

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2004-016975

04/02/2008

HON. EDWARD O. BURKE

CLERK OF THE COURT  
L. Nixon  
Deputy

ALEJANDRO GARRIDO, et al.

DANIEL B TREON

v.

WILSHIRE INSURANCE COMPANY, et al.

MICHAEL R ALTAFFER

SUZANNE M DOHRER

MINUTE ENTRY

The Court has received and reviewed Plaintiffs Alejandro and Maricela Garrido (“Garridos”) and Bernardo and Agripina Ontiveros (“Ontiveros”) (collectively, “Insureds”) Motion to Strike Defendant Wilshire Insurance Company’s (“Wilshire”) Affirmative Defense of Subjective Good Faith, the Responses and Replies, and issues the following ruling

Plaintiffs Motion to Strike Defendant Wilshire’s Affirmative Defense of Subjective Good Faith is DENIED.

**FACTS**

On November 1, 2003, Alejandro and Maricela Garrido (the “Garridos”) experienced a fire loss at their home at 302 E. Desert Drive, Phoenix, Arizona. At the time of the fire, the Garridos had a policy of insurance with Wilshire. To assist in the appraisal of the loss and the adjustment of the Garridos’ claims, Wilshire retained Roger Page d/b/a AM/PM Claims Service (“Page”), an independent adjuster.

Following correspondence between Wilshire and Page, Wilshire issued a \$3,000.00 advance payment to the Garridos.

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On November 20, 2003, the Garridos entered into a contract with David Skipton for public adjusting services in connection with their fire loss. A week or so later, Page received notice that the Garridos had retained Skipton's services.

In November, 2003, the Ontiveros had a small fire in their electrical service panel.

On December 1, Wilshire advised Page to attempt to resolve any discrepancies between Skipton's public adjuster's appraisal and Page's own appraisal.

On three separate occasions, December 2, 2003, January 15, 2004, and February 3, 2004, Skipton wrote Page, with copies to Wilshire and to his clients, citing legal authorities and making various legal arguments on behalf of his clients. Wilshire retained Mr. Caravetta and Mr. Gerber as its legal counsel.

On January 1, 2004, the Ontiveros' property suffered another, much larger fire. Electrical issues inside the house, not the panel box, caused this fire. Mr. Ontiveros decided to hire Mr. Skipton and Skipton & Associates to assist him with his claim.

On January 28, 2004, Wilshire issued a check for \$42,061.41, the undisputed actual cash value amount of the structural loss the Garridos suffered as provided by Page.

As this lawsuit progressed, issues of attorney-client privilege arose continually. Wilshire has refused to produce certain documents from its claim file on the basis of attorney-client privilege.

On July 24, 2007, the Special Master appointed by the Court issued an order directing that Wilshire deliver all documents withheld from production by Wilshire as well as an index of the Jones, Skelton & Hochuli file and the actual documents in the Jones, Skelton & Hochuli file for his *in camera* review.

On August 27, 2007, the Special Master, upon completion of his *in camera* review of all the documents, sustained Wilshire's assertion of the attorney-client privilege and work product privilege except for a few specific documents.

After Plaintiffs filed a Motion for Reconsideration, Defendants replied, and a hearing was held on October 1, 2007. The Special Master affirmed his prior holding and entered his order.

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**RULING**

Defendant Wilshire asserts that Plaintiffs' Motion to Strike Defendant Wilshire Insurance Company's Affirmative Defense of Subjective Good Faith should be denied because "Wilshire has not asserted the advice of counsel as an affirmative defense in this action, Wilshire has not expressly or impliedly waived the attorney-client privilege with counsel at Jones, Skelton & Hochuli and because counsel were not acting as adjusters in connection with the handling of Mr. and Mrs. Garrido's claims." The Court agrees with this assessment. It is improper to strike the affirmative defense of subjective good faith for Wilshire considering that Defendant has never asserted this affirmative defense.

The Court sustains the Special Master's October 1, 2007 order. At no point in this proceeding has Defendant Wilshire expressly or impliedly waived the attorney-client privilege. Therefore, the privileged documents that Plaintiffs assert are discoverable do not need to be produced.

Plaintiffs assert that their Motion to Strike should be granted because *State Farm Mut. Auto Ins. v. Lee*, 199 Ariz. 52, 13 P.3d 1169 (2000) is controlling. Our Supreme Court in *State Farm* declared that an insurance company can not maintain that it acted with subjective good faith if it is also utilizing the attorney-client privilege to cover up attorney contributions to its insurance adjustment process. However, Defendant Wilshire has made no affirmative assertion that its' counsel assisted in the interpretation of the insurance policies. As the Special Master held:

I find that Defendant Wilshire has made no such affirmative assertion in this case but instead, asserts it denied coverage based upon its interpretation of the insurance policy at issue. The mere fact that Defendant Wilshire had retained counsel at the time it made its own decision to deny coverage is not sufficient to establish an implied waiver of the attorney-client privilege.

At no time in this case has Wilshire asserted the affirmative defense of subjective good faith. Therefore, Plaintiffs can not establish an implied waiver of Defendant's attorney-client privilege. Thus, Plaintiffs' Motion to Strike is DENIED.