No. 86413-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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JOHN STAPLES,

Plaintiff/Petitioner,

vs.

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ALLSTATE INSURANCE COMPANY,

Defendant/Respondent.

BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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On Behalf of
Washington State Association for Justice Foundation

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in Washington insurance law, including an interest in the rights and obligations of insurers and insureds with respect to the investigation and handling of first party insurance claims.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case arises out of a casualty loss claim submitted by John Staples (Staples) to his insurer Allstate Insurance Company (Allstate). The questions before the Court bear on the circumstances under which an insured is required to submit to an examination under oath (EUO), and the consequences for failing to do so. The underlying facts are drawn from the unpublished Court of Appeals opinion, the briefing of the parties and the superior court order on summary judgment. See Staples v. Allstate Ins. Co., *noted at* 161 Wn.App. 1038 (2011), *review granted*, 173 Wn.2d 1013 (2012); Staples Br. at 2-12; Allstate Br. at 3-12; Staples Pet. for Rev.

at 2-12; Allstate Ans. to Pet. for Rev. at 1-11; Staples Supp. Br. at 1 & Appendix; Allstate Supp. Br. at 1; CP 255-57.[1]

For purposes of this amicus curiae brief, the following facts are relevant: In August 2008 Staple's truck was stolen, along with tools and equipment stored inside a compartment mounted on the truck. At the time, Staples carried both motor vehicle and homeowner's insurance with Allstate. Staples filed a claim with Allstate under the homeowner' policy for the loss of his tools and equipment.[2]

Allstate received the police report of the theft. According to the report, the tools and equipment were used for Staples' work, and he estimated that it would cost $15,000 to replace them. In the first of two subsequent recorded interviews given to Allstate, Staples indicated that the tools had been collected over a period of 50 years, and implied the tools and equipment were used for personal purposes. He estimated the total value of the tools and equipment as between $20,000 and $25,000. Staples filed an itemized sworn proof of loss claim with Allstate for $25,000, later revised to add some items and remove others.

Based upon its belief that the recorded interview was inconsistent with the initial police report, Allstate assigned Staples' claim to its special investigation unit, and conducted a second recorded interview of Staples. Afterward, Allstate notified Staples it had scheduled him for an EUO, and

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[1] CP 255-57 is the superior court's "Order Granting Allstate's Motion for Summary Judgment Re Plaintiff's Failure to Comply," which is reproduced in the Appendix to this brief for the convenience of the Court.

[2] Staples also made a claim with Allstate under the motor vehicle policy for the theft of the truck, and Allstate paid this claim. See Staples Pet. for Rev. at 3.

further requested extensive documentation in advance of the EUO that Allstate believed necessary to process the claim.

From this point forward, as the Court of Appeals opinion and briefing of the parties reflect, it appears that the parties' relationship deteriorated in a series of exchanges over several months. Staples questioned Allstate's demand for an EUO and its dissatisfaction with the documentary proof submitted in support of the claim. Allstate considered Staples' submissions both incomplete and suspect. Ultimately, in April 2009 Allstate denied Staples' claim under the homeowner's policy based upon his failure to appear for an EUO and provide adequate documentation for his claim, and for noncooperation with the investigation.[3]

Staples initiated this action against Allstate for breach of contract, and for violation of the Consumer Protection Act, Ch. 19.86 RCW, and the Insurance Fair Conduct Act, RCW 48.30.015. Shortly after initiation of the action, Allstate moved for summary judgment of dismissal based on Staples' failure to cooperate. Staples countered that genuine issues of material fact existed regarding the issue of alleged noncooperation, and also sought a continuance under CR 56(f) to permit discovery.

The superior court granted summary judgment of dismissal based solely on Staples' failure to submit to the examination under oath. See

[3] After Allstate's denial of the claim Staples made an effort to resolve the EUO impasse, offering to appear at an EUO if Allstate would briefly extend the looming one-year policy limitation period for bringing suit on the claim. Allstate rejected this proposal. See Staples Br. at 10.

CP 255-57 (Appendix). The Court of Appeals, Division I, affirmed. Relying principally on its decision in Downie v. State Farm Fire & Cas. Co., 84 Wn.App. 577, 929 P.2d 484, *review denied*, 132 Wn.2d 1003 (1997), the court concluded that Staples' failure to submit to an EUO was determinative and "breached a valid condition precedent to filing suit under the policy." Staples Slip Op. at 8. In so doing, the court rejected Staples' arguments that Allstate unreasonably broadened its investigation on the basis of an unfounded suspicion of fraud, and that a reasonableness requirement should apply to an insurer's EUO request. See id. It also rejected Staples' argument that his civil claims were not subject to dismissal based upon failure to submit to an EUO unless Allstate established actual prejudice resulting therefrom, concluding that Staples had not preserved this issue for review. See id. at 8-9. Lastly, the court affirmed the trial court's implicit rejection of Staples' motion for a continuance under CR 56(f), finding no abuse of discretion. See id. at 9-10.

Staples sought review in this Court, challenging whether his claims were properly dismissed for failure to submit to the EUO, and, alternatively, whether the superior court abused its discretion in not granting the CR 56(f) continuance. See Staples Pet. for Rev. at 1-2. This Court granted review.

Two subsections of Allstate's policy are particularly relevant to this review. Section I Conditions, subsection 3, provides in relevant part:

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:
(...)
f) as often as **we** reasonably require:
(...)
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.
(...)
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**.

(Emphasis original.)[4] Section I, subsection 12, of the Allstate policy provides:

Action Against Us
No one may bring an action against **us** in any way related to the existence or amount of coverage, or the amount of loss for which coverage is sought, under a coverage to which **Section I Conditions** applies, unless:

a) there has been full compliance with all policy terms; and
b) the action is commenced within one year after the inception of loss or damage.

Staples Slip. Op. at 7 n.3 (quoting Allstate policy).

III. ISSUES PRESENTED

1.) Does Allstate's homeowner's policy or Washington insurance law require that Allstate's demand for an initial examination under oath be reasonable and made in good faith?

2.) Under Allstate's policy or Washington insurance law, may Allstate deny a casualty claim or obtain dismissal of a related civil action,

[4] This text is drawn from the extract from Allstate's policy reproduced as an attachment to Staples' supplemental brief. See Staples Supp. Br. at Appendix (A-2); see also Staples Slip. Op. at 7 n.3. This same attachment from Staples' brief is reproduced in the Appendix to this brief for the convenience of the Court.

based upon an insured's failure to submit to an examination under oath, in the absence of proof of actual prejudice resulting therefrom?

IV. SUMMARY OF ARGUMENT

Properly interpreted, Allstate's examination under oath provision requires a reasonable basis for invoking the provision. Unless the EUO demand is reasonable under the circumstances, Allstate should not be permitted to deny an insured's claim for failure to submit to an examination under oath, nor assert such failure as an affirmative defense in the insured's related civil action. This interpretation of Allstate's policy is wholly consistent with Washington insurance law, which generally requires an insurer to act reasonably and in good faith in all aspects of the insurer-insured relationship.

Under both Allstate's policy and Washington insurance law, an insured's failure to submit to an examination under oath cannot serve as a basis for denial of coverage, or as an affirmative defense in a related civil action, unless Allstate establishes that under the circumstances it was actually prejudiced by such conduct. The prejudice analysis under Washington law is governed by Oregon Auto. Ins. Co. v. Salzberg, 85 Wn.2d 372, 535 P.2d 816 (1975)

To the extent the holdings in Downie v. State Farm Fire & Casualty, supra, are inconsistent with the above analysis, they should be disapproved.

V. ARGUMENT

A. Both Allstate's Policy And Washington Insurance Law Require That A Demand For An EUO Must Be Reasonable And Made In Good Faith.

Staples argues that both Allstate's insurance policy and Washington insurance law require reasonable grounds for an EUO, and that the Court of Appeals below erred in confining the reasonableness requirement in the text of Allstate's EUO provision to the *number* of EUOs conducted. See Staples Supp. Br. at 2-4; Staples Reply Br. at 4; see also Staples Slip. Op. at 7-8.

Allstate counters that compliance with its demand for an EUO is an "absolute condition precedent" to Staples' right to file suit. Allstate Supp. Br. at 1, 4. This argument appears to be based on its reading of the policy language, and the Court of Appeals opinion in Downie, supra, also involving the failure to submit to an EUO. See Allstate Br. at 6-7 & 24-25. Relying on Downie, Allstate contends that its policy language and Washington law do not impose a reasonableness requirement for conducting an EUO, and that its policy only requires reasonableness to the extent that it schedules more than one EUO. See Allstate Supp. Br. at 6-10; see also Downie, 84 Wn.App. at 583; Staples Slip. Op. at 7-8.

As explained below, Staples is correct that both Allstate's policy and Washington insurance law require an insurer act reasonably in demanding an insured submit to an EUO.

Re: Allstate Policy Interpretation

Although the question of whether an EUO request must be reasonable is at issue in this appeal, Allstate's policy language has not been meaningfully examined with the rules of construction governing insurance policies in mind. But see Allstate Supp. Br. at 8 (relying on Downie and cases applying plain language analysis in arguing reasonableness relates solely to the number of EUOs).[5] Two rules of construction are particularly relevant. First, an insurance policy should be interpreted "according to the way it would be understood by the average insurance purchaser." State Farm Insurance v. Emerson, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984). Second, if language in an insurance policy is susceptible of more than one meaning, it should be construed in favor of the insured. See Wash. Restaurant Corp. v. Gen. Ins. Co., 64 Wn.2d 150, 153, 390 P.2d 970 (1964).

The average purchaser of insurance would read Allstate's requirement that "**you** must . . . as often as **we** reasonably require . . . at **our** request, submit to examinations under oath" as imposing a reasonableness requirement on *each* EUO the insurer demands. Allstate

[5] This failure to fully address the issue of policy interpretation should not foreclose the Court from reaching this question, particularly when the EUO language at issue is a variant on standardized policy language, and the Court's disposition here will likely impact other insurers and insureds. See RCW 48.18.120(1) (authorizing Insurance Commissioner to adopt standard form policies); WAC 284-20-010 (adopting 1943 New York Standard Fire Insurance Policy); 1943 New York Standard Fire Insurance Policy, lines 113-17 (setting forth standardized EUO provision, which provides "[t]he insured, as often as may be reasonably required, shall . . . submit to examinations under oath"; available at www.insurance.wa.gov); see also Allstate Supp. Br. at 3-4. For the same reason, in its discretion the Court may allow amicus curiae to address the issue if it is necessary for the Court to reach a proper decision. See Harris v. Dep't of Labor & Indus., 120 Wn.2d 461, 467-68, 843 P.2d 1056 (1993).

Policy Section I Conditions, subsection 3 (Appendix). The average purchaser would not read this provision as allowing Allstate one EUO as a matter of right, whether or not reasonable. While the provision contemplates that more than one EUO may occur, it requires that each and every EUO request must be reasonable in nature under the then attendant circumstances.

This reading is grounded in common sense. Surely, the average purchaser would not think that this language would allow Allstate to make an unreasonable demand for an initial EUO, merely to unsettle or intimidate the insured. Cf. Pilgrim v. State Farm Fire & Cas., 89 Wn.App. 712, 719-20, 950 P.2d 479 (1997) (involving interpretation of similarly worded language regarding insurer's request for records and documents, concluding "the insurer can require an insured to provide only answers to material requests, that is, matters concerning a subject reasonably relevant and germane to the insurer's investigation as it was proceeding at the time it made the demand"; footnote omitted); accord Tran v. State Farm Fire & Cas. Co., 136 Wn.2d 214, 224, 961 P.2d 358 (1998) (citing Pilgrim with approval for the proposition that "[t]he only limitation on the requirement that insureds cooperate with the insurer's investigation is that the insurer's requests for information must be material"). Imposing a materiality requirement for an insurer's request for records and documents, as the Court of Appeals did in Pilgrim and as this Court approved in Tran, is

tantamount to imposing a reasonableness requirement. Recognizing reasonableness-based limits on EUOs is conceptually indistinguishable.

Alternately, if the Court concludes Allstate's policy language is not sufficiently clear to invoke the average purchaser analysis, the phrasing of the EUO provision is at best ambiguous, requiring an interpretation most favorable to the insured. Such an interpretation would likewise impose a reasonableness requirement on each and every EUO demanded by the insurer.[6]

Nonetheless, Allstate argues that an insurer's demand for an EUO is an absolute condition precedent to a civil action by the insurer, citing Ward v. National Fire Ins. Co., 10 Wash. 361, 38 Pac. 1127 (1894), and Georgian House of Interiors v. Glens Falls Ins. Co., 21 Wn.2d 470, 151 P.2d 598 (1944). See Allstate Supp. Br. at 6-7. The policies in both of these cases lack reasonableness language in connection with the EUOs, in contrast to Allstate's policy. See Ward, 10 Wash. at 362 (policy providing "[a]s often as required the assured shall . . . submit to examinations under oath"); Georgian, 21 Wn.2d at 475 (policy providing "[t]he insured, as often as required, shall . . . submit to examinations under oath"). While the

[6] Neither Downie nor the Court of Appeals opinion below undertakes a textual analysis of the EUO policy language using these rules of construction. See Downie, 84 Wn.App. at 581-83; Staples Slip. Op. at 7-8. In both cases, the Court of Appeals below summarily concludes the "reasonably" reference only refers to the number of times that the insurer may demand an EUO, focusing instead on its characterization of the EUO as a condition precedent to suit. See Downie at 582-83; Staples Slip. Op. at 8. As discussed in §B, infra, this Court has rejected a formalistic condition precedent analysis in interpreting insurance policies.

If the Court finds Allstate's policy imposes a reasonableness requirement with respect to all EUOs, then the analysis of the similar policy language in Downie should be disapproved to the extent inconsistent. See Downie, at 581-83.

policies in Ward and Georgian both provide for records to be produced in a reasonable manner, the reasonableness language is contained in separate clauses and does not appear to apply to EUOs. See Ward at 362 (referring to production of records at "reasonable times and places"; Georgian at 475 (referring to production of records at "reasonable place").[7]

In any event, as discussed in §B infra, the condition precedent analysis in Ward and Georgian is no longer viable.

Re: Washington Insurance Law

While the above textual analysis of Allstate's policy should be dispositive, under Washington law a reasonableness requirement should be read into Allstate's policy, including, but not limited to, its EUO provision. RCW 48.01.030 requires both insurers and insureds to be "actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters."[8] This statutory requirement is necessarily read into every policy of insurance. See Touchette v. Northwestern Mut. Ins. Co., 80 Wn.2d 327, 332, 494 P.2d 479 (1972) (stating "a valid statute becomes a part of and should be read into the insurance policy"; involving the underinsured motorist statute, RCW 48.22.030). As explained in St. Paul Fire & Marine Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 129-30, 196 P.3d 664 (2008):

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[7] Also, Allstate's citations to Ward and Georgian do not directly relate to the EUOs. The passage from Ward quoted by Allstate relates to the insured's duty to provide a proof of loss. See Allstate Supp. Br. at 7 (quoting Ward at 364-65). Similarly, Allstate's reference to Georgian involves a separate "iron-safe" clause, distinct from the EUO provision of the policy. See Allstate Supp. Br. at 7 (citing Georgian, 21 Wn.2d at 475, 495-96).

[8] The full text of the current version of RCW 48.01.030 is reproduced in the Appendix to this brief.

> The duty of good faith is not specific to either of the main benefits of an insurance contract but permeates the insurance arrangement. *See* [*Indus. Indem. Co. v.*] *Kallevig,* 114 Wn.2d [907, 916, 792 P.2d 520 (1990)] (citing RCW 48.01.030). The good faith duty between an insurer and an insured arises from a source akin to a fiduciary duty. *Tank v. State Farm Fire & Cas. Co.,* 105 Wn.2d 381, 385–86, 715 P.2d 1133 (1986). "This fiduciary relationship, as the basis of an insurer's duty of good faith, implies more than the 'honesty and lawfulness of purpose' which comprises a standard definition of good faith. It implies 'a broad obligation of fair dealing' and a responsibility to give 'equal consideration' to the insured's interests." *Id.* (quoting *Tyler v. Grange Ins. Ass'n,* 3 Wn.App. 167, 173, 177, 473 P.2d 193 (1970)). Both Washington courts and the legislature have consistently imposed a duty of good faith on the insurance industry. *Id.* at 386.

(Footnote omitted.)[9]

An insurer's obligation of good faith includes the duty to act reasonably in its dealings with the insured. See Mut. of Enumclaw v. Paulson Constr., 161 Wn.2d 903, 916, 169 P.3d 1 (2007) (recognizing conduct that is unreasonable, frivolous or unfounded violates an insurer's duty of good faith).[10] "Actions by an insurer done without reasonable justification, are done without the good faith mandated by RCW 48.01.030[.]" Whistman v. West Am. of Ohio Cas. Group of Ins. Cos., 38 Wn.App. 580, 585, 686 P.2d 1086 (1984); see also Indus. Indem. Co. v. Kallevig, 114 Wn.2d 907, 917, 792 P.2d 520 (1990) (citing Whistman with approval for this proposition). This same overarching reasonableness requirement is evident throughout the administrative

[9] Non-substantive differences in the foregoing quotation appear in the Westlaw version of this Onvia quote.

[10] An insurer may violate its duty of good faith even when its conduct is ostensibly reasonable, because good faith also requires honesty and lawfulness of purpose. See Paulson Constr., 161 Wn.2d at 915, n.9.

regulations governing claims settlement and other practices. See WAC 284-30-300 to -450 & 284-30-500 to -800.

The fact that the Insurance Commissioner has authorized use of the 1943 New York Standard Fire Insurance Policy, which has language in its EUO provision similar to that involved here, does not foreclose application of the reasonableness requirement embedded in Washington insurance law as a matter of public policy (assuming for the sake of argument that it is not already imposed in the text of the standard form policy). Similarly, the fact that RCW 48.18.460 authorizes the inclusion of provisions for examinations under oath in insurance policies does not speak to whether either the particular policy language or Washington insurance law otherwise generally imposes a reasonableness requirement. See Allstate Supp. Br. at 7 (suggesting RCW 48.18.460 confers an unfettered right to conduct EUOs).[11] The adoption of the standard form policy and RCW 48.18.460 merely enable insurers to place EUO provisions in their policies. Moreover, to read RCW 48.18.460 as authorizing EUOs under any circumstances, reasonable or not, would be contrary to the statutory duty imposed on insurers under RCW 48.01.030.

There is no basis in Washington law for excluding EUOs from the general requirement of reasonableness applicable to all dealings between

[11] The current version of RCW 48.18.460 is reproduced in the Appendix to this brief.

insurer and insured. Properly interpreted, Allstate's EUO provision is wholly consistent with Washington insurance law.[12]

It is for the Court to determine whether this summary judgment record reflects that reasonable minds could differ on whether Allstate had a reasonable basis for demanding Staples submit to an EUO under the circumstances.

B. Under Allstate's Policy And Washington Insurance Law, The Failure Of An Insured To Submit To An EUO Alone Is Not A Sufficient Basis For Denying Coverage, Absent Proof Of Prejudice; Nor Can it Serve As An Affirmative Defense To An Insured's Related Civil Action Unless Allstate Establishes It Was Actually Prejudiced By Such Conduct.

Staples argues that both Allstate's policy and Washington law require Allstate to prove actual prejudice resulting from Staples' failure to submit to an EUO before dismissing this civil action, and that the Court of Appeals below erred in not reaching this issue on grounds that it was not sufficiently argued before the court. See Staples Supp. Br. at 2-7. Staples further contends that genuine issues of material fact exist regarding the actual prejudice issue, distinguishing this case from other Washington precedent where actual prejudice was found as a matter of law. See Staples Supp. Br. at 7-10; Staples Reply Br. at 2-5. Allstate argues that an insured who breaches a condition precedent to suit, such as the EUO provision, is precluded from filing suit as a matter of law, see Allstate

[12] While this Court has not previously had occasion to recognize a reasonableness requirement as to an insurer's specific demand for an EUO, in Pierce v. Globe & Rutgers Fire Ins. Co., 107 Wash. 501, 505-06, 182 Pac. 586 (1919), the Court held, in a coverage dispute between insured and insurer, that an insurer's affirmative defense based upon an insured's failure to appear for a scheduled EUO required trial on whether such failure was "without reasonable cause," as the issue could not be determined as a matter of law under the particular facts and circumstances.

Supp. Br. at 9-10, or is deemed to have prejudiced the insurer as a matter of law, see id. at 10-13.

The briefing is unclear whether the superior court undertook a prejudice analysis in the course of dismissing Staples' claim, and the court's order is silent on this question. See CP 255-57. The Court of Appeals below did not address this issue because it determined it was not sufficiently argued on review. See Staples Slip. Op. at 8-9.[13] WSAJ Foundation assumes for purposes of this argument that the actual prejudice issue is properly before this Court.[14]

Re: Allstate Policy

An insured's duty to submit to an EUO (reasonably) required by Allstate is one of a series of obligations owed under the policy requiring the insured to cooperate regarding adjustment of the claim. See Allstate policy, subsection 3 (Appendix). However, as with all parts of subsection 3, an insured who fails to submit to an EUO may only be denied coverage if the "failure to comply is prejudicial to [Allstate]." Id. (last paragraph).

Under its own policy language, Allstate cannot deny coverage for failure to submit to an EUO in the absence of proof of prejudice. As a

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[13] Downie also did not reach this issue because it found that the insured had not preserved the prejudice argument, although the court does note "that some cases require that the insurance company prove that it was prejudiced by the policy violation before it can insist on strict compliance with the policy provisions." 84 Wn.App. at 582-83, n.7.

[14] Staples argued in the Court of Appeals that Allstate has the burden of establishing that any failure to cooperate on his part—including the failure to submit to the EUO—resulted in actual prejudice to Allstate. See Staples Br. at 13-14, 19; Staples Reply Br. at 4-5; see also Allstate Br. at 29-31; RAP 1.2(a) (providing generally that, absent compelling reasons, the Rules of Appellate Procedure should be interpreted to facilitate resolution of cases on the merits).

consequence, it should not be able to defeat an insured's civil action based solely on noncompliance with an EUO demand unless it proves prejudice actually occurred.

The Court of Appeals below appears to have accepted Allstate's argument that Staples' action must be dismissed under subsection 12 because full compliance with all policy provisions is a condition precedent to maintaining the action. See Staples Slip. Op. at 5-8 and accompanying notes. This analytical approach should be rejected because it fails to read the insurance policy in its entirety and give meaning to Allstate's separate prejudice requirement. See RCW 48.18.520 (requiring insurance policies to be read in their entirety); Miller v. Penn Mutual Life Ins. Co., 189 Wash. 269, 275, 64 P.2d 1050 (1937) (requiring, if possible, different parts of insurance policy to be harmonized and given effect). Reading Allstate's policy subsections 3 and 12 together, Allstate should not be allowed an affirmative defense for Staples' failure to submit to the EUO unless it establishes actual prejudice.

Re: Washington Insurance Law

The Allstate policy provision requiring a showing of prejudice before an insurer can deny a claim based on an insured's noncooperation, such as failure to submit to an EUO, is wholly consistent with Washington case law recognizing that an insurer cannot invoke the failure to cooperate as an affirmative defense to an insured's civil action bearing on denial of the underlying claim unless it demonstrates actual prejudice resulted from

the conduct. See Oregon Auto. Ins. Co. v. Salzberg, 85 Wn.2d 372, 376-77, 535 P.2d 816 (1975) (imposing, based on public policy grounds, actual prejudice requirement on insurer seeking to avoid policy obligations based upon noncooperation of insured, notwithstanding "no action" clause requiring full compliance with policy as condition precedent to suit); see also Nicolai v. Transcontinental Ins. Co., 61 Wn.2d 295, 298-99, 378 P.2d 287 (1963) (noting in dicta that an insured's failure to appear for an examination under oath is not fatal to an action on the policy by a coinsured absent a showing that the insurer has been injured thereby).

Allstate's "absolute condition precedent" argument, see Allstate Supp. Br. at 1, 4, 6-10 & Allstate Br. at 24-25, with its reliance on early Washington case law, is answered by this Court's opinion in Salzberg, which soundly rejects this formalistic approach based upon public policy considerations grounded in the unique nature of the insurance contract:

> [W]e deem it no longer appropriate to adhere to the view that the release of an insurer from its obligations without a showing of prejudice to it should depend upon the legalistic conundrum of whether the cooperation clause is an express condition precedent or only a covenant. Such an approach places an undue emphasis on traditional, technical contract principles and their dubious application in cases of this nature. In addition, insurance policies, in fact, are simply unlike traditional contracts, *i.e.*, they are not purely private affairs but abound with public policy considerations, one of which is that the risk-spreading theory of such policies should operate to afford to affected members of the public—frequently innocent third persons—the maximum protection possible consonant with fairness to the insurer. *Cf. Touchette v. Northwestern Mut. Ins. Co.*, 80 Wn.2d 327, 494 P.2d 479 (1972). It is manifest that this public policy consideration would be diminished, discounted, or denied if the insurer were relieved of its responsibilities although it is not prejudiced by the insured's actions or conduct in regard to its investigation or presentation and

> defense of the tort case. Such relief, absent a showing of prejudice, would be tantamount to a questionable windfall for the insurer at the expense of the public.
>
> For the foregoing reasons, we are convinced that sound public policy requires that an alleged breach of a cooperation clause may be considered substantial and material, and may effect a release of an insurer from its responsibilities *only* if the insurer was actually *prejudiced* by the insured's actions or conduct. The requirement of a showing of prejudice would pertain irrespective of whether the cooperation clause could be said to be a covenant or an express condition precedent and, in this regard, the burden of proof is upon the insurer. *See Campbell v. Allstate Ins. Co.*, [384 P.2d 155 (Cal. 1963)].

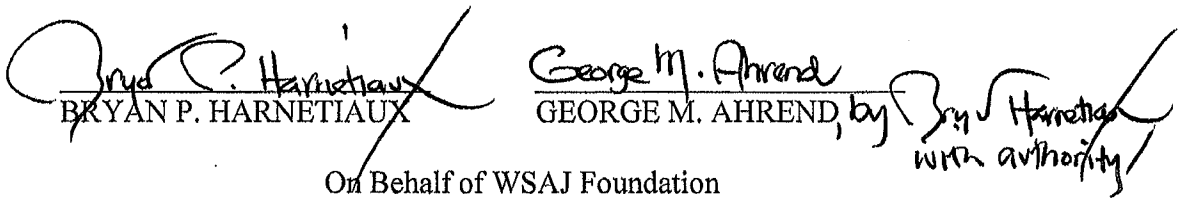
85 Wn.2d at 376-77. This analysis should apply equally to Allstate's argument here that compliance with its demand for an EUO is a condition precedent to suit by Staples. To the extent Downie is inconsistent with Salzberg, in relying upon a now-outdated condition precedent analysis, it must be disapproved. See Downie, 84 Wn.App. at 582-85.

As noted in Salzberg, generally the question of prejudice is for the trier of fact, unless no genuine issue of material fact exists on the issue. See 85 Wn.2d at 377. It is for the Court to determine on this summary judgment record if reasonable minds could differ on whether Staples' failure to submit to Allstate's EUO demand actually prejudiced the insurer, or whether Allstate has established prejudice as a matter of law. See id. (finding question of fact on prejudice issue); Pilgrim, 89 Wn.App. at 723-25 (concluding prejudice as a matter of law); Tran, 136 Wn.2d at 230-32 (same).

VI. CONCLUSION

This Court should adopt the arguments advanced in this brief and resolve this appeal accordingly.

DATED this 14th day of May, 2012.



BRYAN P. HARNETIAUX

GEORGE M. AHREND, by Bryan Harnetiaux with authority

On Behalf of WSAJ Foundation

Appendix

Honorable Steven Gonzalez
Trial Date: February 7, 2011
Hearing Date: December 17, 2009

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JOHN STAPLES, Plaintiff, vs. ALLSTATE INSURANCE COMPANY, an insurance company doing business in Washington, Defendant.	No. 09-2-31398-9 SEA **ORDER GRANTING ALLSTATE'S MOTION FOR SUMMARY JUDGMENT RE PLAINTIFF'S FAILURE TO COMPLY**

THIS MATTER having come before the Court pursuant to Allstate's Motion for Summary Judgment Regarding Plaintiff's Failure to Comply, the Court hearing oral argument and considering the pleadings filed in this action and the following evidence:

1. Allstate's Motion for Summary Judgment Regarding Plaintiff's Failure to Comply;
2. Declaration of Carrie Rohling, with attached exhibits;
3. Declaration of Rory Leid, with attached exhibits;
4. Plaintiff's Response to Defendant's's Motion for Summary Judgment;
5. Declaration of Daniel R. Fjelstad, with attachments;
6. Declaration of James Sullivan, with attachments;
7. Declaration of John Staples, with attachments;

COLE, LETHER, WATHEN & LEID, P.C.
1000 SECOND AVENUE, SUITE 1300
SEATTLE, WA 98104-1082
(206) 622-0494

8. Allstate's Reply in Support of its Motion for Summary Judgment Regarding Plaintiff's Failure to Comply;

9. Declaration of Carrie Rohling in Support of Allstate's Reply, with attachments; and

10. The pleadings and records previously filed herein.

Based on the argument of counsel and the evidence presented, the Court finds:

1. ~~Allstate has requested that the Plaintiff provide documentation pursuant to the terms and conditions of the subject policy. Plaintiff has failed to provide documentation relevant to Allstate's investigation of his insurance claim.~~

2. Allstate has requested that the Plaintiff submit to an examination under oath pursuant to the terms and conditions of the policy. Plaintiff has refused to sit for his examination under oath.

5. ~~Plaintiff had no legal or factual basis in filing this lawsuit when plaintiff had not appear for his examination under oath or produced the information requested prior to filing this lawsuit.~~

6.

Based on the above, IT IS HEREBY ORDERED:

1. Allstate's Motion for Summary Judgment Regarding Plaintiff's Failure to Comply is GRANTED. based upon his failure to appear for an examination under oath.

2. Plaintiff's lawsuit is dismissed with prejudice.

3. ~~Allstate is awarded _____ in sanctions for having to defend this frivolous lawsuit.~~

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4.

DATED this 17th day of December, 2009.

Judge Steven Gonzalez

Presented by:

COLE, LETHER, WATHEN, LEID & HALL, P.C.

Rory W. Leid, III, WSBA #25075
Midori R. Sagara, WSBA #39626

Approved ~~by:~~ as to form:

SCOTT, KINNEY, FJELSTAD & MACK

Daniel J. Fjelstad, WSBA #18025

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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:

PROP *61000460803158700143119*

RCW 48.01.030. Public interest

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

[1995 c 285 § 16; 1947 c 79 § .01.03; Rem. Supp. 1947 § 45.01.03.]

RCW 48.18.460. Proof of loss--Furnishing forms--May require oath

An insurer shall furnish, upon request of any person claiming to have a loss under any insurance contract, forms of proof of loss for completion by such person. But such insurer shall not, by reason of the requirement so to furnish forms, have any responsibility for or with reference to the completion of such proof or the manner of any such completion or attempted completion. If 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.

[1995 c 285 § 17; 1949 c 190 § 26; 1947 c 79 § .18.46; Rem. Supp. 1949 § 45.18.46.]

OFFICE RECEPTIONIST, CLERK

To: amicuswsajf@wsajf.ORG
Cc: fjelstad@skfmlaw.com; rleid@cwlhlaw.com; sestes@kbmlawyers.com
Subject: RE: Staples v. Allstate Ins. Co. (S.C. #86413-6)

Rec'd 5/14/2012

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Sent: Monday, May 14, 2012 4:35 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: fjelstad@skfmlaw.com; rleid@cwlhlaw.com; sestes@kbmlawyers.com
Subject: Staples v. Allstate Ins. Co. (S.C. #86413-6)

Dear Mr. Carpenter,

Attached is our proposed brief in the above entitled case. Electronic service has been made per prior arrangement.

Respectfully submitted,

Bryan Harnetiaux, WSBA #5169
on Behalf of WSAJ Foundation