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STATE OF WASHINGTON

NO. 64816-1-I

SUPREME COURT

JOHN STAPLES,

Appellant,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

PETITION FOR REVIEW

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TABLE OF CONTENTS

| | <u>Page</u> |
|--|--------------------|
| I. IDENTITY OF PETITIONER..... | 1 |
| II. CITATION OF COURT OF APPEALS DECISION..... | 1 |
| III. ISSUES PRESENTED FOR REVIEW..... | 1 |
| 1. After an insured had already undergone two recorded interviews as part of the claim investigation process, the insurer requested that he undergo an examination under oath. 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. 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 rejected that request. On such a record, is entry of summary judgment proper on the basis of the insured's failure to attend the requested examination under oath?..... | 1 |
| 2. 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?..... | 2 |
| IV. STATEMENT OF THE CASE..... | 2 |
| A. Facts..... | 2 |
| B. Litigation history..... | 10 |
| V. ARGUMENT..... | 12 |

| | | |
|------|--|------|
| A. | This petition involves issues of substantial public interest that the Supreme Court should address..... | 13 |
| 1. | The issue of the circumstances in which an insured must attend an examination under oath during the claims adjustment process before filing suit is of substantial public interest..... | 13 |
| 2. | The issue of the circumstances in which a party should be permitted, pursuant to CR 56(f), to pursue discovery before a motion for summary judgment is resolved is of substantial public interest..... | 17 |
| VI. | CONCLUSION..... | 20 |
| VII. | APPENDIX..... | A-1 |
| 1. | Court of Appeals Division One decision..... | A-2 |
| 2. | Respondent’s Motion to Publish..... | A-12 |
| 3. | Declaration of Marilee C. Erickson in Support of Respondent’s Motion to Publish..... | A-16 |
| 4. | Declaration of Rory W. Leid, III, in Support of Respondent’s Motion to Publish..... | A-18 |

TABLE OF AUTHORITIES

CASES

| | |
|--|----|
| <i>Chavis v. State Farm Fire & Cas. Co.</i> , 346 S.E.2d 496, 499 (1986) | 16 |
| <i>Coggle v. Snow</i> , 56 Wn. App. 499, 504, 784 P.2d 554 (1990) | 18 |
| <i>Coventry Associates v. American States Ins. Co.</i> , 136 Wn.2d 269, 961 P.2d 933 (1998) | 12 |
| <i>Doe v. Abington Friends Sch.</i> , 480 F.3d 252, 257 (3d Cir. 2007) | 18 |
| <i>Harrods Ltd. v. Sixty Internet Domain Names</i> , 302 F.3d 214, 244-45 (4 th Cir. 2002) | 19 |
| <i>Keith v. Allstate Indem. Co.</i> , 105 Wn. App. 251, 225, 19 P.3d 1077 (2001) | 16 |
| <i>Kleinman v. Vincent</i> , No. 90 CIV. 5665, 1991 WL 2804 *1 (S.D.N.Y. Jan. 8, 1991) | 19 |
| <i>Miller v. Wolpoff & Abramson, L.L.P.</i> , 321 F.3d 292, 303-04 (2d Cir. 2003) | 18 |
| <i>Patton v. Gen. & Signal Corp.</i> , 984 F. Supp. 666, 670 (W.D.N.Y. 1997) | 19 |
| <i>Pilgrim v. State Farm Fire & Cas. Co.</i> , 85 Wn. App. 712, 719, 720, 950 P.2d 479 (1997) | 15 |
| <i>Tran v. State Farm Fire & Cas. Co.</i> , 136 Wn.2d 214, 238-39, 966 P.2d 358 (1998) | 16 |

| | |
|--|----|
| <i>Van Noy v. State Farm Mut. Auto. Ins. Co.</i> , 98 Wn. App. 487, 492, 983 P.2d 1129 (1999) | 15 |
| <i>Zilisch v. State Farm</i> , 995 P.2d 276 (Ariz. 2000) | 15 |

STATUTES

| | |
|---------------------|-------|
| RCW 19.86.010 | 10 |
| RCW 48.30.015 | 9, 10 |

RULES

| | |
|---------------------|--------------|
| CR 11 | 10, 12 |
| CR 56(f) | 11-12, 17-20 |
| FRCP 56(f) | 18 |
| RAP 13.4(b)(4)..... | 13 |

I. IDENTITY OF PETITIONER

John Staples (Staples), the plaintiff in this action and appellant in the Court of Appeals, hereby petitions for review of the Court of Appeals decision affirming an order of summary judgment dismissing his lawsuit.

II. CITATION OF COURT OF APPEALS DECISION

Staples seeks review of the Court of Appeals (Division One) decision, *Staples v. Allstate Insurance Company*, No. 64816-1-1, which was filed on May 16, 2011. No motion for reconsideration was filed.

III. ISSUES PRESENTED FOR REVIEW

1. After an insured had already undergone two recorded interviews as part of the claim investigation process, the insurer requested that he undergo an examination under oath. 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. 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 rejected that request. On such a record, is entry of summary judgment proper on the basis of the insured's failure to attend the requested examination under oath?

2. 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?

IV. STATEMENT OF THE CASE

A. Facts

John 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 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 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's motor vehicle coverage. Allstate considered Staples's 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 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 produce an itemization of the stolen tools. As Staples located such materials, he provided them to Allstate. (CP 52-53, ¶¶ 12-14)

From the outset of the claims adjusting 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.

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

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's 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 was that the interview was under oath. The interview lasted over an hour. A number of questions were repeated from the prior interview. (CP 55, ¶ 18)

Two days later, Allstate sent a letter to Staples scheduling an Examination Under Oath at Allstate's 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's 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 and despite Allstate's ability to obtain many of the requested materials on its own via the authorization Staples had signed. 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's 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 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's current counsel, Daniel Fjelstad (Fjelstad) began representing him. (CP 65, ¶ 3, and 70) By letter 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

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

transcripts. Rather, by letter dated March 18, 2009, Allstate simply restated its requests for information from Staples. (CP 74-75)

By letter dated April 2, 2009, Fjelstad requested that Allstate provide him with some reasonable basis for its continued inquiry into Staples's financial circumstances. (CP 77-78) The letter pointed out that because Fjelstad had just become involved in Staples's 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's 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 any further information nor with any further explanation for its requests, Allstate, by letter dated April 30, 2009, denied his claim. Allstate's stated basis for the denial was Staples's 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. (Emphasis added.) 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)(Emphasis added.)

In response to Allstate’s rejection of Staples’s 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's 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 of Staples's 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.³ (CP 98) The following day, Allstate rejected the offer by letter from counsel. (CP 100-01) Yet again, the letter set out the unchanging generic list of materials Staples was supposedly "refusing" to provide Allstate, without

³ The limitation period would have expired the following day except that the July 27, 2009 letter tolled, and extended, the limitation for 20 days pursuant to statute.

acknowledging any of the materials he had provided. The letter identified no prejudice that Allstate might suffer if the limitation period was extended.

B. Litigation history

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 for violation of 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 barred suit, apparently under any of Staples's three causes of action. 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's 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's financial status was warranted. Despite

Staples's counsel's numerous prelitigation requests for Allstate's justification for investigating Staples's financial circumstances, Allstate had never provided him with that report.

Following filing of the motion, Staples's 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. In responding to the motion for summary judgment, Staples requested, pursuant to CR 56(f) time to pursue discovery before the court's ruling on the motion for summary judgment. He specifically requested sufficient time to obtain responses to the interrogatories and requests for production he had already propounded to Allstate and to take depositions of the Allstate personnel involved in investigating and adjusting his claim.

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 language, the court added, "based upon his failure to appear for an examination under oath." (CP 256) The court crossed out language in the proposed order stating that Staples had failed to provide Allstate with documentation relevant to its investigation. In

granting the motion, the court implicitly rejected Staples's request for time in which to pursue discovery. The court denied Allstate's request for CR 11 sanctions.

Staples appealed on the grounds that the court erred both in granting the motion and in denying his CR 56(f) request. The Court of Appeals affirmed the trial court's order. (Appendix 1) The court held that attendance at the requested examination under oath was a condition precedent to filing suit, regardless of whether the request was reasonable and regardless of whether the failure to attend caused Allstate any prejudice.⁴ (Decision, 8-9) The court rejected Staples's request for more time pursuant to CR 56(f), declaring that Staples had failed to show what relevant evidence discovery might produce. (*Id.*, 10) Allstate subsequently moved for publication of the decision. (Appendix 2) The court denied that request. (Appendix 3)

V. ARGUMENT

⁴ In its motion, Allstate did not distinguish between Staples's three separate causes of action in seeking dismissal. Likewise, in dismissing Staples's 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 both the trial court and the Court of Appeals found that Staples's failure to attend an EUO barred him from filing suit under any theory because of their conclusion that such attendance was a condition precedent to filing suit.

A. This petition involves issues of substantial public interest that the Supreme Court should address.

RAP 13.4(b)(4) provides that the Supreme Court may accept a petition for review “[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” For the reasons set forth below, Staples submits that this petition involves two issue of substantial public interest sufficient to warrant review. The two issues are treated in order.

1. The issue of the circumstances in which an insured must attend an examination under oath during the claims adjustment process before filing suit is of substantial public interest.

The instant case involves a factual situation that is most conducive to a judicial weighing and balancing of the reciprocal duties owed between insurers and insureds during the claims adjustment process. The decision at issue suggests that all duties run in one direction—from the insured to the insurer, with the insured in the adjustment process having no rights, not even a right to an explanation of why the insurer is making its inquiry nor a right to receive any other information from the insurer. Simply, the decision suggests that the insurer holds all the cards during the claims adjustment process. The decision suggests that an insurer need not justify its inquiries as

reasonable, nor show that an insured's actions caused actual prejudice. Review of the decision would permit the Supreme Court to identify where a proper balance between the parties' rights and duties lies.

Importantly, Allstate recognizes the important public interest at issue in this case. In seeking publication of the Court of Appeals decision, Allstate argued, among other things, that publication was appropriate because "the court's opinion is of general public interest and importance." (Appendix 2—Motion to Publish, 3) In support of its assertion of the decision's importance, Allstate offered declarations from a veteran Seattle insurance law practitioner (Appendix 3), Marilee C. Erickson, and from its own counsel, Rory Leid (Appendix 4). The Erickson declaration provides as follows:

Given my experience, I believe that the Court's May 16, 2011, opinion is of general public interest and importance. The Court's clarification of the *Downie* ruling provides further guidance to insureds, insurers, attorneys, and the Washington Courts regarding the insurer's rights and the insured's obligations during claims investigations. As such, I believe that the Court's opinion should be made available to the public.

Staples submits that the principles articulated in the Court of Appeals decision insufficiently recognize the fiduciary duty insurers owe insureds during the claims adjustment process. Analysis of pertinent

law, undertaken below, suggests why it is important that the Supreme Court clarify the nature of that duty.

Washington law has long recognized that a “fiduciary or quasi-fiduciary relationship exists between an insurer and its insured.”⁵ *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 98 Wn. App. 487, 492, 983 P.2d 1129 (1999). Indeed, the insurer’s 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.*

An insurer’s fiduciary obligation to its insureds extends to the claims adjustment process. Accordingly, an insurer’s permissible scope of inquiry to an insured is not 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.”

Pilgrim v. State Farm Fire & Cas. Co., 89 Wn. App. 712, 719, 950 P.2d

⁵ In analyzing any aspect of the insurer/insured relationship, it is important to keep in mind the special nature of that relationship: “An insurance contract is not an ordinary commercial bargain; implicit in the contract and the relationship is the insurer’s obligation to play fairly with its insured.” *Zilisch v. State Farm*, 995 P.2d 276 (Ariz. 2000).

479 (1997). 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 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).

Neither the trial court nor the Court of Appeals hinted at any obligation on Allstate's part to justify its burdensome inquiry into Staples's financial status. Until Staples filed suit, Allstate made no effort

to explain why its inquiry into his financial condition was reasonably justified, despite numerous requests from Staples that it do so. Sound public policy dictates that some criteria should control when an insurer may properly engage in such inquiry.

In fact, Allstate's handling of the instant claim bears much resemblance 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 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 claim investigation 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. This case provides an opportunity for the Court to establish guidelines for when an insurer's inquiry into an insured's financial status is justified and to otherwise establish clear limitations with regard to when insurers may be permitted to deny a legitimate claim because of noncooperation on the part of an insured.

- 2. The issue of the circumstances in which a party should be permitted, pursuant to CR 56(f), to pursue discovery before a motion for summary judgment is resolved is of substantial public interest.**

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).

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’s request for a continuance. Such rejection constituted

an abuse of the court's discretion. This case offers the Court an opportunity to set forth clear guidelines for when continuance of a motion for summary judgment is appropriate pursuant to CR 56(f).

VI. CONCLUSION

This case involves issues of substantial public interest. A clearer articulation of the reciprocal rights and duties of insurers and insureds during the claims adjustment process would serve a substantial public interest in this state. Likewise, clarifying when a CR 56(f) continuance is appropriate would serve a substantial public interest. Supreme Court review is warranted.

DATED this 22nd day of August, 2011.

Respectfully submitted,



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VII. APPENDIX

| | | |
|-------------|---|------|
| Appendix 1. | Court of Appeals Division One decision..... | A-2 |
| Appendix 2. | Respondent's Motion to Publish..... | A-12 |
| Appendix 3. | Declaration of Marilee C. Erickson in Support of Respondent's Motion to Publish..... | A-16 |
| Appendix 4. | Declaration of Rory W. Leid, III, in Support of Respondent's Motion to Publish..... | A-18 |

APPENDIX

| | | |
|-------------|---|------|
| Appendix 1. | Court of Appeals Division One decision..... | A-2 |
| Appendix 2. | Respondent's Motion to Publish..... | A-12 |
| Appendix 3. | Declaration of Marilee C. Erickson in Support of Respondent's Motion to Publish..... | A-16 |
| Appendix 4. | Declaration of Rory W. Leid, III, in Support of Respondent's Motion to Publish..... | A-18 |

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

| | | |
|-------------------------|---|----------------------------|
| JOHN STAPLES, |) | |
| |) | No. 64816-1 |
| Appellant, |) | |
| |) | DIVISION ONE |
| v. |) | |
| |) | |
| ALLSTATE INSURANCE CO., |) | UNPUBLISHED OPINION |
| |) | |
| Respondent. |) | FILED: <u>May 16, 2011</u> |

SPEARMAN, J. — John Staples appeals the trial court's order dismissing on summary judgment his claims against Allstate Insurance Company for breach of contract and violations of the Insurance Fair Conduct Act and the Consumer Protection Act. Staples brought suit after Allstate denied his insurance claim because of his failure to comply with the policy requirements of appearing for an examination under oath (EUO) and providing requested information. The trial court granted summary judgment based solely on Staples's failure to appear for an EUO. We hold that Staples's failure to appear for an EUO breached a valid condition precedent to filing suit and affirm. We deny Allstate's request for attorney fees on appeal.

FACTS

On or about August 18, 2008, Staples's truck was stolen from the parking lot of his part-time employer. Staples had retired in 2005, after which he performed occasional consulting work in a mechanical capacity. Affixed to the truck was a compartment inside which he stored tools and equipment. Staples reported his loss to law enforcement, informing police that it would cost \$15,000 to replace the tools and equipment. He also notified Allstate, with whom he had a homeowner's policy and a motor vehicle policy, and Allstate began adjusting his claim.

Allstate conducted a recorded interview of Staples on September 18, 2008. Staples informed Allstate that the total value of the items taken was between \$20,000 and \$25,000. He also stated, when asked by Allstate whether he used the tools for his work, that he had started working as a Boeing mechanic at age 18 and had been collecting tools for the past 50 years. Because Allstate believed this information was inconsistent with the information purportedly given to the police officer at the time of the theft,¹ it transferred Staples's claim to its

¹ The police report states:

I asked Staples what was inside the vehicle, and he told me that the business that he works for, ESC Corp., does gas scrubbing engineering work. The van was a mobile workshop for the business that Staples contracted with. Contained within the van was a full set up of tools to include: machine tools, tap and dye sets, a grinding wheel, several rollaway chests, waterloo brand tool storage units, work benches and more. Staples told me that it would cost \$15,000 to replace the tools and equipment stored in the van.

No. 64816-1-1/3

Special Investigation Unit and notified Staples. On January 13, 2009, at Allstate's request, Staples participated in another recorded interview.

Two days later, on January 15, Allstate notified Staples by letter that it had scheduled him for an EUO on January 29, 2009. The letter requested that Staples submit, by January 16, substantial documentation that Allstate believed necessary to evaluate the legitimacy of his claim. On January 23, Staples advised Allstate that he was not available on January 29 and asked why another examination was necessary. He requested transcripts of the two recorded statements he had already given. Also on January 23, Allstate, by letter to Staples, reiterated its request for the documentation sought in its letter of January 15 and demanded a response by February 6. Allstate added that it would reschedule the EUO after it received the requested documentation.

On February 4, Allstate acknowledged receipt of Staples's letter of January 23. It stated that it was under no obligation to provide transcripts of Staples's recorded statements, but explained that it would provide him a transcript of an EUO after he appeared for it. The letter noted that Staples had not appeared for an EUO to date, but had merely appeared for recorded statements. The letter made another request for documents, and asked Staples to contact Allstate by February 16 to schedule an EUO. On February 10, 2009, Staples's counsel advised Allstate that Staples was out of the state until the end of February. During March and April, counsel for Staples and Allstate exchanged

No. 64816-1-1/4.

additional letters disputing whether Staples had responded sufficiently to Allstate's requests for documentation.

On April 30, 2009, Allstate advised Staples that it was denying his claim because Staples, by failing to appear for an EUO and by failing to provide requested documentation, had failed to cooperate with Allstate's investigation. Staples responded that Allstate had failed to act in good faith and denied that he had been uncooperative. He indicated that he was ready and willing to participate in an EUO if Allstate would justify its "onerous" requests for information.

On July 27, 2009, Staples notified Allstate of his intent to sue based on RCW 48.30.015 because it had handled his claim in bad faith. Allstate responded that Staples's claim was "denied based upon his failure to cooperate, including, but not limited to, his failure to appear for an examination under oath." Staples replied that he would appear for an EUO if Allstate agreed to an extension of the one-year contractual limitation on filing suit. Allstate rejected Staples's offer, claimed that he was precluded from filing suit because of his noncooperation, and stated that it would move for an immediate dismissal of any such suit and seek sanctions.

Staples filed suit against Allstate on August 24, 2009 for breach of contract and violations of the Insurance Fair Conduct Act (IFCA), RCW 48.30.015, and the Consumer Protection Act (CPA), RCW 19.86.010, et seq. Allstate moved for summary judgment on the basis that Staples, by refusing to

No. 64816-1-I/5

appear for an EUO and submit all requested documentation, had failed to comply with its investigation. Allstate argued that this failure precluded his lawsuit under the policy and precluded coverage for his claim. Allstate sought fees and costs against Staples and his counsel under CR 11. Staples served a discovery request on Allstate, but the responses were not due until after the summary judgment hearing date. In response to Allstate's motion, Staples argued that there were genuine issues of material fact as to whether he reasonably cooperated with Allstate's investigation. But he did not dispute that he did not appear for an EUO as required by the policy. He requested that the trial court, if it concluded that summary judgment was appropriate, grant a continuance under CR 56(f) to permit him to conduct discovery. The trial court granted summary judgment, dismissing Staples's claim with prejudice "based upon [Staples'] failure to appear for an examination under oath." It denied Allstate's request for CR 11 sanctions. Staples appeals.

DISCUSSION

Staples argues that there are material issues of fact as to whether he cooperated with Allstate's investigation. The majority of the parties' briefing is devoted to argument over whether Allstate's fraud investigation was justified to begin with and whether Staples substantially complied with Allstate's requests for information. But the trial court's grant of summary judgment was based solely on

No. 64816-1-1/6

his failure to appear for an EUO.² We affirm based on our conclusion that, as in Downie v. State Farm Fire and Cas. Co., 84 Wn. App. 577, 929 P.2d 484 (1997), Staples's failure to appear for an EUO breached a valid condition precedent to filing suit.

We review an order granting summary judgment de novo, engaging in the same inquiry as the trial court. Weden v. San Juan County, 135 Wn.2d 678, 689, 958 P.2d 273 (1998). Summary judgment is proper if the pleadings, depositions, answers, and admissions, together with the affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

In Downie, we addressed the issue of whether summary judgment dismissal of an insured's claims against his insurer was proper on the basis of his failure to appear for an EUO. We held that a policy provision requiring an EUO was a valid condition precedent to filing suit and that because the insured failed to submit to an EUO, summary judgment was proper. Downie, 84 Wn. App. at 582–83. We rejected the insured's argument that he substantially complied with an EUO by signing a sworn proof of loss and submitting to two recorded statements with insurance adjusters. Id. at 583.

² The trial court's order did not specify whether Staples's failure to appear for an EUO warranted dismissal because his alleged failure to cooperate permitted it to deny coverage under the policy or because he had failed to satisfy the condition precedent of full compliance before filing suit against Allstate. We base our resolution of this appeal solely on the latter, as we may "affirm a lower court's ruling on any grounds adequately supported in the record." State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004) (citing In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003)).

This case is governed by Downie. As in that case, Staples's policy required him to submit to an EUO as often as Allstate reasonably required and stated that no action related to coverage under the policy could be brought by an insured unless the insured fully complied with the policy.³ The record reflects that Staples gave two recorded statements but did not submit to an EUO. Allstate repeatedly sought to have Staples appear for an EUO and asked him to contact the company to schedule an EUO. Staples claims he believed, at the time he gave the recorded statements, that they were under oath. But Allstate unequivocally stated in a letter to him that the two statements were recorded but

³ The relevant language from Staples's policy is below:

Section I Conditions

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:

...
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.

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

...
2) at our request, submit to examination under oath, separately and apart from any other person defined as you or insured person and sign a transcript of the same.

...
g) within 60 days after the loss, give us a signed, sworn proof of the 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.

...
12. 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.

No. 64816-1-1/8

not under oath, and Staples does not dispute this assertion.⁴ Therefore, there is no material issue of fact that Staples did not appear for an EUO, and Staples's failure to appear for an EUO breached a valid condition precedent to filing suit under the policy.

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

Staples argues at length that there are issues of fact as to the reasonableness of Allstate's decision to broaden its investigation to include possible fraud and as to whether Allstate was prejudiced by his alleged failure to comply with its requests for documentation. But the trial court did not grant summary judgment on either of these grounds, basing dismissal solely on Staples's failure to appear for an EUO. And while Staples does argue that Allstate was required to show prejudice specifically from his failure to submit to an EUO, he does so only in passing and cites no authority in support of this

⁴ Staples only argues that he complied with the policy because he agreed to appear for an EUO on the condition that Allstate extend the policy's one-year limit on filing suit.

No. 64816-1-1/9

argument. Accordingly, we decline to reach this issue. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (citing State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)).⁵

We next address Staples's argument, set out in a footnote, that the trial court erred in dismissing his IFCA/CPA claims because it did not distinguish between those claims and his contract claim.⁶ While Staples recognized this issue below, he declined to argue the issue before the trial court and cited no authority in support.⁷ Generally, we will not consider arguments that were not made below and we decline to do so here. State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).

Staples also argues that the trial court erred when it denied his request for a continuance of the summary judgment hearing. A trial court's denial of a request for a continuance under CR 56(f) is reviewed for abuse of discretion.

⁵ We noted in Downie that some of the cases require an insurance company to prove that it was prejudiced by a policy violation before it could insist on strict compliance from the insured, but, as in this case, we did not reach the issue because it was not properly briefed. Downie, 84 Wn. App. at 582 n. 7.

⁶ Under IFCA, "[a]ny first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs, as set forth in subsection (3) of this section." RCW 48.30.015(1). To establish a claim under the CPA, a plaintiff must establish five elements: "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

⁷ Staples's position below was that any distinction between the claims "need not be explored further as, on the instant record, Allstate's noncooperation allegation does not even bar Staples' contractual claim."

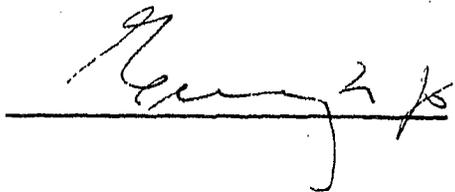
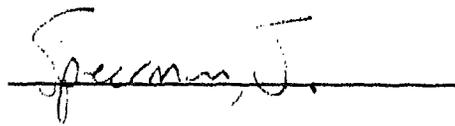
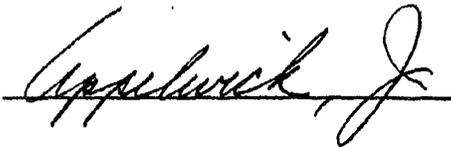
Coggle v. Snow, 56 Wn. App. 499, 504, 784 P.2d 554 (1990). A trial court may deny a motion for a continuance when (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence, (2) the requesting party does not state what evidence would be established through the additional discovery, or (3) the desired evidence will not raise a genuine issue of material fact. Colwell v. Holy Family Hosp., 104 Wn. App. 606, 615, 15 P.3d 210 (2001) (citing Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d 474 (1989)).

The trial court did not abuse its discretion in not addressing Staples's request for a continuance when ruling on Allstate's motion for summary judgment. Staples did not offer a good reason for the delay in beginning discovery, state what evidence would have been established through additional discovery, or show that the desired evidence would raise a genuine issue of material fact.

Allstate seeks attorney fees on appeal under RAP 18.1(a). It does not, however, cite a statute, rule, contract, or equitable principle under which it is permitted to recover fees. Accordingly, we deny the request.

Affirmed.

WE CONCUR:



NO. 64816-1

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

King County Cause No. 09-2-31398-9 SEA

JOHN STAPLES,

Plaintiff/Appellant,

v.

ALLSTATE INSURANCE COMPANY,

Defendant/Respondent.

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SCOTT, KINNEY & FJELSTAD

RESPONDENT'S MOTION TO PUBLISH

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

Rory W. Leid, III, WSBA #25075

Midori R. Sagara, WSBA #39626

Attorneys for Defendant/Respondent

1000 Second Avenue, Suite 1300

Seattle, WA 98104-1972

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I. IDENTITY OF MOVING PARTY

Allstate Insurance Company (Allstate), the prevailing party, brings the following Motion to Publish.

II. RELIEF REQUESTED

Pursuant to RAP 12.3(e), Allstate respectfully requests that the Court enter an order to publish the Court's opinion filed on May 16, 2011.

III. FACTS

On May 16, 2011, the Court issued its opinion affirming the trial court's grant of summary judgment and dismissal of the Plaintiff's lawsuit. The Court's opinion clarified the insurance common law that once requested, an examination under oath (EUO) is an absolute condition precedent to filing suit.

IV. GROUNDS FOR RELIEF

A. Law Regarding Publishing Opinions

RCW 2.06.040 provides in relevant part as follows:

**~~Panels–Decisions, publication as opinions,
when–Sessions–Rules.~~**

...All decisions of the court having precedential value shall be published as opinions of the court. Each panel shall determine whether a decision of the court has sufficient precedential value to be published as an opinion of the court.

RCW 2.06.040.

Washington Courts have outlined the considerations for determining whether a case has precedential value. Appellate opinions should be published in the following cases:

- (1) Where the decision determines an unsettled or new

- question of law or constitutional principle;
- (2) Where the decision modifies, clarifies, or reverses an established principle of law;
 - (3) Where the decision is of general public interest or importance;
 - (4) Where the case is in conflict with a prior opinion of the Court of Appeals;
 - (5) Where the decision is not unanimous.

See State v. Fitzpatrick, 5 Wn. App. 661, 669, 491 P.2d 262 (1971), *rev denied*, 80 Wn.2d 1003 (1972); *see also* RAP 12.3(e).

In this case, the Court's May 16, 2011, opinion meets considerations (2) and (3). As such, the Court should enter an order publishing the opinion.

B. The Court's Opinion Clarifies Existing Law.

The Court's opinion relies on *Downie v. State Farm and Cas. Co.*, 84 Wn. App. 577, 929 P.2d 484 (1997). In *Downie*, the court ruled that an EUO was a condition precedent to filing suit. *Downie*, 84 Wn. App. at 585. The *Downie* opinion focused on the insured's arguments that the insurer was not reasonable in requesting an EUO, and that the insured had substantially complied with the insurer's investigation. *Id.* at 583-85. The *Downie* Court rejected both of these arguments against dismissal. *Id.*

The Court's May 16, 2011, opinion follows the *Downie* Court's ruling. However, the Court's May 16, 2011, opinion clarifies the *Downie* ruling. In addition to the insured's arguments in *Downie*, Plaintiff argued that he would have appeared for an EUO had Allstate provided sufficient justification for the EUO, or had Allstate extended the policy's one year suit limitation. The Court rejected these arguments. In doing so, the Court clarified that an insured cannot bargain for his cooperation with an insurer's investigation. Plaintiff could not condition

his appearance at an EUO on the extension of the policy's one year suit limitation, or on the Plaintiff's approval of the EUO request. A ruling otherwise would allow insureds to prolong their non-cooperation indefinitely, with no consequence of suit preclusion. Given the Court's clarification, the May 16, 2011, opinion should be published.

C. The Court's Opinion is of General Public Interest and Importance.

The Court's May 16, 2011, opinion provides further guidance to insureds, insurers, attorneys, and the Washington Courts regarding the insurer's rights and the insured's obligations during claims investigation. *See Erickson and Leid Declarations.* The Court's opinion enforces the rule that once requested, an EUO is an absolute condition precedent to filing suit. The Court's opinion clarifies this rule by rejecting the arguments that an insured can avoid this condition precedent by alleging that the insurer did not provide sufficient justification, or that the insurer failed to extend the one year suit limitation. As such, the Court's opinion should be available to the public.

V. CONCLUSION

For the foregoing reasons, the Court should enter an order to publish the Court's May 16, 2011, opinion.

DATED this 25th day of May, 2011.

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



Rory W. Leid, III, WSBA #25075
Midori R. Sagara, WSBA #39626
Attorneys for Defendant/Respondent

NO. 64816-1

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

King County Cause No. 09-2-31398-9 SEA

JOHN STAPLES,

Plaintiff/Appellant,

v.

ALLSTATE INSURANCE COMPANY,

Defendant/Respondent.

**DECLARATION OF MARILEE C. ERICKSON IN SUPPORT OF
RESPONDENT'S MOTION TO PUBLISH**

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

Rory W. Leid, III, WSBA #25075

Midori R. Sagara, WSBA #39626

Attorneys for Defendant/Respondent

1000 Second Avenue, Suite 1300
Seattle, WA 98104-1972
Telephone: (206) 622-0494

I, Marilee C. Erickson, make the following declaration certified to be true under penalty of perjury pursuant to RCW 9A.72.085:

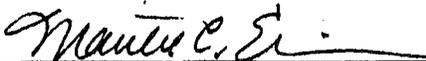
1. I am a shareholder at Reed McClure. I have been in practice for over twenty-two years. I have been practicing in insurance law for over twenty years. I base this declaration on my personal knowledge.

2. I receive notifications of all Washington appellate opinions, and the Court's May 16, 2011, opinion in this case caught my interest. I have read the Court's May 16, 2011, opinion.

3. Given my experience, I believe that the Court's May 16, 2011, opinion is of general public interest and importance. The Court's clarification of the *Downie* ruling provides further guidance to insureds, insurers, attorneys, and the Washington Courts regarding the insurer's rights and the insured's obligations during claims investigations. As such, I believe that the Court's opinion should be made available to the public.

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

DATED this 24th day of May, 2011, at Seattle, Washington.


Marilee C. Erickson, WSBA #16144

NO. 64816-1

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

King County Cause No. 09-2-31398-9 SEA

JOHN STAPLES,

Plaintiff/Appellant,

v.

ALLSTATE INSURANCE COMPANY,

Defendant/Respondent.

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MAY 27 2011

SCOTT, KINNEY & FJELSTAD

**DECLARATION OF RORY W. LEID, III, IN SUPPORT
OF RESPONDENT'S MOTION TO PUBLISH**

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

Rory W. Leid, III, WSBA #25075

Midori R. Sagara, WSBA #39626

Attorneys for Defendant/Respondent

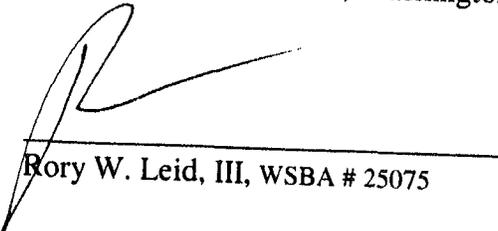
1000 Second Avenue, Suite 1300
Seattle, WA 98104-1972
Telephone: (206) 622-0494

I, Rory W. Leid, III, make the following declaration certified to be true under penalty of perjury pursuant to RCW 9A.72.085:

1. I am one of the attorneys representing Defendant/Respondent Allstate Insurance Company in this matter. I base this declaration on my personal knowledge.
2. I have been practicing in insurance law for over thirteen years.
3. Given my experience, I believe that the Court's May 16, 2011, opinion is of general public interest and importance. The Court's clarification of the *Downie* ruling provides further guidance to insureds, insurers, attorneys, and the Washington Courts. As such, I believe that the Court's opinion should be made available to the public.

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

DATED this 25 day of May, 2011, at Seattle, Washington.


Rory W. Leid, III, WSBA # 25075