DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

RAYMOND BENNETT and VALENCIA BENNETT, husband and wife, Plaintiffs/Appellants, v. INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, a foreign corporation; AIG DOMESTIC CLAIMS, INC., a foreign corporation, Defendants/Appellees.	1 CA-CV 10-0815 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-052900

The Honorable Linda H. Miles, Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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N O R R I S, Judge

¶1 This appeal arises out of a lawsuit filed by Raymond and Valencia Bennett against the Insurance Company of the State of Pennsylvania ("ICSOP") and AIG Domestic Claims ("AIG") (collectively, "Defendants"). The Bennetts allege, *inter alia,* Defendants breached the implied covenant of good faith and fair dealing in handling claims stemming from Raymond's work-related injury at U-Haul International, Inc. The superior court granted Defendants' summary judgment motions on the Bennetts' liability and damages claims. As we explain, we agree with the Bennetts they presented triable issues of fact on their claim Defendants acted in bad faith by scheduling an independent medical examination ("IME") and selecting Zoran Maric, M.D., to perform the IME. Further, in light of this holding, we direct the superior court to reconsider the Bennetts' request for punitive damages on this issue, and reverse the grant of summary judgment on Valencia's claim for loss of consortium. We affirm summary judgment on the Bennetts' other claims, and express no opinion on their argument the discovery master appointed by the superior court should not have allowed Defendants to redact attorney-

client privilege-related information, as it is not properly before us.

DISCUSSION

¶2 An insurer breaches the implied covenant of good faith and fair dealing when "the insurer 'intentionally denies, fails to process or pay a claim without a reasonable basis.'" *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 196 Ariz. 234, 237, ¶ 20, 995 P.2d 276, 279 (2000) (quoting *Noble v. Nat'l Am. Life Ins. Co.*, 128 Ariz. 188, 190, 624 P.2d 866, 868 (1981)). An insurer has "an obligation to immediately conduct an adequate investigation, act reasonably in evaluating the claim, and act promptly in paying a legitimate claim. . . . It should not force an insured to go through needless adversarial hoops to achieve its rights under the policy." *Id.* at 238, ¶ 21, 995 P.2d at 280. The question of whether an insurer's actions were reasonable has both objective and subjective elements. *See State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 57, ¶ 15, 13 P.3d 1169, 1174 (2000); *Trus Joist Corp. v. Safeco Ins. Co. of Am.*, 153 Ariz. 95, 104, 735 P.2d 125, 134 (App. 1986).

¶3 We review the superior court's grants of summary judgment de novo to determine "whether there are any genuine issues of material fact." *Unique Equip. Co. v. TRW Vehicle Safety Sys., Inc.*, 197 Ariz. 50, 52, ¶ 5, 3 P.3d 970,

972 (App. 1999). If "the evidence or inferences would permit a jury to resolve a material issue in favor of either party, summary judgment is improper." *Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 292, ¶ 19, 229 P.3d 1031, 1034 (App. 2010) (quotation omitted). We view the facts and reasonable inferences in the light most favorable to the Bennetts, the parties against whom judgment was entered. *Unique Equip. Co.*, 197 Ariz. at 52, ¶ 5, 3 P.3d at 972.

I. Independent Medical Examination with Dr. Maric

A. Background

¶4 First, the Bennetts argue the superior court should not have granted summary judgment on their argument Defendants acted in bad faith when they required Raymond to submit to an IME, and allegedly selected a biased doctor to perform the IME. For the reasons discussed below, we agree these two interrelated issues present genuine issues of fact precluding summary judgment.

¶5 On September 27, 2005, Raymond was attempting to connect a trailer to a vehicle in the course of his employment at U-Haul when "he felt 'a pop' in his neck." After experiencing increasing neck pain that radiated into his right arm, he sought medical attention. Doctors initially prescribed pain medications and physical therapy for his injuries, but,

when his symptoms did not improve, ordered MRI and electrodiagnostic evaluations. Charles Gagnon, D.O., performed the electrodiagnostic tests and found evidence of carpal tunnel syndrome in Raymond's right hand. Dr. Gagnon's report suggested the carpal tunnel syndrome was "longstanding" and Raymond's "overall picture appear[ed] to be an aggravation of his preexisting cervical degenerative disc disease." After reviewing the MRI results, Ali Araghi, D.O., concluded that several of Raymond's cervical disks were herniated and recommended surgery.

¶6 AIG subjected the surgery recommendation to two levels of review. The AIG adjuster first approved the surgery on November 30, 2005, and "ICSOP's utilization-review department" approved it again eight days later. On December 1, in between the two approvals, an employee of Health Direct (a company Defendants describe as "a medical-management firm which assists ICSOP with coordinating medical care") wrote in a message to the AIG adjustor that because Raymond had signs of preexisting cervical degenerative disc disease and carpal tunnel syndrome, they "may want to look at getting [an] IME, at least to have [carpal tunnel syndrome] addressed." On December 5, 2005, a U-Haul employee also wrote to the AIG adjustor "we should just go ahead and sched[ule] an IME . . . . This claim will get ugly --

trust me. Mr. Bennett has been a problem employee since he started . . . . He has several discrimination suits against U-Haul (he is Afro-American), including a recent one as a result of our inability to accommodate Mod/Alt duty for this injury." After receiving this email, the AIG adjustor scheduled the IME.

¶7 AIG selected Zoran Maric, M.D., to perform the IME. Dr. Maric evaluated Raymond's MRI scan and his symptoms and concluded Raymond's "pain complaints [were] nonorganic in nature" and that no "further treatment" was needed. Dr. Maric also emphasized that he did not "agree with Dr. Araghi that Mr. Bennett [was] a surgical candidate."

¶8 After receiving Dr. Maric's IME report and noting the conflict between Dr. Araghi and Dr. Maric's "two totally different opinions," AIG scheduled a second IME with Terry McLean, M.D., a doctor Raymond apparently selected. Dr. McLean recommended surgery and disagreed with many of Dr. Maric's conclusions. AIG then again approved the surgery, which Dr. McLean performed on March 27, 2006.

B. Issues of Fact Precluding Summary Judgment

¶9 Although an insurer is "entitled to seek an independent medical examination" to ensure surgery is necessary, *Mendoza v. McDonald's Corp.*, 222 Ariz. 139, 159, ¶ 64, 213

P.3d 288, 308 (App. 2009), it may not use the process to breach the implied covenant of good faith and fair dealing.

¶10 The record suggests AIG acted on one or both of two grounds for ordering an IME: evidence suggesting Raymond had "longstanding" carpal tunnel syndrome and preexisting cervical disc disease, and the U-Haul employee's suggestion that Raymond "ha[d] been a problem employee since he started." A jury could find that Defendants ordered the IME for the second reason, and, if so, it was a "needless adversarial hoop[]," *Zilisch*, 196 Ariz. at 238, ¶ 21, 995 P.2d at 280, or evidence of "impermissible 'doctor shopping,'" *Mendoza*, 222 Ariz. at 159, ¶ 64, 213 P.3d at 308. There is accordingly a genuine issue of material fact as to whether Defendants acted in bad faith by ordering an IME.

¶11 The Bennetts further assert that Dr. Maric "had earned a reputation as someone who 'usually disagrees' with another surgeon's request for surgical authorization," and argue Defendants "knew, through [their] adjustor, that Dr. Maric always gave the same opinion and never agreed with a request for surgery." Defendants do not dispute this characterization of Dr. Maric, and admit they selected him, but argue they did not do so "for improper reasons, such as to delay surgery or intimidate Bennett into withdrawing his request." The record

contains evidence contradicting this argument; specifically, after receiving Dr. Maric's report, the AIG adjustor told U-Haul she "probably shouldn't have used" Dr. Maric because she had "noticed that Dr. Maric says the same thing in just about every IME" and "[Dr. Maric] said his usual, return to full duty, no need for further care, etc." A jury could reasonably infer from these statements that AIG intentionally selected a doctor they knew would disagree with the recommendation for surgery; this evidence, coupled with the interrelated question of AIG's motive in ordering an IME, also establishes a genuine issue of material fact that precludes summary judgment.

¶12 Defendants essentially argue that even if they did cause an unnecessary delay in surgery by selecting Dr. Maric for an IME –- a conclusion we leave to a jury and do not decide here –- the delay was not objectively unreasonable because Dr. Araghi did not consider Raymond's injury an "emergency." Defendants further argue no harm was caused because Raymond's condition did not worsen as a result of the delay, and their "immediate decision to pay for a second IME by a doctor of Bennett's choice disposes of any claim of subjective bad faith." We are unpersuaded there are no genuine issues of material fact regarding the subjective and objective reasonableness of Defendants' conduct. There is evidence suggesting

Defendants were aware the surgery Dr. Araghi recommended for Raymond was urgent, as the record reflects the AIG adjuster first scheduled the IME with Dr. Maric for January 18, 2006, but rescheduled it for December 14, 2005, after Dr. Araghi told her Raymond's "injury [was] very serious and [he wanted] to do surgery right away." The record also contains medical expert witness testimony from which a jury could find the delay caused Raymond's condition to worsen or otherwise harmed him. Finally, the decision to send Raymond to Dr. McLean does not obviate a claim for bad faith arising out of the earlier decision to obtain an IME and select Dr. Maric to perform it. *See Deese v. State Farm Mut. Auto. Ins. Co.*, 172 Ariz. 504, 507, 838 P.2d 1265, 1268 (1992) ("[A]n insurance company's duty of good faith means that 'an insurer must deal fairly with an insured, giving equal consideration *in all matters* to the insured's interest.'") (quoting *Tank v. State Farm Fire & Cas. Co.*, 105 Wash.2d 381, 386, 715 P.2d 1133, 1136 (1986)).

¶13 For the reasons discussed above, we reverse the superior court's grant of summary judgment on this part of the Bennetts' bad faith claim and remand it to the superior court for further proceedings consistent with this decision.

II. The Bennetts' Post-Surgery Bad Faith Arguments

A. Dispute Over Loss of Earning Capacity

¶14 The Bennetts argue Defendants "exercised bad faith in investigating and litigating Mr. Bennett's right to permanent total disability benefits." We disagree.

¶15 After the surgery, Raymond continued to receive treatment, including physical therapy. In December 2006, Dr. McLean wrote that he and two other doctors who had evaluated Raymond -- Leo Kahn, M.D., and Mary Merkel, M.D. -- "felt" that Raymond was "stationary" and "totally disabled from any employment," and recommended that Raymond be provided with a motorized wheelchair. AIG accordingly notified the Commission that Raymond had an unscheduled permanent partial disability, and provided him with a motorized wheelchair. Defendants also, however, ordered covert surveillance of Raymond "to show the doctors that [Raymond did] not need a motorized wheelchair." In April 2007, the Commission found Raymond had a permanent total unscheduled disability with a 100% loss of earning capacity and awarded him compensation of $1,600 per month. Defendants then showed Raymond's doctors a surveillance video of Raymond walking "without difficulty without [a] cane," and standing "without difficulty and . . . no limp or unstable gait." After reviewing the surveillance video, all of Raymond's doctors

agreed he was at least capable of performing sedentary work part-time. Defendants then challenged the Commission's finding of permanent total unscheduled disability, arguing Raymond was not totally disabled. A Commission administrative law judge ("ALJ") held a series of hearings on this and other issues, and, after adopting Dr. McLean's opinion of Raymond's earning capacity, found he could perform part-time sedentary work and accordingly reduced his disability benefits.

¶16 As an initial matter, we disagree with Defendants' argument that, relying on *Aetna Casualty & Surety Co. v. Superior Court*, 161 Ariz. 437, 778 P.2d 1333 (App. 1989), the ALJ's decision to reduce Raymond's benefits "should preclude any finding that [Defendants] acted in bad faith by challenging Bennett's claim of a 100% [loss of earning capacity]." This argument formed the basis for Defendants' summary judgment motion on this claim, and it appears the superior court accepted

it.[1] As Defendants recognize, this court held in *Lennar Corp. v. Transamerica Insurance Co.* that a prior ruling in favor of an insurer's position may be relevant to but is not dispositive of whether the insurer acted in bad faith. 227 Ariz. 238, __, ¶ 17, 256 P.3d 635, 640-41 (App. 2011). We therefore do not affirm summary judgment on that basis.

¶17 The Bennetts assert Defendants investigated Raymond's right to permanent total disability benefits with the purpose of denying benefits, and their failure to present evidence of the reasonable availability of employment opportunities evidences bad faith. We find no genuine issue of material fact precluding summary judgment on this claim; Defendants' investigation was reasonable and their decision to dispute the ALJ's finding of a

[1]This issue is complicated by the fact that Defendants first moved for summary judgment on this claim in February 2009, relying solely on their *Aetna* argument, then, while their first motion was still pending, filed a second summary judgment motion in January 2010 which included both the *Aetna* argument and an additional argument. From the transcript of the hearing on the February 2009 motion, it appears the superior court judge then assigned to the case agreed with the *Aetna* argument, but did not rule on the motion. A different judge granted the February 2009 motion in June 2010, after considering the arguments in both motions. The issue is further complicated by the superior court's decision not to provide "any kind of an analysis of [the court's] reasoning for [its] ruling on these motions." Although we appreciate the complexity of the motions presented to the superior court, the court's decision not to explain its reasoning makes appellate review extremely difficult. *See State v. Fisher*, 141 Ariz. 227, 236 n.1, 686 P.2d 750, 759 n.1 (1984) ("We strongly urge trial courts to include in the record the reasons for their decisions so that appellate courts may review those decisions in a more directed and efficacious manner.").

total loss of earning capacity was reasonably supported by reliable medical opinions. *See W.A. Krueger Co. v. Indus. Comm'n*, 150 Ariz. 66, 68, 722 P.2d 234, 236 (1986) (medical opinions based on review of surveillance footage were proper basis to deny disability benefits). Further, although Defendants failed to prove the reasonable availability of job opportunities, as this court's May 2009 memorandum decision held,[2] this failure does not rise to the level of bad faith. For these reasons, we affirm the superior court's grant of summary judgment on this part of the Bennetts' bad faith claim.

B. Dispute over Wheelchair and Wheelchair Transportation

¶18 The Bennetts assert Defendants exercised bad faith in the process of providing Raymond with an electric wheelchair, replacement parts, and a means of transportation for the wheelchair. We disagree.

¶19 As discussed above, Defendants provided Raymond with a motorized wheelchair in January 2007, after his doctors recommended he be provided one, and began covert surveillance of Raymond around the same time. After viewing the surveillance

[2]*Bennett v. Indus. Comm'n*, 1 CA-CV 08-0040, 2009 WL 1449169, at *4, ¶ 18 (Ariz. App. May 21, 2009) (mem. decision) ("Based on the lack of evidence, we find that Insurance failed to come forward with sufficient evidence to meet the shifted burden regarding reasonable availability.")

footage in April 2007, certain of Raymond's doctors concluded he no longer needed to use a wheelchair. Defendants then refused to provide replacement wheels for the chair until after the ALJ found in May 2008 that Raymond was entitled to "a motorized wheelchair and parts and some device to be placed on the back of his vehicle to transport [the] wheelchair." After Raymond filed a Request for Review, the ALJ issued a Decision Upon Review which clarified that "[i]t is not unreasonable that an evaluation be performed with respect to [Raymond's] transportation. This evaluation should be dealt with administratively, to evaluate [Raymond's] vehicle for the transportation of a motorized wheelchair."

¶20 The Bennetts accordingly had their vehicle evaluated for a wheelchair lift, and the lift vendor reported their "vehicle [was] too small to have any wheelchair [lift] safely installed." The Bennetts then asked Defendants to provide a larger vehicle with a lift, but Defendants refused to do so, arguing the purchase of a new vehicle was outside the scope of the ALJ's order, and asked for "an alternative that [did] not include the purchase of a vehicle." Defendants also found a vendor who told them a lift could safely be installed on the Bennetts' car, and asked the Bennetts to schedule a day to bring their car in to have the lift installed, but the record suggests

the lift was never installed due to concerns the Bennetts' car could not support the weight.

¶21 In February 2009, the Bennetts filed a request for a hearing under Arizona Revised Statutes ("A.R.S.") section 23-1061(J)[3] (Supp. 2008) with the Commission, asserting they were entitled to a means of transporting the wheelchair but Defendants had refused to provide anything but a lift for their current vehicle, which was not feasible. After an informal conference with an ALJ, the parties agreed to modify the Bennetts' vehicle to accommodate a lift. Then, after an evaluation revealed the vehicle could feasibly be modified to accommodate a lift, the Bennetts notified Defendants they preferred to have the cost of the modification applied to a new car, as their existing car was old and its continued usefulness was "questionable." After further dispute, the parties eventually agreed to a settlement, approved by the ALJ, wherein Defendants agreed to pay Raymond a lump sum of money and install, maintain, and replace the wheelchair lift, and Raymond agreed not "to make any claims for financial assistance for the purchase of a motor vehicle."

[3]This subsection states that "[t]he commission shall investigate and review any claim in which it appears to the commission that the claimant has not been granted the benefits to which such claimant is entitled."

¶22 The Bennetts essentially assert the positions taken by Defendants and the delays throughout this timeframe evidence bad faith. We do not see a genuine issue of material fact precluding summary judgment on these issues. Defendants' initial refusal to supply replacement parts for the wheelchair was supported by the opinions of certain of Raymond's doctors and Defendants were entitled to rely on those opinions. Although the lengthy dispute over the wheelchair lift described above was undoubtedly frustrating for the Bennetts, it does not appear the frustration was entirely of Defendants' making. The record suggests that much of the dispute was due to vague language in the ALJ's findings regarding the need for wheelchair transportation, and that the dispute was further complicated by the apparently unexpected discovery the Bennetts' vehicle could not support the weight of a wheelchair lift. In sum, Defendants' actions were reasonably supported by medical opinions and the ALJ's findings and do not reflect Defendants were attempting to take "unfair financial advantage of [their] insured through conduct that invade[d] the insured's right to honest and fair treatment." *Rawlings v. Apodaca*, 151 Ariz. 149, 156, 726 P.2d 565, 572 (1986). We therefore affirm the superior court's grant of summary judgment on this part of the Bennetts' bad faith claim.

C. Dispute over Psychological Consultation

¶23 The Bennetts argue Defendants acted in bad faith by sending Raymond to an IME when he requested psychological treatment. We disagree.

¶24 In April 2006, Dr. McLean recommended that Raymond visit a psychologist because he felt Raymond had "trouble adjusting to [his] injury and the neurological changes as a result." Defendants scheduled an appointment with a psychologist for Raymond, but cancelled it at his request. In July 2007, Raymond again requested a psychological consultation. In response, Defendants scheduled an IME with a psychologist, Patricia Johnson, Ph.D. Raymond then filed a request for an A.R.S. § 23-1061(J) hearing with the Commission, arguing that an IME was not the same thing as a psychological evaluation. After her evaluation, Dr. Johnson reported that Raymond should continue to be treated with antidepressant medication "to assist in management of his pain syndrome," but did not need counseling. At his own expense, Raymond then visited a second psychologist, Brady Wilson, Ph.D., who recommended counseling. In his May 2008 findings, the ALJ found Raymond should have "some supportive care with a counselor." The ALJ also declined to award reimbursement for Dr. Wilson's evaluation, noting, "an

appropriate psychological evaluation was provided through Dr. Johnson."

¶25 The Bennetts assert that because Defendants "reversed the proper roles of the IME doctor and the treating doctor, it can be inferred that the IME was a mere pretext to deny benefits and exert leverage." We find no genuine issue of material fact precluding summary judgment on this issue. The record demonstrates, as the ALJ found, that Dr. Johnson's evaluation was appropriate, and, as Dr. Wilson later testified, Dr. Johnson's opinion was reasonable. We therefore affirm the superior court's grant of summary judgment on this part of the Bennetts' bad faith claim.

III. Punitive Damages

¶26 The Bennetts argue the superior court should not have granted summary judgment on their request for punitive damages. We agree in part.

¶27 As discussed, the Bennetts have presented a genuine issue of material fact as to Defendants' alleged bad faith in ordering the IME with Dr. Maric, *see supra* ¶¶ 9-12, but have failed to do so on all other aspects of their bad faith claim. Because the superior court did not explain the basis for its rulings, *see supra* note 1, we cannot determine whether the court granted summary judgment on the Bennetts' punitive damages

request based on the legal and factual merits or because it had found no triable issue of fact on bad faith. We therefore reverse and remand the grant of summary judgment on punitive damages insofar as it applies to the IME with Dr. Maric, and affirm summary judgment on punitive damages on all other aspects of the Bennetts' bad faith claim. On remand, the superior court should reconsider whether summary judgment on punitive damages is warranted, *i.e.*, whether there is sufficient evidence from which a jury could find Defendants' scheduling of the IME coupled with their selection of Dr. Maric was "'aggravated, outrageous, malicious or fraudulent' combined with an evil mind as evidenced by a showing that [Defendants were] consciously aware of the needs and rights of the insured and nevertheless, ignored [their] obligations." *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 332, 723 P.2d 675, 681 (1986) (quoting *Rawlings*, 151 Ariz. at 162, 726 P.2d at 578). We leave this determination to the discretion of the superior court, based on the existing record or as supplemented by the parties.

IV. Loss of Consortium

¶28 The Bennetts argue the superior court should not have granted summary judgment on Valencia Bennett's loss of consortium claim. We agree.

¶29 A claim for loss of consortium is designed to compensate for the loss of "love, affection, protection, support, services, companionship, care, society, and in the marital relationship, sexual relations" resulting from tort damages. *Barnes v. Outlaw*, 192 Ariz. 283, 286, ¶ 10, 964 P.2d 484, 487 (1998). Valencia accordingly asserts she has been deprived of Raymond's support and affection as a result of Defendants' bad faith.

¶30 Because a claim for loss of consortium is derivative from the underlying tort, "all elements of the underlying cause must be proven before the claim can exist." *Id.* at ¶ 8, 964 P.2d at 487. At trial, the Bennetts may present evidence supporting a claim for loss of consortium for the jury to consider in the event it finds Defendants acted in bad faith: "[w]hether the marital relationship has been harmed enough to warrant damages in any given case is a matter for the jury to decide." *Id.* at ¶ 11, 964 P.2d at 487. We therefore reverse and remand the superior court's grant of summary judgment on Valencia's claim for loss of consortium.

V. Aiding and Abetting

¶31 The Bennetts argue the superior court should not have granted summary judgment on their claim AIG is liable for aiding and abetting ICSOP's bad faith. We disagree.

¶32 The duty of an insurer to act in good faith is non-delegable. *Walter v. Simmons*, 169 Ariz. 229, 238, 818 P.2d 214, 223 (App. 1991). Thus, although ICSOP is allowed to delegate "*performance* of its duty of good faith . . . through whatever organizational arrangement it desires," it may not give its delegate –- in this case, AIG –- "authority to deprive its insureds of the benefit of the insureds' bargain." *Id.* "If the insurer were allowed to delegate the *duty itself*, an injured insured would have no recourse for breach of the duty against either the insurer, from whom the duty is owned, or its delegate, with whom the insured has no contractual relationship." *Id.* Because the Bennetts have no contractual relationship with AIG, they may not hold it liable for failure to act in good faith. *See Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 575, 108 Cal. Rptr. 480, 487, 510 P.2d 1032, 1039 (1973) ("Obviously, the [insurance adjusting firm] defendants were not parties to the agreements for insurance; therefore, they are not, as such, subject to an implied duty of good faith and fair dealing.")

¶33 The Bennetts argue that *because* ICSOP's duty of good faith is non-delegable, and ICSOP is therefore the "primary tortfeasor," AIG can be held liable for aiding and abetting tortious conduct if AIG knew that ICSOP's conduct constituted a

breach of the duty of good faith and AIG substantially assisted or encouraged ICSOP to breach the duty. *See Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395*, 201 Ariz. 474, 485, ¶ 34, 38 P.3d 12, 23 (2002).

¶34 This argument overlooks that, under the principles of delegation discussed above, ICSOP and AIG were acting as one entity. *See, e.g.*, *Perry v. Apache Junction Elementary Sch. Dist. No. 43 Bd. of Trs.*, 20 Ariz. App. 561, 564, 514 P.2d 514, 517 (1973) (citation omitted) ("[A]gents and employees of a corporation cannot conspire with their corporate principal or employer when acting in their official capacities on behalf of the corporation and not as individuals for their individual advantage."). Simply put, the fact that ICSOP could not delegate its duty to act in good faith to AIG does not mean there is a legal distinction between the actions of AIG and ICSOP.

¶35 Further, even if we could see a distinction, Defendants argue, and we agree, the Bennetts' bad faith claim is founded entirely on the conduct of AIG, not ICSOP, and thus AIG could not "know that the primary tortfeasor's conduct constitute[d] a breach of duty." *Wells Fargo*, 201 Ariz. at 485, ¶ 34, 38 P.3d at 23. We therefore affirm the superior court's grant of summary judgment on aiding and abetting.

VI. Discovery

¶36 The Bennetts challenge an order entered by the court-appointed special discovery master refusing to require AIG to produce those portions of its claims file it asserted were protected by the attorney-client privilege. We agree with AIG this issue is not properly before us as the Bennetts failed to challenge the order in the superior court. Generally, we do not consider issues raised for the first time on appeal. *Canyon Ambulatory Surgery Ctr. v. SCF Arizona*, 225 Ariz. 414, 418 n.11, ¶ 10, 239 P.3d 733, 737 n.11 (App. 2010). Although we recognize this rule is procedural, we apply it here. Given the complexity of this case and the extensive record, whether the discovery master correctly addressed AIG's attorney-client privilege claim is an issue that should first be addressed by the superior court, not this court. We express no opinion regarding the merits of the issue or the special discovery master's order. Further, we express no opinion as to whether the superior court should consider the Bennetts' arguments regarding AIG's invocation of the attorney-client privilege. *See generally Miner v. Rogers*, 115 Ariz. 463, 565 P.2d 1324 (App. 1977) (under prior version of Arizona Rule of Civil Procedure 53(h), trial court could reject master's report even though no objections filed); Fed. R. Civ. P. 53 2003 advisory committee's notes

("Although a court may properly refuse to entertain untimely review proceedings, [it may also] excuse the failure to seek timely review.").

VII. Attorneys' Fees and Costs

¶37 Both sides request an award of attorneys' fees on appeal under A.R.S. § 12-341.01 (2003). Because neither side has ultimately succeeded for purposes of this statute, we deny the parties' competing requests without prejudice to the superior court awarding attorneys' fees on appeal to the party who ultimately prevails at trial.

¶38 The Bennetts also request we reverse the superior court's order entered on November 10, 2010 awarding attorneys' fees and costs to Defendants. The record does not, however, reflect the Bennetts separately appealed this order, and we therefore lack jurisdiction to consider it. *See Arizona Attorneys' Fees Manual* § 1.3.2 (Bruce E. Meyerson & Patricia K. Norris eds., 5th ed. 2010) (citation omitted) ("[A]n appeal from the underlying 'merits' Rule 54(b) judgment will not encompass a subsequent fee judgment; a notice of appeal must be filed from the fee judgment to seek review of the fee decision.").

¶39 We award the Bennetts their costs on appeal subject to their compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶40 For the foregoing reasons, we reverse the superior court's grant of summary judgment on the issues discussed at *supra* Parts I, III, and IV, and remand for further proceedings consistent with this decision. We affirm summary judgment in Defendants' favor in all other respects. We decline to address the Bennetts' challenge to the special discovery master's order.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Judge

/s/
MICHAEL J. BROWN, Judge