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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.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The Superior Court erred in entering an order of summary judgment concerning the plaintiff's claim for property insurance benefits.

2. The Superior Court erred in denying the plaintiff's request to permit further discovery pursuant to CR 56(f) before ruling on the defendant's motion for summary judgment.

A. Issues Pertaining to Assignments of Error

1. If, during an insurer's investigation of a property insurance claim, the insurer ignores an insured's request for a justification of the insurer's inquiry into the insured's possible financial motive for overvaluing or misrepresenting his claim, may summary judgment still be entered for the insurer on the basis of the insured's failure to cooperate with the investigation?

(Assignment of Error 1)

2. After an insured had already undergone two interviews as part of the claim investigation process, the insurer requested that he undergo an examination under oath. Through counsel, the insured inquired what the basis for the request was and why further inquiry into his financial circumstances was appropriate. The insurer offered no

explanation and refused to provide the insured's counsel with materials he had requested. Later, despite the insurer's refusal to respond substantively to his requests, the insured offered to attend an examination under oath if the insurer would extend the contractual time limitation for filing suit. The insurer declined that request. On such a record, is entry of summary judgment proper on the basis of the insured's failure to comply with the insurer's investigation of his claim due to his failure to attend the requested examination under oath?
(Assignment of Error 1)

3. When a defendant moves for summary judgment less than three months after suit is filed, and before the plaintiff has conducted any discovery, is it error to deny the plaintiff's request to continue the hearing on the defendant's motion to permit the plaintiff to conduct discovery?

(Assignment of Error 2)

II. STATEMENT OF THE CASE

A. Facts

John Staples (Staples) has been retired since 2005, except for performing some occasional consulting work. (CP 47, ¶ 1) He has had some form of insurance through the defendant, Allstate Insurance

Company (Allstate), since at least 1984. (CP 52, ¶ 11) During his retirement, Staples has divided his time between two residences, one in Kirkland and one in rural Snohomish County. (*Id.*, ¶ 12)

On August 18, 2008, Staples discovered that a large truck he owned had been stolen from the parking lot of his part-time employer. (CP 51, ¶ 10 and 58) Inside the walk-in container affixed to the rear of his truck tools of all sorts and sizes had been stored. Staples stored the tools in the truck both to save storage costs and to permit him access to them at either of his residences. The truck's container had a 14' bed, which Staples had designed to serve as a mobile workshop. He had always enjoyed working with tools, and he had owned some of the tools stored in the truck for 50 years or more. (CP 47, ¶ 1)

The day of the theft, Staples reported his loss to both law enforcement and to his Allstate agent. (CP 51, ¶ 10) He later submitted a claim for his loss to Allstate. Allstate paid for the value of the truck under Staples' motor vehicle coverage. Allstate considered Staples' claim for the lost tools under his homeowner's policy.¹

Naturally, given the large number of tools involved and how long Staples had owned some of them, proof of their loss and value presented

¹The truck was found in Lynnwood in December, 2008. Very little was left in the rear container, and damage had been done to the container's interior. (CP 54, ¶ 17)

a challenge. Certainly, no detailed, up-to-date inventory was available. Rather, Staples had to rely upon materials such as instruction manuals, photographs, and the few receipts he had, as well as upon his memory, to try to construct an itemization of the stolen tools. Given his somewhat transient living arrangements, some delay was necessarily incurred in gathering whatever relevant materials he possessed. As Staples located such materials, he provided them to Allstate. (CP 52-53, ¶¶ 12-14)

From the outset of the claim handling process, Allstate personnel appear to have suspected Staples of having submitted a fraudulent claim. In particular, Allstate compelled Staples to undergo a recorded interview on September 23, 2008. The questions were wide-ranging, even touching on such matters as his domestic partner's income. Nonetheless, Staples did his best to answer them. (CP 54, ¶ 15) Shortly thereafter, by letter dated September 29, 2008, Allstate notified Staples that his claim was being transferred to its Special Investigation Unit. (CP 65, ¶ 2) Months of delay followed.

On December 11, 2008, at Allstate's request, Staples signed an authorization for release of information. The scope of the authorization was quite broad, permitting Allstate access to virtually any information that might reflect on Staples' financial status:

any and all information regarding my salary, employment records, mortgage records, income tax returns and supporting records, banks statements or records, finance or installment purchases, credit standing or rating, auto, property and liability claim history, police, traffic or accidental reports, including personal or public records retained by any law enforcement agency relating to criminal arrests or convictions, and including any and all insurance records and purchases, medical and hospital records, notes and payment records relating thereto.

(CP 60)

On January 13, 2009, at Allstate's insistence, Staples again participated in a recorded interview. Allstate did not explain to him why another interview was necessary. His recollection is that the interview was under oath. The interview lasted over an hour. A number of questions were repeated. (CP 55, ¶ 18)

Two days later, Allstate sent a letter to Staples scheduling an Examination Under Oath at Allstate's current counsel's office. (CP 62-64) Again, Allstate offered no explanation for its request. In the letter, Allstate made demands for financial information from Staples that were quite onerous. For instance, Allstate requested "[a] list of all . . . debts and liabilities in excess of \$500 existing on the date that the loss occurred, showing a) the creditor; b) the date the debt was incurred; c) the original amount of the indebtedness; d) the amount owed at the time of the loss; e) the reason the debt was incurred." Allstate also requested

“ . . . documents received from any creditor or other person to whom [Staples] owed money in the twelve months prior to the loss.” (*Id.*)

Though nearly five months had passed since Staples’ loss when the examination under oath was scheduled, Allstate still had neither denied his claim, nor offered to reimburse him for any of his loss. Allstate simply continued demanding that Staples produce a broad range of materials, without acknowledging the materials he had already provided. Staples believed he had already provided all he had with regard to a number of the categories. Moreover, Allstate wholly failed to articulate why its burdensome and unnecessary investigation should continue. Rather, Allstate issued repeated threats about denying his claim for noncooperation, though Staples did not know what further information he could provide. (CP 55-56, ¶¶ 19, 20)

When Allstate demanded the examination under oath, Staples determined that he needed to retain counsel. He hired James Sullivan (Sullivan). Sullivan contacted Allstate on Staples’ behalf. He informed Allstate that the date set for yet another examination did not work for Staples.² (CP 103, ¶ 3) He inquired why yet another examination was necessary. Sullivan also requested transcripts of the two recorded

² Staples was scheduled to be in Arizona on the date the examination was to occur. (CP 56, ¶ 21)

interviews. (CP 105-06) In response, Allstate offered no justification for its burdensome requests, and, without explanation, refused to provide him with the transcripts. (CP 103, ¶ 3)

In February, 2009, Staples' current counsel, Daniel R. Fjelstad (Fjelstad) began representing him. (CP 65, ¶ 3, and 70) By letter to Allstate counsel dated March 11, 2009, Fjelstad requested that Allstate provide him with all the materials Sullivan had requested in his letter to Allstate of January 23, 2009, including transcripts of the recorded interviews. (CP 72) As with Sullivan, Allstate offered no explanation in refusing to provide the transcripts. Rather, by letter dated March 18, 2009, Allstate simply restated its requests for information from Staples. (CP 74-75)

By letter to Allstate counsel dated April 2, 2009, Fjelstad requested that Allstate provide him with some reasonable basis for its continued inquiry into Staples' financial circumstances. (CP 77-78) The letter pointed out that because Fjelstad had just become involved in Staples' representation, Allstate's deadline of April 1, 2009 for him to provide the requested information was rather arbitrary and unreasonable. The deadline was even more arbitrary and unreasonable given that Allstate would not specify what information it still sought, nor what it

had already obtained. Allstate's response to the letter failed to articulate any basis for Allstate's investigation into Staples' financial situation; rather, counsel simply suggested that the requested financial information was "material" to Allstate's investigation. (CP 80-81) With regard to the deadline for Staples to furnish the requested information, Allstate's letter failed to specify how it would suffer any prejudice if further delay occurred.

Without providing Staples with any further information nor with any further explanation for its requests, Allstate, by letter dated April 30, 2009, denied Staples' claim. Allstate's stated basis for the denial was Staples' purported noncooperation for failing to report for an examination under oath and for failing to otherwise provide Allstate with requested information. The policy language Allstate cited as justifying its denial is that which requires, after a property loss, that an insured provide Allstate with "all accounting records, bills, invoices and other vouchers" that it might "reasonably request to examine," and "submit to examination under oath" at its request. The policy further provided that Allstate had no duty to provide coverage to an insured if the insured failed to comply with these provisions "and this failure to comply is prejudicial to us." (CP 149)

Curiously, by separate letter to Fjelstad of the same date, Allstate's counsel wrote: "You are respectfully advised that Allstate's investigation in regard to this matter is continuing for the reasons set forth in our earlier correspondence. As a result, Allstate can neither admit nor deny liability at this time." (CP 83)

In response to Allstate's rejection of Staples' claim, Fjelstad wrote Allstate a letter, dated May 7, 2009, stating that Allstate had failed to act in good faith. The letter also made clear that Staples was not refusing to provide Allstate with additional information. In particular, the letter stated, ". . . [Staples] was ready to participate in an examination under oath if Allstate had simply expressed the slightest justification for its onerous requests for information from him." (CP 85) By letter from counsel dated May 12, 2009, Allstate responded with yet another letter setting forth a litany of materials Staples was to provide Allstate, but presumably had not provided. (CP 87-88)

By letter dated July 27, 2009, Fjelstad notified Allstate's counsel of Staples' intent to sue Allstate pursuant to RCW 48.30.015 because of Allstate's lack of good faith in handling his claim. (CP 90-92) Allstate responded, by letter dated August 3, 2009, with yet another claim that Staples had "refused" to provide Allstate with requested information and

asserting that “your client’s claim was denied based upon his failure to cooperate, including, but not limited to, his failure to appear for an examination under oath.” The letter set out yet again the same list of materials Allstate had requested of Staples throughout the claims adjustment period, without any acknowledgement of the materials he had provided to Allstate. (CP 94-96)

In an effort to avoid litigation and further delay in Staples’ receipt of insurance proceeds, Fjelstad wrote Allstate’s counsel on August 17, 2009. The letter indicated that Staples would appear for an examination under oath if Allstate would agree to an extension of the one-year contractual time limitation on filing suit. (CP 98) The following day, Allstate rejected the offer by letter from counsel. (CP 100-01) Yet again, the letter set out the unchanging list of materials Staples was supposedly “refusing” to provide Allstate, without acknowledging any of the materials he had provided. The letter identified no prejudice that Allstate might suffer if the limitation period was extended.

B. Superior Court Proceedings

Shortly after Allstate refused to extend the contractual limitation period, on August 24, 2009, Staples sued. (CP 1-8) He asserted a claim

for breach of contract, and brought claims under the Insurance Fair Conduct Act (RCW 48.30.015) and the Consumer Protection Act (RCW 19.86.010 *et seq.*). Less than three months later, on November 18, 2009, Allstate moved for summary judgment, asserting that Staples should be declared noncooperative with its claim investigation as a matter of law, and that such noncooperation bars suit, apparently under any of Staples' three causes of action. (CP 14) Allstate also sought fees and costs against Staples and his counsel pursuant to CR 11.

In its motion, Allstate relied upon an August 18, 2009 police report pertaining to Staples' theft complaint. (CP 151-55) That report stated that Staples estimated the value of the stolen tools at \$15,000. (CP 152) Allstate asserted that because that sum was less than the \$20,000 to \$25,000 estimate Staples later gave an Allstate investigator, an investigation into Staples' financial status was warranted. Despite Staples' counsel's numerous prelitigation requests for Allstate's justification for investigating Staples' financial circumstances, Allstate had not provided him with that report.

Following filing of the motion, Staples' counsel served a set of interrogatories and requests for production on Allstate. (CP 67, ¶ 13)

Responses were not due until after the date set for hearing on the motion, and Allstate did not respond before the hearing.

Following argument, the trial court entered summary judgment for Allstate. (CP 255-57) Allstate's proposed order stated, "Allstate's Motion for Summary Judgment Regarding Plaintiff's Failure to Comply is GRANTED." To that, the court added, "based upon his failure to appear for an examination under oath." (CP 256) The court denied Allstate's request for CR 11 sanctions. This appeal followed.

III. ARGUMENT

A. Argument

1. Standard of review.

In considering a summary judgment motion, a court must view all facts and reasonable inferences therefrom in favor of the nonmoving party. *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). A court may grant summary judgment only if the pleadings, affidavits, and depositions, and the reasonable inferences to be drawn therefrom, when viewed in the light most favorable to the nonmoving party, establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995); *see*

also CR 56(c). The moving party has the “burden of proving, by uncontroverted facts, that no genuine issue exists . . .” *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). A court “must deny a motion for summary judgment if the record shows any reasonable hypothesis which entitles the nonmoving party to relief.” *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980). When the reasonableness of a party’s conduct is at issue, summary judgment is rarely appropriate. See *Morris v. McNicol*, 83 Wn.2d 491, 495, 519 P.2d 7 (1974); and *Preston v. Duncan*, 55 Wn.2d 678, 681-82, 349 P.2d 605 (1960).

2. Allstate’s investigation of Staples’ property loss claim was unjustifiably broad, and, genuine issues of material fact exist whether he substantially complied with Allstate’s investigation. Entry of summary judgment, constituted, accordingly, error.

In *Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 376, 535 P.2d 816 (1975), Washington’s Supreme Court declared: “An alleged breach of a cooperation clause is generally a question for the trier of fact, unless, of course, there exists no genuine issue as to any material fact by virtue of the pleadings, affidavits, et cetera.” The burden of demonstrating an insured’s noncompliance is upon the insurer. *Id.* 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). Trifling noncompliance on the insured's part is not sufficient to defeat coverage: "[t]he standard by which the insured's conduct is measured is substantial compliance." *Id.*, at 720.

An insurer's permissible scope of inquiry to an insured is not, of course, boundless: "the insurer can only require an insured to provide 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." *Id.*, at 719. An insured's financial status can become relevant to an insurer's investigation of a claim, but only if the insurer "has reason to broaden its investigation into the insured's possible financial motive for overvaluing or misrepresenting his claim." *Keith v. Allstate Indem. Co.*, 105 Wn. App. 251, 255, 19 P.3d 1077 (2001), citing *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 966 P.2d 358 (1998).

In the instant case, Allstate asserts that Staples should be determined as a matter of law to have failed to have substantially

complied with its investigation of his property loss claim.³ As set forth below, Allstate's motion should be denied because, first, Allstate has failed to establish that any inquiry into Staples' financial status was justifiable, and, second, genuine issues of material fact exist with regard to whether Staples substantially complied with Allstate's investigation of his claim.

a. Genuine issues of material fact exist with regard to whether Allstate's inquiry into Staples' financial status was even justified.

Allstate has failed to make a plausible showing that its inquiry into Staples' financial condition was ever reasonably justified. At a minimum, genuine issues of material fact exist with regard to that issue. In its motion, Allstate cited an alleged discrepancy between the value of the stolen items which Staples supposedly provided to the law enforcement officer investigating the loss on the day he reported the theft and the value he provided to a claims investigator a month later. (CP 17-

³ In its motion, Allstate did not distinguish between Staples' three separate causes of action in seeking dismissal. Likewise, in dismissing Staples' complaint, the Superior Court did not distinguish between his causes of action. Apparently, Allstate deems the failure to cooperate claim as a bar to each of them. Allstate offered no authority that suggests an insured's failure to cooperate necessarily bars IFCA or CPA claims. Certainly, on a theoretical level, scenarios can be constructed in which an insured fails to cooperate with an investigation, but the insurer nonetheless violates either IFCA or CPA provisions. See *Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 961 P.2d 933 (1998). For present purposes, however, such distinction need not be explored further as, on the instant record, Allstate's noncooperation allegation does not even bar Staples' contractual claim.

18) The police report which Allstate cites as the basis of its claim that Staples made contradictory claims is, of course, hearsay. Moreover, even if Staples told the officer the stolen items were worth \$15,000 on the day he discovered the theft, and then told the claims investigator a month later, after he had had time to consider all the items lost, that they were worth \$20,000 to \$25,000, the difference between those estimates is de minimus.⁴

Allstate also alleges Staples made contradictory statements to the officer and to the claims investigator concerning the stolen tools' use. (CP 17) On its face, the officer's assertion that the truck was a mobile workshop for Staples' work for a gas scrubbing engineering firm is implausible. That sort of work simply would not be likely to incorporate use of the type of tools which Staples reported as stolen. (CP 49-50, ¶¶ 4-6) Moreover, Staples told the claims investigator that though some of the tools could be used in his work, he had collected the tools over a 50-year span. Staples' explanation for why he had so many tools in the truck is quite innocent. (See CP 47-51, ¶¶ 1,7, 8.) Further, Staples has explained that his valuation of the stolen tools varied somewhat over

⁴ Cf., the discrepancy at issue in *Pilgrim*: the insureds told the law enforcement officer investigating their burglary claim that the stolen items were valued at \$15,000, but later told their insurer that the items were worth over \$78,000. 89 Wn. App. at 714-15. Staples explains that his valuation of the stolen tools varied somewhat over time as he gave more thought to what he stored in the truck. (CP 52-53, ¶¶ 12-14)

time as he gave more thought to what he had stored in the truck. (CP 52-53, ¶¶ 12-14)

Perhaps if Allstate had called the law enforcement officer to whom it claims Staples made contradictory statements the inconsistencies it alleges could have been cleared up. Instead, Allstate acted to treat its insured as a perpetrator of fraud without performing even a minimal investigation. Allstate launched a fraud investigation of its insured based on hearsay statements in a police report. The allegedly contradictory statements which Allstate has cited as justifying its inquiry into Staples' financial circumstances simply are too innocuous to justify that inquiry. At a minimum, a trier of fact should be permitted to resolve whether the inquiry was warranted. Accordingly, the Superior Court erred in determining, as a matter of law, that Staples failed to reasonably cooperate with Allstate's inquiry, when, in fact, the inquiry was not legally justified.

b. Genuine issues of material fact exist with regard to whether Staples substantially complied with Allstate's investigation of his claim.

Washington law has long recognized that a "fiduciary or quasi-fiduciary relationship exists between an insurer and its insured." *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 98 Wn. App. 487, 492, 983 P.2d

1129 (1999). Indeed, the insurer's fiduciary obligation to an insured "rises to a level higher than that of mere honesty and lawfulness of purpose. It requires an insurer to deal fairly with an insured, giving equal consideration in all matters to the insured's interests, as well as its own." *Id.*

The instant record suggests Allstate's view of its relationship with Staples as one in which all obligations ran from the insured to the insurer, with no mutuality involved. Allstate consistently rejected any requests for information or explanation from its insured, failing to accord his interests any respect or deference. A fair inference from the record is that Allstate simply wanted to find a way to deny Staples' claim.

Despite Allstate's claims, the record indicates that Staples never refused to cooperate in any way with any request for information from Allstate and did not refuse to participate in an examination under oath. After Staples had already participated in two recorded interviews, both of which he thought were under oath (CP 55-56, ¶¶ 15 and 18), he inquired through counsel what might be the justification for the examination under oath which Allstate had scheduled. Allstate never provided a substantive response. During the claim processing period, Allstate did not even reference the allegedly contradictory statements it

now offers as justifying the inquiry into Staples' financial status; it never mentioned the police report to Staples' counsel at all. (CP 66, ¶ 4.) Allstate's actions simply were not consistent with its obligation to treat its insured's interests equally to its own.

Even though Allstate refused to offer any substantive justification for its requested examination under oath, the record surely would permit a trier of fact to find that Staples was willing to cooperate with Allstate. The record does not support Allstate's claim that, as a matter of law, Staples "refused" to attend an examination under oath. Rather, before appearing for such an examination, he simply wanted Allstate to justify its request for an examination. Allstate repeatedly refused to provide such justification. Finally, with the one-year contractual limitation period imminent, Staples offered to show for an examination, with the only condition being that Allstate needed to extend the limitation for filing suit. (CP 98) Allstate's rejection of that offer is more consistent with a desire to simply reject a claim rather than fairly investigate and adjust such claim. (*See* CP 100-01) 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. (*Id.*)

In its motion, Allstate failed to identify any specific information Staples supposedly refused to provide to it, and failed to even attempt to explain how it might have been prejudiced in any manner from any information Staples might have failed to produce. Under the policy, an insured's failure to comply may only defeat coverage if the "failure to comply is prejudicial to us." (CP 149) Rather than making a case for showing prejudice, Allstate's motion simply cited to the laundry list of financial materials it repeatedly requested from Staples (CP 19-20), and made the unsubstantiated claim that he did not provide Allstate with all that he could have provided. Allstate failed to identify a single specific piece of financial information to which Staples had access that he failed to provide to Allstate. (CP 14-30) Importantly, Staples believes he provided as much information as he was able to Allstate. (CP 55, ¶ 19.)

Despite this record, the court found, as a matter of law, that Staples did not substantially comply with Allstate's investigation because he failed to appear for an examination under oath. Accordingly, apparently, he violated his obligation to reasonably comply with Allstate's investigation and Allstate's denial of coverage was appropriate. Given this record, a determination that Staples failed, as a

matter of law, to substantially comply with Allstate's investigation, and that such failure prejudiced Allstate, is not supportable.

In dissenting in *Tran*, Justice Sanders stated:

We must protect insureds from company demands which push the envelope of permissible discovery to simply create a "noncooperation" pretext to deny the claim. [¶] The reason behind this requirement as it relates to the usual cooperation clause was well stated by the North Carolina Supreme Court which explained the cooperation clause

does not grant to the insurer an unlimited right to roam at will through all of the insureds' financial records without the restriction of reasonableness and specificity. Such an obligation would subject an insured to endless document production, including every check they might have tendered and every automatic teller withdrawal they might have made, as the insurer fished for evidence on which to build an arson defense.

Tran, 136 Wn.2d at 238-39, quoting *Chavis v. State Farm Fire & Cas. Co.*, 346 S.E.2d 496, 499 (1986) (note10).

Allstate's handling of the instant claim bears much relation to the situation of which Justice Sanders warned; a trier of fact could most certainly construe Allstate's actions here as an attempt to create a noncooperation pretext as a basis for denying a legitimate claim. The record reflects very little, if any, effort on the part of Allstate's personnel to assist a longtime insured in maneuvering his way through the claims investigation period after the theft of his property. Indeed, a claim that

Allstate's handling of this claim is characterized by delay, unwarranted suspicion, and unfocused investigation is at least as supportable as the claim Allstate makes against Staples. At a minimum, genuine issues of material fact exist with regard to whether Staples substantially complied with Allstate's investigation, such that the trial court's entry of summary judgment was erroneous.

c. At a minimum, the trial court should have permitted Staples to conduct discovery.

CR 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

A trial court's denial of a request for a continuance pursuant to CR 56(f) is subject to an abuse of discretion standard on review. *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554 (1990). In *Coggle*, the court stated: "[t]he primary consideration in the trial court's decision on the motion for a continuance should have been justice." 56 Wn. App. at 508. The court also indicated that a trial court should consider prejudice to the moving party in adjudicating a CR 56(f) request for a continuance.

With regard to CR 56(f)'s federal counterpart, FRCP 56(f), federal courts have repeatedly stated that entry of summary judgment is rarely appropriate when the nonmoving party has not had adequate time to pursue discovery. *See, e.g. Doe v. Abington Friends Sch.*, 480 F.3d 252, 257 (3d Cir. 2007)(it is "well established" that a court should provide a party opposing summary judgment an adequate opportunity to conduct discovery); *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 303-04 (2d Cir. 2003)(summary judgment should be entered against a plaintiff who has not had an opportunity to conduct discovery "only in the rarest of cases"); and *Patton v. Gen. Signal Corp.*, 984 F. Supp. 666, 670 (W.D.N.Y. 1997), citing *Kleinman v. Vincent*, No. 90 CIV. 5665, 1991 WL 2804 *1 (S.D.N.Y. Jan. 8, 1991)("pre-discovery summary judgment remains the exception rather than the rule, and will be 'granted only in the clearest of cases'"). *See also Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244-45 (4th Cir. 2002).

As set forth in his counsel's declaration, Staples had not yet conducted any discovery at the time Allstate filed its motion. (CP 67, ¶ 13) He did submit a set of interrogatories and requests for production to Allstate shortly thereafter, but the responses thereto were not due until after the hearing on the motion. Staples' counsel informed the court that

he anticipated taking depositions of the Allstate personnel involved in the investigation and adjusting of Staples' claim. (*Id.*)

In response to Allstate's motion for summary judgment, Staples requested that if the court were to determine summary judgment was appropriate on the present record that he be granted a continuance of the motion to permit him to obtain responses to written discovery and to conduct depositions. (CP 187-88) By the time Allstate filed its motion, it had served Staples with two sets of requests for admissions as well as a set of interrogatories and requests for production. Staples sought some reasonable period of time in which to conduct discovery of his own pursuant to CR 56(f). (CP 188)

Despite the suit's being less than three months old when the motion was filed, and despite Allstate's failure to make any claim that a continuance would cause it any prejudice (CP 107-113), the court rejected Staples' request for a continuance. Such rejection constituted an abuse of the court's discretion. 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 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 7th day of May, 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:

BRIEF OF APPELLANT

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

Lawrence R. Cock
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 17th day of May, 2010.

SCOTT, KINNEY, FJELSTAD & MACK



Laura Kondo

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