

FILED
COURT OF APPEALS
DIVISION II
2019 OCT 30 PM 4:22
STATE OF WASHINGTON
BY _____

No. 53381-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

TERRI LYN HALL,

Appellant,

v.

GROUP HEALTH COOPERATIVE,

Respondents.

APPELLANT'S REPLY BRIEF

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ORIGINAL

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I. REPLY

- A. **Judicial estoppel prevents GHC from now claiming it is prejudiced for not receiving information that it previously claimed to the trial court was “irrelevant to the current subrogation claim.”**

GHC feigns prejudice for supposedly not receiving the information to allow it to evaluate the validity of its subrogation claim -- yet it previously claimed to the trial court that such information was irrelevant to the current subrogation claim.

In defense of Ms. Hall’s motion based on GHC’s deficient answers to Requests for Admission, GHC made the following argument to the Superior Court: “[Ms. Hall’s] personal injury claim is **not relevant to the current subrogation claim.**” [Bold added] and “[. . .] likewise, requests for admission on the **injuries Defendant Hall sustained** from the tortfeasor **are not relevant to the subrogation claim.**” [Bold added]. *CP 962-963.*

GHC also argued to the trial court that the made whole doctrine “is not at issue in this case.” *CP 968 (line 23).*

Apparently those positions no longer suit GHC. GHC now takes the opposite position -- i.e. that such information is needed to investigate its right to reimbursement and whether Hall was made whole. If Ms. Hall’s personal injury claim and her causally-related injuries are irrelevant to its subrogation claim (as GHC represented to the trial court), then that is one

more reason why GHC's current breach and prejudice argument fails.

[A]n insured does not need to supply information unrelated to the policy or investigation of the claim.

Pilgrim v. State Farm Fire & Cas. Ins. Co., 89 Wash. App. 712, 720, 950

P.2d 479 (1997). GHC cannot have it both ways. This is judicial estoppel.

“Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.”

[Bold added]. *Arkison v. Ethan Allen, Inc.*, 160 Wash. 2d 535, 538, 160 P.3d

13, 15 (2007), quoting *Bartley-Williams v. Kendall*, 134 Wash.App. 95, 98,

138 P.3d 1103 (2006).

Three factors guide the Court's determination of whether to apply the judicial estoppel doctrine: (1) whether a party's later position is clearly inconsistent with its earlier position, (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled, and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *id.*, at 538-539.

GHC's conduct fits all three guiding factors. This about-face by GHC, especially when its prior position was taken to avoid CR 36 admissions that

could have aided Ms. Hall in her case at the Superior Court, is impermissible and prevented by judicial estoppel. Judicial estoppel applies to questions of both fact and law, and it seeks to avoid, among other things, inconsistency. *Harris v. Fortin*, 183 Wash. App. 522, 526, 333 P.3d 556 (2014).

GHC benefitted from its defense against Ms. Hall's motion regarding GHC's deficient CR 36 answers. The Court denied Ms. Hall's motion. *VRP 5-11-18 Mtn to Strike 26:12-13*.

B. The cooperation clause does not apply to “investigating” or “evaluating” made whole. It applies to “collection” and “recovery” - once made whole has been proven.

Parties are bound by the contract as signed. *See Max L. Wells Tr. by Horning v. Grand Cent. Sauna & Hot Tub Co. of Seattle*, 62 Wash. App. 593, 602, 815 P.2d 284 (1991).

1. GHC's cooperation clause says what it says, not what GHC wants it to say.

GHC's cooperation clauses are limited in scope to GHC's “recovery of” and “efforts to collect” its Medical Expenses – **not** GHC's “evaluation of” or “efforts to investigate” made whole or reimbursement rights.

GHC constructs its argument based on a cooperation clause that does not exist in its contract – i.e. to cooperate with GHC's “investigation” or “evaluation” of made whole and right to reimbursement.

The actual cooperation clauses in GHC's contract use the terms

“efforts to collect” and “in recovery of” GHC’s Medical Expenses.

To “collect” or to “recover” is not the same as to “evaluate” or “investigate.” Undefined terms in an insurance policy are given their ordinary and common meaning. *See Moeller v. Farmers Ins. Co. of Washington*, 173 Wash. 2d 264, 272, 267 P.3d 998 (2011).

“Recover” means: “To get back : REGAIN”.

www.merriam-webster.com/dictionary/recover. “Recovery” means: “[T]he act, process or an instance of recovering.”

www.merriam-webster.com/dictionary/recovery. ““Collect” means “to receive, gather, or exact from a number of persons or other sources.” Webster’s Third New International Dictionary 444 (2002).” *Jumamil v.*

Lakeside Casino, LLC, 179 Wash. App. 665, 690, 319 P.3d 868 (2014).

“Evaluate” means: “[T]o determine or fix the value of.”

www.merriam-webster.com/dictionary/evaluate. “Investigate” means: “[T]o observe or study by close examination and systematic inquiry.”

www.merriam-webster.com/dictionary/investigate.

“The court must enforce the contract as written if the language is clear and unambiguous.” *Washington Pub. Util. Districts’ Utilities Sys. v. Pub.*

Util. Dist. No. 1 of Clallam Cty., 112 Wash. 2d 1, 10, 771 P.2d 701 (1989).

“The duty to cooperate exists only in relation to performance of a

specific contract term.” *Badgett v. Sec. State Bank*, 116 Wash. 2d 563, 570, 807 P.2d 356 (1991).

2. GHC construes its contract in a way that is in bad faith and that violates well-settled rules of insurance contract construction.

It is a fact, provable by reviewing the GHC contract, that the GHC contract **does not contain** a cooperation clause that Ms. Hall must cooperate in GHC’s “evaluation” or “investigation” of made whole or determining reimbursement rights.

GHC is construing its contract to such a degree that it has replaced words and created duties that do not exist. Our Supreme Court has rejected that. “This court will not extend the language of the contract beyond its plain meaning.” *Metro. Mortg. & Sec. Co. v. Reliable Ins. Co.*, 64 Wash. 2d 98, 100, 390 P.2d 694 (1964). “Insurance contracts are construed strictly against the insurer and liberally in favor of the insured.” *id.*

GHC’s effort to have this Court modify the contract to change the language fails as a matter of law. “If the policy language is clear and unambiguous, the court may not modify the contract or create an ambiguity where none exists.” *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Zuver*, 110 Wash. 2d 207, 210, 750 P.2d 1247 (1988).

3. **A right to reimbursement is required before there can be “recovery” or “efforts to collect.” Made whole IS a condition precedent to helping GHC “recover” or “collect”.**

GHC argues that the plain language of the GHC contract “refutes Hall’s contention that being ‘made whole’ was a condition precedent to her duty to cooperate.” *Resp. Br. 30*. GHC’s argument fails because it changes the language of the cooperation clause and conflates the phrases “efforts to assess” (or efforts to investigate or evaluate) with the phrase “efforts to collect”. The only way to arrive at GHC’s conclusion is to ignore the contract as written.

Ms. Hall being made whole is a condition that must exist before GHC can force Ms. Hall to help GHC collect her settlement proceeds. GHC must first have a right to reimbursement before it may “recover” or “collect”. The GHC contract and Washington case law tell us as much.

GHC contract: “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.” *CP 1708*.

2019 Supreme Court Caselaw: “But an insurer generally cannot obtain a recovery if its insured has uncompensated damages.” [Bold added]. *Daniels v. State Farm Mut. Auto. Ins. Co.*, 193 Wash. 2d 563, 572, 444 P.3d 582 (2019).

“Wherever they [subrogation rights] reside, it has long been recognized that such rights are subject to the principle that an insured must be “made whole” for any losses before an insurer may **recover** its payments:

[W]hile an insurer is entitled to be reimbursed to the extent that its insured recovers payment for the same loss from a [tortfeasor] 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.”

[Bold added] *Grp. Health Coop. v. Coon*, 447 P.3d 139, 143 (Wash. 2019), quoting *Thiringer v. Am. Motors Ins. Co.*, 91 Wash.2d 215, 219, 588 P.2d 191 (1978) (emphasis added); and citing *Daniels v. State Farm Mut. Auto. Ins. Co.*, 193 Wash.2d 563, 576, 444 P.3d 582 (2019).

“Even if this court were to find that GHO’s right to direct reimbursement is not dependent on its right to subrogation, the fact remains that, if Coon has not been “made whole,” no right to reimbursement ever **arises**. Certainly, absent full recovery by Coon, GHO **does not have a right to be reimbursed** from the Coons’ settlement proceeds.” [Bold added]. *Grp. Health Coop. v. Coon*, *id.*, at 144.

“In sum, the Coons have a right in contract and at common law to receive full compensation for their losses before GHO may **seek reimbursement** of its payments for Coon’s medical expenses.” [Bold added]. *id.*, at 146.

In our case, the GHC contract says what it says (i.e. efforts to “collect” and in “recovery of”), and not what GHC wants it to say.

GHC cannot now change its contract to suit its argument. “Absent fraud, deceit or coercion, a voluntary signatory is bound to a signed contract even if ignorant of its terms.” *Max L. Wells Tr. by Horning v. Grand Cent. Sauna & Hot Tub Co. of Seattle, id.*, at 602.

Even if “collect” or “in recovery of” were ambiguous, “[A]ny ambiguity is resolved against the insurer and in favor of the insured.” *Kalles v. State Farm Mut. Auto. Ins. Co.*, 433 P.3d 523, 525 (2019), citing *American Star Ins. Co. v. Grice*, 121 Wash.2d 869, 874-75, 854 P.2d 622 (1993).

C. GHC’s argument that it had “no way of evaluating” whether Ms. Hall was not made whole is disproven by GHC’s prior conduct and its own file notes.

The crux of GHC’s argument is its claim that it “[h]ad no way of evaluating Hall’s contention that she has not been “made whole,” and thus whether it had a right to reimbursement.” *Resp Br. 2*. The facts do not agree.

1. GHC’s has already determined (in bad faith) made whole so it cannot now be heard that it had no way of evaluating made whole.

GHC’s unsupported claim (that it had no way of evaluating Hall’s contention that she has not been made whole and thus whether it had a right to reimbursement) – is disproved by what GHC has admitted in its Response

brief:

[o]n 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."

[Bold added]. *See Resp. Br. 9, citing CP 1207.* GHC admits that in this letter its attorney "[e]xplained that its decision was based on GHC's claim file and "the information made available to us to date," [. . .]". *id, citing CP 1207.* GHC's claim file note from March 21, 2016 documents that the claims handler had even prepared an evaluation worksheet.

If GHC had no way to evaluate whether Ms. Hall was not made whole (as it now claims), then it was misrepresenting to Ms. Hall in the April 27, 2016 letter that based on the claim fail and other information, she was "[f]ully compensated by the settlement" and that GHC was "[e]ntitled to be reimbursed for the amounts it expended for Ms. Hall's medical care."

It is an unfair method of competition and an unfair or deceptive act or practice in the business of insurance, specifically to the settlement of claims, for an insurer to misrepresent pertinent facts. *WAC 284-30-330(1).*

2. **Reality is that GHC had considerable and meaningful information about Ms. Hall's claim and damages. GHC's claim that it did not have such information is provably false.**

Even if the cooperation clause said what GHC pretends it says, the

Superior Court erred when it decided as a matter of law that Ms. Hall breached the cooperation clause. “Breach of a cooperation clause is measured by the yardstick of substantial compliance.” *Staples v. Allstate Ins. Co.*, 176 Wash. 2d 404, 414, 295 P.3d 201 (2013).

GHC’s contention that it did not have enough information and that it had no way of evaluating Ms. Hall’s contention that she was not made whole is argument, but not fact. GHC asserts that “[t]he claims file shows only that GHC was generally aware Hall had a history of significant health problems, [. . .]” *Resp. Br. 19*. This is provably inaccurate.

GHC’s claim file documented the Superior Court cause number, the facts of the loss, injuries, the third party insurer, the attorney fee percentage and over \$50,000 in costs. GHC’s claim file notes show extensive information and knowledge about Ms. Hall’s case, damages and settlement:

- ▶ Assumption of risk is the issue of proceeding down the dark stairs.** Talking w/Ingrid, a friend. *CP 1796*.
- ▶ *She said she could see the steps CP 1804.*
- ▶ Any other exit? – There was an alternate ramp to the side *CP 1804*.
- ▶ Recd cl from Tim Freeman [sic]. [. . .] Case did not resolve at mediation, but now they have an acceptable offer of \$600k. [. . .] and member not being fully compensated as specials exceeded this amount. *CP 1806*.
- ▶ Gross Settlement Amount: \$600,000.00 *CP 1804*.

- ▶ Walking down stairs missing the last step and fell exiting a dark building [. . .] not in scope of employment *CP 1796*.
- ▶ fx Rt femur, fx LT hand, head injury, ulnar nerve lesion, post op infection subsequent surgeries fracture-dislocation, left fifth carpometacarpal joint *CP 1796*.
- ▶ Attorney says [Ms. Hall] testified at deposition: she was planning to stay until they ‘kicked her out’ enjoyed her job. *CP 1796*.

GHC’s claim file also documented \$219,000 in medical expenses, almost \$500,000 in wage loss, over \$30,000 in chore services, and a total wage loss, chore services and medical expenses claim of \$736,869. *CP 1796*.

In 2012, GHC knew that Ms. Hall fell after walking out of a meeting on September 18, 2012 and that she had filed a personal injury claim with Mutual of Enumclaw, which was the liability insurance carrier. *CP 42*.

The GHC claims handler literally had read to her from Ms. Hall’s attorney an extensive list of prior conditions from an expert report, and the GHC claim file even documents that “[A]ttorney called [. . .] citing Sherry and comp neg issues.” *CP 1806*.

GHC also knew of the tortfeasor’s policy limits, because GHC’s attorney stated to the Superior Court: “The tortfeasor had policy limits of \$3 million.” *CP 977*. GHC had several conversations with Ms. Hall’s attorney. It was also Ms. Hall’s medical provider – for several decades. Being her medical provider, it had access to medical records. This is further evidenced by the

fact that the GHC contract allows Ms. Hall to request and receive a copy of her medical records:

As an Enrollee, you have the right: [. . .] to request and receive a copy of your medical records [. . .].

CP 105-106.

There is no clause in GHC's contract obligating Ms. Hall to acquiesce to every demand by GHC for information in GHC's "evaluation" or "investigation" of made whole or reimbursement rights. Even absent such a clause, GHC had considerable and meaningful information to evaluate that.

3. The law does not support GHC's claim to its insured's attorney's work product.

GHC's request that Ms. Hall's attorney keep GHC informed of any settlement **negotiations** with Labor 1992 Corporation (*Resp Br. 7, citing CP 1221, 1301-44*) is not backed by any obligation in the GHC Contract. Also, Ms. Hall's attorney had no attorney-client privilege with GHC in Ms. Hall's tort case. GHC admits as much. *CP 759*. Informing GHC (a non-client) of information that would reveal settlement negotiation strategies would violate the work product doctrine. "An attorney owes fiduciary duties to his or her client." *Arden v. Forsberg & Umlauf, P.S.*, 193 Wash. App. 731, 743, 373 P.3d 320, 326 (2016), *aff'd but criticized*, 189 Wash. 2d 315, 402 P.3d 245 (2017).

4. Summary of why GHC's position lacks credibility and is inconsistent with the facts.

Information now claimed as necessary by GHC was earlier claimed as "not relevant to the current subrogation claim."

If GHC lacked information to determine made whole, then it committed bad faith and violated WAC 284-30-330 when it represented to Ms. Hall that she was made whole and GHC was entitled to reimbursement. GHC did not lack information, it just put its own interests in front of its insureds. GHC had a wealth of information about Ms. Hall's personal injury claim, her injuries and her damages. GHC's claim file bears this out.

GHC did not come close to overcoming the high standard of a CR 56 motion, and the trial court erred when it decided the factual issues of prejudice, non-cooperation and material breach of contract as a matter of law.

D. GHC relies on caselaw that is so unlike this case that it serves only to mislead.

GHC's reliance on *Tran v. State Farm Fire & Cas. Co.*, *Pilgrim v. State Farm Fire & Cas. Ins. Co.*, and *Keith v. Allstate Indem. Co.*, 105 Wash. App. 251, 254, 19 P.3d 1077, 1079 (2001) is mistaken. Each of those cases involved insurance policies with cooperation clauses that were entirely (and materially) different than the "collection" and "recovery" cooperation clauses in the GHC contract.

In each of those cases, the cooperation clauses had nothing to do with subrogation or even with cooperating in the insurer's efforts to "collect" money to which both insured and insurer staked a claim. *See policy language in Tran v. State Farm Fire & Cas. Co.*, 136 Wash. 2d 214, 225, 961 P.2d 358, 363 (1998) and *Pilgrim v. State Farm Fire & Cas. Ins. Co.*, 89 Wash. App. 712, 726/Appendix 950 P.2d 479, 486 (1997) and *Keith v. Allstate Indem. Co.*, 105 Wash. App. 251, 254, 19 P.3d 1077, 1079 (2001).

GHC also cites in a footnote (footnote 4 on p. 22 of Resp. Br.) four cases that have nothing to do with subrogation, made whole, or a cooperation clause pertaining to an insurer's efforts to collect or recover subrogation funds to which the insured and insurer stake a claim.

Caselaw that is dissimilar to the present case both in contract language and facts is only a distraction from the actual facts and the applicable law.

E. *Group Health Coop. v. Coon* (a 2019 case) is very similar to this case in both facts and issues. The Supreme Court's opinion supports reversing the trial court's decision in our case.

In 2019, the Supreme Court issued its written opinion in the subrogation case *Grp. Health Coop. v. Coon*, 193 Wash. 2d 841 447 P.3d 139 (2019). In that case, as in our case, GHC was the insurer. In that case, relevant parts of the GHC contract are essentially identical to the contract in our case. *See Grp. Health Coop. v. Coon appellate opinion at p. 743.*

As in our case, in *Grp. Health Coop. v. Coon* GHC claimed that the insureds breached the contract, forfeited their rights and that GHC was entitled to “full reimbursement”. *id.*, at 856. As in our case, the issues on appeal in *Grp. Health Coop. v. Coon* revolved around subrogation, made whole and prejudice.

As in our case, the Coons’ situation “[r]epresents the typical settlement scenario to which the Thiringer priority rule has been applied over the last 40 years.” *id.*, at 853-854.

1. The Supreme Court’s holding in *Group Health v. Coons*.

In *Grp. Health Coop. v. Coon*, the Supreme Court stated: “Wherever they [subrogation rights] reside, it has long been recognized that such rights are subject to the principle that an insured must be “made whole” for any losses before an insurer may recover its payments: [. . .]” *id.*, at 850.

The Supreme Court also stated: “Even if this court were to find that GHO’s right to direct reimbursement is not dependent on its right to subrogation, the fact remains that, if Coon has not been “made whole,” no right to reimbursement ever arises.” *id.*, at 852. Several other rules are found in the Supreme Court’s ruling:

- ▶ Insurers **may not** contract for reimbursement without regard to limits on its subrogation rights. *id.*, at 851.
- ▶ “Settlement for less than the tortfeasor’s policy limits does not create a presumption of full compensation.” *id.*, at 855.

- ▶ The insurer bears the burden of proving full compensation – and that is a question of fact, not of law. *id.*, at 856.

The Supreme Court held: “In sum, the Coons have a right in contract and at common law to receive full compensation for their losses before GHO may seek reimbursement of its payments for Coon’s medical expenses. The Coons’ situation is analogous to that of every injured party who makes a calculated decision based on the risks of litigation to accept a settlement. We **decline the invitation to upset almost four decades of insurance law** in Washington State recognizing the wisdom and fairness of the “made whole” principle.” [Bold added]. *Grp. Health Coop. v. Coon, id.*, at 856.

2. Group Health’s “prejudice” argument fails.

As in our case, in *Grp. Health Coop. v. Coon*, Group Health argued that “[t]he Coons forfeited their rights under the insurance contract by breaching the contract.” *id.* In *Grp. Health Coop. v. Coon*, the insured failed to give GHC advanced notice of its settlement, *and* the insured’s attorney disbursed all settlement funds.

In our case, GHC admits that it was given notice prior to settlement. *See Resp. Br. 8, citing CP 1221.* Ms. Hall’s attorney continues to hold the \$45,002.91 in a trust account. GHC’s claim file notes and other evidence show that GHC had extensive information about Ms. Hall’s injury case.

GHC has not been prejudiced and has not shown prejudice - let alone

concrete detriment, together with some specific harm to GHC caused thereby. Three fundamental rules on the issue of supposed prejudice were re-iterated by the Supreme Court in *Grp. Health Coop v. Coon*:

“[A]n insurer is entitled to relief based on an insured’s breach of contract **only if, and to the extent,** it can demonstrate prejudice resulting from the breach.” [Bold added]. *id.*, at 857–58.

To determine prejudice, the insurer must show concrete detriment, together with some specific harm to the insurer caused thereby. *id.*, at 857.

Determining prejudice from a policy breach is a question of fact for the jury and will seldom be established as a matter of law. *id.*, at 857.

F. GHC’s “take” on *Grp. Health Coop v. Coon* is not accurate or consistent with the Supreme Court’s opinion in that case.

GHC claims that the Supreme Court in *Grp. Health Coop v. Coon* relies upon *Tran* and *Pilgrim* to confirm that prejudice can be established as a matter of law when the insurer shows specific harm from the insured’s refusal to cooperate. *Resp Br. 24*. That is an inaccurate take on the Supreme Court’s written opinion in *Grp. Health Coop v. Coon*.

The Supreme Court discusses *Tran* and *Pilgrim*, but not on the issue of whether prejudice can be established as a matter of law (as GHC claims here.) The Supreme Court discussed *Tran* and *Pilgrim* because Group Health invoked those cases and the Supreme Court was responding to Group

Health's argument that it (Group Health) did not have to make a showing of prejudice:

Throughout the summary judgment proceedings, GHO did not offer any evidence of prejudice, CP at 389-407, but instead maintained that no showing of prejudice was required [. . .].

Grp. Health Coop. v. Coon, id., at 857. The Supreme Court then noted that Group Health relied on *Tran* and *Pilgrim* to support that argument.

Responding to Group Health's argument (that it did not have to show prejudice) the Supreme Court then stated: "[b]ut these cases [*Tran and Pilgrim*] compel the opposite conclusion. *id.*

The Supreme Court proceeded to discuss *Tran* and *Pilgrim* for the purpose of explaining that Group Health was wrong and that prejudice must be shown by the insurer before it can obtain relief on an insured's breach of contract. The Supreme Court then stated: "Consistent with these cases [*Tran and Pilgrim*] and our long-standing precedent, we reiterate that an insurer is entitled to relief based on an insured's breach of contract only if, and to the extent, it can demonstrate prejudice resulting from the breach." *id.*, 857-858.

The Supreme Court also cited *Tran*, for the rule (which favors Ms. Hall) that determining prejudice from a policy breach is a question of fact for the jury and will seldom be established as a matter of law. *id.*, at 857.

G. GHC sent over ten letters to Ms. Hall - each a misrepresentation and each a material breach of its contract.

GHC makes much of its October 4, 2012 letter to Ms. Hall wherein it stated: “In other words, Group Health has the right to be reimbursed for your medical expenses if the at-fault party is liable and the at-fault party has sufficient assets to compensate you for your damages from the accident-injury.” *CP 112*. This is a misrepresentation of GHC’s subrogation rights.

The made whole doctrine does not hinge on whether the tortfeasor has sufficient assets. The made whole doctrine hinges on whether the insured is fully compensated by the relevant applicable measure of damages. See *Sherry v. Fin. Indem. Co.*, 160 Wash.2d 611, 619, 160 P.3d 31 (2007), quoting *Barney v. Safeco Ins. Co. of Am.*, 73 Wash.App 426, 429-31, 869 P.2d 1093 (1994).

Full compensation within the meaning of the *Thiringer* rule contemplates that the Ms. Hall has made a complete recovery of the actual losses suffered as a result of the underlying incident **without regard to fault**. See *Sherry v. Fin. Indem. Co.*, *id.*, at 626.

GHC’s October 2, 2012 letter is not a defense against the misrepresentations and omissions in the more than ten letters that GHC subsequently sent.

1. GHC letters constitute a material breach of contract.

There is in every contract an implied duty of good faith and fair dealing.

Badgett v. Sec. State Bank, 116 Wash. 2d 563, 569, 807 P.2d 356, 360 (1991). The GHC contract states that Ms. Hall has the right to information about her rights and responsibilities as a patient and consumer. *CP 106*.

GHC engaged in a pattern of sending letters to either Ms. Hall or Ms. Hall's attorney (or both) that were misleading and that misrepresented its policy and its subrogation rights. *CP 752 (RFA 210) and CP 1810-1850; CP 1296-1297*. Each letter is a separate material breach of GHC's contract.

On May 23, 2013, GHC sent Ms. Hall's attorney a letter stating in pertinent part: "Though this contractual [subrogation] clause and principles of equity, Group Health is **entitled** to reimbursement for 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." [Bold added]. *See Dec of Pam Henley CP 1221 and see the letter at CP 1296-1297*.

Also in this 2013 letter, GHC misleadingly invoked its cooperation clause even though it was not in effect: "Because your client has a contracted duty to cooperate with Group Health's recovery of its subrogated interest, we ask that you complete the enclosed questionnaire and return it to our office." *CP 1297*. This letter was sent years before Ms. Hall's settlement - yet GHC represents to this Court that Ms. Hall's duty to cooperate "[a]rose when she

received the settlement funds, [. . .]" [Bold added]. *Resp. Br. 30-31.*

GHC sent over ten letters to Ms. Hall – and each of those letters included the material misrepresentation that at the time of settlement, payment of GHC’s reimbursement “**should be made**” by check and payable to GHC. [Bold added]. *CP 752 (RFA 210) and CP 1810-1850.*

“Should” means: “Used in auxiliary function to express obligation, p r o p r i e t y , o r e x p e d i e n c y . ”
[https://www.merriam-webster.com/dictionary/should.](https://www.merriam-webster.com/dictionary/should)

Reality is that pursuant to the GHC contract and Washington law, payment should **not** be made to GHC if Ms. Hall is not made whole.

In each of these GHC letters, GHC omitted that GHC’s contract has a provision that limits GHC’s right to subrogation to the excess required to fully compensate Ms. Hall for her loss, including general damages. That is material information - going to the heart of whether reimbursement “should be made” at the time of settlement.

In these letters, GHC omits to mention that **despite its subrogation clause**, if Ms. Hall is not made whole, no right to reimbursement ever arises. This means that the GHC letters are misleading, deceptive and a misrepresentation of GHC’s subrogation rights.

GHC took overt actions (i.e. repeatedly sending written

correspondence) that omitted material policy provisions, that misrepresented its subrogation rights, and that mislead (rather than inform) Ms. Hall about her rights under the contract and Washington subrogation law.

Each letter materially breached the GHC contract - both the provision that Ms. Hall has the right to information about her rights and responsibilities, and the duty of good faith and fair dealing that as a matter of law is inhered in the contract. A breach or non-performance of a promise by one party to a bilateral contract, so material as to justify a refusal of the other party to perform a contractual duty, discharges that duty. *See 224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wash. App. 700, 725, 281 P.3d 693 (2012).

H. The *British Columbia Ministry of Health v. Homewood* case supports reversing the trial court's summary judgment order.

GHC cites to *British Columbia Ministry of Health v. Homewood*, 93 Wash. App. 702, 714, 970 P.2d 381 (1999). That case supports a finding that the trial court erred in granting GHC's MSJ: "Under different facts – where the insurer does not concede that the injured party was not fully compensated and has, instead, filed controverting evidence raising genuine issues of material fact with respect to that question in light of the formula in *Elovich* – an objective evaluation of the party's injuries by a trier of fact would be required." [Bold added]. *id.*, at 714-715.

In our case, GHC has **not** filed contravening evidence raising a genuine

issue of material fact with respect to whether Ms. Hall was not fully compensated. The evidence shows Ms. Hall's economic damages alone exceeded \$700,000 and that this case involved evidence of comparative negligence. Even the GHC claim file notes show economic damages exceeding the settlement amount and that: "[A]ttorney called [. . .] citing Sherry and comp neg issues."

I. GHC committed bad faith and violated the CPA. Summary Judgment was improper.

Ms. Hall devoted around five pages in her opening brief to showing how GHC acted in bad faith. *App Br.* 39-44. GHC responded and concludes that it did not commit bad faith. GHC's response is helpful only to show that the Superior Court never should have taken the factual issue of bad faith and decided it as a matter of law. "Whether an insurer acted in bad faith remains a question of fact." *Smith v. Safeco Ins. Co.*, 150 Wash. 2d 478, 485, 78 P.3d 1274 (2003). "But a court must deny summary judgment when a party raises a material factual dispute." *id.*, at 485-86.

GHC calls Ms. Hall's assertion that it engaged in deceptive collection activities "absurd." *Resp. Br.* 35. The law and facts disagree. "The first two elements of a CPA claim [unfair or deceptive act or practice that affects trade or commerce] are established where a statute declares that a violation is a per se unfair trade practice." *Keodalah v. Allstate Ins. Co.*, 449 P.3d 1040

(Wash. 2019). A violation of WAC 284-30-330 is a per se unfair trade practice. *id.* Ms. Hall has shown in detail how GHC has violated WAC 284-30-330 and RCW 48.01.030. *See App. Br. 39-44.* RCW 48.01.030 establishes a per se public interest. *Keodalah v. Allstate Ins. Co., id.*, citing *Hangman Ridge*, 105 Wash.2d at 791-92, 719 P.2d 531. Ms. Hall has incurred a \$500 cost from Dr. Ghidella (Declaration defending against GHC's bad-faith action) and she has been denied possession of over \$45,000 of her settlement money. Deprivation of the use of property as a result of an unfair or deceptive act or practice is sufficient to satisfy the injury and proximate cause elements of a CPA claim. *See Sorrel v. Eagle Healthcare, Inc.*, 110 Wash. App. 290, 298-99, 38 P.3d 1024, (2002). There is nothing "absurd" about this CPA claim.

GHC calls Ms. Hall's assertion that she was forced to sue GHC in order to gain the benefits of the contract "absurd". *Resp. Br. 35.* What Ms. Hall actually asserted is: "GHC has forced Ms. Hall to engage in costly and time consuming litigation to make her insurer honor its contract and made whole case law." *App. Br. 44.* This is on point. If GHC can force its insured to pay GHC thousands of dollars (above and beyond her premiums) to reimburse GHC when GHC has no right to that money, then GHC is effectively negating the coverage that Ms. Hall purchased.

J. Ms. Hall is entitled to fees and costs both under RCW 19.86 et seq. and case law.

If the insurer can take the insured's money to pay itself back for what it paid in medical expenses – even though it has no right to that money – then its coverage was not actually coverage. GHC argues that this is not a dispute about the value of the reimbursement right. *Resp. Br. 37*. If this is true and there is no such dispute, then GHC has apparently agreed with Ms. Hall and is admitting that the value is zero, because GHC has no reimbursement right.

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

II. CONCLUSION

The Superior Court should have granted Ms. Hall's MSJ (that she did not breach the contract - the cooperation clauses were not in effect and GHC had voluminous information, notice of settlement, and Ms. Hall's attorney continues to hold funds in trust). The Superior Court never should have ruled as matter of law that Ms. Hall breached the contract (question of fact) and never should have dismissed her counterclaims as a matter of law (bad faith also a question of fact).

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DATED: October 30, 2019

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FILED
COURT OF APPEALS
DIVISION II

2019 OCT 30 PM 4: 22

STATE OF WASHINGTON

BY _____

No. 53381-2-II

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 REPLY BRIEF

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ORIGINAL

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 Reply Brief; and
 2. Declaration of Service.

ORIGINAL (and one copy) TO:

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

[] Via Hand Delivery

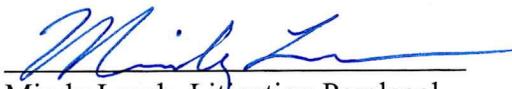
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