

No. 86413-6

J.M. JOHNSON, J. (dissenting)—Instead of attending an examination under oath (EUO) as Allstate Insurance Company requested and the policy provides to process his suspect claim, John Staples engaged in delay tactics for months. Only after Allstate ultimately denied his claim did Staples attempt to schedule the EUO, and only on the condition that Allstate agree to extend the time under which Staples could bring suit. Despite all this, the majority holds factual issues remain as to whether Staples “substantially complied” with the insurance policy and whether Allstate was prejudiced by his conduct. The majority’s position is inconsistent with our precedent and undermines the clear and unambiguous terms of the policy that governed the relationship between these parties. Staples did not substantially comply with his insurance policy, and under *Tran v. State Farm Fire & Casualty Co.*, 136

Wn.2d 214, 231, 961 P.2d 358 (1998), Allstate suffered actual prejudice as a result. Staples' claims were properly dismissed. I dissent.

On or about August 18, 2008, Staples reported to police that his vehicle was stolen and that it contained work tools worth \$15,000. Two weeks later, Staples submitted a claim under his Allstate homeowner's policy, stating the tools were for personal use<sup>1</sup> and were worth between \$20,000 and \$25,000. Due to these inconsistencies, Staples' claim was routed to Allstate's special investigations unit for further inspection.

Pursuant to Staples' insurance policy, Allstate requested that Staples submit certain documents relating to Staples' ownership of the claimed items and Staples' financial and employment history. Staples produced some, but not all, of the requested documentation. Allstate scheduled an EUO—also pursuant to the terms of Staples' insurance policy. Staples claimed he could not make the EUO scheduled by Allstate and made no effort to reschedule the EUO at a more convenient time. For several months, Allstate notified Staples that he had not responded sufficiently and noted the potential consequences of his noncompliance. Still, instead of producing the requested documents or

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<sup>1</sup> The inconsistency regarding whether the tools were used for business or personal purposes was presumably deemed relevant by Allstate because Allstate's homeowner's policy does not cover the loss of work equipment.

finding a mutually agreeable time for an EUO, Staples refused to cooperate and demanded that Allstate justify each request. Over six months after Staples' claim was filed, it was denied for noncooperation. Three months later, Staples wrote to Allstate stating he was willing to appear at an EUO, but only if Allstate agreed to extend the time limit under which Staples could bring suit. After Allstate refused to make this concession, Staples sued.

The majority's conclusion that Staples may have "substantially complied" with his insurance policy is dubious. Staples' policy unequivocally required a claimant to provide any and all pertinent documentation reasonably requested by Allstate: "In the event of a loss to any property that may be covered by this policy, **you** must . . . give **us** all accounting records, bills, invoices and other vouchers, or certified copies, which **we** may reasonably request . . . ." Clerk's Papers at 149. The policy also required a claimant to submit to an EUO at Allstate's reasonable request. *Id.* Staples partially complied with only the first of these requirements and made no effort to comply with the second until after his claim was denied. Unlike the majority, I fail to see how Staples' late demand that Allstate vary the terms of the contract by extending the time under which he could file suit amounted to

“substantial compliance” with the policy as it was written.

The majority also implies the EUO was unnecessary because Allstate had “ample opportunity to examine” Staples during two unsworn interviews. Majority at 11. This assertion ignores the basic differences between an interview under oath and a more casual unsworn statement. Washington courts have noted the importance of the examination under oath even when other interviews have been conducted. *See, e.g., Downie v. State Farm Fire & Cas. Co.*, 84 Wn. App. 577, 583-84, 929 P.2d 484 (1997) (“[A] recorded interview is not equivalent to an EUO because (1) a recorded statement is unsworn when it is made, (2) insurers in practice do not intend that recorded statements substitute for EUOs, and (3) the policy language allows insurers to conduct multiple interviews.”). In *Georgian House of Interiors v. Glen Falls Insurance Co.*, 21 Wn.2d 470, 482-83, 151 P.2d 598 (1994), the insured had submitted to an unsworn examination, but we held this did not constitute “sufficient compliance with the provisions of the policies to excuse appellant after demand made upon it to submit to examination under oath and produce for examination its books, records, etc.” Likewise, Staples’ failure to submit to an EUO amounted to noncompliance.

Not only did Staples fail to substantially comply with the terms of the policy, but Allstate suffered prejudice as a result. In *Tran* we stated:

If insurers are inhibited in their effort to process claims due to the uncooperativeness of the insured, they suffer prejudice . . . If we were to reach any other result, we would be encouraging insureds to not cooperate and to submit fraudulent claims.

136 Wn.2d at 231. Tran had provided the police and State Farm with conflicting stories regarding a burglary. *Id.* at 227. During the course of State Farm’s investigation, Tran appeared for an EUO but refused to answer some of the questions. *Id.* at 221. He also failed to produce many documents requested by State Farm for months and ultimately refused to provide records relating to his financial situation. *Id.* We held State Farm was prejudiced by these actions as a matter of law:

[A]n insurer suffers prejudice, as a matter of law, when its insured fails to provide it with the financial records it reasonably needs in order to complete an investigation into the question of whether the insured’s claim was fraudulent.

*Id.* at 217.

The majority distinguishes *Tran* on the grounds that State Farm was faced with a “Hobson’s choice’ of either paying a suspected fraudulent claim, or exposing itself to bad faith liability.” Majority at 17 (citing *Tran*,

136 Wn.2d at 230. The majority asserts Allstate was not in the same predicament because Staples offered to appear for an EUO (after his claim had been denied) and because the underlying theft was not in dispute. Although Allstate did not challenge Staples' assertion that his van had been stolen, the amount and value of the tools in the van and the nature of their use were at issue. Like State Farm in *Tran*, Allstate was not presented with a meaningful choice. It could pay off a claim that may be fraudulent (or at least worth less than Staples claimed), deny the claim and open itself up to a lawsuit, or, if it decided to continue the investigation, concede to Staples' unilateral demand that Allstate allow Staples additional time to sue.

In any case, because of Staples' failure to fulfill his obligations under the policy, Allstate did not have access to the information it requested while the claim was still fresh. We have stated that an insurer has the right to investigate a claim "before all the evidence is washed away by the rain." *Sears, Roebuck & Co. v. Hartford Accident & Indem. Co.*, 50 Wn.2d 443, 453, 313 P.2d 347 (1957). The majority brushes this issue aside, stating Allstate "made no showing that Staples' delay caused any evidence to be lost." Majority at 16 n.7. Yet, how could Allstate point to evidence that had

been lost or altered without first knowing all the evidence that was available? It could not. Allstate was prejudiced as a matter of law by Staples' substantial delay and failure to cooperate with the investigation.

### Conclusion

The majority holds an insured individual with a questionable claim frustrates the company's claim investigation for months by refusing to submit to an EUO as required by the insurance policy may still bring suit against the insurance company for denying his claim based on his noncooperation. Today's decision invites insureds to put minimal effort into complying with the terms of their insurance policies, expecting the company to pay. I would hold Staples' refusal of an EUO does not create a factual question of whether he "substantially complied" with his Allstate policy. I would further hold Staples' conduct prejudiced Allstate because Allstate did not have access to all the information it needed to assess Staples' claim in a timely fashion. I respectfully dissent.

AUTHOR:

Justice James M. Johnson

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WE CONCUR:

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