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No. 85366-5

SUPREME COURT  
OF THE STATE OF WASHINGTON

BRUCE CEDELL, a single man,

*Plaintiff/Petitioner,*

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,

*Defendant/Respondent.*

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS,  
DIVISION II

**BRIEF OF AMICUS CURIAE**  
**WASHINGTON DEFENSE TRIAL LAWYERS**

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## I. INTRODUCTION

The attorney-client privilege exists so that clients, including insurance company clients, may freely and fully communicate with an attorney for legal advice. As Washington cases, including the decision under review here, have recognized, this privilege applies to communications between insurers and counsel hired to advise on coverage issues related to claims under policies protecting against first-party losses and is not lost merely because the insured alleges that the insurer acted in bad faith. Applying the privilege in those bad faith cases upholds the purpose of the rule by encouraging insurers to frankly communicate with their lawyers in attempting to conform their conduct to the applicable legal requirements. As the overwhelming majority of courts have recognized, discouraging such communications would not be socially desirable or consistent with the purpose of the attorney-client privilege. Amicus curiae urges this Court to join that majority and uphold the availability of the protections of the attorney-client privilege to first-party insurers, and in doing so ensure that the crime-fraud exception does not swallow the rule.

## II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Defense Trial Lawyers association (“WDTL”), established in 1962, includes more than 750 Washington attorneys engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve our members through education, recognition, collegiality, professional development and

advocacy. One important way in which WDTL represents its member is through amicus curiae submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients.

A simple hypothetical will show why WDTL believes the issues in this case present such concerns. Suppose an insured suffers a fire loss that might be covered under a first-party insurance policy and tenders their claim. It is not immediately clear whether the loss is covered under the policy. The insurance company could hire a lawyer to aid in determining whether the loss is covered, or just make an educated guess about the law on the subject. Suppose next that the insurance company hires the lawyer, concludes that the loss is not covered, and denies the claim. The insured files a bad faith action that survives a motion to dismiss, but does not allege fraud. If the trial court were to order production of the claims file containing communications between the insurer and the insurer's lawyer (who represents only the insurer because there are no third-party claims against which to defend the insured), the insurer, for all future claims presenting a novel or difficult coverage issue, would be discouraged from retaining lawyers to provide advice and counsel. WDTL respectfully requests that this Court prevent that socially undesirable result by protecting the availability of the attorney-client privilege.

### III. STATEMENT OF THE CASE

For the purposes of this brief, WDTL relies upon the statement of facts set forth by the Court of Appeals.

#### IV. ARGUMENT

**A. The Attorney-Client Privilege Promotes the Public Interest in the Observance of Law and Administration of Justice by Allowing Clients to Communicate Freely with an Attorney.**

The “attorney-client privilege protects evidence from 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), citing E. Clearly, *McCormick on Evidence* § 87 (2d ed. 1972); see also *Dietz v. Doe*, 131 Wn.2d 835, 842, 935 P.2d 611 (1997) (“The attorney-client privilege exists in order to allow the client to communicate freely with an attorney without fear of compulsory discovery.”).

The “attorney-client privilege has its basis in the confidential nature of the communication and seeks to foster a relationship deemed socially desirable.” *Coburn*, 101 Wn.2d at 274, citing 8 J. Wigmore, *Evidence* § 2285 at 531 (3d ed. 1940). See *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981) (the central concern of the attorney-client privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”). The privilege benefits society because it encourages lay persons to obtain legal services to learn their legal rights *and* responsibilities. *In re Disciplinary Proceedings Against Schafer*, 149 Wn.2d 148, 161, 66 P.3d 1036 (2003). See also RPC 2.1 & cmt. 1 (in fulfilling duty to render

candid advice, attorney should deliver his or her honest assessment, even where that advice involves alternatives that a client may be disinclined to confront).

As codified in RCW 5.60.060(2)(a), the attorney-client privilege provides that “[a]n attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.” This privilege plays a vitally important role in determining the scope of allowable discovery, as CR 26(b)(1) allows a party to obtain discovery of any relevant matter only that is not privileged.

**B. The Attorney-Client Privilege Applies to Communications Between an Insurer Covering First-Party Losses and Its Counsel Hired to Make Coverage Determinations.**

Petitioners ask the Court to hold “that no attorney-client privilege exists in a first-party insurance bad faith action.” *See* Supplemental Responsive Brief to Respondent’s Answer to the Washington State Association for Justice Foundation Amicus Curiae Memorandum, pg. 3. Abolishing the attorney-client privilege for communications between an insurer and counsel hired to make coverage determinations, merely because a first-party insured claims bad faith, would be inconsistent with established Washington law and with the law of the great majority of jurisdictions that have addressed this question. Moreover, the holding urged by the Petitioner would be contrary to the public interest rationale underlying the attorney-client privilege, because it would discourage full and frank communication of issues related to coverage between an

insurance company and counsel charged with determining whether the policy covers the claim at issue. WDTL urges this Court to hold, at a minimum, that the mere allegation of bad faith by an insured against its first-party carrier is not sufficient to eliminate the attorney-client privilege between the insurer and its coverage counsel.

**1. Long-Standing Washington Case Law Recognizes the Attorney-Client Privilege as Applied to Communications Between a First-Party Insurance Carrier and Coverage Counsel.**

For the last 24 years at least, Washington courts have recognized the general rule that the attorney-client privilege applies to protect communications relevant to a bad faith claim. *See Escalante v. Sentry Ins.*, 49 Wn. App. 375, 393-94, 742 P.2d 832 (1987), *review denied*, 109 Wn.2d 1025 (1988), *overruled on other grounds by Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 15 P.3d 640 (2001). In *Escalante*, the Court of Appeals recognized that bad faith litigation may implicate certain exceptions to the attorney-client privilege, but that those exceptions are nonetheless exceptions to the general rule that materials and information relating to the insurer's evaluation of the claim are protected by the privilege. 49 Wn. App. at 393-94. WDTL will discuss the only exception implicated by Mr. Cedell in Section C, but as is relevant here, *Escalante* established that an allegation of bad faith does not abrogate the attorney-client privilege. *See* 49 Wn. App. at 393-94. In so holding, the court in *Escalante* invoked the purpose of the attorney-client privilege: protecting confidential attorney-client communications so that

clients will be able to speak freely and fully inform their attorneys of relevant facts. *See* 49 Wn. App. at 393. Since the purpose underlying the attorney-client privilege remains the same, there is no reason for this Court to upend 24 years of Washington law by holding that the attorney-client privilege vanishes merely when “bad faith” is alleged.

Ten years after *Escalante*, the Court of Appeals reaffirmed that decision in *Barry v. USAA*, by holding that communications between the insurer and its lawyer concerning the insured’s claim were privileged for the purposes of the insured’s bad faith insurance suit, subject, of course, to the party seeking discovery being able to show that an exception applied. *See* 98 Wn. App. 199, 205, 989 P.2d. 1172 (1999) (trial court properly refused to apply an exception to the attorney-client privilege). *Barry* distinguished the treatment of first-party bad faith claims involving UIM coverage from bad faith claims arising from what it called the “typical” insurer-insured relationship where the attorney is engaged and paid by the carrier to defend the insured and therefore operates on behalf of two clients. *Barry*, 98 Wn. App. at 204.<sup>1</sup> The “typical” relationship *Barry*

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<sup>1</sup> *Barry* cites to sweeping language from *Silva v. Fire Ins. Exch.*, 112 F.R.D. 699 (D. Mont. 1986), and *Baker v. CNA Ins. Co.*, 123 F.R.D. 322 (D. Mont. 1988), for the proposition that attorney-client privilege may not be invoked in a bad faith action. *Barry*, 98 Wn. App. at 204. But since *Barry* actually applied the attorney-client privilege, that language could only have been cited to distinguish bad faith claims arising from third-party coverage (where the attorney-client privilege does not apply since the lawyer hired by the carrier is operating on behalf of two clients) from bad faith claims arising from first-party coverage. Nevertheless, the language is confusing in light of *Barry*’s holding, and this Court should take this opportunity to clarify that Washington does not follow the conclusory statement from *Silva*, a federal district court case purporting to apply Montana law. Nor does Montana follow *Silva*. *See Palmer v. Farmers Ins. Co.*, 261 Mont. 91, 108, 861 P.2d 895 (1995) (attorney-client privilege protects communications between insurer and attorney where attorney not engaged in dual representation of insured and insurer). Moreover, *Silva* cited to *Brown v.* (Footnote is continued on next page.)

refers to is the relationship that arises for claims made under third-party coverage policies where the insurer provides the insured a defense against the third-party claim.<sup>2</sup> The nature of that relationship means that the attorney hired by the insurance company is defending the insured, such that communication between the lawyer and the insurer are not protected by attorney-client privilege since that lawyer is also acting on behalf of the insured.

This is not a third-party coverage case.<sup>3</sup> The first-party policy at issue here insured Mr. Cedell against certain covered occurrences. Unlike in actions under policies insuring against third-party claims, the lawyer hired by Farmers to determine whether the loss here was covered or excluded under the policy was operating solely on behalf of Farmers.

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*Superior Court in and for Maricopa County*, 137 Ariz. 327, 620 P.2d 725 (1983), as a source for its supposed rule on attorney-client privilege, but *Brown* is a solely a work product case in which the entirely different, need-based, work product rule was applied to the discoverability of a claims file. *Silva* also cited to *Bergeson v. Nat'l Surety Corp.*, 112 F.R.D. 692 (D. Mont. 1986), but that first-party bad faith case also erroneously relied on *Brown*, and cited as Montana authority only a case where the bad faith claim arose from a policy covering third-party claims. Finally, in *Palmer*, the Montana Supreme Court clarified that *Bergeson* and *Baker v. CNA Ins. Co.*, are not authority for the proposition that the attorney-client privilege is inapplicable to first-party bad faith cases when dual representation is not at issue. *Palmer*, 261 Mont. 107-08.

<sup>2</sup> See, e.g., *Tank v. State Farm Fire & Cas. Co.*, 3105 Wn.2d 381, 715 P.2d 1133 (1986) (insurance company hired lawyer to defend, under reservation of rights, insured against action by third-party claimant). This is not a "*Tank*" case because there were no third-party claims at issue, just property loss, and thus Farmers did not need to retain a lawyer to defend Mr. Cedell against any potential liability to third parties.

<sup>3</sup> "Third party coverage indemnifies an insured for covered claims which others [third party claimants] file against him. . . . By contrast, first-party coverage pays specified benefits directly to the insured when a determinable contingency occurs, allowing an insured to make her own personal claim against her insurer." *Mutual of Enumclaw Ins. Co. v. Dan Paulsen Const., Inc.*, 161 Wn.2d 903, 914 n. 8, 169 P.3d 1 (2007) (quotations and citations omitted).

Under established Washington law, the attorney-client privilege should apply to the communications between Farmers and its lawyer because the nature of the relationship was not such that Farmers' coverage counsel was also operating on behalf of the insured, like in cases involving third-party coverage. That Mr. Cedell accused Farmers of bad faith does not change the nature of the relationship between Farmers, its coverage counsel, and Mr. Cedell. And it is the nature of that relationship, with its lack of dual representation, that preserves the attorney-client privilege.

Mr. Cedell recognizes that both *Barry* and *Escalante* support the general rule that the attorney-client privilege is not abrogated merely because bad faith is alleged under a policy providing for first-party coverage. See Supplemental Responsive Brief, pg. 1. Yet instead of citing contrary cases from Washington (of which WDTL could find none), Mr. Cedell asks this Court to create a distinction between bad faith claims under UIM coverage, such as those asserted in *Escalante* and *Barry*, and bad faith claims under first-party property loss coverage. Mr. Cedell's basis for this distinction lies in the supposed difference between UIM insurance and other insurance covering first-party losses.

Washington cases, however, do not recognize such a distinction -- policies covering UIM losses are just a species of first-party coverage. See *State Farm & Cas. Co. v. Parrella*, 135 Wn. App. 536, 542, 141 P.3d 643 (2006) (UIM insurance is first-party coverage); *Am. Mfgs. Mut. Ins. Co. v. Osborn*, 104 Wn. App. 686, 700, 17 P.3d 1229 (2001) (declining to distinguish between UIM and first-party coverage for purposes of

applying law on unfair claims settlement practices); *Rees v. Viking Ins. Co.*, 77 Wn. App. 716, 719, 892 P.2d 1128 (1995) (“UIM coverage is first party coverage.”). And under both UIM and property loss coverage, the lawyer hired by the insurance company is not operating on behalf of both clients, unlike the dual representation relationship that can arise under third-party coverage. Accordingly, the nature of the relationship, under both UIM and property loss coverage, between the insurer and the insurer’s lawyer is such that the attorney-client relationship applies to communications between the insurer and its lawyer.

**2. Case Law from Other Jurisdictions Supports Holding that the Attorney-Client Privilege Applies in Bad-Faith Claims Arising from First-Party Insurance.**

As shown, the Washington cases to address the subject of the attorney-client privilege in a first-party insurance bad faith context came to the same conclusion as the Court of Appeals in the decision under review here: the privilege protects communications between an insurance company and its lawyer related to the first-party insurance claim. This rule is consistent with the law of the great majority of jurisdictions that have addressed the subject:

- In California, for example, the attorney-client privilege applies in bad faith actions arising from the treatment of a claim made under a first-party property loss policy because

...an insurance company should be free to seek legal advice in cases where coverage is unclear without fearing that the communication necessary to obtain that advice will later become available to an insured who is dissatisfied with a decision to deny coverage. **A contrary rule would have a chilling effect on an**

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**insurance company's decision to seek legal advice regarding close coverage questions, and would disserve the primary purpose of the attorney-client privilege** — to facilitate the flow of information between the lawyer and the client so as to lead to an accurate ascertainment and enforcement of rights.

*Aetna Cas. & Ins. Co. v. Superior Court of the City and County of San Francisco*, 153 Cal.App.3d 467, 200 Cal. Rptr. 471, 474 (Cal. Ct. App. 1984) (holding that trial court erred by denying insurance company's motion for protective order) (emphasis added).

• Delaware does not distinguish between first-party bad faith actions arising from UIM or personal injury protection (PIP) coverage: the attorney-client privilege applies, subject to exceptions, in bad faith actions arising from either type of first-party coverage. In *Tackett v. State Farm Fire & Cas. Ins. Co.*, the Delaware Supreme Court recognized that the filing of a bad faith action resulting from the handling of a first-party UIM claim does not result in a *per se* waiver of the attorney-client privilege. 653 A.2d 254, 260 (Del. 1995) (a party cannot force an insurer to waive the protection of the attorney-client privilege merely by bringing a bad faith claim). And in *Clausen v. Nat'l Grange Mut. Ins. Co.*, the Delaware Supreme Court affirmed that the same rule applied in a bad faith claim under a first-party PIP policy: "One of the goals of the Supreme Court's decision in *Tackett* was to make sure that a plaintiff in a bad faith action [will] not be able to go on an expedition into envisioned 'gold mine' that is the claims file just on the basis of" filing a bad faith complaint. 730 A.2d 133, 144 (Del. 1997)

• West Virginia courts have held that the attorney-client privilege applies in a bad faith action arising from a dispute over fire insurance coverage. *State ex rel. U.S. Fid. & Guar. Co. v. Canady*, 194 W. Va. 431, 441-44, 460 S.E.2d 677 (W. Va. 1995) (vacating trial court order for production of privileged documents); *see also State v. Madden*, 215 W.Va. 705, 714, 601 S.E.2d 25 (W.Va. 2004) (vacating trial court order requiring insurance company to submit to discovery requests; trial court erroneously ruled that the attorney-client privilege was inapplicable in a first-party insurance bad faith action).

• In Montana, “the nature of the relationship, not the nature of the cause of actions, controls whether communications between attorney and client can be discovered. . . . The attorney-client privilege protects communications . . . when the insurer’s attorney did not represent the interest of the insured in the underlying case.” *Palmer v. Farmers Ins. Co.*, 261 Mont. 91, 108, 861 P.2d 895 (Mont. 1995) (communications subject to the attorney-client privilege since the insurer’s lawyer was not engaged in dual representation; insurer entitled to new trial on bad faith claim arising from UIM coverage when trial court compelled discovery of, and admitted at trial, materials subject to privilege).<sup>4</sup>

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<sup>4</sup> It should be noted that reference to “first-party bad faith cases” under Montana law does not necessarily mean bad faith cases arising under first-party coverage policies, but rather refers to cases where the insured (instead of a third-party claimant) is the plaintiff in the bad faith action against the insurance company. *Palmer v. Farmers Ins. Co.*, 261 Mont. 91, 108, 861 P.2d 895 (Mont. 1995).

• In South Dakota, coverage opinions provided to the insurer by outside counsel are protected by the attorney-client privilege in first-party bad faith actions. *Bertelsen v. Allstate Ins. Co.*, 796 N.W.2d 685, 701, 2011 S.D. 13 (S.D. 2011) (“The [insureds] were not joint clients of the counsel [their insurer] retained. It thus appears that the attorney-client privilege protects the coverage opinions outside counsel prepared for [the insurer] during the investigation” of the insureds’ claim for medical benefits under an automobile insurance policy.).

• • Indiana recognizes a privilege for documents prepared by outside counsel in response to insurer’s request for legal advice relating to the investigation and validity of a claim made under a first-party property loss policy: “Communications between attorney and client and advice given by attorney must remain confidential to insure the proper functioning of the legal system. . . . To permit the [insured] access to the documents simply because it asserted a bad faith claim against [the insurer] would ignore the basic premise of protecting the attorney-client privilege.” *Hartford Fin. Servs. Group, Inc. v. Lake County Park & Recreation Bd.*, 717 N.E.2d 1232, 1238 (Ind. Ct. App. 1999) (reversing trial court ruling ordering production of claims file; distinguishing between the first-party insurance policy at issue and cases where the attorney was retained by the insurance company to defend the insured). “A simple assertion that an insured cannot otherwise prove a case of bad faith does not automatically permit an insured to rummage through the insurer’s claims file.” *Id.*

- In Arizona, the Supreme Court rejected “the idea that the mere filing of a bad faith action . . . may be found to constitute an implied waiver of the privilege.” *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 62, 13 P.3d 1169 (Ariz. 2000).

- In Florida, the attorney-client privilege applies in bad-faith actions arising from first-party coverage. *See Genovese v. Provident Life & Accident Ins. Co.*, \_\_ So.3d \_\_, 2011 WL 903988 (March 11, 2011) (distinguishing between the work product rule and the attorney-client privilege to hold that attorney-client privileged communications are not discoverable in a bad faith action arising from first-party coverage under a disability income policy); *XL Specialty Ins. Co. v. Aircraft Holdings, LLC*, 929 So.2d 578, 583-84 (Fla. Ct. App. 2006) (trial court erred by compelling production of the claims file from the lawyer hired by the insurer regarding a claim made under a policy covering damage to insured’s Learjet).

While searching nationwide case law to determine whether Washington’s treatment of the attorney-client privilege was consistent with other jurisdictions, WDTL found that one state, Ohio, stood out from the others for its apparently unequivocal abandonment of the attorney-client privilege. Ohio case law, however, does not provide any reasoned basis for abolishing the privilege; instead, coverage-related communications between an insurer and an attorney retained to provide coverage advice was summarily deemed “undeserving of protection” whenever an insured asserts a bad faith claim. *See Boone v. Vanliner Ins.*

Co., 91 Ohio St.3d 209, 212, 744 N.E.2d 154 (Ohio 2001). *Boone* purported to adopt that rule from *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 635 N.E.2d 331 (Ohio 1994), but *Moskovitz* is nothing more than a case where an exception to the attorney-client privilege was broadly applied -- it was not an insurance bad faith case.

The unenviable aspect of Ohio law is the unexamined transformation of an exception to the attorney-client privilege into a rule abolishing the privilege for communications between an insurer and coverage counsel relating to claims made under a first-party policy. There was no reasoned basis for the leap, nor any discussion on whether abolishing the privilege would threaten the open and honest discourse between attorney and client or severely limit the ability of insurers to obtain the advice of counsel when making difficult coverage determinations. *See Boone*, 91 Ohio St.3d at 215-19 (dissent). Because Ohio's abolition of the attorney-client privilege runs contrary to the policy behind the privilege, this Court should decline to follow Ohio's lead, especially where recognition of the attorney-client privilege for the past 24 years in Washington has not prevented first-party insureds from holding the insurers accountable for acting in bad faith.

**C. The Crime-Fraud Exception to the Attorney-Client Privilege Is Not Satisfied By an Allegation of Bad Faith.**

Mr. Cedell also argues that the crime-fraud exception to the attorney-client privilege should be applied here. *See Supplemental*

Responsive Brief, pg. 3.<sup>5</sup> The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (2000) sets forth the exception as follows:

The attorney-client privilege does not apply to a communication when a client:

(a) consults a lawyer, for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or

(b) regardless of the client's purpose at the time of consultation, uses the lawyer's advice or other services to engage in or assist a crime or fraud.

"To strip a communication of the attorney-client privilege, the party seeking discovery must show that (1) its opponent was engaged in or planning a fraud at the time the privileged communication was made, and (2) that the communication was made *in furtherance of* that activity." *Barry*, 49 Wn. App. at 205 (emphasis added).<sup>6</sup> This standard is to be applied by the trial court using the two-part analysis set forth in *Escalante*: "First, the court determines whether there is a factual showing adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to evoke the fraud exception has occurred. Second, if so, the court subjects the documents to an in camera inspection to determine whether there is a foundation in fact for the charge of civil fraud." *Barry*, 98 Wn. App. at 206, citing *Escalante*, 49 Wn. App. at 394.

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<sup>5</sup> Mr. Cedell does not appear to implicate any other possible waiver of or exceptions to the attorney-client privilege, so WDTL will address none here.

<sup>6</sup> If there is no causal connection or functional relationship between the attorney's advice and the client's fraud, the communication is not in furtherance of the fraud. See *United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997).

Insurers have a duty to act in good faith. 6A Washington Practice, Wash. Pattern Jury Instructions, Civil § 320.02 (5th ed.). In the context of a coverage determination, “an insurer who refuses to pay a claim, without conducting a reasonable investigation or without having a reasonable justification, fails to act in good faith.” *See* WPI § 320.04.

In the decision under review, Division II concluded that bad faith does not equal fraud for the purposes of applying the crime-fraud exception to the attorney-client privilege because the elements of fraud and bad faith are separate and distinct. *Cedell v. Farmers Ins. Co. of Washington*, 157 Wn. App. 267, 278, 237 P.3d 309 (2010).<sup>7</sup> Accordingly, Division II held that “alleging bad faith on the part of the insurer does not do away with the attorney-client privilege. Instead, the plaintiff must still show an exception to the attorney-client privilege, such as the fraud exception. That exception requires a showing of actual fraud, not just bad faith.” *Cedell*, 157 Wn. App. at 279.

Division II’s decision is consistent with established Washington case law. Before *Barry*, no Washington court had expressly addressed whether the tort of bad faith was equivalent to fraud for purposes of invoking the crime-fraud exception. *See Whetstone v. Olson*, 46 Wn. App.

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<sup>7</sup> In contrast to the question of reasonableness at the heart of an insurance bad faith claim, allegations of fraud are established under the 9-part test cited by *Cedell*: “(1) a representation of an existing fact, (2) its materiality, (3) its falsity, (4) the speaker’s knowledge of its falsity or ignorance of the truth, (5) the [speaker’s] intent that [the fact] should be acted upon by the person to whom it is made, (6) ignorance of [the fact’s] falsity on the part of the person to whom it is made, (7) the latter’s reliance on the truth of the representation, (8) [the right of the person] to rely on it, and (9) [the person’s] consequent damage.” *Lambert v. State Farm Mut. Auto Ins. Co.*, 2 Wn. App. 136, 141, 467 P.2d 214 (1970).

308, 310 n.1, 732 P.2d 159 (1986) (because the case involved fraud, the court did not have to examine whether the exceptions to the privilege extend to other forms of tortious conduct); *Seattle Northwest Secs. Corp. v. SDH Holdings Co.*, 61 Wn. App. 725, 741, 812 P.2d 488 (1991) (remanding for trial court to determine whether allegations of bad faith conduct by the company resisting disclosure of attorney-client communications were sufficient to invoke the fraud exception and subject the communications to in camera inspection under the *Escalante* test).

*Barry* settled the issue 12 years ago when it held that the allegations were sufficiently supported by the record to establish a prima facie case of insurance bad faith but that a prima facie case of bad faith in the settlement of a UIM claim was not adequate to support a good faith belief that the insurer engaged in wrongful conduct sufficient to invoke the fraud exception to the attorney-client privilege. *Barry*, 98 Wn. App. at 206-07 (affirming trial court's refusal to inspect the privileged documents in camera). In the decision under review, Division II simply followed in *Barry's* footsteps, with additional support for the proposition that fraud and bad faith are distinct concepts.

*Escalante* did not have occasion to decide whether the allegations of bad faith in that case were tantamount to civil fraud. Instead, it adopted the test set forth in *Caldwell v. District Court*, to require a showing of a foundation in fact for the charge of civil fraud before the privilege could be overcome. *Escalante*, 49 Wn. App. at 394, citing *Caldwell*, 644 P.2d 26, 33 (Colo. 1982). And *Caldwell* did not have occasion to decide

whether the allegations of bad faith could satisfy the civil fraud exception since that case, like *Whetstone*, involved allegations of fraud. 644 P.2d at 32 n.5. Instead, *Caldwell* noted that there “is a division of authority over whether the crime or fraud exception extends to all forms of tortious conduct.” *Id.*

WDTL acknowledges that Alaska has virtually abolished the attorney-client privilege in bad faith actions arising out of first-party policies by holding that the alleged bad faith activity by the insurer satisfied the civil fraud requirement of the exception to the attorney-client privilege. *United Servs. Auto. Ass'n v. Werley*, 526 P.2d 28, 33 (1974).<sup>8</sup> This approach has not been widely followed outside of Alaska, with other jurisdictions narrowly applying the civil fraud exception in insurance and non-insurance cases. *See Freedom Trust v. Chubb Group of Ins. Cos.*, 38 F. Supp. 2d 1170, 1173 (C.D. Ca. 1999) (“The gravamen of fraud, however, is falsity. . . . Thus, bad faith denial of insurance coverage is not inherently similar to fraud.”); *Ferrara & DiMercurio v. St. Paul Mercury Ins. Co.*, 173 F.R.D. 7, 11-13 (D. Mass. 1997) (declining to extend crime-fraud exception where no crime or fraud alleged; denying motion to

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<sup>8</sup> *Escalante* cited to *Werley* for the general proposition that the crime-fraud exception to the attorney-client privilege can be invoked upon a prima facie showing of bad faith tantamount to civil fraud. This general proposition is still part of Alaska law. *See In re Mendel*, 897 P.2d 68, 74 (Alaska 1995) (party seeking discovery failed to show prima facie case of crime of fraud that would overcome the attorney-client privilege). *Escalante* did not expressly adopt *Werley*'s holding that a showing of nothing more than a prima facie case of bad faith can be sufficient to invoke the exception. *See Escalante*, 49 Wn. App. at 394. And to the extent *Escalante* can be read as adopting *Werley* in its entirety, *Barry* clarified Washington law on that point by holding that a showing of fraud is required to invoke the fraud exception.

compel production of claims file regarding fire loss under marine insurance policy); *see also Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1551 (10th Cir. 1995) (declining to apply crime-fraud exception where tort of illegal racial discrimination alleged; crime-fraud exception limited to advice in furtherance of crime or fraud); *Oil, Chemical & Atomic Workers Int'l Union v. Sinclair Oil Corp.*, 748 P.2d 283, 290-91 (Wyo. 1987) (declining to adopt an exception to attorney-client privilege for contemplated tortious acts because: “[b]roadening the exception in such ways might lead, at least initially, to greater disclosure (more evidence with which to get at the truth), but in the long run surely the effect would be to discourage clients from attempting to conform their conduct to legal requirements and to discourage lawyers from seeking information from their clients in order to advise them effectively” (quotation and citation omitted)).

There is no good reason to jettison Washington law recognizing the applicability of the attorney-client privilege and instead adopt Alaska’s de facto abolition of the privilege in all circumstances where a prima facie case of bad faith is made out. In addition to being inconsistent with Washington law recognizing that the attorney-client privilege can co-exist with bad faith claims, Alaska’s approach is inconsistent with the purpose of the privilege: protecting confidential attorney-client communications so that clients will be able to speak freely and fully inform their attorneys of relevant facts. Accordingly, WDTL urges this Court to uphold existing Washington law on the attorney-client privilege and to clarify that the full

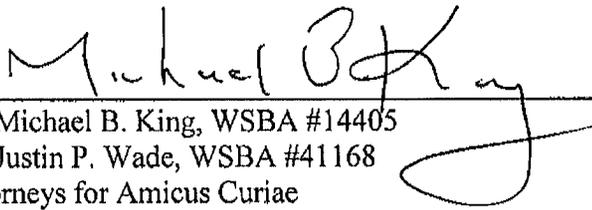
and frank communication between attorneys and their clients is encouraged in Washington to promote the broad public interest in the observance of law and administration of justice.

**V. CONCLUSION**

This Court should uphold the protections of the attorney-client privilege for first-party property loss insurers confronted by bad faith claims by their insureds.

RESPECTFULLY SUBMITTED this 19th day of August, 2011.

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By   
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**CERTIFICATE OF SERVICE**

The undersigned hereby declares as follows:

I am employed at Carney Badley Spellman, PS, attorneys of record for the Washington Defense Trial Lawyers Association herein.

On August 19, 2011, I caused a true and correct copy of the foregoing document to be: 1) filed in the Supreme Court of the State of Washington; and 2) duly served *via electronic mail* and *U.S. mail* on the following parties:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19<sup>th</sup> day of August, 2011 at Seattle, Washington.

  
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Patti Saiden, Legal Assistant