

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ALLSTATE INSURANCE CO.,)	UNPUBLISHED OPINION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

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

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.

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

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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 appear for an EUO and submit all requested documentation, had failed to

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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

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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.

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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

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.

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an EUO, he does so only in passing and cites no authority in support of this 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

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.”

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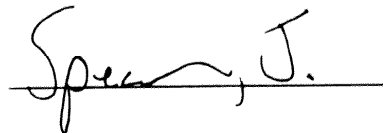
request for a continuance under CR 56(f) is reviewed for abuse of discretion.

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)).

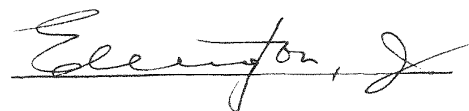
The trial court did not abuse its discretion in not addressing Staples's request for a continuance when ruling on Allstate's motion for summary judgment. Staples did not offer a good reason for the delay in beginning discovery, state what evidence would have been established through additional discovery, 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:



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