

NO. 864136

SUPREME COURT OF THE
STATE OF WASHINGTON

JOHN STAPLES,

Plaintiff/Appellant,

v.

ALLSTATE INSURANCE COMPANY,

Defendant/Respondent.

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STATE OF WASHINGTON
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RESPONDENT ALLSTATE'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

It is undisputed that after John Staples (Staples) submitted a \$25,000.00 insurance claim, he refused to appear for an examination under oath and failed to provide his insurer, Allstate Insurance Company (Allstate), with relevant financial information. The trial court properly dismissed Staples' lawsuit against Allstate based on his failure to comply with Allstate's investigation. On May 16, 2011, the Court of Appeals affirmed the trial court's dismissal.

The Court of Appeals' Opinion of May 16, 2011, is consistent with the established Washington law that an examination under oath is an absolute condition precedent to filing suit. The Court of Appeals' May 16, 2011, Opinion is also consistent with the longstanding authority that the examination under oath is an essential and valid tool for the insurer to evaluate and investigate insurance claims. The Court of Appeals' decision of May 16, 2011, should be affirmed.

II. SUPPLEMENTAL ARGUMENT AND AUTHORITY

A. **Courts Have Upheld the Validity of the Examination under Oath Provision for Over a Century.**

For over a century, American insurers have used examinations under oath to expedite and complete thorough investigations of losses.

See Clafflin et al. v. Commonwealth Ins. Co., 110 U.S. 81, 94-95, 3 S. Ct.

507 (1883); *see also* *Leo Martinez et al.*, NEW APPLEMAN INSURANCE LAW PRACTICE GUIDE, Vol. I, ¶12.20 (2011 Ed.).

Examinations under oath allow insureds to present evidence of their losses. Examinations under oath also allow insurers to cross examine the documents submitted by insureds in proof of their losses. Insurers have requested examinations under oath pursuant to established policy provisions, which together state that as a condition precedent to the insurer's obligation to pay for a loss, the insured must produce relevant documents and appear for an examination under oath. *Id.*

In 1883, in *Clafin et al. v. Commonwealth Ins. Co.*, the United States Supreme Court held that an insured who failed to appear for an examination under oath, or who provided false testimony during such an examination, was precluded from recovery. The *Clafin* Court stated as follows:

The object of the provisions in the policies of insurance, requiring the assured to submit himself to an examination under oath, to be reduced to writing, was to enable the Company to possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to its rights, to enable it to decide upon its obligations, and to protect it against false claims. And every interrogatory that was relevant and pertinent in such an examination was material, in the sense that a true answer to it was the substance of the obligation of the assured.

Clafin et al., 110 U.S. at 94-95.

In 1920, in *Hickman v. The London Assur. Corp.*, the California Supreme Court held similarly to the *Clafin* Court. The *Hickman* Court stated:

As the facts with respect to the amount and circumstances of a loss are almost entirely within the sole knowledge of the insured, and the opportunity and temptation to perpetuate a fraud upon the insurer is often great, it is necessary that it have some means of cross-examining, as it were, upon the written statement and proofs of the insured, for the purpose of getting at the exact facts before paying the sum claimed of it. Such considerations justify the provision universally to be met with in policies, requiring the insured as often as demanded to submit to an examination under oath touching all matters material to the adjustment of the loss, and provisions of that character are held to be reasonable and valid.

Hickman v. The London Assur. Corp., 184 Cal. 524, 529-30, 195 P. 45

(1920); see also *Mahoney v. Scottish Union & Nat. Ins. Co.*, 16 Ohio Dec. 131, 133 (1905).

Informed by the above authority and history, the drafters of the 1943 New York Standard Fire Insurance Policy included the following relevant provisions:

Requirements in case loss occurs...The insured, as often as may be reasonably required, shall...submit to examinations under oath by any person named by this Company, and subscribe the same; and as often as may be

reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated...

Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with,...

AMERICAN BAR ASSOCIATION, ANNOTATION OF THE 1943
NEW YORK STANDARD FIRE INSURANCE POLICY, APPENDIX,
179 (1953).

The majority of States have adopted the New York Standard Fire Policy. *Lee R. Russ et al.*, COUCH ON INSURANCE 3D, §149.3 (2005). In addition to fire policies, many other types of property policies contain the same examination under oath and suit limitation provisions as above.

The majority of jurisdictions have held that an examination under oath is an absolute condition precedent to recovery and/or filing suit. *See, e.g., West v. State Farm Fire & Cas. Co.*, 868 F.2d 348, 351-52 (9th Cir. 1988); *U.S. Fid. & Guar. Co. v. Wigginton*, 964 F.2d 487, 490-91 (5th Cir. 1992); *Pervis v. State Farm Fire & Cas. Co.*, 901 F.2d 944, 946 (11th Cir. 1990); *North River Ins. Co. v. St. Paul Fire and Marine Ins. Co.*, 600 F.2d 721, 724 (8th Cir. 1979); *Kisting v. Westchester Fire Ins. Co.*, 416 F.2d 967, 967 (7th Cir. 1969); *Young v. Am. Cas. Co.*, 416 F.2d 906, 910 (2nd

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In *West v. State Farm Fire and Cas. Co.*, the 9th Circuit Court of Appeals held that the insurer's request for an examination was reasonable as a matter of law, and the insured's refusal precluded any recovery. *West*, 868 F.2d at 351-52. In *West*, the insured submitted a claim to his insurer for an alleged burglary on January 2, 1986. *Id.* at 349. State Farm conducted a preliminary interview, in which West stated that he would submit documentation to substantiate the loss. West failed to do so. State Farm then requested an examination under oath. *Id.*

On August 14, 1986, a State Farm attorney interviewed West in the presence of a court reporter. West, accompanied by an attorney, refused to answer any question that he had been asked in his preliminary interview. On October 20, 1986, State Farm advised West that it would not pay for the claim until West complied with the policy. State Farm further advised that West's compliance was a prerequisite to filing suit. *Id.*

West did not submit any further information, nor did he complete his examination under oath. Instead, on December 15, 1986, West filed suit. *Id.* State Farm was granted dismissal based on West's failure to comply. *Id.* at 350. West appealed. *Id.*

In response to West's appeal, the *West* Court stated that "[f]or West to claim that the scheduled examination under oath was unreasonable is tantamount to a claim that insurance companies are always required to pay claims on their face value..." *Id.* at 351. The court found that State Farm was reasonable in requesting an examination. *Id.*

B. In Washington, the Examination under Oath is an Absolute Condition Precedent to Filing Suit.

About ten years after the U.S. Supreme Court's holding in *Claflin*, the Washington Supreme Court issued a similar opinion. In 1894, in *Ward v. Nat. Fire Ins. Co.*, the Washington Supreme Court stated:

...but it certainly must be conceded that the provision set forth in the policy in this case is a reasonable one, and the insured should be required to comply with it, if possible. This is a provision for the benefit of the insurer, to prevent it from being imposed upon by the scheming and dishonest men; a provision which they have a right to incorporate in their policy and a very necessary one for their protection.

Ward v. Nat. Fire Ins. Co., 10 Wash. 361, 365, 38 P. 1127 (1894).

In 1944, the Washington Supreme Court upheld the dismissal of the insured's claims arising out of two fires based on the insured's failure to comply with requests for an examination under oath, and to provide relevant information. *The Georgian House of Interiors, Inc. v. Glenn Falls Ins. Co.*, 21 Wn.2d 470, 503, 151 P.2d 598 (1944). The *Georgian House* Court referred to the subject cooperation clause, including the examination under oath provision, as "the iron-safe clause." *Id.* Like the majority of States, Washington has adopted the 1943 New York Standard Fire Policy. *See* WAC 284-20-010.

In 1995, the Washington legislature codified the insurer's right to request an examination under oath under all types of policies. *See* RCW 48.18.460. RCW 48.18.460 states in relevant part that "[i]f a person makes a claim under a policy of insurance, the insurer may require that the person be examined under an oath administered by a person authorized by state or federal law to administer oaths." *Id.*

In 1997, in *Downie v. State Farm Fire & Cas. Co.*, the court held that the insured's failure to appear for an examination under oath precluded recovery as a matter of law. *See Downie*, 84 Wn. App. at 583; *see also Keith v. Allstate Indem. Co.*, 105 Wn. App. 251, 255, 19 P.3d 1077 (2001) (upholding dismissal because the insured failed to appear for an examination under oath, and to provide relevant financial information).

The *Downie* Court held that a reasonableness requirement did not pertain to an insurer's first requested examination under oath, but rather pertained only to the number of examinations under oath an insurer requested. *Id.* at 582. This was in part based on the plain language of the policy provision at issue, which stated, "You agree to be examined under oath and subscribe to the same as often as we reasonably require;... *Id.* at 579. The *Downie* Court followed the longstanding rule of insurance contract interpretation that when the contract language is clear and unambiguous, the contract must be enforced as written. *See Mid-Century Ins. Co. v. Henault*, 128 Wn.2d 207, 213, 905 P.2d 379 (1995); *Nat. Union Fire Ins. Co. of Pittsburgh v. Zuver et al.*, 110 Wn.2d 207, 210, 750 P.2d 1247 (1988); *Morgan v. Prudential Ins. Co. of Am.*, 86 Wn.2d 432, 435, 545 P.2d 1193 (1976). The *Downie* Court's holding was also consistent with the longstanding authority regarding the validity of the examination

under oath provision. Thus, the *Downie* Court confirmed that the insurer had an absolute right to one examination under oath, and an insured's refusal in this regard precluded recovery as a matter of law.¹ *Downie*, 84 Wn. App. at 583.

In the present case, Staples' policy with Allstate contains a similar provision to the *Downie* provision cited above. Staples' policy states, in relevant part, "you must... as often as we reasonably require...at our request, submit to examination under oath,... CP 146-50 (emphasis omitted). Just as the *Downie* provision, "reasonably" directly follows "as often as..." *Id.* This language clearly and unambiguously means that reasonableness refers only to multiple requests for examinations under oath. In addition, just as *Downie's* policy, Staples' policy states that no action may be commenced unless the insured has complied with all of the policy provisions. *Id.* The Court of Appeals properly followed the policy language, and the longstanding authority that the examination under oath is an absolute condition precedent to filing suit. Staples' failure to appear

¹ The *Downie* Court declined to consider *Downie's* argument that the insurer was required to show prejudice because *Downie* failed to argue it at the trial court.

for one examination under oath precluded him from filing suit as a matter of law.²

C. Once the Insured Breaches the Examination under Oath Provision, the Insurer is Prejudiced as a Matter of Law.

As outlined above, the insured's failure to comply with an insurer's request for an examination under oath precludes recovery as a matter of law. *See, e.g., West*, 868 F.2d at 351-52; *Wigginton*, 964 F.2d at 490-91; *Pervis*, 901 F.2d at 946; *North River Ins. Co.*, 600 F.2d at 724; *Kisting*, 416 F.2d at 967; *Young*, 416 F.2d at 910; *Spears*, 300 S.W.3d at 680-81; *Brizuela*, 116 Cal. App. 4th at 590; *Thomson*, 232 Mich. App. at 45; *Downie*, 84 Wn. App. at 583; *Lamphere*, 541 N.W.2d at 914; *Baker*, 103 N.C. App. at 522; *Allison*, 543 So. 2d at 664; *Azeem et al.*, 96 A.D.2d at 126; *Boyd*, 452 N.E.2d at 1079.

In *Standard Mut. Ins. Co. v. Boyd*, the court upheld this proposition despite the insured's concern for self-incrimination in a pending arson investigation. *Boyd*, 452 N.E.2d 1074. The *Boyd* Court stated:

The express terms of the policy made the submission of Boyd to examination under oath a condition precedent to his recovery. Further, since the constitutional immunity from being a witness against oneself does not apply in such

² Staples failed to substantively present the issue of prejudice to this Court, and to the Court of Appeals. The Court of Appeals declined to consider this issue. This Court should likewise decline consideration. *See State v. Johnson*, 119 Wn.2d 167, 170-71, 829 P.2d 1082 (1992).

a case, Boyd was required to comply...He refused to do so, and therefore, we hold as a matter of law that Boyd is barred from recovery on his action against Mutual.

Id. at 1079.

It follows that the majority of jurisdictions hold that the insurer need not show prejudice once an insured breaches the condition precedent, or that prejudice may be decided as a matter of law. In *U.S. Fid. & Guar. Co. v. Wigginton*, the Fifth Circuit Court of Appeals stated in regard to the issue of prejudice:

The law of Mississippi is well-settled that an insured's breach of a condition precedent or to *a provision that renders the policy void* relieves the insurer of any obligation to show prejudice....Clearly, then, Wigginton's breach of the examination clause, precluding coverage as a matter of law, obviates any obligation of USF&G to demonstrate prejudice.

Wigginton, 964 F.2d at 490-91; *see also Allison*, 543 So. 2d at 663

("...failure to submit to such an examination, under circumstances such as those present in the case at bar, would preclude coverage under the policies as a matter of law.").

In *Brizuela v. Calfarm Ins. Co.*, the California Court of Appeals found that there was no California authority that required an insurer to show prejudice before denying policy benefits to an insured who had failed to comply with the insurer's request for an examination under oath.

Brizuela, 116 Cal. App. 4th at 590. Relying on *Hickman*, the *Brizuela*

Court stated:

An insured's failure to comply with the policy requirement for examination under oath deprives the insurer of a means for obtaining information necessary to process the claim. The inability to obtain such information is prejudicial, absent extraordinary circumstances.

Id. at 592.

In *Keith v. Allstate Indem. Co.*, the insured failed to comply with the insurer's requests for an examination under oath, and for relevant financial information. In upholding the dismissal, the *Keith* Court stated:

When an insurer has sufficient information to suspect the possibility of a fraudulent claim and the financial condition of the insured is pertinent to the claim, the insurance company is actually prejudiced as a matter of law if the insured fails to provide such information.

Keith, 105 Wn. App. at 255.

The *Keith* Court relied in part on *Tran v. State Farm Fire and Cas. Co.*, 136 Wn.2d 214, 961 P.2d 358 (1998). In *Tran v. State Farm Fire and Cas. Co.*, the court found that the insured's refusal to answer questions regarding his personal and business finances, and failure to provide financial documents, prejudiced the insurer as a matter of law. *Id.* The Tran Court stated:

Without access to financial documents, State Farm could

not evaluate the validity of the [insureds'] claim. It could not decide whether the claim was covered, much less prepare a defense to the inevitable suit by the [insureds'] if it denied coverage. It could not satisfy its statutory duty to ferret out fraud. The [insureds'] refusal to disclose relevant financial information prejudiced State Farm as a matter of law.

Id. at 231.

The *Tran* Court stated the policy behind its decision as follows:

The business of insurance companies is, after all, to provide coverage for the legitimate claims of the parties it insures. If insurers are inhibited in their effort to process claims due to the un-co-operativeness of the insured, they suffer prejudice in the ways identified by State Farm and noted by the court in *Pilgrim*. If we were to reach any other result, we would be encouraging insureds to not cooperate and to submit fraudulent claims.

Id.

Thus, the majority opinion is that once the insured breaches the examination under oath provision, the insurer's investigation has been prejudiced as a matter of law.

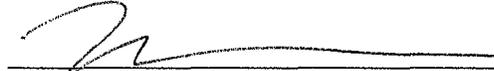
III. CONCLUSION

For the above reasons, in addition to the reasons outlined in Allstate's appellate briefing, this Court should affirm the Court of Appeals' Opinion of May 16, 2011. The Court of Appeals' Opinion is consistent with Washington law, and the majority opinion outside of

Washington. It is also consistent with the history of the examination under oath as an essential tool in the claims investigation, and presentation, process.

DATED this 1st day of February, 2012.

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