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Court of Appeals No. 68226-1

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JOHN J. JONES AND MARY ANN MORBLEY JONES

Petitioners,

v.

KING COUNTY, a municipal corporation,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

I. Identity of Respondent

Respondent King County, the plaintiff in the trial court, submits this brief pursuant to RAP 13.4(d) and asks that the Petition for Review be denied.

II. Court of Appeals Decision

In its decision of August 25, 2013, the Court of Appeals, Division One, affirmed the December 22, 2011 order of the King County Superior Court (Hon. Palmer Robinson) granting King County's Motion for Summary Judgment and entering judgment for King County.

III. Statement of the Case

On or about April 3, 2008, Petitioner John J. Jones injured his ankle while on the property of a third party, Hendrickx Construction ("Hendrickx"). CP 24–27. Jones instituted a civil action against Hendrickx, alleging that Hendrickx negligently caused him to trip and fall.[1]

Hendrickx carried a liability policy with a coverage limit of $1 million with Contractors Bonding and Insurance Company ("CBIC"). CP 43. Jones and Hendrickx entered into a settlement agreement, under which CBIC agreed to pay $610,000 to Jones for his injuries. Under the settlement agreement, $152,000 was apportioned to Petitioner Mary Ann

[1] *Jones v. Hendrickx Construction, Inc.*, King County Cause No. 10-2-19188-7 KNT.

Morbley Jones for her loss of consortium claim. Mr. Jones received $458,000 for his personal injury claim, which amount was not further apportioned. *Id.*

As a result of his injury, Jones incurred medical costs in the undisputed amount of $46,315.98, which were paid by King County (medical benefits are paid directly out of King County's general assets). CP 31. Jones received these benefits because his wife worked for King County and enrolled in KingCare, one of the two medical benefits plans available to County employees.[2] The KingCare plan, a self-funded government medical benefits program, is governed by RCW ch. 48.62 *et seq.*, applicable to self-funded, government risk management programs.

A provision in the KingCare plan provides that, when a covered person recovers payment from a third party, such as CBIC, for an injury caused by a third party, King County is entitled to reimbursement of the amounts it has paid:

> When you or your covered dependent is injured or becomes ill because of the actions or inactions of a third party, KingCare[SM] may cover your eligible medical and prescription drug expenses. However, to receive coverage, you must notify the plan that

[2] The other plan is an insured plan provided by Group Health. *See* CP 35–39 (distinguishing between the Group Health plan and the KingCare plan, where under the Group Health plan reimbursement is limited to the excess required to fully compensate the injured party).

your illness or injury was caused by a third party, and you must follow special plan rules.

* * * *

By accepting plan benefits to pay for treatments, devices, or other products or services related to such illness or injury, you agree that KingCare[SM]

- Has an equitable lien on any and all monies paid (or payable) to you or for your benefit by any responsible party or other recovery to the extent the plan paid benefits for such illness or injury; [and]

- May appoint you as constructive trustee for any and all monies paid (or payable to) you or for your benefit by any responsible party or other recovery to the extent the plan paid benefits for such illness or injury;

* * * *

If you (or your attorney or other representative) receive any payment from the sources listed below—through a judgment, settlement or otherwise—when an illness or injury is the result of a third party, you agree to place the funds in a separate, identifiable account and that KingCare[SM] has an equitable lien on the funds, and/or you agree to serve as constructive trustee over the funds to the extent the plan has paid expenses related to that illness or injury. This means that you will be deemed to be in control of the funds.

You must repay KingCare[SM] first, in full, out of such funds for any health care expenses the plan has paid related to such illness or injury. You must repay KingCare[SM] up to the full amount of the compensation you receive from the responsible party, regardless of whether your settlement or judgment say that the money you received (all or part of it) is for health care expenses.

Furthermore, you must repay KingCare[SM] whether the third party admits liability and whether you've

> been made whole or fully compensated for your injury. If any money is left over, you may keep it.
>
> Additionally, KingCare[SM] isn't required to participate in or contribute to any expenses or fees (including attorneys' fees and costs) you incur in obtaining the funds.

CP 35–41.

After King County's subrogation agent, the Rawlings Company LLC, was informed that Jones had recovered $610,000, it sought reimbursement from Jones under the above provision. CP 22. Jones refused to reimburse King County, which then filed a complaint on April 12, 2011, in King County Superior Court asserting a cause of action for an equitable lien on the settlement proceeds and seeking $46,315.98 in reimbursement. *Id.*; CP 1–5.

Judge Robinson granted King County's motion for summary judgment in December 2011 and made the following relevant findings:

> 1. Defendants John Jones and Mary Ann Morbley Jones received a settlement in the amount of $610,000 as payment for injury received by John Jones from a third party. There is no evidence that Mr. Jones was not "made whole" by this settlement.
>
> 2. Pursuant to the terms of the KingCare plan, King County is entitled to a contractual and equitable lien and reimbursement from said settlement.

CP 186–188.

The Court of Appeals, Division One, affirmed Judge Robinson's ruling on August 26, 2013, finding in pertinent part:

> Under the "made whole" doctrine, an insurer is entitled to reimbursement from an insured who recovers from a tortfeasor, but only for the excess remaining after the insured is fully compensated for his loss. Where an insured accepts a settlement of less than policy limits, that is evidence the insured was fully compensated, i.e., "made whole."
>
> Here, King County came forward with evidence on summary judgment that John Jones and Mary Ann Morbley Jones accepted a settlement of their claims that was less than the limits of the tortfeasor's liability policy. Because the Joneses failed to rebut this evidence, the trial court did not err in concluding King County was entitled to reimbursement for medical payments.

Slip Op. at 1.

Because the Court of Appeals found that there was no material dispute of fact that Mr. Jones had, in fact, been made whole, the Court, in particular, did not address issues of equitable subrogation and the "made whole" doctrine under *Thiringer v. American Motors, Ins. Co.*, 91 Wn.2d 215, 219, 588 P.2d 191 (1978), or whether the doctrine applied to a self-insured government entity such as King County. The Court stated:

> The Joneses' chief argument on appeal is that the "made whole" doctrine applies to bar King County's recovery of medical expenses it paid on behalf of Jones. We disagree.
>
> * * * *

> A large portion of the parties' briefs are devoted to whether the "made whole" doctrine applies in this case....
>
> * * * *
>
> The posture of this case, however, provides us no occasion to address the issue of whether the "made whole" doctrine applies. Because, even if it did, the evidence shows Jones was, in fact, made whole.

Slip Op. at 5–6.

Citing *Peterson v. Safeco Ins. Co. of Ill.*, 95 Wn. App. 254, 259–60, 976 P.2d 632 (1999), a Division Three case, the Court noted that "where an insured accepts a settlement of less than policy limits, this is evidence that the insured was fully compensated." Slip Op. at 6. The Court further noted that its decision in *Truong v. Allstate Prop. & Cas. Ins. Co.*, 151 Wn. App. 195, 201–02, 205, 211 P.3d 430 (2009), held that "after the insurer set forth facts in a summary judgment motion showing the insured accepted a settlement less than policy limits, ... the insured held the burden of rebutting that evidence." Slip Op. at 6–7. Applying these cases to the undisputed facts here, the Court of Appeals held:

> Here, as was the case with the insured in *Truong*, Jones accepted a settlement of $610,000, less than the $1,000,000 policy limits. After King County presented this evidence in its motion for summary judgment, the burden shifted to Jones to come forward with evidence that his damages were greater than the amount of settlement....
>
> * * * *

> ... Jones was unable to meet his burden; he provided no evidence rebutting the County and failed to show "his damages were greater than the amount he settled for." *Truong*, 151 Wn. App. at 202. Therefore, even if the "made whole" doctrine applies in this case, the unrebutted evidence showed Jones was made whole, and King County is not precluded from seeking reimbursement. The trial court did not err in granting summary judgment.

Slip Op. at 7–8.

While the Court of Appeals did refer to *Thiringer* and the Supreme Court's pronouncement of the "'made whole' doctrine" in that case, the Court merely summarized the main holding in *Thiringer*. It did not construe *Thiringer* or otherwise apply its holdings to this case. Slip Op. at 5. As noted, the Court of Appeals found that the "made whole" doctrine and, thus, *Thiringer*, did not come into play where the undisputed evidence demonstrated that Jones was made whole: "The posture of this case ... provides us no occasion to address the issue of whether the 'made whole' doctrine applies." Slip Op. at 6.

IV. Argument

RAP 13.4(b) sets forth the exclusive factors under which the Supreme Court will accept review. The Court will accept review "only" if the petitioner establishes one of the following four grounds: (1) the Court of Appeals decision conflicts with a decision of the Supreme Court; (2) the decision of the Court of Appeals is in conflict with a decision of

another division of the Court of Appeals; (3) a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

A. The Court of Appeals' Decision Is Not in Conflict with a Decision of the Supreme Court.

Jones asserts that the Court of Appeals' decision is in conflict with *Thiringer*, *Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 160 P.3d 31 (2007), and *Liberty Mut. Ins. Co. v. Tripp*, 144 Wn.2d 1, 25 P.3d 997 (2001), which Jones raises in the Petition for the first time in this case. Petition for Review at 2. However, Jones never identifies the purported conflicts, except to contend — apparently — that, under *Tripp*, Jones did not have a burden to come forward with any evidence in opposition to a summary judgment motion to show that he was not "made whole." *Id.* at 6, n.2.

It is plain that the Court of Appeals' decision does not conflict with *Thiringer* as it does not construe or apply *Thiringer*. In fact, the decision is in harmony with *Thiringer*'s central premise, which is, as noted by the Court of Appeals, that:

> [W]hile 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.

Slip Op. at 5. This, of course, is exactly what happened in this case. The Court of Appeals found that Jones had been "made whole" by the settlement reached with the tortfeasor's insurer; therefore, King County was entitled to reimbursement of the "excess" funds it had paid for Jones' medical treatment.

Sherry, a comparative fault case, did not involve an issue central to the Court of Appeals' decision. While Jones contends that "[t]he Court of Appeals did not analyze how comparative fault would impact the Jones [sic]," Petition at 6, Jones does not even suggest how his own, alleged comparative fault should have figured into the Court of Appeals' decision, nor did Jones even raise *Sherry* before the Court of Appeals. Moreover, Jones also did not assign any error with respect to the trial court's alleged failure to consider his comparative fault and did not direct any argument to this issue. *See* Brief of Appellant, Court of Appeals, Division One, No. 68226-1 at 1–2. The Court will not review matters to which error is not assigned. *See Unigard Ins. Co. v. Mutual of Enumclaw Ins. Co.*, 160 Wn. App. 912, 922, 250 P.3d 121 (2011); RAP 10.3(g) ("The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.").

In any event, *Sherry* adds nothing to this case. *Sherry* holds that, in the context of an automobile accident and the public policies underlying UIM and PIP coverage, insureds are not "fully compensated," *i.e.*, "made whole," "until they have recovered all of their damages as a result of a motor vehicle accident," including damages they did not recover because of their own contributory fault. 160 Wn.2d at 620–21. Unlike the Court of Appeals in *Peterson* and *Truong*, *Sherry* did not address the "made whole" consideration where an injured party settles for less than the tortfeasor's policy limits. Rather, *Sherry* concerned an arbitrator's award that was reduced because of the insured's comparative fault.

Furthermore, to the extent the issue of comparative fault was ever placed at issue before the trial court, Jones made no effort to show what his alleged damages may have been above and beyond his allocated $458,000 share of the settlement. "Jones ... provided no evidence rebutting the County and failed to show 'his damages were greater than the amount he settled for.'" Slip Op. at 8 (quoting *Truong*, 151 Wn. App. at 202).

Finally, the Court of Appeals in *Truong* expressly distinguished *Sherry*, noting that Truong's lawsuit "was inspired by the Court of Appeals decision in *Sherry*." 151 Wn. App. at 208. "Truong's lawsuit aimed to extend *Sherry*, the context of which was an underinsured motorist arbitration, into a context where the recipient of PIP benefits settled with

the tortfeasor." *Id.* The *Truong* Court, of course, declined to extend *Sherry* into the settlement realm.

Tripp, which also was a UIM/PIP case, does not address the parties' respective burdens on summary judgment where the issue of whether the insured has been "made whole" is at hand. The only discussion of any party's burden in *Tripp* was the Court's statement that it was the insurer's burden to establish that it had been financially prejudiced by the insured's failure to notify it of a settlement with the tortfeasor, which is not at issue here. 144 Wn.2d at 19.

The only other asserted "error" raised by Jones is based on the fact that the Court of Appeals affirmed the trial court's finding of summary judgment on behalf of King County. Jones asserts that "the question of whether an injured party has been made whole through the compromised settlement of a matter prior to trial is quintessentially a question of fact that should be left to the jury." Petition at 5.

Jones' argument ignores the well-developed case law applying Civil Rule 56. In responding to a summary judgment motion, the non-moving party, "by affidavits or as otherwise provided in this rule [CR 56], must set forth specific facts showing that there is a genuine issue for trial." *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225–26, 770 P.2d 182 (1989). To avoid summary judgment, the non-moving party must

show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Time Oil Co. v. Cigna Property & Cas. Ins. Co.*, 743 F. Supp. 1400, 1406 (W.D. Wash. 1990) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986)).

Jones also cites no authority for the premise that the "made whole" inquiry must be submitted to a jury, and, in any event, this contention is contrary to established case law affirming summary judgment for insurers on the issue of whether an insured has been "made whole." *See, e.g.*, *Peterson*, 95 Wn. App. at 259–60; *Truong*, 151 Wn. App. at 201–02.

B. The Court of Appeals' Decision Does Not Involve an Issue of Substantial Public Interest.

Although Jones never articulates the "substantial public interest" supposedly affected by the Court of Appeals' decision, Jones appears to argue two asserted issues meriting review: the trial court's alleged refusal to allow the Joneses "their right to full discovery" or to amend their answer,[3] and the Court of Appeals' tacit recognition that a health plan member can be sued by the employer, along with the corollary effect that

[3] In this latter respect, Jones contends, "The trial court ... did not ... allow the Jones [sic] to assert their proper counter claims [sic] and amend their answer to add the proper parties (Aetna and Rawlings Company)." Petition at 5. However, the trial court did not rule on the Joneses' motion to amend before granting King County's Motion for Summary Judgment.

this "will embolden insurers and employers to sue more injured victims." Petition at 6, 8. "[T]he decision upheld by the Court of Appeals violates public policy and this violation impacts a substantial number of Washington citizens. ... Thousands of county employees and Washington consumers may suffer the same fate as the Jones [sic] (being sued after they were injured and obtained a recovery) if the Court of Appeals decision in this case is not reversed." *Id.* at 8–9. The discovery contention is untrue; the public policy assertion is fallacious.

As noted by the Court of Appeals, Jones was given additional time to obtain discovery after filing a CR 56(f) motion in response to King County's Motion for Summary Judgment and failed to take advantage of the requested extension:

> The trial court granted the Jones' [sic] CR 56(f) motion to continue, and ordered the County to provide copies of all KingCare plans for the years 2006-2008, along with notices to employees about any changes to the KingCare plan, between those years. The court set the new hearing date for the summary judgment motion six weeks out, and allowed the Joneses and King County to submit supplemental briefing on the motion. King County produced the documents it was ordered to produce and filed a supplemental brief. The Joneses did not file a supplemental brief, nor did they seek additional discovery.

Slip Op. at 4.

The Joneses contend that they "wanted to take depositions and propound interrogatories." Petition at 7. However, as noted by the Court of Appeals, from the date the County's complaint was filed in April 2011 to the trial court's ruling some eight months later, and particularly during the six-week extension granted by the trial court, Jones did not request or conduct any discovery.[4]

Furthermore, Jones did not assign error to or otherwise identify the trial court's discovery rulings, which favored Jones, as an issue for the Court of Appeals' consideration. *See* Brief of Appellant at 1–2; *Unigard Ins. Co. v. Mutual of Enumclaw Ins. Co.*, 160 Wn. App. at 922; RAP 10.3(g).

As to Jones' public policy argument, Jones has not identified the public policy supposedly at issue.[5] Despite the Joneses' assertions that they were sued by King County "to their surprise" and that the County's lawsuit was "in unprecedented fashion" [Petition at 4, 7], there is nothing surprising nor unprecedented in an insurer suing an insured or an employer suing an employee (or former employee) seeking declaratory judgment and

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[4] *See* CP 144–45, Jones counsel's declaration of October 24, 2011, at ¶ 5, conceding that he had not conducted any discovery. *See also* Brief of Appellant at 5.

[5] *Cf Fluke Corp. v. Hartford Acc. & Indem. Co.*, 145 Wn.2d 137, 144, 34 P.3d 809 (2001) ("In those Washington cases in which public policy has served to enhance coverage by overriding policy exclusions, the courts have relied on a public policy 'convincingly expressed' in state statutes.").

other relief. There have been literally thousands of such cases in Washington, several of which have been cited here by both parties.

Such lawsuits are not contrary to public policy [*see* Petition at 8]. The Court of Appeals' decision does not, as Jones asserts, endorse "an entirely new strategy that essentially dilutes a long history of decisions by this court that benefits injury victims." Petition at 8. It simply applies the requirements of Civil Rule 56. There is nothing new here, and "injury victims" are not excused from complying with Civil Rule 56. No public policy is violated when a party brings a civil action and prevails in that action simply because the effect of the lawsuit and outcome does not benefit the injury victim. *See Humleker v. Gallagher Bassett Servs., Inc.*, 159 Wn. App. 667, 246 P.3d 249 (2011), *rev. denied*, 171 Wn.2d 1023 (2011). Such parties still must comply with Civil Rule 56 and present a "genuine issue (of) material fact" to survive summary judgment. Jones failed to do so.

V. CONCLUSION

The Petition does not present an issue meriting review. This is a simple case in which Jones failed to present evidence showing that there was a genuine issue of material fact with respect to the central question of whether Mr. Jones had been "made whole" by the underlying settlement.

The trial court and the Court of Appeals relied on established case law to come to this conclusion.

The Court of Appeals' decision does not conflict with any decision of the Supreme Court nor does it involve an issue of substantial public interest. Jones has not identified a conflicting Supreme Court case and has not identified a "substantial public interest."

Although King County is a public entity, its dispute with Jones is a private matter limited to the particular facts of this case. *See, e.g., Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 796, 225 P.3d 213 (2009) (noting that in determining whether a moot case presents issues of continuing and substantial public interest a court should consider, in part, "whether the issue is of a public or private nature"). Although other parties involved in future subrogation cases and other King County employees hypothetically may face circumstances similar to those faced by Jones, this potentiality does not convert this private dispute into a public one. This matter does not involve the public interest.

On the basis of the foregoing, King County respectfully requests that the Petition for Review be denied.

Respectfully submitted this 25th day of October, 2013.

KARR TUTTLE CAMPBELL

By: _____
Medora A. Marisseau, WSBA #23114
Walter E. Barton, WSBA #26408

Attorneys for Respondent King County

DECLARATION OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that I am over the age of 18 and not a party to the above-captioned action. That on October 25, 2013, I caused to be served upon counsel listed below in the manner indicated a true and correct copy of the foregoing Respondent's Answer to Petition for Review.

Nancy Randall

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Attorneys for Petitioners

- ☒ Via Hand Delivery
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Case Name: John Jones v. Mary Ann Morbley Jones
Case No.: Court of Appeals No. 68226-1 (The Supreme Court has not assigned a cause number).
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Thank you,

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