a half and four years after the accident; paying the entire damage award thirty-six (36) days before it was awarded in the amount of $100,332.95; and paying in full the corrected and Amended Final Award of prejudgment interest in the amount of $101,947.96. The only amount not paid and disputed by Farmers is an alleged outstanding balance of the damage award of $5,608.30 and prejudgment interest accruing on that amount. Finally, in order to be entitled to attorney fees under Idaho Code § 41-1839(4), Cedillo-Steele must show that the appeal, in its entirety, was frivolous, unreasonable and without foundation. This she cannot do.

## IV. CONCLUSION

Farmers respectfully requests that this Court reverse the district court's denial of the Motion to Modify and/or Correct Arbitration Award and the Order Confirming the Arbitration Award with instructions on remand to confirm the Amended Final Award and to reflect that it has been paid, in its entirety. Farmers further respectfully requests this Court reverse the award of attorney fees or, alternatively, reduce the award to $33,444.32. Finally, Farmers requests this Court deny Cedillo-Steele's request for attorney fees on appeal.

DATED this 19 day of June, 2014.

ELAM & BURKE, P.A.

By: _____
Jeffrey A. Thomson, Of the firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19 day of June, 2014, I caused a true and correct copy of the foregoing document to be served as follows:

| | |
|---|---|
| Jon M. Steele<br>Runft & Steele Law Offices, PLLC<br>1020 W. Main Street, Suite 400<br>Boise, ID 83702 | ____ U.S. Mail<br>__✓__ Hand Delivery<br>____ Federal Express<br>____ Via Facsimile – 343-3246 |
| Peter J. Johnson<br>Johnson Law Group<br>103 E. Indiana Ave., Suite A<br>Spokane, WA 99207 | __✓__ U.S. Mail<br>____ Hand Delivery<br>____ Federal Express<br>____ Via Facsimile – (509) 326-7503 |

_____
Jeffrey A. Thomson