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NO. 68226-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

JOHN J. JONES AND MARY ANN MORBLEY JONES,

Appellants,

v.

KING COUNTY, a municipal corporation,

Respondent.

APPELLANT'S REPLY BRIEF

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I. REPLY TO RESPONDENT'S ARGUMENT

King County is seeking special dispensation for a concept in law that has existed even before the United States of America came to be. The Made Whole Doctrine is an equitable defense to the subrogation or reimbursement rights of a subrogated insurance carrier **or other party**, requiring that before subrogation and/or reimbursement will be allowed the insured must be made whole for all of its damages. Precisely what being made whole means varies from state to state, but the concept is nonetheless fairly similar in each state.

It is widely held that in the absence of contrary statutory law or valid contractual obligation to the contrary, the general rule under the doctrine of equitable subrogation is that whether an insured is entitled to receive recovery for the same loss from more than one source, e.g., the insurer and the tortfeasor, it is only after the insured has been fully compensated for all the loss that the insurer acquires a right to subrogation.

Subrogation's long and storied history had its common law roots in the law of equity – the courts of Chancery in England. Subrogation was established well before the law of quasi-contract at common law. This means that subrogation, even today, can arise without an insurance policy or statute giving an insurer or any other party a right of subrogation or reimbursement – so-called —equitable or legal subrogation.

Washington adheres to the Made Whole Doctrine. *Mattson On Behalf of Mattson v. Stone*, 648 P.2d 929 (Wash. App. 1982); *Mahler v. Szucs*, 957 P.2d 632 (Wash. 1998). An injured party must be made whole before the injured party's insurer or other party may require the injured party to reimburse the insurer or other party for a subrogation or reimbursement claim. *Skiles v. Farmers Ins. Co., Inc.*, 814 P.2d 666 (Wash. App. 1991). Known as the *Thiringer Doctrine, Thiringer v. American Motorist Co.*, 588 P.2d 191 (Wash. 1978), the general rule is that while an insurer is entitled to be reimbursed to the extent that its insured recovers payment for the same loss from the tortfeasor responsible for his damage, it can recover only the excess which the insured has received from the wrongdoer, remaining after the insured is fully compensated for his loss. *Id.* However, the *Thiringer* case seemingly suggests that the *Thiringer Doctrine* may be overridden by specific Plan or policy language to the contrary. *Id.*

The insurance policy in *Thiringer* reserved to the insurer a right of subrogation and provided that the insured should do nothing to prejudice such right. The Supreme Court agreed with the trial court's conclusion that in the context of a general settlement involving automobile personal injury protection the proceeds should be first applied toward the payment of the insured's general damages and then, if any excess remains, toward the payment of the special damages covered by personal injury protection insurance.

Disputes between insureds and subrogating carriers with regard to the Made Whole Doctrine should be and are resolved on a case-by-case basis upon a consideration of —the equitable factors involved, guided by the principle that a party suffering compensable injury is entitled to be made whole but should not be allowed to duplicate his recovery. *Leader Nat'l Ins. Co. v. Torres*, 779 P.2d 722, 723 (Wash. 1989).

Washington law provides a number of factors to be considered when resolving a subrogation or reimbursement dispute between an insurer and its insured where the insured executes a general release with the tortfeasor:

(1) knowledge of insureds and tortfeasors as to outstanding subrogation claims;

(2) extent of the prejudice to insurer's subrogation interests;

(3) desirability of encouraging settlements;

(4) possibility of sharp practices by tortfeasors, insureds or their insurance carriers; and

(5) general public policy that persons suffering compensable injuries are entitled to be made whole. *Torres,* supra.

While the insured is entitled to recoup his general damages from the tortfeasor before subrogation is permitted, in doing so it may not do anything to prejudice the rights of the insurer. *B.C. Ministry of Health v. Homewood*, 970 P.2d 381, 386 (Wash. Ct. App. 1999) (concluding that general settlement involving health insurance should be apportioned first to general damages and

then any excess to special damages). As explained by the court of appeals in *British Columbia Ministry of Health v. Homewood*:

[T]o establish prejudice [the insurer] must show

(1) the percentage of negligence of [each of three tortfeasors];

(2) the total losses the plaintiff suffered; [and]

(3) that the settlement as a percentage of plaintiff's total injuries was less than the percentage of the settling entities' comparative negligence. Only if the latter percentage exceeds the former will [the insurer's] subrogation rights have been prejudiced .... Homewood, supra.

The holding in *Thiringer* was also construed by the Court of Appeals in *Fisher v. Aldi Tire, Inc.* to allow the parties to the contract to modify subrogation standards developed at common law. *British Columbia Ministry of Health v. Homewood,* 902 P.2d 166 (Wash. App. 1995). However, the language purporting to change the common law standards must be clear and unambiguous.

A self-insured retention (SIR) of $100,000 paid by an insured under a CGL policy does not constitute —primary insurance for purposes of subrogation, according to the Washington Court of Appeals. *Bordeaux, Inc. v. American Safety Ins. Co,* 186 P.3d 1188 (Wash. App. 2008).

Therefore, the CGL carrier was not entitled to any portion of a third-party subrogation recovery unless and until the insured was made whole under *Thiringer* for the SIR payment it had made.

When defending against an equitable subrogation interest, where the injured party's non-economic damages far exceed the amount he is legally entitled to, because he opted to avoid the risk of a trial, the injured party will necessarily not be "made whole." In this instance, the Mr. and Mrs. Jones, the appellants, should not be forced to pay subrogation interests that would further erode their damages.

The purpose behind a subrogation interest is to prevent double recovery, not to benefit the insurer or other party by allowing them to take advantage of premiums paid for the insurer to take assume the risk of loss and also take advantage of a pool of money put together from the efforts of an injured party who is not yet adjudged to have been made whole. This does not change because the party claiming subrogation rights has used a contract of adhesion to reserve or avoid equitable defenses. Contractual subrogation interests should merely confirm, but not expand the equitable right to subrogation. The principal purpose of an insurance contract is still to protect the insured from loss, thereby placing the loss on the insurer. If either party must go unpaid, the loss should be borne by the insurer-- the insured has paid the insurer to assume this risk.

II. CONCLUSION

The Appellant respectfully requests that the Court reverse the order of the trial court granting summary judgment to Respondent and return this matter to the lower court for a trial on the merits.

DATED this 26th day of November, 2012

RESPECTFULLY submitted,

WARD SMITH PLLC

By: _____
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Attorneys for the Appellant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner indicated a copy of the Appellate Reply Brief to:

Medora Marisseau Karr Tuttle Campbell 1201 3rd Avenue, Suite 2900 Seattle, WA 98101-3028 *Attorney for Plaintffs/Respondents* Office: 206-224-8045 mmarisseau@karrtuttle.com	VIA FEDERAL EXPRESS [ ] VIA REGULAR MAIL [ ] VIA CERTIFIED MAIL [ ] VIA E-MAIL [X] HAND DELIVERED [ ]	

Dated at Seattle, Washington, this 26th day of November, 2012

J.D. Smith