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NO. 864136

SUPREME COURT OF THE
STATE OF WASHINGTON

JOHN STAPLES,

Plaintiff/Appellant,

v.

ALLSTATE INSURANCE COMPANY,

Defendant/Respondent.

SUPPLEMENTAL BRIEF OF APPELLANT – JOHN STAPLES

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ORIGINAL

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I. INTRODUCTION

Pursuant to this Court's request, Petitioner John Staples (Staples) hereby submits his Supplemental Brief of Petitioner. The objective of this brief is not to replicate points made in Staples' two briefs filed in the Court of Appeals, but to address specific points of analysis raised in that court's decision of May 16, 2011. The brief begins with an updated statement of the case, then addresses the Court of Appeals' analysis.

II. STATEMENT OF THE CASE

This case involves a claim for insurance benefits for property loss under a homeowner's policy. The Superior Court entered summary judgment against Staples, determining that his failure to attend an Examination Under Oath (EUO), which Respondent Allstate Indemnity Company (Allstate) had requested, precluded him from filing suit. The Superior Court also denied Staples' request for an extension of time under CR 56(f) to pursue discovery prior to the court's hearing the motion for summary judgment.

Staples appealed both issues. On May 16, 2011, the Court of Appeals issued a decision (Dec.) affirming the Superior Court on both issues. Staples petitioned this Court for review on both issues.

III. ARGUMENT

- A. The Court of Appeals erred in determining that *Downie v. Farm Fire & Cas. Co.* is determinative of the instant case and that a reasonableness requirement that generally applies to insurers during a claim investigation does not apply with regard to requesting an EUO.**

The Court of Appeals began its discussion of the noncooperation issue as follows:

Staples argues that there are material issues of fact as to whether he cooperated with Allstate's investigation. The majority of the parties' briefing is devoted to argument over whether Allstate's fraud investigation was justified to begin with and whether Staples substantially complied with Allstate's requests for information. But the trial court's grant of summary judgment was based solely on his failure to appear for an EUO. [Note omitted.] We affirm based on our conclusion that, as in *Downie v. State Farm Fire & Cas. Co.*, 84 Wn. App. 577, 929 P.2d 484 (1997), Staples's failure to appear for an EUO breached a valid condition precedent to filing suit.

(Dec., 5-6.) The court then made clear its view that an EUO provision is not bound by the reasonableness requirement that generally adheres to an insurance policy's noncooperation provisions:

Staples argues that "some notion of reasonableness should limit . . . the number of times an insured can be asked the same question." And while the policy does require Allstate to be reasonable in the *number* of times that it sought an EUO, Staples did not appear for even one. *See Downie*, 84 Wn. App. at 582. Moreover, as we noted in *Downie*, "[w]hile the reasonableness of an insurer's requests may be relevant to a question of compliance with a general cooperation clause, no court has imposed such a reasonableness requirement when reviewing a policy provision requiring an EUO as a condition precedent to filing suit." *Id.*, at 583.

(Dec., 8.)

In divorcing the EUO provision from the balance of the policy's cooperation provisions, the court ignored the structure of the policy itself. The policy's cooperation provisions are set forth in a section captioned "What You Must Do After A Loss." (See Appendix A, attached hereto, CP 149.) In that section, the EUO provision (subpart (f)(2)) is simply one of seven subparts identifying an insured's obligations following a loss. Nothing in the policy suggests that the EUO provision should be treated any differently than any other cooperation provision.

Moreover, from a policy perspective, there is no apparent justification for divorcing the EUO provision from the reasonableness requirement that would otherwise apply. In fact, doing so is inconsistent with Washington law. As set forth in Staples' initial brief to the Court of Appeals, an insurer's inquiry into an insured's financial condition is appropriate only after the insurer has formed a reasonable basis for questioning an insured's possible motivation for overvaluing a claim. (Brief of Appellant, p. 14, citing *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 966 P.2d 355 (1998), and *Keith v. Allstate Indem. Co.*, 105 Wn. App. 251, 255, 19 P.3d 1077 (2001).) Surely, not even Allstate would contend that any time a property loss claim is made that an insurer

can demand an EUO right out of the gate, without any reasonable basis for suspecting fraud. An insurer must have some reasonable basis for requesting an EUO, and reasonableness is generally a factual question.

Beyond these considerations, *Downie* simply does not dictate the outcome of this case. In *Downie*, the insured, unlike Staples, refused to sign a general authorization that would have permitted the insurer to have access to his confidential records. *Downie*, 84 Wn. App. at 580. Moreover, in *Downie*, the insured filed suit without ever responding in any manner to the insurer's request for an EUO. *Id.* In the instant case, Staples did not ignore Allstate's request for an EUO, nor did he refuse to attend one. Rather, after signing a broad information release, turning over the records he had, and participating in two recorded interviews, he simply inquired through counsel what Allstate's justification for the EUO request was. Allstate, of course, never offered any justification. Then, ultimately, Staples made himself available for an EUO, but Allstate refused to extend the contractual limitation period to accommodate him. (Br. of App., 7-10.)

As discussed in Staples' initial brief, an insurer at all times owes an insured a duty to give equal consideration to an insured's interests. (Br. of App., 17-18.) The insurer/insured relationship is a relationship of mutual obligations and responsibilities. The nature of the relationship does not change when an insurer demands an EUO. The Court of

Appeals' decision rewards the stonewalling that Allstate exhibited toward Staples during the investigation of his claim, and otherwise fails to recognize the two-way nature of the relationship between the insurer and the insured. Factual questions concerning the reasonableness of Allstate's request for an EUO and whether Staples failed to reasonably cooperate with Allstate's request require trial of this matter.

B. An insurer cannot deny a claim based on an insured's noncompliance with the insurer's investigation unless such noncompliance causes the insurer actual prejudice.

In affirming the trial court, the Court of Appeals stated:

... while Staples does argue that Allstate was required to show prejudice specifically from his failure to submit to an EUO, he does so only in passing and cites no authority in support of this argument. Accordingly, we decline to reach this issue.

(Dec., 9.)

The parties' briefing does not support this curious assertion. In fact, in his initial brief, Staples makes a number of references to Allstate's failure to show how his response to the request for an EUO prejudiced it. For instance, at pages 13 to 14, Staples stated: "For an insurer to avoid liability under a policy on the basis of an insured's noncooperation, the insurer must establish that the insured's refusal to cooperate caused actual and material prejudice to its ability to determine coverage. *Pilgrim v. State Farm Fire & Cas. Co.*, 89 Wn. App. 712, 950 P.2d 479 (1997)." Further,

at page 19, Staples argued: "Allstate could not possibly produce a plausible argument that extending the limitation a few weeks so that an examination under oath could take place would have caused it prejudice; indeed, Allstate did not even try to make such an argument." Moreover, at page 20, Staples cited policy language requiring prejudice: "[U]nder the policy, an insured's failure to comply may only defeat coverage if the 'failure to comply is prejudicial to us.'" Staples then pointed out that Allstate had never made any effort to try to prove prejudice.

Importantly, Allstate plainly recognized that Staples was contending that it needed to prove that Staples' noncompliance had caused it prejudice. At page 29 of its brief, Allstate included a two-page section that followed this heading: "Allstate Was Prejudiced as a Matter of Law by Staples' Failure to Comply." Staples responded to Allstate's argument concerning its claim of prejudice as a matter of law at pages 4 to 5 of his reply brief.

Given the attention the parties paid to the prejudice issue in their page-limited briefing, the Court of Appeals' assertion that it need not address the issue because Staples had addressed the issue only "in passing" and without citation to authority is not sustainable. The issue requires review. As set forth below, both case law and Allstate's own

policy require that Allstate establish that actual and material prejudice flowed from Staples' alleged noncompliance before his claim could properly be denied.

The *Pilgrim* case cited above provides an in-depth analysis of Washington law with regard to whether an insurer must establish prejudice before denying an insured policy benefits based on the insured's noncooperation with a claim investigation. The court first stated that Washington law is "well established" that determining whether the insurer suffered prejudice is necessary. 89 Wn. App. at 723. The court then stated that noncooperation clauses are "designed 'to prevent the insurer from being prejudiced by the insured's actions.'" *Id.*, at 724, citing *Pub. Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 803, 881 P.2d 1020 (1994). The court concluded:

To establish prejudice, the insurer must show "concrete detriment . . . together with some specific harm to the insurer caused thereby. [Quoting *Carron, Inc. v. Fed. Ins. Co.*, 82 Wn.2d 480, 487, 918 P.2d 937 (1996).] Moreover, the issue of prejudice from a policy breach is a question of fact for the jury and "will be presumed only in extreme cases." [Quoting *Pulse v. Northwest Farm Bureau Ins. Co.*, 18 Wn. App. 59, 62, 566 P.2d 577 (1977).]

Id., at 724-25.¹ See also *Pub. Util. Dist. No. 1*, 124 Wn.2d at 804 (“The burden of showing the actual prejudice is on the insurer, and it is a factual determination”); and *Mut. of Enumclaw v. USF Ins. Co.*, 164 Wn.2d 411, 428-31, 191 P.3d 866 (2008) (analysis of Washington law pertaining to insurer’s need to prove prejudice when denying claim based on insured’s breach of policy provision).

With regard to the instant case, the prejudice provision of the policy plainly applies to the EUO provision. (See Appendix A.) The provision, which concludes the policy section headed “What You Must Do After A Loss,” reads: “We have no duty to provide coverage under this section if you, an insured person, or a representative of either fail to comply with items a) through g) above, and this failure to comply is prejudicial to us.” Given that the EUO provision is one of the referenced items, no plausible argument can be made for excluding the provision from the prejudice requirement. Moreover, the provision must be interpreted to mean something; it is not just gratuitous language casually

¹ Though the *Pilgrim* court did affirm summary judgment on behalf of the insurer on the basis of the insureds’ noncooperation, finding prejudice to the insurer as a matter of law, the facts concerning the insureds’ lack of cooperation are far more stark than in the instant case. Among other things, the insureds apparently refused to give the insurer authorization to obtain credit reports on its own and also refused to provide the insurer with a number of documents pertaining to their financial status unless the insurer signed a confidentiality agreement that would have “prohibited [it] from divulging, to third parties including the police, information received from [them].” *Id.*, at 715-16. In the instant case, of course, Staples signed a broad release authorizing Allstate to obtain a vast array of financial and personal information pertaining to him. (CP 60.)

inserted into the policy. The provision must be interpreted to require actual prejudice to Allstate before it may properly deny a claim based on an insured's noncooperation.

With regard to the prejudice issue, Allstate's only argument is the simple tautological assertion that "we asked for it, so it was material, and Staples' failure to give it to us caused us prejudice." Because the policy language bars Allstate from denying Staples' claim absent actual prejudice from his not participating in an EUO, and because Allstate made no record concerning actual prejudice, Allstate's denial may be upheld only if the Court were to find that this is an "extreme case," as referenced in *Pilgrim*. The facts in this case do not make for an "extreme case" in which prejudice may be presumed. Again, after participating in two recorded interviews, giving Allstate whatever responsive materials he had, and signing a broad information release, Staples simply inquired why an EUO was necessary. Then, he agreed to the EUO if Allstate would extend the contractual limitation period. It is impossible to conceive how Allstate would have suffered actual prejudice by granting a short extension of the limitation period in which to take Staples' EUO. In any event, Allstate certainly made no record concerning such prejudice.

Staples plainly raised the issue of prejudice in the Court of Appeals and the court should have addressed that issue. Review of the issue

establishes that both case law and the policy language required Allstate to prove actual prejudice resulting from Staples' actions. Allstate has wholly failed to meet that requirement. Accordingly, this matter should be remanded for trial.

C. The Superior Court erred in denying Staples' CR 56(f) request for an extension of time in which to pursue discovery.

With regard to the CR 56(f) issue, the Court of Appeals stated: "Staples did not offer a good reason for the delay in beginning discovery, state what evidence would have been established through additional discovery, or show that the desired evidence would raise a genuine issue of material fact." (Dec., 10.)

The court's determination concerning Staples' CR 56(f) request puts a very difficult burden on plaintiffs. Though Allstate filed its motion for summary judgment less than three months after suit was filed and Staples sent out discovery requests shortly thereafter, the court determined that he had no good reason for having "delay[ed] in beginning discovery." (Br. of App., 11.) Moreover, despite Staples' not yet having obtained anything in discovery at the time of the hearing of the motion for summary judgment, not even Allstate's claim file, he was somehow supposed to know what information or materials Allstate might possess that would help him prove his case.

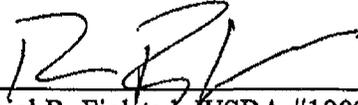
The case was still quite new at the time it was dismissed. There was no showing that Allstate would have been unfairly prejudiced if Staples had been granted a short extension of time in which to conduct discovery. (CP 107-113.) Staples respectfully submits that the Court of Appeals erred in failing to find that the trial court abused its discretion in denying his CR 56(f) request. A remand to the Superior Court to permit Staples time to conduct discovery is the appropriate remedy.

IV. CONCLUSION

For the reasons set forth above, Staples respectfully submits that the Court of Appeals' opinion affirming the Superior Court's order of summary judgment should be reversed and this matter remanded for trial. Alternatively, this matter should be remanded to the Superior Court with instructions that Staples should be permitted discovery before the motion for summary judgment is again considered.

DATED this 3rd day of February, 2012.

Respectfully submitted,


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V. APPENDIX

Appendix 1. Staples' insurance policy's cooperation provision
section "What You Must Do After A Loss" A-2

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Interest in the property covered, nor more than the amount of coverage afforded by this policy.

3. What You Must Do After A Loss

In the event of a loss to any property that may be covered by this policy, you must:

- a) Immediately give us or our agent notice. Report any theft to the police as soon as possible. If the loss involves a credit card, debit or automated teller machine card, or bank fund transfer card, give notice to the company or bank that issued the card.
- b) protect the property from further loss. Make any reasonable repairs necessary to protect it. Keep an accurate record of any repair expenses.
- c) separate damaged from undamaged personal property. Give us a detailed list of the damaged, destroyed or stolen property, showing the quantity, cost, actual cash value and the amount of loss claimed.
- d) give us all accounting records, bills, invoices and other vouchers, or certified copies, which we may reasonably request to examine and permit us to make copies.
- e) produce receipts for any increased costs to maintain your standard of living while you reside elsewhere, and records supporting any claim for loss of rental income.
- f) as often as we reasonably require:
 - 1) show us the damaged property.
 - 2) at our request, submit to examinations under oath, separately and apart from any other person defined as you or insured person and sign a transcript of the same.
 - 3) produce representatives, employees, members of the insured person's household or others to the extent it is within the insured person's power to do so; and
- g) within 60 days after the loss, give us a signed, sworn proof of the loss. This statement must include the following information:
 - 1) the date, time, location and cause of loss;

- 2) the interest insured persons and others have in the property, including any encumbrances;
- 3) the actual cash value and amount of loss for each item damaged, destroyed or stolen;
- 4) any other insurance that may cover the loss;
- 5) any changes in title, use, occupancy or possession of the property that have occurred during the policy period;
- 6) at our request, the specifications of any damaged building structure or other structure; and
- 7) evidence supporting any claim under the Credit Card, Debit or Automated Teller Machine Card, Bank Fund Transfer Card, Check Forgery and Counterfeit Money protection. State the cause and amount of loss.

We have no duty to provide coverage under this section if you, an insured person, or a representative of either fail to comply with items a) through g) above, and this failure to comply is prejudicial to us.

4. Our Settlement Options

In the event of a covered loss, we have the option to:

- a) repair, rebuild or replace all or any part of the damaged, destroyed or stolen property with property of like kind and quality within a reasonable time; or
- b) pay for all or any part of the damaged, destroyed or stolen property as described in Condition 5 "How We Pay For A Loss".

Within 30 days after we receive your signed, sworn proof of loss we will notify you of the option or options we intend to exercise.

5. How We Pay For A Loss

Under Coverage A—Dwelling Protection, Coverage B—Other Structures Protection and Coverage C—Personal Property Protection, payment for covered loss will be by one or more of the following methods:

