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NO. 64816-1-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN STAPLES,

Appellant,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

REPLY OF APPELLANT

Scott, Kinney, Fjelstad & Mack
DANIEL R. FJELSTAD, WSBA #18025
Attorneys for Appellant
John Staples
600 University St., Suite 1928
Seattle, Washington 98101
(206) 622-2200

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In no particular order, John Staples responds to arguments set forth in Allstate's brief.

A. Allstate Proposes a New Standard for Determining What Materials a Court may Consider in Resolving a Motion for Summary Judgment.

Allstate argues that parts of Staples' initial brief should be stricken because the brief "alleges facts unsupported by the record." (Brief, 13) Specifically, Allstate argues that factual allegations made on pages 4 through 8 of Staples' brief should be stricken "because there is no *objective evidence* in the record to support them." [Emphasis added.] (*Id.*, 14) Allstate subsequently makes a number of other references to "objective evidence."

CR 56, of course, makes no requirement that, in responding to a motion for summary judgment, the nonmoving party may rely only upon objective evidence, whatever that might be. Rather, the rule permits the nonmoving party to rely upon reasonable inferences that the record might support. In moving to strike allegations from Staples that are not supported by objective evidence, Allstate is apparently attempting to change the standard for materials which a court may consider in adjudicating a motion for summary judgment. The allegations Allstate moves to strike reflect inferences reasonably drawn from the record. Allstate's request should be rejected.

B. Allstate's Reliance on *Tran*, *Pilgrim*, and *Keith* is Misplaced.

Allstate argues that the insurers' requests for financial information involved in *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 961 P.2d 358 (1998), *Pilgrim v. State Farm Fire & Cas.*, 89 Wn. App. 712, 950 P.2d 479 (1997), *Keith v. Allstate Indem. Co.*, 105 Wn. App. 251, 19 P.3d 443 (2001), were similar to the requests to those Allstate made upon Staples. Accordingly, the orders of summary judgment granted to the insurers in those cases apparently should guide the result in this case.

Each of the three cited cases is quite distinguishable from the instant case. First, each involved more suspicious circumstances at the outset of the claim than does the instant case. For instance, in *Pilgrim*, the police officer investigating the insureds' theft claim expressed doubts about the legitimacy of the claim. Moreover, the insureds' claim grew over tenfold during its course, from \$14,760 to \$148,000. *Pilgrim*, 89 Wn. App. at 717. And, each of these three cases involved questions about whether any loss had occurred at all. In this case, Allstate never challenged Staples' claim that his truck was stolen—Allstate paid him for the loss of his truck, but challenged him on the value of its contents. Accordingly, the reasonableness of Allstate's requests for financial

information is considerably less clear than what was at issue in the three cited cases.

More importantly, however, in each of those cases, the insureds' refusal to provide the relevant insurer with requested information was not arguable. In *Tran*, the insured refused outright to provide financial records or tax returns to the insurer, or answer any questions about his personal or business finances. 136 Wn.2d at 221. In *Keith*, the insured refused to sign an authorization for release of information, an authorization which appears much like that which Staples signed in the instant case. 105 Wn. App. at 253. Further, just one week after getting a letter from Allstate requesting financial information and an examination under oath, he sued without complying. *Id.*, at 254. In *Pilgrim*, as in *Keith*, the insureds refused to sign an authorization to permit the insurer to obtain information from third parties, and refused to provide the insurer with income tax returns and other materials relating to their financial condition. 89 Wn. App. at 717.

The refusal to cooperate in these cases is far more clear than in the instant case, yet the trial court found a refusal to cooperate on Staples' part as a matter of law. The instant record simply does not support that finding. Staples signed a broad authorization permitting Allstate to obtain virtually any type of information about him, provided Allstate whatever

materials he was able to obtain, participated in two recorded interviews, and ultimately agreed to participate in an examination under oath despite Allstate's refusal to offer him any meaningful justification for such an examination. Such action cannot properly be characterized as noncooperation as a matter of law. Rather, whether Staples substantially cooperated with Allstate's investigation presents a question of fact.

C. Staples' Participation in Allstate's Claim Investigation did not Prejudice Allstate as a Matter of Law

Again citing *Tran*, *Pilgrim*, and *Keith*, Allstate asserts that Staples' alleged noncooperation prejudiced it as a matter of law. (Brief, 29) As set forth above, those three cases are distinguishable from the instant matter and do not dictate this matter's outcome. Most certainly, those cases do not support a determination in this matter that Staples' interactions with Allstate prejudiced Allstate as a matter of law. Accordingly, the burden is upon Allstate, pursuant both to its own policy and to pertinent case law, to show actual prejudice. *See Pilgrim*, 89 Wn. App. at 720.

The record provides no evidence that anything Staples did caused Allstate any actual prejudice. Moreover, even indulging speculation, it is difficult to conceive of how Staples' actions might have caused actual prejudice to Allstate's interests. It is particularly difficult to conceive of how the circumstances concerning the requested examination under oath

may have caused Allstate actual prejudice. Again, Staples ultimately agreed to attend the requested examination under oath, so long as Allstate would agree to toll the contractual limitation period for filing suit for a couple weeks. Allstate rejected any tolling. Such a brief tolling period could not possibly have caused actual prejudice to Allstate. The lack of actual prejudice surrounding the examination under oath issue is rather important given that the trial court entered summary judgment for Allstate solely on the basis that Staples supposedly refused to attend the requested examination. Because Allstate identified no actual prejudice to its interests from anything Staples did, the court erred in finding that such prejudice occurred.

D. Staples is not “Attempting to Create New Washington Law.”

Allstate claims that “Staples is attempting to create new Washington law that an insured may decide whether or when to cooperate with the insurer’s investigation.” (Brief, 25) Allstate posits that this proposed “new Washington law” would conflict with what it suggests is the applicable standard: “Once an insurer has requested compliance, the burden shifts to the insured to follow through with that compliance.” (*Id.*)

Allstate actually would be the party which seems to be proposing new Washington law—ironically, the cases Allstate cites in support of the

quoted standard all come from out-of-state. In any event, Staples hardly suggests that an insured should be granted the unfettered discretion Allstate describes. Rather, he simply asserts that an insurer's investigation of an insured's financial situation cannot be an arbitrary and unbridled fishing expedition that the insurer never has to justify or explain. That assertion hardly conflicts with established Washington law.

Allstate proposes a relationship in which all duties flow from the insured to the insurer, with none flowing the other way.¹ That proposal is at odds with the fiduciary duty that an insurer owes its insureds. Staples proposes nothing more than that some notion of reasonableness should limit the number of whacks an insurer can have at an insured, the number of hoops the insured should have to jump through, the number of times an insured can be asked the same question. Recognizing such limitation would not change Washington law in the least.

Staples does not seek to create new law. Instead, he views this case as providing this Court with an opportunity to clarify what are reasonable restrictions on an insurer's reliance on "noncooperation"

¹ Indeed, on the instant record, it is difficult to see how Allstate can plausibly argue that it met its duty to "deal fairly with an insured, giving equal consideration in all matters to the insured's interests, as well as its own." *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 98 Wn. App. 487, 492, 983 P.2d 1129 (1994).

clauses to deny coverage, and to preclude such clauses from being used as a tactical guise for denying meritorious claims.

E. Allstate's CR 56(f) Argument Contains Mischaracterizations.

In its argument concerning the trial court's denial of Staples' CR 56(f) request for a continuance of the hearing so he could pursue some discovery, Allstate makes a number of references to Staples' having sought "additional" or "further" discovery. (Brief, 17-19) As the record makes clear, Staples was not permitted any discovery. Allstate faults Staples for not having obtained any discovery "in over three months of litigation." (*Id.*, 18) Allstate actually filed its motion for summary judgment less than two months after filing its answer. Faulting Staples for not yet having sought discovery in that very short period of time is over-the-top. As the cases cited in Staples' initial brief state, the presumption is that a party should be permitted discovery before being dismissed on summary judgment.

F. No Authority Supports Allstate's Request for an Award of Attorney's Fees.

Allstate's brief includes a request for an award of attorney's fees if it should prevail on appeal. Allstate correctly states that attorney's fees "[a]re recoverable on appeal if allowed by statute, rule, contract, or equitable principles . . ." (*Id.*, 31) Allstate, however, cites no statute, rule,

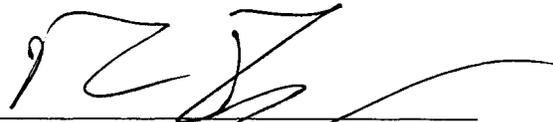
contract, or equitable principle which would permit an attorney's fee award here. Accordingly, there is no basis for an award of fees if Allstate prevails.

G. Conclusion

For the reasons set forth above and in Staples' initial brief, the trial court's order of summary judgment dismissing this case should be reversed and this case remanded for trial. Alternatively, the trial court's denial of Staples' request for a continuance pursuant to CR 56(f) should be reversed and this case remanded to the trial court to permit Staples to conduct discovery.

DATED this 16th day of July, 2010.

SCOTT, KINNEY, FJELSTAD & MACK



Daniel R. Fjelstad, WSBA #18025
Of Attorneys for Appellant

PROOF OF SERVICE

I, Laura Kondo, hereby declare that I am and at all times herein mentioned, a citizen of the United States and a resident of the State of Washington, over the age of eighteen, not a party nor interested in the above-entitled action, and am competent to be a witness herein.

On this day, I filed with the State of Washington Court of Appeals the following document:

REPLY OF APPELLANT

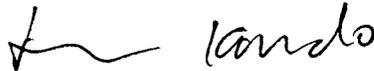
And served the same document via legal messenger to the party below:

Rory W. Leid
Midori Sagara
Cole, Lether, Wathen & Leid, P.C.
1000 Second Avenue Building, Suite 1300
Seattle, Washington 98104

I hereby declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16th day of July, 2010.

SCOTT, KINNEY, FJELSTAD & MACK



Laura Kondo