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No. 96516-1

No. 76365-2-I

IN THE COURT OF APPEALS – DIVISION I

OF THE STATE OF WASHINGTON

GROUP HEALTH COOPERATIVE,
a Washington non-profit corporation,

Respondent,

vs.

NATHANIEL COON and LORI COON,
husband and wife,

Appellants.

APPELLANTS' CORRECTED REPLY BRIEF

Eugene M. Moen, WSBA #1145
Attorney for Appellants
115 NE 100th Street, Suite 220
Seattle, WA 98125
Telephone: 206/443-8600
Facsimile: 206/443-6904
gene@cmglaw.com

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I. ARGUMENT

A. Washington case law, not the insurance contract, determines whether Washington's "made whole" concept applies.

In its brief, Respondent Group Health is conflating two different concepts: the provisions of the insurance contract and the case law regarding the "made whole" doctrine. The Coons' position that the Group Health lien is not enforceable is not based solely on terms of the insurance contract, although that contract includes provisions that recognize Washington law regarding the "made whole" doctrine.

The Coons are seeking to apply well-established Washington case law to the subrogation rights asserted by Group Health. That would be the situation regardless of the Group Health contract provisions. Those provisions cannot abrogate the case law. See *Liberty Mutual v. Tripp*, 144 Wn.2d 1, 21, 25 P.3d 997 (2001) (holding that an insurance contract which attempts to avoid the "Made Whole Rule" is contrary to public policy and unenforceable, and "[c]ase law on this point has been clear since at least 1978.").

In discussing the contract, Group Health also takes contradictory positions. It argues that no liable entity exists, but yet

the contract provision states that Group Health "will be subrogated to any rights that the Member may have to receive compensation or damages related to the injury or illness..." [emphasis added]. If there is no liable tortfeasor, then the Coons had no "rights . . . to receive compensation or damages" from the Everett Clinic, and there would thus be no subrogation. But this issue is not relevant, since there was a disputed claim and monies were paid in settlement by the Everett Clinic based on that claim. The issue in dispute is whether the settlement made the Coons whole

B. The settlement with the Everett Clinic was a compromise based on inability to establish liability on the part of the Clinic.

Group Health emphasizes that the Coons' attorney and his experts felt that litigation against the Everett Clinic could not be commenced at the time of the settlement because of lack of proof of both negligence and causation. However, a pre-litigation claim had been made to the Clinic and the Clinic paid money, after a mediation, in order to resolve that claim. This was a disputed claim, both as to liability and damages, as is true in almost all medical negligence cases.

The Clinic may have paid money in settlement because adverse information was known by the Clinic that was not known to the Coons or their attorney, or the Clinic wanted to avoid the risks of litigation given the very large damages potential in the claim. There is also an indication that the settlement was part of a study to determine the effectiveness of early resolution of medical negligence claims. In his declaration, attorney Todd W. Gardner noted that, from his review of correspondence, it appeared that the Clinic "targeted this case as the type of case they would try to resolve before litigation was filed under a new program designed to reduce litigation filings and provide some level of compensation to persons who have suffered grievous injuries on their watch." CP 101.

Regardless of the reasons for the Clinic's willingness to enter into a pre-litigation settlement, the underlying facts regarding the Coons' claim -- and regarding the Coons' acceptance of a settlement for less than the available insurance coverage -- are very pertinent to any evaluation of whether they were "made whole" through the settlement.

C. **The fact of a settlement for less than available insurance coverage or assets is not sufficient proof that the Coons were "made whole" in the settlement, but is only evidence to be considered with other material facts applicable to the settlement.**

The thrust of the trial court's ruling is that any claim that settles for less than available insurance limits is automatically proof that the claimants were made whole, and obviates any need to examine other facts regarding the settlement. The trial court granted summary judgment in favor of Group Health based on this simple – but erroneous -- proposition, and it effectively ignored the many other material facts regarding the circumstances of the settlement.

Group Health now concedes that *Liberty Mutual v. Tripp*, 144 Wn.2d 1, 25 P.3d 997 (2001) does not hold that a settlement for less than policy limits creates a presumption that the claimants were made whole. Rather, such a settlement is simply some evidence to be considered in determining whether a settlement made the claimants whole. The Coons agree with that interpretation of *Tripp* as well as *Truong v. Allstate Property Cas. Ins. Co.*, 151 Wn. App. 193, 211 P.3d 430 (2009), but point out that this implies that there can be other evidence pertaining to that issue.

In the *Truong* the contention of the claimant was that he received only half of his actual damages because there was an issue regarding contributory negligence. In other words, the *Truong* claimant did not have adequate evidence that the alleged tortfeasor was responsible for all of his damages. If the trial court in the instant case is correct in it's ruling, that issue would not even have been considered in the *Truong* case. Under the trial court's rationale in the instant case, the only question in *Truong* would be whether the settlement was for less than the policy limits. Yet the court in *Truong* considered whether the evidence presented by the claimant – a conclusory declaration without reference to specific facts – was sufficient to raise an issue of material fact and defeat summary judgment, and decided it did not.

In the instant case, the Coons presented a great deal of factual evidence showing that, because of their inability to establish liability, they were forced to accept a settlement for much less than their actual damages.

In the instant case, the declarations of the Coons' experts are not simply conclusory. They discuss in detail the specific facts that necessitated a settlement amount far below the damages sustained by

Mr. and Mrs. Coon and their children. The information set out in the clerk's papers and in the detailed declarations of the Coons' experts raise numerous and genuine issues of material fact. Those facts are not material only if the sole issue is whether the settlement was for less than available insurance.

II. CONCLUSION

The trial court made an erroneous ruling that accepting a settlement for less than insurance policy limits establishes, as a matter of law, that the Coons were made whole by the settlement. In doing so, it did not consider the genuine issues of material facts presented by the evidence. Because of this error of law, the trial court's judgment in favor of Group Health should be reversed and remanded for further proceedings to determine the basic fact issues relating to whether the Coons were fully compensated for their losses and thus were made whole through the settlement.

RESPECTFULLY SUBMITTED this 1st day of June, 2017.

By
Eugene M. Moen, WSBA #1145
Attorney for Appellants

CERTIFICATE OF SERVICE

I declare that on this date, I forwarded a copy of this *Appellants' Corrected Reply Brief* to the parties of record in the manner described below:

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I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED this 1st day of June, 2017 at Seattle, Washington.

Patricia A. Freeman, Paralegal to
Eugene M. Moen

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Sender Name: Trisha Freeman - Email: trish@cmglaw.com
Filing on Behalf of: Eugene Melvin Moen - Email: gene@cmglaw.com (Alternate Email: Trish@cmglaw.com)

Address:
115 NE 100th Street
Suite 220
Seattle, WA, 98125
Phone: (206) 443-8600

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