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No. 96516-1

No. 76365-2-I

IN THE COURT OF APPEALS – DIVISION I  
OF THE STATE OF WASHINGTON

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GROUP HEALTH COOPERATIVE,  
a Washington non-profit corporation,

Respondent,

vs.

NATHANIEL COON and LORI COON,  
husband and wife,

Appellants.

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APPELLANTS' OPENING BRIEF

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

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## I. INTRODUCTION

Nathaniel “Joel” Coon’s leg was amputated above the knee after he suffered a fungal infection following arthroscopic anterior cruciate ligament (ACL) replacement surgery at the Everett Clinic (hereinafter “the Clinic”) in 2012. After losing the leg, the Coons were provided gratuitous financial help by the Clinic, before a claim was asserted, to help with financial impact on his business and for unpaid medical bills. There was no obligation to repay those funds.

The Coons then pursued a medical malpractice claim against the Clinic. Unable to find evidence that the standard of care was violated—and faced with the potential of receiving no compensation for their injuries other than the voluntary payments made by the Clinic—the Coons agreed to compromise their claims and settle for \$2,000,000 (excluding the amounts voluntarily provided by the Clinic), an amount that was far less than full compensation.

Group Health Cooperative had paid \$372,634.07 for medical expenses associated with the incident and filed a lawsuit seeking a judicial determination that the Coons were “made whole” by virtue of their compromise settlement, and sought summary judgment on

that issue. The trial court was provided with copies of the Coons' expert opinions, mediation materials, and other documents demonstrating that the Coon family's damages exceed the settlement by millions of dollars. The trial court granted the plaintiff's motion, reasoning that a settlement of a contested claim for less than applicable policy limits, regardless of the rationale or facts regarding such a settlement, automatically meant that the claimants were made whole.

## **II. ASSIGNMENT OF ERROR**

The trial court erred in granting Plaintiff's summary judgment.

## **III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

- A. Did the trial court err as a matter of law when it concluded that a tort settlement for less than insurance policy limits means the party received "full compensation for the party's damages."
- B. Did the trial court err as a matter of law when it concluded that summary judgment was proper on the issue of whether Defendants were made whole despite evidence of genuine issues of material fact regarding that issue?
- C. Did the trial court err when it concluded that the Coons' settlement for less than available insurance policy limits "in consideration of their evidence of

damages versus risk of failure at trial” constitutes full compensation for their damages as a matter of law?

#### **IV. STATEMENT OF THE CASE**

Joel and Lori Coon live in Snohomish, Washington with their two daughters. CP 144. In 2012, Joel and Lori owned and operated a successful landscaping business. CP 147. Lori, who had been a practicing nurse, left medicine to help her husband manage their business and raise their daughters. CP 144. The Coons are hard working and extremely active. Their work and recreation revolved around vigorous outdoor activities, including hiking, camping, fishing and hunting. CP 249-252.

In late 2011, Joel injured his leg. When conservative treatment failed, his physician recommended arthroscopic surgery to repair his right ACL. Surgery was scheduled for the spring of 2012. CP 181.

##### **A. Arthroscopic Knee Injury Results in Amputation.**

On March 21, 2012, Joel Coon underwent arthroscopic right ACL reconstruction, using an autograft (which is a tendon harvested from Mr. Coon’s body), which was performed at a Clinic ambulatory surgery center. CP 181. After surgery, Mr. Coon

developed an extremely rare fungal infection that ultimately led to an above-knee amputation at the Mayo Clinic in Rochester, Minnesota on October 17, 2012. CP 185.

Before a claim was made, and before they were represented by counsel, the Clinic began assisting Mr. Coon by paying medical bills and providing financial assistance in an amount that eventually totaled \$328,936.86. CP 256. This was because the incident was being handled under an experimental program to compensate patients who were injured. CP 355. In addition, the Clinic undertook an investigation searching for possible causes of the infection. CP 172. On September 12, 2012, the Clinic sent a letter to the Coons stating that the source of the fungal infection could not be determined. CP 172.

**B. Group Health Contract Provides for Reimbursement Only After The Participant Is Made Whole.**

Mr. Coon's health insurer Group Health paid some of his medical bills related to the infection and amputation. CP 283. The insurance contract between Mr. Coon and Group Health states:

The benefits under this Agreement will be available to a Member for injury or illness caused by another party,

subject to the exclusion and limitations of this Agreement. If GHO provides benefits under this Agreement for the treatment of injury or illness, GHO will be subrogated to any rights that the Member may have to recovery compensation or damages related to the injury or illness and the Member shall reimburse GHO for all benefits provide, 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.

...  
**GHO'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. (emphasis added). CP 343.**

**C. The Factual Evidence Is That The Loss of Mr. Coon's leg Caused \$10 Million In Damages.**

Loss of a leg above the knee is a devastating injury, which requires significant future medical treatment. Bernice Kegel is a physical therapist with extensive experience treating amputees like Mr. Coon. The Coons' retained Ms. Kegel to create a life care plan for Mr. Coon. Her report describes future care needs totaling \$3,331,069. CP 144.

As the owner of a landscaping business, Mr. Coon's business suffered because he could not work while doctors attempted to treat his infection, amputated his leg, and recovered from the amputation.

In addition, the loss of his leg—and resulting disability—affected Mr. Coon’s ability to work as a landscaping supervisor. CP 147. His disability would also financially impact their landscaping business in the future. To analyze the impact Mr. Coon’s amputation has had, and will have, on his landscaping business, the Coons hired economist Lorraine Barrick. After reviewing and evaluating the Coons business, Ms. Barrick calculated that the Coons’ past economic damages totaled \$282,590.00. CP 208-240. In addition, she calculated that the Coons future economic losses is between \$4 million and \$7 million. CP 208-240.

According to the reports of Ms. Kegel and Ms. Barrick, the Coons’ economic damages total between \$7.5 million and \$11 million. CP 144. This number does not account for Mr. Coon’s non-economic damages, Lori Coon’s loss of consortium damages, or their daughters’ loss of consortium damages.

Given the lack of a “fixed standard” for computing general damages, the Coons retained two Western Washington attorneys with experience in handling medical negligence cases. Medical malpractice attorneys Todd Gardner (a plaintiffs attorney) and Kathy

Cochran (a defense attorney) both opined that if liability was established by a jury, Mr. Coon's general damages would alone exceed \$2 million. Both Mr. Gardner and Ms. Cochran have extensive experience litigating medical malpractice claims. CP 340. CP 363. According to these attorneys, full compensation for the Coons family for the injuries sustained by Mr. Coon totals between \$5 and \$15 million. CP 343-360.

**D. The Coons Pursued A Medical Malpractice Claim Against The Everett Clinic, But Did Not Find Evidence That The Standard Of Care Was Breached.**

After losing his leg to the infection, Mr. Coon retained an attorney to pursue a medical negligence claim against the Clinic. Medical malpractice lawsuits related to peri-operative infections are usually defended, because the cause of the infection is often not clear, and infections are a known risk of any surgical procedure. CP 354. The Coons' lawyers reviewed Mr. Coon's medical records and consulted with multiple experts, including Mr. Coon's orthopedic surgeon at the Mayo Clinic. CP 145. However, after an extensive review the Coons' attorneys were unable to find any direct evidence of negligence on behalf of the Clinic. CP 145. In addition, like the

Clinic, the Coons' attorneys were unable to even determine the source of Mr. Coon's infection. CP 145. Without evidence of how Mr. Coon even contracted the infection, it was not possible to develop a theory of liability on the part of the Clinic. CP 145, 356.

With no direct evidence of negligence, the only liability theory available to the Coons was the doctrine of *res ipsa loquitur*. While *res ipsa loquitur* spares the Coons the requirement of proving specific acts of negligence, it only applies in cases where a plaintiff can show that he or she suffered injury, the cause of which cannot be fully explained, **and the injury is of a type that would not ordinarily result if the defendant were not negligent.** However, the risk of infection is well known to occur in the absence of negligence. CP 352.

Prior to the filing of a lawsuit, the Coons and the Clinic agreed to mediate the claims. CP 144. Following mediation, the Coons agreed to accept \$2 million in settlement of their claims, not including payments already made by the Clinic on a voluntary basis. CP 254. The Coons agreed to this compromise settlement because they had little or no chance of succeeding had their claims been

litigated and the case prosecuted to trial. CP 353-354. Their attorney also concluded that he could not ethically file a lawsuit without any prima facie evidence of negligence on the part of the Clinic. CP 489.

**E. Liability Factors Forced The Coons To Accept A Compromise Settlement For Much Less Than Full Compensation.**

The Coon Family settled their case for a small fraction of their total damages. Mr. Coon lost his leg above the knee, is permanently disabled, and for the rest of his life will require the use of a cumbersome prosthetic device to ambulate. CP 107. The loss of his leg has dramatically altered his life and that of his wife and children. CP 249-252.

Mr. Coon's life-care plan and income loss is estimated to be in excess of \$7 million. CP 208-240. The gross settlement amount of \$2,328,936.86 is only a fraction of the Coons total economic damages, without any consideration for his general damages, his wife's damages, or his daughters' damages. The evidence was that the loss of consortium claims of Mr. Coon's wife and children were also substantial, since Mr. Coon's loss of a limb has significantly altered the family's activities and lifestyle. CP 249-252.

As set out in the papers submitted to the trial court, the Coons agreed to settle their medical malpractice case for less than full compensation because of the lack of a viable theory of liability and expert medical support for liability and/or causation. CP 343-369. As explained by defendants' experts, had the Coons proceeded with a lawsuit, the case would likely have been dismissed on summary judgment or resulted in a defense verdict. CP 343-369. The settlement offer made to the Coon family at mediation presented them with two options: 1) accept a settlement for far less than full compensation; or 2) accept nothing (other than the \$328,936.86 voluntarily paid to them by the Clinic). They did not have the option of trying to achieve a larger amount by pursuing litigation against the Clinic, since no direct or even circumstantial evidence had been found to support the claim.

**F. Group Health Filed A Lawsuit Seeking A Judicial Determination That The Coons Were Fully Compensated.**

Following settlement, the Coons' attorney advised Group Health that their claim had resolved, and advised it that the Coons were not made whole. Group Health was provided with the parties'

mediation materials, including Mr. Coon's life care plan and economic loss reports. CP 485. Relying solely upon the fact that the Coons settled their claim, and without regard to the reasons for the low settlement, Group Health demanded full repayment of the amount it had paid.

The Coons' experts, Mr. Gardner and Ms. Cochran, reviewed the same materials provided to Group Health and each concluded that the Coons have not been fully compensated. Their reports did not simply state conclusory opinions, but cited specific facts regarding the claim. Based on those facts, both experts opined that the Coon family's economic damages alone are far in excess of the settlement amount. Mr. Gardner stated:

In a clear liability case involving the injuries sustained by Joel Coon and the damages suffered personally and by his family, I think that 60% of the time this case is tried, the verdict would range from \$8 million to \$15 million. Based upon the information I reviewed, in addition to well over \$300,000 in medical expenses to date, the plaintiffs would have been able to present future medical, therapy and prosthetic expenses in excess of \$3,300,000, supported by a well-researched and detailed Life Care Plan, and loss of earning capacity of \$6.5 million –\$7 million supported by an accountant with education, training and experience in assessing the value of a business. In short, economic damages presented by the plaintiffs would be in excess

of \$10 million. CP 357.

Likewise, Ms. Cochran opines:

Mr. Coon's previous medical expenses exceeded \$300,000. In addition, the life-care plan prepared by the Coons' expert, Bernice Kegel, described nearly \$2 million in future care costs related to Mr. Coon's amputation. In my opinion, this life care plan was skeletal compared to plans I have seen in other cases. In addition, a report prepared by the Coons' economist, Lorraine Barrick, stated that Mr. Coon's past and future income loss would exceed \$7 million. The economic losses described by these two experts total approximately \$9 million. While I would expect the Everett Clinic to retain its own experts to evaluate Mr. Coon's future medical need and wage loss, it is unlikely that any expert would conclude that he suffered no economic harm. Even if the Everett Clinic's experts were to conclude that Mr. Coon's economic damages experts overstated his damages by 50%, Mr. Coon's economic losses alone are still roughly double the settlement amount. In addition to economic damages, the Coons would be entitled to general damages, which I would expect to be very significant based upon my own experience defending an amputation case. CP 366.

## V. ARGUMENT

### A. Summary Judgment Is Not Appropriate Where The Record Reflected Genuine Issues Of Material Fact As To Whether The Coons Were Made Whole In The Settlement.

The Coons appeal from the trial court's summary judgment.

Appellate review of a trial court's decision on summary judgment is

*de novo*; the appellate court engages in the same inquiry as the trial court. *Castro v. Stanwood Sch. Dist. No. 401*, 151 Wn.2d 221, 86 P.3d 1166 (2004). The court reviews material submitted for and against a motion for summary judgment in the light most favorable to the non-moving party. *Yakima Fruit & Coldstorage Co v. Central Heating & Plumbing Co.*, 81 Wn.2d 528, 503 P.2d 108 (1973). If there are genuine issues of material fact undecided or the moving party is not entitled to judgment as a matter of law, then the summary judgment must be denied. *Yakima Fruit*, 81 Wn.2d 528; CR 56(c). “The motion should be granted only if from the evidence, reasonable men could reach but one conclusion.” *Yakima Fruit*, 81 Wn.2d at 530.

**B. Group Health’s Subrogation/Repayment Right Does Not Arise Until The Coon Family Is Fully Compensated.**

It is well settled in Washington that “while 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.” Mahler v. Szucs*, 135 Wn.2d 398, 417, 957 P.2d 632 (1998), quoting *Thiringer v. American Motors Ins. Co.*, 91 Wn.2d 215, 219–20, 588 P.2d 191 (1978).

Washington’s public policy is written into the insurance contract between Group Health and the Coon family. The insurance policy states:

GHO’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.

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.”).

Thus, Group Health is not entitled to reimbursement until the Coon family is fully compensated for their losses. In this case, the only facts Group Health has offered to prove that the Coon family has been made whole is (1) they agreed to a compromise settlement regarding a medical malpractice lawsuit and (2) the applicable liability insurance coverage exceeds that amount. The only other evidence regarding the issue of whether the Coons were made whole

was submitted by the Coons themselves, and the facts and evidence therein overwhelmingly established that they were not made whole.

**C. Group Health Has The Burden Of Proving That The Coon Family Is Fully Compensated.**

In determining whether an insurer is entitled to reimbursement “[t]he key factor” is “the presence or absence of double recovery,” not subrogation principles, increased premiums, or exclusionary clauses in medical insurance policies. *Keenan v. Industrial Indem. Ins. Co. of Northwest*, 108 Wn.2d 314, 319, 738 P.2d 270 (1987); *Brown v. Snohomish County Physicians Corp.*, 120 Wn.2d 747, 755, 845 P.2d 334 (1993). Indeed, before a double recovery can be shown, the insurer claiming a right to reimbursement has the burden of proving that the settlement included any “expense, amount or payment for which such benefits were paid.” *Thiringer*, 91 Wn.2d at 220. Group Health cannot meet its burden in this case.

In *Brown v. Snohomish County Physicians Corp.*, the Washington Supreme Court answered the question of who has the burden of proving whether a settlement has been fully compensated explaining:

When the insured makes the prima facie case that there is coverage, the burden is on the insurer to prove that the loss is not covered because of an exclusionary provision in the policy. *Burrier v. Mutual Life Ins. Co. of N.Y.*, 63 Wash.2d 266, 270, 387 P.2d 58 (1963); *PEMCO v. Rash*, 48 Wash.App. 701, 703, 740 P.2d 370 (1987). We conclude this rule applies here, and ***the burden is on SCPC to establish that Brown and Hogsett were fully compensated and that the contract provisions should be applied to prevent double recovery for medical expenses.*** (emphasis added)

*Id.* at 758-9. Thus, as the insurer seeking repayment—Group Health in this case—has the burden to establish that the Coon family has been fully compensated.

**D. Settlement For Less Than Insurance Policy Limits Does Not Create A Presumption Of Full Compensation.**

In this case, the evidence to support the claim for repayment is the fact that the Coon family settled their claim. However, in Washington a settlement for less than policy limits does not raise a presumption that an insured has been made whole. *Liberty Mutual v. Tripp*, 144 Wn.2d 1, 25 P.3d 997 (2001).

In *Tripp* the Washington Supreme Court rejected an insurer's argument that settlement for less than policy limits raises a presumption that their insured was made whole:

***Liberty argues that settlement for less than the tortfeasor's limits of liability raises a presumption that the insureds have been made whole.*** Br. in Answer to Amicus Curiae WSTLA Foundation at 10. Liberty relies on *Peterson v. Safeco Insurance Co.*, 95 Wash.App. 254, 260, 976 P.2d 632 (1999), which, in turn, relied on a decision of the Court of Appeals in *Allstate Insurance Co. v. Batacan*, 89 Wash.App. 260, 266, 948 P.2d 1316 (1997), for the proposition that an insured who settles is impliedly fully compensated. However, this court overruled *Batacan*. *Allstate Ins. Co. v. Batacan*, 139 Wash.2d 443, 986 P.2d 823 (1999). Furthermore, ***there is no other precedent for the position that settlement for less than the tortfeasor's policy limits somehow raises a presumption of full compensation*** or otherwise prejudices the insured's PIP benefits. (emphasis added)

*Id.* at 22. In *Tripp*, the Washington Supreme Court specifically rejected the Court of Appeals reasoning in *Peterson v. Safeco Insurance Co.* that settlement raises a presumption of full compensation. *Tripp*, 144 Wn.2d at 22. This is important because the Court of Appeals case *Group Health* cites in support of its claim—*Truong v. Allstate*, 151 Wn.App. 195, 211 P.3d 430 (2009)—relies on *Peterson* for the proposition that a settlement for less than policy limits creates a presumption of full compensation.

**E. *Truong v. Allstate* Relies On Overruled Authority To Support A Presumption Rejected By The Washington Supreme Court.**

Group Health cited *Truong v. Allstate*, as supporting its claim for repayment. In *Truong*, the Court held: “*Peterson [v. Safeco]* shows that a settlement with a tortfeasor for less than limits is evidence that the PIP recipient received full compensation.” *Id.* at 203. This conflicts with the Washington Supreme Court’s holding in *Tripp*, which overruled *Peterson* finding no “... precedent for the position that settlement for less than the tortfeasor's policy limits somehow raises a presumption of full compensation.” *Tripp*, 144 Wn.2d at 22. The Court of Appeals cannot overrule existing Supreme Court precedent. Thus, *Truong* cannot be cited to support the position that settlement for less than insurance policy limits creates a presumption of full compensation. Furthermore, even if settlement for less than policy limits is evidence of full compensation, it does not create a non-rebuttable presumption of that conclusion. At most, such a settlement is only one of several factors that should be considered in deciding whether a claimant is made whole through a settlement. 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 addition to relying upon law that the Washington Supreme Court has rejected, *Peterson* and *Truong* are also factually distinct. In *Peterson v. Safeco*, plaintiff sought declaratory judgment that he was not fully compensated by his settlement with the tortfeasor. *Peterson*, 95 Wn.App. at 257-58. Plaintiff received compensation for both special and general damages, but argued that since he was required to pay his attorney fees and incurred costs from his settlement, he was not fully compensated. *Id.* at 260. The Court rejected this argument, finding the payment of plaintiff’s attorney fees and costs “is ‘irrelevant in this context.’” *Id.* at 261.

In *Truong*, Mr. Truong’s special damages totaled \$4,172.00, and he accepted a settlement in the amount of \$9,347.54. Mr. Truong’s PIP insurer, Allstate, presented evidence through its PIP insurance adjuster that Mr. Truong’s claim was consistently valued at \$9,347.54, which is the amount he accepted in settlement. Thus, Mr. Truong received full compensation for his special damages, and at least some compensation for his general damages.

The *Truong* opinion also did not require that factors reducing the amount of a settlement must be established by a fact-finder at arbitration or trial:

**Truong did not make any claim for UIM benefits under his policy with Allstate. Thus, arbitration was not available as a fact finding method to establish what his total damages were. But Sherry is not necessarily limited to its context of an arbitration concerning UIM benefits. Because the court broadly interpreted the meaning of the term "full compensation," the rationale for denying an offset to the PIP insurer can be equally applicable in a case where an insured obtains a settlement from a tortfeasor. The question then becomes whether the settlement is full compensation for the actual losses suffered in the automobile accident. (emphasis added).**

*Truong v. Allstate*, 151 Wn.App 195, 201(Div 1, 2009).

In contrast to both *Peterson* and *Truong*, the Coons' settlement did not provide full compensation for even their special damages. The evidence before the trial court was that the Coons' special damages are between \$4 million and \$7 million. The Coons' settlement with the Everett Clinic for \$2.3 million demonstrates that the Coons were not fully compensated for their special damages. In addition, the Coons have received no compensation for their general damages.

## VI. CONCLUSION

There were numerous genuine issues of material fact presented to the trial court with regard to the issue of whether the Coons were made whole in the settlement, and therefore summary judgment was not appropriate. The Coons respectfully request this Court to reverse the trial court's order granting Summary Judgment to Plaintiff and remand the case for further proceedings to determine whether the Coons were made whole through the settlement in question.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of March,  
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 *Appellant's Opening Brief* to the parties of record in the manner described below:

Court of Appeals, Division I  
The State of Washington  
600 University Street  
One Union Square  
Seattle, WA 98101-1194

- Legal Messenger (Original + 1 copy)
- Hand Delivered
- Facsimile
- UPS
- Email

Michael H. Church  
Hailey L. Landrus  
STAMPER RUBENS, PS  
720 West Boone, Suite 200  
Spokane, WA 99201-2560  
*Attorneys for Respondent*

- Legal Messenger
- Hand Delivered
- Facsimile
- UPS
- Email

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

EXECUTED this <sup>30</sup>30 day of March, 2017 at Seattle, Washington.



Patricia A. Freeman, Paralegal to Eugene M. Moen