No. 101342-6

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 55585-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KAISER FOUNDATION HEALTH PLAN, INC., d/b/a KAISER FOUNDATION HEALTH PLAN, f/k/a GROUP HEALTH COOPERATIVE,,

Plaintiff/Respondent,

v.

KENNETH MAYLONE,

Defendants/Appellant.

RESPONDENT'S ANSWER TO APPELLANT'S PETITION FOR REVIEW

STAMPER RUBENS, P.S.

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I. IDENTITY OF RESPONDENT

The Responden,t Kaiser Foundation Health Plan (hereinafter "Kaiser") is a Washington nonprofit corporation providing healthcare services in the state of Washington.

II. CITATION TO COURT OF APPEALS DECISION

Kaiser Found. Health Plan, Inc. v. Maylone, No. 55585-9-II, 2022 WL 3754902, (Wash. Ct. App. Aug. 30, 2022).

III. STATEMENT OF THE ISSUE PRESENTED

Whether the Appellant met his burden under RAP 13.4(b) when Appellant fails to establish that a specific decision of this Court or the Court of Appeals is in conflict with the Court of Appeals' decision in this matter, fails to establish that this case involves a significant unresolved question of law under the Constitution of the State of Washington or of the United States, and fails to demonstrate that review should be granted as to an issue of substantial public interest.

IV. STATEMENT OF THE CASE

Respondent Kaiser Foundation Health Plan (hereinafter "Kaiser") is a Washington nonprofit corporation providing healthcare services in the state of Washington. CP 16. Kaiser agreed to provide medical coverage to Appellant Kenneth Maylone (hereinafter "Maylone") pursuant to his 2016 Prepaid Comprehensive Medical Plan (high and standard option) with a Point of Service product, and a high deductible health plan ("Medical Coverage Agreement"). CP 16-17. The Medical Coverage Agreement is governed by Federal Employees Health Benefit Act ("FEHBA"), a federal law authorizing the United States Office of Personnel Management ("OPM") to enter medical coverage agreements with private insurers on behalf of federal employees and their families. *Id.*

On or about March 18, 2016, Maylone was involved in a motor vehicle accident. CP 17. On or about April 5, 2016, Kaiser learned that Maylone was injured in the accident and issued a letter to Maylone explaining his benefits and Kaiser's rights to

subrogation and reimbursement, pursuant to the Medical Coverage Agreement. *Id.* Between March 18, 2016, and July 3, 2017, Kaiser paid a total of $157,265.92 for medical expenses related to Maylone's injuries in the accident. *Id.*

Maylone made a claim against his Uninsured Motorist (UIM) policy with The Hartford related to the March 18, 2016 accident. *Id.* By January 4, 2017, The Hartford was prepared to offer Maylone his full policy limits to resolve that claim. CP 333.

The Medical Coverage Agreement provides that Kaiser is entitled to be reimbursed for all medical expenses it paid from any settlement funds Maylone receives from any third party payor. CP 16-17, 24. The MCA gives Kaiser the same reimbursement right even against funds received by Maylone from his own insurance policy regardless of whether he has been fully compensated and without deducting fees and costs:

> **When Others Are Responsible for Injuries**
>
> **Our right to pursue and receive subrogation and reimbursement recoveries is a condition of, and a limitation on, the nature of benefits or benefit**

payments and on the provision of benefits under our coverage.

If you have received benefits or benefit payments as a result of an injury or illness **and you** or your representatives, heirs, administrators, successors, or assignees **receive payment from** any party that may be liable, a third party's insurance policies, **your own insurance policies,** or a worker's compensation program or policy, **you must reimburse [Kaiser] out of that payment. Our right of reimbursement extends to any payment received by settlement, judgment, or otherwise.**

We are entitled to reimbursement to the extent of the benefits we have paid or provided in connection with your injury or illness. However, we will cover the cost of treatment that exceeds the amount of the payment you received.

Reimbursement to [Kaiser] out of the payment shall take first priority (before any of the rights of any other parties are honored) and is not impacted by how the judgment, settlement, or other recovery is characterized, designated, or apportioned. **Our right of reimbursement is not subject to reduction based on attorney fees or costs under the "common fund" doctrine and is fully enforceable regardless of whether you are "made whole" or fully compensated for the amount of damages claimed.**

[Kaiser] may, at [its] option, choose to exercise [its] right of subrogation and pursue a recovery from any liable party as successor to your rights.

If you do pursue a claim or case related to your injury or illness, you must promptly notify us

and cooperate with our reimbursement or subrogation efforts.

CP 24.

On August 31, 2017, Kaiser sent Maylone's attorney, Paul Loudenslager, a Case Itemization Report, listing the payments Kaiser made to medical providers on behalf of Maylone for medical treatment for his injuries from the motor vehicle accident. CP 17-18, 30-39. Along with this Report, Kaiser requested that Mr. Loudenslager keep Kaiser informed of any settlement negotiations and included instructions to forward payment to Kaiser upon receiving any settlement. CP 31.

From that time forward, Kaiser and Mr. Loudenslager exchanged a number of letters with regard to Maylone's claim against his UIM carrier. Throughout this correspondence, Kaiser at all times reiterated its reimbursement and subrogation rights and interests. At various points during these communications, Mr. Loudenslager stated that there was no reason for Maylone to resolve his claim with his UIM carrier if the entire settlement

would be subject to Kaiser's right to reimbursement/subrogation. CP 18-19, *Id.* at ¶ 10, 41-43; *see also* CP 20, 54. This representation gave the clear implication that, unless Kaiser reduced its reimbursement recovery, then Maylone would simply refrain from settling with his UIM carrier with the specific, bad faith intention of preventing Kaiser from being reimbursed at all.

On February 1, 2018, Kaiser sent a letter to Mr. Loudenslager reiterating and explaining that federal law supports Kaiser's subrogation and reimbursement rights under the FEHB Program. CP 20, 61-63. Kaiser and Mr. Loudenslager continued to correspond throughout 2018 and 2019. CP 21-21. This culminated in a letter from Mr. Loudenslager on February 22, 2019, again disputing Kaiser's right to reimbursement and subrogation; in that same letter, he again reiterated the "very real possibility...that Kaiser will collect nothing as Mr. Maylone has no incentive to consummate any settlement with his UIM insurer." CP 20-21, 65-68.

For more than three years, Kaiser communicated with Maylone and, later, Mr. Loudenslager, seeking to enforce its subrogation and reimbursement rights related to Maylone's injury and UIM claim. On June 14, 2019, Maylone notified Kaiser by a telephone call that he had received a settlement check from The Hartford. On June 17, 2019, during another phone call, he confirmed that the settlement check amount was $100,000 and stated that, unless Kaiser reduced its reimbursement claim, he would choose to frame the check and ensure that no one would get a dime. CP 21. The settlement check from The Hartford was made payable jointly to Kaiser and to Maylone and his spouse. *Id.* After Maylone's continued disregard for his duties and Kaiser's subrogation and reimbursement rights, Kaiser filed an action on December 18, 2019, seeking declaratory relief as to its rights under the Medical Coverage Agreement. CP 1. Maylone, after requesting an extension of time to file his Answer, for the first time attempted to rescind his agreement with The Hartford,

and subsequently filed a counterclaim against Kaiser, alleging intentional interference with a contractual relationship. CP 6, 134, 236.

The Superior Court granted summary judgment in favor of Kaiser, dismissing all of Maylone's claims and ordering payment of the $100,000 that Maylone was paid by the Hartford. CP 312-316.

Maylone subsequently appealed the Superior Court's decision to the Court of Appeals. The Court of Appeals held that:

> ...because FEHBA's right to reimbursement preempts state law, Kaiser has a right to reimbursement from Maylone for UIM proceeds. We also hold that Kaiser's policy was not unconscionable and Kaiser is not liable for tortious interference with a contract. However, we determine that Maylone never received settlement proceeds from the Hartford and that there is a genuine issue of material fact as to whether the settlement agreement was effectively rescinded. Accordingly, we reverse the superior court's entry of summary judgment for Kaiser and remand to the superior court for further proceedings consistent with this opinion.

Kaiser Found. Health Plan, Inc. v. Maylone, No. 55585-9-II, 2022 WL 3754902, at *1 (Wash. Ct. App. Aug. 30, 2022). Maylone now petitions this Court for review. He argues that there is no contractual issue to be considered by the court at all given his attempt at rescinding his settlement agreement with The Hartford, despite the fact that Kaiser's Complaint seeks interpretation of both the reimbursement and subrogation provisions of its contract. Maylone further argues that FEHBA preemption does not apply to the MCA at issue despite clear federal precedent. Finally, Maylone asserts that review is appropriate as to his claim of tortious interference with a contract.d

V. ARGUMENT

A. Standard of Review

Maylone seeks review of the Court of Appeals decision under RAP 13.4(b). To obtain review under RAP 13.4(b), Plaintiffs must persuade this Court that the Court of Appeals' decision conflicts with a decision of this Court or another

division of the Court of Appeals, that it involves a significant unresolved question of law under the Constitution of the State of Washington or of the United States is involved, or that it presents an issue of substantial public interest. *Id.*, *see also*, *In re Pers. Restraint of Coats*, 173 Wn.2d 1213, 132-33, 267 P.3d 324 (2011).

Maylone cannot meet the criteria of RAP 13.4(b). In fact, Maylone fails even to acknowledge the standard of review at any point in his briefing. He does not identify any specific decisions of this Court or the Court of Appeals that allegedly conflict with the Court of Appeals decision. He does not identify any unresolved question of law under the Constitution of the State of Washington or of the United States which is involved in this case. Finally, he does not identify any broad issue of public interest, instead merely citing his own individual interests in this case and asserting that his interests are automatically related to a public interest in negotiating contracts.. Notably, Maylone wholly

ignores the federal case that does, in fact, apply to the issues raised on appeal: *Coventry Health Care of Missouri, Inc. v. Nevils,* 581 U.S. ____, 137 S. Ct. 1190, 1198-99 (2017). The *Coventry* decision definitively affirmed that the Federal Employee Health Benefit Act ("FEHBA") preempts all state laws whether case law or statute which would otherwise operate to prevent or limit a FEHBA provider from pursuing subrogation or reimbursement. *Id.* at 1198. The fact that Maylone is displeased with the application of *Coventry* and FEHBA to his situation does not make this case appropriate for review in this Court.

B. The Court of Appeals did not insert new terms into the MCA.

Maylone claims that the Court of Appeals improperly inserted a new contractual term into the MCA, arguing that they should have found that there is no "reimbursement right" and instructed wholesale dismissal of Kaiser's declaratory judgment action. This argument, however, ignores that Kaiser's complaint

specifically asked that the Superior Court to determine Kaiser's "...right to enforce the subrogation/reimbursement in [Maylone's] Plan and recover medical expenses paid on behalf of [Maylone]." CP 2. Despite the fact that Maylone, after being served with the Complaint, for the first time sought to rescind his binding agreement with The Hartford – this section of the MCA still requires interpretation by the courts. Thus, both the Superior Court and the Court of Appeals acted appropriately by declining to dismiss Kaiser's declaratory judgment action.

Although Maylone continues to argue that his claim of interference with a contract is "undisputed" – it plainly is not. Kaiser has, at all times, maintained that there is no evidence of wrongful interference with a contract, and that Maylone has failed to prove the necessary elements of his case. The Court of Appeals also recognized that failure, as discussed *infra*. Notably, Maylone actually received a check from The Hartford in the amount his full policy limits – thus ensuring that he received the

benefit of his contract with the Hartford. Maylone chose to send that check back for the sole bad-faith reason that he did not want to be held to the subrogation and reimbursement provisions of his MCA. Maylone cannot establish damages against Kaiser by refusing to comply with not one, but two separate contracts. The fact that he is displeased with the application of FEHBA to his matter does not change that reality.

C. The Court of Appeals decision is consistent with applicable state and federal precedent.

Maylone continues to assert that he did not receive payment of settlement funds from the Hartford based on the fact that he made the unilateral and bad-faith choice to return the Hartford's check after the instant litigation had already commenced. *See* CP 134 (letter to the Hartford dated February 10, 2020); *compare to* CP 1 (Complaint filed December 18, 2019). Maylone continues to argue that he should be permitted benefit from his own bad faith actions, but wholly ignores the fact that his MCA covers both the issues of subrogation and

reimbursement, both of which were pled by Kaiser in this case. CP 2-3.

Maylone improperly focuses only on language pertaining to reimbursement after receipt of payment, while ignoring that applicable regulations apply in both the context of subrogation and reimbursement. Even to the extent that Maylone asserts that he has rescinded his settlement agreement with the Hartford – which is and has at all times been disputed, and which the Court of Appeals found to be a question of fact – Kaiser's declaratory judgment action would still stand insofar as they would have a right to pursue subrogation and to have the Supreme Court issue a decision to interpret their contractual rights.

In the event that the Superior Court may find that Maylone did not validly rescind the agreement with the Hartford, the Court of Appeals is correct to recognize that the Superior Court has the right to order that upon receipt of funds, Maylone would be

required to make payment in full to Kaiser.[1] A declaratory judgment act, at its core, exists to provide a contract interpretation – it is distinct from a breach of contract or other claim in that it seeks for the court to resolve questions of contract interpretation. RCW 7.24.020. There need not be an actual breach for the Court to make determinations as to each party's contractual rights. RCW 7.24.030. Thus, if the Superior Court found that the settlement agreement with the Hartford were validly rescinded, it would have the right to determine what obligations each party has with respect to subrogation; by contrast, if it finds there was no rescission, then the Court has the right to interpret the contract and state what must be done with the settlement funds upon receipt. These issues are permitted to be resolved before Maylone takes action to breach the MCA. RCW 7.24.030.

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[1] Kaiser notes that on March 12, 2021, the Superior Court of Washington for Clark County did, in fact, receive tender of funds from the Hartford into the court registry.

D. The Court of Appeals decision does not conflict with any public policy or any appellate case as to intentional interference with a contract.

Again, Maylone ignores the Complaint in this case when asserting that Kaiser has not asserted a right to subrogation. The Complaint clearly asks the Superior Court to determine each party's rights as pertain to **both** the subrogation and reimbursement terms of the MCA. CP 2-3.

While Maylone focuses almost exclusively on his claim that Kaiser communicated improperly with the Hartford, he ignores entirely the core point of the Court of Appeals decision:

> There is no evidence in the record of an improper purpose for Kaiser's action or that it employed improper means; there is no evidence of bad faith. Kaiser paid Maylone's medical bills resulting from Maylone's car accident. Kaiser merely informed Maylone and the Hartford of its right to reimbursement and requested that proceeds from a UIM settlement be made out to Kaiser.
>
> But critically, Maylone has failed to show any damages resulting from Kaiser's alleged interference. Under Maylone's medical coverage agreement with Kaiser, he was required to pay the entire settlement amount to Kaiser upon receipt from the Hartford. The Hartford's decision to make

> the proceeds payable to both Maylone and Kaiser did not result in any loss to Maylone because he would not have been permitted to keep the proceeds in any event.
>
> Because Maylone has failed to show intentional interference with an improper objective or the use of a wrongful means and because Maylone cannot show any damages, we determine there was no question of material fact and the superior court did not err in granting summary judgment on Kaiser's behalf in regard to the tortious interference with contract claim.

Kaiser Found. Health Plan, Inc. v. Maylone, No. 55585-9-II, 2022 WL 3754902, at *11 (Wash. Ct. App. Aug. 30, 2022).

In order to prove tortious interference with a contractual relationship, Maylone must produce evidence sufficient to prove the following: (1) the existence of a valid contractual relationship; (2) that Kaiser was aware of and intentionally interfered with that relationship; (3) that the contract was breached as a result of Kaiser's actions; (4) that Kaiser had an improper purpose or used improper means, which resulted in the interference with the contractual relationship; and (5) that Maylone suffered actual damage as a result of Kaiser's actions.

Eugster v. City of Spokane, 121 Wn. App. 799, 811, 91 P.3d 117 (2004).

Maylone does not dispute that he failed to show an improper purpose; he does not dispute that he failed to show any actual damages whatsoever as a result of Kaiser's actions. He has failed to provide any evidence that there is a substantial public interest compelling review of this case when Maylone has plainly failed to meet two essential elements of his claim. Accordingly, he cannot meet the standards of RAP 13.4(b).

E. Preemption pursuant to FEHBA is well established by the United States Supreme Court.

FEHBA authorizes the Office of Personnel Management ("OPM") to enter into contracts with private medical coverage providers to administer benefit plans for federal employees and their dependents. 5 U.S.C. § 8901 *et. seq.* FEHBA also provides that, where a medical coverage agreement is entered pursuant to FEHBA, any provisions therein which "relate to the nature, provision, or extent of coverage or benefits (including payments

with respect to benefits) shall supersede and preempt any state or local law, or any regulation issued thereunder, which relates to health insurance or plans." 5 U.S.C. § 8902(m)(1).

It is undisputed in this matter that the medical coverage agreement at issue was entered pursuant to FEHBA. Initially, after FEHBA was enacted, states "[were] not allowing FEHB Program carriers to collect subrogation and/or reimbursement recoveries due to state law that either prohibit[ed] or limit[ed]" recovery. Letter No. 2012-18, U.S. Office of Personnel Management (June 18, 2012). In an effort to provide further guidance, the OPM issued a letter advising that "the [FEHBA] preempts state laws prohibiting or limiting subrogation and reimbursement. As a result, FEHB Program carriers are entitled to receive these recoveries ***regardless of state law***." *Id.* (emphasis added). This position was then memorialized at 5 C.F.R. § 890.106(a), which states: "All health benefit plan contracts ***shall provide*** that the [FEHB] carrier is entitled to

pursue subrogation and reimbursement recoveries...." (emphasis added). Giving due deference to the OPM's reading of FEHBA, the United States Supreme Court has affirmed that federal law preempts state law regarding FEHB carriers' rights to subrogation and reimbursement. *Coventry Health Care of Missouri, Inc. v. Nevils,* 581 U.S. ____, 137 S. Ct. 1190, 1198-99 (2017). The *Coventry* opinion concludes that state law – including case law on the common fund and made whole doctrines – must yield to FEHBA contracts' subrogation provisions. *Id.* at 1198.

Maylone argues that FEHBA preemption does not apply to this case, making the strained argument that it does not apply when the insured's recovery comes through an Uninsured Motorist ("UIM") policy. This is not the law. It is true that Washington has a strong public policy in favor of drivers having uninsured motorist coverage. His briefing isolates statutes that on their face detail the steps auto insurers must follow when

establishing a new policy or renewing an auto insurance policy. *See* RCW 48.22.030. Nothing in the UIM statute, however, even begins to suggest that it limits medical insurers from seeking reimbursement through a UIM recovery. On its face, it is simply a procedural requirement that auto insurers must adhere to.

These procedural requirements, do not and cannot override the right of a FEHBA provider to enforce its reimbursement and subrogation rights. There is, in fact, nothing in the UIM statute that in any way prohibits subrogation and reimbursement of medical expenses pursuant to an MCA. Even to the extent that Maylone attempts to interpret RCW 48.22.030 to prevent reimbursement through a UIM policy, he is in fact conceding that they relate to health insurance or plans, because he seeks to have this statute prevent subrogation and reimbursement under FEHBA. The *Coventry* court has made it explicitly clear that this is not permitted, stating: "We hold...that contractual subrogation and reimbursement prescriptions plainly

'relate to ... payments with respect to benefits,' § 8902(m)(1) ; therefore, by statutory instruction, they override state law barring subrogation and reimbursement." *Coventry*, 137 S. Ct. at 1194. In other words: to the extent that Washington state law would otherwise prevent subrogation and reimbursement as to recovery under a UIM policy, the Medical Coverage Agreement preempts that law and *permits* subrogation and reimbursement.

Maylone's briefing wholly lacks any reference to case law to support his public policy claims that obtaining settlement proceeds through UIM coverage defeats FEHBA preemption. That is because no such case law exists. Maylone attempts to argue that the Court of Appeals has found that Maylone's settlement recovery is 100% medical expenses – this, too, is false. The Court of Appeals correctly stated: "Maylone's agreement with Kaiser explicitly states that Kaiser has a right to reimbursement that extends to all settlement proceeds and 'is not impacted by how the ... settlement, or other recovery is

characterized, designated, or apportioned.' CP at 24. Therefore, it does not matter whether the Hartford characterized its $100,000 settlement offer as a payment for medical expenses or for noneconomic damages." *Kaiser Found. Health Plan, Inc. v. Maylone*, No. 55585-9-II, 2022 WL 3754902, at *9 (Wash. Ct. App. Aug. 30, 2022). In other words, the Court of Appeals' actual finding was that under the MCA at issue, it is wholly irrelevant how the Hartford, or Maylone, or his (unnamed and unknown) spouse categorizes a settlement payment: Kaiser has a right to reimbursement regardless of the subjective characterization. To find otherwise would be to allow an insured to nullify FEHBA preemption by entering settlement agreements that state proceeds are only for damages other than medical expenses. FEHBA, and Kaiser's MCA, do not permit this, and the Court of Appeals correctly did so.

Despite Maylone's continued insistence that there are no laws which "relate to health insurance or plans" at issue in this

case, it is clear through his argument that he is attempting to accomplish precisely what *Coventry* found impermissible: to apply state law in a way that prevents subrogation and/or reimbursement under FEHBA. This is simply not permitted, and it is difficult to imagine more well-settled law than that established by the United States Supreme Court. *See Coventry,* 581 U.S. ____, 137 S. Ct. 1190. Maylone cannot ignore this clear, explicit ruling simply because he is displeased with the realities of its application to his particular circumstances.

VI. CONCLUSION

Maylone has failed to meet his their burden under RAP 13.4(b) in all respects. The Court of Appeals decision follows well settled law and is appropriate. For the reasons set forth above, Kaiser respectfully requests that Plaintiffs' petition for review be denied.

Dated this 9th day of November, 2022.

CERTIFICATION OF WORD COUNT

Undersigned counsel certifies pursuant to RAP 18.17(b) that this brief is 3,995 words in length.

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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, 2022, I arranged for service of the foregoing Respondent's Answer to Appellant's Petition for Review, to the court and to the parties to this action as follows:

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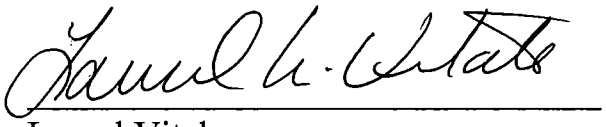

Laurel Vitale

STAMPER RUBENS, P.S.

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