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Court of Appeals No. 38921-5-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

BRUCE CEDELL, a single man,

Plaintiff/Petitioner,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Defendant/Respondent

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
JY RONALD R. CARPENTER
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APPEAL FROM COURT OF APPEALS DIVISION II

OF THE STATE OF WASHINGTON NO. 38921-5-II

**RESPONDENT'S ANSWER TO WASHINGTON STATE
ASSOCIATION FOR JUSTICE FOUNDATION AMICUS
CURIAE MEMORANDUM IN SUPPORT OF REVIEW**

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I. IDENTITY OF RESPONDENT

Defendant/respondent, Farmers Insurance Company of Washington, requests the Court deny plaintiff's/petitioner's Petition for Review of the Court of Appeals decision below.

II. DECISION

The Court of Appeals filed its decision in this case on October 21, 2010. A copy of this decision is attached as Appendix A to petitioner's Petition.

III. ISSUES PRESENTED FOR REVIEW

Should the Court deny the Petition for Discretionary Review, where the decision of the Court of Appeals is consistent with applicable Washington law?

IV. STATEMENT OF THE CASE

The *Amicus Curiae* Memorandum submitted by the Washington State Association for Justice Foundation (WSAJF) presents no new factual background of the case not already responded by Respondent in its prior Answer to Petitioner's Petition for Discretionary Review. Therefore, Respondent reincorporates herein its Statement of the Case from its prior Answer filed December 21, 2010.

V. ARGUMENT

A. Argument Why Review Should Be Denied.

1. The Court of Appeals' decision is not in conflict with *Escalante*.

The Washington Court of Appeals' decision reversing the superior court was consistent with *Escalante v. Sentry Ins.*, 49 Wn. App. 375, 743 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).

Relying on *Escalante*, Division II's opinion below recognized correctly that the trial court erred when it found that an insurance company does not have any right to attorney-client privilege in a bad faith claim. Notably, the WSAJF does not argue, and tacitly concedes, that insurance companies are entitled to the attorney-client privilege subject to specified exceptions.

Moreover, Division II's opinion below recognized correctly that *Escalante* established a two-step analysis for determining whether fraudulent conduct exists that is sufficient to overcome the attorney-client privilege. "First, the trial court determines whether there is a factual showing adequate to show that wrongful conduct sufficient to evoke the fraud exception has occurred." *See Cedell v. Farmers Ins. Co. of Washington*, 157 Wn. App. 267, 277 (2010)

(citing *Escalante*, 49 Wn. App. at 394). “Second, if so, the court conducts an *in-camera* inspection of the documents to determine whether there is a foundation in fact to overcome the privilege based on civil fraud.” *Id.* (citing *Escalante*, 49 Wn. App. at 394).

The WSAJF argues in effect that Division II’s opinion conflates the quantum of proof required to justify an *in camera* review (“good faith belief ... [of] wrongful conduct”) with the quantum of proof required to fully and finally effect the fraud exception to the attorney-client privilege (“prima facie showing of ... civil fraud.”). *See* WSAJF’s Amicus Curiae Memorandum at 7. The WSAJF argues that Division II imposed a much more onerous standard of proof – limiting the civil fraud exception to actual fraud. *Id.* However, the WSAJF misstates Division II’s ruling, which was entirely consistent with *Escalante*.

Under *Escalante*, Washington law protects confidential communications between an insurer and its counsel unless an insured can establish that the factual circumstances justify application of the fraud exception. *Escalante*, 49 Wn. App. at 394. Generally, the exception is invoked only when the insured presents a prima facie showing of bad faith tantamount to civil fraud. *Id.*

To invoke an *in camera* review, the insured must first make a “factual showing adequate to support a good faith belief by a

reasonable person that wrongful conduct sufficient to invoke the ... fraud exception ... has occurred.” *Escalante*, 49 Wn. App. at 394. Admittedly, the *Escalante* court did not address what quantum of proof was required to constitute a “good faith belief” by a reasonable person of sufficient wrongful conduct. *Id.*

Escalante however, was not the only case to address the “good faith belief” standard. This was also addressed in *Barry v. USAA*, 98 Wn. App. 199, 989 P.2d 1172 (1999). Until Division II’s opinion below, only two cases had addressed this issue: *Escalante* and *Barry*. But, the WSAJF argues that Division II’s opinion is inconsistent with *Escalante* only. Notably, the WSAJF does not argue that Division II’s opinion is inconsistent with *Barry*.

This is not surprising given that *Barry*, a case decided after *Escalante*, addressed what quantum of proof was required at each of the two steps in the analysis for determining whether fraudulent conduct existed sufficient to invoke the exception. Under *Barry*, the court held that a “good faith belief” is not satisfied by mere allegations or even evidence of bad faith or CPA violations. *Barry*, 98 Wn. App. at 206-07. In *Barry*, the insured sought an *in camera* review of the insurer’s claim file and argued that there was a factual basis to support a good faith belief that the insurer had committed fraud, alleging that the insurer had significantly delayed responding

to and settling her claim. The Court of Appeals ruled that such allegations or evidence were insufficient to support a good faith belief that the insurer had committed fraud. *Id.*

Specifically, the insured in *Barry* alleged violations of WAC 284-30-330, including subsection (3) (“Failing to adopt and implement reasonable standards for the prompt investigation of claims...”); subsection (6) (“Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims...”); and subsection (7) (compelling insureds to institute litigation or arbitration to recover amounts due under an insurance policy “by offering substantially less than the amounts ultimately recovered in such actions...”). *Id.* at 206. The insured in *Barry* also claimed that the insurer failed to timely respond to her claim (WAC 284-30-360) and failed to timely act on that claim (WAC 284-30-380). But the *Barry* court held that “[w]hile these allegations may be sufficiently supported by the record to establish a prima facie case of bad faith insurance and CPA violations, they do not, in and of themselves, constitute a good faith belief that [the insurer] committed fraud.” *Id.* at 206-07.

This is precisely the same analysis utilized by Division II in its opinion below. Division II held that Farmers’ alleged conduct “might constitute a violation of former WAC 284-30-330.” *Cedell*,

157 Wn. App. at 278. Division II, however, found that this conduct amounted to nothing more than allegations of bad faith or CPA violations, and were insufficient to invoke the fraud exception. *Id.*

Because Division II's opinion is entirely consistent with *Escalante* when read in conjunction with *Barry*, the Court should deny Petitioner's Motion for Discretionary Review.

2. The WSAJF's reliance on the Alaska case of *Werley* is misplaced.

The WSAJF asserts, correctly, that *Escalante* cited with approval *United Servs. Auto Ass'n v. Werley*, 526 P.2d 28 (Alaska 1974). *Escalante* cited *Werley* for two propositions only: (1) "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;" and (2) "the exception is usually invoked only upon a prima facie showing of bad faith tantamount to civil fraud." *Escalante*, 49 Wn. App. at 394 (citing *Werley*, 526 P.2d at 32).

But even the *Werley* Court recognized that "[t]he mere **allegation** of a crime or civil fraud will generally not suffice to defeat the attorney-client privilege." *Werley*, 526 P.2d at 32 (emphasis added). "To drive the privilege away, there must be

‘something to give colour to the charge’; there must be ‘prima facie evidence that it has some **foundation in fact**.’” *Id.* (citing *Clark v. United States*, 289 U.S. 1, 53 S.Ct. 465, 77 L.Ed. 993 (1932)).¹

This is entirely consistent with Division II’s opinion here. As noted above, Division II noted that while petitioner’s allegations regarding Farmers’ conduct might constitute bad faith and/or CPA violations, it does not rise to the a sufficient quantum of proof to invoke the fraud exception. As such, review here should be denied.

3. The Court of Appeals decision no longer involves an issue of substantial public interest, given that the Court of Appeals’ decision is consistent with long-established Washington law.

The WSAJF argues that Review should be accepted, because the issues present here are of substantial public interest. While Farmers agrees that the trial court’s decision to eviscerate the attorney-client privilege involved an issue of substantial public interest, the Court of Appeals decision does not. The decision by the

¹ The *Werley* Court went further to define the quantum of proof necessary to constitute a *prima facie* showing of fraud: “The general rule is that there must be a prima facie showing of fraud before the attorney-client privilege is deemed defeated. We think the requirement of prima facie evidence of fraud as opposed to a mere allegation of fraud seems particularly meritorious in the circumstance where a party is seeking to discover all the attorney-client communications relating to the defense of an insurance claim by an insurer. ... A prima facie case is one in which the evidence in one’s favor is sufficiently strong for his opponent to be called on to answer it. This definition can be rephrased as requiring that the evidence in favor of a proposition be sufficient to support a finding in its favor, if all the evidence to the contrary be disregarded.” *Werley*, 526 P.2d at 32-33 (citations omitted).

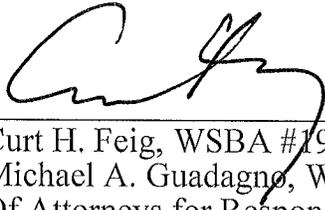
Court of Appeals simply followed long-established Washington law on the attorney-client privilege and work product doctrine.

VI. CONCLUSION

The Court should deny petitioner's Petition for Review of the Court of Appeals decision, dated October 21, 2010.

RESPECTFULLY SUBMITTED this 15th day of February, 2011.

NICOLL BLACK & FEIG

By: 

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Of Attorneys for Respondent/Defendant
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on February 15, 2011, I caused service of the foregoing pleading on each and every attorney of record herein:

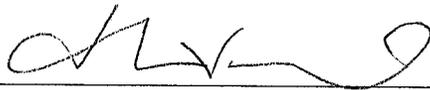
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DATED this 15th day of February, 2011, in Seattle,
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