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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.

RESPONDENTS' ANSWER TO BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION

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Respondents Nathaniel and Lori Coon submit the following answer to the Brief of Amicus Curiae Washington State Association for Justice Foundation (WSAJF). WSAJF shows that the positions taken by Petitioner Group Health (GHO) are extreme and inconsistent with Washington law.

1. WSAJF shows that an insurer relying on a procedural notice violation must show prejudice.

Washington has required insurers to show prejudice to be excused from their obligations based on procedural violations “in nearly all [] contexts.” WSAJF Br. at 16 (quoting *Staples v. Allstate Ins. Co.*, 176 Wn.2d 404, 418, 295 P.3d 201 (2013)). The prejudice requirement is a “flexible” one, allowing consideration of a “variety of factors.” WSAJF Br. at 19 (quoting *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 429, 191 P.3d 866 (2008)).

GHO never pointed to any factors supporting prejudice. GHO never showed it would have pursued the Clinic on its own. GHO never showed it lost the ability to collect in the event it one day shows that the Coons were fully compensated. And GHO never showed a dissipation of the settlement funds. Rather, the Coons wisely accepted the best settlement that could be obtained. The Coons and GHO had a legitimate dispute about whether the settlement fully compensated the Coons. They would have had the same dispute even had GHO attended the mediation.

Despite this, the trial court awarded GHO a 100% refund of all the coverage it paid, together with pre-judgment interest exceeding \$100,000. Under the trial court's judgment, GHO is *better off* than if Coon had never been injured.

Lacking any prejudice, GHO argues that in case of any "breach of the health care services contract's terms," prejudice "should be considered proven as a matter of law." Pet'r's Supp. Br. at 11. Criticizing the Court of Appeals' prejudice analysis, GHO argues that this Court should not "impose such an impediment" on its reimbursement rights. *Id.* at 13. In other words, GHO argues it is entitled to a windfall recovery in case of any breach, even when it is *not* harmed. WSAJF shows that GHO's position is extreme and inconsistent with this Court's decisions.

2. WSAJF shows that GHO may not contract around the made-whole rule.

Allowing an insurer to share in a recovery made by a policyholder is "an equitable remedy subject to equitable principles." WSAJF Br. at 7 (citing *Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 417, 693 P.2d 697 (1985)). In the courts below, GHO's position was that the Coons had been made whole. CP 486, 512. For the first time in this Court, GHO argues that it "need not prove that the policyholder has been 'made whole'" to claim reimbursement. Pet'r's Br. at 11. It argues that its

contract made its coverage “secondary” to *any* recovery the Coons made. Pet’r’s Br. at 14–15. In effect, GHO argues that it can unilaterally eliminate the made-whole rule by contract, even though its own contract specifically requires it to prove that Coons were make whole.

GHO’s position that it “need not prove” that the Coons were made whole is the very proposition this Court said in *Thiringer v. Am. Motors Ins. Co.* would be “obviously unfair” if included in an insurance policy. 91 Wn.2d 215, 220, 588 P.2d 191 (1978). And in *Liberty Mut. Ins. Co. v. Tripp*, 144 Wn.2d 1, 21, 25 P.3d 997 (2001), the Court enforced the made-whole rule “notwithstanding the contractual language,” which had sought to allow broader reimbursement. WSAJ shows that GHO’s argument on this point, too, is inconsistent with this Court’s decisions.

3. WSAJF shows that public policy treats GHO’s contract the same as other insurance contracts.

WSAJF shows that Washington has applied the made-whole rule in a broad array of insurance transactions, from personal to commercial lines. WSAJF Br. at 9–10. Hoping to avoid this Court’s decades-long adherence to the made-whole rule as a general rule of insurance, GHO argues that there is “no similarly strong public policy of protecting a health care services contract policyholder” as was found in this Court’s decisions cited above. Pet’r’s Br. at 16. This argument is simply incorrect.

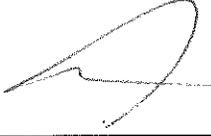
GHO fails to support its argument with any authority. To the contrary, the very existence of health care service contracts in Washington flows from the “paramount concern” to protect access to health care. RCW 48.44.309. In *Brown v. Snohomish County Physicians Corp.*, the Court applied “general rules respecting insurance policies” to a health care service contract, and relied on the “strong public policy of *Thiringer*” in holding that a health care service contractor was subject to this public policy requiring that the insured be “fully compensated.” 120 Wn.2d 747, 753, 758–59, 845 P.2d 334 (1993). These public concerns would be directly threatened if health insurers such as GHO could unilaterally eliminate the made-whole rule, impose draconian notice requirements, and deplete the resources of injured victims to cover their own healthcare costs. GHO even emphasizes that it covered only “50%” of the actual cost of Mr. Coon’s prosthesis. Pet’r’s Supp. Br. at 1.

WSAJF correctly observes that GHO has cited nothing to support excusing health insurance from the made-whole rule, and that its position is inconsistent with the analysis of every Washington decision to date. *See* WSAJF Br. at 10.

RESPECTFULLY SUBMITTED this 17th day of May, 2019.

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CERTIFICATE OF SERVICE

I, Shannon McKeon, declare under penalty of perjury under the laws of the State of Washington that at all times hereinafter mentioned, I am a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date below, I caused a copy of the foregoing document to be served on the individuals identified below via email

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Dated this 17th day of May, 2019.



Shannon McKeon
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