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No. 96516-1

SUPREME COURT
OF THE STATE OF WASHINGTON

GROUP HEALTH COOPERATIVE,
a Washington nonprofit corporation,

Petitioner,

v.

NATHANIEL COON and LORI COON,
husband and wife,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONER

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I. SUPPLEMENTAL STATEMENT OF FACTS

Nathaniel Coon had arthroscopic surgery at the Everett Clinic on March 21, 2012, to repair tears to the ACL and meniscus of his right knee suffered while he was playing in the snow during a trip to Leavenworth. After the surgery Mr. Coon developed a fungal infection that seven months later led to the amputation of his leg. (CP 144, 151-53)

Mr. Coon and his family had health care coverage through Group Health Cooperative (hereafter "Group Health" or "GHO"), a health care services contractor. (CP 410) *See* RCW 48.44.010 (defining health care services contractor). Group Health paid $372,634 in medical expenses as a result of Mr. Coon's knee injury, beginning with $5,006.81 paid to the Everett Clinic for his minor knee surgery and culminating in $104,070.68 paid to the Mayo Clinic, which first treated Mr. Coon in an attempt to stave off the fungal infection, and then performed the October 17, 2012 surgery in which his leg was amputated. Group Health also paid $48,218.34 for the covered cost (50%) of Mr. Coon's top-of-the-line prosthetic leg. (CP 189, 262, 515)

The Coons' Group Health Medical Coverage Agreement had a subrogation and reimbursement provision, requiring the Coons to

"reimburse GHO for all benefits provided, from any amounts the Member received or is entitled to receive from any source on account of such injury or illness, whether by suit, settlement or otherwise." (CP 454) Group Health's payment of medical expenses was secondary to other sources of payment "from any source:"

> Subject to the above provisions, if the Injured Person is entitled to or does receive from any source as a result of the events causing the injury or illness, including but not limited to any liability insurance or uninsured/underinsured motorist funds, GHO's Medical Expenses are secondary, not primary.

(CP 454)

Group Health's Medical Coverage Agreement also required the Coons to "cooperate fully with GHO in its efforts to collect GHO's Medical Expenses," including "supplying GHO with information about the cause of injury or illness, any potentially liable third parties, defendants and/or insurers related to the Injured Person's claim and informing GHO of any settlement or other payments relating to the Injured Person's injury." (CP 454) The Coons were obligated by the Medical Coverage Agreement to protect Group Health's interests when settling with a third party, and to reimburse Group Health for 100% of medical expenses paid if they failed to cooperate fully in recovering medical expenses paid by Group Health:

> The Injured Person shall promptly notify GHO of any tentative settlement with a third party and shall not settle a claim without protecting GHO's interest. If the Injured Person fails to cooperate fully with GHO in recovery of GHO's Medical Expenses, the Injured Person shall be responsible for directly reimbursing GHO for 100% of GHO's Medical Expenses.

(CP 454)

The Medical Coverage Agreement further gave Group Health an equitable lien over and required the Coons to serve as constructive trustee and hold in trust any funds the Coons received "from any source that may serve to compensate for medical injuries or medical expenses" "until GHO's subrogation and reimbursement rights are fully determined:"

> To the extent that the Injured Person recovers funds from any source that may serve to compensate for medical injuries or medical expenses, the Injured Person agrees to hold such monies in trust or in a separate identifiable account until GHO's subrogation and reimbursement rights are fully determined and that GHO has an equitable lien over such monies to the full extent of GHO's Medical Expenses and/or the Injured Person agrees to serve as constructive trustee over the monies to the extent of GHO's Medical Expenses.

(CP 455)

Even before the Coons retained counsel, the Everett Clinic had paid a portion of Mr. Coon's medical expenses, and had paid Mr. Coons $10,000 a month while he was unable to work – a total of

$328,936.86. (CP 160, 256) Neither the Coons nor the Everett Clinic was able to identify either the source of the infection that resulted in the amputation of Mr. Coon's leg or any negligence on the part of the Everett Clinic that might have caused the infection. (CP 145, 158-60, 172) The Everett Clinic nevertheless proposed to the Coons a mediation to resolve any remaining claims as a result of Mr. Coon's injury. (CP 144) The Coons retained attorney Gene Moen, who prepared a mediation package for a mediation originally scheduled for February 12, 2014. (CP 142)

In preparation for the mediation, the Coons' law firm asked Group Health for a "breakdown of your subrogation lien for benefits paid relating to this claim." (CP 460) Pam Henley of Group Health provided this information on January 28, 2014, telling the Coons' attorney that "I will be your Group Health contact during mediation" (CP 473), and asking the Coons' attorney to "keep us informed regarding settlement negotiations and contact us prior to final settlement to confirm Group Health's subrogation amount". (CP 463)

The materials the Coons' attorney prepared for the mediation with the Everett Clinic included a claim for past medical expenses, and described in detail medical expenses that Group Health had

paid. (CP 146) However, after notifying Ms. Henley that the mediation was postponed to March 26, 2014, neither the Coons nor their attorney further communicated with Group Health or Ms. Henley before or during the mediation, or until over a month later, on April 28, 2014. (CP 253, 406)

At the mediation, the Everett Clinic and the Coons agreed to settle all the Coons' claims for $2 million, in addition to the $328,936.86 the Everett Clinic had previously paid to or on behalf of the Coons. (CP 256) On April 25, 2014, the Coons and their attorney signed a Settlement Agreement and Release with the Everett Clinic. (CP 257-58) In the Settlement Agreement, the "Coons hereby release and forever discharge" the Everett Clinic "from any and all liens and/or expenses incurred as a result of, and reasonably related to the above-referenced matter." (CP 255) The parties "understood and agreed that certain ["medical, hospital"] claims or liens may exist . . . as a result of the subject incident," and "[t]he Coons agree[d] to pay, resolve or otherwise fully satisfy all such claims or lien and to indemnify and hold harmless" the Everett Clinic. (CP 255) The Settlement Agreement also provided that the Coons' counsel would hold funds to pay any subrogation or reimbursement claims:

> This settlement is based upon a good faith determination of the parties in order to resolve a questionable claim. The Coons and their counsel also specifically agree that The Coons' counsel will hold sufficient additional funds in trust to satisfy any and all other liens, rights of reimbursement, or subrogation amounts due to any other liens, rights of reimbursement or subrogation obligations until all such obligations are satisfied and discharged.

(CP 255-56)

On appeal, the Coons have not challenged the trial court's determination that settlement of their claims against the Everett Clinic without notification to Group Health and without protecting Group Health's subrogation interest breached the Medical Coverage Agreement. (CP 506, 516)

The Coons finally notified Group Health of their settlement with the Everett Clinic three days after signing the Settlement Agreement. On April 28, 2014, the Coons' attorney for the first time asked Group Health to waive its reimbursement claim. (CP 253) Group Health did not waive its contractual rights. (CP 406, 482, 486) On May 19, 2014, the Coons' attorney wrote Group Health again, reporting that he "had been holding back the lien amount in his trust account" and stating "Please be advised that we will disburse the remaining settlement funds on May 30, 2014." (CP 280) Group Health confirmed its unwillingness to waive its reimbursement

claims by the May 30 deadline unilaterally imposed by the Coons, faxing a letter to the Coons' attorney at 3:39 p.m. stating that "[w]ith the information provided at this time, Group Health declines to waive our reimbursement rights," but "would pay you the equitable apportionment of the collection costs and legal fees/expenses." (CP 406, 480-82)

The Coons' attorney nevertheless disbursed all the settlement funds on May 30, 2014, without reimbursing Group Health. (CP 281, 518) On June 4, 2014, the Coons' attorney wrote Group Health that he had "disbursed the remaining funds to Mr. and Mrs. Coon" because "[w]e had not received a response from Group Health by 4 00 pm on May 30th." (CP 484)

On appeal, the Coons also have not challenged the trial court's determination that refusal to reimburse Group Health from the funds received from the Everett Clinic breached the Medical Coverage Agreement. (CP 506, 516)

Group Health brought this action seeking a declaratory judgment requiring the Coons to reimburse the $372,634 Group Health had paid in medical expenses, plus interest, under the terms of the Medical Coverage Agreement. (CP 501-05) Both parties moved for summary judgment. The trial court granted Group

Health's motion, holding it had a valid and enforceable reimbursement claim. (CP 512) The trial court denied the Coons' motion because they had breached the contract by settling with the Everett Clinic without notifying Group Health, by failing to protect Group Health's subrogation interests, and by then disbursing funds without reimbursing Group Health. (CP 514-16)

The Coons appealed the order granting Group Health's request for reimbursement, but not the order denying them summary judgment. (CP 1, 506) "[U]ndisputed facts establish that the Coons breached the notice requirements of the contract" and "that the Coons did not consult Group Health before settling their claim against the [Everett] Clinic." *Group Health Cooperative v. Coon,* 4 Wn. App. 2d 737, 748, ¶¶ 30, 28, 423 P.3d 906 (2018).

The Court of Appeals reversed, holding that Group Health could not enforce its contractual right to reimbursement without first showing prejudice from the Coons' breach of the policy, and on the grounds that Group Health had "not established that the Coons have a nonspeculative claim against a tortfeasor." 4 Wn. App. 2d at 748, ¶ 30, 751, ¶ 37. The Court of Appeals also held that in the "absence of a judicial decision absolving the Clinic of liability," Group Health

must also prove the Coons had been "made whole" before pursuing any reimbursement claim. 4 Wn. App. 2d at 753, ¶ 42.

This Court accepted review of the Court of Appeals' decision.

II. SUPPLEMENTAL STATEMENT OF ISSUES

A. May a health insurer seeking reimbursement pursuant to its coverage agreement from the proceeds of its policyholder's settlement with a third party that eliminated, without notice to the insurer, the insurer's contractual right of subrogation for medical expenses the health insurer paid, recover from its policyholder only if it establishes on a more probable than not basis that the third party is liable in tort for the policyholder's injury?

B. Is a health insurer seeking reimbursement from the proceeds of the insured's settlement with the third party allegedly liable for the insured's injuries prejudiced when the insured eliminates the insurer's contractual right of subrogation by failing to give the insurer notice of the settlement and then disbursing to the policyholder all proceeds of the settlement, in breach of the parties' agreement and of the policyholder's agreement with the third party, in order to defeat the insurer's right of reimbursement before it could be fully determined?

III. SUPPLEMENTAL ARGUMENT

This dispute has, to date, been addressed exclusively through the lens of the equitable subrogation rights of a casualty insurer, which usually arise (and have been addressed in the courts) in the context of the under- or uninsured motorist (UIM) or personal injury protection (PIP) provisions of insurance against the negligence of a third party. *See* RCW 48.11.070 (defining casualty insurance). That was the basis for the Court of Appeals' reasoning imposing both the "made whole" and "prejudice" limitations on Group Health's enforcement of its contractual subrogation and reimbursement rights against a policyholder to whom it had provided medical benefits under a health care services contract that not only indisputably made its coverage secondary to other sources of payment but that the policyholder indisputably breached.

This case, however, arises from a health care services contract that provides that the health insurer's payment of medical expenses is secondary to other sources of payment for the benefits, that gives the health insurer who has paid medical expenses as an initial matter a contractual right of reimbursement if another source of payment is available for the benefits, and that imposes fiduciary duties on the policyholder who has benefited from the health insurer's payment of

those medical expenses to protect the insurer's rights and to serve as constructive trustee of funds received from any other source until the health insurer's contractual subrogation and reimbursement rights are fully determined. This case arises from the policyholder's indisputable breach of that agreement despite contract terms that otherwise limited the health insurer's subrogation rights to the excess of the amount required to fully compensate the policyholder for the loss sustained, and that obligated the health insurer to pay its equitable apportionment of the costs of collecting from another source for payment of the medical benefits.

Given those distinctions, before enforcing its contractual right to reimbursement a health care insurer need not prove that the policyholder has been "made whole" by a third-party tortfeasor who must be found liable for the policyholder's injury. To the contrary, prejudice from the policyholder's admitted material breach of the health care services contract's terms should be considered proven as a matter of law.

To hold otherwise will encourage policyholders and their attorneys to settle third-party claims without notice to, and without protecting the subrogation interests of, health insurers who have paid medical expenses in expectation that those payments can be

recovered if the policyholder is compensated from a third party. Such a result would be contrary to this Court's recognition of the common law and statutory duties of good faith, fair dealing, honesty and equity that *both* insurers and insureds owe:

> The potential for conflict of interest abounds in such circumstances. Both insurer and insured, having entered into an insurance contract, are bound by the common law duty of good faith and fair dealing, as well as the statutory duty "to practice honesty and equity in all insurance matters." RCW 48.01.030. We have said the statute creates a fiduciary duty for insurers running to their insureds. *Industrial Indem. Co. of the Northwest, Inc. v. Kallevig,* 114 Wn.2d 907, 916–17, 792 P.2d 520 (1990). Yet the injured insured seeks recovery from the tortfeasor, the same source to which the insurer may look to recover its payments to its insured.

Mahler v. Szucs, 135 Wn.2d 398, 414–15, 957 P.2d 632 (1998), *overruled on other grounds by Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 272 P.3d 802 (2012).

Mahler addressed these "new conflicts," 135 Wn.2d at 415, presented by its recognition of an insurer's subrogation and reimbursement rights in an insured's recovery from a third party. This Court held in *Mahler* that the insurer could have a contractual "right to recover from the insured the amount of payments made from any recovery the insured secures from a third party tortfeasor," 135 Wn.2d at 415, but was obligated to pay its share of legal expenses

for the recovery, leaving to the insured the right to pursue the entire claim. This Court based its holding, in part, on the "elementary consideration against claim splitting" that militated against allowing separate claims by both the insurer and the insured. *Mahler,* 135 Wn.2d at 415, n.7.

Division One relied on this Court's decision in *Liberty Mutual Ins. Co. v. Tripp,* 144 Wn.2d 1, 25 P.3d 997 (2001), in holding that Group Health must prove prejudice from the Coons' breach of the Medical Coverage Agreement before seeking reimbursement. But *Tripp* does not hold that "[w]hen an insured breaches an insurance contract by failing to give the insurance company notice of a settlement," "the law provides the company a remedy only if it can show prejudice." *Coon,* 4 Wn. App. 2d at 748, ¶ 30. Nor should the Court impose such an impediment to Group Health's enforcement to its contractual reimbursement right in this case.

The casualty insurer in *Tripp* sought a declaratory judgment that its insureds had waived the right to UIM coverage by failing to notify the insurer that they settled with the third-party tortfeasor after a car accident. This Court held that "an insured's failure to give its insurer notice of a tentative settlement with a tortfeasor will not reduce a UIM carrier's obligation to pay UIM benefits to its insured

unless the insurer can show that it was prejudiced, and then only to the extent it was prejudiced, by the insured's actions." *Tripp,* 144 Wn.2d at 17.

This Court grounded its holding in *Tripp* on the public policy underlying UIM coverage: allowing an insured's "violation of the notice settlement clause to automatically preclude UIM coverage" would afford the UIM insurer a windfall and "would be inconsistent with the requirement that insureds be provided with that 'second layer of floating protection.'" *Tripp,* 144 Wn.2d at 17. That holding was based on the reasoning "that UIM and PIP insurance are both creatures of public policy: coverages that every insurer writing automobile policies within the state must, by law, offer their insureds." *Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 620, ¶ 15, 622, 160 P.3d 31 (2007).

"UIM is unique among insurance"; "[i]ts purpose and focus are very narrow." *Sherry,* 160 Wn.2d at 622, ¶ 19. This Court should not expand *Tripp* beyond the "narrow" focus of UIM or PIP coverage and casualty insurance. None of this Court's reasons for imposing the *Tripp* prejudice requirement exist here. First, Group Health's contractual reimbursement claim arises from the Coons' recovery of funds from another source that made Group Health's coverage

secondary, and from the Coons' admittedly material breach of the parties' contract for health care benefits that Group Health provided, not UIM or PIP coverage.

Second, unlike in every UIM or PIP coverage case, the Coons' "defense" depends upon there being no liable third-party tortfeasor – an argument, in essence, that any money the Coons (and their attorney) can extract from a third party in settlement must be theirs to spend, without regard to their contractual obligations to Group Health to protect its subrogation interests and to reimburse medical benefits paid pursuant to a health care services contract that gave Group Health a claim to reimbursement from that recovery. UIM coverage exists because of a "strong public policy favoring full compensation of innocent automobile accident victims who must rely on their own UIM coverage." *Brown v. Snohomish County Physicians Corp.*, 120 Wn.2d 747, 758, 845 P.2d 334 (1993); *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 87, 794 P.2d 1259 (1990) ("In protecting the innocent victim of an auto accident, UIM insurance provides a source of indemnification when the tortfeasor does not provide adequate protection"). "The common denominator of all these cases is third party liability." *Cook v. USAA Cas. Ins. Co.*, 121 Wn. App. 844, 849, 90 P.3d 1154 (2004).

There is no similarly strong public policy of protecting a health care services contract policyholder who is not "legally entitled" to recover damages in the absence of a "negligent tortfeasor." Group Health is a health care services contractor that was obligated to (and did) pay for Mr. Coons' health care no matter how those medical expenses arose. The type of "prejudice" required by the Court of Appeals would be impossible to prove whenever a policyholder settles with a potentially liable tortfeasor. And refusing to recognize that a health insurer has necessarily been prejudiced by its policyholder's settlement and disbursement of settlement funds before the insurer's subrogation and reimbursement interests have been determined would instead encourage sharp dealing and bad faith on the part of health insurance policyholders and their counsel, contrary to the reasoning of *Mahler* even in the context of casualty insurance.

This is not a coverage case; Group Health fully complied with its obligations to the Coons under the Medical Coverage Agreement. The Coons and their counsel, on the other hand, breached not only the Medical Coverage Agreement with Group Health, but the Settlement Agreement and Release with the Everett Clinic by disbursing all the settlement funds before Group Health's

subrogation and lien rights could be determined. This Court should not prevent Group Health from enforcing its contractual reimbursement rights where, as here, a policyholder with knowledge of its health insurer's claim for reimbursement of medical expenses without notice to the insurer settles a claim against a third party, promising to fulfill its contractual obligation to reimburse its medical benefits provider, and then disburses all the settlement funds despite knowing that the health insurer expects the policyholder to comply with his contractual obligation to reimburse it.

IV. CONCLUSION

This Court should reverse the Court of Appeals and reinstate the trial court's order granting summary judgment to Group Health on its contractual reimbursement claim.

Dated this 5th day of April, 2019.

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DECLARATION OF SERVICE

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

That on April 5, 2019, I arranged for service of the foregoing Supplemental Brief of Petitioner, to the court and to the parties to this action as follows:

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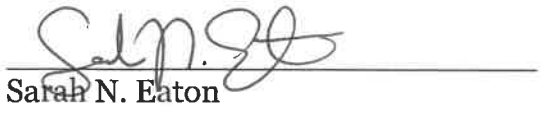
DATED at Seattle, Washington this 5th day of April, 2019.



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