89445-1

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN J. JONES AND MARY ANN MORBLEY JONES

Appellants,

v.

KING COUNTY, a municipal corporation,

Respondents.

PETITION FOR REVIEW

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I
NO. 68226-1

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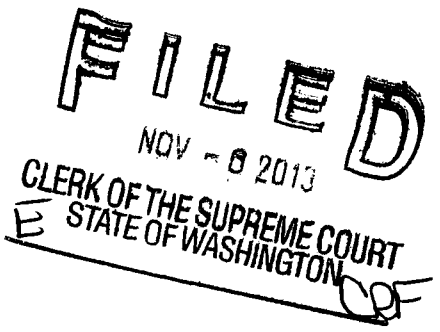

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I. IDENTITY OF PETITIONER

Appellants John Jones and Mary Ann Morbley-Jones, individually and on behalf of all others similarly situated, asks this Court to accept review of the Court of Appeals' decision filed on August 26, 2013 that terminated review in this case. A copy of this decision is attached to this petition as A-1.

II. ISSUE PRESENTED FOR REVIEW

Since this court decided *Thiringer v. American Motors* in 1978, insurers have expressed their disdain for this decision and several courts have struggled with the proper way to apply this vital decision. Further, courts have struggled with the comparative fault concept decided in the *Sherry v. Financial Indemnity* decision.

The Court of Appeals ruling in this case conflicts directly with *Thiringer, Sherry and Liberty Mutual* because it affirmed the trial court's summary judgment when this court clearly contemplated that determination of whether an injured person is made whole is a question of fact (This was clarified in *Liberty Mutual v. Trip*; holding that settling short of limits doesn't shift the burden of proof on made whole--that the insurer has that burden to prove 'made whole' and this can only be done by a formal adjudication of plaintiff's total damages). The Court of Appeals addressed the trial court only allowing limited discovery but did not

address the trial courts error in not allowing appellants to amend their answer and assert counterclaims. The issues presented for review is whether the Court of Appeals decision conflicts with *Thiringer, Sherry and Liberty Mutual,* whether *Thiringer* type decisions can be decided on summary judgment when the parties were not allowed full discovery or an opportunity to assert counterclaim to include the proper parties and whether substantial public interest is served by allowing government entities to sue its employees after a serious, life-changing injuries. RAP 13.4 provides in part that this Court will accept a petition for review if the decision of the Court of Appeals is in conflict with a decision of this Court or if the petition involves an issue of substantial public interest that should be determined by this Court. *See* RAP 13.4(b). Discretionary review is warranted in this case because the Court of Appeals' decision conflicts with this Court's decision in *Thiringer v. American Motors, Sherry v. Financial Indemnity and Liberty Mutual v. Trip* and it adversely affects thousands of county employees who may become accident victims.

III. STATEMENT OF THE CASE

On April 3, 2008, Mr. Jones was visiting with Mark Hendrickx at a Hendrickx construction site located on Beacon Hill in Seattle. At the time of this incident, Hendrickx Construction, Inc. was building a house in the area. Mr. Jones and Mr. Hendrickx were having a conversation on the

main level of an unfinished home that was a number of feet from the ground. For workers to enter and exit the home, a wooden board was laid from the main level of the home to the ground. When attempting to exit the structure, Mr. Jones stepped down with his right foot from the wood board to the ramp when his foot slipped, causing him to hit his stomach/rib area on the wooden ramp before falling to the ground. Mr. Jones landed awkwardly on his right ankle and immediately fell to the ground.

Mr. Jones suffered a comminuted intra-articular distal right tibial fracture and transverse right fibular fracture, and required three surgeries. But even after three surgical procedures, Mr. Jones has been unable to walk normally, often experiencing swelling in his foot after walking even a short distance. Additionally, Mr. Jones has suffered from a number of side-effects from prescription drugs he has taken to assist in his recovery. It is a certainty that Mr. Jones will never fully recover from his injuries.

Mr. Jones filed a civil lawsuit in King County Superior Court against Hendrickx Construction, Inc. Discovery was conducted, and the parties achieved a settlement agreement at mediation whereby Hendrickx Construction, Inc., through its insurance company, Contractors Bonding and Insurance Company, agreed to pay $610,000.00. to Mr. and Mrs. Jones for the harms and losses they sustained as a result of its insured's

negligence. Liability was heavily contested and Mr. Jones conceded he was partially at fault.

From the beginning of the underlying case, the undersigned counsel for Plaintiffs was in contact with The Rawlings Company. Dan Kearns, the Rawlings representative indicated on several occasions that he was seeking the subrogation of **Aetna, not King County**.

A. Procedural Posture.

To their surprise, the Jones' were sued by King County and not Aetna. King County pretended Aetna was not involved or that they were the Jones' insurer at all. King County then sought to rush to judgment and filed its motion for summary judgment very early; trial was more than a year away. In Defendant's (Appellants) Answer, it was clear that leave of court may be necessary. A class action lawsuit with very similar issues had been recently filed and because the class was so recently filed, the Jones's were trying to determine how it may impact the lawsuit brought against them by King County or whether they would be a party to the class action. The class action issues appeared the exact same as the issues in the King County v. Jones matter, therefore Jones sought to conduct discovery and sought to amend their Answer to bring proper counterclaims and all necessary parties. The appellants anticipated issuing interrogatories and requests for productions, taking depositions, and issuing requests for

admission. They also planned to file a third party complaint adding both Aetna and Rawlings as parties, as well as counterclaims against King County. The trial court only required King County to produce some documents but did not allow full and complete discovery or allow the Jones to assert their proper counter claims and amend their answer to add the proper parties (Aetna and Rawlings Company). Interestingly, the trial court and the Court of Appeals agreed that *Thiringer* did not apply but the county was responsible for a pro-rata share of fees and costs (*Mahler*).

IV. ARGUMENT

A. Discretionary review is warranted in this case because the Court of Appeals' decision conflicts with this Court's decision in *Thiringer v. American Motors, Sherry v. Financial Indemity and Liberty Mutual v. Trip.*

By its nature, the question as to 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[1]. In this case, the Jones were insured with Aetna and if analyzed as an insurer, consistent with the public policy that injured victims must be made whole before insurers have a right of reimbursement, King County would have no standing to have sued the Jones'. Here, King County sued the Jones and argued that the long history of cases supporting injured victims did not

[1] To date, no one has determined what was the value of Jones' case, therefore it is illogical to conclude he was made whole. This is why a jury trial is required.

apply to them because they were not an insurer. The Court of Appeals did not analyze how comparative fault would impact the Jones, the court rather stopped its analysis at the fact that the Jones' settled for less than policy limits. Court of Appeals at Page 1.[2] In the underlying case, not only was **comparative fault asserted**, it was **conceded** because it was so obvious. The settlement reached took into the account the comparative fault and, the risk, the costs and the probability of success at trial. Jones accepted an amount in settlement that was a fraction of the full value of their case. It bears mentioning that a portion of the settlement was appropriately allocated to Ms. Morbley-Jones for loss of consortium, thereby leaving even less for Mr. Jones, who suffered serious and permanent injuries. He was not even close to being made whole.

B. Discretionary review is warranted in this case because not allowing citizens sued by their employer an opportunity to participate in full discovery or amend their pleadings violates public policy.

Summary judgment "must be employed with caution lest worthwhile causes perish short of a determination of their true merit." *Smith v. Acme Paving Co.*, 16 Wn.App. 389, 392 (1976). "The granting of summary judgment is proper only ... where it is quite clear what the truth is, and no genuine issue remains for trial. It is not the purpose of the rule to cut

[2] Neither the Trial Court nor Court of Appeals acknowledged that this was King County's burden, not the Jones. Settling for less than policy limits does not shift the burden to Jones, that burden was and is the burden of King County. (Liberty Mutual v. Tripp)

litigants off from their right to trial by jury if they really have issues to try." *Burback v. Bucher*, 56 Wn.2d 875, 877 (1960). Here, in unprecedented fashion, the Jones was sued by King County. King County then swiftly moved for summary judgment and the Jones were not afforded their right to full discovery or to name the proper parties. The trial court allowed very limited discovery, only requiring the county to produce policy documents for a short period. The Jones was not allowed the ability to analyze and determine what specific discovery tools they would employ. They certainty wanted to take depositions and propound interrogatories. More critical was that Jones' desired to amend their answer (it is important to note that trial was more than a year away) to assert counterclaims against King County and to add necessary parties, namely Aetna Insurance Company (the Jones's actual insurer) and their subrogation representative, The Rawlings Company. The Court of Appeals does not mention Aetna Insurance at all, when in reality they are the real party because the Jones presented an insurance card to their doctors that beared the name "Aetna". The Court confused The Rawlings Company as seeking to obtain reimbursement for the County, when it fact, it was monies paid by Aetna. Court of Appeals at page 3. The Court of Appeals concludes this was not an occasion to address the issue of made whole, when in reality, that was the issue the trial court reached. Court of Appeals

at page 6. The Court of Appeals then made a huge leap by concluding, even if it did, that Jones was made whole. This is error because the court never analyzed the factual circumstance that concluded Jones was comparatively at fault in causing his own injuries. Court of Appeals at page 6.

The Court of Appeals' decision would cause confusion and essentially lead employers and insurers with the impression that *Thiringer, Sherry and Liberty* was no longer valid Washington law. The Court of Appeals decision will embolden insurers and employers to sue more injured victims, an entirely new strategy that essentially dilutes a long history of decisions by this court that benefits injury victims. Because the decision upheld by the Court of Appeals violates public policy and this violation impacts a substantial number of Washington citizens, discretionary review is warranted in this case. This case also presents an opportunity for this court to clarify how trial courts should deal with *Thiringer* type decisions as this comes up often when policy limits are at issue and/or when an injury victim is comparatively at fault and necessarily resolved their cases for less than available policy limits.

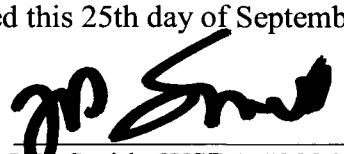
V. CONCLUSION

Thousands of county employees and Washington consumers may suffer the same fate as the Jones (being sued after they were injured and

obtained a recovery) if the Court of Appeals decision in this case is not reversed. To correct this injustice, discretionary review in this case should be granted.

VI. APPENDIX A-1

Respectfully submitted this 25th day of September, 2013



J.D. Smith, WSBA #28246
Co-Counsel for Defendant/Appellant

CERTIFICATE/PROOF OF SERVICE

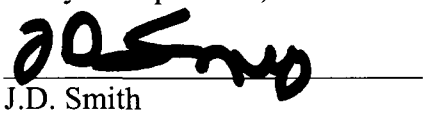
I hereby certify under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner indicated a copy of the foregoing:

PETITION FOR REVIEW

TO:

Medora Marisseau Karr Tuttle Campbell 1201 3rd Avenue, Suite 2900 Seattle, WA 98101-3028 *Attorney for Plaintffs/Respondents* Office: 206-224-8045 Fax: 206-682-7100 mmarisseau@karrtuttle.com jcoolbaugh@karrtuttle.com	VIA FEDERAL EXPRESS [ ] VIA REGULAR MAIL [ ] VIA CERTIFIED MAIL [ ] VIA E-MAIL [ ] HAND DELIVERED [X]

Dated at Seattle, Washington, this 25th day of September, 2013



J.D. Smith

APPENDIX A-1

RICHARD D. JOHNSON,
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August 26, 2013

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CASE #: 68226-1-I
King County, Respondent/Cross App v. John J. Jones & Mary Ann Morbley Jonesd, Appellant/Cross Resp
King County, Cause No. 11-2-13470-9 SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Affirmed"

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of $200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd
Enclosure
c: The Honorable Palmer Robinson

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

KING COUNTY, a municipal corporation, Respondent, v. JOHN J. JONES and MARY ANN MORBLEY JONES, Appellants.	)	No. 68226-1-I DIVISION ONE UNPUBLISHED OPINION FILED: August 26, 2013

SPEARMAN, A.C.J. — 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. Accordingly, we affirm the order granting King County's motion for summary judgment.

FACTS

John Jones injured his ankle while on a Hendrickx Construction worksite. After filing suit against Hendrickx Construction, Inc., Jones settled with Hendrickx's liability carrier, Contractors Bonding and Insurance Company ("CBIC"). Jones' settlement amount was $610,000, of which $152,000 was apportioned to his wife Mary Ann Morbley Jones for her loss of consortium, wage loss, and other claims. The CBIC policy had coverage limits of $1,000,000.

Jones' medical costs, which are not in dispute here, totaled $46,315.98, and were paid as medical benefits by King County. Jones received these benefits because his wife worked for King County and enrolled in KingCare, one of the two medical benefits plans available to employees of King County. The KingCare plan is a self-funded government medical benefits program.

A provision in the KingCare plan provides that, when a person covered by the plan obtains a recovery for an injury caused by a third party, King County is entitled to reimbursement:

> 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 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 says 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.

Clerk's Papers (CP) at 35-41.

After King County's subrogation agent, the Rawlings Company LLC, learned that Jones had obtained a $610,000 settlement, it sought reimbursement for King County. Jones refused to reimburse the County, and the County filed suit against Jones and his wife.

The County moved for summary judgment. The Joneses responded that the County was precluded from recovering under the "made whole" doctrine, which precludes an insurer from being reimbursed for personal injury protection payments until the insured has been made whole. They also sought a continuance under CR 56(f). The County argued it was not an insurer.

At the summary judgment hearing, the trial court questioned whether it needed to decide if King County was an insurer, because if Jones had been made whole, then the County was entitled to reimbursement regardless of the County's status as an insurer. The trial court granted the Jones' 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.

After the second summary judgment hearing, the trial court granted the summary judgment motion, ordering that "King County is entitled to be reimbursed $46,315.98, minus an equitable share of the expenses and fees incurred in recovering those funds," plus its fees and costs for bringing the action. CP at 186-88. The Joneses appeal.

DISCUSSION

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.

The "made whole" doctrine was announced by our Supreme Court in Thiringer v. American Motors Ins. Co., 91 Wn.2d 215, 219-20, 588 P.2d 191 (1978); see also Averill v. Farmers Ins. Co. of Washington, 155 Wn. App. 106, 229 P.3d 830 (2010) (analyzing Thiringer). In Thiringer, an insurer refused to pay personal injury protection (PIP) benefits to its insured, and the insured settled with the tortfeasor. Id. at 216-17. The insured then demanded PIP benefits, arguing his damages exceeded the amount of the settlement. Id. at 217. The Supreme Court affirmed the trial court, holding that the settlement amount should first be applied to the insured's general damages and then, if any excess remained, toward the payment of the special damages to which the PIP coverage applied affirmed:

> 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.

Id. at 219.

A large portion of the parties' briefs are devoted to whether the "made whole" doctrine applies in this case. King County argues it does not because the County is not an insurer and is therefore not subject to the doctrine. Thus the County contends it can

recover under its contract reimbursement from Jones regardless of whether he was made whole. Jones, on the other hand, contends that subrogation "can arise without an insurance policy or statute giving an insurer or any other party a right of subrogation or reimbursement . . . ." Reply Brief at 1. Each party cites numerous cases in support of their respective positions, although none appears to directly address the issue of whether the "made whole" doctrine applies to an entity that provides a self-funded medical benefits program.

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. Under Peterson v. Safeco Ins. Co. of Illinois, 95 Wn. App. 254, 976 P.2d 632 (1999), where an insured accepts a settlement of less than policy limits, this is evidence that the insured was fully compensated:

> Farmers had $250,000 available to settle this claim. After negotiations and consultation with an experienced plaintiff's personal injury lawyer, Mr. Peterson accepted $20,000. And in exchange for that money, he fully released Farmers and Mr. Carroll from any further liability. He also agreed to indemnify them from any claim by Safeco for its PIP interest. If the gross settlement did not reflect what Mr. Peterson, or his attorney, believed to be full compensation, then they had no obligation to accept it. They could have, instead, completed arbitration to have the question of full compensation decided.

Peterson, 95 Wn. App. at 259-60; see also Truong v. Allstate Property and Cas. Ins. Co., 151 Wn. App. 195, 205, 211 P.3d 430 (2009) ("Peterson shows that a settlement with a tortfeasor for less than limits is evidence that the PIP recipient received full compensation"). Truong at 205. In Troung, after the insurer set forth facts in a summary

judgment motion showing the insured accepted a settlement less than policy limits, the court held the insured had the burden of rebutting that evidence:

> Allstate set forth facts showing that Truong freely accepted an arms-length settlement from Dinh in an amount less than the limits of Dinh's liability insurance. Such a settlement is some evidence, even if not irrefutable evidence, that the settlement fully compensated Truong.
>
> > A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material facts exists.
>
> Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Thus, Truong had the burden of rebutting that evidence by showing that his damages were greater than the amount he settled for. Truong did not meet this burden.

Troung, 151 Wn. App. at 201-02.

Here, as was the case with the insured in Troung, 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. Although Jones' summary judgment response failed entirely to address this issue, the trial court nevertheless gave Jones additional time. Indeed, the trial court granted Jones' request for a continuance for that very purpose, and ordered the County to disclose additional evidence, namely copies of all the KingCare plans for the years 2006-2008, along with notices to employees about any changes to the KingCare plan between

those years. Jones, however, never filed a supplemental response, nor did he seek additional discovery on this issue.

In other words, 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.

Affirmed.

Specrunny, A.C.J.

WE CONCUR:

Dwyer, J.

Grosse, J.