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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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Case No. 3:15-cv-00406-MMD-VPC

ORDER

<p>ATTAIN SPECIALTY INSURANCE COMPANY, a Michigan corporation,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>RENO CAB COMPANY, INC., d/b/a RENO-SPARKS CAB, a Nevada corporation, and RICHARD L. WARNE, an individual,</p> <p style="text-align: right;">Defendants.</p>
<p>RENO CAB COMPANY, INC., d/b/a RENO-SPARKS CAB, a Nevada corporation, and RICHARD L. WARNE, an individual,</p> <p style="text-align: right;">Counterclaimant,</p> <p style="text-align: center;">v.</p> <p>ATTAIN SPECIALTY INSURANCE COMPANY, a Michigan corporation,</p> <p style="text-align: right;">Counterdefendant.</p>

I. SUMMARY

Plaintiff/Counter-Defendant Atain Specialty Insurance Company (“Atain”) objects to the Magistrate Judge’s Order granting Defendant/Counter-Claimant Reno Cab Company, Inc.’s (“Reno Cab”) motion to compel. (ECF No. 97.) On January 24, 2017, after hearing from the parties, the Magistrate Judge directed the deposition of Pamela McKay to be conducted by February 24, 2017, and for unredacted work product of Ms.

1 McKay to be produced ten (10) court days before her deposition. (ECF No. 96.) Atain
2 waited 13 days, until February 6, 2017, to object and sought emergency relief. (ECF No.
3 97.) Despite such delay,¹ the Court shortened the time for Reno Cab to file its response
4 (ECF Nos. 98, 99),² which the Court has reviewed. For the reasons discussed below,
5 Atain’s objection (“Objection”) is overruled.

6 **II. RELEVANT BACKGROUND**

7 This action involves a dispute as to coverage under a commercial general liability
8 policy covering the policy period of December 15, 2011, to December 15, 2012 (“the
9 Policy”), for a lawsuit arising out of a purported altercation on December 23, 2011
10 (“Underlying Action”). (ECF No. 1 at 2-3.) The complaint in the Underlying Action alleges
11 that Defendant Richard Warne (“Warne”) had a verbal argument about a cab fare and
12 used force against the victim which resulted in his death. (ECF No. 1-2.) The plaintiffs in
13 the Underlying Action asserted claims for wrongful death, battery and negligent training
14 and supervision against Reno Cab and Warne. (*Id.*) Atain asserts two claims for
15 declaratory relief to declare that it had no duty to defend and no duty to indemnify under
16 the Policy because coverage is excluded under the assault and battery endorsement. (*Id.*
17 at 5-11.) Reno Cab asserts counterclaims for breach of contract, breach of the implied
18 covenant of good faith and fair dealing, and for violations of the Unfair Claims Practices
19 Act. (ECF No. 6.)

20 As relevant to Atain’s Objection, Atain’s claim adjuster, Sally Rock, testified that
21 where the claim involved a fatality and a complaint was filed, “Atain would generally send
22 it to coverage counsel for an opinion instead of making the decision [itself].” (ECF No. 67-
23 11 at 9, 16.) In this case, after doing some initial investigation into Reno Cab’s coverage
24 tender, Ms. Rock referred the matter to “coverage counsel,” Ms. McKay, “to look at the

25 ¹The Court reminds Atain of LR 7-4(b), which states: “Emergency motions should
26 be rare. A party or attorney’s failure to effectively manage deadlines, discovery, trial, or
27 any other aspect of litigation does not constitute an emergency.” It is not clear why Atain
waited almost two weeks to file its objection seeking emergency relief.

28 ²The normal response time would have fallen on February 20, 2017, which is
beyond the deadline for Atain to produce Ms. McKay’s unredacted work product.

1 facts the complaint stated, and the policy to assist in determining whether this is a tender
2 that would be accepted.” (*Id.* at 15.) Based on Ms. McKay’s recommendations, Atain
3 declined Reno Cab’s tender of defense of the Underlying Action. (*Id.* at 18)

4 **III. LEGAL STANDARD**

5 Magistrate judges are authorized to resolve pretrial matters subject to district court
6 review under a “clearly erroneous or contrary to law” standard. 28 U.S.C. § 636(b)(1)(A);
7 *see also* Fed. R. Civ. P. 72(a); LR IB 3-1(a) (“A district judge may reconsider any pretrial
8 matter referred to a magistrate judge in a civil or criminal case pursuant to LR IB 1-3,
9 where it has been shown that the magistrate judge’s ruling is clearly erroneous or contrary
10 to law.”). A magistrate judge’s order is “clearly erroneous” if the court has “a definite and
11 firm conviction that a mistake has been committed.” *See United States v. U.S. Gypsum*
12 *Co.*, 333 U.S. 364, 395 (1948); *Burdick v. Comm’r IRS*, 979 F.2d 1369, 1370 (9th Cir.
13 1992). “An order is contrary to law when it fails to apply or misapplies relevant statutes,
14 case law, or rules of procedure.” *Jadwin v. Cty. of Kern*, 767 F. Supp. 2d 1069, 1110-11
15 (E.D. Cal. 2011) (quoting *DeFazio v. Wallis*, 459 F. Supp. 2d 159, 163 (E.D.N.Y. 2006)).
16 When reviewing the order, however, the magistrate judge “is afforded broad discretion,
17 which will be overruled only if abused.” *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D.
18 443, 446 (C.D. Cal. 2007). The district judge “may not simply substitute its judgment” for
19 that of the magistrate judge. *Grimes v. City and County of San Francisco*, 951 F.2d 236,
20 241 (9th Cir. 1991) (citing *United States v. BNS, Inc.*, 858 F.2d 456, 464 (9th Cir. 1988)).

21 **IV. DISCUSSION**

22 The gist of Atain’s argument is that the Magistrate Judge’s finding that Atain waived
23 the attorney-client privilege and work product is clearly contrary to law because Atain has
24 not asserted the affirmative defense of advice of counsel. Atain suggests the Magistrate
25 Judge did not fully consider Ms. Rock’s testimony and erroneously relied on *Wardleigh v.*
26 *District Court*, 891 P.2d 1180 (Nev. 1995). Reno Cab counters that Ms. Rock’s testimony
27 supports a finding of implied waiver of the attorney-client privilege and work product. The
28 Court agrees with Reno Cab.

1 In *Wardleigh*, the Nevada Supreme Court adopted implied waiver of the attorney-
2 client privileged. *Wardleigh*, 891 P.2d at 1186. As the court explained, “where party seeks
3 an advantage in litigation by revealing part of a privileged communication, the party shall
4 be deemed to have waived the entire attorney-client privilege as it relates to the subject
5 matter of that which was partially disclosed.” *Id.* (citation omitted).


6 Here, Atain’s representative testified that Atain’s coverage counsel investigated
7 Reno Cab’s claim and made the decision to deny coverage based on coverage counsel’s
8 recommendation. Atain suggests that Reno Cab took Ms. Rock’s testimony out of context,
9 but Ms. Rock’s deposition testimony is clear — she relied on counsel to investigate Reno
10 Cab’s claim and denied coverage based on counsel’s recommendations. (ECF No. 67-
11 11 at 16-18.) While Atain has not asserted advice of counsel as an affirmative defense,
12 Atain’s response to Reno Cab’s bad faith claim implicitly raises advice of counsel. Under
13 these circumstances, the Magistrate Judge did not commit clear error when she found
14 implied waiver of the privilege and the attorney work product.

15 **V. CONCLUSION**

16 The Court notes that the parties made several arguments and cited to several
17 cases not discussed above. The Court has reviewed these arguments and cases and
18 determines that they do not warrant discussion as they do not affect the outcome of
19 Atain’s Objection.

20 It is therefore ordered that Atain Specialty Insurance Company’s Objection to the
21 Magistrate Judge’s Order (ECF No. 97) is overruled.

22 DATED THIS 15th day of February 2017.

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25 _____
26 MIRANDA M. DU
27 UNITED STATES DISTRICT JUDGE
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