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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

No. 53381-2-II

BY _____

DEPUTY

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

TERRI LYN HALL,

Appellant,

v.

GROUP HEALTH COOPERATIVE,

Respondents.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The lower court endorsed a distorted construction of the Group Health Cooperative (“GHC”) insurance contract. At every opportunity, the lower court uprooted and abused longstanding rules for construing insurance contracts that favor the insured. The lower court turned a blind eye to decades of well-settled precedent on the made whole doctrine and then on the equitable principal that in the subrogation context, insurer’s must pay a pro rata share of fees and costs. The lower court also curtailed full and fair discovery. The orders identified in section II, should be reversed.

II. ASSIGNMENTS OF ERROR

Appellant seeks review by the Washington State Court of Appeals, Division II, of the trial court’s orders and decisions as follows:

1. Order Granting Plaintiff Group Health Cooperative’s Motion for Summary Judgment; (CP 1920-1922)
2. Order Denying Defendant’s Motion for Partial Summary Judgment (CP 1923-1925);
3. Order Denying Defendant’s Motion for Partial Summary Judgment (CP 1926-1928);
4. Judgment for Plaintiff Group Health Cooperative; (CP 1945-1946);
5. Judgment Summary (CP 1947-1948).

Each of the trial court’s rulings constitute reversible error.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court commit reversible error when it denied Ms. Hall's motion for partial summary judgment (CP 1923-1925)? **YES.**
2. Did the court commit reversible error when it granted GHC's motion for summary judgment (CP 1920-1922)? **YES.**
3. Did the court commit reversible error when it denied Ms. Hall's second motion for partial summary judgment (CP 1926-1928)? **YES.**
4. Did the court commit reversible error when it entered judgment and judgment summary in favor of GHC for \$83,329.66 (CP 1945-1948)? **YES.**

IV. STATEMENT OF FACTS

A. Background Facts

Terri Hall started a premises liability personal injury lawsuit against Labor 1992 Corporation ("L92C"), in Thurston County Superior Court (hereafter the "tort case"). *CP 1558-1565*. The tort case arose out of an incident where Terri Hall fell while walking down exterior stairs outside of the Davis-Williams Building in Olympia on September 18, 2012.

1. Terri Hall's economic damages:

Terri Hall's **economic** damages exceeded \$700,000. As of May 9, 2016 (Ms. Hall's scheduled trial date) the net present value of her past and future wage and benefit net loss due to the incident was \$484,199. *CP 1728-1761*. L92C admitted under CR36 to over \$200,000 of reasonable expenses

for necessary medical care, treatment and services for Ms. Hall caused by the incident. *CP 1463-1552.*

Patrick Bays, a Board Certified Orthopedic Surgeon who served as and independent medical expert in Ms. Hall's tort case, opined that Ms. Hall sustained a sixty-two percent permanent impairment of her right lower extremity and a twenty percent impairment to her left upper extremity, caused by the incident, on a more probable than not basis. *CP 1659-1660.* Ms. Hall was forced into retirement as a consequence of her injuries as a result of the incident. *CP 1660.*

2. GHC was Ms. Hall's health insurer:

GHC was Ms. Hall's health insurer. GHC claims that it paid \$83,580.66 of Ms. Hall's medical expenses incurred as a result of the injuries she suffered. *CP 1349.*

3. Evidence of comparative fault:

Ms. Hall's tort case involved evidence of comparative fault. After exiting the Davis-William building, Ms. Hall could have walked down either a ramp or a set of stairs. *CP 1633-1634.* It was getting dark outside. The lighting in the entryway once stepping outside of the double-doors was not on, but she could see the stairs as she moved forward to encounter them. *CP 1617-1619; 1621-1624.* Despite her past medical history of her knee giving

way on her, weakness and difficulty with stairs, feeling of instability in her right knee, intermittent catching in the right knee and near fall on several occasions, knee going out on her, problems with right knee replacement feeling unstable in valgus, feeling like she is going to hyperextend her knee at times, weakness, trouble going up and down stairs, needing to be careful when she goes up and down stairs, occasionally getting a catch in the knee, inability to run because her knee feels unsafe to her, feeling a lot of pain with walking or climbing stairs, unstable right knee and her knee collapsing – she took the stairs.

Rather than focusing on safely descending the stairs, Ms. Hall thought she was **turned, talking to her friend** Ingrid as she descended the stairs. *CP 1626*. Ms. Hall got to the end of the stairway handrail, **assumed** that she was on the sidewalk, and proceeded to step onto the edge of one of the stairs and then fell. *CP 1627-1629*.

4. Evidence of relevant prior medical history and conditions:

Ms. Hall's tort case also involved evidence of relevant prior medical history and pre-existing medical conditions. The following are excerpts from some of the records pertaining to Ms. Hall **that preceded** the September 18, 2012 incident (bold emphasis, if any, omitted):

- “CHIEF COMPLAINT: Unstable right knee. HISTORY OF PRESENT CONDITION: At the age of 16, she had an

operation on this knee for a recurrent dislocating right patella. She did well for a period of ten years, when on the 24th of August 1979, while serving drinks at the Eagles in Hoquiam, her knee collapsed. [. . .] She is very cautious on descending stairs.” *CP 1583* (ER 803(a)(16); ER 803(a)(8) via RCW 5.44.040);

- “The patient says that her knee now tends to give way on her. She has weakness and difficulty with stairs.” *CP 1586* (ER 803(a)(16); ER 803(a)(8) via RCW 5.44.040);
- “She continues to have a feeling of the knee giving way on her at times. [. . .] She has some trouble going up and down stairs. She has to be careful when she does this.” *CP 1591* (ER 803(a)(16); ER 803(a)(8) via RCW 5.44.040);
- “A lot of pain with walking or climbing stairs.” *CP 1593* (ER 803(a)(16); & ER 803(a)(8) via RCW 5.44.040);
- “There is the intermittent catching in the right knee and she has nearly fallen on several occasions, [. . .]” *CP 1603* (ER 803(a)(8) via RCW 5.44.040);
- “Apparently she was walking around at the ball game and her knee went out on her again. She went down and had such severe pain from this she ended up in the emergency room [. . .]” *CP 1612* (ER 803(a)(8) via RCW 5.44.040);
- “Terri comes in today for follow-up of her right total knee. She is having some problems with it feeling unstable in valgus, [. . .]” *CP 1614* (ER 803(a)(8) via RCW 5.44.040).

Additionally, see *CP 1581-1582, 1585, 1588-1589, 1592, 1594, 1598* (ER 803(a)(16); ER 803(a)(8) via RCW 5.44.040); and *CP 1604, 1608, 1610, 1613* (ER 803(a)(8) via RCW 5.44.040).

L92C obtained an expert report from Sean Ghidella, MD. Ms. Hall’s

past medical history and preexisting conditions had bearing on opinions of Dr. Ghidella that were relevant to the issues of damages. *CP 1059-1109*.

A note in GHC's subrogation claim file labeled "PRIORS", documented among other things: "Rt knee pre existing surgeris" and "Carpal Tunnel Repair" and "TOTAL KNEE REVIS ONE COMPARTMENT" and "TOTAL KNEE ARTHROPLASTY". *CP 1808*.

5. Ms. Hall settled her civil tort case:

Ms. Hall settled her tort case for \$600,000. Her settlement does not fully compensate her for her losses sustained - the evidence of comparative fault and unfavorable prior medical history was prevalent.

6. GHC's contract limits its right to reimbursement:

GHC's insurance contract limits its subrogation and reimbursement rights to the **excess** of the amount required to **fully compensate** Ms. Hall for the loss sustained, including her general damages. The contract states:

GHC'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.

[Bold added] *CP 1708*. By its own contract, when the insured is not made whole, GHC has no right to reimbursement.

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7. GHC was on notice that Ms. Hall was not fully compensated, but sued Ms. Hall anyway:

GHC knew Ms. Hall was not made whole. *CP 1806, 1804, 1796, 1203, 1209*. Despite its contract and Washington case law, GHC sued Ms. Hall and sought not just to collect reimbursement (which it is not owed), but to collect the entire \$83,580.66 it claimed it paid. GHC is not entitled to reimbursement — which is the central issue in this case and on appeal. But even if GHC were, it would not be for the **entire** \$83,580.66. This is because of well settled case law that GHC must pay a pro rata share of Ms. Hall's attorney fees and costs.

It is grossly inequitable for GHC to reap the benefits of the common fund that was created through the services of Ms. Hall's attorneys, yet then make its insured bear the entirety of the attorney's fees and costs. No insurer acting in good faith toward its insured would claim any different.

The formula for calculating GHC's pro rata share of Ms. Hall's legal expenses — if it were even legally entitled to recovery -- is set forth in *Safeco Ins. Co. v. Woodley*, 150 Wash.2d. 765, 82 P.3d 660 (2004) and is: legal expenses times the ratio obtained by dividing the GHC "reimbursement" by the total damages. *See id at 772-773*. Following this legal and mathematical formula, GHC's reimbursement would be, at most, \$45,002.91.

However, GHC is "double-dipping". It was paid \$838 by L92C

insurer Mutual of Enumclaw on February 4, 2013, yet part of what comprises GHC's claimed \$83,580.66 amount is \$251 of the \$838 paid by Mutual of Enumclaw. *See CP 1221[section 10], 1303 [10/1/12 \$251 entry], 1863.*

GHC's claimed \$83,580.66 payments should really only be \$83,329.66, and if GHC's reimbursement was not barred by its contract and case law (it is), it's reimbursement would only be **\$44,751.91**.

GHC claims that Ms. Hall breached the contract by failing to hold in trust disputed funds to the full extent of medical expenses paid by GHC. Actually, Ms. Hall's attorney continues to hold the amount of \$45,002.91 in its trust account – but disputes it is Group Health's money. *CP 1430.*

GHC also claims that Ms. Hall is in breach of the contract's cooperation clauses and therefore “cannot seek to enforce” the contract. But the law and the evidence tell a different story.

The cooperation clauses at issue operate only in the circumstance where GHC has a clear legal right to collect or recover its medical expenses. The GHC contract literally uses the terms “in its [GHC's] efforts to collect its Medical Expenses” and “in recovery of its [GHC's] Medical Expenses” as the scope within which those clauses operate. The contract states:

The Injured Person and his/her agents shall cooperate fully with GHC in its **efforts to collect GHC's Medical Expenses**.
[Emph added].

...

If the Injured Person fails to cooperate fully with GHC **in recovery of GHC's Medical Expenses**, the Injured Person shall be responsible for directly reimbursing GHC for 100% of GHC's Medical Expenses. [Emph added].

CP 1708-1709. The GHC contract's made whole provision (quoted on page 8 above) bars GHC from having a right to reimbursement of its Medical Expenses when, like here, its insured is not fully compensated. Cooperating with GHC in its "efforts to collect" or "recover" reimbursement only applies when GHC has a right to reimbursement.

It is senseless, even absurd, that GHC would interpret its contract as forcing Ms. Hall to help it collect money from a settlement fund that is not even enough to fully compensate Ms. Hall for her losses and to which, by its own contract, GHC has no right.

But even if the cooperation clauses were operative, the evidence shows that Ms. Hall cooperated. *CP 1796, 1806.* The cooperation clause lists information about which GHC is to be supplied: Cause of injury or illness, any potentially liable third parties, defendants and/or insurers related to the Injured Person's claim and informing GHC of any settlement or other payments relating to the Injured Person's Injury. *CP 1708-1709.*

GHC's own subrogation file notes defeat any claim by GHC that it was unaware of the cause of injury, the third party insurer, the third party insurer's total med-payment amount and the settlement amount. *CP 1796.*

The identify of the third party is a matter of public record.

GHC claims that Ms. Hall breached the contract by failing to give GHC notice of tentative settlement. GHC's own file note disproves this claim. *CP 1806*. On or about March 30, 2016, but after the failed mediation and prior to execution of the Release, Ms. Hall and L92C reached a verbal agreement to settle the tort case for payment of \$600,000. *CP 1458*. GHC's note of **that same day** evidences that GHC was aware that the tort case did not resolve in mediation, and that GHC was aware of an acceptable offer of \$600,000. *CP 1806*. This was before the release was signed and before the settlement check was even received. *1576-1578, 1859*.

GHC is not entitled to its insured's attorney work product, strategies or tactics of its insured's lawyer at any time. GH cannot put its financial interests ahead of its insured, and to do so is to act in bad faith. *See Mut. of Enumclaw Ins. Co. v. T & G Const., Inc.*, 165 Wash. 2d 255, 269, 199 P.3d 376 (2008).

GHC also claims that Ms. Hall breached the contract by fully releasing L92C from liability for GHC's subrogation claim. This shows a misunderstanding of subrogation law. If GHC had a right to reimbursement, its avenue to enforce that would be by asserting a type of lien against the settlement proceeds – not by suing the tortfeasor, since Ms. Hall elected to

sue the tortfeasor herself and included a claim for her medical expenses in that lawsuit and therefore did not abandon that claim. *See section A "BASIS 3" below.* Ms. Hall's attorney holds \$45,002.91 disputed funds in trust, and signing the release in no way prejudiced GHC's purported subrogation rights.

8. Ms. Hall countersued GHC:

GHC has had repeated opportunities to engage in good faith in its handling of its subrogation claim - and it has failed. It has engaged in unfair and deceptive acts in the business of insurance – and has damaged its insured. It has materially breached its contract. Ms. Hall countersued GHC for bad faith, CPA violation and breach of contract. *CP 15-25.*

B. Discovery Abuses:

The lower court allowed GHC to skirt providing Ms. Hall with full and complete responses to discovery that sought relevant documents and information. The lower court did this by drastically restricting the scope of information that GHC needed to provide to Ms. Hall. *See Ms. Hall's motion to compel (CP 343-356), compared to the court's order (CP 1379-1383).* The lower court abused its discretion. The lower court essentially condoned a discovery practice by a large corporate party (GHC) about which the Court of Appeals in *Target Nat. Bank v. Higgins*, has already disapproved: "Large corporate defendants can be uncooperative in discovery, leading to an

increase in effort expended by the debtor's attorney.” *Target Nat. Bank v. Higgins*, 180 Wash. App. 165, 192, 321 P.3d 1215 (2014).

C. Motions for Summary Judgment

Whether Ms. Hall was fully compensated for her actual losses suffered (i.e. made whole) is an issue relevant to the outcome of GHC’s lawsuit against Ms. Hall. Whether Ms. Hall was fully compensated has direct bearing on whether GHC has a right to reimbursement.

On June 20, 2018, Ms. Hall moved for summary judgment that: (1) The made whole doctrine and the made whole limitation to reimbursement in the GHC contract are relevant and applicable as a matter of law to the determination of GHC’s claim and Ms. Hall’s counterclaims; and (2) Evidence of Ms. Hall’s comparative fault and relevant preexisting medical history and conditions is relevant as a matter of law to the determination of whether Ms. Hall was made whole. *CP 1111-1129*. The hearing took place on September 14, 2018.

The lower court denied the motion **on the basis that the judge believed that it would be an advisory ruling**. *VRP 9/14/18 27:15-16*. No written order was entered at that time. At the hearing, the lower court stated: “I will sign an order that is agreed as to form by the parties or it can be presented at a later time for the Court’s signature.” *id.*, at 28:6-8. Months

later, GHC and Ms. Hall's counsel jointly signed an order, which stated: "Defendant's Motion for Partial Summary Judgment, heard on September 14, 2018 seeks advisory opinions from the Court and therefore on that basis only – and not on the merits - - is denied. The Court is not ruling on the issues in Defendant's motion. This shall constitute a final order." *CP 1923-1925*. This jointly signed order was then presented to the judge for signature by GHC counsel, who stated to the court: "This court ruled on three motions for summary judgment, and I have three agreed orders on each of those motions." *VRP 1/11/19 3:9-11*.

Even though at the MSJ hearing the lower court said it would sign an agreed order, the court did not. Instead, the court altered the agreed order such that it did not accurately reflect the court's own ruling. The order, altered by the court states: "Defendant's Motion for Partial Summary Judgment, heard on September 14, 2018 is denied. This shall constitute a final order." *CP 1923-1925*. (At the hearing, the lower court stated in its ruling: "So the Court is denying the motion on the basis that it believes that it would be an advisory ruling, [. . .]". See *VRP 9/14/18 27:15-16*:)

On October 3, 2018, Ms. Hall filed a motion for partial summary judgment, seeking dismissal of GHC's breach of contract claim. *CP 1431-1455*. Ms. Hall's argument was essentially:

(1) GHC has in no way been prejudiced because even if it had a right to reimbursement that amount would be \$45,002.91 (because it must, as a matter of law, pay a pro rata share of fees and costs) and Ms. Hall's attorney is holding that amount in trust; (2) GHC's claim that it was not on notice of a tentative settlement is contradicted by its own case note from prior to the tort case release being signed; (3) Ms. Hall did not violate the cooperation clauses in GHC's contract because they were inoperative; and (4) The supposed "breach" claimed by GHC would not have prejudiced GHC and would not be a "material breach" because subrogation is not a primary function of the GHC contract. *CP 1438-1439.*

Both the law and evidence supported dismissal of GHC's breach claim. *See CP 1438-1439; 1460-1761.* The lower court denied the motion. *CP 1926-1928.*

GHC filed a motion for summary judgment, which was heard on the same day as was Ms. Hall's October 3, 2018 MSJ. GHC's MSJ sought summary judgment declaring that it has a valid and enforceable claim for reimbursement against Ms. Hall, ordering Ms. Hall to pay GHC the **full** amount of its outstanding subrogation/reimbursement plus pre-judgment interest; and dismissing Ms. Hall's counterclaims. *CP 1345-1369.*

The lower court granted GHC's MSJ, and subsequently entered

judgment in GHC's favor for the entire \$83,329.66, but reserved the issue of pre-judgment interest for future argument and briefing. *CP 1920-1922; 1945-1948.*

V. ARGUMENT

The Appellate Court reviews summary judgment orders de novo, considering the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *See Keck v. Collins*, 184 Wash. 2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is appropriate only when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. *id.*

A. **Granting GHC's breach of contract MSJ and denying Ms. Hall's MSJ to dismiss GHC's breach of contract claim was error.**

There are four bases for why the lower court erred in granting GHC's breach of contract MSJ and in denying Ms. Hall's MSJ to dismiss GHC's breach of contract claim: (1) The cooperation clauses were not operative; (2) Ms. Hall did not fail to cooperate; (3) Ms. Hall did not prejudice GHC and (4) Any breach was not material.

BASIS 1: The cooperation clauses were not operative:

There are two reasons for why the cooperation clauses in the GHC contract were not operative: (a) **Five** rules for construing insurance contracts would be violated in order to find the cooperation clauses operative; (b) The

condition precedent to Ms. Hall cooperating with GH's effort to collect its Medical Expenses has yet to occur.

a. Five rules for construing insurance contracts would be violated in order to find the cooperation clause operative:

Rule 1: The made whole provision would be rendered meaningless.

It is GHC's burden to prove that Terri Hall was made whole by the third party settlement. It is not Terri Hall's burden to prove she was not made whole. "And it is the insurer's burden to prove the insured had received double recovery." *Leahy v. State Farm Mut. Auto. Ins. Co.*, 418 P.3d 175, 189 (Wash. Ct. App. 2018); "And the insurer has the burden of proving that an insured has received double recovery." *Sherry v. Fin. Indem. Co.*, 132 Wash. App. 355, 368, 131 P.3d 922 (2006), *aff'd and remanded*, 160 Wash. 2d 611, 160 P.3d 31 (2007) "We therefore affirm and remand to the trial court based on the presence of issues of fact as to whether PSE has been made whole with respect to the third-party insurers. In resolving these issues, consistent with *Weyerhaeuser and Pederson's*, the Insurers bear the burden of establishing the right to and amount of any offsets necessary to avoid double recovery by PSE." *Puget Sound Energy, Inc. v. Alba Gen. Ins. Co.*, 149 Wash. 2d 135, 142-43, 68 P.3d 106 (2003);

Ms. Hall was forced into retirement as a consequence of her injuries as a result of the incident, and her past and future economic damages

exceeded \$700,000.

Regarding **noneconomic** damages, the Supreme Court has acknowledged that in a personal injuries case, the claimed noneconomic damages typically amount to many multiples of the economic damages. *See Mahler v. Szucs*, 135 Wash. 2d 398, 414, 957 P.2d 632, order corrected on denial of reconsideration, 966 P.2d 305 (Wash. 1998). (implied overruling on other grounds).

Dr. Bays opined in his expert report:

In my opinion, Ms. Hall has sustained **permanent impairment caused by the subject incident of 9/18/12**, on a more-probable-than-not basis. With respect to the right femur fracture, [. . .] a **62% impairment to the right lower extremity**.

With respect to the injury to the left hand, including a comminuted fracture to the fifth carpometacarpal joint requiring operative intervention, [. . .] a **20% impairment to the left upper extremity** on the basis of grip strength deficit caused by the subject incident.

[Bold added]. *CP 1659-1660*. GHC has committed in contract that it does not have a right to reimbursement if Ms. Hall was not made whole.

To construe the GHC contract to obligate Ms. Hall to cooperate with GHC in its efforts to collect GHC's Medical Expenses, despite her not being made whole, would render the made-whole provision in the contract meaningless and without any force or effect. This would violate case law.

"In construing the language of an insurance policy, the entire contract must

be construed together so as to give force and effect to each clause.” *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash. 2d 869, 876, 784 P.2d 507, 511 (1990). “We view an insurance contract in its entirety and cannot interpret a phrase in isolation.” *Moeller v. Farmers Ins. Co. of Washington*, 173 Wash. 2d 264, 271, 267 P.3d 998 (2011).

Rule 2: The “average person purchasing insurance” rule.

The contract’s cooperation provisions are limited in scope, and that scope is cooperating in GHC’s “efforts to collect” or “in recovery of” its Medical Expenses. No average person purchasing insurance would understand the GHC contract, as it is written, to force Ms. Hall to help her insurer collect or recover money from her already deficient common fund – to which by its own contract’s made-whole provision GHC is not owed.

“It is well established that the language of an insurance policy should be interpreted in accordance with the way it would be understood by the average man purchasing insurance.” *Ames v. Baker*, 68 Wash. 2d 713, 716, 415 P.2d 74 (1966). *See also Boeing Co. v. Aetna Cas. & Sur. Co.*, *id.*

“Policy language is to be interpreted as the average person would understand it, not in a technical sense.” *Kent Farms, Inc. v. Zurich Ins. Co.*, 140 Wash. 2d 396, 399, 998 P.2d 292 (2000).

Rule 3: No strained or forced construction leading to absurd results.

The GHC contract is susceptible to only one reasonable interpretation:

When the insured is not fully compensated, GHC's right to collect its Medical Expenses is barred by the contract's made whole provision and so the cooperation clauses, which apply to GHC's efforts to collect or recover its Medical Expenses, are not applicable. The result is practical and reasonable.

Construing the contract to require Ms. Hall to help GHC collect money from a dearth of settlement proceeds even though GHC's right to collect is barred by that same contract is an impractical and unreasonable construction of the contract. It would lead to absurdity: The insured, Ms. Hall, would be forced to act against her own financial interests to help its insurer collect money from a common fund that already does not make Ms. Hall whole, thereby creating an even bigger loss to Ms. Hall.

It is a hardship to Ms. Hall for her insurer to force her to help it seize money from a common fund that already does not fully compensate Ms. Hall.

When interpreting an insurance contract, a construction which results in hardship or absurdity is presumed **not** to be the intent by the parties. *Campbell v. Ticor Title Ins. Co.*, 166 Wash. 2d 466, 472, 209 P.3d 859 (2009).

It is the general policy that insureds receive full compensation **before** **an insurer can seek reimbursement.** See *Sherry v. Fin. Indem. Co.*, 160

Wash. 2d 611, 622, 160 P.3d 31 (2007). An insurer is not permitted to limit its liability if to do so would be inconsistent with public policy. See *Britton v. Safeco Ins. Co. of Am.*, 104 Wash. 2d 518, 528, 707 P.2d 125 (1985). “A contract provision is void as contrary to public policy if it seriously offends law or public policy.” *Keystone Masonry, Inc. v. Garco Const., Inc.*, 135 Wash. App. 927, 933, 147 P.3d 610 (2006). “In this state it is well established that public policy requires an injured party to be made whole before requiring reimbursement of an injured party's insurance carrier.” *Skiles v. Farmers Ins. Co.*, 61 Wash. App. 943, 947, 814 P.2d 666 (1991).

Construing the GHC cooperation clauses to be “breachable” even when the insured has not been made whole violates public policy and renders the cooperation clauses void. Such an impractical construction of the GHC contract is rejected by Washington law. “The contract should be given a practical and reasonable rather than a literal interpretation; it should not be given a strained or forced construction which would lead to an extension or restriction of the policy beyond what is fairly within its terms, or which would lead to an absurd conclusion, or render the policy nonsensical or ineffective.” *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wash. 2d 901, 907, 726 P.2d 439 (1986).

“We should not engage in a “strained or forced construction” that

would lead to absurd results.” *Boag v. Farmers Ins. Co. of Washington*, 117 Wash. App. 116, 124, 69 P.3d 370 (2003).

Rule 4: The “most favorable to the insured” rule.

Even if the GHC contract was fairly susceptible to GHC’s interpretation, the court must apply the interpretation most favorable to the insured, Ms. Hall. “When a policy is fairly susceptible of two different interpretations, that interpretation most favorable to the insured **must be** applied, even though a different meaning may have been intended by the insurer.” [Bold added]. *Ames v. Baker*, 68 Wash. 2d 713, 717, 415 P.2d 74 (1966).

Rule 5: Interpreting “strictly against the insurer” rule.

“As a general rule, we interpret insurance contracts strictly against the insurer.” *Mid-Century Ins. Co. v. Henault*, 75 Wash. App. 733, 739, 879 P.2d 994 (1994), *aff’d*, 128 Wash. 2d 207, 905 P.2d 379 (1995).

The GHC contract must be interpreted strictly against GHC. As a matter of law, GHC’s contract shall **not** be interpreted such that it would be a breach by Ms. Hall if she does not take action against her own financial interests and help her insurer seize money from her settlement proceeds to which the insurer has no right – reducing Ms. Hall’s net recovery even more, thereby creating a bigger gap between her actual damages and her actual

recovery.

Neither Ms. Hall nor the courts shall endorse an absurd, dishonest, and inequitable construction of the contract. The lower court did.

b. Made whole is a condition precedent to Ms. Hall cooperating with GHC's efforts take money from the common fund.

Being fully compensated is a condition precedent to the accrual of GHC's right to obligate Ms. Hall to cooperate with GHC's efforts to collect or recover its Medical Expenses.

A condition precedent is: Such as must happen or be performed [i.e. Ms. Hall must be fully compensated for her actual losses suffered, including general damages]; before a right can accrue to enforce an obligation against another in favor of one claiming such right that is dependent on the happening thereof [i.e. before GHC's right can accrue to enforce an obligation against Ms. Hall to cooperate with GHC to recover or collect its Medical Expenses]. *See Partlow v. Mathews*, 43 Wash. 2d 398, 406, 261 P.2d 394 (1953).

It is GHC's burden to prove that Ms. Hall was made whole. *See Leahy v. State Farm Mut. Auto. Ins. Co., id., and Puget Sound Energy, Inc. v. Alba Gen. Ins. Co., id., and Sherry v. Fin. Indem. Co., id.*

GHC does not satisfy this burden simply by the fact that Ms. Hall

settled with L92C for less than its policy limits – because it is Ms. Hall’s *actual damages* that determine full compensation, not whether the L92C insurance policy limits were exhausted. The Washington State Supreme Court in *Sherry v. Fin. Indem. Co.,id.*, provided a two-prong test for an insurer’s entitlement to reimbursement: (1) when the contract itself authorizes it, and (2) when the insured is fully compensated by the relevant “applicable measure of damages”. *Id.*, at 619.

As to the second prong, the Supreme Court in *Sherry* specifically used the term “relevant applicable measure of damages” – **not** “exhaustion of policy limits or tortfeasor’s assets”. The measure of damages in tort actions is that indemnity which will afford an adequate compensation to a person for the loss suffered or the injury sustained by him as the direct, natural, and proximate consequence of the wrongful act or omission. *See Burr v. Clark*, 30 Wash. 2d 149, 158, 190 P.2d 769 (1948).

“The question of reimbursement concerns only whether an insured has been fully compensated for its loss. This inquiry does not depend upon whether the loss is fully or only partially insured. Neither does it depend upon whether the insured itself was the cause of some part of the loss.” [footnotes omitted] *S & K Motors, Inc. v. Harco Nat. Ins. Co.*, 151 Wash.App. 633,641–42, 213 P.3d 630 (2009).

“This court has **never** limited full recovery to the amount recoverable under UIM coverage. Rather, our opinions suggest insureds are not fully compensated until they have recovered all of their damages as a result of a motor vehicle accident.” [Bold added]. *Sherry, id.*, at 621. In 2001 our Supreme Court recognized that:

“[t]here is no other precedent for the position that settlement for less than the tortfeasor's policy limits somehow raises a presumption of full compensation or otherwise prejudices the insured's PIP benefits.

Liberty Mut. Ins. Co. v. Tripp, 144 Wash. 2d 1, 22, 25 P.3d 997 (2001).

The made whole condition precedent in GHC's contract has never been proven by GHC, which as a matter of law results in two conclusions: (1) That GHC has no right to enforce its cooperation clauses; (Nonoccurrence of a condition prevents the promisee from acquiring a right, or deprives him of one. *See Ross v. Harding*, 64 Wash. 2d 231, 236, 391 P.2d 526 (1964)); and (2) That the cooperation clause cannot have been breached. (Conditions precedent are those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a breach of contract duty. *See Ross v. Harding*, 64 Wash. 2d 231, 236, 391 P.2d 526 (1964)).

c. Made whole caselaw

Even if GHC's contract did not have a made-whole provision, the

caselaw adopts a “made whole” rule, and that rule limits GHC’s contractual “right” to reimbursement.

“Out of the recovery from the third party the insured is to be reimbursed first, for the loss not covered by insurance, and the insurer is entitled to any remaining balance, up to a sum sufficient to reimburse the insurer fully, the insured being entitled to anything beyond that.”

Daniels v. State Farm Mut. Auto. Ins. Co., No. 96185-9, 2019 WL 2909308, at *3 (Wash. July 3, 2019), quoting Robert E. Keeton, *Basic Text on Insurance Law* § 3.10(c)(2), at 161 (1971).

“The made whole doctrine is a limitation on the recovery of the insurer when it seeks reimbursement from its insured for a loss it has previously paid to the insured.” *Averill v. Farmers Ins. Co. of Washington*, 155 Wash. App. 106, 114, 229 P.3d 830 (2010).

In its July 3, 2019 opinion in *Daniels v. State Farm Mut. Auto. Ins. Co.*, *id.*, the Supreme Court stated: “In addressing conflicts between subrogated insurers and injured insureds, we have generally established priority for the interests of the insureds through the made whole doctrine.” *id.*, at 3. The proceeds of any recovery from a third-party tortfeasor, whether in a subrogation action or otherwise, must be allocated in such a way as to first make the insured whole. *See, id.*, at 5.

The Supreme Court also stated: “But an insurer generally cannot

obtain a recovery if its insured has uncompensated damages.” *Id.*, at 3.

In a recent subrogation case from 2018, also involving GHC, GHC relied on provisions of its contract that are essentially identical to provisions in our GHC contract. *See Grp. Health Coop. v. Coon*, 423 P.3d 906 (Wash. Ct. App. 2018), review granted, 192 Wash. 2d 1017, 433 P.3d 812 (2019). And the Court of Appeals held that the made whole rule adopted by our Supreme Court in *Thiringer v. American Motors Insurance Company*, 91 Wash.2d 215, 588 P.2d 191 (1978), **limits this contractual right to reimbursement:**

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., 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.

[footnote omitted; bold added]. *Id.*, at 749. The similarities between that GHC subrogation case and this GHC subrogation case are remarkable. *See Id.*, at 738, 742-748.

One difference was that In *Grp. Health Coop. v. Coon*, Coons’ lawyer

disbursed (not to GHC) the lien amount that it was holding in its trust account. *id.*, at 744. In our case, Ms. Hall's counsel continues to hold the \$45,002.91 in trust.

The Appellate Court in *Grp. Health Coop. v. Coon*, determined that the made whole doctrine in *Thiringer* was vital to the insureds receiving the full benefit of their GHC policy:

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.

id., at 753. Similarly, refusing to apply the made whole rule in *Thiringer* would deprive Ms. Hall of the full benefit of her GHC health policy.

d. Summary

As a matter of law, Ms. Hall did not breach the GHC insurance contract's cooperation clauses because they were not in effect. Distorting the GHC contract by giving effect to the cooperation clauses rendered the made whole provision in the GHC contract meaningless, violated the made whole doctrine in Washington law, broke four other well-settled rules for construing insurance contracts and enforced a conditional obligation even though the triggering event (the condition precedent) has yet to occur.

BASIS 2: Ms. Hall did not fail to cooperate.

Even if the cooperation clauses were in effect, there was no material

breach. The cooperation clause lists information about which GHC is to be supplied: Cause of injury or illness, any potentially liable third parties, defendants and/or insurers related to the Injured Person's claim and informing GHC of any settlement or other payments relating to the Injured Person's Injury.

Based on GHC's own file notes (*ER 801(d)(2)*) it cannot be disputed that GHC was on notice as to facts of the incident, that the lawsuit had been filed, the identity of the third party insurer, injuries sustained by Ms. Hall, that she claimed over \$700,000 in special damages, facts of prior medical history, the issue of comparative fault, and of the tentative settlement.

It also cannot be disputed that GHC's supposed "interest" is being preserved in Ms. Hall's counsel's trust account.

GHC's subrogation file was obtained by Ms. Hall's counsel. GHC's subrogation file note dated March 21, 2016 (prior to Ms. Hall's settlement) shows a voluminous amount of information:

LOSS FACTS: Walking down stairs missing the last step and fell exiting a dark building - A State Labor Council – not in scope of employment.

INJURIES: fx RT femur, fx LT hand, head injury, ulnar nerve lesion, post op Infection subsequent to surgeries fracture-dislocation, left fifth carpometacarpal joint See priors below

GH's ATTORNEY FEE: 40% Costs: 56,446

CLAIMED VALUES:

- Medical expenses \$219,000
- Wage loss \$484,119 L&I
adjudicator

Attorney says testified at deposition: she was planning to stay until they 'kicked her out' enjoyed her job.

- Mileage \$
- Other \$33,750 chore
services
- TOTAL \$736,869

COVERAGES AVAILABLE: [. . .]

Insurer	\$ amt
Premise MP: Mutual of Enumclaw	\$10,000 Limits confirmed tendered: Yes
Premise MP: Mutual of Enumclaw	\$600,000 Limits confirmed tendered: No

[. . .]

Was the settlement amount reduced by comparative negligence? Exterior stairway, lighting in upper part but it was dark. The exterior light was out. Handrail did not extend to end of the last step despite the blueprints. Assumption of risk is the issue of proceeding down the dark stairs.**

Talking w/ Ingrid, a friend. They did not depose Ingrid as a witness for liability.....

[. . .]

RECOMMENDATION AND RATIONALE: Attorney called pre-mediation asking us to accept \$5,000 in full citing Sherry and comp neg issues. Suit was filed December 2014 in Thurston County cause #14-2-02378-0. [. . .]

September care alone: 40,256.64	Care 1 month since dol: 53,280.34
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CP 1796. Another GHC note from the same day (3/21/16) states:

Call from atty Tim Freeman [. . .] atty **read off very extensive list of pre-existing conditions from records review by MD**, surgery not indicated from this fall etc, [. . .]

[Bold added] *CP 1806.* A GHC March 30, 2016 note states in part: “[. . .] but they now have an acceptable offer of \$600k.” *id.*

A third subrogation file note states: “Gross Settlement Amount: \$600,000.00”. *CP 1804.* On April 5, 2016, Ms. Hall’s attorney emailed GHC’s attorney that: “We disagree that your client has any right of reimbursement based upon Washington law and the facts of this case that involve Plaintiff’s preexisting conditions and comparative fault.” *CP 1203.*

On May 3, 2016, Ms. Hall’s attorney emailed GHC’s attorney that: “As you are responsible for knowing, she had a long history of preexisting injury. see, *Sherry v. Financial Indemnity*. You are responsible for knowing that there were facts supporting comparative fault. There was no full recovery because of these factors. See, *Thiringer*. There is no valid subrogation claim.” *CP 1209.*

“The burden of proving noncooperation is on the insurer.” *Staples v. Allstate Ins. Co.*, 176 Wash. 2d 404, 410, 295 P.3d 201 (2013). “Breach of a cooperation clause is measured by the yardstick of substantial compliance.” *id.*, at 414. The GHC file notes evidence cooperation and that GHC was well

informed of various aspects pertaining to Ms. Hall's case.

GHC also claims that Ms. Hall breached the contract by failing to give GHC notice of tentative settlement - another claim defeated by its own case note. GHC's March 30, 2016 note states in pertinent part: "Recd cl from Tim Freeman. [. . .] Case did not resolve in mediation, but now they have an acceptable offer of \$600k." *CP 1806*. This note was prior to Ms. Hall signing the release and prior to her attorneys' receipt of the settlement funds.

"Indeed, we have required a showing of prejudice for many nongeneral cooperation clauses, including a clause requiring the insured to obtain the insurer's consent before settling, [. . .]" *Staples v. Allstate Ins. Co., id.*, at 418. GHC has not been prejudiced. *See BASIS 3 below*.

Lastly, GHC claims that Ms. Hall breached the contract by fully releasing L92C from liability for GHC's subrogation claim. This is incorrect. **Nowhere** in GHC's insurance contract does it state that Ms. Hall shall not fully release the tortfeasor from liability for GHC's subrogation claim. Rather, the contract requires that Ms. Hall and her agents not do anything to "prejudice" GHC's subrogation and reimbursement rights and that she not settle a claim without "protecting" GHC's interests. *CP 1709*.

GHC's "interests" are protected. Ms. Hall sued the tortfeasor and sought compensation for medical expenses and Ms. Hall's attorney continues

to hold \$45,002.91 in trust. GHC has not been prejudiced. *See next section.*

BASIS 3: GHC has not been prejudiced

In every cooperation clause, notice clause, and “no settlement clause” case, where the prejudice issue has been raised, the court has analyzed prejudice. Three courts have discussed prejudice when addressing cooperation clauses. Numerous courts have analyzed prejudice when addressing notice clauses. One case analyzed prejudice in the context of a no settlement clause. These types of clauses are similar in that they all condition payment of the claim on the insured's satisfaction of policy requirements. They are designed “to prevent the insurer from being prejudiced by the insured's actions.” **Therefore, “[t]o release an insurer from its obligations without a showing of actual prejudice would be to authorize a possible windfall for the insurers.”**

[footnotes omitted; bold added]. *Pilgrim v. State Farm Fire & Cas. Ins. Co.*, 89 Wash. App. 712, 723–24, 950 P.2d 479 (1997). *Quoting Pub. Util. Dist. No. 1 of Klickitat Cty. v. Int'l Ins. Co.*, 124 Wash. 2d 789, 803, 881 P.2d 1020 (1994).

To establish prejudice, the insurer must show concrete detriment together with some specific harm to the insurer caused thereby. *See id.*, at 724-725. Moreover, the issue of prejudice from a policy breach is a question of fact for the jury and will be presumed only in extreme cases. *id.*, at 725. “Prejudice is an issue of fact that will seldom be established as a matter of law.” *Staples v. Allstate Ins. Co.*, *id.*, at 419. Prejudice will be presumed only in extreme cases. *See id.*

“To release an insurer from its obligations without a showing of

actual prejudice would be to authorize a possible windfall for the insurers.”
Pub. Util. Dist. No. 1 of Klickitat Cty. v. Int'l Ins. Co., id., at 803.

“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.**” [bold added]. *Grp. Health Coop. v. Coon, id.*, at 748. Even if on March 30, 2016 GHC was not on notice of the \$600,000 tentative settlement (it was), that is irrelevant because GHC cannot show that it was prejudiced.

Unlike this case, in the *Grp. Health Coop. v. Coon* case, undisputed facts established that the Coons breached the notice requirements of the contract. *id.* Nonetheless, the Court of Appeals stated:

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.

Id. As a matter of law, GHC cannot show prejudice. Its “interest” is protected by being held in trust, pending the outcome of this case.

As to GHC’s claim that Ms. Hall released L92C from liability for GHC’s subrogation claim, that as a matter of law did not prejudice GHC because GHC’s avenue for enforcing its subrogation is through a “lien” – not to sue the tortfeasor.

There are two features to subrogation. The first is the right to

reimbursement, and the second is the mechanism for the enforcement of that right. See *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wash. App. 185, 200, 312 P.3d 976 (2013).

“Generally two means exist through which a subrogated insurer can recover from a responsible third party: (1) the insured brings a claim against the third party and the insurer seeks reimbursement from the insured’s recovery, or (2) the insurer can “stand in the shoes” of its insured and pursue a claim against the responsible party directly.” *Daniels v. State Farm Mut. Auto. Ins. Co., id.*, at 2.

Terri Hall did not abandon her “shoes”. She sued the tortfeasor included in that suit a claim for her medical expenses incurred as a result of the injury. CP 1558-1565. That matters, because Terri Hall signing the release in no way prejudiced GHC because GHC’s enforcement mechanism is not to sue L92C (those shoes were not abandoned), but rather as a type of lien against any recovery Ms. Hall secured from the third party.

Reimbursement on that “lien” (GHC’s supposed interest) would be in the amount of \$45,002.91 at most, or \$44,751.91 given GHC’s double dipping. Ms. Hall’s attorney is holding the greater of those amounts in trust.

GHC’s supposed subrogation and reimbursement rights have been protected and have **not** been prejudiced. “[. . .] Mr. Peterson did not

prejudice Safeco's right to reimbursement. He created a common fund and currently holds the PIP amount in trust, pending resolution of this dispute.” *Peterson v. Safeco Ins. Co. of Illinois*, 95 Wash. App. 254, 257, 976 P.2d 632, (1999). GHC’s claim that Ms. Hall “prejudiced” GHC’s subrogation and reimbursement rights and therefore breached the contract is baseless.

BASIS 4: No material breach by Ms. Hall.

There has been no material breach by Ms. Hall. “A material breach is one that substantially defeats a **primary function** of the contract.” [Bold emph added]. *Top Line Builders, Inc. v. Bovenkamp*, 179 Wash. App. 794, 808, 320 P.3d 130 (2014). *See also Mitchell v. Straith*, 40 Wash. App. 405, 410, 698 P.2d 609 (1985).

“Webster's Dictionary states that “**primary**” means “**first in rank or importance: Chief, Principal.**”¹⁰ Webster's Third New Int'l Dictionary 1800(2 a) (1988).” [bold emph added]. *Tahoma Audubon Soc'y v. Park Junction Partners*, 128 Wash. App. 671, 684, 116 P.3d 1046, (2005).

Even if Ms. Hall did not help GHC collect its Medical Expenses to GHC’s satisfaction or notify GHC of a tentative settlement or hold funds in trust, that would not be a **material** breach of the GHC contract. None of that is the **primary function** of the insurance contract.

The primary function of the insurance contract is to transfer risk from

insured to insurer. “Indeed, this court can find no Washington case or statute in which the phrase “contract of insurance” denotes a broader category of contract than that transferring risk from insured to insurer.” *State v. Mau*, 178 Wash. 2d 308, 316, 308 P.3d 629 (2013). The purpose of insurance is to insure. *See Aetna Cas. & Sur. Co. v. M & S Indus., Inc.*, 64 Wash. App. 916, 923, 827 P.2d 321 (1992). “Insurance” is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies. *See RCW 48.01.040*.

Based on the documentary evidence Ms. Hall cooperated with GHC, GHC had notice of the lawsuit, of the third party insurer, of injuries, of facts of the incident and of the tentative settlement amount, and Ms. Hall’s attorney is holding \$45,002.01 in its trust account.

Given the evidence in this case and the rules for construing insurance contracts, the made whole case law and the case law requiring prejudice to the insurer, the lower court should have denied GHC’s breach of contract MSJ and granted Ms. Hall’s MSJ to dismiss GHC’s breach of contract claim.

Based on each and all of the above reasons in BASES 1 through BASES 4 above, this Court should reverse the lower court’s order on GHC’s MSJ and dismiss GHC’s breach of contract claim.

Ms. Hall is entitled to summary judgment dismissing GHC’s breach

of contract claim. Alternatively, at a minimum GHC's breach of contract claim should have gone to the jury.

"Whether a party has breached a contract is a question of fact." *Frank Coluccio Const. Co. v. King Cty.*, 136 Wash. App. 751, 762, 150 P.3d 1147, (2007); citing *Palmiero v. Spada Distrib. Co.*, 217 F.2d 561, 565 (9th Cir. 1954) ("the question of breach of any contract, oral or written, is a question of fact to be left to the trier of fact"). Whether a breach is material is a question of fact. *Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wash. App. 191, 209, 165 P.3d 1271 (2007).

As the moving party, it was GHC's burden to prove by uncontroverted facts that there is no genuine issue of material facts. *See Jacobsen v. State*, 89 Wash. 2d 104, 108, 569 P.2d 1152 (1977). It failed to meet this burden.

In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably for the nonmoving party and, when so considered, if reasonable people might reach different conclusions, the motion should be denied. *Id at 108-109.*

A motion for summary judgment will be granted **only if**, after considering the evidence in the light most favorable to the nonmoving party, reasonable persons could reach but **one conclusion**. *See Overton v. Consol. Ins. Co.*, 145 Wash. 2d 417, 429, 38 P.3d 322 (2002).

There is only one reasonable interpretation of the GHC insurance contract - the interpretation of Ms. Hall, which aligns with the made whole doctrine. In *Daniels v. State Farm Mut. Auto. Ins. Co.*, *id*, the insurer's and lower court's interpretation did not align with the common law made whole doctrine, and it was therefore rejected by the Supreme Court: "Here, there can be only one reasonable interpretation, which is one that aligns with the common law made whole doctrine. The interpretation State Farm urges, and which was adopted by the courts below, does not align with that doctrine; therefore we reject it." *Daniels, id.*, at 7.

B. The Court erred when it dismissed Ms. Hall's counterclaims on summary judgment.

In its motion for summary judgment GHC also sought and received dismissal of Ms. Hall's counterclaims. This was reversible error. The following nine facts are indisputable:

GHC was aware on March 30, 2016 (and prior to the release being signed) of a post-mediation acceptable offer of \$600,000; GHC was aware that Ms. Hall was asserting that she was not made whole; Ms. Hall offered to settle GHC's claim for \$5,000; The GHC contract has a provision that limits GHC's right to reimbursement and subrogation to the excess of the amount required to fully compensate Ms. Hall for her losses, including general damages; In the tort case, L92C admitted to over \$200,000 of

expenses incurred by Ms. Hall from various providers as being a reasonable value for necessary medical care, treatment and services caused by the incident; William Brandt, a CPA, accredited business valuations specialist who is certified in financial forensics, issued a report in the tort case wherein he opined an economic loss to Ms. Hall of over \$400,000; The settlement with L92C was only \$600,000; Ms. Hall's attorney is holding \$45,002.91 in trust; and GHC sent multiple letters to Ms. Hall that represented to her that at the time of settlement, payment **should be made** by check and **payable to** GHC, and these letters were silent as to GHC's lack of rights in contract and case law if Ms. Hall was not made whole by the settlement. *CP 1810-1850*.

B(i). The evidence shows that GHC committed bad faith:

1. GHC did not evaluate Ms. Hall's \$5,000 "piece-of-mind" settlement offer as though it, GHC, bore the entire risk. GHC must evaluate settlement offers as though GHC bore the entire risk. *See Truck Ins. Exch. of Farmers Ins. Grp. v. Century Indem. Co.*, 76 Wash. App. 527, 534, 887 P.2d 455 (1995);

2. GHC misrepresented pertinent facts and insurance policy provisions when it sent multiple collection letters to Ms. Hall that were silent as to GHC's policy provision limiting its right of reimbursement if Ms. Hall was not made whole, and that directed that at the time of settlement, payment

should be made by check and **payable to** GHC. “Even accurate information may be deceptive “ ‘if there is a representation, omission or practice that is likely to mislead.’ ”” *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wash. 2d 83, 115, 285 P.3d 34 (2012). An insurance company's duty of good faith rises to an even higher level than that of honesty and lawfulness of purpose toward its policyholders: an insurer **must deal fairly with an insured, giving equal consideration in all matters to the insured's interests.** *See Tank v. State Farm Fire & Cas. Co.*, 105 Wash. 2d 381, 386, 715 P.2d 1133 (1986). The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. *See RCW 48.01.030*; GHC must not misrepresent pertinent facts or insurance policy provisions. *See WAC 284-30-330(1)*; and

3. GHC also misrepresented a pertinent fact and insurance policy provisions in a letter it sent to Ms. Hall’s attorney that stated in pertinent part: “Through this contractual clause and principles of equity, Group Health is entitled to reimbursement for its medical treatment given to a patient where the injury is caused by the act or omission of a third party and where the patient obtains a settlement or judgment against the third party.” *CP 1221 [section 8] and 1296*. This is misleading, deceptive and a misrepresentation

because of what GHC *failed* to disclose in this letter – that its contract and case law bar its right to reimbursement when the insured is not fully compensated.

“[. . .] the failure to disclose material terms violates the CPA.” *Bain v. Metro. Mortg. Grp., Inc., id.*, at 116. This misleading, deceptive and misrepresenting letter violates GHC’s duty of good faith as set forth in *Tank v. State Farm Fire & Cas. Co., id.*, at 386. It violates the duty of good faith as set forth in RCW 48.01.030. It violates WAC 284-30-330(1), which prohibits an insurer from misrepresenting pertinent facts or policy provisions. And, it violates its duty in *Truck Ins. Exch. of Farmers Ins. Grp. v. Century Indem. Co.*, 76 Wash. App. 527, 534, 887 P.2d 455 (1995) to evaluate the \$5,000 settlement offer as though GHC bore the entire risk.

4. GHC has overemphasized its own interests and failed to practice honesty and equity when it contorted its contract to favor itself over its insured in a way that violates multiple rules of construction for insurance contracts and when it took positions to favor itself over its insured that defy Washington law (that GHC has the burden to prove that Ms. Hall was made whole; that actual damages determine full compensation, not whether the L92C insurance policy limits were exhausted.; That it is the general policy that insureds receive full compensation before an insurer can seek

reimbursement; That GHC **must** pay or have withheld from the reimbursement amount a pro rata share of attorney fees and costs; That nonoccurrence of a condition prevents the promisee from acquiring a right, or deprives him of one; and that conditions precedent are those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a breach of contract duty.)

And so GHC acted in bad faith by overemphasizing its own interests (*See Anderson v. State Farm Mut. Ins. Co.*, 101 Wash. App. 323, 329, 2 P.3d 1029 (2000)), and it violated its duty of good faith as set forth in *Tank v. State Farm Fire & Cas. Co.*, *id.*, at 386, and in RCW 48.01.030.

5. GHC overemphasized its own interests and failed to practice honesty and equity when it took the misleading and deceptive act of seeking reimbursement of the entire \$83,580.66, even though case law requires that it must pay a share of attorney fees and costs. And so GHC acted in bad faith by overemphasizing its own interests (*See Anderson v. State Farm Mut. Ins. Co.*, *id.*), and it violated its duty of good faith as set forth in *Tank v. State Farm Fire & Cas. Co.*, *id.*, at 386, and its duty of good faith as set forth in RCW 48.01.030.

6. GHC overemphasized its own interests, failed to practice honesty and equity, and misrepresented a pertinent fact in claiming that it

paid \$83,580.66 in medical expenses, and then proceeding to compel its insured to litigate over that amount – when in fact Mutual of Enumclaw already paid a portion of that.

And so GHC acted in bad faith by overemphasizing its own interests (*See Anderson v. State Farm Mut. Ins. Co., id.*), and it violated its duty of good faith as set forth in *Tank v. State Farm Fire & Cas. Co., id.* at 386, its duty of good faith as set forth in RCW 48.01.030, and it violated its duty in WAC 284-30-330(1) to not misrepresent pertinent facts..

7. GHC repeatedly dealt unfairly with Ms. Hall. An example of this is shown by GHC’s bad-faith attempt to circumvent its legal obligation to pay its share of fees and costs. Another example is the absurd way in which GHC construes its contract and essentially tries to sidestep the provision in its contract that bars its right to reimbursement when the insured is not fully compensated. GHC claims (despite CR 11) that Ms. Hall breached the contract by failing to give notice of tentative settlement – yet GHC knew when it filed this lawsuit that its own file note dated March 30, 2016 stated in pertinent part: “Case did not resolve in mediation, but now they have an acceptable offer of \$600k.”

And so GHC violated its duty of good faith as set forth in *Tank v. State Farm Fire & Cas. Co., id.* at 386, and its duty of good faith as set forth

in RCW 48.01.030.

The evidence shows that GHC materially breached its contract. Regulatory statutes become part of the policy of insurance and should be read into the insurance policy. *See Touchette v. Nw. Mut. Ins. Co.*, 80 Wash. 2d 327, 332, 494 P.2d 479 (1972). And so GHC's violation of RCW 48.01.030 and WAC 284-30-330 are each breaches of contract.

“[. . .] the insurance contract brings the insured a certain peace of mind that the insurer will deal with it fairly and justly when a claim is made. Conduct by the insurer which erodes the security purchased by the insured breaches the insurer's duty to act in good faith.” [footnote omitted]. *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wash. 2d 269, 282–83, 961 P.2d 933 (1998). GHC has eroded the security that it deal fairly and justly with Ms. Hall when a claim is made. A significant purpose of an insurance contract is frustrated if, in order to gain the benefits of the contract, the insured is forced to engage in costly and time consuming litigation. *Colorado Structures, Inc. v. Ins. Co. of the W.*, 161 Wash. 2d 577, 604, 167 P.3d 1125 (2007). GHC has forced Ms. Hall to engage in costly time consuming litigation to make her insurer honor its contract and made whole case law.

B(ii) The evidence shows that GHC violated the CPA.

To prevail in a private CPA claim, the plaintiff must prove (1) an

unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. *Panag v. Farmers Ins. Co. of Washington*, 166 Wash. 2d 27, 37, 204 P.3d 885 (2009).

1. Unfair or deceptive act or practice occurring in trade/commerce:

Given the evidence, a jury could determine that GHC breached its duty of good faith. *See above*. Genuine issues of material fact exist on that issue. And a breach of GHC's duty of good faith constitutes a per se CPA violation. *See Tank, id.*, at 394.

"[. . .] under RCW 48.30.010, a single violation of WAC 284-30-330 constitutes a statutorily proscribed unfair trade practice. Accordingly, an insured may establish a per se unfair trade practice under the CPA by demonstrating a violation of RCW 48.30.010 based upon a single violation of WAC 284-30-330." *Gosney v. Fireman's Fund Ins. Co.*, 419 P.3d 447, 470 (Wash. Ct. App. 2018), review denied, No. 96029-1, 2018 WL 4770998 (Wash. Oct. 3, 2018).

We hold that a **CPA claim may be predicated on the deceptive characterization of an unadjudicated insurance subrogation claim as a liquidated debt** that must be immediately paid.

[Bold added]. *Panag v. Farmers Ins. Co. of Washington, id.*, at 65. The CPA

is applicable to deceptive insurance subrogation collection activities.

We conclude the CPA is applicable to deceptive insurance subrogation collection activities, considering the broad legislative mandate that the business of insurance is vital to the public interest, the public policies favoring honest debt collection, and the statutory mandate to liberally construe the CPA in order to protect the public from inventive attempts to engage in unfair and deceptive business practices. *id.*, at 55.

2. Affecting the public interest:

The business of insurance is one affected by the public interest. *See RCW 48.01.030.*

3. Injury and causation:

“We further hold that a CPA plaintiff alleging deceptive collection methods need not remand payment to establish injury: other expenses incurred as a result of the deceptive practice may satisfy the injury element.” *Panag v. Farmers Ins. Co. of Washington, id.*, at 65.

Consulting an attorney to dispel uncertainty regarding the nature of an alleged debt is sufficient to show injury to business or property. *See id.*, at 62. “Investigation expenses and other costs resulting from a deceptive business practice sufficiently establish injury.” *Id.*

Because of GHC’s deceptive, unfair acts and practices, Ms. Hall has incurred a \$500.00 cost from Dr. Ghidella (Declaration defending against GHC’s bad-faith action) and Ms. Hall has been denied possession of her

\$45,002.91 settlement money. *See CP 1858, 1574.* These are CPA “injuries”.

“No monetary damages need be proven so long as there is some injury to property or business. Sufficient injury to satisfy the fourth and fifth elements of a Consumer Protection Act claim is established when a plaintiff is deprived of the use of his property as a result of an unfair or deceptive act or practice. In this case, Sorrel was denied rightful possession of his funds for a period of two weeks. His CPA claim should not have been dismissed for failure to establish injury.” [footnotes omitted]. *Sorrel v. Eagle Healthcare, Inc.*, 110 Wash. App. 290, 298–99, 38 P.3d 1024, (2002).

The evidence shows that GHC committed bad faith, materially breached its contract and violated the Consumer Protection Act. It was error to dismiss these claims – questions of fact – on summary judgment.

C. Attorney fees

This request for fees is made under authority of RAP 18.1

Ms. Hall has been injured by GHC’s violation of the CPA. *See above.* Ms. Hall requests attorney fees and costs under RCW 19.86.090. “Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW

19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee.”

Ms. Hall also requests reasonable attorney fees and costs under *McRory v. N. Ins. Co. of New York*, 138 Wash.2d 550, 980 P.2d 736 (1999) and *Olympic Steamship*, 117 Wash. 2d 37, 811 P.2d 673 (1991).

This action was precipitated precisely because of GHC’s unfair and deceptive, and bad faith decisions to improperly put the burden of proof on its insured, to defy made-whole law, to defy its made-whole contract provision, to take absurd and impractical positions in construing its contract, and to overemphasize its own interests without dealing fairly with Ms. Hall and without giving equal consideration to her interests. GHC has compelled Ms. Hall to assume the burden of legal action to obtain the full benefit of her insurance contract.

“... [W]e believe that an award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action, **to obtain the full benefit of his insurance contract**, regardless of whether the insurer's duty to defend is at issue.” [Bold emph added]. *McRory v. N. Ins. Co. of New York, id., at 555.*

“Under *Olympic Steamship*, “[a]n insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees.” 117 Wash.2d at 54, 811 P.2d 673.” *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wash. 2d 643, 658, 272 P.3d 802 (2012).

“Whether the insured must defend a suit filed by third parties, appear in a declaratory action, or as in this case, file a suit for damages to obtain the benefit of its insurance contract is irrelevant. In every case, the conduct of the insurer imposes upon the insured the cost of compelling the insurer to honor its commitment and, thus, is equally burdensome to the insured.” *Id.*, at 52–53.

The relevant question under *Olympic Steamship* revolves around whether the insurer has **honored its commitment** or whether the insured has to assume the burden of legal action to get the full benefit of her contract. GHC has compelled Ms. Hall to litigate to ensure she receives the full benefit of her GHC policy.

In the absence of *Olympic Steamship* fees, Weismann would not be made whole because the coverage she is entitled to would be diminished by the attorney fees she incurred to obtain it.

Matsyuk v. State Farm Fire & Cas. Co., *id.*, at 661.

VI. CONCLUSION

The lower Court never should have dismissed Ms. Hall's counterclaims on summary judgment, allowed GHC's breach of contract claim to survive summary judgment, and entered summary judgment on GHC's breach of contract claim. The lower court never should have entered a money judgment for GHC, let alone a judgment representing a dollar-for-dollar payment (rather than making GHC pay a pro rata share of its insured's attorneys fees and costs). Based on the foregoing, Ms. Hall seeks reversal of the lower court's orders and judgment/judgment summary.

DATED: July 31, 2019

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STATE OF WASHINGTON

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

TERRI LYN HALL,

Appellant,

v.

GROUP HEALTH COOPERATIVE,

Respondents.

DECLARATION OF SERVICE OF
APPELLANT'S OPENING BRIEF

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I declare under penalty of perjury under the laws of the State of Washington that on the date set forth below, I caused the documents referenced below to be served in the manners indicated on the following:

DOCUMENTS: 1. Appellant's Opening Brief; and
 2. Declaration of Service.

ORIGINAL (and one copy) TO:

David C. Ponzoha, Court Clerk
Washington State Court of Appeals Division II

[] Via ABC Legal Messenger

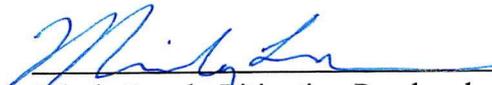
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DATED this 31 day of July, 2019, at Olympia, Washington.


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