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IN THE SUPREME COURT FOR THE STATE OF IDAHO

PEGGY CEDILLO, Plaintiff/Appellant, v. FARMERS INSURANCE COMPANY OF IDAHO, Defendant/Respondent.	Supreme Court Docket No. 43890 Ada County Case No. CV-OC-2013-08697 **RESPONDENT'S BRIEF**

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RESPONDENT'S BRIEF

Appeal of *Peggy Cedillo v. Farmers Insurance Company of Idaho*
Honorable Lynn G. Norton, District Judge Presiding

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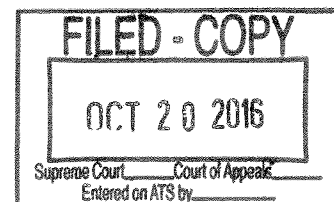

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1

A. Introduction 1

B. Course of Proceedings 1

C. Statement of Facts 2

II. ARGUMENT 6

A. The District Court's discovery rulings should be upheld and affirmed because the District Court correctly perceived these discovery matters as discretionary, acted within the applicable legal standards and exercised sound reasoning in entering both its July 17, 2015 Order and its September 16, 2015 Order. 6

1. July 17, 2015 Order. 8

a. Cedillo failed to preserve her appeal regarding ESI discovery and, to the extent that the District Court entered an order on this issue, it did not abuse its discretion. 8

b. The District Court correctly ruled on the timing of objections under Idaho Rule of Civil Procedure 33 and did not abuse its discretion. 10

2. September 16, 2015 Order 11

B. Cedillo's failure to establish an essential element of her bad faith claim, that her claim was not fairly debatable, warrants the entry of summary judgment on this claim 15

C. The District Court did not abuse its discretion in its denial of Cedillo's Motion to Amend. 22

III. ATTORNEY FEES 25

IV. CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Anderson v. Farmers Ins. Co. of Idaho, 130 Idaho 755, 947 P.2d 1003 (1997)........................... 17
Baxter v. Craney, 135 Idaho 166, 16 P.3d 263 (1997) 22
Cedell v. Farmers Insurance Company of Washington, 176 Wash. 2d 686, 295 P.3d 239 (2013) 11, 12, 13, 14
Cedillo v. Farmers Ins. Co., 345 P. 3d 213 (2015) 1, 2, 5
Cristo Viene Pentecostal Church v. Paz, 144 Idaho 304, 160 P.3d 743 (2007) 15
Cummings v. Stephens, No. 43081, 2016 Ida. LEXIS 265 (2016) 7
Gen. Auto Parts Co., Inc. v. Genuine Parts Co., 132 Idaho 849, 979 P.2d 1207 (1999)............. 23
Greene v. Truck Ins. Exchange, 114 Idaho 63, 753 P.2d 274 (1988) 17, 23
Hines v. Hines, 129 Idaho 847, 934 P.2d 20 (1997)... 22
Jacobson v. State Farm, 136 Idaho 171, 30 P.3d 949 (2001).. 17
Jen-Rath Co. v. Kit Mfg. Co., 137 Idaho 330, 48 P.3d 659 (2002) 6
Kirkman v. Stoker, 134 Idaho 541, 6P.3d 397 (2000) 25
Lakeland True Value Hardware, LLC v. The Hartford Ins. Co., 153 Idaho 716, 291 P.3d 399 (2012) 16, 17
Liponis v. Bach, 149 Idaho 372, 234 P.3d 696 (2010) 6
Lucas v. State Farm Fire & Cas. Co., 131 Idaho 674, 963 P.2d 357 (1998) 21
McGilvray v. Farmers New World Life Ins. Co., 136 Idaho 39, 28 P.3d 380 (2001) 16
Michael v. Zehm, 74 Idaho 442, 263 P.2d 990 (1953) 6
Pass v. Kenny, 118 Idaho 445, 797 P.2d 153 (1990) 26
Porter v. Bassett, 146 Idaho 399, 195 P.3d 1212 (2008) 16
Reynolds v. Trout Jones Gledhill Fuhrman, P.A., 293 P.3d 645 (2013) 15
Robinson v. State Farm Mut. Auto Ins. Co., 137 Idaho 173, 45 P. 2d 829 (2002) 17, 16
Roper v. State Farm, 131 Idaho 459, P.2d 1145 (1998).. 17
Sirius LC v. Erickson, 144 Idaho 38, 156 P.3d 539 (2007) 7
Stewart v. Stewart, 143 Idaho 673, 152 P.3d 544 (2007) 7, 22
Suitts v. Nix, 141 Idaho 706, 117 P.3d 120 (2005) 6
Taylor v. AIA Servs. Corp., 151 Idaho 552, 261 P.3d 829 (2011) 6, 15
Taylor v. McNichols, 149 Idaho 826, 243 P.3d 642 (2010) 15
Vaught v. Dairyland Ins. Co., 131 Idaho 357, 956 P.2d 674 (1998) 23
Walker v. Boozer, 140 Idaho 451, 95 P.3d 69 (2004).. 7, 22
Weaver v. Stafford, 134 Idaho 691, 8 P.3d 1234 (2000).. 22

White v. Unigard Mut. Ins. Co., 112 Idaho 94, 730 P.2d 1014 (1986) 16

Statutes

Idaho Code § 6-1604 22
Idaho Code §12-121 25

Rules

I.R.C.P. 26 10
I.R.C.P. 33 10
I.R.C.P. 37(a)(2) 8
I.R.C.P. 56 21
I.R.C.P. 56(c) 15
I.R.E. 502(d)(5) 13
I.A.R. 35 .... 6, 11, 15, 22
I.A.R. 40 25
I.A.R. 41 25

I. STATEMENT OF THE CASE

A. Introduction

Appellant/Plaintiff Cedillo ("Cedillo") opted to pursue a tort claim for bad faith against her insurance company, Farmers Ins. Co. of Idaho ("Farmers") following the submission of her claim to binding arbitration to address the amount of contractual damages due under her underinsured motorist policy. In this second appeal to the Idaho Supreme Court arising from her injuries sustained in a 2008 motorcycle accident, Cedillo challenges the District Court's discovery rulings, the District Court's entry of summary judgment on her claim for bad faith and the District Court's denial of her Motion to Amend to Add a Claim for Punitive Damages. As discussed herein, the District Court's decisions and the Final Judgment should be affirmed.

B. Course of Proceedings

The procedural history of this case through March 5, 2015, is primarily set forth in this Court's opinion in *Cedillo v. Farmers Ins. Co.*, 345 P.3d 213, 216 (2015). Following the entry of this Court's first appellate opinion, the case returned to the District Court to permit Cedillo to litigate her claims in her *First Amended Petition for Confirmation of Arbitration Award, Award of Arbitration Fees, Unenforceability of Off-Set Clause and Bad Faith*, filed on August 16, 2013.[1]

Following the District Court's entry of summary judgment on both of her remaining claims of "Unenforceability of Off-Set Clause" and "Bad Faith," Cedillo filed her Notice of

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[1] Cedillo's *First Amended Petition for Confirmation of Arbitration Award, Award of Arbitration Fees, Unenforceability of Off-Set Clause and Bad Faith*, filed on August 16, 2013, was a filing in which Cedillo attempted to join her application for judicial confirmation under the Uniform Arbitration Act with a standard lawsuit pleading.

Appeal on January 12, 2016. The District Court entered a Final Judgment on January 22, 2016. Thereafter, Cedillo filed an amended Notice of Appeal on February 22, 2016.

C. Statement of Facts

On May 25, 2008, Peggy Cedillo was injured while riding as a passenger on Jon Steele's motorcycle. *Cedillo v. Farmers Ins. Co.*, 345 P.3d 213, 216 (2015). The motorcycle drifted to the right and hit a concrete barrier. *Cedillo,* 345 P.3d at 216. Steele had his own insurance with $100,000.00 in bodily injury coverage and $5,000.00 in medical payment coverage. *Id.* On July 28, 2009, Cedillo sent Farmers a letter stating that she had settled her claim against Steele for his policy limits of $105,000.00. R., 1171-1172. Her letter then demanded her underinsured motorist policy limits of $500,000.00 from Farmers and asked that the claim be resolved in 30 days. R., 1171-1172. At that time, Cedillo's medical expenses totaled $53,048.62. R., 1171-1172. Farmers requested Cedillo provide a release allowing Farmers to obtain prior medical records. R., 1177-1179. Cedillo returned the medical release, but expressly limited it to post-accident records. R., 1173. On August 25, 2009, Farmers sent Cedillo a check for $25,000.00 with a letter that stated the check was Farmers' valuation of her UIM claim (*i.e.*, $130,000.00). R., 1174. Importantly, Farmers expressly noted in its letter to Cedillo on August 25, 2009, that it had no information as to a claimed wage loss, either past or future and that no wage loss was included in the evaluation. *Id.* Farmers invited Cedillo to provide any additional information at this point. *Id.*

Nothing further was heard from Cedillo until March 30, 2010 when she sent a letter to inform Farmers adjuster Ron Ramsey that she continued to have headaches, neck pain and

tingling in her arm and fingers. R., 1175-1176. She suggested that Dr. Little had recommended a surgical procedure, a bilateral occipital neurectomy that would cost approximately $25,000.00. *Id.* There was no mention of any wage loss claim, either past or future at this point. *Id.* On March 30, 2010, she demanded the remainder of her UIM policy benefits of "$485,000.00" plus interest on or before April 15, 2010.[2] *Id.*

On April 14, 2010, Ron Ramsey wrote a letter to Cedillo acknowledging her March 30, 2010 letter. R., 1177. He noted that no medical records were included with Cedillo's letter, and stated that he would use the previously provided medical release to obtain any new post-accident treatment records. *Id.* Ron Ramsey again reiterated the need for medical records for five years before the subject accident. *Id.*

On May 7, 2010, Ron Ramsey wrote a letter to Cedillo indicating that Dr. Little's records had been obtained and there was no documentation related to Cedillo's claimed need for future surgery in his records. R., 1191. Mr. Ramsey asked Cedillo to submit additional documentation, if she had any for evaluation. *Id.* Also, Mr. Ramsey reiterated his request for a records release for pre-accident medical records, as well as a list of providers Cedillo treated with both before and after the accident. *Id.*

On July 2, 2010, Cedillo returned an executed release that was not limited to just records for her treatment following the subject accident. R., 1180. On July 16, 2010, Mr. Ramsey again asked for a list of providers from Cedillo. R., 1181. On September 3, 2010, Cedillo made

[2] Of note, Cedillo's request did not take into account the offset of $105,000.00 and her subtraction was incorrect (she only subtracted $15,000.00 instead of the amount paid of $25,000.00). Said differently, the amount of benefits remaining on the policy was $370,000.00, not $485,000.00.

another demand stating that her total damages "far exceed the policy limits of $500,000.00 and medical coverage of $10,000.00 and the amounts paid by Progressive ($105,000.00)." R., 1182-1184. In other words, on September 30, 2010, Cedillo asserted her accident damages were in excess of $615,000.00. *Id.* In her correspondence, she provided updated medical bills of $56,018.22 and a list of her prior healthcare providers. *Id.* She again alleged future medical bills of $25,000.00. *Id.* She also raised the issue of past lost wages for the first time and provided one page of her tax return for years 2004-2009. *Id.* While alleging she had prior wage loss and suggesting future wage loss for 2010, Cedillo did not articulate a value or an amount of wage loss damages. *Id.* Cedillo claimed she was a top performing real estate agent, but as of September 3, 2010, she alleged that she has not returned to her pre-crash income level. *Id.* She further alleged that this loss was the result of her "inability to carry on my real estate business at the pre-crash level of intensity." *Id.*

In response, on September 24, 2010, Mr. Ramsey requested Ms. Cedillo's complete tax returns (as opposed to the one page excerpt provided). R., 1185. He also followed up on Cedillo's claim for future medical expense of $25,000.00, indicating that as September 24, 2010, Farmers had not received any records or provider's opinions in support of Cedillo's allegations about the need for future medical care. *Id.*

On May 5, 2011, following the independent evaluation by Dr. Wilson, Mr. Ramsey sent Mr. Steele a letter stating that Farmers evaluated Ms. Cedillo's claim and concluded that it did not exceed $130,000.00. R., 1189. Specifically, Mr. Ramsey explained that Dr. Wilson concluded that Cedillo's C7-T1 herniation and subsequent surgery was more likely than not an

aggravated pre-existing condition and that the injury was only 50% related to the subject accident. *Id.* Mr. Ramsey, on May 5, 2011, explained to Cedillo that the review of Cedillo's medical records do not indicate any long-term physical reason why Ms. Cedillo could not perform her occupation as a real estate agent. *Id.* Mr. Ramsey also raised the issue of the 2008 economic downturn, which greatly impacted the real estate market in Boise, as a likely cause of Cedillo's alleged loss of income, as opposed to her alleged inability to work as a real estate agent. *Id.*

In 2012, Cedillo's injuries continued to evolve. She had both a second cervical surgery, a C5-C6 discectomy and fusion in 2012. She also had a shoulder surgery for a labrum and rotator cuff tear. As a result of these surgeries, Cedillo incurred additional medical expenses and based upon the new records and expert opinions which were produced, Farmers re-evaluated the claim and paid an additional $155,000 prior to the arbitration on October 18, 2012. Prior to the Arbitrator's decision, Ms. Cedillo had received $285,000.00 to compensate her for her alleged injuries caused by Mr. Steele's negligent operation of his motorcycle.

As is established in *Cedillo*, ultimately, the parties did not agree on the amount of contract damages Cedillo was legally entitled to recover and Cedillo's UIM claim was submitted to binding arbitration. *Cedillo,* 345 P.3d at 216.

II. ARGUMENT

A. The District Court's discovery rulings should be upheld and affirmed because the District Court correctly perceived these discovery matters as discretionary, acted within the applicable legal standards and exercised sound reasoning in entering both its July 17, 2015 Order and its September 16, 2015 Order.

Cedillo's appellate brief on discovery issues fails to comply with the requirements of Idaho Appellate Rule 35. I.A.R. 35 expressly provides that the brief "shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to authorities, statues and parts of the transcript and record relied upon." I.A.R. 35(a)(6). Also, a general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue. *Michael v. Zehm*, 74 Idaho 442, 445, 263 P.2d 990, 991 (1953). Under Idaho law, to the extent that an assignment of error is not argued and supported in compliance with the Idaho Appellate Rules, it is deemed to be waived. *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005). As this Court has repeatedly held that it will not consider an issue which is not supported by argument and authority in the opening brief, Cedillo's appeal of discovery issues should not be considered. *Liponis v. Bach*, 149 Idaho 372, 374, 234 P.3d 696, 698 (2010). *See also Taylor v. AIA Servs. Corp.*, 151 Idaho 552, 559, 261 P.3d 829, 836 (2011).

"Control of discovery is within the discretion of the trial court." *Jen-Rath Co. v. Kit Mfg. Co.*, 137 Idaho 330, 336, 48 P.3d 659, 665 (2002). "A trial court's decision to grant or deny a motion to compel will not be disturbed by this Court unless there has been a clear abuse of discretion." *Taylor v. AIA Servs. Corp.*, 151 Idaho 552, 571, 261 P.3d 829, 848 (2011) citing

Sirius LC v. Erickson, 144 Idaho 38, 43, 156 P.3d 539, 544 (2007).

"The burden of showing the trial court abused its discretion rests with the appellant." *Walker v. Boozer*, 140 Idaho 451, 456, 95 P.3d 69, 74 (2004). In reviewing a trial court's abuse of discretion, this Court considers: (1) whether the court correctly perceived the issue as discretionary; (2) whether the court acted within the outer boundaries of its discretion and consistently with applicable legal standards; and (3) whether it reached its decision by an exercise of reason. *Stewart v. Stewart*, 143 Idaho 673, 678, 152 P.3d 544, 549 (2007).

In this case, Cedillo's appellate brief makes no attempt to address the matters this Court considers when evaluating a claimed abuse of discretion. In a recent opinion, the Court concluded that an appellant's brief was "fatally deficient" when the appellant failed to identify and apply the applicable standard of review. *Cummings v. Stephens*, No. 43081, 2016 Ida. LEXIS 265, at *14-15 (Sept. 12, 2016). In *Cummings*, the Court noted the appellant's fatal deficiencies included not contending that the district court failed to perceive the issue as one of discretion, not arguing that the district court failed to act within the boundaries of its discretion and consistent with the legal standards and not arguing that the district court failed to reach its decision by an exercise of reason. *Cummings*, 2016 Ida. LEXIS at *14-15. Accordingly, given Cedillo's fatal deficiencies, this Court should not consider Cedillo's appeal of discovery issues.

In addition to the above discussed briefing deficiencies, Cedillo also presents her issues on appeal related to the District Court's discovery rulings in a jumbled fashion without appropriately linking her appeal issue to a specific District Court action or ruling. For ease in addressing these appellate issues, to the end the Court does consider Cedillo's appeal, Farmers

has organized its Respondent's Brief by Order date and will address the Orders and the issues decided by each Order chronologically.

1. **July 17, 2015 Order.**

   a. ***Cedillo failed to preserve her appeal regarding ESI discovery and, to the extent that the District Court entered an order on this issue, it did not abuse its discretion.***

Cedillo first filed a Motion to Compel Farmers' Answers and Responses to Cedillo's First Set of Interrogatories and Requests for Production of Documents on November 25, 2013. R., 20. While it is unclear in the record whether this Motion was heard by the Court, it is clear that no ruling was issued with respect to Cedillo's Motion to Compel prior to the District Court losing jurisdiction over the case due to the arbitration appeal. Upon returning to the District Court, Cedillo filed a Renewed Motion to Compel on May 28, 2015. R., 131. In her Renewed Motion to Compel, Cedillo challenged Farmers' Answer to Interrogatory No. 9 and Farmers' Response to Request for Production of Documents No. 4, which Cedillo labels as "Electronically Stored Information (ESI) discovery." R., 306. As outlined in Farmers' Opposition to Cedillo's Renewed Motion to Compel, Cedillo's counsel had failed to meet and confer with Farmers' counsel to address her specific allegations of Farmers' deficiency in responding to her Interrogatories and Requests for Production of Documents involving "ESI" as was required prior to filing a Motion to Compel per Rule 37(a)(2) of the Idaho Rules Civil Procedure. R., 311 and R., 313.

Cedillo's Renewed Motion to Compel was heard by the District Court on July 16, 2015. A written Memorandum Decision and Order Granting Cedillo's Renewed Motion to Compel was

entered on July 17, 2015. R., 386-393. In this July 17, 2015 Memorandum Order, the District Court noted that with regard to Electronically Stored Information, the "parties are working to resolve these conflicts." R., 391. The Court entered a "general order" requiring Farmers to "identify whether any responsive ESI exits, and then to the extent it exists, disclose what it is and how it is stored, no later than July 31, 2015." R., 391. Farmers complied with this Order. R., 416-417. The Court further noted "the parties are working to provide search terms to search Farmers' computers, network, email servers and other ESI storage systems regarding discovery in this case." R., 391.

The Court expressly stated in the July 17, 2015 Memorandum Order, "[t]o the extent these issues remain unresolved, or further objections are raised, **the parties may address these issues with their briefing for the hearing scheduled Aug. (sic) 20, 2015**." (Emphasis added.) R., 391.

A review of the appellate record makes it clear that prior to the August 20, 2015 hearing, Cedillo failed to file any briefing in advance of the hearing on any unresolved issues or concerns related to "ESI discovery."

As set forth in the Court's Memorandum Decision and Order granting in part Cedillo's Renewed Motion to Compel, dated September 16, 2015, the Court held a hearing on August 20, 2015 to address any remaining discovery issues the parties could not resolve on their own. R., 491. Prior to the August 20, 2015 hearing, on August 14, 2015, Cedillo filed a Motion for In Camera Review of Documents. R., 395. This Motion did <u>not</u> address any unresolved issues or concerns related to "ESI discovery" related to the July 17, 2015 Memorandum Order. R., 395.

Rather, Cedillo was seeking an "*in camera* review" of documents which existed in a hard copy, paper form.

Of significance, Cedillo's appellate brief fails to even reference the Court's July 17, 2015 Memorandum Order in which it entered a general order on ESI discovery. To the extent that the issue of "ESI discovery" was even decided by the District Court on July 17, 2015, it correctly perceived the issue of ESI discovery as discretionary, acted within the bounds of discretion and consistently with applicable legal standards, and reached its decision by an exercise of reason. On appeal, Cedillo has not and cannot show that the District Court abused its discretion in granting Cedillo's Renewed Motion to Compel on the issue of "ESI discovery." Additionally, Cedillo failed to preserve this issue for appeal by her own failure to submit briefing on any unresolved issues or concerns related to ESI discovery prior to the August 20, 2015 hearing.

b. The District Court correctly ruled on the timing of objections under Idaho Rule of Civil Procedure 33 and did not abuse its discretion.

In her Renewed Motion to Compel, Cedillo requested that the District Court conclude that discovery objections not raised timely are waived. In its July 17, 2015 Memorandum Order, the District Court denied Cedillo's requested ruling. R., 386-393. In doing so, the District Court noted Cedillo failed to cite to any Idaho authority in support of her argument and distinguished the Idaho Rules of Civil Procedure from the Federal Rules of Civil Procedure. R., 392.

In reaching its well-reasoned opinion, the District Court stated that I.R.C.P. 33, as it read on July 17, 2015, contained no language to support such a waiver ruling. R., 392. The District Court further noted that "I.R.C.P. 26(e) requires supplementation of discovery responses under

certain circumstances, which conceivably could include supplemental grounds for objections." R., 392.

As discussed above, the District Court correctly perceived the discovery issues as discretionary. Additionally, it correctly applied the Idaho Rules of Civil Procedure and reached a sound, well-reasoned decision. Here, Cedillo's appeal fails because she does not even argue that the District Court abused its discretion in reaching its decision.

2. September 16, 2015 Order.

The next appellate issues raised by Cedillo arise from the District Court's Memorandum Decision and Order granting in part Cedillo's Renewed Motion to Compel, dated September 16, 2015. R., 490-506. Importantly, as discussed above, in raising these issues on appeal, Cedillo fails to comply with I.A.R. 35. As discussed above, Cedillo has failed to address the appellate issue before the Court: whether the Court abused its discretion in making the discovery rulings set forth in Court's Memorandum Decision and Order granting in part Cedillo's Renewed Motion to Compel, dated September 16, 2015.[3] In Cedillo's appellate brief, she has simply repeated her briefing and arguments set forth in her Memorandum in Support of Cedillo's Renewed Motion to Compel, which she previously filed in the District Court. *See* R., 296-304. Merely re-arguing a motion to compel on appeal is inappropriate and her arguments should be disregarded.

In this case, Farmers produced a bulk of the approximately 6700 pages in the claim file.

[3] Cedillo's deficiency is apparent in the manner in which she identifies the pending appellate issue: "will this Court adopt the reasoning and conclusions of the Washington Supreme Court in the bad faith case of *Cedell v. Farmers Insurance Company of Washington*, 176 Wash. 2d 686, 295 P.3d 239 (2013)."

R., 331-356. Farmers asserted approximately 150 pages of the claim file were privileged. R., 447-460. A privilege log was provided to Cedillo with regard to these documents. R., 447-460. However, Cedillo took the position in her Motion to Compel that nothing in the claim file was privileged.

Ultimately, the parties reached a discovery impasse and the District Court addressed the discovery dispute. In its detailed seventeen (17) page September 16, 2015 Memorandum Order, the District Court addressed several discovery issues specifically related to the underinsured motorist claim file that Farmers maintained for Cedillo's claim, including but not limited to the sufficiency of Farmers' privilege claims under Idaho law, the required scope of production of documents in the claim file under Idaho law, and the District Court's findings following its *in camera* review of disputed portions of Farmers' claim file.

In its September 16, 2015 Memorandum Order, the District Court carefully analyzed the discovery issues. Specifically, the District Court discussed *Myers v. Workmen's Auto Ins Co.* and *Kirk v. Ford Motor Co.* R., 496. After analyzing these cases, the District Court appropriately noted that "while these cases provide guidance, they are not directly on point." *Id.* The District Court also considered the Washington State case, *Cedell v. Farmers Insurance Company of Washington*, 176 Wash. 2d 686, 295 P.3d 239 (2013). R., 498. Of note, in *Cedell*, Washington addressed the production of an insurance claim file with a pending bad faith claim.

The District Court also noted that the Idaho Federal District Court specifically recognized in *Stewart Title Guar. Co. v. Credit Suisse* that "[t]here is no Idaho Supreme Court decision issue addressing the issue faced by *Cedell*." R., 498. While the District Court opined "*Cedell* is

extremely persuasive," the District Court ultimately held that it was "simply unwilling to whole-heartedly endorse the result in *Cedell* and other similar cases on the assumption that the Idaho Supreme Court will do so." R., 498-499. The District Court further noted that "there are sufficient methods under Idaho law to circumvent privilege and the work-product doctrine in the exceptions stated in the rules, so that there is no need to create a new method of circumvention." R., 499. Contrary to Cedillo's urgings, the District Court expressly stated that "disclosure is not automatic" of a claim file and agreed that there was a tension between the protection and the disclosure of documents in a claim file in a bad faith claim. *Id.*

Here, the District Court conducted an *in camera* review of the disputed documents and considered the application of the work product doctrine and the joint client exception to the attorney client privilege (I.R.E. 502(d)(5)) to such documents. As set forth in its Order, the District Court determined that some of the disputed documents needed to be produced while others could be redacted or completely withheld. R., 501-505. In rendering its September 16, 2015 Memorandum Order, the District Court appropriately considered and reviewed all documents, including documents which involved or were authored by Attorney Jeff Thomson, who represented Farmers in the contract arbitration, and documents which involved or were authored by Farmers' adjuster Ron Ramsey. R., 499. The District Court correctly decided, on a document by document basis, whether such documents were subject to disclosure or whether the privilege applied to the document. Cedillo received the documents that the District Court ordered production of within seven days of the Order. Hence, as set forth in the September 16, 2015 Memorandum Order, the District Court granted in part and denied in part Cedillo's

Renewed Motion to Compel and Motion for *In Camera* Review. R., 506. In a separate Order, the District Court also awarded attorney fees of $15,000.00 to Cedillo as she prevailed in part on her motion to compel. R., 508-516.

Importantly, Cedillo has not argued that the District Court abused its discretion in conducting an *in camera* review of disputed documents identified in Farmers' privilege log. Nor has she argued that the District Court abused its discretion in its application of work product doctrine and the joint client exception to the attorney client privilege to the documents it reviewed *in camera*. Moreover, Cedillo's generic and vague appellate arguments that Farmers should be required to disclose all papers prepared by Attorney Thomson and Ron Ramsey are without merit and should not be considered on appeal.

Here, the District Court undisputedly recognized the discovery issues raised by Cedillo's Motions to Compel as discretionary. On an issue of first impression in Idaho, the District Court carefully considered Idaho cases which would provide guidance on this discovery matter as well reviewing similar cases decided in other jurisdictions (*i.e.*, *Cedell*). Here, the District Court skillfully addressed the discovery issues under Idaho law. The District Court appropriately did not adopt Washington law on this discovery issue based on the speculative assumption that the Idaho Supreme Court would potentially do the same.

In sum, Cedillo has failed to fulfill her burden of proof and establish that the District Court abused its discretion in entering its September 16, 2015 Memorandum Order. Rather, it is clear that the District Court acted within the bounds of its discretion, correctly applied the applicable legal standards in Idaho and reached its decision by an exercise of reason.

Accordingly, this Court should affirm the District Court's September 16, 2015 Memorandum Order.

B. Cedillo's failure to establish an essential element of her bad faith claim, that her claim was not fairly debatable, warrants the entry of summary judgment on this claim.

Of great significance, in her appellate briefing, Cedillo fails to identify the applicable standard of review for this appeal issue and she fails to apply such a standard in her briefing. I.A.R. 35(a)(6). *See also Taylor*, 151 Idaho at 559, 261 P.3d at 836. As discussed above, these omissions are "fatally deficient" for her appeal and the Court should decline to address this appellate issue.

A *de novo* review standard applies to an appeal arising from an order granting or denying summary judgment. *Reynolds v. Trout Jones Gledhill Fuhrman, P.A.*, 293 P.3d 645, 650-651 (2013). The standard of review on appeal from summary judgment is the same standard as that used by the district court in ruling on the motion for summary judgment. *Taylor v. McNichols*, 149 Idaho 826, 832, 243 P.3d 642, 648 (2010).

Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). "If there is no genuine issue of material fact, only a question of law remains, over which this Court exercises free review." *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 307, 160 P.3d 743, 746 (2007).

Moreover, if the nonmoving party cannot make a showing on an element essential to her claim, "there can be no genuine issue of material fact since a complete failure of proof concerning an essential element on the nonmoving party's case necessarily renders all other facts immaterial." *McGilvray v. Farmers New World Life Ins. Co.*, 136 Idaho 39, 42, 28 P.3d 380, 383 (2001). Therefore, if the nonmoving party fails to provide a sufficient showing to establish the essential elements of her case, summary judgment shall be granted to the moving party. *Porter v. Bassett*, 146 Idaho 399, 403, 195 P.3d 1212, 1216 (2008).

Idaho law clearly provides that to prevail on a bad faith claim, the insured must prove (1) the insurer intentionally and unreasonably denied or withheld payment; (2) the claim was not fairly debatable; (3) that the denial or failure to pay was not the result of a good faith mistake; and (4) the resulting harm is not fully compensable by contract damages. *Lakeland True Value Hardware, LLC v. The Hartford Ins. Co.*, 153 Idaho 716, 721, 291 P.3d 399, 404 (2012). A claim is fairly debatable if, at the time the claim was under consideration, "there existed a legitimate question or difference of opinion over the eligibility, amount or value of the claim." *Robinson v. State Farm Mut. Auto Ins. Co.*, 137 Idaho 173, 177-178, 45 P. 2d 829, 833-834 (2002). As this Court is aware, the tort of bad faith is not a tortious breach of contract, but a breach of a duty imposed as a consequence of a contractual relationship. *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 97, 730 P.2d 1014, 1017 (1986).

In Idaho, the Idaho Supreme Court has addressed the fairly debatable issue in five cases and the Idaho Court of Appeals has addressed the issue in one case. In five of those six cases, the Idaho Appellate Courts have held that the insured's claim **was** fairly debatable and thus, **no**

viable bad faith action arose. *See Lakeland True Hardware, LLC v. Hartford*, 153 Idaho 716, 291 P.3d 399 (2012) (plaintiff failed to provide evidence that its claim was not fairly debatable.); *Robinson v. State Farm*, 137 Idaho 173, 45 P.3d 829 (2002) (burden is on plaintiff to show the claim is not fairly debatable); *Jacobson v. State Farm*, 136 Idaho 171, 30 P.3d 949 (2001); *Roper v. State Farm*, 131 Idaho 459, 958 P.2d 1145 (1998) (investigation by the insurance company as to causation between the medical condition and the accident does not create a claim for bad faith); *Anderson v. Farmers Ins. Co. of Idaho*, 130 Idaho 755, 947 P.2d 1003 (1997) (claim was fairly debatable because the carrier consistently maintained that plaintiff's remaining medical bills and general damages were in dispute and that the accident was not a significant factor in causing plaintiff's medical problems); *Greene v. Truck Ins. Exchange*, 114 Idaho 63, 753 P.2d 274 (Ct. App. 1988) (bad faith claim was not viable because the insurance company performed tasks imposed on it by the policy; it acknowledged, investigated, and offered payment based on its investigation).

In this case, Farmers filed a Motion for Summary Judgment on Cedillo's cause of action for bad faith specifically challenging the tort element of "fairly debatable." In responding to such a summary judgment motion, Plaintiff must establish that her claim was not fairly debatable to survive the summary judgment challenge. Importantly, the burden does not rest with moving party, Farmers, to show that the claim was fairly debatable. In this case, the District Court correctly stated and applied this standard and the burden of proof. R., 2294-2295.

Summary judgment is warranted because Cedillo has failed to establish an essential element of her case. Summary judgment is also appropriate because Cedillo has failed to

establish a material question of fact as to whether her claim was not fairly debatable. Here, Cedillo erroneously argues that the arbitration findings conclusively establish that her claim was not fairly debatable. As discussed above, the contractual issues in this case were previously arbitrated and, ultimately, this Court reviewed the arbitration decision and the imposition of attorney fees and costs. Upon remand to the District Court, following the first appeal, one of the remaining causes of action was Cedillo's tort claim for bad faith.

Cedillo's argument that "the issues raised in Farmers' Motion for Summary Judgment were resolved in arbitration" and "whether Cedillo's claim was "fairly debatable" or not has been resolved in Cedillo's favor" are incorrect as a matter of law. There is clear Idaho case law distinguishing between contractual claims and the tort of bad faith. Of note, the District Court expressly addressed Cedillo's apparent confusion between contract and tort. R., 2296-2297. The District Court clearly held that the pending summary judgment was brought on one element of the tort of bad faith, fairly debatable, and contractual claims addressed in arbitration were wholly separate from the issues related to the tort of bad faith. R., 2296-2297. Yet, Cedillo continues to advocate for misapplication of Idaho law and continues to conflate the contract issue and the tort issue in her opposition to Farmers' Motion for Summary Judgment.

Moreover, summary judgement is appropriate because Cedillo's arguments in opposition to Farmers' summary judgment motion are wholly unsupported by evidence in the record. The District Court's opinion is telling in this regard. The District Court noted, "in this case, Cedillo spent so much time arguing about the fairness of her claim, and the bad behavior of Defendant Farmers, that she simply did not present the Court with any evidence that the claim was not fairly

debatable." R., 2301. The District Court also stated "Cedillo has not created a factual issue because Cedillo has not identified to the Court exactly where that evidence is in the record." R., 2301.

Similarly, despite making the following sweeping statement in her appellate brief, "[t]he record in this case presents facts which entitle Cedillo to present her bad faith claim to a jury," the only record citation in her appellate brief supporting Cedillo's argument is to that of her retained expert witness's report. *See* Appellant's Brief, p. 37.

Cedillo's retained expert witness report is not evidence upon which a jury could rely to determine if a claim was not fairly datable. *See* R., 2299. Mr. Paul does not address the "fairly debatable" issue, except in a cursory and conclusory fashion. R., 2299. In fact, Mr. Paul admits some aspects of the claim were fairly debatable in stating "[w]hile some individual acts were based on fairly debatable issues, others were not, and the totality of Farmers' conduct could not be characterized as reasonable." R., 1879. Hence, it is clear that Mr. Paul's report does not support Cedillo's burden of proof in establishing that the claim was not fairly debatable nor does it raise a factual issue to preclude the entry of summary judgment.

On the other hand, as recognized in the District Court's opinion, there is voluminous support in Farmers' record establishing the claim was fairly debatable. R., 2297-2299. The type of claim (*i.e.*, a disputed value claim), Cedillo's failure to provide Farmers with adequate information to allow an investigation of the claim, as well as the existence of complicated, pre-existing injuries all illustrate that her claim was fairly debatable.

Specifically, in this case, a review of the evidence in the record clearly shows that there was a reasonable dispute between Cedillo and Farmers about the value of the claim, rendering the claim fairly debatable. The initial communications between the parties indicates that the claim was fairly debatable because Cedillo had incurred medical expenses of $53,048.62, yet nevertheless demanded $500,000.00. R., 1171.

Furthermore, in March 2010, Cedillo claimed the need for additional surgery; however, she refused to provide the information related to the need for such surgery for at least six months. R., 1175-1176, 1185-1186. Cedillo later added a wage loss claim, but again failed to provide the requisite evidentiary support. R., 1177-1179, 1182-1185, 1185-1186. She even testified at her own deposition approximately four years after the subject accident that she had a wage loss claim, but she could not put a dollar amount on it. R., 1721 (pp. 80:24-81:21).

Moreover, Cedillo had extensive pre-existing injuries to her spine and shoulder, which rendered her claimed damages and injuries fairly debatable. R., 1156-1163. A review of the record shows these arguments are supported by the Affidavits of Richard Wilson, M.D. (R., 1203-1233), Mark Williams, D.O. (R., 1234-1239) and Shannon Purvis (R., 1192-1202).[4] The defense's summary judgment was also supported by testimony found in the deposition and arbitration transcripts of Dr. Price, Dr. Little and Dr. Goodwin. *See* generally, R., 1156-1163. *See also*, R., 1320-1353, 1244-1254, 1461-1471. The record clearly demonstrates that Cedillo

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[4] Cedillo did file a Motion to Strike these Affidavits alleging inadmissible hearsay, however, the District Court correctly concluded that these Affidavits were admissible. R., 2285-2287. Of note, in her appellate brief, Cedillo is not challenging the Court's evidentiary ruling on her Motion to Strike, but rather is just reiterating her misguided position that the contractual arbitration is determinative of the claim for bad faith.

presented no admissible evidence establishing that her pre-existing injuries did not make the claim fairly debatable as is required under I.R.C.P. 56. *See Lucas v. State Farm Fire & Cas. Co.*, 131 Idaho 674, 678, 963 P.2d 357, 361 (1998).

Again, in response to Farmers' Motion and its arguments on her complex pre-existing injuries showing the claim was fairly debatable, Cedillo has put forth her misguided arguments about the relevancy of the contractual arbitration. She has similarly lodged allegations about Dr. Wilson and Dr. Williams being "biased actors" and providing objectionable testimony in their respective admissible affidavits submitted to the District Court. However, Cedillo utterly fails to use pleadings, depositions, admissions or affidavits to show that there is a genuine issue as to any material fact demonstrating that her claim was not fairly debatable. Said differently, the testimony in the record regarding Cedillo's injuries demonstrates that there was a dispute about the cause and nature of her injuries. Cedillo has failed to come forward with any testimony or admissible evidence to establish that there was no dispute about the cause and nature of her injuries, as she is required to do to survive Farmers' summary judgment challenge.

In sum, under the *de novo* standard of review, the record in this case clearly establishes that summary judgment should be entered on Cedillo's bad faith claim because she cannot establish an essential element of her case, that her claim was not fairly debatable, through her submission of affidavits or admissible evidence. Moreover, she has not raised a material issue of fact, which would preclude the entry of summary judgment. This Court should affirm the District Court's summary judgment decision.

C. The District Court did not abuse its discretion in its denial of Cedillo's Motion to Amend.

With regard to her appeal on the denial of her Motion to Amend, Cedillo similarly fails to identify the applicable standard of review for this appeal issue, she fails to apply such a standard in her briefing and she fails to set forth her appellate issue supported by argument and authority. I.A.R. 35(a)(6). *See also Taylor*, 151 Idaho at 559, 261 P.3d at 836. As discussed above, these omissions are "fatal deficiencies" for her appeal and the Court should decline to address this appellate issue.

In Idaho, a trial court's decision to deny a motion to amend a pleading is reviewed by this Court for an abuse of discretion. *Baxter v. Craney*, 135 Idaho 166, 169, 16 P.3d 263, 266 (2000); *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20, 26 (1997). The burden of showing the trial court abused its discretion rests with the appellant. *Walker*, 140 Idaho at 456, 95 P.3d at 74.

As discussed above, in reviewing a trial court's abuse of discretion, the appellate court considers: (1) whether the court correctly perceived the issue as discretionary; (2) whether the court acted within the outer boundaries of its discretion and consistently with applicable legal standards; and (3) whether it reached its decision by an exercise of reason. *Stewart*, 143 Idaho at 678, 152 P.3d at 549.

Moreover, under Idaho law, to support a motion to add punitive damages, the plaintiff must provide clear and convincing evidence of a reasonable likelihood of proving facts showing that the opposing party's conduct was oppressive, fraudulent, wanton, malicious or outrageous. Idaho Code § 6-1604; *Weaver v. Stafford*, 134 Idaho 691, 699-700, 8 P.3d 1234, 1242-43 (2000);

Vaught v. Dairyland Ins. Co., 131 Idaho 357, 362, 956 P.2d 674, 679 (1998). Additionally, to recover punitive damages for denial of an insurance claim, the insured must show (1) that the company initially refused to pay a valid claim, (2) that the company's refusal to make prompt payment was an extreme deviation from reasonable standards of conduct, and (3) that this extreme deviation occurred with an understanding of the probable consequences. *Greene*, 114 Idaho at 68, 753 P.2d at 279.

Because punitive damages are not favored in the law, Idaho courts have held that they should be awarded only in the most unusual and compelling circumstances. *Gen. Auto Parts Co., Inc. v. Genuine Parts Co.*, 132 Idaho 849, 852, 979 P.2d 1207, 1210 (1999). Additionally, trial courts have wide latitude in determining whether to allow a complaint to be amended to include such a claim. *Id.* at 852.

Here, the District Court correctly perceived that the issue of whether to grant or deny a motion to amend was discretionary. R., 2284. Additionally, the District Court fairly evaluated Cedillo's Motion to Amend under the prevailing Idaho standard for punitive damages. *See* R., 2290-2293. Specifically, in its Order, the District Court analyzed and considered the specific underlying facts including, but not limited to the facts of the subject accident, Cedillo's demand for UIM benefits, the interactions between Cedillo and Farmers that followed her demand, the payment by Farmers, the arbitration and the arbitrator's award in Cedillo's favor. In evaluating these considerations, the District Court noted "[t]he facts show a series of events that, while not ideal and clearly not agreeable to Cedillo, are not necessarily unusual or compelling." R., 2291. In further exercising its discretion, the District Court considered the dispute over the value of the

case and each side's position prior to arbitration. The District Court acknowledged that it was Farmers' decision to arbitrate Cedillo's claims and it ultimately lost in arbitration and ended up paying Cedillo attorney fees and interest. R., 2293. The District Court appropriately noted, "[t]aking that type of chance in a case such as this is a tactical decision, the wisdom of which the Court does not judge." R., 2293.

In its Order, the District Court acknowledged Cedillo's argument that Farmers' conduct was "oppressive, malicious or outrageous." However, after engaging in a thorough review of the facts and the record before the Court, the District Court concluded that Cedillo had not established through clear and convincing evidence a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. R., 2293. Accordingly, the Court denied Cedillo's Motion to Amend the Pleadings to Add a Claim for Punitive Damages. R., 2293.

Of significance, in her appellate brief, Cedillo does not suggest that the District Court abused its discretion or failed to properly perceive the issue of whether to grant or deny her motion to amend as being discretionary. She does not take issue with the standards or legal authority used by the District Court in reaching its decision. Nor does Cedillo argue that the District Court failed to reach its decision by an exercise of reason.

Rather, in her appellate brief, Cedillo merely argues the District Court reached an erroneous decision. She argues that "her expert report and Farmers' own files and its discovery responses" support her Motion to Amend. Of note, the only evidence cited in the record by Cedillo is the report of her expert. Even though Cedillo claims "Farmers' own files and its

discovery responses" support her Motion to Amend, she provides no citation to the record. In reviewing Cedillo's Motion to Amend, the Court also had before it an Affidavit from Robert Anderson, an expert retained by Farmers, who opined that punitive damages should not be added as a claim in the subject case. R., 2234-2236. However, in reaching its written decision, the Court does not identify or cite reliance on one side or the others' expert witness. Rather, as discussed above, the Court through an appropriate exercise of its discretion, evaluated the major facts of the case in reaching its ultimate decision.

Simply stated, in denying Cedillo's Motion to Amend, the Court appropriately exercised its discretion and issued a well-reasoned decision based on Idaho law supporting its denial. On appeal, Cedillo has completely failed to fulfill her burden of showing the trial court abused its discretion in denying her Motion to Amend. Accordingly, this Court should affirm the District Court's decision denying Cedillo's Motion to Amend under the abuse of discretion standard.

III. ATTORNEY FEES

Farmers requests an award of costs and fees on appeal pursuant to Idaho Appellate Rules 40 and 41, and Idaho Code §12-121. An award of attorney fees is appropriate if this Court finds that the appeal was pursued frivolously, unreasonably or without foundation. *Kirkman v. Stoker*, 134 Idaho 541, 546, 6 P.3d 397, 402 (2000). Such an award is proper where the appellant argued issues that were not preserved for appeal, argued with the district court's findings of fact and invited this Court to substitute its own judgment for that of the District Court. *Id.* at 546. It is also proper when the appellant does nothing more than simply invite this Court to second-guess a District Court, when the appellant has made no showing the that the District Court misapplied

well-settled law, or when the appellant failed to provide a cogent argument with regard to the District Court's exercise of discretion. *Pass v. Kenny*, 118 Idaho 445, 450, 797 P.2d 153, 157 (Ct. App. 1990).

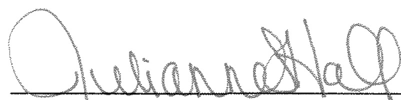
In this case, Cedillo failed to preserve all of her discovery issues for appeal, invited this Court to second-guess the District Court, failed to make a showing that the District Court misapplied well-settled law, and failed to provide cogent arguments with regard to the District Court's exercise of discretion. Therefore, Farmers requests that it be awarded its costs and fees for defending against this frivolous and unreasonable appeal.

IV. CONCLUSION

For the reasons set forth above, Farmers respectfully requests this Court affirm the decisions of the District Court in all respects.

DATED this 20th day of October, 2016.

GJORDING FOUSER, PLLC



Jack S. Gjording – Of the Firm
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Attorneys for Defendant/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of October, 2016, a true and correct copy of the foregoing was served on the following by the manner indicated:

John L. Runft	☐	U.S. Mail
Jon M. Steele	☒	Hand-Delivery
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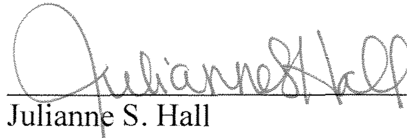

Julianne S. Hall