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SUMMARY OF WISCONSIN MADE WHOLE DOCTRINE DECISIONS

Garrity v. Rural Mutual Insurance Company, 253 N.W.2d 512 (Wis. 1977).

Summary: *An insurer is allowed no subrogation recovery if the total amount recovered by its insured from the wrongdoer does not cover the insured's total loss.*

Facts: Insured under fire policy suffered fire loss in the amount of $110,000. Rural Mutual paid policy limits of $67,227.12 and brought action against insurer of truck which caused the fire to their dairy barn. Rural Mutual was also a third-party carrier, with $25,000 in coverage, and it filed a third-party action against itself denying that negligent operation of the truck caused the fire and filed a third-party complaint asking for determination of its subrogation rights. The Garrity's executed a subrogation receipt which gave Rural Mutual subrogation rights.

Issue: What are the rights of the insured and its insurer to a third-party recovery when the insured's loss exceeds the amount recoverable under a standard fire insurance policy?

Holding: Under common law subrogation an insured must be made whole before the insurer may recover anything from the tortfeasor. Where a right of subrogation is formalized by execution of an expressed assignment, the assignment adds nothing to the rights vested in the insurer by the doctrine of subrogation.

Rimes v. State Farm Mutual Automobile Insurance Company, 316 N.W.2d 348 (Wis. 1982).

Summary: *Provides for mini-trial to be held by the court to determine if an insured has been made whole for all of his damages, not just damages for the subrogated amount.*

Facts: The plaintiffs were in auto accident and State Farm made med pay payment of $9,649. The plaintiff sued three defendants, Switzer ($300,000 in insurance with Travelers), Stiles ($50,000 in insurance with American Family), and Langdon ($50,000 in insurance with American Family). State Farm was Rimes' own liability insurance company and was joined as a defendant because of possible subrogation rights as a result of payments under the medical pay provisions of two separate auto policies, one issued to Rimes and one to his wife. Rimes signed subrogation receipts covering $9,649.00, which said no settlement will be made or any release given by the insured without the consent of the insurer. State Farm attempted to enter into stipulations with the defendants to protect its subrogation rights, but was unsuccessful, so it filed an answer alleging its subrogation rights and participated in the case.

The day before trial, Langdon and its insurer were dismissed, but all parties stipulated that State Farm had a subrogation interest in the medical bills and "shall recover the amounts paid under the medical pay provisions of his insurance policies." On the second day of trial, Rimes settled all remaining claims for $125,000 and $9,649.90 was paid to the court. A two-day mini-trial was held to determine whether Rimes was made whole. The court found $300,433.54 in damages and denied any subrogation rights to State Farm.

Issue: Was State Farm entitled to subrogation?

Holding: No, an insurer is not allowed subrogation recovery if the total amount recovered by its insured from the wrongdoer does not cover the insured's total loss. Even though the insured has recovered a sum more than sufficient to equal the subrogated amount claimed by the insurer, the insurer is not entitled to subrogation unless the insured has been made whole for his entire loss. The insurer could not even recover under the subrogation agreement signed

by its insurer. A *Rimes* hearing is a trial in which the court determines various items of damages which a jury would have found to be sufficient to make the insured made whole and have the case go to trial.

Vogt v. Schroeder, 383 N.W.2d 876 (Wis. 1986).

Summary: *Rimes is not absolute. An UIM carrier has a right of subrogation against an underinsured third party and his insurer to the extent that the underinsurer has paid benefits to its own insured prior to release of the third-party tortfeasor and his insurer.*

Facts: The injured passenger brought suit against the tortfeasor and also recovered $50,000 in UM benefits from his own carrier, Wisconsin Employers Casualty Company. The liability carrier, Progressive Casualty Insurance Company, asked for a determination of its rights in light of the subrogation interest of the UM carrier.

Issue: Can an UIM carrier have a right of subrogation against an UIM tortfeasor when the UIM carrier makes a partial payment of its insured's damages?

Holding: A UIM carrier has a right of subrogation against a third-party tortfeasor. The equities to be balanced in *Garrity* and *Rimes* were between an insurer's right to recoup benefits paid and an insured's right to obtain full compensation. Here, the equities were between an UIM carrier who paid benefits and an UIM tortfeasor. The court recognized a new equitable principle apart from the Made Whole Doctrine, "the wrongdoer should be responsible for his conduct and not be allowed to go scot-free by failing to respond in damages, while another, an indemnitor or the injured party, was required to do so." The *Rimes* made whole principle is not absolute. This case set the stage for *Blue Cross v. Firemen's Fund* and *Mutual Service v. American Family*, which were both later overruled by *Schulte*.

Valley Forge Ins. Co. v. Home Mutual Ins. Co., 133 Wis.2d 364, 396 N.W.2d 348 (Ct. App.1986).

Summary*: An insured must be "made whole" for both property and personal injury damages before his insurer can subrogate for property damages.*

Facts: The insured and two passengers were injured in auto accident. Insurer, Valley Forge, paid for the vehicle loss. Valley Forge notified Home Mutual, the third-party carrier, that it paid collision losses and had subrogation rights. Home Mutual had $25,000 limits. Home Mutual paid $25,000 to two injured passengers and $25,000 to the insured exhausting its coverage, and paid the insured $6,000 under its property damage liability provisions.

Issue: Can the property carrier subrogate even though the insured is not made whole for his personal injury damages?

Holding: No, the test of wholeness depends on whether the insured has been completely compensated for all types of damages whether they are personal injury or property damage.

Mutual Serv. Cas. Co. v. Am. Family Ins. Group, 410 N.W.2d 582 (Wis. 1987), overruled by *Schulte*, below.

Summary*: The Wisconsin Supreme Court rejected the argument that a subrogated carrier could only recover its subrogated amount if the insured had been made whole. It said that neither Garrity nor Rimes "is applicable in an action brought by a subrogated carrier against the third-party tortfeasor or the tortfeasor's insurer where the insured had previously settled with the third-party tortfeasor. [Decided same day as Blue Cross & Blue Shield United of Wisconsin v. Fireman's Fund Insurance Company of Wisconsin, below].*

Facts: A car driven by Villareal (Mutual) rear-ended a car driven by Charles Bolser (American Family). Mutual paid $2,000 in medical benefits to Villareal and notified American Family of its subrogation interest. A medical expense receipt, release and subrogation agreement was signed by Villareal in which he promised to do nothing to prejudice Mutual's subrogation rights. Villareal filed suit against American Family for injuries and settled. American Family issued two checks, one in the amount of $7,900 payable to Villareal and the other in the amount of $2,000 payable to Villareal, on which Mutual was named as a payee. Villareal refused to endorse the check to Mutual. Mutual filed suit

against American Family to recover the $2,000. Mutual later amended to include Villareal and his attorney. American Family was dismissed from the lawsuit because of the release, and because of including Mutual's name on the $2,000 check. American Family argued whether Mutual could recover from it depended on whether or not the insured had been made whole. No *Rimes* hearing was requested by the settling parties.

Issue: Should American Family be liable to Mutual for Mutual's subrogation interests?

Holding: No, neither *Garrity* nor *Rimes*, applies "in an action brought by a subrogated insurer against the tortfeasor or the tortfeasor's insurer where the subrogated insurer's insured had previously settled with the tortfeasor."

Blue Cross & Blue Shield United of Wisconsin v. Fireman's Fund Insurance Company of Wisconsin, 411 N.W.2d 133 (Wis. 1987), overruled by *Schulte*, below.

Summary: *The Supreme Court held that a subrogated carrier, bringing its own subrogation action against a tortfeasor, did not need to allege or prove that the insured was made whole when the insured settled its own action independently against the third-party tortfeasor for less than policy limits. It is not in competition with the insured for a limited pool of funds. [Decided same day as Mutual Serv. Cas. Co. v. Am. Family Ins. Group, above].*

Facts: Blue Cross' insured was involved in an auto accident and received medical benefits in the amount of $10,202.50. Blue Cross notified the third-party tortfeasor, Fireman's Fund, of its subrogation rights, and later learned that its insureds had settled their personal injury claims for $60,000, $40,000 less than Fireman's policy limits. As part of the settlement, the insured agreed to indemnify Fireman's Fund for any claim made by Blue Cross against Fireman's Fund. Blue Cross sued Fireman's Fund and the third party to recover the $10,202.50. The trial court dismissed the complaint because Blue Cross failed to allege that the insureds had been "made whole."

Issue: Is a subrogated insurer required to allege that an insured who settled with a tortfeasor has been made whole?

Holding: No, *Vogt* recognized the principle that the insured must be made whole before the subrogated insurer may recover is not absolute but depends on the equities and the facts involved. An insured who settles his part of the claim against a tortfeasor before a subrogated carrier commences suit against a tortfeasor does not have to be made whole before an insurer can state a claim against a tortfeasor and the tortfeasor's carrier. The equitable factor present in *Garrity* and *Rimes* - the prospect of an insurer competing with its own insured for funds which are insufficient to make the insured whole - was not present. The subrogating carrier was also seeking funds directly from the third party and not its insured. Where an insured has not settled with the tortfeasor before the carrier brings suit, any recovery the insurer makes could reduce the amount available to compensate the injured insured. Where an insured and insurer are competing with each other for limited settlement funds, *Garrity* and *Rimes* apply to prohibit the insurer from recovering until the insured has been made whole.

Oakley v. Fireman's Fund of Wisconsin, 470 N.W.2d 882 (Wis. 1991).

Summary: *An insured's attorney's fees are not part of his damages and are not included in determining whether an insured is "made whole."*

Facts: The insured recovered from his insurer under UM provisions for injuries sustained in accident with an uninsured driver. The Court of Appeals held that the health insurer was entitled to subrogation from the third party and that the insured was entitled to a pro-rata contribution toward his attorneys' fees from his insurer. The insured had been made whole except for his attorneys' fees.

Issue: Is an insured made whole even though he has to pay his attorneys' fees and is left with less than his total damages?

Holding: Yes, attorneys' fees are not included in determining whether a party is "made whole." Attorneys' fees are not elements of damages.

Schulte v. Frazin, M.D., 500 N.W.2d 305 (Wis. 1993).

Summary: *An injured plaintiff may settle directly with a tortfeasor without resolving the subrogated carrier's interests, if the settling parties ask the circuit court to determine whether the injured party has been made whole, and the subrogated carrier has an opportunity to participate in the hearing. This is known as the "Schulte settlement procedure." The injured party should have the "right to settle on its own terms" and that "refusal to recognize indemnification agreements could hamper plaintiffs' settlement attempts." When the insured and tortfeasor have settled and included an indemnification clause in their settlement agreement, they create a limited pool of funds over which the insured and subrogated carrier must compete, and the Made Whole Doctrine is triggered. When the subrogated carrier's interests are not resolved, the settling parties ask the court to determine if the insured has been made whole. This is true even when the settlement is for much less than the subrogated amount.*

Facts: The patient brought a medical malpractice action naming her health insurer as a party defendant based on subrogation rights. After settlement between patient and defendant for $2,460,000, the plaintiffs moved to extinguish Compcare's subrogation lien on the grounds that they had not been made whole. The settlement agreement provided that the plaintiffs would indemnify the defendants for any liability arising out of the incident and a hearing would take place in order to resolve whether Compcare had a right of subrogation. A *Rimes* hearing was held and Compcare did not participate in the hearing, except for examining one of the plaintiff's witnesses regarding the indemnification agreement. Compcare insisted that it could proceed on its cross-claim against the defendant. The court found damages ranging $2,950,000 to $4,790,000 and held that the plaintiffs were not made whole and extinguished Compcare's subrogation lien.

Issue: What are the respective rights of the insured and subrogated insurer when the insured settled with the defendants without involving the subrogated insurer who has requested a *Rimes* hearing, the insurer has had the opportunity to participate in the hearing, and the court has determined that the settlement did not make the plaintiff whole?

Holding: The plaintiff is not made whole. *Blue Cross* and *Mutual* are overruled. A subrogated health insurer cannot recover subrogated amounts when an insured settles with the medical malpractice defendants without involving the subrogated insurer where the insurer and insured request a *Rimes* hearing, the subrogated carrier has an opportunity to participate, and the court determines that the settlement did not make the plaintiff whole. Subrogated insurer's rights of subrogation depend on whether the settlement made the insurer whole. The insured or insurer must to some extent be unpaid, and if insured is not made whole, Wisconsin Health Insurers should go unpaid. Wisconsin Health Insurers, in an amicus brief, asserted that if the Supreme Court held this way, attorneys in future cases will act unethically and collusion will take place between the plaintiffs and defendants in order to eliminate a subrogated insurer's interests. The Supreme Court totally rejected such a view of the legal profession in this state.

The Supreme Court's cases may conflict to some extent over whether subrogation recoveries decrease premiums. Compare *Rimes* with *Cunningham v. Metropolitan Life Ins. Co.*, 360 N.W.2d 33 (Wis. 1985). Compcare overstates its case by arguing that this decision will automatically result in higher premiums for all Wisconsin insureds. An injured plaintiff may settle directly with a tortfeasor without resolving the subrogated carrier's interests, if the settling parties ask the circuit court to determine whether the injured party has been made whole and the subrogated carrier has an opportunity to participate in the hearing. This is known as the "*Schulte* settlement procedure". The key is that in order for this to take place, there must be a situation in which the insured or insurer must to some extent go unpaid.

Sorge v. National Car Rental System, Inc., 512 N.W.2d 505 (Wis. 1994).

Summary: *Contributory negligence reduces the hurdle a subrogated carrier must clear in order to subrogate. As long as the insured recovers its damages, less any reduction for contributory negligence, it is made whole.*

Facts: Subrogated insurers sought reimbursement from the injured party settlement agreement with the tortfeasor that compensated her for all damages, less the amount attributable to her contributory negligence.

Issue: Is the injured plaintiff made whole when she receives compensation in a settlement agreement covering all of her losses, less the amount corresponding to her contributory negligence?

Holding: Yes, such a settlement agreement does make an injured party whole and thus allows her subrogating carriers to seek reimbursement from her. If the insured sustains $100,000 and is contributorally negligent, the insured is made whole with the recovery of $75,000.

Ives v. Coopertools, 559 N.W.2d 571 (Wis. 1997).

Summary: *(3 to 3 decision). In cases involving contributory negligence, Sorge is no longer the law - but doesn't say what is. Three justices essentially say an insured can never be made whole when there is contributory negligence, and three said there should be a pro rata reduction, allowing partial subrogation recovery.*

Facts: Ives was injured when he fell out of a deer stand. His health plan (non-ERISA) paid $132,292 in medical expenses and Ives sued the manufacturer of the deer stand, paying $261,250 to settle the $1.5 million claim. Ives requested a *Rimes* hearing. Total damages were $1.5 million and plaintiffs received only 17.42% of their total damages. The trial court held that the health plan was not entitled to reimbursement of its subrogated interest and it appealed. The Court of Appeals remanded for determination for Ives' percentage of contributory negligence.

Issue: Should Rhinelander receive 17.42% of its lien or should there be a full-blown evidentiary determination of contributory negligence?

Holding: Overruled *Sorge*, but failed to establish any precedent as to what the law actually is. Three justices concluded that a person can never be made whole if the person is contributorally negligent. Justices Abrahamson, Bablith and Geske concluded that in order to be entitled to subrogation, the insured must receive all of its damages.

Justices Steinmetz, Wilcox and Cooks agreed that *Sorge* should be overruled, but the subrogated insurer should recover at a rate equal to the plaintiff's recovery in relation to his or her gross damages, and attorneys' fees and costs should be handled on a pro rata basis as well.

The subrogation doctrine advances an important policy rationale underlying the tort system. It forces a wrongdoer who has caused a loss to bear the burden of reimbursing the insurer for indemnity payments made to its insured as a result of the wrongdoer's acts and omissions. Although an insured is entitled to indemnity from its insurer pursuant to coverage provided under an insurance policy, the insured is entitled only to be made whole, not more than whole. Subrogation prevents an insured from obtaining one recovery from the insurer under its contractual obligations and a second recovery from the tortfeasor under general tort principles.

Paulson v. Allstate Insurance Company, 665 N.W.2d 744 (Wis. 2003).

Summary: *Where the plaintiff's insurer pays 100% of the repair costs and then subsequently settles its subrogation claim with the tortfeasor's insurer for a reduced amount based on plaintiff's alleged contributory negligence, the plaintiff cannot collect the difference under the Collateral Source Rule. (The holding in this case is referred to as "the subrogation rule."). The "subrogation rule" trumps the "Collateral Source Rule."*

Facts: The plaintiff was injured and her car was damaged in a car accident. The plaintiff's insurer, Midwest Security Insurance Company, after paying the car repair bill, settled its subrogation claim with Allstate, the defendant's insurer. Midwest and Allstate reached a settlement agreement regarding the repair bill under which Allstate paid 70% of the bill based upon consideration of plaintiff's contributory negligence. The plaintiffs argued that they were entitled to the difference, the 30% Allstate did not have to pay to Midwest. The circuit court refused to award the Paulsons the 30% difference. The Court of Appeals reversed and remanded that issue to the circuit court with instructions to enter judgment for that amount in favor of the Paulsons. The Supreme Court accepted Allstate's petition for review.

Issue: If the plaintiff's insurer pays 100% of the repair costs, then subsequently settles its subrogation claim with the tortfeasor's insurer for a reduced amount based on the plaintiff's alleged contributory negligence, can a plaintiff collect the difference under the Collateral Source Rule?

Holding: No, the Paulsons had no claim for property damages aside from the $500 deductible because of Midwest's subrogation interest. This case involves the interaction of the Collateral Source Rule, subrogation, and the Made Whole Doctrine. Allowing the plaintiff to recover this sum would amount to double recovery. Paulson had already collected from Midwest the amount of property damages to which she was entitled and was not entitled to any additional compensation. The "subrogation rule" trumps the "Collateral Source Rule."

Made Whole Doctrine: Even though the plaintiff argued she was not made whole before Midwest Security settled its property subrogation claim and there was no *Rimes* hearing, no determination of damages, or finding that Paulson was or wasn't made whole, the Made Whole Doctrine is inapplicable to this case. The Made Whole Doctrine does not prevent the carrier's subrogation of property damages before the insured is made whole because there is no competition between an insured and insurer for a limited pool of money. Paulson argued that she had damages beyond those paid by her insurer and that Midwest Security and the tortfeasor's insurer settled before there was any finding of the extent of damages and she had made no assertion that there was an insufficient pool of money, no discussion of policy limits, and no limited pool of funds.

Collateral Source Rule**:** An insured is not entitled to recover from the tortfeasor the difference between the amount his insurer paid for car repairs and the reduced negotiated amount his insurer recovered from the tortfeasor in subrogation for those property damages. In this case, Midwest Security has divested itself of its subrogation interest by settling with the tortfeasor's liability carrier. Subrogation trumps the Collateral Source Rule. Under *Lambert v. Wrensch*, 399 N.W.2d 369 (Wis. 1987), if subrogation exists, the Collateral Source Rule is inapplicable.

Petta v. ABC Insurance Co., 692 N.W.2d 639 (Wis. 2005) (argued by MWL)

Summary: *The Made Whole Doctrine applies in a wrongful death case. The Made Whole Doctrine is essentially one of "priority," determining who gets paid first among competing claims. Wrongful death plaintiffs, although not technically "insureds," must be made whole before the insurer of decedent can recover in subrogation or reimbursement. This case was argued by MWL.*

Facts: Dayle Petta was killed in an auto accident while unmarried. She had two adult children. No estate opened. Two children filed wrongful death case. Dayle Petta was insured by Travco, which paid property damage to its "insured" for the value of the car and for final medical and funeral benefits under its med pay provisions. These payments were not made to the children who were not insureds under the policy. The children settled for the $250,000 policy limits and additional $30,000 paid by the defendant personally. The children followed the settlement procedure set forth in *Schulte v. Frazin,* specifically agreeing to indemnify the defendants from any subrogation claims of Travco.

Travco stipulated that the $280,000 settlement did not make the children whole for their damages in the wrongful death case. Travco (argued by Gary Wickert) sought reimbursement of its subrogation lien, claiming that the *Rimes* Made Whole Doctrine did not apply in a wrongful death case. Travco's position was that *Rimes* and *Schulte* did not apply because the two adult children were not "insureds." Travco claimed it was entitled to recover its subrogation interests from the defendant, but because of the *Schulte* indemnity agreement, the Pettas had to pay it. Travco also refused to seek a *Rimes* hearing, so the Pettas filed a motion for a *Rimes* hearing, seeking a declaration that because they had not been made whole, Travco was not entitled to any subrogation/reimbursement. The Petta's motion was granted by the trial court and Travco appealed.

The Court of Appeals reversed the trial court, stating that the *Rimes* doctrine did not apply in wrongful death cases, because it applies only to benefit an "insured." The Supreme Court granted the Petta's petition for review.

Issue: Did the Made Whole Doctrine prevent the decedent's insurer, State Farm, from subrogating, when the wrongful death beneficiaries (not technically the insureds) were not made whole?

Holding: Yes, State Farm was not entitled to subrogation because the children of the deceased were not "made whole." Even though they were not technically "insureds" of State Farm, the *Rimes* doctrine (Made Whole Doctrine) is essentially one of "priority" to determine who gets paid first among competing claims. The Pettas' claims take priority over Travco's subrogation claims. Because the Pettas were statutorily entitled to manage the estate's claim for property damage arising from the wrecked car, and make claims for the deceased mother's medical and funeral expenses as part of their wrongful death action, and because these claims are indivisible and inseparable from the Pettas' claims for their own losses of pecuniary injury and loss of society and companionship, the subrogation claim must fail until the Pettas are made whole.

An insurer is not allowed subrogation recovery if the total amount recovered by its insured and the wrongdoer does not cover the insured's total loss. Even though the insured has recovered a sum more than sufficient to equal the subrogated amount claimed by the insurer, the insurer is not entitled to subrogation unless the insured has been made whole for his entire loss. The insurer could not even recover under the subrogation agreement signed its insurer. A *Rimes* hearing is a trial in which the court determines various items of damages which a jury would have found to be sufficient to make the insured made whole and have the case go to trial.

Muller v. Society Insurance Company, 750 N.W.2d 1 (Wis. 2008).

Summary: *The Made Whole Doctrine does not apply in situations where the insured settles with the tortfeasor for an amount, which when combined with the carrier's subrogation interests, does not exceed the limits of available third-party liability limits. The policy behind subrogation rests on equitable principles, including (1) ensuring that the insured is made whole, (2) preventing unjust enrichment, and (3) ensuring that the tortfeasor is held responsible for his conduct. Subrogation is allowed when the rights of those seeking it outweigh those of its opponents.*

Facts: A fire caused $697,981.58 in damage to Bruce and Karen Muller's sporting goods store in Milltown, Wisconsin. The fire was caused by the negligence of an electrician, George Jerrick, whose liability carrier, United Fire & Casualty, had $1 million policy limits. The Mullers' property insurer, Society Insurance Company, paid out its policy limits of $407,378.88, leaving the Mullers with an uninsured loss of $290,602.30. The Mullers sued George Jerrick and United Fire & Casualty to recover their uninsured loss and Society entered the lawsuit and assisted, claiming subrogation rights. At mediation, Society reached a tentative settlement with George Jerrick and United Fire & Casualty for $190,000, conditioned upon the Mullers settling with George Jerrick or resolving the case at trial. The Mullers later settled their claim for $120,000 - $170,602.70 less than their uninsured loss. The insureds clearly were not made whole.

The Mullers asked the court to void Society's settlement to the extent that the Mullers had not been made whole under the *Rimes* doctrine in Wisconsin – a 1982 case which provides for a hearing to determine whether an insured has been whole before a subrogation claim is allowed. The Mullers wanted to recover their $170,602.70 shortfall out of the $190,000 Society subrogation settlement. The trial court held that because the Mullers and Society were in competition for the "limited" pool of $310,000 (combination of both settlements), Society was required to disgorge part of their subrogation recovery in order to make the Mullers whole. Society appealed. The Court of Appeals reversed the trial court, holding that the $1 million liability policy was "far more than adequate to cover all the claims." It stated that the Mullers "made a conscious choice to accept less than their losses … [that] … cannot plausibly be tied to any limited funds." The Mullers then appealed to the Wisconsin Supreme Court.

Issue: Was Society Insurance Company entitled to subrogation?

Holding: Yes, the Wisconsin Supreme Court affirmed the Court of Appeals' decision and held for the first time that the Made Whole Doctrine does not apply in situations where the insured settles with the tortfeasor for an amount, which when combined with the carrier's subrogation interests, does not exceed the limits of available third-party liability limits.

Society was allowed to keep its entire subrogation recovery from the third party. The court wrote a long majority opinion, which walked through the long history of the Made Whole Doctrine in Wisconsin. The court did not abandon the equitable basis of subrogation or backtrack from its position that the Made Whole Doctrine cannot be contracted

away via policy language. But it gave us perhaps something even better – an argument that in every case where the third-party policy limits exceed the insured's uninsured loss and carrier's subrogation interests combined, made whole is inapplicable. The significance of the case extends far beyond Wisconsin, the state in which the Made Whole Doctrine really got its start. Known as the "mother of all made whole states," Wisconsin has provided the template for many states who similarly adopted the equitable Made Whole Doctrine over the years. The 1977 *Garrity v. Rural Mutual Insurance Company* and 1982 *Rimes v. State Farm Mutual Automobile Insurance Company* decisions really put the "Made Whole Doctrine" on the map and have been the most frequently cited cases in subrogation jurisprudence ever since. But *Rimes* and *Garrity* involved situations where the insured and subrogated insurers were battling over a finite and limited pool of funds.

The *Muller* decision is significant, but it still leaves unanswered made whole questions. Opponents of subrogation may argue that the case only applies to situations where the insured has settled independently of the subrogated insurer. They might argue that the Made Whole Doctrine should still apply to a settlement made by the insured, a portion of which is claimed by a subrogated insurer in satisfaction of its rights of reimbursement or subrogation. However, the *Muller* decision seems to clearly state that, under any circumstances, the Made Whole Doctrine will not apply if the following conditions exist:

(1) The subrogated insurer has fully satisfied its obligations to its insured under an insurance contract;
(2) The insured has had an opportunity to settle its claim with the tortfeasor and tortfeasor's liability insurer;
(3) The *pool of settlement funds available to the insured* exceeds the total claims of both the insured and subrogated insurer;
(4) The insured settles its claim with the tortfeasor, even though the settlement, together with the subrogated insurer's policy claim payment, does not satisfy the insured's total claim; and
(5) The insured/plaintiff does not agree to indemnify the tortfeasor with regard to the subrogated insurer's interest in the settlement or recovery.

The key is the existence of competition for a limited pool of funds. We know this decision doesn't stand for the proposition that an insured is made whole by merely settling a case. That was made clear in *Rimes.* However, the *Muller* decision seems to be indicating that, in some circumstances, where the tortfeasor's liability limits exceed the combined claims of the insured and subrogated insurer and the insured settles for a lesser amount anyway, the Made Whole Doctrine won't apply.

The Supreme Court made particular note of the fact that Society had preserved its right to proceed against the tortfeasor and their carrier by not stipulating to the insured's settlement and agreeing to seek its subrogation recovery out of those funds, as was done in *Rimes.* The Court also noted that personal injury claims can be stickier because the estimation of total damages is much more imprecise than in property damage cases such as *Muller.* The Court stated that the Made Whole Doctrine is not a "simplistic or absolute rule." Subrogation depends on the application of equitable principles to the facts of each case – principles concerned with preserving the rights of both the insured and subrogated insurer. Sometimes, the Made Whole Doctrine simply doesn't apply.

Significant is the fact that the *Muller* Court specifically pointed out that as part of the settlement agreement, the Mullers did not indemnify the tortfeasor or its insurer against the subrogated claim, as sometimes occurs in settlements. The Supreme Court stated that such an indemnification agreement "limits available funds," because a liability carrier will always attempt to limit its exposure and will be more willing to settle with the insured if it can eliminate the subrogated carrier's rights of recovery and/or reimbursement in the process. Therefore, if the insured is not made whole by a settlement that includes an indemnification agreement, the insured has claimed the available pool of settlement funds, and the insurer may be barred from subrogating as a result of the Made Whole Doctrine.

Fischer v. Steffen, 797 N.W.2d 501 (Wis. 2011).

Summary: *The Paulson ruling (Subrogation trumps the Collateral Source Rule) applies where the subrogated carrier attempts but fails to recover its subrogation interest in arbitration and the plaintiff/insured pursues the third party in litigation.*

Facts: The plaintiff's (Fischer) insurer paid $10,000 (the policy limit) of his $12,157.14 in medical expenses resulting from an auto collision. It then arbitrated its subrogation claim against the alleged tortfeasor (Steffen) and her insurer, Wilson Mutual Insurance Company. The plaintiff's insurer lost the arbitration because the arbitration panel found that Steffen was not negligent. Fischer sued Steffen and had better luck with a jury than his insurer did with arbitration. The jury found Steffen to be negligent and awarded damages. The trial court, however, reduced his $12,157.14 jury award for medical expenses by $10,000, citing *Paulson* for the proposition that the subrogation rule trumps the Collateral Source Doctrine in this case. Fischer claimed that his insurer waived subrogation rights by opting to go to arbitration and he should, therefore, get the whole amount awarded by the jury under the Collateral Source Doctrine, especially considering that his insurer lost at arbitration.

Issue: Does the "subrogation rule" set forth in *Paulson* apply where the insurer attempts, but fails, to recover its subrogation interest in arbitration as opposed to litigation?

Holding: Yes, the "subrogation rule" (subrogation trumps Collateral Source Rule) set forth in *Paulson* controls even where the insurer attempts, but fails, to recover its subrogation interest in arbitration and the plaintiff pursues the third party in litigation. Like *Paulson*, this case involved the interplay between the Collateral Source Rule and the Made Whole Doctrine. The *Paulson* ruling governs this case.

Employers Mutual Cas. Co. v. Kujawa, 2015 WI App 26, 361 Wis. 2d 213, 861 N.W.2d 808.

Summary: *Muller applies only in cases where the insured/plaintiff does not agree to indemnify the tortfeasor with regard to the subrogated insurer's interest in the settlement or recovery or there is a limited pool of funds being competed for by the insured and the insurer.*

Facts: The plaintiff was in an employer's vehicle insured by Employers Mutual and was rear-ended by the defendant, insured by Travelers/St. Paul, which carried $2 million in liability limits. He incurred $3,917 in medical expenses and $2,132.72 in lost wages, and received $767 in Med Pay benefits from the Employers Mutual policy. The plaintiff settled for $10,000 because he didn't want to take the time and expense to pursue the case further. Employers Mutual insisted on receiving its full $767 and rejected a $500 settlement offer. A *Rimes* hearing was held and the court determined that the plaintiff was not made whole.

Issue: Does the Made Whole Doctrine apply when the third-party liability is undisputed and the tortfeasor's policy limits are sufficient to cover both the insured's damages and the subrogation interest?

Holding: Yes, the Made Whole Doctrine applies and the *Muller* decision is only applicable in property damage subrogation cases, and only where the insured/plaintiff does not agree to indemnify the tortfeasor with regard to the subrogated insurer's interest in the settlement or recovery. *Muller* doesn't apply in this case because Kujawa's settlement required an indemnification agreement, which indirectly created a limited pool of settlement funds. As a result, Kujawa and Employers Mutual were competing for a limited pool of money. Only where there is no indemnification agreement and no limited pool of funds does *Muller* apply. To refute Employers Mutual's observation that such reasoning will allow the insureds to settle for less than what makes them whole in order to intentionally extinguish subrogation rights, the court said that there was no evidence of that in this case. The court said that the insured should not be forced to go to trial so that the insurer, who accepts premiums to accept the risk of loss, can recover all the amounts it paid under the policy. The court also noted that Employers Mutual's policy stated that it would be entitled to a recovery only after the insured has been fully compensated.

Gabe's Construction Co., Inc. v. Holly Pipe Corp., 2015 WL 1014624 (E.D. Wis. 2015).

Summary: *An injured plaintiff may settle directly with a tortfeasor without resolving the subrogated carrier's interests, if the settling parties ask the circuit court to determine whether the injured party has been made whole and the subrogated carrier has an opportunity to participate in the hearing. This is known as the "Schulte settlement procedure." The injured party should have the right to settle on its own terms and that refusal to recognize*

indemnification agreements could hamper the plaintiffs' settlement attempts. When the insured and tortfeasor have settled and included an indemnification clause in their settlement agreement, they create a limited pool of funds over which the insured and subrogated carrier must compete, and the Made Whole Doctrine is triggered. When the subrogated carrier's interests are not resolved, the settling parties ask the court to determine if the insured has been made whole. This is true even when the settlement is for much less than the subrogated amount.

Facts: The plaintiff, Gabe's Construction Company, Inc. ("Gabe's"), rented pipe from defendants NST Corporation and Holly Pipe Corporation for use in a construction project in Florida. The pipe broke during installation causing significant damage. Gabe's submitted a claim to its insurer, National Fire Insurance Company of Hartford ("National Fire"), which paid Gabe's $692,928. Gabe's then brought a diversity action against the defendants and their insurers and named National Fire as an involuntary plaintiff. National Fire brought a subrogation claim against Gabe's and defendants demanding reimbursement for the money it paid Gabe's. While the litigation was pending, Gabe's settled with defendants for $250,000. National Fire was advised of the negotiations leading to the settlement but chose not to be a party to it. As part of the settlement, Gabe's agreed to indemnify defendants for sums the defendants might be found to owe National Fire on its subrogation claim. Gabe's and the defendants filed separate motions to dismiss National Fire's subrogation claim. The defendants argued that they should be dismissed because the indemnification agreement made Gabe's liable if National Fire prevails on its subrogation claim, and Gabe's argued that it should be dismissed because it has not been made whole for the loss it sustained.

Issue: Should National Fire's subrogation claim against the defendants be dismissed due to the settlement agreement?

Holding: Yes, the settlement agreement contained an agreement that the insured would indemnify the defendants for any subrogation claims. As a result, National Union must look to its insured for reimbursement, and any such reimbursement depends on whether the insured has been made whole. The policy behind subrogation rests on equitable principles, including (1) ensuring that the plaintiff is fully compensated for loss; (2) preventing unjust enrichment; and (3) ensuring that the wrongdoer is held responsible for his conduct.

Generally, when a subrogated insurer and its own insured are competing for a limited pool of settlement funds that cannot cover both parties' claims, the Made Whole Doctrine applies and the insurer may not recover unless its insured has been made whole. Conversely, when the available pool of settlement funds is sufficient to cover the claims of both the subrogated insurer and its insured, the Made Whole Doctrine does not apply and a subrogated insurer is entitled to recover regardless of whether its insured was made whole. This is because when adequate funds are available to cover both claims and the insured still settles for less than a made-whole amount, it should not be allowed to argue that it was not made whole.

However, when the settlement agreement requires the insured to indemnify the defendant for any subrogation interests, this automatically creates a limited pool of settlement funds over which the insured and insurer must compete, triggering the Made Whole Doctrine. Gabe's and the defendants followed the "Schulte settlement procedure." The "Schulte settlement procedure" is where the insured settles directly with a tortfeasor without resolving the subrogated carrier's interests, the settling parties ask the circuit court to determine whether the injured party has been made whole, and the subrogated carrier has an opportunity to participate in the hearing.

National Fire argued that according to *Muller*, where the policy limits are sufficient to cover all claims (as here), the insured cannot settle for less than policy limits and then invoke the Made Whole Doctrine. However, *Muller* did not involve an indemnification agreement and so it doesn't apply.

National Fire also argued that the Made Whole Doctrine did not apply because, when Gabe's settled, it breached its obligations under the policy to protect National Fire's subrogation rights. However, the court held that the record in this case indicated that Gabe's made efforts to secure National Fire's subrogation right, including naming it as a party in the litigation, cooperating in discovery, expert witness retention, and mediation efforts, and its decision to settle was based on "good faith and reasonable reasons for compromising the claim." In addition, a party has the right to settle on its own terms, and the Made Whole Doctrine cannot be circumvented by contract. The court held that whether Gabe's was made whole was a fact question to be determined in later proceedings.

Dufour v. Progressive Classic Ins. Co., 881 N.W.2d 678 (Wis. 2016).

Summary: *Subrogation balances equities and is very fact-specific, heavily influenced by the facts in a particular case. When the insured gets everything he bargained for under his policy, and if the subrogated carrier had not pursued subrogation the insured would not have had access to additional funds from the third party, the Made Whole Doctrine doesn't apply.*

Facts: Dairyland Insurance Company insured Dennis Dufour, who was injured in a motorcycle accident. The defendant's insurer paid its bodily injury liability limits of $100,000 to Dufour and Dairyland also paid $100,000 UIM limits to Dufour. It was agreed that Dufour's bodily injury damages were in excess of $200,000. Dairyland also paid Dufour $15,589.86 for 100% of the property damage to his motorcycle. Dairyland pursued and recovered subrogation from the defendant's insurer for the property damages. Defour demanded that Dairyland pay him the funds it obtained, arguing that he was not made whole. Dairyland refused and Defour sued Dairyland for breach of contract and bad faith.

Issue: Can Dairyland retain the property damage subrogation recovery it obtained from the tortfeasor when its insured's bodily injury damages exceed the bodily injury liability limits and its insured is not made whole?

Holding: Yes. The Supreme Court held that the Made Whole Doctrine did not apply, under these circumstances, to prevent Dairyland from keeping its property damage subrogation recovery because the equities favor Dairyland: (1) Dairyland fully paid Dufour all he bargained for (bodily injury limit) under his policy, which included the policy's limits for bodily injury and 100% of Dufour's property damage; (2) Dufour had priority in settling with the tortfeasor's insurer. By allowing Dufour to recover all proceeds under both policies, the court observed that Dairyland and Dufour were not in competition for a limited pool of funds, which is a necessary element for the Made Whole Doctrine to apply; and (3) the policy Dairyland issued to Dufour provided separate coverages for bodily injury and for property damage, and the court "decline[d] to rewrite Dairyland's policy to provide for lump sum coverage where such coverage was not contemplated by the parties." Dufour contended that he was entitled to the $15,598 paid by American Standard in response to Dairyland's subrogation claim. However, if Dairyland had not proceeded on its subrogation claim, Dufour would have had no access to these additional funds from the tortfeasor's insurer; so the subrogation claim was not depriving Dufour of any additional funds. The Dairyland policy provided separate coverages for bodily injury and for property damage, and the court "decline[d] to rewrite Dairyland's policy to provide for lump sum coverage where such coverage was not contemplated by the parties."

Contractual subrogation and equitable subrogation both exist under Wisconsin law. *Jindra v. Diederich Flooring*, 511 N.W.2d 855 (Wis. 1994). With either type of subrogation, equities affect the asserted right to subrogation. *Garrity v. Rural Mut. Ins. Co*., 253 N.W.2d 512 (Wis. 1977). Equitable principles apply even to a contractual right of subrogation:

> *Subrogation is a purely derivative right that permits an insurer who has been contractually obligated to satisfy a loss created by a third party to step into the shoes of its insured and to pursue recovery from the responsible wrongdoer.... The doctrine of subrogation enables an insurer that has paid an insured's loss pursuant to a policy of property insurance to recoup that payment from the party responsible for the loss*. *Muller v. Society Insurance Company,* 750 N.W.2d 1 (Wis. 2008).

Subrogation balances equities between parties by preventing a double recovery while at the same time requiring the tortfeasor to pay for the damages it caused. Subrogation is not only equitable, but it is very fact-specific, heavily influenced by the facts in a particular case. *Vogt v. Schroeder*, 383 N.W.2d 876 (Wis. 1986) (stating that "subrogation is an equitable doctrine and depends upon a just resolution of a dispute under a particular set of facts.").

There are three non-exhaustive, equitable principles which may affect subrogation:

1. Ensuring that the insured is fully compensated;
2. Preventing unjust enrichment; and
3. Ensuring that the tortfeasor is held responsible for his conduct and not allowed to go scot-free by failing to respond to damages while another, the plaintiff's insurer, is required to do so.

The Made Whole Doctrine ensures that subrogation does not arise until the insured is fully compensated. However, the Made Whole Doctrine is only one consideration in determining whether an insurer is entitled to subrogation. *Vogt v. Schroeder*, 383 N.W.2d 876 (Wis. 1986). It is not applicable in all situations, and the test of "wholeness" stated in *Rimes* is not the sole criterion for whether an insurer can subrogate. An insurer is not precluded from subrogating simply because the insured has not been fully compensated for the loss. The specific facts and equities dictate whether the Made Whole Doctrine will apply.

In *Garrity* and *Rimes*, the insurer attempted to recovery its subrogation interest from monies that otherwise would have gone to its insured. Good summary of Made Whole Doctrine law in Wisconsin.

Farnsworth v. American Family Mutual Ins. Co., 2020 WL 13356349 (Wis. App. 2020) (unreported).

Summary: *In a Rimes hearing the court need not necessarily determine a specific dollar amount for damages sustained by the insured. Its only determination is whether or not the insured was "made whole." Made whole findings of fact are reviewed under the "clearly erroneous" standard, and a made whole determination is only "clearly erroneous" where "it is against the great weight and clear preponderance of the evidence."*

Facts: Farnsworth brought suit against Hill and Hill's automobile insurer, American Family, for damages arising out of a November 2014 automobile accident. Farnsworth named as a defendant her automobile insurer, WEA, because of its subrogated interest arising by virtue of medical payments it made under its policy. Farnsworth, Hill, and American Family settled Farnsworth's personal injury action for $155,000. WEA then moved for an order requiring Farnsworth to reimburse it $10,000 for medical payments or, in the alternative, to adjudicate the matter at a *Rimes* hearing. At Rimes hearing court heard evidence of medical reports, lost wages, and testimony of insured about neck pain and reasons for settling. In particular, she settled because of concerns about a July 2014 medical record indicating neck pain from previous accident—which she indicated was a mistake. The court ruled that Farnsworth was not made whole and that WEA could not recover its med pay subrogation payments.

Issue: (1) Must the trial court determine and itemize a specific dollar amount of damages sustained by the insured? (2) Should the court consider attorneys' fees and litigation expenses as an element of Farnsworth's damages? (3) Was Farnsworth made whole as a matter of law because the settlement was for less than the third-party liability limits or because the recovery was almost twice the insured's special damages? (4) Did the evidence support the court's finding that Farnsworth was not "made whole"?

Holding: (1) No. Courts may itemize the insured's damages if they want, but that is only incidental to the ultimate issue of whether the insured was "made whole." (2) No. Fees/costs are not an element of damages, and an insured is "made whole" even if fees/costs decrease the amount recovered from the tortfeasor. (See *Oakley*, above). Because the trial court did not discuss attorneys' fees, there is no support in the record for WEA's position that the trial court factored fees/costs into its determination that $155,000 did not make Farnsworth whole. (3) No. Wisconsin courts have rejected this reasoning in the context of personal injury cases, which often involve damages disputes, and where, as determined by the trial court here, settlement results in a limited pool of funds between plaintiff and insurer. See *Kujawa* and *Muller* above. (4) Yes. Made whole findings of fact are reviewed under the "clearly erroneous" standard, giving "due regard ... to the opportunity of the trial court to judge the credibility of the witnesses." Wis. Stat. § 805.17(2). A finding of fact is "clearly erroneous" where "it is against the great weight and clear preponderance of the evidence." The undisputed testimony at the *Rimes* hearing provided ample evidence that Farnsworth's injuries were significant and permanent, that her quality of life was worsened, and that she settled her case for less than she believed it was worth to avoid the "rogue medical record" issue.
