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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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GROUP HEALTH COOPERATIVE,

Respondent,

v.

TERRI LYN HALL,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
THE HONORABLE CAROL MURPHY

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

Respondent Group Health Cooperative (“GHC”) paid more than \$83,000 in medical expenses appellant Terri Hall incurred after falling down the front steps of a building, pursuant to a medical coverage agreement (“MCA”) that required Hall to cooperate with GHC in seeking reimbursement from any liable third party. After Hall settled her tort claim against the building owner for \$600,000, GHC repeatedly asked Hall to produce information so it could evaluate whether it had a right to reimbursement from the settlement funds. Despite the language of the coverage agreement requiring her to “cooperate fully with GHC in its efforts to collect GHC’s Medical Expenses,” Hall refused to provide any of the requested information, asserting that GHC had no right to reimbursement because Hall believed she had not been “made whole” by the settlement. After GHC was forced to bring this lawsuit, the trial court granted summary judgment in favor of GHC, ruling that Hall breached her duty of cooperation as a matter of law and that her breach prejudiced GHC’s ability to assess its reimbursement rights.

The trial court was right. An insured cannot eliminate an insurer’s reimbursement rights by asserting she has not been fully

compensated and then denying the insurer any information that would allow it to assess that claim. To the contrary, Hall's duty to cooperate required her to provide the requested information, and her refusal to do so undeniably prejudiced GHC. Without the information in Hall's possession, GHC had no way of evaluating Hall's contention that she had not been "made whole," and thus whether it had a right to reimbursement. In particular, GHC had no way of assessing whether Hall, at age 60 and suffering admitted preexisting conditions, was forced to retire as a result of her fall – the basis for her claim that she lost nearly \$500,000 in wages and thus was not "made whole" – or whether, consistent with the finding of an independent medical exam Hall refused to produce, she "could have resumed work." (CP 1101)

An insured cannot – as Hall did – refuse to cooperate and provide to her medical care provider any information about her settlement with a claimed tortfeasor on the grounds that she has unilaterally determined that she was not "made whole" by her settlement with the tortfeasor. Failure to provide material information to a first party insurer such as GHC has long been grounds for determining prejudice as a matter of law. This Court should affirm.

## **II. RESTATEMENT OF THE ISSUES**

1. Did Hall breach her duty of cooperation and prejudice GHC as a matter of law by refusing to provide information that was undisputedly material to whether she received full compensation from a \$600,000 settlement?

2. GHC – like any insurer – cannot assess whether its insured has been fully compensated without the insured’s cooperation. Did the trial court correctly reject Hall’s contention that GHC proving she was fully compensated from a settlement was a condition precedent to her duty of cooperation under her medical coverage agreement?

3. Did the trial court correctly dismiss Hall’s counterclaims premised on her assertion that GHC acted improperly by requesting information relevant to its investigation whether she had been fully compensated, and by then seeking reimbursement pursuant to the terms of the medical coverage agreement after she refused to provide that information?

### III. RESTATEMENT OF THE CASE

**A. Hall's medical coverage agreement required her to cooperate with GHC's efforts to seek reimbursement of medical expenses paid on her behalf.**

Respondent Group Health Cooperative ("GHC") is a Washington nonprofit corporation providing healthcare services in Washington State. (CP 1) Appellant Terri Hall contracted for medical coverage with GHC beginning January 1, 2012. (CP 1665-1726) The Medical Coverage Agreement ("MCA") contains a subrogation provision that gives GHC the right to recover medical expenses paid on Hall's behalf from any third-party settlement:

If GHC provides benefits under this Agreement for the treatment of the injury or illness, GHC will be subrogated to any rights that the Member may have to recover compensation or damages related to the injury or illness and the Member shall reimburse GHC for all benefits provided, from any amounts the Member received or is entitled to receive from any source on account of such injury or illness, whether by suit, settlement or otherwise.

(CP 1708; *see also* CP 1708: "GHC shall have the right to recover GHC's Medical Expenses from any source available to the Injured Person as a result of the events causing injury" including "a settlement between [a] third party")

The MCA also required Hall and her agents to "do nothing to prejudice GHC's subrogation and reimbursement rights," to

“promptly notify GHC of any tentative settlement with a third party” and to “not settle a claim without protecting GHC’s interest.” (CP 1709) If Hall recovered funds from “any source that may serve to compensate for medical injuries or medical expenses,” she was required “to hold such monies in trust or in a separate identifiable account until GHC’s subrogation and reimbursement rights are fully determined.” (CP 1709)

The MCA also required Hall and her agents to cooperate in GHC’s efforts to collect its medical expenses by, among other things, giving GHC information regarding the cause of her injuries or settlement:

The Injured Person and his/her agents shall cooperate fully with GHC in its efforts to collect GHC’s Medical Expenses. This cooperation includes, but is not limited to, supplying GHC with information about the cause of injury or illness, any potentially liable third parties, defendants and/or insurers related to the Injured Person’s claim and informing GHC of any settlement or other payments relating to the Injured Person’s injury.

(CP 1708) If Hall “fail[ed] to cooperate fully with GHC in recovery of GHC’s Medical Expenses,” then she would “be responsible for directly reimbursing GHC for 100% of GHC’s Medical Expenses.”

(CP 1709)

The MCA also provided that GHC would “reduce the amount of reimbursement to GHC by the amount of an equitable apportionment” of attorney’s fees so long as Hall provided GHC with “a list of the fees and associated costs before settlement” and “the Injured Person’s attorney’s actions were reasonable and necessary to secure recovery.” (CP 1709) However, the MCA provided that GHC would not be required to pay any attorney’s fees if Hall refused to cooperate. (CP 1709)

**B. After settling a personal injury claim, Hall refused to provide GHC any information that would have allowed it to evaluate whether it had a right to reimbursement from the settlement.**

On September 18, 2012, Hall fell down a set of stairs at an office building in Olympia, Washington, fracturing her right leg and her left pinky finger. (CP 370-372, 1083) On October 4, 2012, Hall informed GHC of her fall and that she had filed a personal injury claim with the building owner’s insurance carrier. (CP 1220) On May 8, 2013, attorney Ron Meyers sent GHC a letter informing it that Hall had retained his firm to represent her in “all matters arising from” her fall. (CP 1290) GHC responded informing Meyers of its subrogation rights and that it was “entitled to reimbursement for medical treatment given . . . where the patient obtains a settlement

or judgment against [a] third party.” (CP 1296) Consistent with the MCA, GHC informed Meyers that GHC “may be willing to pay a portion of your attorney’s fees” and that he “should contact us if you believe such an arrangement would be appropriate.” (CP 1297) GHC concluded by asking that Myers “not take any action to prejudice the rights of Group Health and also that you contact us prior to any settlement.” (CP 1297)

In December 2014, Hall filed suit against the owner of the building, Labor 1992 Corporation. (CP 370-77) Between August 2013 and February 2016, GHC sent eleven letters to Meyers’ office reminding him of GHC’s subrogation claim, providing an updated list of providers that GHC had paid on Hall’s behalf, and requesting that Hall’s attorneys keep GHC informed of any settlement negotiations with Labor 1992 Corporation. (CP 1221, 1301-44)

On March 18, 2016, Hall’s attorneys informed GHC Third Party Specialist Pamela Henley that Hall had a mediation with Labor 1992 Corporation set for March 23, and asked whether GHC would accept \$5,000 to release its subrogation claim. (CP 1221) GHC rejected this offer and asked Hall’s attorneys to contact GHC during the mediation. (CP 1221, 1806)

Hall's attorneys did not contact GHC during the mediation. (CP 1221) A week after the mediation, on March 30, 2016, Hall's attorney called Henley to tell her that Hall intended to accept a post-mediation settlement offer of \$600,000 (CP 1221), and that they did not think Hall had been fully compensated because her special damages exceeded \$600,000. (CP 1806, 1903)

Although GHC did not learn of this report until discovery in this case, this claim that Hall had half a million dollars in specials was apparently based on a preliminary report from Hall's economic damages expert estimating she lost \$484,199 in past and future income as a result of the accident. (CP 1736) The expert's estimate itself was based on Hall's representation that as a result of the fall she was forced to retire from her position as a Department of Labor and Industries Workers' Compensation Adjudicator, and that but for the fall she would have worked until 2019. (CP 1733-34) Hall had worked at DLI for almost thirty years when she fell, and turned 60 two months after her fall. (CP 1733)

On April 5, 2016, Hall executed a settlement with Labor 1992 Corporation. (CP 1172-74) Hall accepted \$600,000 in exchange for "releas[ing] and forever discharg[ing]" Labor 1992 Corporation from "all claims . . . resulting from the accident." (CP 1172) Hall further

agreed to hold Labor 1992 Corporation harmless from all subrogated claims and claims for reimbursement, and “to pay and fully resolve all outstanding health care expenses, liens, attorney fees and expenses, subrogation claims and claims for reimbursement, related to the described accident or event, from money received in this settlement.” (CP 1172)

The same day Hall settled her lawsuit, GHC’s attorney sent her attorney a letter informing him that Hall was “not authorized to release any of the funds at issue/Group Health’s subrogation claim.” (CP 1201) (emphasis in original) Meyers responded immediately, denying that GHC “has any right of reimbursement,” withdrawing Hall’s previous offer of \$5,000 to release any subrogation claim, and threatening to sue GHC under the Consumer Protection Act. (CP 1203)

Three weeks later, on April 27, 2016, GHC’s attorney again wrote to Meyers asserting that Hall had been fully compensated by the settlement and thus GHC was “entitled to be reimbursed for the amounts it expended for Ms. Hall’s medical care.” (CP 1207) GHC’s attorney explained that its decision was based on GHC’s claim file and “the information made available to us to date,” and that if Hall disagreed with his determination, she should “provide additional

evidence,” including “a copy of your mediation statement, as well as all materials provided to the mediator, copies of medical records, expert reports and any other information you believe supports your position.” (CP 1207) That same day, Meyers disbursed the settlement funds from his trust account to Hall, withholding only \$45,002.91 – the amount he asserted GHC would be entitled to if it had a claim for reimbursement. (CP 1430)

Hall did not provide GHC any additional information as requested. (CP 1209) Instead, on May 3, 2016, Hall’s attorney emailed GHC’s attorney asserting that the settlement did not fully compensate Hall because “she had a long history of preexisting injury” and “there were facts supporting comparative fault.” (CP 1209) Hall’s attorney again threatened to sue GHC under the Consumer Protection Act, and to seek CR 11 sanctions against GHC’s attorney. (CP 1209) GHC’s attorney again asked for the records specified in his April 27 letter on May 5. Hall still did not provide them. (CP 1198, 1213)

On June 10, 2016, GHC’s attorney again wrote Hall’s attorney requesting “information in support of your claim for a reduction in Group Health’s subrogation claim,” reminded him that Hall’s failure to provide the requested information was a violation of her duty to

cooperate, and asked that Meyers contact him within a week to discuss GHC's reimbursement claim. (CP 1217-18) Meyers never responded. (CP 1199) Nor did Hall ever provide GHC the requested information. (CP 1199)

**C. The trial court granted GHC summary judgment, ruling that Hall was required to reimburse GHC \$83,329 and dismissing Hall's counterclaims.**

GHC filed a complaint on September 16, 2016, seeking a declaratory judgment that Hall was required to reimburse it \$83,580.66 for medical expenses related to her personal injury claim. (CP 1-6; *see also* CP 1221, 1312) Hall counterclaimed for breach of contract, bad faith, and violation of the Consumer Protection Act. (CP 15-25)

Hall finally produced medical records and expert reports addressing the injuries purportedly caused by her fall during discovery in this litigation. Hall's medical records disclosed that she had a long history of problems with her right leg, including numerous knee surgeries as early as 1969. (CP 908-49, 1581-1614; *see also* CP 1113-16: Hall's motion for partial summary judgment outlining decades of problems with her knee) Hall also produced a CR 35 independent medical exam performed on February 12, 2016, as part of her lawsuit against Labor 1992 Corporation. (CP 1059-1109)

Contrary to Hall's claim that she was forced to retire as a result of the fall, this exam found that "she could have resumed work," that she had "healed her [leg] fracture, and this has contributed very little to her current symptomatology, if any at all," and that the fracture of her left pinky finger had healed and "would not require any restrictions whatsoever." (CP 1101) The exam also found that Hall did not "suffer from any permanent partial disability due to any of the injuries sustained in th[e] incident," but rather that her right leg "was already extremely compromised based on her prior surgeries," and that "she has had a complex history, and many very rare and unusual procedures." (CP 1101) The exam further found that the surgeries performed on Hall after her fall, which were the basis for the majority of the expenses paid by GHC, were "medically necessary and causally related to the event in question." (CP 1099-1100, 1312)

GHC moved for summary judgment, seeking dismissal of Hall's counterclaims and arguing Hall breached her duty to cooperate by refusing to provide any of the information GHC requested, and thus she was required to reimburse GHC for all its medical expenses. (CP 1345-69) The trial court granted GHC's motion (CP 1920-22), because "based on the undisputed facts and the case law . . . Ms. Hall has not fully cooperated" (11/2/18 RP 76-

77), and denied Hall's cross-motions for partial summary judgment. (CP 1923-28)<sup>1</sup> The trial court entered judgment in favor of GHC for \$83,329.66. (CP 1945-48)<sup>2</sup>

#### IV. RESPONSE ARGUMENT

**A. The trial court correctly held that Hall breached the cooperation clause and prejudiced GHC as a matter of law by refusing to provide any information necessary to assess her claim that GHC was not entitled to reimbursement.**

The trial court correctly granted GHC summary judgment because Hall breached her duty to cooperate and prejudiced GHC as a matter of law by refusing to provide any of the information it requested so that it could evaluate her claim that it was not entitled to reimbursement. In direct violation of her duty to "cooperate fully with GHC in its efforts to collect GHC's Medical Expenses" (CP 1708), Hall and her counsel unilaterally decided she had not been

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<sup>1</sup> Hall alleges that GHC engaged in "discovery abuse," but she does not assign error to any discovery order or provide any argument in support of this passing allegation. (App. Br. 11-12) Indeed, the trial court granted Hall's motion to compel asking that GHC produce her claims file, contrary to her assertion the trial court "allowed GHC to skirt providing Ms. Hall with full and complete responses to discovery." (*Compare* App. Br. 11, *with* CP 343-56, 572-73)

<sup>2</sup> The trial court deducted \$251 from the amount sought by GHC based on Hall's objection that GHC had already been reimbursed for that amount by Labor 1992 Corporation's insurer. (*See* CP 1932, 1945)

“made whole” and thus was not required to provide GHC any of the information it requested.

Hall’s stonewalling placed GHC in an impossible dilemma. GHC could either forfeit its contractual right to reimbursement by accepting Hall’s assertion that she had not been “made whole” – an assertion she refused to support with any evidence – or seek to enforce that right in court, incurring the costs and risks associated with litigation. Because both the MCA and well-established case law require insureds to cooperate precisely to avoid this dilemma, this Court should affirm the trial court.<sup>3</sup>

1. **Hall breached her duty to cooperate as a matter of law by refusing to provide GHC any of the information it requested to evaluate her claim that she had not been made whole.**

The MCA required Hall and her agents to “*cooperate fully* with GHC in its efforts to collect GHC’s Medical Expenses.” (CP

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<sup>3</sup> The Supreme Court recently confirmed that a settlement for less than a tortfeasor’s available insurance policy limits is “*some evidence* that the insured has been fully compensated,” though not sufficient by itself to overcome other evidence that an insured was not made whole on summary judgment, making the issue one of fact. *Grp. Health Coop. v. Coon*, \_\_\_ Wn.2d \_\_\_, 447 P.3d 139, 146 (2019) (emphasis in original). Accordingly, GHC acknowledges that Hall’s settlement for less than policy limits does not prove that Hall was made whole as a matter of law. The trial court’s summary judgment order nevertheless should be affirmed because Hall breached her duty to cooperate and prejudiced GHC as a matter of law, as argued in this brief.

1708) (emphasis added) The trial court correctly ruled that Hall breached this duty as a matter of law because she undisputedly did not provide GHC *any* of the information it requested as part of its investigation whether she had been fully compensated by her settlement with Labor 1992 Corporation.

“Cooperation is essential to the insurance relationship because that relationship involves a continuous exchange of information between an insurer and an insured interspersed with activities that affect the rights of both, and the relationship can function only if both sides cooperate.” 16 Williston on Contracts § 49:108 (4th ed.). “In order to determine the scope of [an insured’s] duty to cooperate with the insurer, we must first look to the relevant policy language.” *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 225, 961 P.2d 358 (1998). “The only limitation on the requirement that insureds cooperate with the insurer’s investigation is that the insurer’s requests for information must be material to the circumstances giving rise to liability on its part.” *Tran*, 136 Wn.2d at 224, citing *Pilgrim v. State Farm Fire & Cas. Ins. Co.*, 89 Wn. App. 712, 950 P.2d 479 (1997). “Information is material when it concerns a subject relevant and germane to the insurer’s investigation . . . at

the time the inquiry was made.” *Tran*, 136 Wn.2d at 224 (quoted source omitted).

In *Tran*, the Supreme Court held that an insured breached his duty to cooperate as a matter of law when he refused to provide his homeowner’s insurer with requested personal and business financial records necessary to investigate his claim seeking payment for stolen items. 136 Wn.2d at 226-28. The Court reasoned that “no reasonable juror could conclude that Tran substantially cooperated in the investigation or settlement of his claim” and that his conduct “constitutes a breach of the cooperation clause as a matter of law.” *Tran*, 136 Wn.2d at 228 (quoted source omitted); *see also Pilgrim*, 89 Wn. App. at 722 (insureds breached duty of cooperation as a matter of law because “[w]ith the exception of their W-2’s, they produced nothing” during investigation of their theft claim); *Keith v. Allstate Indem. Co.*, 105 Wn. App. 251, 256, 19 P.3d 1077 (2001) (insured breach duty of cooperation as a matter of law by refusing to provide financial records during investigation of his claim for loss of a car due to fire).

Hall’s contractual duty of cooperation must be interpreted in light of the “made whole” provision of the MCA and Washington law governing an insurer’s subrogation rights. Under the MCA, as soon

as Hall recovered the amount of her “loss,” GHC was entitled to reimbursement from the excess over the amount necessary to make her whole. (See CP 1708: GHC has reimbursement rights in “the excess of the amount required to fully compensate the Injured Person for the loss sustained”) *Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 621-22, 160 P.3d 31 (2007) (insurer’s right to reimbursement arises after the insured has “been fully compensated for *the loss*.”) (emphasis added). Washington law allows an insurer to “obtain reimbursement from an insured who has . . . received excess compensation from having received payments from both the first-party insurer and a third party” because “the insured is not entitled to a double recovery.” *Daniels v. State Farm Mut. Auto. Ins. Co.*, 193 Wn.2d 563, 572-73, ¶ 12, 444 P.3d 582 (2019) (cited at App. Br. 25-26).

Whether an insured has been “made whole” is determined “by the relevant applicable measure of damages.” *Sherry*, 160 Wn.2d at 619 (internal quotation omitted). Most relevant here, a personal injury plaintiff cannot recover damages for “any condition or disability that may have existed prior to this occurrence . . . that was *not caused or contributed to by this occurrence*.” WPI 30.17, 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. (7th ed.) (emphasis

added); *see also* *Thogerson v. Heiner*, 66 Wn. App. 466, 472-75, 832 P.2d 508 (1992) (affirming use of WPI 30.17 because there was evidence that both before and after accident plaintiff suffered “severe headaches unrelated to the accident”); *Bowman v. Whitelock*, 43 Wn. App. 353, 359, 717 P.2d 303 (1986) (affirming use of WPI 30.17 because “there was evidence that Bowman had a history of serious back trouble caused by a degenerative spinal condition as recently as 3 years prior to the airplane accident”).

With this law in mind, if – as Hall herself argues (App. Br. 4-6) – her disabilities existed before the fall, then her alleged damages arising from those disabilities, including nearly \$500,000 in claimed lost wages because, at age 60, she retired after 30 years at DLI, were not part of the “loss” she was entitled to recover in order to be “made whole.” GHC had strong reason to believe that was the case given Hall’s admission that “she had a long history of preexisting injury.” (CP 1209) GHC thus reasonably, and repeatedly, requested that Hall produce – as required by her policy – information bearing on the cause of her injuries, including her mediation statement, the materials provided to the mediator, medical records, and expert reports. (CP 1207, 1213, 1217) *See* 3 Stein on Personal Injury Damages Treatise § 21:95 (3d ed.) (observing that when the plaintiff

has preexisting injuries it is “vitaly important for counsel to obtain all of the prior medical records from all health care providers who have in any way been involved in the treatment of the client’s pre-existing symptomatic condition.”).

Hall undisputedly refused to provide GHC any of this information. (CP 1198-99) Instead, Hall unilaterally and categorically denied that GHC had any right to reimbursement, threatened it with litigation, threatened its counsel with sanctions, and disbursed all of the funds save for roughly half of the disputed amount despite her duty to hold settlement funds “in trust . . . until GHC’s subrogation and reimbursement rights are fully determined.” (CP 1209-10, 1709)

Contrary to Hall’s assertion that GHC’s claims file “shows a voluminous amount of information” (App. Br. 28), the claims file shows only that GHC was generally aware Hall had a history of significant health problems, because her attorney “read off” records to GHC when asking it to release its reimbursement claim in exchange for \$5,000. (CP 1806, 1808) But Hall undisputedly refused to provide GHC any of those records, including expert reports and records in her possession addressing whether the disabilities that purportedly prevented her from returning to work

were caused by the fall or predated it. Making bare allegations and then refusing to provide anything substantiating those allegations is not “cooperation.” Hall breached her duty of cooperation as a matter of law.

**2. Hall’s refusal to cooperate prejudiced GHC as a matter of law by preventing it from investigating whether she was made whole by the settlement.**

Without the information GHC requested – and that Hall was undisputedly required to produce – GHC could not evaluate whether Hall had been made whole and whether it had a right to reimbursement. That is prejudice as a matter of law. Accordingly, the trial court correctly held that Hall is “responsible for directly reimbursing GHC for 100% of GHC’s Medical Expenses.” (CP 1709)

“An insured’s breach of a cooperation clause releases the insurer from its responsibilities if the insurer was actually prejudiced by the insured’s breach.” *Tran*, 136 Wn.2d at 228. “Claims of actual prejudice require affirmative proof of an advantage lost or disadvantage suffered as a result of the breach, which has an identifiable detrimental effect on the insurer’s ability to evaluate or present its defenses to coverage or liability.” *Tran*, 136 Wn.2d at 228-29 (internal quotation and alterations omitted).

Although prejudice “will seldom be established as a matter of law,” *Tran*, 136 Wn.2d at 228, Washington courts have repeatedly held that a breach of the duty to cooperate prejudices an insurer as a matter of law when it “impede[s] [the insurer’s] ability to investigate the claim.” *Tran*, 136 Wn.2d at 231. In *Tran*, for example, the Supreme Court held the insurer was prejudiced as a matter of law because the lack of access to financial documents “prevent[ed] it from completing its investigation to determine if its insured’s claim was fraudulent.” 136 Wn.2d at 233. The Supreme Court explained the impossible situation in which an insured places an insurer when it refuses to provide information necessary to the insurer’s investigation:

Without being able to examine Tran’s financial records, State Farm . . . was faced with a Hobson’s choice of either denying a suspected fraudulent claim without an adequate investigation, which could expose it to claims of bad faith or violation of the Consumer Protection Act, or paying a suspected fraudulent claim, which would be against public policy.

*Tran*, 136 Wn.2d at 230.

Other cases also affirm the grant of summary judgment to a first party insurer where, as here, the insured prejudiced the insurer by impeding its efforts to investigate the facts underlying the insured’s claim. For example, this Court held that an insured’s

refusal to provide financial records, including tax returns and a list of debts and liabilities, prejudiced the insurer as a matter of law because the insurer could not investigate whether the insured had the financial wherewithal to purchase the Rolls Royce he claimed was destroyed or whether he had “a financial motive for making a false claim” in *Keith*, 105 Wn. App. at 255-56. Likewise, the insureds’ “refusal to disclose relevant financial information prejudiced State Farm as a matter of law” because the insurer was unable “to complete its investigation of the facts underlying the [insureds’] claim” that nearly \$150,000 in personal property had been stolen in *Pilgrim*, 89 Wn. App. at 725.<sup>4</sup>

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<sup>4</sup> See also *Herman v. Safeco Ins. Co. of Am.*, 104 Wn. App. 783, 792, 17 P.3d 631 (2001) (“Herman’s failure to provide financial documents prejudiced [the insurer’s] ability to conduct a thorough investigation.”); *Albee v. Farmers Ins. Co.*, 92 Wn. App. 866, 876, 967 P.2d 1 (1998) (insured’s refusal to submit to physical examination prejudiced insurer as a matter of law by hampering its ability to determine whether it should pay PIP benefits), *rev. denied*, 137 Wn.2d 1027 (1999); *Felice v. St. Paul Fire & Marine Ins. Co.*, 42 Wn. App. 352, 360, 711 P.2d 1066 (1985) (insured’s failure to provide notice of lawsuit prejudiced insurer as a matter of law “because it precluded the opportunity to evaluate the facts and determine whether a trial and expenses for an appeal were warranted”), *rev. denied*, 105 Wn.2d 1014 (1986); *Sears, Roebuck & Co. v. Hartford Accident & Indem. Co.*, 50 Wn.2d 443, 454, 313 P.2d 347 (1957) (insurer prejudiced as a matter of law by insured’s 14-month delay in forwarding complaint because it deprived insurer of the right to have suit investigated and defended by its own counsel).

Here, as in these cases, Hall prejudiced GHC as a matter of law by refusing to provide information and documents that it needed to investigate its right to reimbursement and whether Hall was “made whole.” The independent medical exam obtained by Labor 1992 Corporation found that – contrary to Hall’s current assertion that she was forced to retire as a result of the fall (App Br. 3) – Hall “could have resumed work.” (CP 1101) The exam similarly found – consistent with Hall’s medical records she refused to produce – that Hall’s right leg was not disabled as a result of the fall, but “was already extremely compromised based on her prior surgeries.” (CP 1101) Hall nowhere acknowledges this evidence in her brief, and simply takes as fact the finding of her own medical expert that she was forced to retire as a result of the fall, and that she would have worked another seven years but for this injury. (*See, e.g.*, App. Br. 16-17) Of course, Hall did not provide GHC her medical expert’s report or the report of her economic loss expert.

Rather than produce any reports or medical records, Hall continued to make the bare assertion that GHC had no “right of reimbursement based . . . [on] the facts of this case.” (CP 1203) Had Hall produced any of the requested information, GHC could have begun to answer its questions regarding her claim reflected in its

contemporaneous claim file, including “why couldn’t she return to [work]?”, “was she planning on retirement anyways?”, and “[h]ow long is this forecasted for future wage loss?” (CP 1804)

Hall relies on the Court of Appeals’ decision in *Grp. Health Coop. v. Coon*, 4 Wn. App.2d 737, 423 P.3d 906 (2018) (App. Br. 33), *aff’d*, \_\_\_ Wn.2d \_\_\_, 447 P.3d 139 (2019). But the Supreme Court’s decision in *Coon* relies upon *Tran* and *Pilgrim* to confirm that prejudice *can* “be established as a matter of law” when, as here, the insurer shows “specific harm” from the insured’s refusal to cooperate. 447 P.3d at 147 (quoting *Tran*, 136 Wn.2d at 228; *Pilgrim*, 89 Wn. App. at 725) And the facts of *Coon* demonstrate why the failure to provide information can make the issue of prejudice one that should be decided as a matter of law when, as here, the insured fails to cooperate at all, baldly asserting only that she was not “made whole” without providing any information that would allow the insurer to evaluate that claim.

In *Coon*, unlike here, the insured provided GHC with “the mediation letters of both the claimant and defendant,” and his attorney explained there were no expert reports to produce in the insured’s *res ipsa* case because he was “unable to come up . . . with expert support for a claim of negligence.” *See Coon*, 4 Wn. App.2d at

745, ¶ 19 (emphasis removed). Unlike Hall, the insured in *Coon* also provided expert opinions from two attorneys that he had not been made whole. 4 Wn. App.2d at 746, ¶ 22. Here, in contrast, Hall categorically refused to provide GHC any of the information or materials it requested, instead telling GHC that it was “responsible for knowing[] she had a long history of preexisting injury” despite her refusal to produce any of the records that would have allowed it to assess her medical history. (CP 1209)

*Coon* confirms why an insured’s refusal to provide information relevant to determining whether the insured was made whole is prejudicial as a matter of law. Under *Coon* an insurer has the burden of establishing an insured has been made whole. 447 P.3d at 146, ¶ 26. But a medical insurer such as GHC can only meet that burden with the cooperation of the insured, because under a first party insurance contract such as the one at issue here “what each of the direct parties to the insurance contract needs is in the hands of the other.” Plitt et al., 14 Couch on Ins. § 199:1 (3rd Ed.).

The law does not countenance encouraging insureds to violate their agreements as Hall did here – unilaterally accepting a settlement promising to satisfy any subrogated insurer, refusing to provide her insurer any information, and then claiming that the

insurer's inability to prove she was made whole – caused by the insured's own lack of cooperation – precludes enforcement of the medical coverage agreement, including its cooperation provisions, and reimbursement. No Washington case allows insureds and their counsel to appoint themselves the sole judge of whether they are made whole in this manner. Rather – as a matter of policy and equity – they consistently reject results that would “encourag[e] insureds to not cooperate.” *Tran*, 136 Wn.2d at 231; *see also British Columbia Ministry of Health v. Homewood*, 93 Wn. App. 702, 714, 970 P.2d 381 (1999) (distinguishing insurer's concession that an insured was not made whole from “a determination that an injured party . . . may subjectively value his or her own injuries and thereby bind his or her insurer”), *rev. denied*, 140 Wn.2d 1015 (2000).

Hall misses the point in arguing that GHC was not prejudiced because its right to reimbursement will be determined by “the outcome of this case.” (App. Br. 33) GHC's insureds are contractually obligated to cooperate precisely so that it does *not* have to sue them to obtain information necessary to evaluate whether it can assert a right to reimbursement. Had Hall provided the requested information, GHC could have made an informed decision

whether to pursue its reimbursement right. Instead, it was forced to sue.

Hall asks this Court to place medical insurers in a dilemma analytically identical to that the Supreme Court rejected in *Tran*, forcing insurers to either forego their right to reimbursement or sue their insured based on limited information, incurring not only the costs of litigation but exposing them to claims of bad faith and violation of the Consumer Protection Act. Indeed, that is precisely what happened here – Hall counterclaimed against GHC for bad faith, violating the Consumer Protection Act, and breach of contract, alleging that it had performed an inadequate investigation even though it was her own refusal to cooperate that compelled GHC to sue in order to perform a fuller investigation through discovery. (CP 19-25)

Hall's argument that she did not "materially" breach the contract merely repackages her argument that she did not prejudice GHC, and should be rejected for the same reasons. (App. Br. 35-38) A material breach is one severe enough to excuse the non-breaching party's performance of the contract. DeWolf & Allen, 25 Wash. Prac. § 10.1 (3d ed.). A breach of a cooperation clause that prejudices the insurer excuses the insurer's performance. *Tran*, 136 Wn.2d at 228.

Accordingly, a prejudicial breach of a cooperation clause is – by definition – a material breach.

Hall’s appeals to fairness and equity are unavailing. There is nothing “inequitable” about holding Hall to the consequences of failing to cooperate outlined in the MCA. (App. Br. 7) *Salewski v. Pilchuck Veterinary Hosp., Inc., P.S.*, 189 Wn. App. 898, 908, ¶ 21, 359 P.3d 884 (2015) (“it is not the duty of courts of common law to relieve parties from the consequences of their own improvidence”) (quoted source omitted), *rev. denied*, 185 Wn.2d 1006 (2016). Likewise, although it may be against Hall’s “own financial interests” to provide evidence undermining her bare assertion she was not “made whole,” that is precisely what she contracted to do. (*Compare* App. Br. 19 *with* CP 1708) Ensuring that Hall does not reap a double recovery is consistent with Washington’s policy of allowing insurers “to recoup . . . payment from the party responsible for the loss.” *Daniels*, 193 Wn.2d at 569, ¶ 8 (quoted source omitted). This Court should affirm the trial court’s summary judgment in favor of GHC.

**B. Being “made whole” is not a condition precedent to Hall’s duty to cooperate.**

Hall’s argument that being “made whole” was a condition precedent to her duty to cooperate is meritless. No language in the

MCA conditions an insured's duty to cooperate on her being made whole. Hall's argument would negate her duty to cooperate because, as the trial court recognized, GHC could not prove she had been "made whole" without the information Hall refused to provide. The trial court correctly rejected Hall's strained interpretation of the MCA.

"A condition precedent is an event occurring after the making of a valid contract which must occur before a right to immediate performance arises." *Jones Assocs., Inc. v. Eastside Properties, Inc.*, 41 Wn. App. 462, 466, 704 P.2d 681 (1985). "Whether a provision in a contract is a condition, the nonfulfillment of which excuses performance, depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances." *Jones*, 41 Wn. App. at 466 (quoting 5 Williston, Contracts (3d ed.) § 663, p. 127). "An intent to create a condition is often revealed by such phrases and words as 'provided that,' 'on condition,' 'when,' 'so that,' 'while,' 'as soon as,' and 'after.'" *Jones*, 41 Wn. App. at 467 (quoted source omitted). "Where it is doubtful whether words create a promise or an express condition, they are interpreted as creating a promise." *Jones*, 41 Wn. App. at 467.

The plain language of the MCA refutes Hall's contention that being "made whole" was a condition precedent to her duty to cooperate. The MCA provides that Hall and her agents "shall cooperate fully with GHC in its efforts to collect GHC's Medical Expenses." (CP 1708) Hall herself acknowledges that assessing whether she was made whole is a prerequisite to GHC determining whether it has a right to reimbursement, and thus a necessary part of GHC's "efforts to collect [its] Medical Expenses." (*See App. Br. 12* ("Whether Ms. Hall was fully compensated has direct bearing on whether GHC has a right to reimbursement.")) Accordingly, Hall was required to cooperate with those efforts, including by providing "information about the cause of injury." (CP 1708)

The MCA contains no conditional qualifiers on Hall's duty to cooperate, nor does it in any way reference the language limiting GHC's reimbursement "to the excess of the amount required to fully compensate" Hall. (CP 1708) Moreover, the MCA states that an insured who "recovers funds from any source that may serve to compensate for medical injuries or medical expenses" must "hold such monies in trust or in a separate identifiable account until GHC's subrogation and reimbursement rights are fully determined." (CP 1709) This language underscores that Hall's duty to cooperate arose

when she received settlement funds, and that it was not conditioned on GHC proving that she had been “made whole.”

Construing Hall’s duty of cooperation as arising only *after* she has – in her own subjective estimation – been “fully compensated” would nullify the cooperation clause and GHC’s right to reimbursement. *GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 135, ¶ 20, 317 P.3d 1074 (“An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective.”), *rev. denied*, 181 Wn.2d 1008 (2014). If insureds are not required to cooperate until an insurer proves they have been made whole, an insured’s duty of cooperation would never arise because an *insurer cannot prove the insured has been made whole without the insured’s cooperation.* (See § IV.A) The trial court correctly rejected Hall’s interpretation of the policy because of the impossible catch-22 it required GHC to resolve in order to assert its right to reimbursement: “how is it that Group Health meets its burden of showing that your client was not fully compensated, if there is no obligation on your client’s part to cooperate with Group Health?” (11/2/18 RP 62)

Hall's condition precedent argument is yet another attempt to make herself the sole arbiter whether she has been "made whole." This Court should reject it.

**C. The trial court correctly dismissed Hall's counterclaims because GHC acted properly in pursuing its reimbursement claim.**

An insurer does nothing wrong by asking an insured to comply with her contractual duty to cooperate as part of its investigation. (See § IV.A) Hall's arguments that the trial court erroneously dismissed her counterclaims are all premised on the contrary assumption – that GHC somehow acted improperly in requesting information from her. (App. Br. 38-47) For this reason alone, this Court should affirm the dismissal of Hall's counterclaims for breach of contract, bad faith, and violation of the Consumer Protection Act.

Regardless, Hall's counterclaims are flawed in other respects. "Claims of bad faith are not easy to establish and an insured has a heavy burden to meet." *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 433, 38 P.3d 322 (2002). "To succeed, the insured must show the insurer's breach of the insurance contract was unreasonable, frivolous, or unfounded." *Overton*, 145 Wn.2d at 433 (internal quotation omitted). "Harm . . . is an essential element" of a bad faith

claim and an insurer is entitled to summary judgment “if a reasonable person could conclude only that the insured suffered no harm.” *Werlinger v. Clarendon Nat. Ins. Co.*, 129 Wn. App. 804, 808, ¶ 10, 120 P.3d 593 (2005), *rev. denied*, 157 Wn.2d 1004 (2006). Likewise, damages are a necessary element of “a claim under the Consumer Protection Act” and a claim for breach of contract. *Keith*, 105 Wn. App. at 257; *Baldwin v. Silver*, 165 Wn. App. 463, 473, ¶ 21, 269 P.3d 284 (2011).<sup>5</sup>

Hall first asserts that GHC breached its duty to evaluate her \$5,000 settlement offer as though it “bore the entire risk,” ignoring that duty applies in the context of defending and indemnifying an insured from a third party. (See App. Br. 39 (citing *Truck Ins. Exch. of Farmers Ins. Grp. v. Century Indem. Co.*, 76 Wn. App. 527, 534, 887 P.2d 455, *rev. denied*, 127 Wn.2d 1002 (1995))). Here, the settlement offer was from Hall, not a third party, and GHC did not act in bad faith by rejecting Hall’s token settlement requiring it to forfeit its contractual right to reimbursement.

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<sup>5</sup> Hall asserts that bad faith is a “per se” violation of the Consumer Protection Act, but “no authority . . . support[s] . . . the proposition that a bad faith finding per se satisfies the CPA’s injury requirement.” *Villegas v. Nationstar Mortg., LLC*, 8 Wn. App. 878, 895, ¶ 46, 444 P.3d 14 (2019).

Hall also claims that GHC “misrepresented a pertinent fact” by informing her that GHC was “entitled to reimbursement for its medical treatment” because it failed to also inform her that GHC’s right to reimbursement arose after she was “fully compensated.” (App. Br. 40-41) But in a letter sent *before* the one cited by Hall, GHC told Hall that it would have the right to reimbursement “if the at-fault party is liable and the at-fault party has *sufficient assets to compensate you.*” (CP 112 (emphasis added)) Hall also nowhere explains how she was damaged by the alleged misrepresentation, given that her attorney was undisputedly aware of the “made whole” doctrine. (CP 1209)

Nor did GHC act in bad faith by “seeking reimbursement of the entire \$83,580.66” rather than reducing its claim to pay a portion of Hall’s attorney’s fees. (See App. Br. 42-43) The MCA makes clear that if Hall “fail[ed] to cooperate fully with GHC in recovery of GHC’s Medical Expenses” she would be “responsible for directly reimbursing GHC for 100% of GHC’s Medical Expenses.” (CP 1709 (emphasis added)) *See also Tran*, 136 Wn.2d at 233 (rejecting insured’s request for attorney’s fees based on insured’s breach of duty to cooperate). Further, as GHC told Hall’s attorney in its first letter to him, under the MCA Hall’s cooperation was a necessary

prerequisite to any apportionment of attorney's fees. (CP 1297; *see also* CP 1709) Because Hall refused to cooperate, she had no right to attorney's fees.

Hall's assertion that she was forced to sue GHC "in order to gain the benefits of the contract" is absurd. (App. Br. 44) GHC paid over \$83,000 in Hall's medical expenses promptly and without question. (CP 1221, 1312) Far from trying to "sidestep" the provision of the MCA limiting reimbursement to when Hall was "fully compensated" (App. Br. 43), GHC asked only that Hall provide it with information that would have allowed it to determine whether she *had* been fully compensated. Hall then refused to provide that information, forcing GHC – not Hall – to sue to gain the benefit of its contract.

Hall's assertion that GHC engaged in deceptive "collection activities" is equally absurd. Hall cites *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 35-36, ¶¶ 4, 8, 204 P.3d 885 (2009), where a collection agency retained by an insurer repeatedly sent its insureds "FORMAL COLLECTION NOTICE[S]" threatening legal action if they did not "[a]ct immediately." In contrast, here, GHC never told Hall that it had commenced a collection proceeding, but rather pleaded with her attorney to "please contact [it] . . . to discuss

... reimbursement.” (CP 1218; *see also* CP 1213 (GHC attorney: “I have not received any of the records I requested in my last letter . . . . When will you be providing me the requested information?”))

The trial court correctly dismissed all of Halls’ counterclaims as a matter of law because GHC did not act improperly by asking Hall to cooperate with its investigation of its right to reimbursement and then filing this action after she unequivocally refused to cooperate.

**D. Hall is not entitled to attorney’s fees based on her flawed Consumer Protection Act claim or under *Olympic Steamship*.**

Because Hall’s Consumer Protection Act claim fails as a matter of law, she is not entitled to prevailing party attorney’s fees under RCW 19.86.090. (*See* App. Br. 47-48) *Rawe v. Bosnar*, 167 Wn. App. 509, 513, ¶ 11, 273 P.3d 488 (“An attorney fee award under the [Consumer Protection Act] is predicated on Mr. Rawe being the prevailing party. He is not. Therefore, his fee request is denied.”), *rev. denied*, 175 Wn.2d 1003 (2012).

Likewise, Hall is not entitled to attorney’s fees under *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) and *McRory v. N. Ins. Co. of New York*, 138 Wn.2d 550, 980 P.2d 736 (1999) (*see* App Br. 48-49). Those cases authorize an award of fees when an insured successfully sues to establish coverage. *See*

*McRory*, 138 Wn.2d at 551; see also *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 659, ¶ 30, 272 P.3d 802 (2012) (“the scenario we are faced with here is properly characterized as a *coverage dispute*, not as a dispute about the value of the *reimbursement right*”) (emphasis added and removed) (cited at App. Br. 49). Hall was not successful, nor was coverage ever in dispute. GHC never denied coverage, but brought suit seeking a declaration of its right to reimbursement after Hall left it no other choice.

## V. CONCLUSION

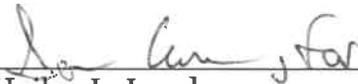
This Court should affirm the trial court.

Dated this 30<sup>th</sup> day of September, 2019.

STAMPER RUBENS, P.S.

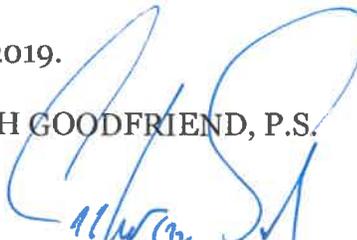
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**DECLARATION OF SERVICE**

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

That on September 30, 2019, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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Sarah N. Eaton

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