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NO. 68226-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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JOHN J. JONES AND MARY ANN MORBLEY JONES

Appellants,

v.

KING COUNTY, a municipal corporation,

Respondents.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PALMER ROBINSON

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# BRIEF OF APPELLANT

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## I. INTRODUCTION

King County claims that its Health Plan for its employees allows full reimbursement subrogation on a first-dollar basis even when the injured person was not made whole in the third party claim. They also claim they do not have to contribute to costs or attorney fees. Their argument has three prongs. First, the Health Plan is not an insured plan, but a self-funded plan and thus, state law does not apply. Second, the contract specifically provides for first-dollar recovery without contribution to costs and attorney fees and that the contract terms are enforceable under contract law. And, finally, because the Plan is self-funded, it is not an insurance company and so insurance case law does not apply. Close analysis, however, shows that all three prongs are invalid.

## II. ASSIGNMENTS OF ERROR

1. The Superior Court erred by reaching the factual conclusion that "[t]here is *no* evidence that Mr. Jones was not 'made whole'" by way of the settlement of his underlying personal injury action, where the determination as to whether Mr. Jones was made whole is genuine issue of material fact that should have rightfully have been left solely in the province of the jury.

2. The Superior Court erred to the extent that it implicitly held that as a matter of law, King County is entitled to contractual and equitable liens and reimbursement from said settle.
3. The Superior Court erred by disregarding the appellants' CR 15 Motion to Amend their Answer to the Complaint, in that reasonable minds could conclude that the elements of apparent authority negate King County's argument that it is not an insurance company.
4. The Superior Court erred to the extent that it implicitly concluded that, although King County is subject to state laws and precedents used to regulate the Insurance Industry, it has no obligation allow the injured party to be made whole before the injured party is required to reimburse insurers under the subrogation and lien provisions of the health planto held that as a matter of law, King County is entitled to contractual and equitable liens and reimbursement from said settle.

## III. STATEMENT OF THE CASE

On or about April 3, 2008, Mr. Jones was visiting with Mark Hendrickx at a Hendrickx construction site located on Beacon Hill in Seattle. At the time of this incident, Hendrickx Construction, Inc. was building a house in the area. Mr. Jones and Mr. Hendrickx were having a conversation on the main level of an unfinished home that was a number of feet from the ground. For workers to enter and exit the home, a wooden board was laid from the main level of the home to the ground. When attempting to exit the structure, Mr. Jones stepped down with his right foot from the wood board to the ramp when his foot slipped, causing him to hit his stomach/rib area on the wooden ramp before falling to the ground. Mr. Jones landed awkwardly on his right ankle and immediately fell to the ground.

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

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

From the beginning of the underlying case, the undersigned counsel for Plaintiffs was in contact with The Rawling Company. Dan Kearns, the Rawlings representative indicated on several occasions that he was seeking the subrogation of Aetna. See Exhibits 1 and 2 of Declaration of J.D. Smith.

**A. Procedural Posture/Class Action Lawsuit.**

Plaintiff filed its motion for summary judgment on September 28th and trial is more than a year away. In Defendant's Answer, it was clear that leave of court may be necessary. See Exhibit 3 of Declaration of J.D. Smith. A class action lawsuit was recently filed, a copy of which is attached as Exhibit 4 to Declaration of J.D. Smith. Because the class was so recently filed, Defendants have not yet determined how it may impact

this case. The issues appear the exact same as the issues being litigated in this case.

**B. Discovery Has Not Yet Been Conducted and this Court Should Not Make a Determination on the Merits of this Case Without the Parties Having Done So.**

Defendants anticipate issuing interrogatories and requests for admissions, taking depositions, and issuing requests for admission. See Paragraph 5 of *Declaration of J.D. Smith.* Counsel for Defendants had some health issues that have prevented him from fully engaging in this case. Id.

Defendants also plan to file a third party complaint adding both Aetna and Rawlings as parties, as well as counterclaims against King County. Declaration of Mary Ann Morbley Jones.

**C. Mr. Jones was not made whole, a separate proceeding is necessary for this determination.**

The demand letter and photos of Mr. Jones' injuries clearly shows the significance of Mr. Jones' injuries. The Defendant's mediation letter confirms a true liability and comparative fault defense. See paragraphs 5, 6 and 7 of Declaration of J.D. Smith. See also Declaration of Mary Ann Morbley Jones.

## IV. ARGUMENT

### A. Summary Judgment Is Not Affirmed Where Genuine Issues Of Material Fact Remain.

This Court reviews a summary judgment *de novo*, making the same inquiry the trial court did: summary judgment should not be granted unless the pleadings and evidence show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Firth v. Lu*, 146 Wn.2d 608, 614, 49 P.3d 117 (2002). The burden of proof is on the Respondents as the moving party, and any doubt as to the existence of a genuine issue of material fact is resolved against summary judgment. *Atherton Condo. Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). All facts are considered in the light most favorable to the Gordlys and all reasonable inferences are drawn in their favor. *Id.* Judgment should issue only if reasonable persons could reach but one conclusion from the evidence. *Turgren v King County*, 104 Wn. 2d 293, 312, 705 P.2d 258 (1985). In particular, "issues of negligence and proximate cause are generally not susceptible to summary judgment." *Owen v. Burlington No. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005). By its nature, the question as to whether an injured party has been made whole through the compromised settlement of a matter prior to trial is quintessentially a question of fact that should be left to the jury.

If this Court reaches the Superior Court's denial of the Jones' CR 15 Motion to Amend Answer, that denial is reviewed for abuse of discretion. *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990). The standard is whether discretion was exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion. *Id.* In making this determination, this Court views all facts in the light most favorable to the Joneses and draws all reasonable inferences in their favor. *Tellevik v. Real Prop. Known As 31641 West Rutherford St.*, 120 Wn.2d 68, 91, 838 P.2d 111 (1992).

## II. ARGUMENT AND AUTHORITIES.

### A. King County's Summary Judgment Motion is Premature and Defendants Should be Afforded Additional Time to Respond.

Civil Rule 56(f) permits the trial court to refuse an application for summary judgment or to order a continuance to permit additional discovery to be conducted. Summary judgment "must be employed with caution lest worthwhile causes perish short of a determination of their true merit." *Smith v. Acme Paving Co.*, 16 Wn.App. 389, 392 (1976). "The granting of summary judgment is proper only ... where it is quite clear what the truth is, and no genuine issue remains for trial. It is not the purpose of the rule to cut litigants off from their right to trial by jury if they really have issues to try." *Burback v. Bucher*, 56 Wn.2d 875, 877

(1960). "Only where it appears from the pleadings, depositions, and affidavits on file that a party will not be able to present an issue of material fact before the trier of fact should a summary judgment be granted." *Cofer v. County of Pierce*, 8 Wn.App. 258, 262 (1973).

Defendants are likely to require the entire discovery period to assemble the facts and opinions necessary to prepare this case for trial. Because the defendants desire to assert Counter Claims and Third-Party claims, additional counsel will likely appear and the trial date will likely change. The Defendants' should not be denied this opportunity.

It is clear that there are triable issues in this case. For example, was Mr. Jones made whole, was he comparatively at fault? What is Aetna's role as the Jones' insurer? Does Washington law apply to them? What is The Rawlings Company's contractual relationship with Aetna and King County?

**B.** What is Subrogation?

Subrogation is an equitable doctrine. Subrogation is a corollary of the more general principle that unjust enrichment should not be allowed; unjust enrichment is what the principle of subrogation is intended to prevent. *Johnny's Seafood Co v. City of Tacoma*, 73 Wn.App. 415, 421, 869 P.2d 1097 (1994). The doctrine seeks to impose ultimate responsibility for a loss on the party who "in equity and good conscience,

ought to bear it." *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998). The courts will protect subrogation rights "only when justice so requires." *Winters v. State Farm Mut. Auto Ins. Co.*, 144 Wn.2d 869, 875, 31 P.3d 1164 (2001).

**C.** The Self-Funded Argument

The attempt to create a valid argument is curious because it seeks to adopt some ERISA arguments, but disclaims others. King County employees are government workers. ERISA specifically exempts government plans. 29 U.S.C. § 1003. But the argument is advanced that, like ERISA plans, this plan is self-funded so state law does not apply. This is a non-sequitur. ERISA, based on an act of Congress, pre-empts state law unless the plan is insured. (If insured, state laws apply.) But the County's plan is not an ERISA plan. There is no basis for federal law to apply. Washington State law must apply. Self-funding may make a difference in ERISA law, but not in general subrogation law.

**D.** The Contract Language

The County then advances its argument by adopting the ERISA argument that, unconstrained by state law subrogation principles, it can enforce any contracted provision it unilaterally writes. This argument also fails. ERISA Section 502(a)(3)'s statutory definition requires that a court

apply traditional principles of equity when fashioning relief. Both in *Sereboff* and in prior cases, the U.S. Supreme Court has instructed that, when construing and applying Section 502(a)(3), a court should apply principles of equity that existed in the days of the "divided bench." *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356, 126 S.Ct. 1869, 164 L.Ed 612 (2006). In so doing, the Court has further instructed that courts should "consult" standard treatises on equity, "such as Dobbs, Palmer, Corbin, and the Restatements." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217 (2002); *see also Sereboff* at 368. All the authoritative treatises cited in *Sereboff* and *Knudson* dictate that a Plan's remedy is controlled by principles of unjust enrichment, not contract law. Has the tort victim been unjustly enriched by recovering from both the tortfeasor and the contracted for medical payments insurer? *Dobbs* explained that both constructive trust and equitable lien remedies "are invoked for the same reasons, *to prevent unjust enrichment.*" 1 D. Dobbs, Law of Remedies § 4.3(3), at 602 (emphasis added). *Palmer* is no less clear. 1 G. Palmer, Law of Restitution § 1.3, at 16-20 (explaining that these remedies are "aimed at preventing unjust enrichment"). Under equitable principles of unjust enrichment, a Plan is entitled to recover, at most, that portion of a beneficiary's underlying settlement that is specifically allocable to those medical expenses that it paid, minus a

proportional share of the costs and attorney fees incurred in recovering those expenses from third parties. This approach achieves an equal balance between a Plan and its beneficiary, whereby each party (1) recovers a proportion of the underlying settlement that corresponds to their claims, and (2) contributes proportionally to the costs of obtaining that recovery. The strict contract language is not enforceable. It is well understood in subrogation claims that when an insured recovers a lump sum from a third-party tortfeasor, the insured's "unjust" gain, and the corresponding measure of an insurer's maximum award, is limited by the amount the insured has "double recovered." *See 46A C.J.S. Insurance* § 1993 ("Subrogation prevents . . . unjust enrichment to the insured that would result from double recovery."); *Robert E. Keeton & Alan I. Widiss, Insurance Law* § 3.10(7) (1988) ("Recognition and enforcement of a right to subrogation for health insurers is primarily premised on precluding duplicative recoveries."); *see also Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1117-18 (9th Cir. 2010). Moreover, it is a bedrock principle that, in the context of an insurer's effort to recover from an insured, a "double recovery" has only occurred where an insured has recovered twice for the same loss. *See, e.g., 16 Couch on Ins.* § 222:8 ("[S]ubrogation has the objective of preventing the insured from recovering twice for one harm."). This approach is consistent with the

trend in the field. One need only look to the U.S. Supreme Court's decision in *Arkansas Dept of Health & Human Services v. Ahlborn*, 547 U.S. 268, 126 S.Ct. 1752, 164 L.Ed.2d 459 (2006), regarding Medicaid subrogation. This is also the approach adopted by the Washington Supreme Court in *Tobin v. Department of Labor & Industries*, 165 Wn.2d 1016, 199 P.3d 411 (2009), regarding Labor & Industries subrogation. Thus, equity controls the subrogation rights of the plan, not the unilaterally drafted language of the contract.

**E.** Does it Make a Difference if King County is Not an Insurance Company?

As to the argument that King County is not an insurance company and so insurance cases do not apply, one need only look at the decision in *Brown v. Snohomish Cy. Physicians Corp.*, 120 Wn.2d 747, 845 P. 2d 334 (1993). *Brown* involved a Health Care Service contract, not an insurance company. The contract purported to deny benefits if a UIM policy was applicable in the case. The court stated,

> ...limitations in insurance contracts which are contrary to public policy and statute will not be enforced, but otherwise insurers are permitted to limit their contractual liability." *State Farm Gen. Ins. Co v. Emerson*, 102 Wn.2d 477, 481,

687 P,.2d 1139 (1984); *Mutual of Enumclaw Ins. Co. v. Wiscomb*, 97 Wn.2d 203, 210, 643 P.2d 441 (1982), *aff'g on rehearing*, 95 Wn.2d373, 622 P.2d 1234 (1980). Washington courts have hesitated to "invoke public policy to limit or avoid express contract terms absent legislative action." *Emerson*, at 481; *see Boing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 876 n.1, 784 P.2d 507, 87 A.L.R.4th 405 (1990). Where appropriate, though, public policy has been invoked to invalidate insurance contract provisions.

...

Petitioners claim that the provisions violate public policy favoring adequate indemnification of innocent automobile accident victims and public policy underlying UIM coverage. We agree.

The issue is not whether they are or are not an insurance company. The issue is subrogation, an equitable doctrine to avoid unjust enrichment.

**F.** Washington Subrogation Law

The lead case is *Thiringer v. American Motors Ins. Co.*, 91 Wn.2d 215, 588 P.2d 191 (1978) which underscored the public policy to full compensation for injury victims and adopted the rule of last dollar

subrogation. It is ridiculous to suggest that *Thiringer* was an insurance company case, the County is not an insurance company, and therefore the *Thiringer* case and its progeny do not apply. It is a subrogation case! Subrogation is an equitable doctrine. Equity will not enforce the draconian terms of the plan, terms of adhesion drafted without input from the plan beneficiaries.

**G.** What About Costs and Attorney Fees?

With regard to the claim that the plan does not have to share in the costs and fees of collection, the position of the plan is likewise wrong. The seminal Washington case on this issue is *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998). The court ruled that the victim's PIP carrier seeking reimbursement from the fund created by the insured must pay a pro rata share of the legal expenses the insured incurred in order to recover from the tortfeasor.

As explained in *Mahler*: "This equitable sharing rule is based on the common fund doctrine, which, as an exception to the American Rule on fees in civil cases, applies to cases where litigants preserve or create a common fund for the benefit of others as well as themselves." The "common fund" in *Mahler* consisted of the recovery the insured obtained from the tortfeasor only. From this fund, the insured was compensated

and the PIP carrier was reimbursed. Because the PIP carrier reimbursed itself from a fund that the insured created, the PIP carrier was obligated to pay a pro rata share of the legal expenses incurred by the insured to create the fund.

As explained in *Winters v. State Farm Mutual Automobile Insurance Company*, 144 Wn.2d 869, 31 P.3d 764 (2001), "[t]hese pooled funds became the common fund from which the PIP insurer was able to recoup payments it had made". *Winters* clarified that the pro-rata sharing rule articulated in *Mahler* is based on equitable principles, not specific policy language, and applies to PIP reimbursements from UIM recoveries as well as from tortfeasor recoveries. Numerous authorities are also in accord that allowing the insurer to recover its *gross* proportional amount would frustrate the principle of unjust enrichment. As Palmer observed, an "insurance carrier is unjustly enriched if the insured is forced to bear the cost of recovering medical payments for the carrier's benefits." 4 G. Palmer, Law of Restitution § 23.18(d), at 672 n.56; *see also Hospital Service Co. v. Penn. Ins. Co.*, 227 A.2d 105, 111 (R.I. 1967) (holding that "[i]t would be inequitable and unjust to require [an insured] to incur expenses for the recovery of money which will inure to the benefit of [the insurer] without allowing [the insured] some reimbursement").

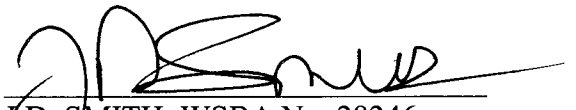
## VI. CONCLUSION

Because Respondents are actually or at a minimum treated like an insurance company in considering their entitlement to reimbursement of amounts paid for the medical expenses paid to treat Mr. Jones under applicable Washington law, under principals of equity and because a reasonable jury could have found that the Appellants were not made whole by virtue of the fact that they settled their claim and avoided the risk of an unpredictable jury trial. Summary judgment was improperly granted, so the decision of the trial court should be reversed and this case remanded, the Appellants allowed to amend their Answer and for the matter to proceed to trial.

DATED this 10th day of August , 2012.

RESPECTFULLY submitted,

**WARD SMITH PLLC**

By: 

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## CERTIFICATE OF SERVICE

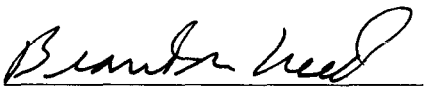
I hereby certify under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner indicated a copy of the foregoing:

APPELLATE BRIEF

TO:

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

Dated at Seattle, Washington, this 10th day of August, 2012.



Brandon C. Reed