No. 96516-1

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 76365-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GROUP HEALTH COOPERATIVE,
a Washington nonprofit corporation,

Petitioner,

v.

NATHANIEL COON and LORI COON,
husband and wife,

Respondents.

PETITION FOR REVIEW

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A. Identity of Petitioner and Decision Below.

Petitioner Group Health Cooperative ("Group Health" or "GHO") seeks review of Division One's published August 13, 2018 decision reversing the trial court's order requiring respondents Nathaniel and Lori Coon to reimburse Group Health for $372,634 in medical expenses after the Coons entered into a settlement with a third party without first notifying Group Health, as required by their health insurance policy. (App. A) A timely motion for reconsideration was denied on October 10, 2018. (App. B)

B. Issues Presented for Review.

1. Does the Court of Appeals' published decision erroneously conflate the limits on an insurer's subrogation rights when an insured has not been "made whole" by settlement with or judgment against a third-party tortfeasor with an insurer's contractual right to reimbursement when there is not a third-party tortfeasor?

2. When there is no concern that an insured must be "made whole" in a settlement with or judgment against a third-party tortfeasor, does the Court of Appeals' published decision erroneously expand beyond UIM coverage cases the requirement that an insurer

show prejudice before it can enforce a contractual right to reimbursement?

C. Statement of the Case.

1. Group Health paid over $372,000 in medical expenses when Mr. Coons' leg was amputated after surgery at Everett Clinic, retaining a right to reimbursement for "any amounts" the Coons received "from any source."

Respondents Nathaniel and Lori Coon had health insurance through petitioner Group Health. (CP 409-58) After Mr. Coon underwent knee surgery at the Everett Clinic ("the Clinic") in March 2012 he developed an infection that ultimately resulted in amputation of his leg above his knee. (App. A ¶ 2; CP 181, 185) Group Health paid $372,634.07 in medical expenses for this injury under the Coons' health insurance policy. (CP 283, 287-88)

The Coons' health insurance policy gave Group Health subrogation and reimbursement rights requiring the Coons to "reimburse GHO for all benefits provided, from any amounts the Member received or is entitled to receive from any source on account of such injury or illness, whether by suit, settlement or otherwise." (CP 454) The policy required the Coons to "cooperate fully with GHO in its efforts to collect GHO's Medical Expenses," including "supplying GHO with information about the cause of injury or

illness, any potentially liable third parties, defendants and/or insurers related to the Injured Person's claim and informing GHO of any settlement or other payments relating to the Injured Person's injury" and provided that the "Injured Person . . . shall do nothing to prejudice GHO's subrogation and reimbursement rights":

> The Injured Person shall promptly notify GHO of any tentative settlement with a third party and shall not settle a claim without protecting GHO's interest. If the Injured Person fails to cooperate fully with GHO in recovery of GHO's Medical Expenses, the Injured Person shall be responsible for directly reimbursing GHO for 100% of GHO's Medical Expenses.

(CP 454) Finally, the policy required the Coons to hold in trust any funds received "from any source that may serve to compensate for medical injuries or medical expenses" "until GHO's subrogation and reimbursement rights are fully determined." (CP 455)

2. Group Health sought reimbursement after the Coons breached their health insurance policy by settling with the Clinic for $2 million without prior notice to Group Health.

The Clinic could not determine the source of the infection that had resulted in the amputation of Mr. Coon's leg, and the Coons were unable to find any evidence that the Clinic had breached the standard of care. (CP 145, 158-60, 172-73; App. A ¶ 3) The Coons concluded that, at best, they "have a *res ipsa loquitur* case" and that the chances of succeeding at trial against the Clinic "truly approached 0%." (CP

145, 354) As part of a "new program designed to reduce litigation filings and provide some level of compensation to patients" (CP 355), however, the Clinic "offered mediation in the hope of reaching a final settlement without the need for litigation." (CP 161) The Clinic and the Coons settled for $2 million, with no prior notice to Group Health, on April 25, 2014. (CP 253-59; App. A ¶ 11)

The Coons notified Group Health of the settlement on April 28, 2014, when it asked Group Health to waive its reimbursement claim. (CP 253; App. A ¶ 16) Group Health did not waive its contractual rights, and requested reimbursement for the benefits it had provided under the policy. (CP 406, 482, 486) The Coons again breached the policy by disbursing the settlement funds from trust before Group Health responded and "GHO's subrogation and reimbursement rights [were] fully determined." (CP 281, 455)

3. The Court of Appeals reversed the trial court's order requiring the Coons to reimburse Group Health on the grounds the Clinic was not a "third-party tortfeasor."

Both parties moved for summary judgment after Group Health sought a declaratory judgment requiring the Coons to reimburse the $372,634 Group Health had paid in medical expenses. (CP 501-05; 370-402) The trial court granted Group Health's motion, holding it had a valid and enforceable subrogation claim (CP

509-13), and denied the Coons' motion, because they had breached the contract by settling with the Clinic without notifying Group Health or protecting its subrogation interests. (CP 514-16)

The Coons appealed the order granting Group Health's motion for reimbursement, but not the order concluding they had breached the health insurance contract. (CP 506; App. A ¶ 24) In a published decision, Division One reversed. The Court of Appeals held that Group Health could not enforce its contractual right to reimbursement without first showing prejudice from the Coons' breach of the policy, and because Group Health had "not established that the Coons have a nonspeculative claim against a tortfeasor." (App. A ¶¶ 30, 37) Despite recognizing that the "Coons, the Clinic, and everyone else involved in this litigation have been unable to develop a viable theory of liability against any entity," the Court of Appeals also held that in the "absence of a judicial decision absolving the Clinic of liability," Group Health must also prove the Coons had been "made whole" before pursuing any reimbursement claim. (App. A ¶¶ 37, 42)

D. Argument Why Review Should Be Granted.

1. The Court of Appeals' published decision conflicts with this Court's decisions in *Mahler* and *Thiringer*, and with Division One's decision in *Cook*. (RAP 13.4(b)(1), (2), (4)).

Premised on a flawed interpretation of this Court's decisions in *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998), and *Thiringer v. American Motors Ins. Co.*, 91 Wn.2d 215, 588 P.2d 191 (1978), Division One in this case prevented enforcement of a contractual right to reimbursement in the absence of a third-party tortfeasor. The Court of Appeals' published decision conflicts with *Mahler, Thiringer,* and *Cook v. USAA Cas. Ins. Co.*, 121 Wn. App. 844, 90 P.3d 1154 (2004), which held that *Thiringer*'s "made whole" rule does not apply where there is no third-party tortfeasor. This Court should grant review under RAP 13.4(1), (2), and (4) to clarify this conflict and settle a question of significant public interest: whether when there is no third-party tortfeasor an insurer's reimbursement rights are subject to the "made whole" rule limiting an insurer's subrogation rights against a tortfeasor.

a. The Court of Appeals' decision conflicts with this Court's decision in *Mahler*.

The Court of Appeals erroneously held that if Group Health "cannot establish the existence of a negligent third party who caused

its insured to incur medical expenses, this is not a subrogation case at all" (App. A ¶ 36), by disregarding this Court's decision in *Mahler*, which makes clear that an insurer can have a contractual right to reimbursement in the absence of a third-party tortfeasor.

The "general purpose of subrogation is to facilitate placement of the financial consequences of loss on the party *primarily responsible in law* for such loss." *Mahler*, 135 Wn.2d at 412 (emphasis added, quoted source omitted). The two "features" of subrogation are the right to reimbursement itself, and the "mechanism for the enforcement of the right." *Mahler*, 135 Wn.2d at 412. The subrogee can enforce its right as a "lien against any recovery the subrogor secures from the third party" or by "standing in the shoes of its subrogor" in an action against the tortfeasor. *Mahler*, 135 Wn.2d at 413. A subrogee has a right of reimbursement "[b]y virtue of payments made to a subrogor stemming from the actions of a third party"; thus, traditional insurance subrogation "exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty." *Mahler*, 135 Wn.2d at 413, 419 (quoted source omitted). Accordingly, "[n]o right of subrogation can arise in favor of an insurer against its own insured." *Mahler*, 135 Wn.2d at 419 (quoted source omitted).

But this Court also recognized in *Mahler* that an insurer *can* have a contractual right to reimbursement from its insured separate from the traditional right to subrogation against a third party. In *Mahler*, State Farm sought reimbursement of benefits paid to its insured, who was injured in a car accident, after the insured settled with the negligent driver. This Court held that State Farm "simply contracted for a right to reimbursement of its PIP payments *from its insureds* from the proceeds of a settlement," as the policy "reserved a traditional subrogation right" to sue in its insured's shoes *only* when the insured fails to pursue a tortfeasor. *Mahler,* 135 Wn.2d at 420-21 (emphasis in original). Because the "literal language" of the policy transferred "an interest in moneys after they become the property of the insured," creating "a right in the proceeds, not against the tortfeasor," this Court held that State Farm had only a "contractual right of reimbursement, not a right to subrogation." *Mahler,* 135 Wn.2d at 419-21 (quoted source omitted).

The Court of Appeals disregarded both *Mahler* and the "literal language" of the policy here. Nothing in the plain language of the health insurance policy at issue here predicates Group Health's reimbursement on the existence of a third-party tortfeasor. Group Health has the right to reimbursement from its insured "for all

benefits provided, from any amounts the Member *received* or is entitled to receive *from any source* on account of such injury or illness, *whether by suit, settlement or otherwise*" (CP 454, emphasis added), irrespective of whether the injury or illness was caused by a "negligent third party" (App. A ¶ 36):

> [I]f the Injured Person is entitled to *or does receive money from* ***any*** *source* as a result of the events causing the injury or illness, including *but not limited to any liability insurance* or uninsured/underinsured motorist funds, GHO's Medical Expenses are secondary, not primary.

(CP 454, emphasis added)

The Court of Appeals misinterpreted the language "as a result of the events *causing the injury*" (App. A ¶ 36, emphasis in original) in the policy to require that *a negligent* third party cause the injury. The "event" that caused Mr. Coon's infection and subsequent amputation was the surgery performed at the Clinic; nothing in the policy requires that "event" be the result of negligence. It is thus immaterial that "everyone . . . involved in this litigation ha[s] been unable to develop a viable theory of liability against any entity." (App. A ¶ 37) This Court should accept review and hold Group Health need not prove "that the Coons have a nonspeculative claim against a tortfeasor" (App. A ¶ 37) in order to enforce the provisions of its health insurance contract.

b. The Court of Appeals' decision conflicts with *Thiringer* and *Cook*.

Generally, an insurer is "substituted to the rights of the insured and pursue[s] recovery directly from the tortfeasor or, when the insured recovers from the tortfeasor, [is] reimbursed from that recovery." *Paulsen v. Dep't of Soc. & Health Servs.*, 78 Wn. App. 665, 668, 898 P.2d 353 (1995), *rev. denied*, 128 Wn.2d 1010 (1996). However, an insurer "can recover only the excess which the insured has received from the wrongdoer, remaining after the insured is fully compensated for his loss," as a "*party suffering compensable injury* is entitled to be made whole but should not be allowed to duplicate his recovery." *Thiringer*, 91 Wn.2d at 219-20 (emphasis added).

Thiringer is based entirely on a third-party tortfeasor being "responsible in law" for the insured's injury. *Mahler*, 135 Wn.2d at 412. Where, as here, there is no legally responsible "wrongdoer" from which an insured party "is entitled to be made whole," *Thiringer*, 91 Wn.2d at 220, however, an insurer need not demonstrate that its insured has been fully compensated prior to enforcing a contractual right to reimbursement, as Division One correctly recognized in *Cook v. USAA Cas. Ins. Co.*, 121 Wn. App. 844, 90 P.3d 1154 (2004). *Thiringer* "protect[s] an insured's right to full compensation," "[b]ut when the insured has no basis in tort or

contract for a recovery . . . then *Thiringer* does not apply." 121 Wn. App. at 848-49.

In *Cook*, USAA paid the Cooks their policy limits under both a homeowners and a renter's insurance policy after a fire started in a gas water heater exhaust flue. After subsequently losing their negligence lawsuit against the company that installed the flue, the Cooks sought a portion of the funds that USAA had obtained settling with the defendants, arguing that under *Thiringer* USAA was not entitled to retain any subrogation settlement funds until the Cooks were "fully compensated." Division One affirmed dismissal of the insureds' claims against USAA, recognizing that the "*Thiringer* full compensation rule has never been applied in situations where there was no liable third party." *Cook*, 121 Wn. App. at 848. Because "the Cooks did not suffer compensable injury, they bear the risk of loss." *Cook*, 121 Wn. App. at 849.

Similarly here, the Coons did not suffer a "compensable injury" implicating *Thiringer's* "made whole" rule. A compensable injury is "an invasion of a legally protected interest," "caused by conduct of such a character as to make it tortious," which "would entitle the person suffering the invasion to maintain an action of tort." *Restatement (Second) of Torts* § 7 cmt. a (1965); *Gunnier v.*

Yakima Heart Center, Inc., P.S., 134 Wn.2d 854, 859, 953 P.2d 1162 (1998) (negligence action arises "at the time of the alleged wrongful act or omission causing the injury"). Here, however, the Coons admit that they could not have sued the Clinic, because there is no evidence that the Clinic was negligent (CP 285, 354); Division One likewise recognized that the Coons did not have a "nonspeculative claim" against the Clinic, as "everyone" has "been unable to develop a viable theory of liability against any entity" in this case. (App. A ¶ 37)

Division One erred in abandoning *Cook* and holding that *Thiringer* limits the right to reimbursement under a health insurance policy in the absence of a "judicial decision absolving" a tortfeasor of liability.[1] (App. A ¶ 42) The Court of Appeals' decision is both illogical and internally inconsistent. Under Division One's reasoning, a contractual right to reimbursement is unenforceable unless a "liable tortfeasor" exists. Yet in order to recover any

[1] This holding also conflicts with *Loc Thien Truong v. Allstate Prop. & Cas. Ins. Co.*, 151 Wn. App. 195, 201, ¶ 11, 211 P.3d 430 (2009), which rejected an insured's argument that he was "entitled to go to trial" to have a judicial determination of whether or not he had been fully compensated by a settlement with a third-party tortfeasor before being required to reimburse PIP payments.

damages, the nonbreaching party must produce a "judicial decision" absolving the tortfeasor of all liability. (App. A ¶¶ 36, 42)

It is Division One, not Group Health, that "is taking contradictory positions." (App. A ¶ 34) Group Health is not attempting to "avoid application of the equities advanced by *Thiringer* merely by asserting that the alleged tortfeasor had no tort liability." (App. A ¶ 42) Instead, it is the Coons who refuse to reimburse Group Health for benefits on the grounds they have not been "made whole" by a nonexistent tortfeasor. In a case where the Coons received $2 million even though "everyone" admits there was "truly" a zero percent chance that the Clinic was liable for Mr. Coon's injury (CP 354), they refuse to comply with their health insurance policy. The Court of Appeals' published decision blessing that reasoning conflicts with *Mahler, Thiringer,* and the "made whole" policies underlying those cases.

2. The Court of Appeals' published decision conflicts with *Tran* and *Pilgrim*, wrongly expanding *Tripp's* narrow UIM holding to contractual reimbursement of medical expenses paid by a health insurer. (RAP 13.4(b)(1), (2), (4)).

Under the plain language of its policy, Group Health had a right to seek 100% reimbursement from the Coons for their undisputed breach of contract. The Court of Appeals disregarded

this plain language in its published decision to impose an additional requirement of prejudice based on a flawed interpretation of this Court's decision in *Liberty Mut. Ins. Co. v. Tripp*, 144 Wn.2d 1, 25 P.3d 997 (2001). This Court should grant review under RAP 13.4(b)(1), (2), and (4) because the Court of Appeals' decision contravenes fundamental contract principles, conflicts with *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 961 P.2d 358 (1998), and *Pilgrim v. State Farm Fire & Cas. Ins. Co.*, 89 Wn. App. 712, 950 P.2d 479 (1997) by erroneously extending *Tripp* beyond the narrow realm of UIM coverage, and raises a matter of substantial public interest: whether in a non-UIM case where coverage is not in question, a health insurer must prove prejudice before seeking reimbursement for medical benefits paid under the policy.

a. The Court of Appeals violated fundamental contract principles by rewriting unambiguous contractual language.

Washington courts "construe insurance policies as contracts," *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171, ¶ 10, 110 P.3d 733 (2005), and "may not modify clear and unambiguous language in an insurance policy." *West Am. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 80 Wn.2d 38, 44, 491 P.2d 641

(1971). Division One disregarded these "well settled" principles, *Quadrant Corp.*, 154 Wn.2d at 171, ¶ 10, by requiring Group Health to "establish[] by undisputed facts any prejudice caused" by the Coons' undisputed breach of contract prior to seeking reimbursement under the policy. (App. A ¶ 30)

The health insurance policy clearly and unambiguously prohibited the Coons from doing anything "to prejudice GHO's subrogation and reimbursement rights." (CP 454) In particular, the Coons were required to "promptly notify GHO of any tentative settlement with a third party" and to "not settle a claim without protecting GHO's interest." (CP 454) The policy also plainly and unequivocally set forth Group Health's remedy in the event of a breach:

> If the Injured Person fails to cooperate fully with GHO in recovery of GHO's Medical Expenses, the Injured Person shall be responsible for directly reimbursing GHO for 100% of GHO's Medical Expenses.

(CP 454)

The Coons breached their duties under the contract as a matter of law by settling with the Clinic without notifying Group Health or protecting its interests. (CP 516; App. A ¶ 30) The Coons then disbursed the settlement funds in violation of Group Health's equitable lien. (CP 281, 455) Because the Coons "fail[ed] to

cooperate fully with GHO in recovery of GHO's Medical Expenses," they are "responsible for directly reimbursing GHO for 100% of GHO's Medical Expenses" under the plain language of the policy. (CP 454) The Court of Appeals erred in not enforcing the parties' unambiguous contract as written.

b. The Court of Appeals' decision conflicts with *Tran* and *Pilgrim* by misapplying *Tripp* beyond its narrow focus of UIM coverage.

The Court of Appeals' published decision also conflicts with this Court's decision in *Tran* and its own decision in *Pilgrim,* misapplying this Court's decision in *Tripp* to require Group Health establish prejudice as a prerequisite to enforcing its contractual remedy for the Coons' breach. (App. A ¶ 30)

An insurer must prove prejudice only in insurance coverage cases where the insurer's payment is conditioned upon the insured's satisfaction of policy requirements. *Tran,* 136 Wn.2d at 228-29; *Pilgrim,* 89 Wn. App. at 724. "By contrast, courts refuse to analyze prejudice in cases involving types of clauses other than those involving the handling of claims." *Pilgrim,* 89 Wn. App. at 724. This is not a coverage case. The insurance contract provided coverage for medical expenses, and Group Health undisputedly paid Mr. Coon's medical expenses. Neither *Tran* nor *Pilgrim* require an insurer who

has already provided coverage to prove prejudice in order to enforce its contractual remedy for a breach. *See Tran*, 136 Wn.2d at 229-30 ("State Farm needed to establish only that Tran's failure to produce these items *prejudiced its ability to determine coverage*") (emphasis added).

In *Tripp*, also a coverage case, Liberty sought a declaratory judgment that its insureds had waived the right to UIM coverage by failing to notify Liberty that they settled with the third-party tortfeasor after a car accident. Analyzing the coverage issue, this Court held that "an insured's failure to give its insurer notice of a tentative settlement with a tortfeasor will not reduce a UIM carrier's obligation to pay UIM benefits to its insured unless the insurer can show that it was prejudiced, and then only to the extent it was prejudiced, by the insured's actions." *Tripp,* 144 Wn.2d at 17.[2]

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[2] Liberty also argued that the Tripps "were obligated to reimburse it for the PIP benefits it had paid them because the Tripps released Liberty's subrogation claim against the tortfeasor." *Tripp,* 144 Wn.2d at 8. This Court held that "*a PIP insured* cannot be required to reimburse the insurer unless and until the insured is fully compensated." *Tripp,* 144 Wn.2d at 21 (emphasis added, citing *Thiringer,* 91 Wn.2d at 219). Here, the Coons were not PIP insureds, the Clinic was not a tortfeasor, and *Thiringer*'s "full compensation" or "made whole" rule is inapplicable for the reasons argued in the previous section of this petition.

Tripp does not hold that "the law provides the company a remedy only if it can show prejudice" "[w]hen an insured breaches an insurance contract by failing to give the insurance company notice of a settlement." (App. 12 ¶ 30) This Court instead grounded its holding in *Tripp* on the public policy underlying UIM coverage: allowing an insured's "violation of the notice settlement clause to automatically preclude UIM coverage" would afford the UIM insurer a windfall and "would be inconsistent with the requirement that insureds be provided with that 'second layer of floating protection.'" *Tripp,* 144 Wn.2d at 17. For this reason alone, *Tripp* requires an insurer to "prove that it was prejudiced by the settlement" in order to be "relieved of its obligation to provide UIM coverage." 144 Wn.2d at 17.

None of this Court's reasons for imposing a prejudice requirement in *Tripp* exist here. First, Group Health's reimbursement claim is a remedy arising from the Coons' breach of the parties' contract for health care benefits that Group Health provided, not UIM coverage. UIM coverage is a "creature" of public policy "that every insurer writing automobile policies within the state must, by law, offer their insureds." *Sherry*, 160 Wn.2d at 622, ¶ 19. Accordingly, "[i]t is important to remember that UIM is unique

among insurance"; its "purpose and focus are very narrow." *Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 620, ¶ 15, 160 P.3d 31 (2007). Division One clearly failed to heed this Court's "reminder" in *Sherry* when it expanded *Tripp* beyond the "narrow" focus of UIM coverage.

Second, unlike in every UIM coverage case, there is no liable third-party tortfeasor here. UIM coverage exists because of a "strong public policy favoring full compensation of innocent automobile accident victims who must rely on their own UIM coverage." *Brown v. Snohomish County Physicians Corp.*, 120 Wn.2d 747, 758, 845 P.2d 334 (1993); *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 87, 794 P.2d 1259 (1990) (by "protecting the innocent victim of an auto accident, UIM insurance provides a source of indemnification when the tortfeasor does not provide adequate protection"). There is no similarly "strong" public policy of protecting an insured who is not "legally entitled" to recover damages in the absence of a "negligent tortfeasor."

Division One's reasoning is, once again, internally inconsistent and illogical, requiring Group Health to demonstrate prejudice from the Coons' breach and allowing the Coons to retain $2 million, free of Group Health's contractual reimbursement rights,

on a claim that had no legal validity. Group Health paid $372,634 for Mr. Coon's medical expenses; it never sought to be "relieved of its obligation to provide" coverage to the Coons. *Tripp*, 144 Wn.2d at 17. Nor did Group Health seek to be excused from future performance under the policy. Rather, Group Health seeks reimbursement as damages for the Coons' breach, as it was entitled to do without demonstrating prejudice under the Coon's health insurance policy.

E. Conclusion.

This Court should accept review and reinstate the trial court's order requiring the Coons to reimburse Group Health pursuant to the terms of their health insurance policy.

Dated this 9th day of November, 2018.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 9, 2018, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 9th day of November, 2018.

V. Vigoren

Victoria K. Vigoren

423 P.3d 906
Court of Appeals of Washington, Division 1.

GROUP HEALTH COOPERATIVE, a Washington nonprofit corporation, Respondent,
v.
Nathaniel COON and Lori Coon, husband and wife, Appellants.

No. 76365-2-I
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FILED: August 13, 2018

Synopsis

Background: Health insurer brought declaratory judgment action against insureds, seeking reimbursement for health care benefits it provided to insureds after insured contracted an infection following knee surgery that resulted in an above-the-knee amputation. The Superior Court, Snohomish County, George F. Appel, J., granted summary judgment in favor of insurer, and insureds appealed.

Holdings: The Court of Appeals, Leach, J., held that:

genuine issue of material fact as to whether health insurer suffered any prejudice as a result of insureds' breach of insurance contract precluded summary judgment, and

genuine issue of material fact as to whether insureds received full compensation for their losses precluded summary judgment.

Reversed and remanded.

***907** Appeal from Snohomish Superior Court, No. 16-2-01883-0, Honorable George F. Appel, Judge.

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PUBLISHED OPINION

Leach, J.

¶ 1 Group Health Cooperative seeks reimbursement for health care benefits it provided to Nathaniel (Joel) and Lori Coon. The trial court determined on summary judgment that Group Health had an enforceable right to reimbursement from settlement funds obtained by the Coons. The Coons appeal from that decision. Because disputed factual issues prevent the resolution of Group Health's claims on summary judgment, we reverse and remand for further proceedings.

FACTS

¶ 2 The parties do not dispute many underlying facts. Nathaniel Coon had knee surgery at the Everett Clinic (Clinic) in March 2012. After the surgery, he developed an aggressive infection in his leg that ultimately resulted in an above-the-knee amputation. The Coons' insurer, Group Health, paid approximately $372,000 in medical expenses for his treatment. In December 2013, an attorney for the Coons wrote to Group Health, advising that he was representing the Coons in connection with a medical malpractice claim against the Everett Clinic for injuries he sustained from complications during the knee surgery procedure. He stated that the Clinic was disputing both negligence and causation. He requested that Group Health provide a breakdown of its "subrogation lien" for benefits it had paid relating to this claim. Group Health wrote back, including an itemized list of providers and expenses that had been covered. Group Health asked to be kept informed of settlement negotiations and to be contacted before final settlement "to confirm Group Health's subrogation amount."

¶ 3 The Clinic was unable to determine the cause of the infection, and the Coons likewise, despite considerable effort, could not identify a theory of negligence and causation that would support a malpractice lawsuit against the Clinic. The Clinic voluntarily paid the Coons over $300,000 to help with medical expenses, wage loss, travel and accommodation expenses (the amputation

App. A

occurred out of state), and other expenses. The Clinic also asked the Coons to participate in mediation *908 to resolve any claim by the Coons for additional compensation.

¶ 4 A declaration from attorney Todd Gardner, submitted to the trial court by the Coons, suggests a possible motivation for the mediation request:

> It appears that there were factors that motivated The Everett Clinic to enter into pre-litigation negotiations in this case that were not centered on traditional assessments of liability and damages. It appears from the correspondence I have reviewed, that The Everett Clinic targeted this case as the type of case they would try to resolve before litigation was filed under a new program designed to reduce litigation filings and provide some level of compensation to patients who have suffered grievous injuries on their watch. This provided an opening for plaintiffs to mediate the claim with The Everett Clinic without the need for filing litigation.

¶ 5 Before the mediation, both the Coons' lawyer and the Clinic's lawyer sent letters to the mediator. Each provided background on Coon's injury and discussed that party's view of the case. The letter from Coons' counsel explained that no lawsuit had been filed: "this is an attempt at a pre-litigation resolution of the claim." The Clinic had "initiated the resolution effort":

> The Everett Clinic and its insurer initiated the resolution effort before I became involved. They have been very cooperative in helping Mr. and Mrs. Coon financially to deal with the consequences of his injury, including making monthly payments to help Mr. Coon hire people to assist in running his lawn care and landscaping business. The Coons very much appreciate that help.

Counsel went on to explain that he had not established a theory of liability:

> We have consulted with several liability experts, including an orthopedic surgeon, an orthopedic infectious disease expert, a hospital-infection expert, and an expert in operating room construction and ventilation systems. ... I also had an extensive telephone conference with Dr. Robert Trousdale, the orthopedic surgeon most closely involved with Joel's care at the Mayo Clinic [where the amputation occurred]. At this point, we have several hypothetical theories about how the fungal infection was acquired by Joel. However, without extensive discovery we are not able to pin-point a specific explanation of how this happened. Basically, at this point we have a *res ipsa loquitur* case.

¶ 6 According to the letter, Dr. Trousdale had suggested a possible liability theory, that fungal spores were tracked into the operating room "by a provider, possibly on the sole of a shoe." Dr. Trousdale "said that this kind of fungal infection would not ordinarily occur if appropriate sterile techniques and procedures were followed and the positive pressure ventilation system was designed and operating properly."

¶ 7 The letter described how Coon's amputation had impacted him and his family. The injury interfered with Coon's ability to operate his business and engage in the outdoor activities he had previously enjoyed. His claimed damages included $2 million in future care costs and $7 million in future economic loss. The letter made this statement about noneconomic damages: "Joel and Lori would present very well to a jury, and I have no doubt that any award for the non-economic impact of this injury would be for many millions of dollars."

¶ 8 The letter from the Clinic's counsel explained that the fungal infection acquired by Coon was "extremely rare, aggressive, and resistant to most known and FDA-approved antifungal agents." After an "extensive review," the Clinic was still "unable to find a definite source or

cause" of Coon's infection. As part of its review, the Clinic had consulted with experts who determined that the doctors who performed Coon's surgery met or exceeded the standard of care. The Clinic had determined it was "unlikely" that the infection was caused by conditions in the operating room.

¶ 9 In view of the fact that neither the Clinic nor the Coons could determine what caused the infection, the Clinic's lawyer suggested that the Coons would face difficulty proving liability:

> ***909** The parties have agreed to mediation in the hope of reaching a final settlement without the need for litigation. TEC [the Everett Clinic], however, is concerned that the Coons' expectations for settlement may not prove to be realistic. TEC believes that the Coons may not fully appreciate the difficulty they face in trying to prove, to a reasonable degree of medical probability, how the infection occurred, its source or cause, or what, if any, specific precautions that allegedly should have been taken but were not taken would have prevented the infection from occurring. The damages the Coons are seeking should be significantly discounted to account for the difficulties of proof of liability and causation that they face.
>
> ....
>
> Given the difficulty in identifying, more probably than not, the source of the SP [Scedisporium prolificans] spores, it is also difficult to establish more probably than not that any additional precautions could have been taken (that should have been taken) that would have prevented Mr. Coon's SP infection. The simple fact remains that this exceedingly rare SP infection is so highly resistant to most, if not all, readily available anti-fungal agents that it is unlikely that any customarily-employed infection control procedure would have killed the SP and prevented the infection.

¶ 10 Counsel described the Coons' estimated damages as "over-inflated." The Clinic was "not prepared to acquiesce" in those estimates.

¶ 11 The mediation resulted in a settlement: the Clinic agreed to pay the Coons $2 million in exchange for their agreement to fully release the Clinic from any claims. According to the parties' appellate briefing, $2 million was less than the Clinic's insurance policy limits.

¶ 12 Group Health's insurance contract provided it with "Subrogation and Reimbursement Rights" if the Coons received funds from another source:

> If GHO [Group Health Options, Inc.] provides benefits under this Agreement for the treatment of the injury or illness, GHO will be subrogated to any rights that the Member may have to recover compensation or damages related to the injury or illness and the Member shall reimburse GHO for all benefits provided, from any amounts the Member received or is entitled to receive from any source on account of such injury or illness, whether by suit, settlement, or otherwise. This section VII.B more fully describes GHO's subrogation and reimbursement rights.

¶ 13 A later paragraph in the same section contained the fuller description of these rights, and it made Group Health's right of subrogation conditional upon the injury being "caused by a third party":

> If the Injured Person's injuries were caused by a third party giving rise to a claim of legal liability against the third party and/or payment by the third party to the Injured Person and/or a settlement between the third party and the Injured Person, GHO shall have the right to recover GHO's Medical Expenses from any source available to the Injured Person as a result of the events causing the injury, including but not limited to funds available through applicable third party liability coverage and uninsured/underinsured motorist coverage. This right is commonly referred to as "subrogation." GHO shall be subrogated to and may enforce all rights of the Injured Person to

> the full extent of GHO's Medical Expenses.

¶ 14 And the next contract paragraph limited Group Health's rights: "GHO's subrogation and reimbursement rights shall be limited to the excess of the amount required to fully compensate the Injured Person for the loss sustained, including general damages."

¶ 15 Finally, the contract also prohibited the Coons from prejudicing Group Health's contract rights:

> The Injured Person and his/her agents shall do nothing to prejudice GHO's subrogation and reimbursement rights. The Injured Person shall promptly notify GHO of any tentative settlement with a third party and shall not settle a claim without protecting GHO's interest. If the Injured Person fails to cooperate fully with GHO in ***910** recovery of GHO's Medical Expenses, the Injured Person shall be responsible for directly reimbursing GHO for 100% of GHO's Medical Expenses.

¶ 16 On April 28, 2014, three days after the Clinic settlement, the Coons' lawyer first notified Group Health about it. He described the settlement amount as "woefully inadequate" but explained that "we felt that the chances of proving liability" were "very small":

> The claim against the Everett Clinic by Mr. and Mrs. Coon has settled for $2,000,000. This amount is woefully inadequate to cover the actual damages suffered by Mr. Coon, his wife, and their two children. Even without allocating a portion of the settlement to claims of Mrs. Coon and the children (who all were required by the Everett Clinic to release their claims as part of the settlement), Mr. Coon has not even come close to being "made whole"....
>
> The reality is that we felt that the chances of proving liability on the part of the Everett Clinic for the fungal infection and its consequences were very small. The particular fungal organism is extremely rare and has been implicated in orthopedic surgeries on only a handful of occasions throughout the world. We consulted with nationally-known orthopedic and infectious disease experts and were unable to obtain expert medical support for a claim.

The letter concluded, "Under these circumstances, we are requesting that Group Health waive its subrogation claim."

¶ 17 Group Health did not respond. The Coons' lawyer sent a follow-up letter three weeks later, May 19, 2014. It said, "We have been holding back the lien amount in my firm's trust account. Please be advised that we will disburse the remaining settlement funds on May 30, 2014." When no response was received by 4:00 p.m. on that date, the funds were disbursed.

¶ 18 By letters dated May 30 and June 3, counsel for Group Health declined to waive the company's interest in the settlement funds. The June 3 letter said, "If Nathaniel J Coon felt that he would not be fully compensated by the $2,000,000.00, he was under no obligation to accept it."

¶ 19 In a response letter dated June 9, 2014, the Coons' lawyer explained that his clients accepted $2 million because of proof problems, not because that amount fully compensated them:

> As you know from reading the mediation letters of both the claimant and defendant, *no one could determine how Mr. Coon ended up with a very rare fungal infection from his [knee] surgery, let alone whether anyone* was *negligent in allowing that to happen. We had consulted with* a *number of potential experts, and were unable to come up with a viable theory or with expert support for a claim of negligence.* Had we been able to do so, I would have strongly recommended that the Coons not settle for the amount ultimately offered, because it was far below any reasonable prediction of a jury verdict range.
>
> ....
>
> The settlement occurred before a lawsuit was filed. Mr. Coon had no option but to accept the very low settlement offer, given the fact a malpractice lawsuit could not be filed in the absence of a viable theory of liability and expert medical support for that theory. *As an attorney, I could not ethically file such a lawsuit, and unless discovery in the lawsuit produced different facts and evidence, a motion for summary judgment likely would have resulted in dismissal.*

(Emphasis added.) Counsel again requested that Group Health waive its stated subrogation lien.

¶ 20 The parties could not resolve the matter, and Group Health filed this lawsuit. Its amended complaint for declaratory relief requested a determination of Group Health's subrogation rights and judgment against the Coons for $372,634 plus interest and attorney fees.

¶ 21 Both parties moved for summary judgment. Group Health asserted there was no question that it held contractual subrogation rights under its policy with the Coons. Group Health pointed out that the Coons had collected "from the alleged tortfeasor" more *911 than six times the amount of their medical expenses for a claim that had no viable threat of liability and no expert medical support. "To allow Defendant to retain the full proceeds of the settlement he received from the alleged tortfeasor, as well as the full amount that GHC expended on his behalf is the epitome of a double recovery." Group Health argued that it was entitled to summary judgment for the additional reason that the Coons breached their insurance contract when they failed to provide prompt notification of the settlement and failed to hold the settlement funds in trust pending determination of Group Health's subrogation and reimbursement rights. Group Health asserted, "Defendants accepted a settlement of a doubtful and disputed claim for less than policy limits. The Defendants are unable to show that the settlement did not fully compensate them for the injury." Group Health sought an order "declaring that it has a valid and enforceable subrogation claim" and ordering the Coons to pay Group Health "the amount of its outstanding subrogation claim."

¶ 22 The Coons argued, in response, that they were not "made whole" by the settlement; thus, Group Health was not entitled to reimbursement because the "condition precedent" of full compensation had not occurred. [1] They attached declarations submitted by two medical malpractice lawyers (Todd Gardner and Kathy Cochran), opining that the settlement award did not amount to full compensation. The Coons' motion for summary judgment sought dismissal of all claims.

1 The Coons did not ask the trial court to reduce any reimbursement the trial court found that they owed Group Health by its proportionate share of attorney fees incurred to obtain the Clinic settlement. See Mahler v. Szucs, 135 Wash.2d 398, 429, 957 P.2d 632 (1998). However, we note that Group Health's June 3 letter offered to "participate in an equitable and proportionate share of attorney fees and costs."

¶ 23 The court granted summary judgment to Group Health, concluding, "By settling for less than the available insurance policy limits in consideration of Defendants' evidence of damages versus risk of failure at trial, NATHANIAL COON and LORI COON's agreement to settle constitutes full compensation for their damages as a matter of law."

¶ 24 The Coons appeal from that decision. They have not appealed the separate order denying their motion for summary judgment.

ANALYSIS

¶ 25 This court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. [2] We construe all facts and reasonable inferences from them in the light most favorable to the nonmoving party—here, the Coons. [3] Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. [4]

2 Brown v. Snohomish County Physicians Corp., 120 Wash.2d 747, 752, 845 P.2d 334 (1993).

3 Loc Thien Truong v. Allstate Prop. & Cas. Ins. Co., 151 Wash. App. 195, 201, 211 P.3d 430 (2009).

4 CR 56(c).

¶ 26 The Coons' position on appeal is the same as below: Group Health is not entitled to reimbursement because the settlement did not result in full compensation. They claim the settlement covered only a portion of their general damages and none of their special damages.

¶ 27 The Coons rely exclusively on an insured party's right to full compensation that arises from the common law. They do not rely on the contract language limiting Group Health's rights "to the excess of the amount required to fully compensate the Injured Person for the loss sustained, including general damages." At oral argument, the Coons' counsel expressly disavowed any reliance on

this provision. For this reason, we do not consider its effect on Group Health's claim.

¶ 28 Group Health responds, first, that the appeal is moot because the Coons "materially breached" the insurance contract: "[a] party is barred from enforcing a contract that it has materially breached." [5] Group Health alleges that the Coons breached the contract by failing to provide adequate notice of the ***912** settlement, failing to protect Group Health's subrogation interests, refusing to provide reimbursement, and disbursing the funds counsel held in trust. When the trial court denied the Coons' summary judgment motion, it found as an undisputed fact that the Coons did not consult Group Health before settling their claim against the Everett Clinic.

5 Rosen v. Ascentry Techs., Inc., 143 Wash. App. 364, 369, 177 P.3d 765 (2008).

¶ 29 Alternatively, Group Health contends that the common law "made whole" rule does not apply here because there is no third partly liable to the Coons, relying on Cook v. USAA Casualty Insurance Co. [6] Group Health appropriately does not defend the trial court's decision on the basis that the Clinic settlement made the Coons whole. [7]

6 121 Wash. App. 844, 847, 90 P.3d 1154 (2004).

7 See Liberty Mut. Ins. Co. v. Tripp, 144 Wash.2d 1, 22, 25 P.3d 997 (2001) (no precedent for the position that settlement for less than the tortfeasor's policy limits raises a presumption of full compensation).

Breach of Contract

¶ 30 When an insured breaches an insurance contract by failing to give the insurance company notice of a settlement, the law provides the company a remedy only if it can show prejudice. [8] Here, undisputed facts establish that the Coons breached the notice requirements of the contract. But Group Health has not established by undisputed facts any prejudice caused by this breach. Group Health merely makes a conclusory allegation that it was prejudiced by the release of the settlement funds from the Coons' attorney's trust account.

8 Tripp, 144 Wash.2d at 16, 25 P.3d 997.

¶ 31 In view of Group Health's position that the Clinic had no liability to Coons, one could reasonably infer that the Coons' settlement did not impair any claim that Group Health might otherwise have pursued against the Clinic. Also, one can reasonably infer from Group Health's payment of Clinic charges that the Clinic had knowledge of at least an equitable reimbursement claim at the time of settlement. This may preclude the release signed by the Coons from extinguishing Group Health's direct claim against the Clinic. [9] Thus, the Coons can show at least a factual dispute about prejudice to Group Health. So we reject Group Health's claim that the Coons' breach makes this appeal moot.

9 Leader Nat'l Ins. Co. v. Torres, 113 Wash.2d 366, 373-74, 779 P.2d 722 (1989).

Applicability of the "Made Whole" Doctrine

¶ 32 Group Health relies exclusively on the provisions of its contract, and not any common law right of reimbursement, to support its claim. In Thiringer v. American Motors Insurance Co., [10] the Washington Supreme Court adopted a "made whole" rule that limits this contractual right:

> 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 a tort-feasor responsible for the 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.

10 91 Wash.2d 215, 219, 588 P.2d 191 (1978).

¶ 33 Group Health claims this rule does not apply in this case because there is no third party liable to the Coons, citing Cook. In Cook, this court affirmed the summary judgment dismissal of the Cooks' claims against its insurer, USAA. We held that the Thiringer "made whole" rule does not apply when the insured has no basis in contract or tort for a recovery from a third party. [11]

11 Cook, 121 Wash. App. at 849, 90 P.3d 1154.

¶ 34 The reply brief of the Coons points out that Group Health is taking contradictory positions when it argues that the absence of a liable tortfeasor prevents the Coons from invoking the "made whole" principle of Thiringer. In oral argument before this court, the Coons described Group Health's argument as "a two-edged sword." They argued that if the absence of a liable tortfeasor prevents application of the "made whole" rule, then it also prevents Group Health from asserting a right of subrogation.

¶ 35 "Generally, subrogation allows the insurer to be substituted to the rights of ***913** the insured and pursue recovery directly *from the tortfeasor* or, when the insured recovers *from the tortfeasor,* to be reimbursed from that recovery." [12] Of the three elements our Supreme Court considers necessary for legal subrogation, the first is " 'the existence of a debt or obligation for which a party, other than the subrogee, is primarily liable.' " [13] The elements of legal subrogation set forth in Appleman's treatise include "existing and assignable claims held by the policyholder *against a tortfeasor*" and "justice requires that *the tortfeasor* pay for the loss." [14]

12 Paulsen v. Dep't of Soc. & Health Servs., 78 Wash. App. 665, 668, 898 P.2d 353 (1995) (emphasis added).

13 Livingston v. Shelton, 85 Wash.2d 615, 618-19, 537 P.2d 774 (1975) (quoting Lawyers Title Ins. Co. v. Edmar Constr. Co., 294 A.2d 865, 869 (D.C. Ct. App. 1972)).

14 5 JEFFREY E. THOMAS & SUSAN LYONS, NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 49.02[3][b] (2018) (emphasis added).

¶ 36 Group Health is bound by these principles of subrogation. There is no statutory lien (like the one considered in Paulsen) to displace them. The policy itself, in the paragraph that fully describes the insurer's subrogation rights, states that Group Health has a right to recover its medical expenses from any source available to the injured person "as a result of the events *causing the injury."* (Emphasis added.) Group Health consistently refers to its claim as a subrogation lien. Its claim for relief seeks a declaration that it has "a valid and enforceable subrogation claim." If Group Health cannot establish the existence of a negligent third party who caused its insured to incur medical expenses, this is not a subrogation case at all.

¶ 37 The Coons, the Clinic, and everyone else involved in this litigation have been unable to develop a viable theory of liability against any entity. If this were summary judgment in a malpractice lawsuit by the Coons against the Clinic or its doctors, the Coons would lose because they did not present evidence of negligence and causation. But this is summary judgment in a declaratory action brought by Group Health against the Coons to recover Group Health's alleged subrogation lien. Group Health has the burden of proving there is a valid subrogation lien. The summary judgment stage is past the point when speculation will suffice. [15] Because Group Health has not established that the Coons have a nonspeculative claim against a tortfeasor, it has no right to relief on summary judgment.

15 Marshall v. Bally's Pacwest, Inc., 94 Wash. App. 372, 377, 972 P.2d 475 (1999).

¶ 38 Both parties have briefed this appeal primarily on the assumption that this is a subrogation case. Group Health claims that under Cook, the absence of a liable tortfeasor means that the "made whole" rule does not apply. Assuming for the sake of argument that Group Health has the right to assert a subrogation claim even when no liable tortfeasor has been identified, we nevertheless conclude that Group Health is not entitled to relief on summary judgment. Group Health reads Cook too broadly.

¶ 39 Cook involved unusual facts. [16] The Cooks suffered losses caused by a house fire that started in a gas water heater flue during construction. They sued Lavine's, the company that installed the flue, and Butler, their house builder. They also separately sued their insurance company, USAA, over coverage for this loss. The Cooks and USAA settled. USAA paid the Cooks its policy limits and retained a subrogation interest in the Cooks' claims against Lavine's and Butler. The Cooks' claimed losses exceeded the amount USAA paid them. So USAA retained separate counsel to appear and represent it against Lavine's and Butler.

16 Cook, 121 Wash. App. at 849, 90 P.3d 1154.

¶ 40 Butler settled. The Cooks and USAA presented different versions of the settlement but agreed that USAA received $25,000 and Butler made its expert available to the Cooks for trial against Lavine's.

After the Cooks rejected Lavine's settlement offer, USAA settled with Lavine's by selling it USAA's subrogation interest. The Cooks agreed that this settlement did not affect its claims against Lavine's. The Cooks proceeded to trial against Lavine's and lost; a ***914** jury returned a defense verdict. Then the Cooks demanded that USAA "make them whole for their uninsured losses" by paying them a portion of the funds that USAA received from Lavine's and Butler. When USAA refused, the Cooks sued, claiming that under Thiringer. USAA was not entitled to retain any subrogation settlement funds until the Cooks were fully compensated.[17] The trial court properly dismissed the suit on summary judgment, and we affirmed because, in view of the defense verdict against Lavine's, "[s]ince the Cooks did not suffer compensable injury, they bear the risk of loss."[18]

17 Cook, 121 Wash. App. at 847, 90 P.3d 1154.

18 Cook, 121 Wash. App. at 849, 90 P.3d 1154.

¶ 41 Several aspects of this case distinguish it from Cook. First, in Cook, a court had decided that the entity paying money to USAA had no liability to the Cooks before the Cooks demanded that USAA pay that money to them. USAA did nothing to interfere with the Cooks' pursuit of more money from Lavine's and Butler after they received from USAA the full amount available under its policy.

¶ 42 Here, no court had resolved the issue of the Clinic's liability to the Coons. For whatever reason, the Clinic was willing to pay the Coons $2 million to settle and avoid future litigation. The posture of the Coons, the Clinic, and Group Health is similar to that of an injured party, an alleged tortfeasor, and the injured party's insurance company in many personal injury settlements involving contested liability. In the absence of a judicial decision absolving the Clinic of liability, it is not clear that the weakness of the Coons' claims provides a basis for refusing to apply the Thiringer "made whole" rule. An insurance company that is pursuing its right of subrogation after settlement of a contested liability case should not be permitted to avoid application of the equities advanced by Thiringer merely by asserting that the alleged tortfeasor had no tort liability, especially when the absence of a liable tortfeasor suggests that the insurance company had no right of subrogation to begin with.

¶ 43 Second, the Cooks received the full benefit of their insurance policy, having received policy limits from USAA. Coons, by contrast, have not received policy limits. Refusing to apply Thiringer here would deprive the Coons of the full benefit of their Group Health policy when a substantial fact question exists about the extent to which they have been fully compensated for their losses.

¶ 44 Third, the Cooks tried to use Thiringer as a sword to recover from USAA monies that a court already determined that they had no legal right to recover from Lavine's. The Cooks rejected a settlement offer from Lavine's and proceeded to trial. When this choice produced no recovery, the Cooks sought to benefit from USAA's more successful litigation strategy and transfer the economic consequences of their choice to USAA, relying on Thiringer. which based its "made whole" rule on equitable principles. The law has long recognized that " 'he who seeks equity must do equity.' "[19] The Cooks did not. The Coons did not engage in any similar inequitable conduct.

19 Malo v. Anderson, 62 Wash.2d 813, 817, 384 P.2d 867 (1963) (quoting 2 JOHN NORTON POMEROY & SPENCER W. SYMONS, A TREATISE ON EQUITY JURISPRUDENCE § 385, at 52 (5th ed. 1941)).

¶ 45 For these reasons, Cook does not bar application of Thiringer in this case. The Coons have produced sufficient nonconclusory evidence to create a question of fact about whether their damages exceed the $2 million paid by the Clinic.

CONCLUSION

¶ 46 The trial court incorrectly concluded that Group Health has a valid and enforceable subrogation claim against the Coons. Group Health has not established the existence of a third party tortfeasor who can be made to take responsibility for the Coons' damages. Even assuming the "made whole" principle applies in this situation, it cannot be said that the Coons' agreement to settle with the Clinic for less than its policy limits resulted in full compensation for their damages as a matter of law. Because no court had found the absence of Clinic liability to the Coons for their losses, our decision in Cook ***915** does not bar application of Thiringer in this case. Because questions of fact exist about whether the Coons have received full compensation for their losses and whether their breach of the Group Health contract

prejudiced it, we reverse the trial court and remand for further proceedings consistent with this opinion.

WE CONCUR:

Verellen, J.

Becker, J.

All Citations

423 P.3d 906

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FILED
10/10/2018
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GROUP HEALTH COOPERATIVE, a Washington nonprofit corporation, Respondent, v. NATHANIEL COON and LORI COON, husband and wife, Appellants.	No. 76365-2-I ORDER DENYING MOTION FOR RECONSIDERATION

The respondent, Group Health Cooperative, having filed a motion for reconsideration herein, and the appellants, Nathaniel Coon and Lori Coon, having filed an answer thereto, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

Leach, J.
Judge

STAMPER RUBENS, P.S.

November 09, 2018 - 4:48 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	76365-2
Appellate Court Case Title:	Group Health Cooperative, Respondent v. Nathaniel Coon, et ux., Appellants
Superior Court Case Number:	16-2-01883-0

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