

COURT OF APPEALS
DIVISION II

09 OCT -08 PM 12:51

STATE OF WASHINGTON
BY JW
DEPUTY

NO. 38921-5-II

Grays Harbor County Superior Court

Cause No. 07-2-01376-4

**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON**

BRUCE CEDELL, a single man,

Plaintiff / Respondent,

v.

FARMERS INSURANCE OF WASHINGTON,

Defendant / Appellant.

RESPONSE TO APPELLANT'S BRIEF

RE DISCRETIONARY REVIEW

Stephen L. Olson
Olson, Zabriskie & Campbell, Inc.
104 West Marcy Avenue
Montesano, WA 98563
(360) 249-6174

LC 101107
M A

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. FACTS	1
II. ARGUMENT.....	12
A. <i>Relevancy</i>	12
B. <i>Attorney / Client and Work Product Claims</i>	13
III. IN CAMERA REVIEW	18
A. <i>The superior court did not commit error by ordering the in camera review of the documents claimed to be protected by the attorney-client privilege and the work product doctrine</i>	18
IV. DISCOVERY ABUSES	24
A. <i>The Trial Court's imposition of monetary sanctions was not an abuse of discretion</i>	24

TABLE OF AUTHORITIES

	Page
Washington State Cases	
<u>Barry v. USAA</u> , 98 Wn. App. 199, 989 P.2d 1172 (1999)	10,13,17,23
<u>Burnet v. Spokane Ambulance</u> , 131 Wn.2d 484, 933 P.2d 1036 (1997)	27,27
<u>Coburn v. Seda</u> , 101 Wn.2d 270, 274, 677 P.2d 173 (1984)	19
<u>Dayton v. Farmers Ins. Group</u> , 124 Wn. 2d 277, 281, 876 P.2d 896 (1994)	14
<u>Dike v. Dike</u> , 75 Wn.2d 1, 448 P.2d 490 (1968)	17,19
<u>Ellwein vs. Hartford Co.</u> , 142 Wn.2d 766, 779, 15 P.3d 640	11
<u>Escalante v. Sentry Insurance Company</u> , 49 Wn. App. 375, 743 P.2d 832 (1987)	11,14,18,20,23
<u>Gammon v. Clark Equipment Co.</u> , 38 Wn.App. 274, 686 P.2d 1102 (1984)	12
<u>Heidebrink v. Moriwaki</u> , 104 Wn.2d 392, 706 P.2d 212 (1985)	20,21,23
<u>Magana v. Hyundai Motor Am.</u> , 141 Wn.App. 495, 170 P.3d 1165 (2007)	27
<u>Mayer v. Sto Indus., Inc.</u> , 156 Wn.2d 677, 132 P.3d 115 (2006)	28
<u>Physicians Ins. Exchange v. Fisons Corp.</u> , 172 Wn.2d 299, 858 P.2d 1054 (1993).....	25,27,28
<u>Roberson v. Perez</u> , 123 Wn.App. 320, 96 P3d 420 (2004)	28
<u>Smith v. Behr Process Corp.</u> , 113 Wn.App. 306, 324, 54 P.3d 665 (2002)	27
<u>Snedigar v. Hoddersen</u> , 114 Wn.2d 153, 169, 786 P.2d 781 (1990)	27

Taylor v. Cessna Aircraft Co.,
39 Wn.App. 828, 696 P.2d 28 (1985).....12,26

Washington State Physicians Insurance Exchange and Association v.
Fisons Corporation,
122 Wn.2d 299, 339, 858 P.2d 1054 (1993)25,27,28

Non-Washington State Cases

Baker v. CNA Ins. Co., 123 F.R.D. 322, 326 (D. Mont. 1988)14

Brown v. Superior Court in and for Maricopa County,
137 Ariz. 327, 670 P.2d 725 (1983)15,16,21,24

Caldwell v. District Court in and for the City and County of Denver,
--Colo.--, 644 P.2d 26 (Colo. 1982)16,19

Gibson v. Western Fire Ins. Co., --Mont.--, 682 P.2d 725 (1984)16

Hickman v. Taylor, 329 U.S. 495 (1947)26

In re Bergeson, et al., 112 F.R.D. 692, (D. Mont. 1986).....15,16,19

Schwarzer, Sanctions Under the New Federal Rule 11
- A Closer Look, 104 F.R.D. 181, 182 (1985)25,26

Silva v. Fire Ins. Exch., 112 F.R.D. 699 (D. Mont. 1986).....14,15,19

United Services Automobile Assn v. Werley,
526 P. 2d 28 (Alaska 1974)16,19

8 C. Wright & A. Miller *Federal Practice*
§§ 2017, 2021-28, at 198-99 (1970)20

Rules and Regulations

RCW 5.60.060(2)	17,18
Civil Rule 11	7, 9, 25, 26, 28
Civil Rule 26	7, 9, 21
Civil Rule 26(b)(3).....	20,21
Civil Rule 26(b)(1)	16
Civil Rule 26(g)	25, 26, 27
Civil Rule 37	28

I. FACTS

Bruce Cedell owned a home at 1211 Young Street, Elma, Washington and was the sole insured of Farmers Insurance. (CP 466)

He had owned the house for approximately 20 years and had paid premiums to insure the home with Farmers for approximately 20 years. He had no mortgage at the time of the fire. (CP 466)

On November 25, 2006, while Bruce was downtown in Elma, his house burned down. When he left the home, the following people were present: Emma Cedell, his daughter; Melissa Ackley; Lisa Charlton; and Joey Fullerton. (CP 466)

When he returned, the house was on fire and the fire trucks were there. Dispatch records reveal that Melissa Ackley called in the fire to dispatch at 0022. On November 25, 2006, the Elma fire department responded within minutes, including Mr. Cedell's Farmers agent, Mike Stillwell, a volunteer firefighter. (CP 472)

Farmers records reflect that Bruce Cedell called in and reported the fire to them on November 27, 2006, to Laurie Oleary. (CP 28) Farmers hired John Powell, a fire investigator, to investigate this fire on November 30, 2006. It was his conclusion that the rendition of the fire was consistent with the acute burn patterns seen to the headboard and mattress, both in terms of the potential of the acceleration of the fire near the candle and in

the location described by Ms. Ackley relative to those patterns. He found “no physical evidence supporting an incendiary origin”. His final conclusion was that the candle Melissa Ackley described “presents a possible or even probable source of ignition that is consistent with the remaining physical evidence”. Farmers was mailed this findings report on December 5, 2006. (CP 479-484) The Elma Fire Department completed its investigation on November 29, 2006 and concluded their investigation with a finding that the case was considered accidental. (CP 473-476)

Mr. Cedell cooperated with both investigations.

As far as Mr. Cedell knows, these are the only two fire investigations that were ever conducted and both concluded that this fire was accidental and that there was absolutely no physical evidence of an incendiary origin. (CP 473-484) Farmers interrogatory supplemental answer signed February 26th 2009 makes it clear that Farmers does not contend (1) that Mr. Cedell set this fire; (2) was even present in home when fire broke out; or (3) conspired with anyone else to set this fire. And they admitted they have no physical evidence that this fire has anything other than accidental. (CP 325-330)

On January 4, 2007, Laurie Oleary estimated exposure on building \$70,000 plus \$35,000 cleaning and storage contents. (CP 124)

On April 5, 2007, Farmers had the premises examined by their valuation expert Mr. Mendoza. Mr. Mendoza valued the damage to the house at \$56,498.84. (CP 469)

Seven months post accident, Farmers wrote a letter to Bruce Cedell on July 3, 2007, saying that the fire had been determined to be of unknown origin and that there was “a possibility” that it was intentionally set. Farmers threatened to deny coverage to Mr. Cedell at that time. Farmers then went on to make a “one time only” offer to settle Mr. Cedell’s claim in its entirety for a “one time total sum of \$30,000”. Farmers allowed this offer to be open for a period of ten business days from the date of its letter signed by Ryan Hall. Bruce Cedell attempted to contact Mr. Hall during the ten day period and was told that he was unavailable and on vacation. Mr. Hall did not contact Mr. Cedell when he returned. (CP 466-471)

Farmers has alleged numerous misstatements of Melissa Ackley and contended that the policy excludes intentional acts. Farmers points to the fact that Ms. Ackley was present during the entire loss. Farmers should be acutely aware of the fact that their own policy exclusion applies to coverages A, B and C, section 6 reads: “*Excludes intentional acts of an insured.*” They are further aware that Ms. Ackley is not an insured under the definition of their policy. (CP 378-475, at 387, 391 and 392) Further, their policy excludes coverage only for an insured “*who has intentionally*

concealed or misrepresented any material fact or circumstance” relating to this insurance before or after the loss. (CP 398) They also falsely contend that Mr. Cedell did not report the loss immediately, while their own records reflect that he contacted Ms. Sealy, a Farmers adjuster, on November 27, 2006. (CP 27-28) Mr. Cedell has challenged Farmers to identify any material false statements that he made, but they have not done so to date. (CP 466-471)

On August 1, 2007, we received a letter from Mr. Hall indicating that Farmers investigation was continuing and that they could neither admit or deny coverage. (CP 466-471)

On August 8, 2007, a follow-up letter to Mr. Hall indicated that we had not yet received a copy the insurance policy nor a letter explaining why Farmers had not paid the claim. (CP 466-471)

Mr. Cedell eventually went out and hired an expert to evaluate the appraisal that was done by Mr. Mendoza. Mr. Cedell ended up sending two separate reports of the contractors to Farmers estimating damage to his residence at approximately \$140,000 - \$150,000 (CP 470-471)

Fourteen month post accident, Farmers then had Mr. Schultz, an appraiser, reevaluate the damage to Mr. Cedell’s residence at \$84,847.84 on February 7, 2008. Mr. Schultz conducted a third appraisal estimating the damages then at \$89,147.76 on 10-21-2008, \$32,648 greater than Mr.

Mendoza. (CP 466-471) Neither of these estimates included the contents damage.

On November 5, 2007, a complaint was filed by Bruce Cedell against Farmers Insurance Company of Washington, seeking damages, and alleging among other things that Farmers refused to respond to requests for explanations of delays, reasons for not paying the claim, failing to conduct a reasonably prompt investigation and failing to promptly, fairly and equitably settle Mr. Cedell's claim. The complaint alleged that these were unfair and deceptive acts or practices. Mr. Cedell believes that Farmers insurance conduct in this case amounts to bad faith and to numerous violations of the Washington Administrative Code, which all amount to violations of the Consumer Protection Act including but not limited to failing to acknowledge and act reasonably promptly upon communications; refusing to pay claims without conducting a reasonable investigation; failure to affirm or deny coverage within a reasonable period of time after a loss statement has been completed; not attempting in good faith to effectuate a prompt, fair and equitable settlement of his claims for which liability had become reasonably clear; compelling the insured to institute or submit to litigation, arbitration or appraisal to recover amounts due under insurance policy by offering substantially less than the amounts ultimately to be recovered in such

actions or proceedings; failing to provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for offer of a compromised settlement; failing to make a good faith effort to settle a claim before exercising a contractual right for appraisal. (CP 336-340)

On December 18, 2007, discovery commenced and Requests for Production were sent out to the defendants. First Interrogatories and Second Requests were sent out on the 30th day of April, 2008, to Farmers. (CP 9-17) Farmers' answers to the interrogatories made it clear that Farmers was engaging in delaying tactics and attempting to frustrate discovery. They tried to avoid answering even simple questions such as Interrogatory No. 26: "*Do you claim the plaintiff intentionally set the fire in connection with the incident referred to in the complaint*" and No.44: "*Please state all the physical evidence that Farmers has which tends to prove that this fire was anything other than accidental if any*" and Interrogatory No. 43: "*Please set forth any and all facts that Farmers has that contradicts Mr. Cedell's assertion that he was not even at home at the time the fire broke out*". (CP 9-17) Farmers refused to answer these questions and many others, objecting that the questions were overbroad and unduly burdensome and that they requested information beyond the scope of CR26. (CP 9-17) A motion to compel was filed on January 27,

2009, after a discovery conference was conducted. (CP 1-8) The motion requested that Farmers be required to fully answer the interrogatories and to produce the redacted portion of the records in the claim file in accordance with the requests for production or in the alternative, to conduct an in camera inspection. The redactions covered the period from January 26, 2007 to December 10, 2008. The interrogatories and requests for production were sent out to Farmers on December 18, 2007. Two separate discovery conferences were set up, one on July 11, 2008, and a second call was made to Mr. Feig on January 21, 2009. Each time we were informed that responses would be forthcoming. (CP 1-8)

Eventually a motion to compel was heard and the court entered findings and conclusions, holding that, in summary, the objections by Farmers were not well founded and that the refusal to answer certain of the interrogatories constituted the epitome of bad faith and violations of CR 11 and CR 26. (CP 490-496) The court ordered an *in camera* evaluation of the redacted portions of the record findings that the plaintiff had shown the following:

1. Bruce Cedell owned a home at 1211 Young Street, Elma, Washington, and that he owned the home for 20 years.
2. That Mr. Cedell had insured the home with Farmers for over 20 years.

3. That he had not filed a single claim against Farmers during the entire time he owned the property until a fire broke out on November 25, 2006.

4. That at the time of the fire Mr. Cedell was not present at the home but was in downtown Elma.

5. That the City of Elma Fire Department concluded the fire was accidental.

6. That Farmers investigator John Powell submitted a report to Farmers indicating the fire was consistent with the accidental burning of a candle as described by Melissa Ackley. It also found that there was no evidence of incendiary origin.

7. Farmers was aware of the fact that their insured Bruce Cedell did not have a home after the fire because of the extensive damage to it.

8. Five months after the fire, Farmers sent in Joe Mendoza to estimate the damage to the residence and concluded the damage was \$56,498.84 replacement value.

9. Records created by Rebecca Sealy, a Farmers adjuster, on 01-11-2007, indicated it appeared that Farmers exposure would be approximately \$70,000 in the building and perhaps \$35,000 in contents clean up and storage.

10. On July 3, 2007, Mr. Hall from Farmers sent a letter to Mr. Cedell making a “one-time only” offer of \$30,000 to him. They threatened him with denying coverage and alleged that he had misrepresented material information but did not state what material information he misstated. The offer was stated to be open for 10 days.

11. When Mr. Cedell called Mr. Hall, he was told he was out of the office. They told him that he would call him when he returned, however he did not call back.

12. Farmers has not filed anything to indicate that they have any information or any evidence to indicate that this fire was anything other than accidental and Farmers has presented no proof that Mr. Cedell was even present or near the fire when it started.

13. That the damage to the house was eventually determined to be \$115,000 plus \$16,000 code updates in the appraisal process.

From the above, the court found that there was an adequate basis to order an *in camera* review of the claims file. The court also ordered Farmers to answer the interrogatories, and imposed sanctions including attorney’s fees up to \$2,500 to Olson, Zabriskie & Campbell and a sanction of \$5,000, finding that Farmers failure to answer the interrogatories constituted violations of CR 26 and CR 11. (CP 490-496)

Farmers has finally answered the interrogatories and now admit they did not contend Mr. Cedell was at home when the fire broke out. That they have no physical evidence to prove that the fire in question was intentionally set. That they Farmers do not contend that Bruce Cedell intentionally set the fire that is the subject of plaintiff's claim. That they do not contend Bruce Cedell engaged in a conspiracy with anyone else to set the fire. (CP 325-330)

The court then held that the claims here involved a residential fire and a first-party insured situation. As such, the court indicated that an "insurer owes the insured a heightened duty-a fiduciary duty, which by its nature is not, and should not be adversarial. Under such circumstances, the insured is entitled to discover the entire claims file kept by the insurer, without exceptions of the claims of attorney-client privilege." Judge Edwards noted that in the context of a first-party bad faith action, as distinguished from the UIM cases cited by Farmers. The nature of the issues automatically establish the substantial need for discovery for the claims file, citing *Barry v. USAA*, 98 Wn.App. 199, 989 P.2d 1172 (1999)

and *Escalante v. Sentry Insurance Company*, 49 Wn. App. 375, 743 P.2d 832 (1987)¹.

Judge Edwards then went on to set forth the facts he concluded were relevant to the issues of the defendants claim of work product, after conducting the *in camera* review. He concluded:

1. That the plaintiff cannot obtain equivalent information from another source and that the plaintiff has substantial need for such information.

2. That the mental impressions of counsel for Farmers Insurance are directly at issue in this case.

3. That this is particularly true given his role as the person with primary responsibility for communicating with the insured for several months before the insured retained counsel.

These conclusions were arrived at after he reviewed the entire claims file and as such all work product was also determined to be discoverable.

After reviewing the entire claims file, and considering Farmers responses to interrogatories and the requests for production, including the redacted portions, the court indicated that the court was convinced that

¹ See *Ellwein vs. Hartford Co.*, 142 Wn.2d 766, 779, 15 P.3d 640, where the court noted that the relationship between a UIM insurer and its insured “is by nature adversarial and at arms’ length.”

Farmers Insurance Company of Washington had intentionally violated the discovery rules and has attempted to impede the plaintiff from ascertaining the truth and intentionally obstructed the plaintiff in his attempts to prepare this case for trial. The court then went on to impose additional sanctions for the improper objections of relevance, work product and attorney-client privilege. (CP 490-496)

II. ARGUMENT

The Plaintiff contends that the court properly ordered disclosure of the documents in this case.

A. Relevancy.

There were 58 documents which were redacted or withheld based, at least in part, upon an objection of relevancy. The plaintiff is entitled to receive all of these document without redaction of any information. If the defendant did not agree with the scope of production, or the relevancy of the requested document, then it was required to move for a protective order. *Gammon v. Clark Equipment Co.*, 38 Wn.App. 274, 686 P.2d 1102 (1984). A defendant may not unilaterally decide what is relevant and then withhold requested information in the absence of a protective order. *Taylor v. Cessna Aircraft Co.*, 39 Wn.App. 828, 696 P.2d 28 (1985). The defendants failed to request a protection order and as such, the 58 documents are discoverable.

B. Attorney / Client and Work Product Claims.

In the present case, Farmers contends that the trial court erred when it ordered the production of Farmers' entire claim file. The court held that the attorney-client privilege and work product claims of Farmers were inapplicable in a first party insurance bad faith action. This issue was discussed in Barry v. USAA, 98 Wn.App. 199, at page 204-205. The Barry case involved a lawsuit filed by Denise Barry against her own insurance company, alleging bad faith in their failure to properly handle her UIM claim against USAA. The initial tortfeasor had paid policy limits to Ms. Barry and she filed a claim against USAA under her UIM coverage. The Washington Court of Appeals Division III dealt with the issue of whether an *in camera* review of the claims file should be made by the court to determine whether the documents were protected by the attorney-client privilege. The trial court denied Ms. Barry's request. In addressing this issue, the court distinguished first party insurance situations from UIM third party coverage. In this regard, the court, in Barry v. USAA, 98 Wn.App. 199, 204-205, 989 P.2d 1172 (1999), stated as follows:

We first ask whether any of the materials in Ms. Barry's claims file would be privileged.

Typically, in the insured-insurer relationship, the attorney is engaged and paid by the carrier to defend the insured and

therefore operates on behalf of two clients. *Baker v. CNA Ins. Co.*, 123 F.R.D. 322, 326 (D. Mont. 1988). According to *Baker*, 123 F.D.R. at 326, it is a well established principle in bad faith actions brought by an insured against an insurer under the terms of an insurance contract that communications between the insurer and the attorney are not privileged with respect to the insured. See also *Silva v. Fire Ins. Exch.*, 112 F.R.D. 699 (D. Mont. 1986), cited in *Escalante*, 49 Wn. App. at 394. As explained in *Silva*, 112 F.R.D. at 699-700, “The time-worn claims of work product and attorney-client privilege cannot be invoked to the insurance company’s benefit where the only issue in the case is whether the company breached its duty of good faith in processing the insured’s claim.”

We have good reason to treat first-party bad faith claims involving the processing of UIM claims differently, however. UIM carriers stand in the shoes of the underinsured motorist/tortfeasor to the extent of the carrier’s policy limits. *Dayton v. Farmers Ins. Group*, 124 Wn. 2d 277, 281, 876 P.2d 896 (1994). Consequently, the UIM carrier is entitled to pursue all the defenses against the UIM claimant that could have been asserted by the tortfeasor. See *id* (the UIM carrier is not compelled to pay if the same recovery could not be obtained from the tortfeasor). Because the provision of UIM coverage is by nature adversarial, an inevitable conflict exists between the UIM carrier and the UIM insured. *Fisher v. Allstate Ins. Co.*, 136 Wn. 2d 240, 249, 961 P.2d 350 (1998). The friction between this adversarial relationship and the traditional fiduciary relationship of an insured and an insurer is difficult to resolve.

The court, in *Silva v. Fire Ins Exchange*, 112 F.R.D. 699 (D. Mont. 1986), dealt with a first party insurance bad faith claim and a request for the complete claims file. The insurance company claimed attorney-client privilege for 52 items. In holding that the entire claims file was discoverable, the court, in *Silva vs. Fire Ins. Exchange*, 112 F.R.D. 699, stated at p.699:

This court has recently ruled that a plaintiff in a first-party bad faith action is entitled to discover the entire claims file kept by the insurer. *In re Bergeson, et al.*, 112 F.R.D. 692, 697 (1986). Under ordinary circumstances, a first-party bad faith claim can be proved only by showing the manner in which the claim was processed, and the claims file contains the sole source of much of the needed information. See *Brown v. Superior Court in and for Maricopa County*, 137 Ariz. 327, 670 P.2d 725, 734 (1983).

The *Silva* case was based upon the reasoning set forth in *In re Bergeson*, 112 F.R.D. 692 (D.Mont. 1986). The *Bergeson* case was, once again, a first party insurance bad faith claim. The court in *In re Bergeson, supra*, set forth the criteria that an insurance company is supposed to consider when failing to pay a claim to its insured, when no third party is involved. In this regard, the court in *Bergeson*, stated at p.697:

Obviously, several of the six factors are irrelevant in a case challenging the insurance company's failure to pay a claim to its insured where no third party is involved. On the other hand, both situations arise out of "first-party" bad faith, an action by the insured against the insurer. In any first party bad faith action, the pivotal inquiry is the manner in which the insurance company processed the claim involving its insured.

In a first party bad faith case such as this, where the insurance company has refused to pay benefits claimed under the policy, the critical issue is whether the company had a good faith basis for its decision. This in turn requires a number of other inquiries, including the substance of any investigations conducted by the insurer, the information available to the company at the time its decision was made, and the manner in which the company arrived at its decision, including reliance on advice of counsel. The insurance company's claims file constitutes the only source of this information. Clearly, it is "relevant to the subject matter

involved in the pending action” and “reasonably calculated to lead to the discovery of admissible evidence.” Fed.R.Civ.P. 26(b)(1).

The only issue then is whether particular documents within the claims file were prepared in anticipation of litigation or fall within the attorney client privilege and, if so, whether they may be withheld from discovery. The Court finds ample authority to support ruling that the claims file should be disclosed in a bad faith action against an insurance carrier. See Gibson v. Western Fire Ins. Co., --Mont.--, 682 P.2d 725 (1984) (references in opinion indicate complete access to claims file, including attorney-client correspondence); Caldwell v. District Court in and for the City and County of Denver, --Colo.--, 644 P.2d 26 (1982); Brown v. Superior Court in and for Maricopa County, 137 Ariz. 327, 670 P.2d 725 (1983); United Services Automobile Assn v. Werley, 526 P. 2d 28 (Alaska 1974). As stated by the Supreme Court of Arizona in Brown:

Bad faith actions against an insurer, like actions by client against attorney, patient against doctor, can only be proved by showing exactly how the company processed the claim, how thoroughly it was considered and why the company took the action it did. The claims file is a unique, contemporaneously prepared history of the company’s handling of the claim; in an action such as this the need for information in the file is not only substantial, but overwhelming.

Brown, 670 P.2d at 734.

The defendant in this case attempts to distinguish a first party insurance bad faith claim from a UIM claim, bad faith action, based upon whether there was privity between the lawyer and the insured. The court in In re Bergeson, supra, made it clear that the critical issue in a first party insurance bad faith claim is whether the company had a good faith basis for its decision. It further made it clear that the insurance company is

supposed to exercise good faith in reaching a decision and the information provided to it and relied upon from counsel is pertinent upon whether the insurance company acted in good faith or not. The situation is not supposed to be an adversarial one. It is supposed to be where the insurance company acts on behalf of its insured and, as acknowledged by the defendants in their brief, on behalf of themselves. This is not like the situation presented in *Barry v. USAA*, 98 Wn.App. 199, where the insured steps into the shoes of the underinsured motorist/tortfeasor to the extent of the carrier's policy limit and where the insured is entitled to pursue all the defenses against the UIM claimant that could have been asserted against the tortfeasor. That situation is fraught with conflicts of interest.

The attorney-client privilege is codified at RCW 5.60.060(2) and protects confidential attorney-client communications from discovery so as to encourage clients to fully inform their counsel of all relevant facts. This privilege is subject to exceptions, however, and must be strictly limited to the purpose for which it exists. *Dike v. Dike*, 75 Wn.2d 1, 448 P.2d 490 (1968).

In the present case, the first party insured's bad faith "exception" to the attorney-client privilege applies and the trial court's decision to require disclosure of the redacted portions of the claims file which were subject to the claims of attorney-client privilege did not constitute error.

III. IN CAMERA REVIEW

A. The superior court did not commit error by ordering the *in camera* review of the documents claimed to be protected by the attorney-client privilege and the work product doctrine.

For the reasons set forth previously in this brief, plaintiff contends that in first party insurance situations involving bad faith claims, the attorney-client privilege and work product doctrines are inapplicable. In the event that the court rules otherwise, the plaintiff takes the following position:

1. In *Escalante v. Sentry Insurance*, 49 Wn.App 375, 743 P.2d 832 (1987), the case dealt with a UIM claim filed by Linda Escalante against Sentry Insurance. Because of the manner in which Sentry handled the claim, a bad faith action was filed against it by Ms. Escalante. During the bad faith action, appellant contended that the insurance company's claims of attorney-client privilege and work product doctrines did not protect information relevant to the bad faith claim. The court in dealing with this issue, i.e. a UIM Bad Faith claim, set forth the law in *Escalante v. Sentry Insurance*, 49 Wn. App. 375, at page 393-394:

The attorney-client privilege, codified in former RCW 5.60.060(2), provided:

An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by

the client to him, or his advice given thereon in the course of professional employment.

In general, this privilege protects confidential attorney client communications from discovery or public disclosure so that clients will not hesitate to speak freely and fully inform their attorneys of all relevant facts. Coburn v. Seda, 101 Wn.2d 270, 274, 677 P.2d 173 (1984). The privilege is subject to exceptions, however, and “must be strictly limited to purpose for which it exists.” Dike v. Dike, 75 Wn.2d 1, 11, 448 P.2d 490 (1968). In this regard, appellants argued below and in their appellate brief that an exception to the attorney-client privilege applies in bad faith litigation. That exception, which is referred to variously as the “fraud” or “civil fraud” exception, has been utilized in several insurance bad faith decisions outside of this jurisdiction, and is based on the recognition that attorney-client communications should not be protected when they pertain to ongoing or future fraudulent conduct by the insurer. See, e.g., United Servs. Auto. Ass’n v. Werley, 526 P.2d 28 (Alaska 1974); In re Bergeson, 112 F.R.D. 692 (D. Mont. 1986); Silva v. Fire Ins. Exch. 112 F.R.D. 699 (D. Mont. 1986). The exception is usually invoked only upon a prima facie showing of bad faith tantamount to civil fraud. See United Servs. Auto. Ass’n v. Werley, *supra*. However, recognizing the proof problems inherent in requiring a prima facie showing at the discovery stage, the Supreme Court of Colorado held in Caldwell v. District Court, 644 P.2d 26 (Colo. 1982) that the privilege may be overcome by a showing of a foundation in fact for the charge of civil fraud. Caldwell, at 33. The Caldwell court also held that the “foundation in fact” showing could be accomplished after an *in camera* inspection of the relevant documents. However, the *in camera* inspection would itself be a matter of trial court discretion requiring a factual showing “adequate to support a good faith belief by the reasonable person that wrongful conduct sufficient to invoke the ... fraud exception ... has occurred.” Caldwell, at 33. We find this procedure to be a reasonable solution to the discovery problems associated with the attorney-client privilege in bad faith litigation.

The court, in Escalante v. Sentry Insurance, 49 Wn.App. 375, also addressed the work product rule in CR26(b)(3) and stated at 395:

In applying this rule, courts has noted there is no work product immunity for documents prepared in the regular course of business, as opposed to documents prepared in anticipation of litigation. See Heidebrink v. Moriwaki, 104 Wn.2d 392, 706 P.2d 212 (1985); 8 C. Wright & A. Miller *Federal Practice* §§ 2017, 2021-28, at 198-99 (1970). The application of the words “in anticipation of litigation” in the context of materials prepared by insurance companies was discussed recently in Heidebrink v. Moriwaki, 104 Wn.2d 392, 706 P.2d 212 (1985). The Heidebrink court stated at pages 399-400:

It is difficult in this context to determine whether a document was prepared in anticipation of litigation since an insurance company’s ordinary course of business entails litigation. The requirement of having an attorney involved in the case before documents prepared by an insurance carrier are protected is a rather conclusory determination of the issue and is contrary to the plain language of the rule. On the other hand, broad protection for all investigations conducted by an insurer as suggested by several cases cited by respondents is likewise an unsatisfactory answer to the problem. Should such a rule of thumb approach become the general rule, it is not hard to imagine insurers mechanically forming their practices so as to make all documents appear to be prepared in “anticipation of litigation”. We believe the better approach to the problem is to look to the specific parties involved and the expectations of those parties. With these parties in mind, the scope of CR 26(b)(3) should provide protection when such protection comports with the underlying rationale of the rule to allow broad discovery, while maintaining certain restraints on bad faith, irrelevant and privileged inquiries in order to ensure just and fair resolutions of disputes.

Thus, under Heidebrink, Washington courts are required to evaluate the specific parties and their expectations in order to determine whether the materials sought were prepared in

anticipation of litigation. *Heidebrink* also clearly states that even if a particular object of discovery is found to be protected by the work product doctrine, the material sought is still discoverable if the discovering party shows substantial need. *Heidebrink*, at 401. Since a determination of the parties' "expectations" is presumably, in part, a factual inquiry, and since the "substantial need" test is essentially a *factual* determination "vested in the sound discretion of the trial judge", *Heidebrink*, at 401, we must remand all discovery requests to which Sentry objected on the basis of work product for the trial court to determine which documents are subject to the work product doctrine, and to determine whether substantial need has been shown.

The court then went on to address the issue of whether mental impressions, conclusions, opinions, etc. of an attorney or other representative of Sentry were discoverable under the work product doctrine, and concluded at page 397:

However, we must address one other issue raised by the parties regarding the work product doctrine, *i.e.*, the discoverability, under CR 26(b)(3), of mental impressions, conclusions, opinions, etc., of an attorney or other representative of Sentry. Appellants cite *Brown v. Superior Court*, 137 Ariz. 327, 670 P.2d 725 (1983) for the proposition that CR 26(b)(3) does not protect mental impressions, etc., when the action involves an insurer's bad faith in handling an insured's claim. . . . [W]e note that the mental impressions, etc., of an attorney or representative of a party are not protected by the work product doctrine if they are not prepared in anticipation of litigation, but generally are protected if they are prepared in anticipation of litigation. The question before us is whether such mental impressions, etc., are *absolutely* protected when they are prepared in anticipation of litigation. . . . [G]iven the unique nature of bad faith actions, and considering the protection available in the form of *in camera* inspections, we hold that mental impressions, etc., are discoverable in a bad faith action if they are directly in issue, and if the discovering party makes a stronger showing of necessity and hardship than is normally required under CR 26.

In the present case, the court set forth its reasoning for order an *in camera* review in its findings and order entered on March 2, 2009. (CP 490-496) These facts are summarized as follows:

(1) Farmers was aware that Bruce Cedell had suffered extensive damage to his home and personal contents exceeding \$100,000. (Finding #10.)

(2) Farmers had absolutely no evidence that Mr. Cedell, the insured on the policy in this case, was not present in the home when the fire broke out.

(3) The Elma Fire Department concluded that the fire was accidental.

(4) John Paul, Farmers fire investigator, concluded that the fire was accidental and that there was no evidence of incendiary origin.

(5) That the actual damage to the home was eventually determined to exceed \$115,000, not including the loss of contents.

(6) On July 3, 2007, Farmers sent a letter to Mr. Cedell, who was unrepresented, giving him either 10 days to either accept or reject the \$30,000 offer that they made to him at that time. They threatened to deny coverage to him if he did not accept them and claim that he made

misrepresentations, but did not state what material information he misstated.

The memorandum decision of the court in this case made it clear that the court felt that the mental impressions of counsel for Farmers Insurance are directly at issue in this case. The court found in its memorandum decision after its *in camera* inspection that this was “particularly true, given his (Mr. Hall’s) role as a person with primary responsibility for communicating with the insured for several months before the insured retained counsel.” (CP 507-514)

In the present case, the documents were prepared in the regular course of business. *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 706 P.2d 212 (1985). As noted by the court in *Escalante*, it is difficult to determine when an insurance company prepares a document in anticipation of litigation since an insurance company’s ordinary course of business entails litigation. The court cited *Barry* in the proposition that in the context of a first party bad faith action the nature of the issue is automatically establishes substantial need for discovery of the claims file. *Barry v. USAA*, 98 Wn.App. 199, 208, 989 P.2d 1172 (1999). The Court of Appeals in *Escalante*, *supra*, cited a decision of the Arizona Supreme Court which held that the work product rule had no application in a first party bad faith litigation. The claims file is unique, contemporaneously

prepared of the company's handling of the claim; in an action such as this, the need for the information in the file is not only substantial but overwhelming. *Brown v. Superior Court*, 137 Ariz. 327, 670 P.2d 725 (1983).

The memorandum decision of the court entered on file herein reflects that the *in camera* review of the claim file concluded that the plaintiff could not obtain equivalent information from another source and that the plaintiff had a substantial need for the information. It further stated that the mental impressions of counsel for Farmers Insurance are directly at issue in this case and that this was particularly true given his role as the person with the primary responsibility for communicating with the insured for several months before the insured retained counsel. (CP 507-514) As such, the trial court properly ordered that the documents claimed under the attorney-client privilege and/or work product doctrine should be produced.

IV. DISCOVERY ABUSES

A. The Trial Court's imposition of monetary sanctions was not an abuse of discretion.

In the present case the trial court was aware that Farmers had intentionally delayed truthfully answering the interrogatories and requests for production. This is evident by their finally filing truthful and full

answers to many of the interrogatories which they supplemented their interrogatory answers on 2/26/2009. Supplementing interrogatories #26,27, 34, 36, 38, 39, 40, 41, 43 and 44, admitting facts they knew when they answered originally on the 25th day of January, 2008 but failed to disclose. (CP 9-18) In other words, they had no evidence Mr. Cedell was home when the fire broke out, no physical evidence to prove fire was intentionally set, no expert who was of the opinion the fire was intentionally set, they did not contend Mr. Cedell started the fire.

Unfortunately they still contend that Mr. Hall, an attorney handling the claim for Farmers, cannot determine when he returned to his office in July of 2007. (Interrogatory No. 41)

In any event, the court is acutely aware that Farmers is engaging in evasive delaying tactics designed to frustrate the plaintiff and costing the plaintiff time and money.

The Washington Supreme Court in Physicians Ins. Exchange v. Fisons Corp., 172 Wn.2d 299, 858 P.2d 1054 (1993), stated at pages 341-343 as follows:

CR26(g) has not yet been interpreted by this court. The rule parallels Fed.R.Civ.P. 26(g) (Rule 26(g)) and, like its federal counterpart and like CR 11, CR 26(g) is aimed at reducing delaying tactics, procedural harassment and mounting legal costs. Such practices “tend to impose unjustified burdens on other parties, frustrate those who seek to vindicate their rights in the civil justice system into disrepute.” Schwarzer, Sanctions Under the New

Federal Rule 11 – A Closer Look, 104 F.R.D. 181, 182 (1985) (hereinafter Schwarzer).

Because it is essentially identical to Rule 26(g), this court may look to federal court decisions interpreting that rule for guidance in construing CR 26(g). In turn, federal courts analyzing the Rule 26 sanctions provision look to interpretations of Fed.R.Civ.P. 11. The federal advisory committee notes describe the process and problems that led to the enactment of Rule 26(g) as follows:

Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems. . .

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. “Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.” Hickman v. Taylor, 329 U.S. 495 (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake. . . . [T]he premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule’s standards will significantly reduce abuse by imposing disadvantages therefore.

The concept that a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials is reflected in decisions of our Court of Appeals. . . .

The Supreme Court has noted that the aim of the liberal federal discovery rules is to “make a trial less a game of blind-man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” .

.. This system obviously cannot succeed without the full cooperation of the parties. . . .

. . . Rule 26(g) requires an attorney signing a discovery response to certify that the attorney has read the response and that after a reasonable inquiry believes it is (1) consistent with the discovery rules and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; (2) not interposed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had, the amount in controversy, and the importance of the issues at stake in the litigation.

After the *in camera* review the court concluded that Farmers Insurance intentionally violated the discovery rules in an attempt to impede the plaintiff from ascertaining the truth and to obstruct the plaintiff in his attempts to prepare the case for trial. The court felt substantial terms were necessary to discourage the defendant from embracing tactics of evasion and obstruction. In *Magana v. HyundaiMotor Am.*, 141 Wn.App. 495, 170 P.3d 1165 (2007), the court stated:

Washington's discovery rules give trial courts broad discretion to sanction parties for discovery violations. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); *Snedigar v. Hoddersen*, 114 Wn.2d 153, 169, 786 P.2d 781 (1990); *Smith v. Behr Process Corp.*, 113 Wn.App. 306, 324, 54 P.3d 665 (2002) (*Behr*). We review the trial court's sanctions under an abuse of discretion standard that (1) gives the trial court wide latitude in determining appropriate sanctions, (2) reduces trial court reluctance to impose sanctions, and (3) recognizes that the trial court is in a better position to determine this issue. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (*Fisons*). We should not disturb the use of sanctions absent a clear showing that a trial court's discretion was manifestly unreasonable or exercised on untenable

grounds or for untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006); *Burnet*, 131 Wn.2d at 494, 933 P.2d 1036. A decision is untenable if it is based on unsupported facts or an incorrect legal standard, or if no reasonable person would adopt the same view as the trial court. *Mayer*, 156 Wn.2d at 684, 132 P.3d 115.

In *Roberson v. Perez*, 123 Wn.App. 320, 96 P3d 420 (2004), the court stated:

In *Washington State Physicians Insurance Exchange and Association v. Fisons Corporation*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993), the court discussed the standard of review of monetary sanctions imposed under CR 11 and CR 26(g) (attorney certification of answers to discovery requests). While the case before us involved the imposition of sanctions under CR 37, *Fisons* provides analogous authority for our review of the monetary sanctions imposed here.

As with the imposition of other sanctions for discovery abuse, monetary sanctions are reviewed for abuse of discretion giving wide latitude to the trial judge to determine what sanctions are appropriate in a given case. *Fisons*, 122 Wn.2d at 339, 355, 858 P.2d 1054. In making that determination, certain considerations guide the trial court. *Id.* at 355, 858 P.2d 1054. Those considerations include that:

[t]he purposes of sanctions orders are to deter, to punish, to compensate and to educate. Where compensation to litigants is appropriate, then sanctions should include a compensation award. Sanctions need to be severe enough to deter these attorneys and others from participating in this kind of conduct in the future. *Id.* at 356, 858 P.2d 1054 (footnote omitted).

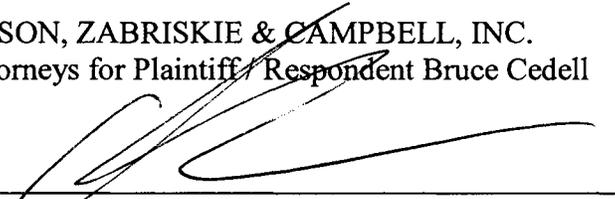
Here the trial court determined that Farmers was intentionally being evasive in any and all of the discovery attempts made by the plaintiff. Their interrogatory answers were intentionally evasive and

untruthful and they wrongfully objected to disclose on the sole basis of relevance and disregard existing case law regarding work product and first party bad faith disclosure requests. Even now they still contend that their attorney has no records or indication of when he returned to his office. This is incredulous. The strong measures by the court are appropriate.

RESPECTFULLY SUBMITTED this 7th day of October, 2009.

OLSON, ZABRISKIE & CAMPBELL, INC.
Attorneys for Plaintiff/ Respondent Bruce Cedell

By:



STEPHEN L. OLSON, WSBA #7489

CERTIFICATE OF SERVICE

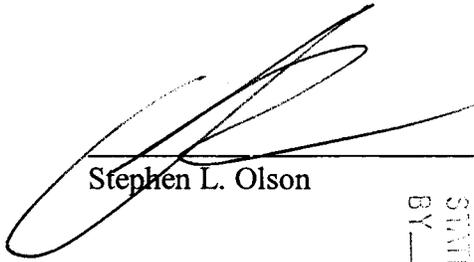
The undersigned certifies under penalty of perjury under the laws of the State of Washington that I directed a true and correct copy of the foregoing pleading on the attorney for Farmers Insurance Company of Washington and the Court of Appeals Division Two, on the 7th day of October, 2009, as follows:

VIA UNITED STATES POSTAL SERVICE, EXPRESS MAIL (NEXT DAY DELIVERY):

Washington State Court of Appeals Division Two

Curt E.H. Feig, Attorney for Farmers
Michael Guadagno, Attorney for Farmers
Nicoll Black & Feig PLLC
816 Second Avenue Suite 300
Seattle WA 98104

DATED: 10/7/, 2009.



Stephen L. Olson

COURT OF APPEALS
DIVISION II
OCT -09 PM 12:31
STATE OF WASHINGTON
BY _____
DEPUTY