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CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

THE ESTATE OF BENJAMIN HOLLAND,)
DECEASED, ET AL,)
Plaintiffs,)
vs.)
METROPOLITAN PROPERTY AND)
CASUALTY INSURANCE COMPANY, ET)
AL.)
Defendants.)

Case No. **CV 2010 677**

**MEMORANDUM DECISION AND ORDER
DENYING PLAINTIFFS' MOTION FOR
RECONSIDERATION**

Attorneys: For the Plaintiffs: Kinzo Mihara
For the Defendants: William Schroeder

I. PROCEDURAL HISTORY.

This Court has set forth the procedural and factual history of this matter in its July 20, 2010, Memorandum Decision and Order: 1) Denying Plaintiffs' Motion for Summary Judgment; 2) Denying Plaintiffs' Motion for Attorney Fees and 3) Granting Defendants' Motion to Compel Performance Under the Settlement and Dismiss the Plaintiffs' Motion for Attorney Fees:

This case involves a settled dispute over insurance coverage, with the issue of attorney fees still in dispute.

On January 26, 2010, plaintiffs Estate of Benjamin Holland, deceased, Gregory Holland and Kathleen Holland (Hollands) filed this action alleging defendants Metropolitan Property and Casualty Insurance and MetLife Auto and Home (MetLife) wrongfully failed to pay the amounts due under an insurance contract within thirty days of being provided proof of loss as required under the contract. Hollands claim three counts of breach of contract, two counts each of negligent and intentional infliction of emotional distress, and three counts of bad faith. Additionally, Hollands claim:

The Estate of Benjamin Holland, Gregory Holland, and Kathleen Holland are entitled to reasonable attorney's fees

pursuant to I.C. § 12-120, § 12-121, § 41-1839, and any other applicable statutory authority and/or judicial doctrine which allows for recovery of attorney fees.

Complaint for Damages, p. 7, ¶ IV.

Benjamin Holland died October 25, 2009, as a result of a motor vehicle accident involving an underinsured motorist. Complaint for Damages, p. 3, ¶¶ 6, 7. Benjamin owned a policy of insurance with MetLife which named Benjamin as the named insured, and had limits of \$100,000 per person and \$300,000 per accident. *Id.*, p. 2, ¶ 3. Benjamin's parents, Gregory and Kathleen Holland, also owned a policy with MetLife, with limits of \$250,000 per person and \$500,000 per accident, which extended coverage to relatives who resided in their household. *Id.*, ¶ 4. Hollands claim just prior to the accident and Benjamin's ensuing death, Benjamin was in the process of moving into a house he had bought, but still had a significant portion of his personal property at his parents' home, and Benjamin continued to receive mail at his parents' home. *Id.*, p. 3, ¶ 6.

On February 9, 2010, Hollands filed "Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. 41-1839", an "Affidavit of Kinzo H. Mihara in Support of Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839", and "Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. 41-1839". Hollands claim their counsel are entitled to reasonable attorney's fees in the amount of \$60,000, that amount being 30% (under a contingency fee agreement) of the \$200,000 ultimately recovered from MetLife, pursuant to I.C. § 41-1839, as a result of MetLife's alleged failure to pay the amount justly due under the insurance contract within thirty days after receiving proof of loss.

On March 2, 2010, the parties stipulated to dismiss all claims, but for the pending motion for attorney's fees, and the Court entered an Order dismissing all claims with prejudice and without costs to either party on March 3, 2010. MetLife filed "Defendants' Answer and Affirmative Defenses" on April 12, 2010, addressing only the Hollands' claims for attorney's fees under I.C. § 41-1839, because given the Court's dismissal of all other claims with prejudice, "no Answer is required as to paragraphs 1 through 33, as all claims, except for the claim for I.C. § 41-1839 attorney's fees, alleged in paragraph 34 of the Complaint, have been dismissed with prejudice." Defendants' Answer and Affirmative Defenses, p. 2. On April 13, 2010, MetLife filed an "Affidavit of Kathleen H. Paukert (Submitted in Opposition to Plaintiff's Motion for Attorney Fees)." Kathleen Paukert was retained by MetLife on January 8, 2010, to provide a coverage opinion concerning claims made against MetLife by Holland. *Id.*, p. 2, ¶ 3. On April 28, 2010, MetLife filed a "Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees" and a "Memorandum of Authorities in Support of Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees". In addition to the initial Paukert affidavit, on May 7, 2010, MetLife filed in support of its motion to compel the "Supplemental Affidavit of Kathleen H. Paukert (Submitted in Opposition to

Plaintiffs' Motion for Attorney's Fees)" and the affidavit of "Daneice Davis (Submitted in Opposition to Plaintiffs' Motion for Attorney's Fees)" (Davis), the adjuster assigned by MetLife to the claims made by Benjamin Holland's estate. On May 10, 2010, MetLife filed "Defendants' Response to Plaintiffs' Motion for Attorney's fees Pursuant to I.C. § 41-1839", and the "Affidavit of William J. Schroeder in Support of Defendant's Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. 41-1839." On May 11, 2010, MetLife filed the "Supplemental Affidavit of Daneice Davis (Submitted in Opposition to Plaintiffs' Motion for Attorney's Fees)". On May 17, 2010, Hollands filed "Plaintiffs' Motion for Summary Judgment, "Memorandum in Support of Plaintiffs' Motion for Summary Judgment", "Plaintiffs' Response to Defendants' Motion to Compel Performance or Dismiss Plaintiffs' Motion for Attorney's Fees", and "Plaintiffs' Reply to Defendants Response to Plaintiffs' Motion for Attorneys' Fees Pursuant to I.C. § 41-1839". On May 20, 2010, Hollands filed "Plaintiffs' Motion to Shorten Time for Hearing on Their Motion for Summary Judgment." In Hollands' motion for summary judgment they argue their entitlement to attorney's fees in the amount of \$60,000 or entitlement to fees in general are based on MetLife's failure to have specifically denied the allegations of Hollands in the Complaint. On May 24, 2010, MetLife objected to Hollands' motion to shorten time on their motion for summary judgment because Hollands' chosen course of proceeding did not provide for a briefing schedule as contemplated in the civil rules. Defendants' Response to Plaintiffs' Motion to Shorten Time for Hearing on Plaintiffs' Motion for Summary Judgment, p. 2. However, MetLife assured the Court:

Defendants' response to Plaintiffs' Motion for Summary Judgment will be filed and served on May 25, 2010.

Defendants have no objection to having Plaintiffs' May 17, 2010 Motion for Summary Judgment heard on June 2, 2010, if the Court has sufficient time to hear all of the motions.

Id. On May 25, 2010, MetLife filed "Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment" and an "Affidavit of William J. Schroeder in Opposition to Plaintiffs' Motion for Summary Judgment". On May 26, 2010, MetLife filed its "Sur-Reply to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839", and the "Supplemental Affidavit of Mr. Schroeder William J. Schroeder in Support of Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839." On May 26, 2010, Hollands filed "Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Summary Judgment." Finally, on May 28, 2010, MetLife filed "Defendants' Reply Memorandum in Support of Defendants' Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney Fees."

In summary, before the Court now are Hollands' motions for attorney's fees, motion to shorten time on summary judgment, and for summary judgment on the issue of entitlement to attorney's fees. Also before the Court is MetLife's motion to compel (actually a motion to enforce a settlement) and motion to dismiss Hollands' motion for attorney's fees. All of these motions are interrelated.

Oral argument was held on June 2, 2010. Due to the extremely large amount of briefing filed a short amount of time before oral argument, the Court was required to take these motions under advisement.

Memorandum Decision and Order: 1) Denying Plaintiffs' Motion for Summary Judgment; 2) Denying Plaintiffs' Motion for Attorney fees and 3) Granting Defendants' Motion to Compel Performance Under the Settlement and Dismiss the Plaintiffs' Motion for Attorney Fees, pp. 1-5. After analyzing the issues, this Court held:

IV. CONCLUSION AND ORDER.

For the reasons stated above, the Motion for Summary Judgment must be denied. Additionally, questions of material fact remain regarding the motion for attorney's fees and the motion to compel performance under the settlement.

IT IS HEREBY ORDERED Hollands' Motion to Shorten Time to hear Hollands' Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED Hollands' Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED Hollands' Motion for Attorney Fees is DENIED.

IT IS FURTHER ORDERED MetLife's Motion to Compel Performance Under the Settlement Agreement and to Dismiss Plaintiffs' Motion for Summary Judgment is GRANTED. The Settlement Agreement is enforced. As a result of the granting of MetLife's Motion to Compel Performance Under the Settlement Agreement and to Dismiss Plaintiffs' Motion for Summary Judgment, Hollands are not entitled to attorney fees under I.C. § 41-1839.

Id., p. 32. Regarding attorney fees requested by Hollands under I.C. § 41-1839, this Court held: 1) "Because there is a dispute of fact as to knowledge, and the facts surrounding the reasonableness of the initial refusal to pay the claim, determination of prevailing party cannot be decided at this time" (*Id.*, p. 12); 2) "...there are *separate offers* made at *separate times* on *separate policies*" (*Id.*, p. 13); 3) "...counsel for Hollands has provided no law to support the innovative argument that these time periods on these separate offers made at separate times on separate policies should be *aggregated*" (*Id.*, p. 14); 4) "...if Paukert on behalf of MetLife found the coverage theory that would provide a larger recovery for the Hollands, and if Mihara on behalf of

Hollands accepted that higher amount based on the coverage theory that MetLife's attorney developed, how can Hollands prove there was an unreasonable refusal to pay Hollands' claim under I.C. § 41-1839?" (*Id.*); 5) "[a]nother issue for this Court is whether the proof of loss submitted by Hollands provided MetLife with sufficient information to allow it to investigate and determine its liability. *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho. 589, 593, 130 P.3d 1127, 1131 (2006)" (*Id.*, pp. 14-15). The Court also found MetLife's estoppel arguments failed at least as to Hollands' motion for summary judgment. *Id.*, pp. 15-18.

The Court denied Hollands' motion for summary judgment. *Id.*, pp. 18-20. In granting MetLife's Motion to Enforce Settlement Agreement, this Court held:

The following was discussed above at pages 13-14, but is now analyzed in more detail. **First**, this started out as somewhat of a moving target for Hollands, and thus, MetLife. This impacted MetLife's "reasonable opportunity to investigate and determine its liability". As mentioned above, there were *separate offers* made at *separate times* on *separate policies*. MetLife was prepared to pay policy limits in Claim No. FRD 373130, the initial claim, but that Hollands' counsel Mihara was seeking to make additional claims under Gregory and Kathleen Holland's policies and would not consider the initial matter concluded. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Under I.C. § 41-1839, p. 3. As such, there was no tender on or about December 7, 2009. Also, to the extent there was a tender as to Claim No. FRD 373130, subsequent to the December 7, 2009, offer on that claim number, claims under the two policies held by Gregory and Kathleen Holland were thereafter assigned Claim Numbers FRD 408440 and 408370, and those claims were clearly not contemplated within the initial \$50,000 offer. In her Affidavit, Davis states she informed Holland's counsel Mihara she would be going on a three-week vacation and would not return until January 6, 2010, at which time the two new claims would be reviewed. Affidavit of Daneice Davis, p. 2, ¶ 3. Davis states this delay was acceptable to Hollands, but that she did not send out a letter confirming her conversation with Hollands' counsel. *Id.* Thereafter, Paukert was retained by MetLife on January 8, 2010, and she had contact with Holland's counsel regularly from January 13, 2010, through February 2, 2010, to discuss theories coverage on the additional claims assigned Claim Numbers FRD 408440 and 408370. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Under I.C. § 41-1839, pp. 15-17. MetLife argues the conversation Davis had begins the 30-day clock running on January 6, 2010, rendering the February 3,

2010, settlement timely. *Id.* **Second**, counsel for Hollands has provided no law to support the innovative argument that these time periods on these separate offers made at separate times on separate policies should be *aggregated*. Again, Hollands argue the cumulative time between November 10, 2009, to December 7, 2009, added to the period from January 7, 2010, to January 26, 2010, amounts to well over the thirty days after proof of loss in which MetLife was required to pay an amount justly due. *Id.*, p. 9. This Court can find no such case law to support such a novel argument. Due to the fact that these are separate offers made at separate times on separate policies, there certainly is no factual basis to aggregate these two discrete time periods. **Third**, if Paukert on behalf of MetLife, found the theory that would provide a larger recovery for the Hollands, and Mihara on behalf of Hollands accepts that higher amounts based on the theory MetLife's attorney created, how can Hollands' claim at this time that MetLife was provided "a reasonable opportunity to investigate and determine its liability"?

For these reasons alone, this Court finds Hollands have failed to meet their burden under *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho. 589, 593, 130 P.3d 1127, 1131 (2006) and *Brinkman v. AID Ins. Co.*, 115 Idaho 346, 349-50, 766 P.2d 1227, 1230-31 (1988), because Hollands failed to prove they submitted proof of loss with sufficient information to allow the MetLife a reasonable opportunity to investigate and determine its liability, when it was MetLife that came up with the creative theory for additional coverage.

MetLife's Motion to Enforce Settlement Agreement must be granted, and Hollands are not entitled to attorney fees.

Id., pp. 30-32.

On August 2, 2010, Hollands filed their Motion for Reconsideration and Memorandum in Support of Motion for Reconsideration. MetLife filed their Memorandum in Opposition to Plaintiffs' Motion for Reconsideration on September 20, 2010. Finally, on September 24, 2010, Hollands filed Plaintiffs Reply Memorandum in Support of Their Motion for Reconsideration. Oral argument was held on September 29, 2010. Again, due the large amount of briefing submitted just prior to oral argument (Hollands' *reply* memorandum is 38 pages, and was filed two business days before oral argument), the Court had to take Hollands' Motion to Reconsider under advisement.

II. STANDARD OF REVIEW.

A trial court's decision to grant or deny a motion for reconsideration is reviewed

for an abuse of discretion. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006).

The district court's decision to award attorney fees is a discretionary decision, subject to the abuse of discretion standard of review. *Bailey v. Sanford*, 139 Idaho 744, 753, 86 P.3d 458, 467 (2004). Subsection (3) of Rule 54 obligates the Court to consider factors (A) through (K) in determining an amount of fees through the use of mandatory "shall" language. The Rule requires the District Court to consider all eleven factors plus any others that the Court deems appropriate. *Lettunich v. Lettunich*, 141 Idaho 425, 435, 111 P.3d 110, 120 (2005). The Court need not address each one of the factors in its decision, but the record must demonstrate that the Court considered them all. *Parsons v. Mut. Of Enumclaw Ins. Co.*, 143 Idaho 743, 747, 152 P.3d 614, 618 (2007) (quoting *Boel v. Stewart Title Guar. Co.*, 137 Idaho 9, 16, 43 P.3d 168, 775 (2002)).

III. ANALYSIS.

A. Introduction.

As a threshold matter, a party must prevail in litigation to receive an award under I.C. § 41-1839. *Mancuda Datsun, Inc. v. Universal Underwriters Ins. Co.*, 106 Idaho 163, 169, 676 P.2d 1274, 1280 (Ct.App. 1984) (citing *Halliday v. Farmers Insurance Exchange*, 89 Idaho 293, 404 P.2d 634 (1965)).

In its July 20, 2010, Memorandum Decision and Order: 1) Denying Plaintiffs' Motion for Summary Judgment; 2) Denying Plaintiffs' Motion for Attorney Fees and 3) Granting Defendants' Motion to Compel Performance Under the Settlement and Dismiss the Plaintiffs' Motion for Attorney Fees, this Court recognized its inability to determine a

prevailing party within the meaning of I.C. § 41-1839. An insured must prevail in an action to be entitled to fees under I.C. § 41-1839. *Arreguin v. Farmers Ins. Co. of Idaho*, 145 Idaho 459, 464, 180 P.3d 498, 503 (2008). To prevail, the insured need not obtain a verdict for the full amount requested, only an amount greater than that tendered by the insurer. *Halliday v. Farmers Ins.*, 89 Idaho 293, 301, 404 P.2d 634, 638-39 (1965). The determination of which party prevails, on which issues, and to what extent is in the discretion of the Court. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 857, 920 P.2d 67, 73 (1996). Importantly:

Where the insurer is sued for attorney fees incurred in a separate successful action...the insurer is obligated to pay attorney's fees only if its initial refusal to pay the claim were unreasonable.”

Dawson v. Olson, 94 Idaho 636, 641, 496 P.2d 97, 102 (1972) (discussing uninsured motorist insurance cases). In the instant matter, the Court noted that an initial offer of the \$50,000 policy limit was made with regard to Claim FRD 373130 on December 7, 2009. After making this offer, Daneice Davis was told by Hollands' counsel, “the matter could not be concluded because he had decided to make claims against two policies in which Mr. Holland's parents were the named insureds.” Affidavit of Daneice Davis (Submitted in Opposition to Plaintiffs' Motion for Attorney's Fees), p. 2, ¶ 3. While the \$200,000.00 for which this case ultimately settled is greater than that offered by MetLife in Claim FRD 373130, claims under the two policies held by Gregory and Kathleen Holland were thereafter assigned Claim Numbers FRD 408440 and 408370 and not contemplated within the initial \$50,000.00 offer.

A successful claim for attorney fees under I.C. § 41-1839 requires an insurer to have unreasonably failed to pay an insured the amount justly due for a period of thirty days after being provided with proof of loss; the insured must prevail in an action

thereafter brought against the insurer for recovery under the policy. *Mancuda Datsun, Inc.*, 106 Idaho 163, 169, 676 P.2d 1274, 1280; *Dawson*, 94 Idaho 636, 641, 496 P.2d 97, 102; I.C. § 41-1839. As set forth above, this Court identified several problems with Hollands' claim of entitlement to attorney fees pursuant to I.C. § 41-1839: Hollands not being the prevailing party; Hollands not having provided sufficient proof of loss; questions remaining with regard to when the 30-day time period began to run; and questions remaining regarding whether MetLife had notice of the lawsuit prior to the settlement offer being made. Memorandum Decision and Order: 1) Denying Plaintiffs' Motion for Summary Judgment; 2) Denying Plaintiffs' Motion for Attorney Fees and 3) Granting Defendants' Motion to Compel Performance Under the Settlement and Dismiss the Plaintiffs' Motion for Attorney Fees, pp. 15-18.

B. Hollands' Motion for Reconsideration.

Hollands move this Court to reconsider its July 20, 2010, Memorandum Decision and Order on several bases.

1. First, Hollands argue the Court failed to make required findings of fact as to what constitutes "proof of loss" and should not have imposed a "reasonable amount of information" standard set forth in *Brinkman v. AID Ins. Co.*, 115 Idaho 346, 766 P.2d 1227, (1988), and *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho. 589, 130 P.3d 1127 (2006). Plaintiffs' Memorandum in Support of Motion for Reconsideration, pp. 3-8. It is Hollands' contention that the policies at issue sufficiently define what "proof of loss" must be provided to the insurer. *Id.*, pp. 4-5. Hollands cite to language in the policy requiring an insured to notify MetLife as soon as possible of any accident or loss; this notification is to contain as many details as possible (including names and addresses of drivers, injured persons and witnesses, and the time, place

and circumstances of the accident or loss); the insured must also provide Metlife with details about the death, injury or other treatment, must consent to be examined, must authorize release of medical reports and records, and must submit details concerning the loss through written or recorded statements or examinations under oath. *Id.*

Hollands state oral proof of loss was made on or about November 8, 2009, and a packet of information was submitted to MetLife on November 17, 2009. *Id.*, pp. 5-6. Hollands also argue that, because all policies at issue required the same proof of loss, the thirty-day clock in I.C. § 41-1839 should have begun running on the same date (either November 8 or 17, 2009, when Hollands provided MetLife with information on the accident and death) regardless of the fact that additional claims were made one month after the initial claim. *Id.*, p. 6. Hollands state they were not notified of what additional proof of loss was lacking. *Id.*, p. 7. Additionally, Hollands argue there was no requirement that a copy of the summons and complaint in the instant suit be immediately forwarded to MetLife (as required under the policy if legal action is begun before MetLife makes payment under any coverage), because MetLife paid \$1,000 in med-pay coverage and funeral benefits on December 29, 2010. *Id.*, p. 5.

In response, MetLife argues Hollands misconstrue Idaho case law. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Reconsideration, pp. 8-11. MetLife argues: "...[A]s in *In re Jones, Greenough, and Brinkman*, because proof of loss is not identified in the insurance policies at issue, Plaintiffs were required to provide a proof of loss with sufficient information to allow the insurer a reasonable opportunity to investigate and determine its liability." *Id.*, p. 11. *In re Jones*, 401 B.R. 456 (Bkrtcy. D. Idaho, 2009) involved an insurer's request for bankruptcy documents and the Court's finding that such a request was unreasonable in light of the insurer's insistence that

plaintiff's counsel provide them with hard copies of public records materials which were readily available online. 401 B.R. 456, 464-65. The bankruptcy court in *In re Jones* concluded adequate proof of loss had been submitted to the insurer on the date plaintiff's counsel notified defendant of (third-party insurer) Allstate's offer. The bankruptcy court wrote:

In that letter, counsel sought Defendant's permission to accept Allstate's policy limits offer. The letter also demanded that Defendant pay Plaintiff the \$10,000 in medical payments benefits, together with the \$25,000 UIM benefits, as provided by the policy.

401 B.R. 456, 461. Allstate claimed it needed plaintiff Darice Jones' bankruptcy filings as part of her "proof of loss", and instead of providing such, her attorney simply explained to Allstate that all of Jones' bankruptcy information was available on the bankruptcy court's website. 401 B.R. 456, 463-64. The bankruptcy court held:

Put another way, while Defendant's [Allstate's] need for information from Plaintiff's bankruptcy file may have been reasonable, Defendant's representatives' insistence that Plaintiff's attorney provide them hard-copy documents, coupled with their apparent failure to simply access the public records themselves, was not reasonable.

401 B.R. 456, 464. The disparity in facts between *In re Jones* and the present case are striking. In *In re Jones*, the insured's failing to provide a hard copy of bankruptcy filings, which were easily and readily available to the insurance company, following the insurance company's insistence on their insured providing those documents, was not going to defeat a claim for attorney fees under I.C. § 41-1839. Basically, *In re Jones* was a case of the insured not doing what the surety could have easily done, and the bankruptcy court was unwilling to penalize the insured and reward the surety for the surety's laziness (or dilatory conduct). In the present case, MetLife was struggling to come up with creative interpretations of its *own* policy to *allow additional coverage*, after the interpretations given by Hollands' attorney Mihara were determined by MetLife to

not allow such coverage. This is a case of the surety expending effort to try to find coverage where the insured's efforts had failed. Basically, the surety MetLife was doing what its insured Hollands (through its attorney Mihara) should have done, following which, no good deed going unpunished, Hollands seek to obtain attorney fees against MetLife. Hollands apparently cannot understand why this Court will not grant them summary judgment on attorney fees under I.C. § 41-1839, when there are not only questions of fact regarding that issue, but where the Court has already granted MetLife's Motion to Enforce the Settlement Agreement, for the reasons reiterated above.

In *Greenough*, the Idaho Supreme Court remanded the issue of sufficiency of proof of loss. The Court noted the policy between Farm Bureau and Greenough did not require the proof-of-loss form that Farm Bureau argued was necessary for a sufficient proof of loss, all the policy required was a signed, sworn proof of loss. *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho 589, 593, 130 P.3d 1127, 1131 (2006). The Idaho Supreme Court wrote: "As defined by this Court, a submitted proof of loss is sufficient when the insured provides the insurer with enough information to allow the insurer a reasonable opportunity to investigate and determine its liability." *Id.* As previously stated by this Court, whether the proof of loss Hollands provided MetLife was sufficient to allow it to investigate and determine its liability remains a question of fact and precludes an award of fees pursuant to I.C § 41-1839 at this time. Memorandum Decision and Order: 1) Denying Plaintiffs' Motion for Summary Judgment; 2) Denying Plaintiffs' Motion for Attorney fees and 3) Granting Defendants' Motion to Compel Performance Under the Settlement and Dismiss the Plaintiffs' Motion for Attorney Fees, p. 15; see also *Greenough*, 142 Idaho 589, 593, 130 P.3d 1127, 1131. That answers

the motion to reconsider this Court's denial of Hollands' motion for summary judgment.

As to this Court's grant of MetLife's motion to compel performance under the settlement and dismissal of the Hollands' motion for attorney fees, which this court granted, this Court held:

For these reasons alone [1) moving target by Hollands, 2) no case law supporting aggregating the time periods for the three policies and 3) theory of additional coverage was arrived at by Pauker or at least MetLife and not by Mihara on behalf of Hollands], this Court finds Hollands have failed to meet their burden under *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho. 589, 593, 130 P.3d 1127, 1131 (2006) and *Brinkman v. AID Ins. Co.*, 115 Idaho 346, 349-50, 766 P.2d 1227, 1230-31 (1988), because Hollands failed to prove they submitted proof of loss with sufficient information to allow the MetLife a reasonable opportunity to investigate and determine its liability, when it was MetLife that came up with the creative theory for additional coverage.

Memorandum Decision and Order: 1) Denying Plaintiffs' Motion for Summary Judgment; 2) Denying Plaintiffs' Motion for Attorney fees and 3) Granting Defendants' Motion to Compel Performance Under the Settlement and Dismiss the Plaintiffs' Motion for Attorney Fees, p. 32.

Hollands understandably want to focus on the "proof of loss" and not on the "coverage" issue. In the rare moment that Hollands have discussed "coverage", Hollands only focus on what "information" was lacking. Hollands write: "Defendants have still not expounded upon which *information* was lacking and how it was relevant to their coverage decision." Plaintiffs' Memorandum in Support of Motion for Reconsideration, p. 15. (emphasis added). It is unfathomable, given the Court's prior decision, that Hollands cannot grasp that this is not a "lack of information case", this is not a "proof of loss" case, this is a coverage case. And it is not facts or information or funeral bills that create any lack of information, it is Hollands' attorney Mihara not coming up with the theory of coverage under the policies, the interpretation of the

policies that would lead to greater recovery for his client...it was Paukert who did this at the insistence of MetLife, or at least it was MetLife that came up with these theories.

Incredibly, Hollands' attorney argues: "Plaintiffs' counsel could not be expected to come up with the same theories of recovery as Defendants' attorneys as he did not have the same information in his possession to base his theories on." Plaintiffs' Memorandum in Support of Motion for Reconsideration, p. 17. The same "information" focus is repeated by Hollands. Plaintiffs' Reply in Support of Motion for Reconsideration, p. 19. This argument is incredible for two reasons.

First, Mihara might "...not be expected to come up with the same theories of recovery as..." Paukert, **but it is Mihara's responsibility on behalf of the Hollands to come up with theories of recovery, ie., policy interpretations, that would work as well as Paukerts.** Mihara didn't do that, Paukert did. Paukert beat Mihara to the punch. All is well, Mihara's clients the Hollands recovered a great deal more than if Paukert hadn't done the creative leg work. **But that is no reason to tag on attorney fees against MetLife when they did that creative work.**

Second, Mihara's claim that "...he did not have the same information in his possession to base his theories on" is completely unsupported, unsupportable, and essentially forces Hollands to admit this is a coverage case, not a proof of loss case. Mihara had the same "information" MetLife had...**Mihara provided MetLife with the information MetLife had!** What Mihara lacked was the end result, the creativity to come up with theories of recovery, policy interpretations that led to higher recovery for Mihara's clients the Hollands. Whether that end result of additional coverage was due to a lack of experience in policy interpretation Mihara, Paukert having more experience, or simply a benevolent MetLife pushing for more coverage, is not known, nor does it

matter. Mihara had the policies, so did MetLife. It was Paukert and MetLife that came up with the policy interpretation on coverage that led to additional recovery. It didn't have anything to do with "information" or "proof of loss".

The following excerpt by Hollands shows their intentional focus on "proof of loss" and intentional disregard for the remaining consideration under the statute of "amount justly due". Hollands write:

An insured is entitled to an award of attorney fees only if (1) he has provided proof of loss as required by the insurance policy; (2) the insurance company fails to pay an amount justly due under the policy within thirty days of such proof of loss...
Hansen v. State Farm Mut. Auto. Ins. Co., 112 Idaho 663, 671, 735, P.2d 974, 982 (Idaho 1987) (emphasis added)

Plaintiffs' Memorandum in Support of Motion for Reconsideration, p. 11. By emphasizing the underlined portion of *Hansen*, Hollands also ignore the insurance company's duty to pay the "amount justly due", and sometimes, and in this case is one of those, the "amount justly due" is a coverage question, not a "proof of loss" question. *In re Jones* (401 B.R. 456, 463-64) notes this quote from *Brinkman* (766 P.2d 1227, 1230-31):

The purpose of a provision for notice and proofs of loss is to allow the insurer to form an intelligent estimate of its rights *and liabilities*, to afford it an opportunity for investigation, and to prevent *fraud and imposition* upon it.
Brinkman, 766 P.2d at 1230-31 (citing 44 Am.Jur.2d. "Insurance," § 1323, p. 250). The *Brinkman* court later reiterated that '[t]he purpose of proof of loss statements, in general, is to furnish the insurer with the particulars of the loss *and all data necessary to determine its liability and the amount thereof, if any.*'

(italics added). The italicized portion shows coverage questions are contemplated under I.C. 49-1839.

MetLife argues: "Given the above, Plaintiffs' effort to manufacture a definition of

“proof of loss” in the policy and thereby avoid application of the Greenough and Brinkman standard is without merit and should be denied.” Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Reconsideration, p. 13. This Court could not agree more, Hollands try to conjure up a definition of proof of loss that is unsupported by Idaho case law and by the policies. But more importantly, Hollands fail to realize this is not a proof of loss case, *it is a coverage case*.

2. Second, Hollands argue the Court improperly imposed a requirement that they demonstrate MetLife acted unreasonably or unjustly before the Court would consider awarding fees. Plaintiffs’ Memorandum in Support of Motion for Reconsideration, p. 10. Hollands argue *Dawson v. Olson*, 94 Idaho 636, 641, 496 P.2d 97, 102 (1972) inappropriately imposes a standard upon them which the statute, I.C. § 41-1839, does not contain. *Id.* Hollands argue that because *Dawson* cites to *Cater v. Cascade Ins. Co.*, 92 Idaho 136, 140, 438 p.2d 566, 570 (1968), which has been overruled, any requirement for obtaining fees under the statute must be based only on the wording of I.C. § 41-1839. *Id.*, p. 11. MetLife responds this Court never made any finding as to the reasonableness or unreasonableness of MetLife’s failure to initially pay. Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Reconsideration, pp. 17-18. Indeed, this Court never imposed such an extra-statutory requirement upon Hollands. The Court found questions of fact remained so as to preclude Hollands being found the prevailing party in this matter and specifically noted, “there was no initial refusal by MetLife to pay.” Memorandum Decision and Order: 1) Denying Plaintiffs’ Motion for Summary Judgment; 2) Denying Plaintiffs’ Motion for Attorney fees and 3) Granting Defendants’ Motion to Compel Performance Under the Settlement and Dismiss the Plaintiffs’ Motion for Attorney Fees, p. 12. Given the Court found no initial

refusal to pay by MetLife, there can have been no requirement imposed by the Court upon Hollands that they show such refusal was unreasonable.

3. Third, Hollands argue MetLife did, in fact, have notice of the instant lawsuit at the time the \$200,000.00 settlement offer was made through the application of agency law principles. Plaintiffs' Memorandum in Support of Motion for Reconsideration, pp. 12-14. Hollands argue the plain language of I.C. § 41-1839 does not require a defendant have notice of a lawsuit before the statute is applicable. *Id.*, p. 12. It appears that Hollands are contending this Court improperly imposed a requirement that, for I.C. § 41-1839 to be applicable, MetLife had to have had knowledge of the lawsuit prior to making a settlement offer. Hollands state the \$1,000.00 med-pay and funeral benefits payment made on December 29, 2009, exempts them from the requirement that the complaint and summons be forwarded to MetLife immediately "if any legal action is begun before we make payment under any coverage." Plaintiffs' Memorandum in Support of Motion for Reconsideration, pp. 4-5, quoting Affidavit of Kinzo Mihara in Support of Plaintiffs' Motion for Reconsideration, Ex. 2, p. 19. MetLife replies:

Moreover, with regard to MetLife's knowledge of the lawsuit and the emails, this Court's ruling simply noted that questions of fact remain as to whether MetLife had knowledge of the lawsuit and whether the emails amounted to an enforceable contract.

Defendants' Memorandum in Opposition to Plaintiffs' Motion for Reconsideration, p. 18.

This Court considered the question of whether MetLife had notice of the lawsuit at the time of the settlement offer in distinguishing the instant matter from that in *Parsons v. Mutual of Enumclaw Ins. Co.*, 143 Idaho 743, 152 P.3d 614 (2007), in which the Supreme Court upheld a \$20,000 contingency fee amount where an insurer tendered \$60,000 on November 12, 2004 after Parsons filed her lawsuit (including a

claim for fees under I.C. § 42-1839) on October 26, 2004, and served Mutual of Enumclaw the following day. 143 Idaho 743, 745, 152 P.3d 614, 616. This Court did not identify any requirement that Hollands immediately notify and/or serve MetLife with the Complaint and Summons, but rather noted the question of fact as to MetLife's knowledge of the lawsuit distinguished the matter from *Parsons*. This distinguishing fact was noted in light of a mere portion of the Court's prevailing party analysis, as it was Hollands who contended the \$200,000 settlement offer was made only after initiation of their lawsuit. See Plaintiffs' Reply to Defendants' response to Motion for Attorney's Fees Pursuant to I.C. § 41-1839, p. 5. Prior to the lawsuit, Hollands contend MetLife was only prepared to tender \$50,000 to settle the claims. *Id.* In sum, there was no requirement imposed by the Court with regard to notice of the lawsuit, but, to the extent Hollands claimed the \$200,000 settlement offer was made only after suit was initiated, the Court found questions of material fact remained in this regard.

4 and 5. Fourth and fifth, Hollands' next two claims of error are related. Hollands argue the Court improperly inquired into whether MetLife had sufficient time and/or information to investigate and determine its liability and argues the 30-day time period under I.C. § 41-1839 began to run on either November 8 or 17, 2009. Plaintiffs' Memorandum in Support of Motion for Reconsideration, pp. 14-15. MetLife argues the Court properly noted the "moving target" to which MetLife was subjected and that no authority has been provided supporting Hollands' claim that the various time periods at issue be aggregated. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Reconsideration, pp. 18-19. Hollands' arguments in this regard clearly fail. Idaho case law has defined "proof of loss" so as to impose upon an insured the duty to provide sufficient information to give the insurer a reasonable opportunity to investigate and

determine its liability. See discussion of *Greenough* and *In re Jones, supra*. In their reply brief, Hollands argue for the first time that, even if questions of fact remain regarding the 30-day time limit as to the additional claims, the initial claim was undisputedly made on November 8, 2009, and no tender was made on December 7, 2009 (as found by this Court). Plaintiffs' Reply in Support of Motion for Reconsideration, pp. 30-33. This Court, as discussed *supra*, found that the December 7, 2009, offer by Daneice Davis was met by Hollands' counsel with the statement that the matter would not be concluded as claims against two other policies would be made. Affidavit of Daneice Davis (Submitted in Opposition to Plaintiffs' Motion for Attorney's Fees), p. 2, ¶ 3. The Court does not now find that MetLife failed to pay the initial claim within the meaning of I.C. § 41-1839. Similarly, there has been no support offered for the contention that the time periods applicable to multiple claims under multiple policies may be aggregated.

6. Sixth, Hollands argue the issue of which attorney came up with the theory of recovery ultimately giving rise to the \$200,000 payment is inapplicable to the statutory analysis at hand. Plaintiffs' Memorandum in Support of Motion for Reconsideration, pp. 16-18. However, this Court did not hold that Paukert's arguably coming up with the theory of recovery was part and parcel of the Court's analysis under I.C. § 41-1839. Rather, the Court found enforcement of the settlement agreement proper in light of Paukert's theories, as opposed to those of Hollands' counsel, being the ones providing for larger recovery; thus, it follows that Hollands did not provide MetLife with a reasonable opportunity to investigate and determine liability and the settlement agreement was proper because I.C. § 41-1839 was not a proper basis for fees given the facts of this case. Memorandum Decision and Order: 1) Denying Plaintiffs' Motion for

Summary Judgment; 2) Denying Plaintiffs' Motion for Attorney fees and 3) Granting Defendants' Motion to Compel Performance Under the Settlement and Dismiss the Plaintiffs' Motion for Attorney Fees, pp. 28-32. Additionally, although Hollands now contend Paukert was equivocal in recalling who came up with the "assigned driver theory", (Plaintiffs' Reply in Support of Motion for Reconsideration, p. 24) Paukert stated she was 95% certain the MetLife adjuster came up with the theory. Affidavit of Kathleen Paukert (Submitted in Opposition to Plaintiffs' Motion for Attorney's Fees), p. 3, ¶ 8.

Paukert went on to state:

I want to be very clear. Mr. Mihara did not present valid theories of coverage. MetLife encouraged me to research an area of coverage that Mr. Mihara never presented. At all times the adjuster for MetLife and I were turning over every stone to find coverage. It is definitely not a clear-cut case that there would be coverage under the motorcycle policy. Regardless, MetLife offered the limits.

Id., p. 6, ¶ 16. As such, the Court found the enforcement of the settlement agreement proper because Hollands failed to establish entitlement to relief under I.C. § 41-1839. At oral argument on the instant motion for reconsideration, the Court made it very clear that the "proof of loss" cases reported in Idaho deal with *amounts to be paid* (i.e. expenses, wage loss, etc.) However, in the present case the Court is being confronted with a *coverage issue* in a "proof of loss" matter; and, it was Paukert who created or developed the theories for finding coverage.

7. Seventh, Hollands next argue the Court's March 3, 2010, Order has been interpreted so as to render Hollands' claim for attorney's fees a nullity. "If the Court's interpretation of its order is given literal effect, then the remaining claim for attorney's fees must also be dismissed as there would be no factual allegations left in the complaint to support the claim." Plaintiffs' Memorandum in Support of Motion for Reconsideration, p. 18. However, no portion of this Court's July 20, 2010,

Memorandum Decision and Order: 1) Denying Plaintiffs' Motion for Summary Judgment; 2) Denying Plaintiffs' Motion for Attorney Fees and 3) Granting Defendants' Motion to Compel Performance Under the Settlement and Dismiss the Plaintiffs' Motion for Attorney Fees, in any way finds no factual allegations remained after the Order granting the Joint Motion to Dismiss was entered. The Court dismissed with prejudice all claims other than the claim for fees. Memorandum Decision and Order: 1) Denying Plaintiffs' Motion for Summary Judgment; 2) Denying Plaintiffs' Motion for Attorney fees and 3) Granting Defendants' Motion to Compel Performance Under the Settlement and Dismiss the Plaintiffs' Motion for Attorney Fees, p. 21. Hollands' concern that no claim for attorney fees can be had where no factual allegations remained after the Court's dismissal of the remaining claims is unfounded.

8. Eighth, Hollands contend their motion for attorney's fees, initially filed on February 9, 2010, was never responded to. Hollands claim this Court failed to address this argument. Plaintiffs' Memorandum in Support of Motion for Reconsideration, p. 19. Interestingly, Hollands' initial one sentence argument that: "Plaintiffs would respectfully ask this Court to review the previous findings in this case and to rule on Plaintiffs' argument that Defendants failed to timely object to Plaintiffs' previous motion for attorney's fees" (*Id.*), even though MetLife failed to even brief the issue on reconsideration, turns into a one page argument in Hollands' reply brief. Plaintiffs' Reply in Support of Motion for Reconsideration, p. 36. Hollands argument is as follows:

For the sake of brevity, Plaintiffs incorporate their argument and the facts in support thereof from Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, § II.G. "Defendants have waived any and all objection to Plaintiffs' entitlement to attorney's fees along with the amount claimed by failing to timely object." Plaintiffs would note that I.R.C.P. 54(e)(6) requires any objection to the

allowance of attorney's fees to be made within 14 days. I.R.C.P. 54(e)(6). The case law explaining this rule sets forth that the rule applies both pre and post-judgment therefore disposing of Defendants' lone argument that the applicable rule applies only post-judgment. See *Crowley v. Lafayette Life Ins. Co.*, 106 Idaho 818 (1984). If not objected to, such objection is waived.

Id.

Hollands are correct, the Court failed to address this issue. That was an intentional omission because Hollands essentially sandbagged MetLife on this issue the first time around. Hollands did not raise this argument in their Memorandum in Support of Motion to Determine Attorney's Fees Pursuant to I.C. § 41-1839. All MetLife ever argued was the fact that Hollands have not met the criteria under I.R.C.P. 54(e)(3). Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, pp. 21-23. The first time Hollands raised the issue that MetLife was untimely under I.R.C.P. 54(d)(5) in objecting to Hollands claim for attorney fees, was in their "Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839." This Court has read Hollands argument found at pages 13-15 in Hollands' "Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839." It is this portion of Hollands' prior briefing to which Hollands now refer in the above quoted argument in briefing on reconsideration. Plaintiffs' Reply in Support of Motion for Reconsideration, p. 36. The Court will now address Hollands' specious argument because MetLife has had the opportunity now to respond (and has chosen not to respond).

Hollands' argument that:

"Defendants have waived any and all objection to Plaintiffs' entitlement to attorney's fees along with the amount claimed by failing to timely object." Plaintiffs would note that I.R.C.P. 54(e)(6) requires any objection to the allowance of attorney's fees to be made within 14 days. I.R.C.P. 54(e)(6).

(*Id.*), is entirely without merit.

First of all, not a single one of the several cases cited by Hollands for this novel proposition (found at pages 13-15 in Hollands' "Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839"), discuss attorney fees under I.C. § 41-1839. Each of these cases discuss attorney fees *after* the case has been resolved, not a claim for attorney fees brought at the *inception* of the case such as in the instant matter. *Conner v. Dake*, 103 Idaho 761, 653 P.2d 1173 (1982) concerned attorney fees under I.C. § 12-121 *following* a judgment which did not include attorney fees. 103 Idaho 761, 763, 653 P.2d 1173, 1175. *Operating Engineers Local Union 370 v. Goodwin Const. Co.*, 104 Idaho 83, 656 P.2d 144 (Ct.App. 1982), dealt with a memorandum of costs and fees under I.C. § 12-121 filed *after* summary judgment was granted in favor of the men and against the unions which brought the lawsuit. *Fearless Ferris Wholesale, Inc. v. Howell*, 105 Idaho 699, 672 P.2d 577 (Ct.App. 1983) concerned attorneys fees under I.C. § 12-121 as part of the trial courts findings. *Ada Col. Hwy. Dist. Ex rel Fairbanks v. Accarequi*, 105 Idaho 873, 676 P.2d 1067 (1983) concerned attorney fees *post judgment* allowed by statute in a land condemnation case. *Crowley v. Lafayette Life Insurance Co.*, 106 Idaho 818, 683 P.2d 854 (1984), did not even deal with attorney fees, but only dealt with costs, and held that a memorandum of costs may be filed prematurely. 106 Idaho 818, 823, 683 P.2d 854, 859. *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Ct.App. 1984), concerned attorney fees under I.C. § 12-121 and 12-120(2) *following* final judgment. *Farber v. Howell*, 111 Idaho 132 (Ct.App. 1986) dealt with a *default judgment* and attorney fees under I.C. § 45-1512 (allowing attorney fees on a deed of trust foreclosure). Holland cites *Great Plains Equipment, Inc., v. Northwest Pipeline Corp.*, 132 Idaho 754, 979

P.2d 627 (1999) for the non-ground breaking (and also not relevant to this case) proposition that an affidavit can supply the information needed for a court to analyze attorney fees under I.R.C.P. 54(d)(5). 132 Idaho 754, 775, 979 P.2d 627, 648. *Great Plains* covers attorney fees allowed *post-judgment* under a bond statute.

Second, Hollands' new argument that I.R.C.P. 54(d)(5) applies *pre-judgment* as well as post-judgment, as set forth by Hollands:

The case law explaining this rule sets forth that the rule applies both pre and post-judgment therefore disposing of Defendants' lone argument that the applicable rule applies only post-judgment. See *Crowley v. Lafayette Life Ins. Co.*, 106 Idaho 818 (1984).

(Plaintiffs' Reply in Support of Motion for Reconsideration, p. 36) is unsubstantiated by Hollands in their briefing (the above quote is the entirety of Hollands' argument), and upon a cursory reading of *Crowley*, is entirely without merit. Hollands do not even cite this Court to a page of the *Crowley* decision for their proposition. *Id.* Nowhere in *Crowley* is it expressed by the Idaho Supreme Court that I.R.C.P. 54(d)(5) applies *pre-judgment* as well as post-judgment. Nowhere in *Crowley* is it *implied* that such is the case. Since counsel for Hollands did not favor this court with any more argument to support this bald assertion, this Court can only infer that the way counsel for Hollands makes this claim is based on the fact that the memorandum of costs in *Crowley* was filed prematurely. All *Crowley* says is if a party files a memorandum of costs *prior* to the entry of the judgment, it is simply deemed filed the date the clerk of the court files the court's decision.

There is nothing in I.R.C.P. 54 or 55 that deals with attorney fees prior to judgment. Hollands interpretation of *Crowley* completely disregards I.R.C.P. 54 and 55 taken in context.

Third, on February 9, 2010, Hollands filed Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839 and their memorandum and affidavit of counsel in support thereof. Also on February 9, 2010, the summons in this matter was issued. On March 2, 2010, MetLife filed its Notice of Appearance. Also on March 2, 2010, both parties submitted their Joint Motion and Stipulated Order to Dismiss All Claims Except for the Pending Motion for Attorney Fees. Hollands had not noticed the attorney's fees issue for hearing before the Court entered its Order to Dismiss All Claims Except for the Pending Motion for Attorney's Fees. Counsel for Hollands thereafter noticed up hearing on the attorney's fees issue for May 12, 2010. The motion was ultimately heard on June 2, 2010, after the May 12, 2010, hearing was vacated and continued.

This Court heard Hollands' motion on fees properly pursuant to the Idaho Rules of Civil Procedure. Idaho Rule of Civil Procedure 7(b)(3) requires that "a written motion,...and notice of the hearing thereon shall be filed with the Court, and served so that it is received by the parties no later than fourteen (14) days before the time specified for the hearing." Because Hollands filed their initial motion prior to MetLife's appearance in this matter, and thereafter did not notice the motion for hearing until May 12, 2010, there was simply no action this Court could have taken prior to the June 2, 2010, date hearing on the motion was had.

Hollands' timeliness argument is completely without merit.

9. Finally, Ninth. At oral argument Mihara emphasized a "tender argument" made in his brief on behalf of Hollands:

Indeed, Plaintiffs would ask this Court to note that the statute requires payment of the amount justly due—not just an offer to pay. I.C. S 41-1839. Indeed, Idaho law states that only a written offer is equivalent to a tender. I.C. § 9-1501. In this case, there is no allegation that Defendants made any written offer. Further, it is undisputed that Defendants did not tender, nor offer to tender, \$200,000.00 to Plaintiffs at

any time prior to February 2, 2010. See Aff. K. Mihara (May), Ex. 19. (RFA No. 9). Depending on the date that this Court finds that Plaintiffs submitted proof of loss as required by their policies, it is undisputed as to the date that payment was tendered.

Plaintiffs' Memorandum in Support of Motion for Reconsideration, p. 11. (underlining in original). This Court did discuss this issue. The Court wrote:

Here, the agreement was reached on or about February 3, 2010. However, the parties disagree as to whether attorney fees were covered by that agreement. Both Davis and Paukert state in their affidavits they had no knowledge a suit had been filed by Hollands until February 8, 2010. Affidavit of Daneice Davis, p. 4, ¶ 10; Affidavit of Kathleen Paukert, p. 5, ¶ 13. Thus, MetLife argues attorney fees were not contemplated in the February 3, 2010, agreement.

Memorandum Decision and Order: 1) Denying Plaintiffs' Motion for Summary Judgment; 2) Denying Plaintiffs' Motion for Attorney fees and 3) Granting Defendants' Motion to Compel Performance Under the Settlement and Dismiss the Plaintiffs' Motion for Attorney Fees, p. 23. The date of "tender" has nothing to do with the Court's decision to grant the motion to enforce the settlement agreement. The following had everything to do with the Court's decision: 1) moving target by Hollands, 2) no case law supporting aggregating the time periods for the three policies and 3) theory of additional coverage was arrived at by Pauker or at least MetLife and not by Mihara on behalf of Hollands.

IV. METLIFE'S PRESENTMENT OF JUDGMENT.

On September 20, 2010, MetLife filed its Notice of Presentment (of a Judgment of Dismissal With Prejudice). While its motion to reconsider was still pending, Hollands have nonetheless not objected to the form of the proposed judgment. The Court has reviewed the form of the proposed Judgment and finds it to be accurate and appropriate given the Court's prior ruling filed July 20, 2010, and this Court's ruling filed presently on Hollands' motion for reconsideration.

IV. CONCLUSION AND ORDER.

For the reasons stated above, Hollands' Motion for Reconsideration must be denied.

IT IS HEREBY ORDERED Hollands' Motion for Reconsideration is DENIED.

IT IS FURTHER ORDERED the judgment presented by MetLife on September 20, 2010, will be signed and entered.

Entered this 6th day of October, 2010.

John T. Mitchell, District Judge

I certify that on the _____ day of October, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Lawyer</u>	<u>Fax #</u>
Kinzo H. Mihara	667-4695	William J. Schroeder	509-838-0007

Jeanne Clausen, Deputy Clerk