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NO. 64816-1

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

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

JOHN STAPLES,

Plaintiff/Appellant,

v.

ALLSTATE INSURANCE COMPANY,

Defendant/Respondent.



BRIEF OF RESPONDENT ALLSTATE

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I. Introduction

This case arises out of a suspect claim for insurance proceeds that John Staples (hereinafter “Staples”) submitted to Allstate Insurance Company (hereinafter “Allstate”). Staples continually refused to cooperate with Allstate’s investigation of his claim. He refused to appear for an examination under oath and he refused to provide financial information. His failure to cooperate prejudiced Allstate’s investigation of his loss.

Staples initially told Allstate that on or about August 18, 2008, his vehicle was stolen. Allstate’s initial investigation revealed the following:

- Staples told the police that approximately \$15,000.00 worth of work tools and equipment were taken with the van. However, he told Allstate that the total value of items taken was between \$20,000.00 and \$25,000.00, \$10,000.00 more than what he told the police.
- Staples told the police that the stolen tools and equipment were for his work. However, he told Allstate that the stolen tools and equipment were for his personal use.
- Allstate confirmed the information in the police report by contacting the reporting officer.

Allstate requested that Staples provide information and documentation relevant to his claim and appear for an examination under oath. Allstate made these requests pursuant to the subject insurance policy and Washington law. Allstate required the information, documentation,

and examination under oath, so that it could make a proper coverage determination and valuation of Staples' claim. In particular, the requested financial information would have shown whether Staples had a financial motive to submit a false claim and whether the claimed tools were for work or personal use. The financial information also may have supported Staples' claim of ownership to the items and clarified Staples' employment and business history. The undisputed facts are that Staples refused to appear for an examination under oath and refused to provide his financial information.

II. Assignments of Error

Allstate does not assign any error to the trial court, but rather requests that the Court affirm the ruling of the trial court. Allstate presents the following counter statement of issues on review:

1. Should the Court affirm the trial court's December 17, 2009, order granting summary judgment when a) Staples failed to provide Allstate with information and documentation relevant to his claim; and b) Staples failed to appear for his examination under oath?
2. Should the Court affirm the trial court's denial of Staples' request for a continuance under CR 56(f) when a) Staples' counsel failed to specify what evidence would be established through additional discovery, and why he failed to obtain such evidence in over three months of litigation;

and b) even if Staples had conducted further discovery, it would not change the facts that Staples failed to provide Allstate with requested information and documentation and appear for his examination under oath?

III. Statement of the Case

A. Procedural History

Staples filed this lawsuit on August 24, 2009. CP 1-8. On September 23, 2009, Allstate filed its Answer and Affirmative Defenses to Plaintiff's Complaint. CP 9-13. Therein, Allstate asserted that Staples was not entitled to any recovery because he failed to comply with Allstate's investigation of his insurance claim. *Id.*

On November 18, 2009, Allstate moved for summary judgment regarding Staples' failure to comply. CP 14-30. Allstate argued that Staples' failure to comply with its investigation precluded coverage for his claim and any recovery in this lawsuit. *Id.* On December 17, 2009, the trial court granted Allstate's Motion for Summary Judgment Regarding Plaintiff's Failure to Comply and dismissed this lawsuit with prejudice. CP 255-57.

On January 15, 2010, Staples timely filed a Notice of Appeal to this Court. CP 258-60.

B. Factual History

1. Staples Submitted a Suspect Insurance Claim to Allstate.

On September 2, 2008, Staples notified Allstate of an alleged theft loss. CP 194-95. Staples told Allstate that on or about August 18, 2008, his personal vehicle, a 1992 Ford Econoline van, was stolen from 15249 Northeast 90th Street, Redmond, Washington 98052. CP 151-52. Allstate initiated a claim under Staples' insurance policy and Allstate immediately began its investigation and adjustment. CP 161.

Staples initially told the police that approximately \$15,000.00 worth of work tools and equipment were taken with the personal van. CP 152. The police report reads as follows:

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.

Id.

Allstate confirmed the information in the report by contacting the reporting police officer. CP 252. However, approximately two weeks

later, on September 18, 2008, Staples told Allstate that the total value of the items taken was between \$20,000.00 and \$25,000.00, \$10,000.00 more than what he told the police. CP 164. Also contrary to what he told the police, Staples implied to Allstate that the stolen tools and equipment were for his personal use. CP 163. On September 18, 2008, he stated as follows:

- Q: Do you use these tools for your work?
A: Oh, some of them could be used, but most of them's, uh, a lifetime of-of tools for the last 50 years.

Id.

Allstate's investigation of the loss expanded given Staples' contrary statements regarding the value and nature of the tools and equipment. CP 165.

2. Staples' Insurance Policy With Allstate Required That He Comply With Allstate's Investigation.

Staples' insurance policy with Allstate at the time of the loss contained the following relevant provisions:

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.

CP 146-50.

3. Staples Failed to Provide Documentation Relevant to Allstate's Investigation.

On September 17, 2008, Allstate sent a letter to Staples advising him that a claim had been started and to request additional information. CP 161. Pursuant to the policy, Allstate requested that Staples complete a Loss Itemization Worksheet, which would detail the claimed items. *Id.* Allstate further requested that Staples provide proof of ownership or any documentation relating to the claimed items. *Id.*

On September 29, 2008, Allstate sent a letter to Staples advising him of its continuing investigation. CP 165-66. Pursuant to the policy, Allstate requested that Staples sign a Sworn Statement in Proof of Loss and Authorization. *Id.* Allstate also reiterated its request that Staples provide a detailed list of claimed items and supporting documentation for each item. *Id.*

Over three months after reporting the loss, Staples submitted the Sworn Statement in Proof of Loss, signed on December 11, 2008. CP 172. Therein, Staples formally claimed a total of \$25,000.00. *Id.* Staples also submitted the Authorization, signed on December 11, 2008. CP 173.

Allstate confirmed receipt of both forms in a letter to Staples, dated December 19, 2008. CP 170.

In regards to specific claimed items, Staples had submitted only an incomplete inventory. CP 171. On January 22, 2009, Staples advised that he was revising the inventory, adding some items and subtracting some items. *Id.* By this time, over four months after the loss, Staples was making a \$25,000.00 claim to Allstate, but had not provided Allstate with all of the requested documentation. *Id.*

4. Staples Failed to Appear for His Examination Under Oath and to Provide Further Relevant Documentation.

On January 15, 2009, Allstate sent a letter to Staples to schedule his examination under oath. CP 205-07. Allstate requested that Staples submit the following before his examination under oath:

- Any estimates, specifications for repairs, appraisals, receipts, invoices, canceled checks, or other documents which substantiate the purchase price or value of any personal property included in the claim;
- All photographs taken or videos taken, either before or after the loss, showing the loss location of any personal property included in the claim;
- All documents, including contracts, owner's manuals, or warranty information which substantiate or pertain to the acquisition, ownership, or other interest in any personal property included in the claim;
- Your income tax returns for the last four years, evidence of

your income for the twelve months prior to the loss, and W-2 forms or other documents substantiating your employment for the last four years;

- All forms, reports, or other documents which you or anyone else submitted to law enforcement personnel or other personnel relating to the loss;
- Any books or records, financial reports, profit and loss statements, financial statements, or other documents which substantiate or pertain to your financial condition for the twelve months prior to the loss;
- A list of all your 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; and
- All notices of delinquency, writs of execution, notices of garnishment, liens, summons, complaints, threats of litigation, or other documents received from any creditor or other person to whom you owed money in the twelve months prior to the loss.

CP 206.

This information would assist Allstate in making an accurate valuation of Staples' claim. CP 238. The information would assist Allstate in determining whether the claim was fraudulent, and whether the claimed items were for work or personal use. *Id.* The information also may support Staples' claim of ownership to the items and clarify Staples' employment and business history. *Id.*

Staples did not respond to Allstate's January 15, 2009, letter. CP 127. Staples' counsel advised that Staples would not appear for an

examination under oath, which Allstate confirmed in a February 4, 2009, letter. CP 129-31. Allstate again requested that Staples provide the above documentation. *Id.*

On March 18, 2009, Allstate wrote to Staples' counsel regarding Staples' failure to cooperate. CP 132-33. Allstate further reiterated its request for documentation. *Id.*

On April 1, 2009, Allstate wrote to Staples' counsel to highlight Staples' failure to cooperate and the consequences thereof. CP 134-37. Allstate again wrote to Staples' counsel on April 13, 2009, to outline the relevancy of the documents requested. CP 138-39. Allstate stated as follows:

Your client's financial records are material to Allstate's investigation. First, as you raised, and the above case law supports, whether your client has a financial motive to file a false claim is material. Second, your client's financial records may support his claim to have ownership of the items allegedly taken in the theft. Third, the financial records will show your client's employment and business history which is also relevant to Allstate's investigation. As such, your client's claim may be closed or denied if he fails or refuses to provide the financial information requested.

Id.

By April 1, 2009, it had been approximately three months since

Allstate had requested that Staples appear for his examination under oath and provide further relevant documents. CP 134-37. Staples failed to do both. *Id.*

5. Allstate Denied Staples' Claim Based on His Failure to Cooperate.

On April 30, 2009, Allstate issued a denial of Staples' claim. CP 157-60. Allstate advised that it was denying Staples' claim because Staples had failed to cooperate with its investigation. *Id.* Rather than cooperate with Allstate's investigation, Staples filed this lawsuit approximately four months later. CP 1-8.

On October 29, 2009, in his responses to Allstate's First Set of Requests for Admission, Staples admitted that he failed to attend an examination under oath prior to filing suit. CP 141. Staples admitted as follows:

RFA No. 17: Admit or deny that you failed to attend an examination under oath prior to this lawsuit.
Response: ... Before filing this lawsuit, Plaintiff participated in two recorded interviews with representatives of the defendant, either or both of which might have constituted an "examination under oath." Plaintiff did not participate in a third interview as the defendant refused to provide Plaintiff's counsel with requested information prior to such interview.

Id.

Thus, it is undisputed that Staples failed to comply with Allstate's investigation. *Id.*

IV. Legal Argument

A. Standard of Review

When reviewing an order for summary judgment, a court engages in the same inquiry as the trial court and will affirm summary judgment if there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998); *see also* CR 56(c). All facts and reasonable inferences are considered in the light most favorable to the non-moving party, and all questions of law are reviewed *de novo*. *Tony Maroni's*, 134 Wn.2d at 698. The court will sustain the trial court's judgment upon any theory established in the pleadings and supported by proof. *Id.*, *citing* *Schaaf v. Highfield*, 127 Wn.2d 17, 20-21, 896 P.2d 665 (1995); *Faylor's Pharmacy v. Depart. of Soc. & Health Servs.*, 125 Wn.2d 488, 493, 886 P.2d 147 (1994).

In this case, the Court should affirm the trial court's December 17, 2009, order on summary judgment because there is no question that

Staples failed to comply with Allstate's investigation, and his failure precluded coverage for his claim and any recovery in this lawsuit.

B. The Court Should Not Consider Any Arguments and Issues That Staples Failed to Properly Raise at the Trial Court.

In general, appellate courts will not review an issue raised for the first time on appeal. *Martin v. Johnson*, 141 Wn. App. 611, 617, 170 P.3d 1198 (2007), citing RAP 2.5(a); *Better Fin. Solutions, Inc. v. Caicos Corp.*, 117 Wn. App. 899, 912-13, 3 P.3d 424 (2003). Staples argues for the first time on appeal that Allstate, and the trial court, did not distinguish among his three causes of action. Staples' Brief, 15. However, it is unclear whether Staples is assigning error to this issue for the Court's review. Staples states, "For present purposes, however, such distinction need not be explored further ..." *Id.*

In any event, the Court should not consider Staples' first-time argument on appeal because it was not properly raised at the trial court. Staples did not brief this issue for the trial court, nor did he argue it.

C. Staples' Brief Should be Partially Stricken Because It Alleges Facts Unsupported by the Record.

Staples' Brief should be stricken where it alleges facts unsupported by the record. *See* RAP 10.3(a)(5), (b); *see also Barnes v. Wash. Natural*

Gas Co., 22 Wn. App. 576, 577, 591 P.2d 461 (1979). Specifically, allegations on pages 4, 5, 6, 7, and 8 of Staples' Brief should be stricken because there is no objective evidence in the record to support them.

On page 4 of Staples' Brief, Staples states, "Months of delay followed." Staples' Brief, 4. However, Staples provides no evidence to support this allegation. *Id.* As such, it should be stricken.

On page 5 of Staples' Brief, Staples states as follows:

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....

Staples' Brief, 5.

Staples provides no evidence to support that "Allstate offered no explanation for its request." *Id.* Further, in the January 15, 2009, letter that Staples references, Allstate states that "[it] wishes to conduct an examination under oath of [Staples] pursuant to the terms and conditions of the policy and Washington State statute." CP 62. Allstate explains that it requires Staples to produce documentation pursuant to the terms and conditions of the policy. CP 63. Allstate explains that "[t]he purpose of producing these records before the examination under oath is to further Allstate's investigation and to facilitate the examination process." *Id.*

Given the plain language of the January 15, 2009, letter, there is no objective evidence to support Staples' allegation that Allstate provided no explanation for its request. The allegation should therefore be stricken.

On page 6 of Staples' Brief, Staples alleges that "Allstate wholly failed to articulate why its burdensome and unnecessary investigation should continue." Staples' Brief, 6. There is no objective evidence to support this allegation. *See* CP 1-260. Rather, Allstate repeatedly stated its basis for its investigation. CP 124-139. Allstate stated that it requested the information and documentation, and that Staples appear for an examination under oath, pursuant to the policy and Washington law. *Id.* Allstate explained in detail why Staples' financial information was relevant. CP 138-139. Allstate stated that Staples' failure to comply prejudiced its investigation and may lead to denial of his claim. CP 124-139. As such, Staples' allegation regarding Allstate's failure should be stricken.

On page 7 of Staples' Brief, Staples alleges that "Allstate offered no explanation in refusing to provide the transcripts." Staples' Brief, 7. However, Staples provides no evidence to support this allegation. *Id.* Further, on February 4, 2009, Allstate provided an explanation as follows:

Allstate is under no obligation to provide you with transcripts or copies of your client's recorded statements at this time. Allstate will provide you with a copy of your client's recorded statement after he has appeared for his examination under oath and signed a correction sheet affidavit thereto.

CP 129.

Staples' allegation regarding the transcripts should therefore be stricken.

On page 8 of Staples' Brief, Staples alleges as follows:

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.

Staples' Brief, 8.

There is no objective evidence to support the above allegations.

See CP 1-260. In fact, in the April 13, 2009, letter that Staples references,

Allstate explains its requests for financial information in detail:

Your client's financial records are material to Allstate's investigation. First, as you raised, and the above case law supports, whether your client has a financial motive to file a false claim is material. Second, your client's financial records may support his claim to have ownership of the items allegedly taken in the theft. Third, the financial

records will show your client's employment history which is also relevant to Allstate's investigation.

CP 80-81.

In sum, the allegations on pages 4, 5, 6, 7, and 8 of Staples' Brief, as outlined above, should be stricken because they are unsupported by the record.

D. The Trial Court Did Not Abuse Its Discretion In Denying Staples' Request For a Continuance to Conduct Discovery Pursuant to CR 56(f).

The ruling on the motions for a continuance and for reconsideration is within the discretion of the trial court and is reversible by an appellate court only for a manifest abuse of discretion. *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554 (1990), *citing Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989); *Perry v. Hamilton*, 51 Wn. App. 936, 938, 756 P.2d 150 (1988). Specifically, a court reviews a trial court's decision regarding a CR 56(f) motion for abuse of discretion. *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 615, 15 P.3d 210 (2001), *citing Tellevik v. Real Prop.*, 120 Wn.2d 68, 90, 838 P.2d 111 (1992).

A 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*, 104 Wn. App. at 615, *quoting Turner*, 54 Wn. App. at 693.

The trial court properly denied Staples' request for a continuance pursuant to CR 56(f) because he did not meet his burden. Staples' counsel failed to specify exactly what evidence would be established through additional discovery, and why he failed to obtain such evidence in over three months of litigation. *See* CP 44-45. Staples' counsel made only the general statement that he wished to obtain responses to written discovery and take Allstate's deposition. *Id.* This is insufficient to obtain a continuance under CR 56(f). Even if Staples had conducted further discovery, it would not have raised a genuine issue of material fact regarding Staples' compliance. The facts that Staples failed to provide Allstate with requested information and documentation and to appear for his examination under oath would have remained. CP 134-37, 157-60. As such, the trial court did not abuse its discretion in denying Staples' request for a continuance and ruling on summary judgment. It had all of the necessary evidence to determine that Staples failed to comply.

In *Colwell*, the Court of Appeals ruled that the trial court did not abuse its discretion in denying the Colwells' request for additional time. *Colwell*, 104 Wn. App. at 615. The court first stated that it was not clear from the record that the Colwells requested a continuance. *Id.* at 614-15. However, assuming that they did, the Colwells failed to show what evidence would be established through additional discovery. *Id.* at 615. The Colwells' counsel made only the general statement that the Colwells should have the opportunity to further rebut the issues raised by the defendants. *See Id.* at 614.

In this case, just as the plaintiffs' counsel in *Colwell*, Staples' counsel made only a general statement that he wished to conduct further discovery. *See* CP 44-45. Just as the plaintiffs in *Colwell*, Staples failed to show exactly what evidence would be established through additional discovery. *Id.* As a result, the Court should affirm the trial court's denial of Staples' request for a continuance pursuant to CR 56(f).

E. Allstate's Requests for Financial Information Were the Same Requests for Information Made in the Cases of *Pilgrim, Tran, and Keith.*

Staples argues that he failed to comply with Allstate's investigation because it was unreasonable. However, Washington Courts have held that

an insured who refuses to provide information material to an insurance company's investigation is precluded from recovery under the insurance policy. See, e.g., *Tran v. State Farm Fire and Cas. Co.*, 136 Wn.2d 214, 232-33, 961 P.2d 358 (1998); *Pilgrim v. State Farm*, 89 Wn. App. 712, 725, 950 P.2d 479 (1997); *Keith v. Allstate Indem. Co.*, 105 Wn. App. 251, 256, 19 P.3d 443 (2001).

In *Pilgrim*, the court held that “[a]n insured’s income and financial condition are undoubtedly relevant to an investigation of whether they filed a fraudulent claim.” *Pilgrim*, 89 Wn. App. at 721. The *Pilgrim* Court further stated that “[t]he relevant inquiry is whether the [insureds] had financial obligations that they were unable to meet.” *Id.*

The court in *Tran* agreed, stating as follows:

. . .the court in *Pilgrim* determined that the insured breached the cooperation clause by refusing to provide its insurer with financial records made relevant by the suspicious nature of the insureds’ claim.

Tran, 136 Wn.2d at 230.

The *Tran* Court further stated:

Without access to financial documents, State Farm could not evaluate the validity of the [insureds’] claim. It could not decide whether the claim was covered, much less

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

Id. at 231.

Finally, the *Tran* Court stated:

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

Id.

In *Keith*, the insured submitted a claim to Allstate for the destruction of a vehicle. *Keith*, 105 Wn. App. at 253. During its investigation, Allstate requested that Keith provide access to personal financial records, including credit reports, tax returns, monthly account statements, profit and loss reports, and any notices of delinquency. *Id.* Keith refused. *Id.* Thereafter, Allstate requested that Keith submit to his examination under oath and provide documents. *Id.* The requested

documents included documents establishing income for the twelve months preceding the loss, four years of W-2 forms, monthly account statements for the twelve months preceding the loss, and a list of debts and liabilities existing at the time of the loss. *Id.* at 253-54. One week later, rather than complying with the policy, Keith sued for coverage. *Id.* at 254.

The *Keith* Court stated:

An insured has a duty to cooperate with the insurer when making a claim. This duty includes providing access to financial information when a request for such information is reasonable in the circumstances of the claim.

Id. at 252.

The *Keith* Court further stated:

An insured's breach of a cooperation clause releases the insurer from its responsibilities if the insurer was actually prejudiced by the insured's breach.

...

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

...

Keith's wage information for 1999, a list of his debts and liabilities at the time of the loss, credit reports and four years of W-2 forms would have assisted Allstate in evaluating Keith's financial condition. By refusing to supply such information, [the insured] breached the cooperation clause of his insurance contract. . .

Id. at 255-56 (citations omitted).

In this case, similar to the insurers in *Tran*, *Pilgrim*, and *Keith*, Allstate requested financial information from Staples. CP 206. Similar to the insurer in *Keith*, Allstate requested that Staples appear for his examination under oath. CP 205-07. Allstate's requests were based on the facts that Staples had provided varying total amounts claimed, contradicting statements regarding claimed items, and an unclear account of the loss. CP 152, 163, 164. As the courts above ruled, Staples' financial information and examination under oath were relevant to Allstate's investigation of his claim. Staples' financial information would have assisted Allstate in making an accurate valuation of his claim. CP 238. The information would have assisted Allstate in determining whether the claim was fraudulent, and whether the claimed items were for work or personal use. *Id.* The information also may have supported Staples' claim of ownership to the items and clarified Staples' employment and business

history. *Id.* Staples failed to provide his financial information, as well as other relevant documentation. CP 134-37, CP 157-60. Staples admits that he failed to appear for his examination under oath. CP 141. Similar to the Courts' holdings in *Tran*, *Pilgrim*, and *Keith*, Staples' failure to cooperate prejudiced Allstate as a matter of law. As such, Staples cannot now recover.

F. Under *Downie*, Staples Cannot Recover Because He Failed to Appear for His Examination under Oath.

It is undisputed that Staples failed to appear for his examination under oath prior to filing this lawsuit. CP 141. Washington Courts have analyzed the What You Must Do If There Is a Loss Sections of policies as a condition precedent to coverage. *See, e.g., Downie v. State Farm Fire & Cas. Co.*, 84 Wn. App. 577, 929 P.2d 484 (1997). In *Downie*, the insured refused to submit to his examination under oath. *Id.* at 580. The insured's policy stated that no action could be brought against the insurance company unless "there has been compliance with the policy provisions. . . ." *Id.* When the insurance company did not admit or deny liability for his claim, the insured filed suit. *Id.* The insurance company moved for summary judgment, asserting that because the insured had refused to submit to his examination under oath, he was precluded from filing suit.

Id. at 581. The *Downie* Court found that the insured failed to submit to his examination under oath, which was a contractual condition precedent to filing suit, and that dismissal of the insured's claim was proper. *Id.*

Similar to *Downie*, Staples failed to appear for his examination under oath. CP 134-37. Staples admits that he failed to appear for an examination under oath prior to filing suit. CP 141. Similar to the *Downie* Court's ruling, this Court should hold that Staples' examination under oath was a condition precedent to filing suit, and that the trial court's dismissal of this lawsuit was proper.

G. Staples Is Attempting to Create New Washington Law.

Staples is attempting to create new Washington law that an insured may decide whether or when to cooperate with the insurer's investigation. There is no authority for this proposition. Arguments unsupported by legal authorities need not be considered by the court. *Topline Equip. v. Nat. Auction Serv.*, 32 Wn. App. 685, 692, 649 P.2d 165 (1982). Further, Staples is attempting to create new Washington law without any briefing regarding why the Court should create new law.

Once an insurer has requested compliance, the burden shifts to the insured to follow through with that compliance. *Bulzomi v. NY Cent. Mut.*

Fire Ins. Co., 92 A.D.2d 878, 459 N.Y.S.2d 861 (1983); *Azeem v. Colonial Assur. Co.*, 96 A.D.2d 123, 468 N.Y.S.2d 248 (1983); *Bergeron v. Employers' Fire Ins. Co.*, 115 Cal. App. 672, 675, 2 P.2d 453 (1931). In *Bergeron*, the insured failed to appear for two scheduled examinations under oath due to an alleged illness and ultimately filed suit prior to complying. The Ninth Circuit held as follows:

However, the real question presented is not as to the reasonableness of the time and place set, but is whether an insured, after receiving such a notice, may ignore the matter entirely, and, without either notifying the company of the reason for his nonappearance or offering to submit to an examination at some other time and place, proceed to trial, with nothing further being done in reference to the desired examination.

Bergeron, 115 Cal. App. at 674-75.

Once Allstate requested compliance, the burden shifted to Staples to follow through with that compliance. Staples could not unilaterally decide whether or when to cooperate. Staples could not claim that he intended to cooperate, yet never actually cooperate. Staples failed to provide relevant documentation, including financial documentation, to Allstate and failed to appear for his examination under oath. CP 134-37, 157-60. As such, Staples is precluded from recovery in this lawsuit.

H. Staples Cannot Place Conditions on His Cooperation.

Staples claims that he belatedly offered to appear for an examination under oath if Allstate would agree to extend the one-year limitation to file suit. However, Staples made this offer on August 17, 2009, over eight months after Allstate first requested that Staples appear for an examination under oath, on January 15, 2009. CP 98. Moreover, when Staples offered to appear for an examination under oath, he did not agree to provide the requested information and documentation. *Id.* Thus, even with Staples' claimed offer, he was not offering to fully comply with Allstate's investigation.

Staples cannot place conditions on his compliance; as stated above, Staples could not decide whether and when to cooperate. *Bulzomi*, 92 A.D.2d 878; *Azeem*, 96 A.D.2d 123; *Bergeron*, 115 Cal. App. at 675; see also *Albee v. Farmers Ins. Co. of Wash.*, 92 Wn. App. 866, 967 P.2d 1 (1998).

In *Albee*, the insurer suspended payment of personal injury protection benefits after the insured failed to attend two medical examinations that it had scheduled. *Albee*, 92 Wn. App. at 867-68. The insurer wrote to the insured explaining that a second medical opinion was necessary so that the insurer could properly evaluate the insured's medical

condition and anticipated future treatment, if any. *Id.* at 870. The insurer quoted the cooperation clause in the insured's policy. *Id.* In response, the insured's counsel wrote to the insurer advising that the insured would not attend the scheduled exam. *Id.* at 870. The insured's counsel further demanded a detailed statement of why the exam was necessary. *Id.* at 870-71. The insured's counsel advised that the insured would attend the exam only if they determined that it was reasonable. *Id.* at 871. Shortly thereafter, the insurer suspended payment. *Id.* The insured filed suit. *Id.* at 871-72

The Court of Appeals held that the insurer had a reasonable basis for requesting the second medical examination. *Id.* at 875. The court further held that the insurer was prejudiced by the insured's failure to cooperate. *Id.* at 876. As such, the court dismissed the insured's lawsuit. *Id.*

In this case, just as the insurer in *Albee*, Allstate had a reasonable basis for its requests for information and documentation and examination under oath. CP 152, 163, 164. In particular, Staples' financial information would have assisted Allstate in making an accurate valuation of his claim. CP 238. The information would have assisted Allstate in

determining whether the claim was fraudulent, and whether the claimed items were for work or personal use. *Id.* The information also may have supported Staples' claim of ownership to the items and clarified Staples' employment and business history. *Id.* Just as the *Albee* Court held, Staples could not place conditions on his cooperation. Staples could not unreasonably demand further justification for Allstate's requests when Allstate had already provided more than sufficient justification. Staples could not belatedly claim to cooperate if Allstate extended the one-year suit limitation. Just as in *Albee*, Staples' failure to comply prejudiced Allstate as a matter of law. Therefore, he is precluded from recovery now.

I. Allstate Was Prejudiced as a Matter of Law by Staples' Failure to Comply.

Staples contends that Allstate did not show that it was prejudiced by his failure to comply. However, Washington Courts have held that when an insured fails to provide his financial information and/or appear for an examination under oath, the insurer is prejudiced as a matter of law. *See, e.g., Tran*, 136 Wn.2d 214; *Pilgrim*, 89 Wn. App. 712; *Keith*, 105 Wn. App. 251.

The *Tran* Court stated:

Without access to financial documents, State

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

Tran, 136 Wn.2d at 231 (emphasis added).

The *Tran* Court further stated:

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

Id (emphasis added).

The *Keith* Court also stated:

An insured's breach of a cooperation clause releases the insurer from its responsibilities if the insurer was actually prejudiced by the insured's breach.

...

When an insurer has sufficient information to suspect the possibility of a fraudulent

claim and the financial condition of the insured is pertinent to the claim the insurance company is actually prejudiced as a matter of law if the insured fails to provide such information.

...

Id. at 255-56 (citations omitted, emphasis added).

In this case, Staples failed to provide Allstate with requested information and documentation and failed to appear for his examination under oath. CP 134-37, 157-60. Just as in *Pilgrim, Tran, and Keith*, Staples' failure to cooperate prejudiced Allstate as a matter of law. Allstate could not promptly determine coverage, evaluate Staples' claim, and/or prepare its defense. Allstate repeatedly advised Staples regarding the need for cooperation, and that coverage could be denied if cooperation was not forthcoming. CP 206, 129-31, 132-33, 134-37, 138-39. Allstate was prejudiced as a matter of law.

J. Allstate Requests Its Fees and Costs as the Prevailing Party.

Attorney fees are recoverable on appeal if allowed by statute, rule, contract, or equitable principles, and the request is made pursuant to RAP 18.1(a). See *In Re the Guardianship of Wells*, 150 Wn. App. 491, 501, 208 P.3d 1126 (2009); *Mackenzie v. Barthol*, 142 Wn. App. 235, 242, 173

P.3d 980 (2007); *Tacoma Northpark, LLC v. NW, LLC*, 123 Wn. App. 73, 84, 96 P.3d 454 (2004). The general rule is that where a prevailing party is entitled to attorney fees below, they are entitled to attorney fees if they prevail on appeal. *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 423, 161 P.3d 406 (2007).

Should the Court affirm the trial court's order granting summary judgment, as the prevailing party, Allstate requests its attorney fees and costs for having to respond to Staples' appeal pursuant to RAP 18.1(a).

V. Conclusion

The Court should affirm the trial court's order, dated December 17, 2009, in its entirety. This lawsuit was properly dismissed.

DATED this 14 day of June, 2010.

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



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NO. 64816-1

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

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

JOHN STAPLES,

Plaintiff/Appellant,

v.

ALLSTATE INSURANCE COMPANY,

Defendant/Respondent.

2010 JUN 16 PM 2:55

COLE, LETHER, WATHEN, LEID & HALL, P.C.
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**PROOF OF SERVICE OF
BRIEF OF RESPONDENT ALLSTATE**

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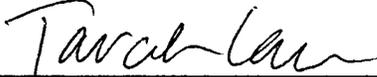
Tarah Lavin, being first duly sworn on oath, deposes and says:
that on the date given below, I forwarded for service the Brief of
Respondent, as indicated below:

Daniel R. Fjelstad
Attorney for Appellant
SCOTT, KINNEY, FJELSTAD & MACK
600 University Street, Suite 1928
Seattle, WA 98101

Via E-Mail
 Via Hand Delivery/Messenger Service
 Via Facsimile

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

DATED this 15th day of June, 2010, at Seattle, WA.



Tarah Lavin, Paralegal