

RECEIVED
SUPERIOR COURT
STATE OF WASHINGTON
2011 SEP 12 AM 8:22
BY DONALD R. CARPENTER
CLERK

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, NO. 38921-5-II

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

Stephen L. Olson, WSBA #7489
Olson & Zabriskie, Inc.
Attorneys for Plaintiff/Petitioner
104 West Marcy Avenue
Montesano, WA 98563
(360) 249-6174

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. STATEMENT OF CASE	1
II. ARGUMENT	2
III. CONCLUSION	3

I. STATEMENT OF THE CASE

During the investigation of Mr. Cedell's claim by his insurance company, Farmers hired a lawyer to participate in the investigation. He communicated with Mr. Cedell for several months, he took the EUO statement of Mr. Cedell, and he deposed a witness. In addition to communicating on a regular basis with Mr. Cedell for months, he sent a one-time offer to settle the claim with threat of denial of coverage if not accepted within 10 days.

The premise of the Washington Defense Trial Lawyers is that the lawyer in the present case was acting solely on behalf of the insurer. If in fact this was the case, Mr. Cedell was never informed that Ryan Hall was not working on his behalf to fully and fairly investigate and resolve his claim. Mr. Cedell rightfully assumed that he was acting on his behalf too since Farmers and its agents owed him a quasi-fiduciary duty.

When Mr. Hall deposed not only Mr. Cedell, and a witness to the fire, he and he alone determined what areas to explore and which questions he wanted to ask or not ask. These decisions were all made at a time when Farmers owed Mr. Cedell quasi-fiduciary duty as such they were required to give Mr. Cedell's interest equal consideration in all of these matters, including fair treatment in the claims handling process. It is clear that as Farmers' agent, Mr. Hall, was required to act on behalf of not only Farmers, but also Mr. Cedell. Mr. Hall was clearly acting in a dual representation situation when he took the actions that he did in this case.

II. ARGUMENT

Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381 made it clear at pages 385 and 386 that in first party insurance situation, the insurance company is supposed to work on behalf of its insured. This is because they contracted to protect the insured and they are legally required to efficiently and fairly investigate and resolve his claims. The present case is unlike the UIM situations where the situation is inherently adversarial from the get go.

In the present case, there is nothing in the record to support the conclusion that Ryan Hall was hired to act solely as coverage counsel as alleged by Farmers. To the contrary, their portions of EUO examination of Mr. Cedell and Ms. Ackley, a witness, made part of the record reveal that Ryan Hall was in fact the person who was conducting the examination and thus the investigation of the claim itself. He designed the questions of Mr. Cedell and Ms. Ackley. Declaration of Clerk's Papers 378-455; Declaration of Curt Feig, including excerpts of the transcripts of the EUO of Mr. Cedell and Ms. Ackley taken (by Mr. Hall). In addition to that, Judge Edwards' memo opinion also indicates that Ryan Hall had participated in communications with Mr. Cedell for months, prior to sending him a letter attempting to coerce settlement of a claim. Clerk's Papers letter ruling from Judge Edwards filed 2-26-09 (485-489). Under the circumstances, Farmers cannot now claim that he was solely hired as a coverage attorney and Farmers should be barred from asserting the attorney/client privilege. Farmers' reliance on *Escalante v. Sentry Insurance Company*, 49 Wn. App. 375, 743 P.2d 832 (1987), and *Barry v. USAA*, 98 Wn.App. 199, 989 P.2d 1172 (1999), is misplaced as both cases are UIM

claims and the situation is inherently adversarial from the start, unlike the present situation.

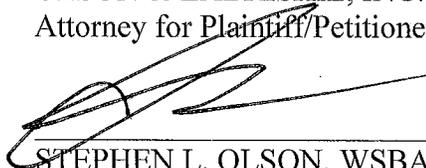
Further, most of the cases cited by Farmers from out of state can be distinguished as either involving UIM claims, or outside counsel who did not participate in the investigation. See *Aetna Casualty v. Superior Court of the City of San Francisco*, 153 Cal.App. 3d 467 (The attorney's contract was via phone. The conversations concerned the legal obligation of the insurance company to defend). *Burtelsen v. Allstate*, 796 N.W.2d 685 (When an attorney acts as an adjuster, their conversations to clients and impressions about the facts are treated as the ordinary business of claims investigation which is outside the scope of the attorney client privilege. *Tackett v. State Farm*, 653 A.2d 254, 260 (1995).

III. CONCLUSION

The Court of Appeals' ruling that the attorney/client privilege should apply should be reversed.

RESPECTFULLY SUBMITTED on 9/21, 2011.

OLSON & ZABRISKIE, INC.
Attorney for Plaintiff/Petitioner



STEPHEN L. OLSON, WSBA #7489

CERTIFICATE OF SERVICE

The undersigned hereby declares as follows:

I am employed at Olson & Zabriskie, Inc., attorneys of record for Plaintiff/Petitioner herein.

On September 9, 2011, I caused a true and correct copy of the foregoing Responsive Brief to Brief of *Amicus Curiae* Washington Defense Trial Lawyers 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:

Curt H. Feig
Michael A. Guadagno
Nicoll Black & Feig PLLC
1325 Fourth Ave., Suite 1650
Seattle, WA 98101
cfeig@nicollblack.com
mguadagno@nicollblack.com

Michael B. King
Justin P. Wade
Carney Badley Spellman P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
king@carneylaw.com
wade@carneylaw.com

Bryan Harnetiaux
517 E. 17th Avenue
Spokane, WA 99203
amicuswsajf@winstoncashatt.com

George M. Ahrend
100 E. Broadway Ave.
Moses Lake, WA 98837
gahrend@ahrendlaw.com

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

Dated this 9 day of September, 2011 at Montesano, Washington.


JULIE BURKE, Legal Assistant