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

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IN THE SUPREME COURT OF THE STATE OF IDAHO

PEGGY CEDILLO, an individual,

Plaintiff-Respondent,

vs.

FARMERS INSURANCE COMPANY OF
IDAHO,

Defendant-Appellant.

Docket No. 41683-2013

APPELLANT'S 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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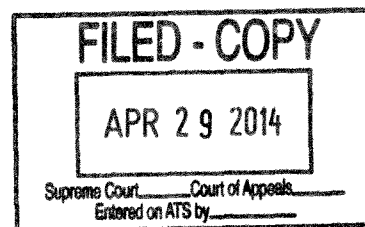


TABLE OF CONTENTS

I. STATEMENT OF THE CASE	1
A. Nature of the Case.....	1
B. Course of Proceedings.	1
C. Statement of Facts.....	4
II. ISSUES PRESENTED ON APPEAL	9
III. ARGUMENT	9
A. The District Court Erred in Denying the Motion to Modify and/or Correct Arbitration Award – There was an Evident Miscalculation of Prejudgment Interest.	9
B. The District Court Erred in Granting Attorney Fees Incurred in Arbitration to Cedillo-Steele.....	18
1. The Request for Attorney Fees is Based on an Unenforceable, Illegal Contract.....	18
2. The Attorney Fee Agreement Does Not Apply to Fees Incurred in Arbitration.....	21
3. If Attorney Fees are Owed the District Court Erred in Awarding the Amount of \$121,007.23; the Most that Can be Awarded is \$33,444.43.....	22
a. No Attorney Fees are Owed Under Idaho Code § 41-1839 on Those UIM Benefit Payments Made Within 30 Days of a Sufficient Proof of Loss.	24
b. No Attorney Fees Are Owed Under Idaho Code § 41-1839 for Recovery of Prejudgment Interest.....	25
c. 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.	26
d. If Attorney Fees are Owed at All, at Most They are Owed Only on the Adjusted Interim Award of UIM Benefits of \$100,332.95.....	28
IV. CONCLUSION	28
CERTIFICATE OF SERVICE	29

TABLE OF AUTHORITIES

Cases

<i>American Foreign Ins. Co. v. Reichert</i> , 140 Idaho 394, 398, 94 P.3d 699, 700 (2004)	9
<i>Anderson v. Miller</i> , 559 N.W.2d 29, 34 (1997)	19
<i>Barry v. Pacific West Construction, Inc.</i> , 140 Idaho 827, 832, 103 P.3d 440, 445 (2004)	19
<i>City of Meridian v. Petra, Inc.</i> , 154 Idaho 425, 299 P.3d 232 (2013)	21
<i>Cranney v. Mut'l of Enumclaw Ins. Co.</i> , 145 Idaho 6, 8, 175 P.3d 168, 170 (2007) ...	9, 14, 15, 26
<i>Ehrich v. A.G. Edwards & Sons, Inc.</i> , 675 F.Supp. 559 (D. S. D., 1987)	17
<i>Employers Mut. Cas. Co. v. Donnelly</i> , 151 Idaho 499, 300 P.3d 31 (2013)	21
<i>Ferrell v. United Financial Casualty Co.</i> , 155 Idaho 85, 305 P.3d 529 (2013)	18
<i>Holland v. Metropolitan Property & Casualty Co.</i> , 158 Idaho 94, 279 P.3d 80 (2012)	24
<i>Reichert</i> , 140 Idaho at 401, 94 P.3d at 706)	14
<i>Martin v. State Farm Mut. Ins. Co.</i> , 138 Idaho 244, 247, 61 P.3d 601, 604 (2002)	20
<i>Pacific Alaska Sea Foods, Inc. v. Vic Hoskins Trucking Inc.</i> , 139 Idaho 472, 474, 80 P.3d 1073, 1075 (2003)	9
<i>Porter v. Canyon County Farmers Mutual Fire Ins.</i> , 45 Idaho 22, 24, 263 P. 632, 634 (1928) ..	20
<i>Quiring v. Quiring</i> , 130 Idaho 560, 568, 944 P.2d 695, 703 (1997)	19
<i>Saxis Steamship Co. v. Multifacs International Traders, Inc.</i> , 375 F.2d 577, 581 n. 4 (2nd Cir. 1967)	17
<i>Schilling v. Allstate Ins. Co.</i> , 132 Idaho 927, 930, 980 P.2d 1014, 1017 (1999)	14
<i>TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Securities, Inc.</i> , 953 A.2d 726 (2008)	15, 16
<i>Transnitro, Inc. v. M/V Wave</i> , 943 F.2d 471 (4th Cir. 1991)	17
<i>Trees v. Kersey</i> , 138 Idaho 3, 56 P.3d 765 (2002)	19
<i>Vaught v. Dairyland Ins. Co.</i> , 131 Idaho 357, 360, 956 P.2d 674, 677 (1998)	18
<i>Wheaton v. Ramsey</i> , 92 Idaho 33, 436 P.2d 248 (1968)	19
<i>Zollinger v. Carrol</i> , 137 Idaho 397, 401, 49 P.3d 402, 406 (2002)	19

Statutes

Idaho Code § 28-22-104	26
Idaho Code § 41-1839	18, 20, 22, 24, 25, 26, 28
Idaho Code § 41-1839(1)	24, 25, 26
Idaho Code § 7-912	9, 13
Idaho Code § 7-913	7, 13, 14
Idaho Code § 7-913(a)(1)	9, 13, 14, 17
Idaho Code § 7-913(a)(3)	9, 13
Idaho Code § 7-913(1)	14
Idaho Code § 7-913(3)	14
Idaho Code § 7-913(a)(1)	14
Idaho Code § 7-913(a)(3)	13

Other Authorities

17 Am.Jur. 2nd Contracts, § 299	19
1A CJS Action, § 68	18, 20

I. STATEMENT OF THE CASE

A. Nature of the Case.

Farmers Insurance Company of Idaho (“Farmers”) appeals from the district court’s denial of the Motion for Modification and/or Correction of Arbitration Award and the district court’s award of attorney fees to Peggy Cedillo-Steele (“Cedillo-Steele”). (R., pp. 643-653.) The grounds for the appeal are there was an evident miscalculation of figures in the Arbitration Award regarding prejudgment interest and Cedillo-Steele was not entitled to attorney fees incurred in arbitration.

B. Course of Proceedings.

Arbitration of Cedillo-Steele’s underinsured motor vehicle (“UIM”) claim was commenced on November 20, 2012, before an arbitrator. (R., p. 119.) The evidentiary portion of the arbitration was completed on November 21, 2012. *Id.* The parties subsequently submitted simultaneous written closing arguments and simultaneous written responses. (*Id.* at pp. 119-120.)

The Arbitrator submitted his Decision and Interim Award on January 16, 2013. (R., pp. 119-156.) The total Interim Award was in the amount of \$406,700.12. (*Id.* at p. 155.) On April 29, 2013, the Arbitrator issued his Final Award. (R., pp. 158-171.) The Arbitrator determined that additional UIM benefits were owed in the amount of \$100,332.95 (“Adjusted Interim Award”). The Adjusted Interim Award took into account various payments made to Cedillo-Steele prior to the arbitration by the insurance company for the tortfeasor and underinsured motorist (her attorney, Jon Steele), prior payments of UIM benefits by Farmers under the UIM coverage, setoffs for contractual adjustments, apportionment of medical expenses to Cedillo-Steele’s pre-accident condition and other adjustments. (R., p. 163.) In addition, the Arbitrator

awarded prejudgment interest in the amount of \$103,135.46 (“Prejudgment Interest Award”).

(*Id.*) The total Final Award was in the amount of \$203,468.41. (*Id.*)

On July 24, 2013, the Arbitrator issued his Amended Final Award and, based on an evident miscalculation of figures, reduced the amount of accrued, unpaid interest and issued an Amended Final Award in the amount of \$101,947.96, which amount reflected payment made by Farmers of the Adjusted Interim Award of UIM benefits of \$100,332.95 and a recalculation of the Prejudgment Interest Award. (R., pp. 173-176.)

Cedillo-Steele filed, in district court, a Petition for Confirmation of Arbitration Award and Award of Attorney Fees on May 13, 2013. (R., pp. 6-88.) On August 16, 2013, she filed a First Amended Petition for Confirmation of Arbitration Award, Award of Attorney Fees, Unenforceability of Offset Clause and Bad Faith. (R., pp. 89-186.) On that same date, Cedillo-Steele filed a Motion to Confirm Arbitration Award and for Award of Costs, Attorney Fees, and Prejudgment Interest and an Amended Verified Memorandum of Costs, Attorney Fees and Prejudgment Interest on that date. (R., pp. 229; 187-228.)

On September 9, 2013, Farmers filed Defendant’s Answer to Plaintiff’s 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., pp. 230-244.) On September 11, 2013, Cedillo-Steele filed the Affidavit of Jon M. Steele in Support of Plaintiff’s Motion to Confirm Arbitration Award, Costs, Attorney Fees, and Prejudgment Interest. (R., pp. 245-259.)

On September 18, 2013, Farmers filed Defendant’s Motion for Modification and/or Correction of Arbitration Award and a supporting Affidavit. (R., pp. 260-262; 263-374.) On that same date, Farmers filed Defendant’s Motion to Disallow Costs and Attorney Fees and

Affidavit of Jeffrey A. Thomson in Support of Defendant's Motion to Disallow Costs and Attorney Fees. (R., pp. 375-377; 378-463.)

On September 25, 2013, Cedillo-Steele filed her Response in Opposition to Defendant's Motion for Modification and/or Correction of Arbitration Award and supporting Affidavit. (R., pp. 491-500; 501-595.) She also filed a Reply Memorandum in Support of Plaintiff's Amended Verified Memorandum of Costs, Attorney Fees and Prejudgment Interest and Jon Steele's Affidavit in Opposition to the Motion to Disallow Costs. (R., pp. 625-639; 596-624.)

On November 14, 2013, the district court issued its Memorandum Decision and Order on Motions on Arbitration Award. (R., pp. 643-653.) The Decision and Order denied Farmers' Motion for Modification and/or Correction of Arbitration Award, confirmed the Amended Final Award, denied Cedillo-Steele's request for costs incurred in arbitration and awarded Cedillo-Steele's attorney fees incurred in arbitration in the amount of \$121,007.23. (R., pp. 643-654; 660-662.)

On December 11, 2013, a document entitled "Judgment" was filed by the district court. (R., pp. 660-662.) The Judgment was served on counsel of record the next day, on December 12, 2013. (R., p. 662.)

On December 11, 2013, Farmers filed Defendant's Notice of Appeal. (R., pp. 663-666.) The Notice of Appeal was not from the "Judgment" filed by the district court, but was an appeal from the Memorandum Decision and Order on Motions on Arbitration Award, as an Order confirming the arbitration award. *Id.* The Notice of Appeal was timely filed.

On December 19, 2013, the Idaho Supreme Court issued an Order Re: Final Judgment remanding the matter to the district court and suspending the appeal to allow for entry of a final judgment. On December 30, 2013, this Court issued its Order to Withdraw Order Re: Final

Judgment, resuming the appeal pursuant to Idaho Appellate Rule 11(a)(8) allowing for an appeal from the Order Confirming Arbitration under the Uniform Arbitration Act.

C. Statement of Facts.

On May 25, 2008, Cedillo-Steele was a passenger on a motorcycle being operated by Jon Steele. (R., p. 121.) Jon Steele sideswiped a concrete barrier, and although the motorcycle did not fall over, Cedillo-Steele was injured. *Id.* Jon Steele was determined to have been the sole cause of the accident. *Id.* Jon Steele was the tortfeasor.

Jon Steele was insured by Progressive but had only \$100,000.00 in bodily injury liability coverage and \$5,000.00 in medical payment coverage benefits. (R., p. 160.) Jon Steele was the underinsured driver.

Although not married at the time of the accident, Cedillo-Steele and Jon Steele were married on December 8, 2008. (R., p. 121.) Jon Steele became Cedillo-Steele's husband.

Jon Steele represented Cedillo-Steele in the arbitration, filed the Petition seeking confirmation of the arbitration award, and sought his attorney fees in the district court. (R., pp. 121, 119, 6 and 245.) Jon Steele was Cedillo-Steele's attorney.

Jon Steele's insurance company, Progressive, paid Cedillo-Steele the bodily injury liability limits of \$100,000.00 plus medical payment coverage benefits of \$5,000.00. (R., p. 160.)

At the time of the accident, Cedillo-Steele was an insured with Farmers. (R., p. 120.) The policy provided UIM coverage. (*Id.*)

On July 28, 2009, Cedillo-Steele advised Farmers that she had settled her claim against the tortfeasor and underinsured driver, Jon Steele, for policy limits of \$100,000.00 and demanded payment of her UIM policy limits and medical payment coverage. (R., p. 165.) At

that time her medical expenses totaled \$53,048.62. *Id.* She did not, however, make any claim for past or future lost income. (*Id.*) Within 30 days, on August 25, 2009, Farmers sent Cedillo-Steele a check for \$25,000.00, representing payment of UIM benefits. (R., p. 166.) This payment represented Farmers' evaluation of damages in the total amount of \$130,000.00 (\$105,000.00 already received from Jon Steele's insurance company, plus \$25,000.00 in UIM benefits).¹

Following the accident, Cedillo-Steele sought chiropractic and acupuncture care. (R., pp. 127-132.) On November 24, 2008, approximately six months after the accident, Cedillo-Steele had a C7-T1 anterior cervical decompression and fusion. (R., p. 133.) Prior to the accident, Cedillo-Steele had had surgery on her right shoulder and pre-accident records revealed preexisting problems to the same area where she had her post-accident surgery. (R., pp. 122-126.) More than three and a half years after the accident, on February 15, 2012, Cedillo-Steele had a C5-6 anterior cervical discectomy and fusion. (R., at p. 135.) On May 22, 2012, nearly four years after the accident, Cedillo-Steele had her second surgery on her right shoulder. (R., p. 136.)

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 \$155,000.00 in UIM benefits. (R., p. 160.) This payment represented Farmers' evaluation based on information not previously available that the UIM claim was worth \$285,000.00 (\$105,000.00 received from the tortfeasor's (Jon Steele's) insurance, \$25,000.00 previously paid UIM benefits and the additional payment of \$155,000.00 in UIM benefits).

¹ Cedillo-Steele's Farmers' policy contained an exclusion under medical payments coverage for motorcycle accidents and therefore she was not entitled to medical payment coverage benefits.

The Farmers policy contains an arbitration clause. (R., p. 121.) The arbitration was limited by agreement of the parties and by order of the arbitrator to the amount of payment due under the UIM coverage. (R., p. 120.) In his Interim Award, without regard to prior payments, setoffs or contract adjustments, the Arbitrator awarded medical expenses in the amount of \$121,700.12. (R., p. 155.) He also awarded lost income in the amount of \$135,000.00. *Id.* The award of lost income was based upon Cedillo-Steele's testimony at the arbitration and the testimony of Dr. Nancy J. Collins, a vocational rehabilitation specialist. (R., pp. 151-152.) Cedillo-Steele had not made a claim for lost income in her original UIM demand. The Arbitrator also awarded \$150,000.00 in non-economic damages for pain and suffering, loss of quality of life, physical limitations, aggravation of preexisting condition and scarring on the right hand. (R., p. 155.)

The Arbitrator's Final Award dated April 29, 2013, reduced the Interim Award by the amounts paid by Jon Steele's insurance company (\$105,000.00), amounts paid by Farmers for UIM benefits prior to the arbitration (\$180,000.00), contractual adjustments (\$19,234.81), a 25% reduction of some medical expenses based on an apportionment to pre-accident, preexisting conditions (\$1,631.36), and adjustment for the erroneous award of a specific bill (\$501.00). (R., pp. 160-162.) After making these adjustment the Arbitrator entered the Adjusted Interim Award, awarding \$100,332.95 as the amount of UIM benefits owed.

On March 25, 2013, Farmers paid the full amount of the Adjusted Interim Award of UIM benefits (\$100,332.95). (R., pp. 284-287.) This payment was made before the Arbitrator's Final Award dated April 29, 2013.

The Arbitrator originally calculated the Prejudgment Interest Award in the amount of \$103,135.46. (R., p. 170.) The Arbitrator determined that prejudgment interest commenced on

August 25, 2009, the date Farmers made its initial payment of \$25,000.00 in UIM benefits in response to Cedillo-Steele's letter dated July 28, 2009. (R., p. 166.) The Arbitrator applied the statutory rate of 12% to an "Initial Amount" of \$255,784.01. (R., p. 170.) This "Initial Amount" was calculated by reducing the Interim Award by amounts previously paid (from the date of payment) and by contract adjustments, uniform application of the 25% apportionment to pre-accident, preexisting conditions and adjustment for the "A Caring Hand" bill. (R., pp. 169-170.) The Arbitrator calculated prejudgment interest on the "Initial Amount" of \$255,784.01 from August 25, 2009 to October 18, 2012 (1,150 days) when Cedillo-Steele received the additional UIM payment from Farmers of \$155,000.00. (R., p. 170.) This payment reduced the "Initial Amount" against which prejudgment interest would be calculated to \$100,784.01. *Id.* Prejudgment interest was then calculated on this "reduced Initial Amount" of \$100,784.01 from October 18, 2012 to the date of the Final Award, April 30, 2013 (194 days). *Id.* The Arbitrator determined that the amount of prejudgment interest from August 25, 2009 to October 18, 2012 was \$96,707.38 and the amount of prejudgment interest from October 18, 2012 to April 30, 2013 was \$6,428.08 for a total amount of the Prejudgment Interest Award of \$103,135.46. *Id.*

The Prejudgment Interest Award was calculated up to April 30, 2013, the day after the Final Award was issued. (R., p. 170.) The Final Award stated that prejudgment interest "shall continue to accrue on the Adjusted Interim Award of \$100,332.95 until the final award is affirmed by a judgment or paid, whichever sooner occurs." *Id.* The Adjusted Interim Award of \$100,332.95 was paid on March 25, 2013, 36 days before the Final Award was issued. (R., pp. 284-287.)

On May 20, 2013, Farmers filed a Motion for Reconsideration of Prejudgment Interest Award with the Arbitrator seeking adjustments of the award of prejudgment interest to account

for the payment of the Adjusted Interim Award before the Final Award was issued. (R., p. 174.) The Motion for Reconsideration also sought recalculation and adjustment of prejudgment interest on medical expenses, lost income and general damages that had not yet been incurred or because the amount had not yet been determined by the Arbitrator and was therefore not mathematically calculable. *Id.*

The Arbitrator agreed that Farmers was entitled to a credit “on the final award of \$100,332.96 for the payment on March 25, 2013.” (*Id.* at p. 175.) The Arbitrator determined that Farmers was entitled to a credit of \$1,187.50 for 36 days of interest at 12% per annum for early payment of the Adjusted Interim Award of \$100,332.95. *Id.* Nevertheless, the Arbitrator applied the payment and the credit to the Prejudgment Interest Award of \$103,135.46 and recalculated an unpaid balance of \$100,332.95 plus unpaid interest of \$2,802.51. *Id.* This left a balance owed on the entire Adjusted Interim Award and a balance of accrued unpaid interest of \$1,615.01.

Ultimately, the Arbitrator recalculated a corrected and Amended Final Award in the amount of \$101,947.96. *Id.* He determined that prejudgment interest would continue to accrue on the “unpaid” Adjusted Interim Award of \$100,332.95 from the date of payment (March 25, 2013) until the Amended Final Award is confirmed in a final judgment or paid, whichever sooner occurs. (*Id.* at pp. 175-176.) Farmers paid the corrected and amended Final Award of \$101,947.96 on September 11, 2013. (R., p. 655.) Cedillo-Steele applied that payment in a manner that created a continuing balance owed of \$5,608.30 with prejudgment interest accruing on that amount at \$1.84 per day from September 12, 2013. *Id.* She applied \$7,223.31 to “outstanding prejudgment interest” and \$94,724.65 was applied to “the Interim Award”. *Id.* The

“Judgment” entered on December 11, 2013, awarded the Defendants \$5,608.30 “on the unpaid balance of the Interim Award and accruing prejudgment interest of \$132.48”. (R., p. 660.)

II. ISSUES PRESENTED ON APPEAL

A. Whether the District Court erred in denying the Motion to Modify and/or Correct the Arbitration Award due to an evident miscalculation of figures?

B. Whether the District Court erred in awarding attorney fees to Cedillo-Steele?

III. ARGUMENT

A. The District Court Erred in Denying the Motion to Modify and/or Correct Arbitration Award – There was an Evident Miscalculation of Prejudgment Interest.

“Judicial review of an arbitrator’s decision is limited to an examination of the award to determine whether any of the grounds for relief stated in Idaho Code §§ 7-912 and 7-913 exists.”

Cranney v. Mut’l of Enumclaw Ins. Co., 145 Idaho 6, 8, 175 P.3d 168, 170 (2007) (quoting *American Foreign Ins. Co. v. Reichert*, 140 Idaho 394, 398, 94 P.3d 699, 700 (2004)).

“Although a reviewing court might believe that some of the arbitrator’s ruling are erroneous, the decision is nevertheless binding unless one of the grounds for relief set forth in Idaho Code §§ 7-912 or 7-913 are present.” *Id.* (quoting *Pacific Alaska Sea Foods, Inc. v. Vic Hoskins Trucking Inc.*, 139 Idaho 472, 474, 80 P.3d 1073, 1075 (2003).)

The Arbitrator’s Award should have been modified and/or corrected because the award of prejudgment interest constituted “an evident miscalculation of figures” under Idaho Code § 7-913(a)(1) and/or is an award “imperfect in a matter of form, not affecting the merits of the controversy” under Idaho Code § 7-913(a)(3). The Arbitrator miscalculated prejudgment interest when he determined that Farmers was entitled to a credit against the Adjusted Interim Award of \$100,332.95 (the amount of the UIM benefits owed) for early payment of that amount on March 25, 2013, but subtracted payment of that amount from the Prejudgment Interest Award rather

than from the Adjusted Interim Award of \$100,332.95. (R., p. 175.) This evident miscalculation led to the following mathematical error in calculating the amount of the final award: rather than a calculation of zero dollars owed on the Adjusted Interim Award as of March 25, 2013 (\$100,332.95 minus \$100,332.95 equals zero dollars), the Arbitrator's miscalculation resulted in a balance owed on the Adjusted Interim Award of the entire amount of the award of \$100,332.95. This miscalculation led to the erroneous result that Farmers continued to owe prejudgment interest on the Adjusted Interim Award after it was paid in full on March 25, 2013 and, according to the Amended Final Award, continued to owe prejudgment interest on the entire Adjusted Interim Award from March 25, 2013 (the date it was paid in full) until it was paid in full . . . again. This miscalculation amounted to Farmers paying damages in the form of prejudgment interest on an award that had already been paid in full, resulting in a double recovery by Cedillo-Steele of portions of the prejudgment interest award. This subtraction error was compounded by the calculation of prejudgment interest on the Prejudgment Interest Award, something the Arbitrator never awarded in the first instance.²

Cedillo-Steele and the district court have further compounded the mathematical error by applying Farmers' later payment of the "corrected and Amended Final Award [of] \$101,947.96" to the prejudgment interest accruing on the miscalculated amount of the "unpaid" Adjusted Interim Award of \$100,332.95. (R., pp. 655; 660.) Cedillo-Steele and the district court calculated accruing prejudgment interest on the alleged "unpaid" Adjusted Interim Award to be

² Cedillo-Steele was awarded prejudgment interest on the Adjusted Interim Award (the amount of UIM benefits owed). (R., p. 170.) The Arbitrator never awarded prejudgment interest on the Prejudgment Interest Award. By subtracting payment from the Prejudgment Interest Award rather than from the Adjusted Interim Award, the Arbitrator either miscalculated prejudgment interest on an amount fully paid or miscalculated prejudgment interest on an amount (the Prejudgment Interest Award) for which no prejudgment interest was awarded. Either scenario arose out of a mathematical error.

\$7,223.31 (\$1,615.01 through March 25, 2013 plus \$5,208.30 from March 26, 2013 through September 11, 2013). *Id.* After first applying Farmers' second payment to this accrued, erroneously calculated prejudgment interest Cedillo-Steele and the district court applied the remaining amount of \$94,724.65 to the corrected and Amended Final Award, leaving a balance owed of \$5,608.30 upon which Cedillo-Steele claims prejudgment interest continues to accrue. (R., pp. 655-656; 658; 660-661.)

The proper calculation, and the calculation consistent with the Arbitrator's own ruling, is to subtract the payment of \$100,332.95 from the Adjusted Interim Award of \$100,332.95, leaving a balance due of zero dollars on the Adjusted Interim Award. The credit of 36 days of interest in the amount of \$1,187.50 awarded by the Arbitrator because of Farmers' early payment of the Adjusted Interim Award would then be subtracted from the Prejudgment Interest Award of \$103,135.46, leaving a balance of unpaid prejudgment interest of \$101,947.96 (which Farmers then paid in full on September 11, 2013) upon which no prejudgment interest would accrue. (R., p. 658.) This proper calculation reflects unpaid prejudgment interest only, upon which the Arbitrator did not award continuing (or any) accrual of prejudgment interest. This proper calculation eliminates continued accrual of prejudgment interest on any amount which is consistent with the relief given by the Arbitrator, and eliminates the continued accrual of prejudgment interest on a balance claimed to be owed by Cedillo-Steele only because she insists on compounding the original miscalculation by the Arbitrator.

Farmers made early payment on the Adjusted Interim Award. (R., p. 175.) When the Final Arbitration Award was issued, the Arbitrator calculated prejudgment interest on the Adjusted Interim Award through the day after the Final Arbitration Award. (R., p. 487.) Because Farmers paid the Adjusted Interim Award 36 days before the final arbitration award, it

sought relief from the award for 36 days of accrued interest in the amount of \$1,187.50. (R., p. 488.)

The Arbitrator recognized that Farmers sought adjustment of the amount of prejudgment interest that was included in the Final Award to account for payment Farmers made to Cedillo-Steele after the Interim Award was issued but before the Final Award was issued. (R., pp. 174-175.) The Arbitrator further recognized that Farmers paid the sum of \$100,332.95 on March 25, 2013, “which was the amount of the adjusted Interim Award.” *Id.* In addition, the Arbitrator recognized that payment and receipt of that amount was not disputed. *Id.* The Arbitrator ruled that Farmers was entitled to a credit on the Final Award of \$100,332.95 for the payment made on March 25, 2013. *Id.* at 175. The Arbitrator determined that Farmers had “establish[ed] that [Farmers] paid to [Cedillo-Steele] the sum of \$100,332.95 on March 25, 2013, which is the principle [sic] amount of the adjusted Interim Award for damages.” (R., p. 255.) The Arbitrator also found that Farmers established that “[t]his payment was made thirty-six (36) days before the Final Award was issued.” *Id.*

Based on these findings the Arbitrator corrected and amended the calculation of prejudgment interest in two ways: first, he recalculated prejudgment interest to account for the early payment of \$100,332.95 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, he applied “the payment of \$100,332.95 on March 25, 2013, to reduce the amount that was owed to Cedillo-Steele on that date. . . .” (R., pp. 255-256.) But the Arbitrator applied the payment first to the Prejudgment Interest Award 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 for a total remaining obligation of \$101,947.96 as of March 25, 2013. (*Id.*) The Arbitrator then

ordered prejudgment interest to continue to accrue “on the unpaid adjusted Interim Award of \$100,332.95 from March 25, 2013.” (R., p. 256.)

The Arbitrator agreed that he had made evident miscalculations and/or his award was imperfect in a matter of form and therefore fell within Idaho Code §§ 7-913(a)(1) and (3). (R., p. 477.) First, the Arbitrator recognized that he had erroneously calculated prejudgment interest to include April 30, 2013, rather than stop on April 29, 2013, the date he issued his Final Award. (R., p. 487.) The Arbitrator also recognized that he had erroneously calculated prejudgment interest by failing to account for payment of \$100,332.95 on March 25, 2013. (R., p. 488.) As to the first mathematical error, the Arbitrator determined that any adjustment in the award would result from correcting the error made in calculating prejudgment interest by failing to account for early payment. (R., p. 487.) As to the second miscalculation, the Arbitrator recognized that payment of the Adjusted Interim Award stopped the accrual of prejudgment interest on that amount and that the Prejudgment Interest Award should be recalculated to end as of March 24, 2013 thereby reducing the final award of prejudgment interest by \$1,187.50. (R., p. 488.) Nevertheless, the Arbitrator then made his miscalculation by subtracting payment of the Adjusted Interim Award of \$100,332.95 on March 25, 2013, to the Prejudgment Interest Award rather than to the Adjusted Interim Award.³

³ The Arbitrator made this miscalculation without application or petition from Cedillo-Steele under either Idaho Code §§ 7-912 or 7-913. In other words, Cedillo-Steele obtained relief from the Final Award in the form of a double recovery of prejudgment interest without making proper (or any) application under the applicable statutes. On the other hand, Farmers, who made proper application under Idaho Code § 7-913 to modify and/or correct the arbitration award, ended up worse off than had it made no application for relief because, even though the Arbitrator recognized his initial mathematical errors and granted a credit to Farmers, he then miscalculated prejudgment interest by applying payment to the Prejudgment Interest Award rather than the Adjusted Interim Award.

Idaho Code § 7-913 requires that, upon application, a district court shall modify or correct an award where there is an evident miscalculation of figures or the award is imperfect in a matter of form, not affecting the merits of the controversy. Idaho Code §§ 7-913(1) and (3). An evident miscalculation of figures under Idaho Code § 7-913(a)(1) must be a mathematical error in calculating the amount of an award, not a legal error in the elements or measures of damages when making the award. *Cranney*, 145 Idaho at 9, 175 P.3d at 171. Farmers is not challenging the arbitration award on the basis of a legal error in the elements or measure of damages.

For instance, Farmers is not claiming the award should be modified or corrected because the Arbitrator failed to award prejudgment interest (*See Schilling v. Allstate Ins. Co.*, 132 Idaho 927, 930, 980 P.2d 1014, 1017 (1999)), or because the Arbitrator awarded prejudgment interest (*See Reichert*, 140 Idaho at 401, 94 P.3d at 706). Nor is Farmers claiming on appeal the arbitration award should have been modified or corrected because the Arbitrator committed a fundamental legal error in awarding prejudgment interest on amounts that had not yet been incurred (as of the date used by the Arbitrator to commence the calculation of prejudgment interest) and on amounts that were not mathematically capable or ascertainable. The Arbitrator, here, did in fact commit these fundamental legal errors in the face of the Idaho Supreme Court's concurring opinion in *Cranney* that holds, in the UIM context, prejudgment interest does not begin to accrue until the amount is incurred or determined:

. . . In uninsured or undersigned motorist cases such as the present one, the amount of prejudgment interest is not "capable of mathematical computation" from the date of the accident or even from the date of the proof of loss because it is unknown what the amount "due" is until it is determined by the arbitrator. The arbitrator's award can include past medical expenses and lost wages, but also can include damages for pain and suffering, future

lost wages and future medical expenses, all of which are unknown until the arbitrator renders his decision. . . .

In summary, it is my opinion that Idaho law allows an arbitrator to grant prejudgment interest in uninsured and underinsured arbitration cases, but the prejudgment interest should apply only to liquidated amounts from the date the expenses are incurred and should not include prejudgment interest on unliquidated claims or future losses.

Cranney, 145 Idaho at 10, 175 P.3d at 172 (special concurrence). These are fundamental legal errors made by the Arbitrator in the elements or measure of damages that are, unfortunately, unreviewable.⁴ The challenge to the Arbitrator's award here is to the mathematical errors made in calculating prejudgment interest.

Farmers' challenge to the Arbitrator's award is akin to the evident miscalculations described and/or found in the following cases. In *TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Securities, Inc.*, 953 A.2d 726 (2008) the defendants argued that the arbitration panel made a blatant error in calculating damages under the Delaware Consumer Fraud Act. *TD Ameritrade*, 953 A.2d at 736. Rather than award statutory treble damages, the arbitration panel awarded quadruple damages. *Id.* The Delaware Court, operating under the Federal Arbitration Act, recognized that courts can modify or correct arbitration awards "[w]here there was an evident material miscalculation of figures." *Id.* at 736-737. The Delaware Court held that "[w]hen an arbitration award orders a party to pay damages that have already been paid or which are

⁴ The Arbitrator awarded prejudgment interest on medical expenses and lost wages not yet incurred and on general damages not yet suffered or mathematically calculable until they were awarded by the Arbitrator. Farmers understands, however, that these errors are beyond review by this Court and, although it is an error that cost Farmers \$67,416.30 in prejudgment interest, it is an error that cannot be challenged. These Arbitrator errors also provided a windfall to Cedillo-Steele in the amount of \$67,416.30 in prejudgment interest on amounts not yet incurred or capable of mathematical computation until they were determined by the Arbitrator. (R., pp. 295-336.) She was also awarded attorney fees on this erroneously awarded prejudgment interest amount resulting in a double windfall. (R., p. 660.)

included elsewhere in the award, a court may modify the award. . . .” *Id.*⁵ The Delaware Court determined that there was a mathematical error which resulted in a double recovery. *Id.* The award granted both compensatory damages for the stolen bonds and an additional award of treble damages and the Delaware Court determined that “[t]he arbitration panel either committed a mathematical error or granted an impermissible double recovery. Either way, the award must be modified to provide for treble damages only.” *Id.*

Here, the Arbitrator committed a mathematical error which also resulted in a double recovery. Here, the Arbitrator determined that Farmers was entitled to a credit on the Final Award of \$100,332.95 for payment of that amount on March 25, 2013. The Arbitrator further determined that payment of \$100,332.95 on March 25, 2013, stopped the running of statutory interest on that amount and reduced the final award of prejudgment interest by \$1,187.50. (R., p. 488.) However, rather than credit the payment to the Adjusted Interim Award, he credited payment to the Prejudgment Interest Award, leaving the entire balance of the Adjusted Interim Award unpaid and continuing to accrue prejudgment interest which amounted to a double recovery of prejudgment interest in the amounts of \$7,223.31 and continuing prejudgment interest accruing at \$1.84 per diem from September 12, 2013. (R., p. 655.) Alternatively, the Arbitrator determined that the Adjusted Interim Award had been paid but failed to calculate the Prejudgment Interest Award consistent with that finding, making the award imperfect as to form. Here, the Arbitrator ordered payment of damages already paid or which were included elsewhere in the award, which amounted to a double recovery, all based on an evident miscalculation of figures.

⁵ The Delaware Court also recognized that a double recovery constitutes a materially unjust miscalculation which may be modified under the Federal Arbitration Act. *Id.*

In *Transnitro, Inc. v. M/V Wave*, 943 F.2d 471 (4th Cir. 1991), the Court reviewed whether there was an evident miscalculation in an arbitrator's failure to calculate a credit for \$34,000.00 in accrued interest under the federal equivalent of Idaho Code § 7-913(a)(1). *Transnitro*, 943 F.2d at 474. The appellate court affirmed the district court's conclusion that it had the power to modify and correct the arbitration award and its deduction of the \$34,000.00 interest credit. *Id.* at 474. See also *Saxis Steamship Co. v. Multifacs International Traders, Inc.*, 375 F.2d 577, 581 n. 4 (2nd Cir. 1967) ("[t]he arbitrators made a mistake in computation . . . and were properly permitted by the district court to revise their computation") Here, the Arbitrator failed to deduct payment from the proper number. Despite the district court's ruling to the contrary, it did have the power to modify and/or correct the Arbitration Award.

Finally, in *Ehrich v. A.G. Edwards & Sons, Inc.*, 675 F.Supp. 559 (D. S. D., 1987), the defendant argued that there was a mathematical error in the arbitration award with respect to the number of months in which interest should be charged. *Ehrich*, 675 F.Supp. at 565-566. Specifically, the defendant argued that the mathematical error was as to the number of months to which interest should have been applied, 73 months instead of 63 months, resulting in an error of \$9,818.92 (1% per month for 63 months equals \$61,324.83 instead of 1% for 73 months equaling \$71,143.75). The Court determined that there was an error in the computation of the arbitration award with respect to the amount of interest calculated on the compensatory damages and modified the arbitration award accordingly. *Id.* at 566. Here, the Arbitrator erred in subtracting payment from the wrong number, resulting in an error in the amount of prejudgment interest.

The district court erred when it determined there was no evident miscalculation of figures in the Arbitration Award with respect to calculating prejudgment interest. This denial of the Motion to Correct and/or Modify Arbitration Award should be reversed.

B. The District Court Erred in Granting Attorney Fees Incurred in Arbitration to Cedillo-Steele.

The standard of review for an award of attorney fees under Idaho Code § 41-1839 is abuse of discretion. *Vaught v. Dairyland Ins. Co.*, 131 Idaho 357, 360, 956 P.2d 674, 677 (1998). However, when an award of attorney fees depends on the interpretation of a statute, the standard for statutory interpretation, free review applies. *Ferrell v. United Financial Casualty Co.*, 155 Idaho 85, 305 P.3d 529 (2013).

1. The Request for Attorney Fees is Based on an Unenforceable, Illegal Contract.

Jon Steele is the tortfeasor; the person responsible for all of Cedillo-Steele's claimed injuries, medical expenses, surgeries, lost income, pain and suffering and other general damages. (See R., p. 121.)

Jon Steele, at the time of the motorcycle accident, had liability insurance limits of only \$100,000.00. (R., p. 160.) Jon Steele is, therefore, the underinsured driver, whose failure to have sufficient coverage caused Cedillo-Steele to make a claim under her own insurance policy.

On November 22, 2011, Cedillo-Steele entered into a contingency fee agreement with Jon Steele, agreeing to pay his attorney fees if certain conditions were met, including recovery of the damages he caused.⁶ (R., pp. 460-461.) Jon Steele is, thereby, the attorney of his own victim, seeking attorney fees that were incurred only because of his wrongful conduct in injuring his client and victim.

A person cannot maintain a claim based on his or her own wrong or caused by his or her own neglect. 1A CJS Action, § 68. "[A] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or

⁶ As discussed below, the agreement did not include recovery of damages as a result of arbitration.

transaction to which he is a party, or to maintain a claim for damages based on his own wrong or caused by his own neglect, . . . or where he must base his cause of action, in whole or in part, on a violation by himself of the criminal or penal laws. . . .” *Anderson v. Miller*, 559 N.W.2d 29, 34 (1997) (Emphasis added). Such an agreement is considered to be an illegal contract.

As a general rule, no action for recovery can be had on an illegal contract, either at law or in equity. 17 Am.Jur. 2nd Contracts, § 299. If a party to an illegal contract requests relief that is based on that illegal contract, he or she cannot recover. *Id.* A party to an illegal contract cannot ask the court to have his illegal objects carried out, as the law will not aid either party to an illegal agreement. *Zollinger v. Carrol*, 137 Idaho 397, 401, 49 P.3d 402, 406 (2002). Illegal contracts are unenforceable. *Quiring v. Quiring*, 130 Idaho 560, 568, 944 P.2d 695, 703 (1997). Instead, the law will leave the parties to an illegal agreement where it found them. *Trees v. Kersey*, 138 Idaho 3, 56 P.3d 765 (2002). When the Court leaves the parties where it finds them, it denies recovery to either party. *Barry v. Pacific West Construction, Inc.*, 140 Idaho 827, 832, 103 P.3d 440, 445 (2004).

Idaho extends the general rule to prevent recovery from a third-party that which is the subject of the illegal contract. In *Wheaton v. Ramsey*, 92 Idaho 33, 436 P.2d 248 (1968), the Idaho Supreme Court denied recovery of a real estate commission to a party to an illegal real estate agreement. *Id.* at Idaho 35, 436 P.2d at 250. In addition to making a claim for the real estate commission against the other party to the illegal contract, the real estate agent also made a claim against a surety bond. *Id.* at 36; 436 P.2d at 251. The Idaho Supreme Court held that the third-party holder of the surety bond was not liable to pay the real estate commission because it was based on an unenforceable, illegal agreement. *Id.*

Here, the claim for attorney fees is based on the attorney fee contract which is based on recovering damages caused by the attorney's own wrongful actions and neglect. It is a contract that benefits Jon Steele as a direct result of his wrongful actions in injuring Peggy Cedillo-Steele. This is against public policy; a court will not aid or reward a wrongdoer. *See Porter v. Canyon County Farmers Mutual Fire Ins.*, 45 Idaho 22, 24, 263 P. 632, 634 (1928). *See also* 1A CJS Actions § 68. To award attorney fees would allow Jon Steele to circumvent the public policy that a wrongdoer should not benefit from his wrongful deeds. The attorney fee agreement is, therefore, an illegal, unenforceable contract.

The doctrine of illegality required the district court to leave the parties where it found them. The request for fees states that Cedillo-Steele has not yet paid the attorney fees. (R., pp. 201-202.) Consequently, leaving the parties as it found them, Cedillo-Steele does not owe these fees.

If Cedillo-Steele does not owe attorney fees, then neither does Farmers. The salutary purpose of Idaho Code § 41-1839 in allowing attorney fees in suits against insurers is not to do so as a penalty, but as an additional sum rendered as compensation when the insured is entitled to recover under the insurance policy, to prevent the sum therein provided from being diminished by expenditures for the services of an attorney. *Martin v. State Farm Mut. Ins. Co.*, 138 Idaho 244, 247, 61 P.3d 601, 604 (2002). As long as Cedillo-Steele does not owe attorney fees, because the contract is illegal, this salutary purpose is met.

Moreover, an illegal contract cannot be enforced against a non-party. *See Wheaton*. The illegal fee agreement cannot be enforced against Farmers. Otherwise, the illegal objects of the contract will be carried out and the law is not supposed to aid a party to an illegal contract. The award of attorney fees should be reversed on this ground.

2. **The Attorney Fee Agreement Does Not Apply to Fees Incurred in Arbitration.**

It is also axiomatic that all written fee agreements are contracts and contracts must be construed against the drafter. *City of Meridian v. Petra, Inc.*, 154 Idaho 425, 299 P.3d 232 (2013). The fee agreement between Cedillo-Steele and Jon Steele states that her claim would be pursued “on a contingency basis, whereby legal fees will be paid only when, and if, you recover monetary damages on your claim in this matter, whether by settlement, or by decision of the district court.” (R., pp. 460-461.) (Emphasis added.) Cedillo-Steele’s recovery of monetary damages did not occur by settlement or by decision of a district court. The recovery came as a result of arbitration. The fee agreement does not apply to any recovery made in arbitration and therefore Cedillo-Steele owes no attorney fees on any recovery from that arbitration. If Cedillo-Steele does not owe attorney fees then neither would Farmers. *See Employers Mut. Cas. Co. v. Donnelly*, 151 Idaho 499, 300 P.3d 31 (2013).

The district court held that because Cedillo-Steele filed a Petition to Confirm the Arbitration Award in district court, any recovery was obtained by virtue of this confirmation and therefore fits within the terms of the fee agreement. (R., p. 650.) The district court erroneously equates “recover” to “confirmation”. The fee agreement clearly and unambiguously bases the contingency fee on the recovery of monetary damages and not upon a judicial process for confirming an arbitration award. The recovery of monetary damages came as a result of the arbitration and not the confirmation process. The attorney fee award should be reversed on this ground.

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

Based on the (illegal) contingent fee agreement and Idaho Code § 41-1839, Cedillo-Steele originally requested attorney fees in the total amount of \$129,340.56. (R., pp. 627, 655.) The amount of attorney fees requested was calculated as one-third (1/3) of the following amounts:

UIM benefits paid by Farmers on August 25, 2009	\$25,000.00
UIM benefits paid by Farmers on October 16, 2012	\$155,000.00
UIM benefits awarded by Arbitrator and paid by Farmers on March 25, 2013	\$100,332.95
Prejudgment interest awarded by Arbitrator and paid by Farmers on September 11, 2013	\$101,947.96
Alleged balance owing on Adjusted Interim Award	\$5,608.30
Continuing accruing prejudgment interest on “unpaid” Adjusted Interim Award through November 22, 2013	\$132.48
TOTAL	\$388,021.69

Cedillo-Steele took the total amount of \$388,021.69 and divided it by three for a total request of \$129,340.56 in attorney fees allegedly owed to Jon Steele. *Id.*

Cedillo-Steele originally sought attorney fees in the amount of one-third (1/3) of the \$25,000.00 payment of UIM benefits made by Farmers to Cedillo-Steele on August 25, 2009. Cedillo-Steele did not retain Jon Steele as her attorney until November 22, 2011. (R., pp. 460-463.) Farmers’ payment of \$25,000.00 was made more than two years before the contingency fee agreement was signed.⁷ (R., pp. 166, 461.) Cedillo-Steele and Jon Steele were seeking payment of attorney fees on an amount paid and received long before Jon Steele was hired as the

⁷ The contingent fee agreement also limits attorney fees to recoveries made through settlement or a decision of the district court and not through arbitration as discussed above. (R., pp. 460-461.)

attorney and without any effort by Jon Steele to obtain that payment.⁸ The district court ruled that Jon Steele was not entitled to an attorney fee equal to one-third (1/3) of the \$25,000.00 payment “since the payment was made before the representation began and Plaintiff’s counsel did not devote any time or labor to obtain this payment.” (R., p. 651.) Cedillo-Steele did not cross appeal from this ruling.

Based on the district court’s decision, Cedillo-Steele ultimately calculated and sought attorney fees on the following amounts:

UIM benefits paid by Farmers on October 16, 2012	\$155,000.00
UIM benefits awarded by Arbitrator and paid by Farmers on March 25, 2013	\$100,332.95
Prejudgment interest awarded by Arbitrator and paid by Farmers on September 11, 2013	\$101,947.96
Alleged balance owing on Adjusted Interim Award	\$5,608.30
Continuing accruing prejudgment interest on “unpaid” Adjusted Interim Award through November 22, 2013	\$132.48
TOTAL	\$363,021.69

Cedillo-Steele sought one-third (1/3) of the total amount of her calculation of \$363,021.69, for a total attorney fee award of \$121,007.23. (R., p. 655.)

The district court erroneously awarded to Cedillo-Steele attorney fees in the amount she sought (\$121,007.23). (R., p. 660.) This attorney fee award was erroneously based on: (1) UIM benefits paid within 30 days of receipt of information sufficient to support payment; (2) the Prejudgment Interest Award; and (3) accrued prejudgment interest based on the Arbitrator’s mathematical error.

⁸ It should be noted that the \$25,000.00 UIM payment was made within 30 days of the “Proof of Loss” and no attorney fees would be owed on that amount regardless of Jon Steele’s involvement as an attorney.

a. No Attorney Fees are Owed Under Idaho Code § 41-1839 on Those UIM Benefit Payments Made Within 30 Days of a Sufficient Proof of Loss.

Idaho Code § 41-1839 requires payment of attorney fees only if an insurer “shall fail for a period of thirty (30) days after proof of loss has been furnished as provided in such policy, certificate or contract, to pay to the person entitled thereto the amount justly due under such policy, certificate or contract.” Idaho Code § 41-1839(1). Farmers paid a total of \$180,000.00 in UIM benefits within 30 days of a sufficient proof of loss and therefore no attorney fees are owed on these payments. The district court correctly determined, for other reasons, that Cedillo-Steele was not entitled to attorney fees on the August 25, 2009, \$25,000.00 payment of UIM benefits but erroneously awarded attorney fees on the payment of \$155,000.00 in UIM benefits made on October 16, 2012. (R., pp. 652, 660-662.) Because this payment was made within 30 days of a sufficient proof of loss, it was error to award attorney fees based on this timely payment.

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). For example, when Farmers paid the original \$25,000.00 payment, the “Proof of Loss” provided by Cedillo-Steele was for medical bills in the approximate amount of \$53,000.00 relating to a single surgery upon which Cedillo-Steele demanded payment of UIM limits of \$500,000.00. (R., p. 165.) Cedillo-Steele made no claim for lost wages, past or future. *Id.* She made no specific claim for future medical expenses. *Id.* Based on this information, Farmers evaluated her UIM claim to be \$130,000.00 and timely tendered \$25,000.00 in UIM benefits. *Id.*⁹ Farmers paid the “amount justly due” of \$25,000.00 on August 25, 2009, within

⁹ This payment was based on offset language in the insurance policy for amounts paid by or on behalf of the tortfeasor (Jon Steele), here \$105,000.00. (R., p. 166.)

thirty (30) days of the original July 28, 2009 Proof of Loss. No attorney fees were owed on this amount.

Likewise, there should have been no attorney fees awarded based on the subsequent payment of \$155,000.00 in UIM benefits on October 16, 2012. As of the date of the initial payment of \$25,000.00, there was no Proof of Loss sufficient to trigger Idaho Code § 41-1839 attorney fees with respect to medical bills not yet incurred, or damages arising out of two subsequent surgeries, or lost wages, or future general damages. The two surgeries did not occur until three and a half and four years after the motorcycle accident. (R., pp. 135-163.) No subsequent medical bills or any other information in the form of medical records or reports were provided by Cedillo-Steele until September 18, 2012. (R., p. 160.) Farmers paid an additional amount of \$155,000.00 within thirty (30) days of receipt, on October 18, 2012, of this new information. (R., p. 160.) This brought the total evaluation of Cedillo-Steele's UIM claim to \$285,000.00.

For purposes of Idaho Code § 41-1839, Farmers paid "the amount justly due" of \$155,000.00 within thirty (30) days of a sufficient "Proof of Loss". The district court erroneously awarded attorney fees under Idaho Code § 41-1839 on this timely payment. The attorney fee award of one-third (1/3) of \$155,000.00 in the amount of \$51,555.67 should be reversed.

b. No Attorney Fees Are Owed Under Idaho Code § 41-1839 for Recovery of Prejudgment Interest.

Idaho Code § 41-1839 provides attorney fees only for the recovery of "the amount justly due under such policy, certificate or contract" and only "in any arbitration for recovery under the terms of the policy, certificate or contract. . . ." Idaho Code § 41-1839(1) (Emphasis added). Cedillo-Steele was awarded attorney fees based on one-third (1/3) of the Prejudgment Interest

Award of \$101,947.65, which is an amount that is not due under the terms of the insurance policy. It is an amount due, if at all, pursuant to statute.¹⁰

Cedillo-Steele sought, and the district court erroneously awarded, one-third (1/3) of the Prejudgment Interest Award of \$101,947.65 in the amount of \$33,982.55 as attorney fees under Idaho Code § 41-1839. Prejudgment interest is not an “amount justly due” under a policy or contract of insurance nor a recovery under the terms of the policy or contract as required by Idaho Code § 41-1839(1). Consequently, the statute upon which Cedillo-Steele was awarded attorney fees does not allow for an award of attorney fees based on recovery of prejudgment interest. Because the prejudgment interest award is not an amount justly due under the insurance policy, Idaho Code § 41-1839 does not require Farmers to pay attorney fees based on that amount. This portion of the attorney fee award should be reversed.¹¹

- c. 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.

Cedillo-Steele sought, and the district court awarded, attorney fees on an alleged balance owing on the Adjusted Interim Award and awarded prejudgment interest on the prejudgment interest accruing on this alleged balance owing. (R., pp. 655, 650, 660.) Both the alleged balance owing on the Adjusted Interim Award of \$5,608.30 and the prejudgment interest accrued through November 22, 2013, in the amount of \$132.48, exist only because of the Arbitrator’s

¹⁰ Prejudgment interest is due, if at all, under Idaho Code § 28-22-104, which applies, by its terms, only when there is no contract provision for prejudgment interest.

¹¹ The Arbitrator committed clear legal error in awarding prejudgment interest on medical bills that had not yet been incurred and general damages that were not yet liquidated in contravention of the *Cranney* concurrence. *See infra*. This clear error resulted in a windfall to Cedillo-Steele of an award of prejudgment interest in the amount of \$67,416.30. It would be particularly inequitable and egregious if Cedillo-Steele and her attorney received an additional windfall in the form of an attorney fee award of one-third (1/3) of this portion of the Prejudgment Interest Award.

mathematical errors discussed above. If these errors are modified or corrected, these amounts will no longer exist and, of course, no attorney fees can be awarded on these amounts.

Regardless of the mathematical errors, the district court erred in awarding attorney fees on these amounts. The alleged balance owing on the Adjusted Interim Award of \$5,608.30 would amount to a double recovery of attorney fees. Cedillo-Steele and Jon Steele already calculated and requested an award of one-third ($1/3$) of the total Adjusted Interim Award and one-third ($1/3$) of the total Prejudgment Interest Award. Cedillo-Steele and Jon Steele seek another attorney fee on the alleged “unpaid” balance owing of the Adjusted Interim Award of \$5,608.30, an amount for which they were already awarded attorney fees when they calculated one-third ($1/3$) of the total Adjusted Interim Award. It was error for Cedillo-Steele to be awarded attorney fees on a balance for which she already received attorney fees.

The accrued prejudgment interest of \$132.48 on this alleged balance that continues to accrue prejudgment interest in the amount of \$1.84 per diem suffers from the same flaw discussed in Section 3.b above – no attorney fees are due on prejudgment interest whether awarded, accrued or otherwise.

Cedillo-Steele sought, and the district court granted, attorney fees in the amount of \$1,869.43 on the alleged balance owing on the Adjusted Interim Award of \$5,608.30 and awarded attorney fees in the amount of \$44.16 on the accrued prejudgment interest amount of \$132.48. The district court’s award of attorney fees in the amount of \$1,913.59 should be reversed.

- d. If Attorney Fees are Owed at All, at Most They are Owed Only on the Adjusted Interim Award of UIM Benefits of \$100,332.95.

The most Cedillo-Steele recovered as “the amount justly due” under the terms of the UIM coverage of her automobile insurance policy is the Adjusted Interim Award of \$100,332.95.¹² This is the amount, after the Arbitrator accounted for offsets, payments, contractual adjustments and apportionment, that was owed in UIM benefits that had not been previously paid. Because attorney fees are owed only on an amount justly due that was not paid within 30 days of a Proof of Loss, this is the only amount under Idaho Code § 41-1839 for which an attorney fee is owed. One-third (1/3) of the Adjusted Interim Award of \$100,332.95 is \$33,444.32. If an attorney fee is owed, this is the most that can be owed.

In summary, the district court erred in awarding any attorney fees. At a minimum, the district court erred in awarding attorney fees on the timely payment of \$155,000.00 (\$51,666.67), the awards of prejudgment interest of \$101,947.96 (\$33,982.65) and \$132.48 (\$44.16) and on the “unpaid” balance of \$5,608.30 (\$1,869.43), for a total erroneous award of \$87,562.91.

IV. CONCLUSION

Farmers respectfully requests that this Court reverse the district court’s denial of the Motion to Modify and/or Correct Arbitration Award regarding the calculation of prejudgment interest. Farmers further requests that the attorney fee award be reversed in total or, alternatively, reduced to \$33,444.32.

¹² It is Farmers’ position that because the contingent fee agreement is illegal and/or does not require Cedillo-Steele to pay attorney fees on amounts recovered in arbitration, that no attorney fee is owed by her under the contingent fee agreement and therefore no attorney fee can be owed by Farmers under Idaho Code § 41-1839.

DATED this 29 day of April, 2014.

ELAM & BURKE, P.A.

By: 

Jeffrey A. Thomson, Of the firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

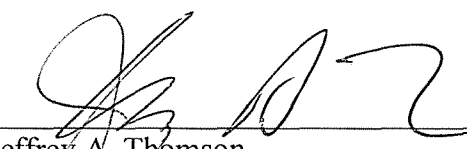
I HEREBY CERTIFY that on the 29 day of April, 2014, I caused a true and correct copy of the foregoing document to be served as follows:

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