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NO. 64626-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON
AT SEATTLE

DALJEET SOMAL,

individually, and on behalf of all those similarly situated,

Appellee/Plaintiff,

v.

ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,

Appellant/Defendant.

REVIEW FROM THE SUPERIOR COURT FOR KING COUNTY
King County Superior Court No. 09-2-23688-7 SEA
THE HONORABLE SUZANNE M. BARNETT

REPLY IN SUPPORT OF BRIEF OF APPELLANT/DEFENDANT
ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY

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I. INTRODUCTION

Last year, on similar facts, this Court held that an auto insurer has no duty to reimburse an insured's collision deductible following the insurer's recovery against a third party tortfeasor. *Averill v. Farmers Ins. Co. of Wash.*, 155 Wn. App. 106, 229 P.2d 830 (2010), *rev. denied* 169 Wn.2d 1017 ("*Averill*"). Plaintiff—represented by the same counsel that lost in *Averill*—rehashes the same unpersuasive arguments already considered and rejected by this Court. *Averill* is binding precedent. The Court should summarily reject Plaintiff's invitation to overturn its own recent decision—a request tantamount to a tardy motion for reconsideration.

Sensing the futility of his common law argument, Somal clings to inapplicable policy language to distinguish this case and support his position. The language he relies upon plainly speaks to Allstate's own subrogation rights where the insured seeks recovery: "When we pay, your rights of recovery from anyone else become ours up to the amount we have paid. However, we may recover only the excess amount you have received after being fully compensated for the loss." CP at 5 (emphasis added). That provision does not require Allstate to refund the insured his or her entire deductible, particularly where, as here, the insurer sought recovery and the insured has already been "fully compensated for the loss." Somal's demand for refund of his deductible refunded has no support in law or in contract.

II. AUTHORITY AND ARGUMENT

A. AVERILL IS DISPOSITIVE

1. **The Common Law Issue Is Identical**

The issue presented in this appeal is whether Washington's made whole doctrine requires an insurer to refund an insured's deductible following an insurer's subrogation recovery against a third party tortfeasor. This Court, in no uncertain terms, held that Washington law imposes no such duty:

The made whole doctrine is a limitation on the recovery of the insurer when it seeks reimbursement from its insured for a loss it has previously paid to the insured. Averill did not recover funds from the tortfeasor, and Farmers made no claim for reimbursement from Averill for the loss it paid to her. Instead, Farmers pursued its own subrogation interest against the tortfeasor. The made whole doctrine has no application to this recovery.

Averill, 155 Wn. App. at 114 (internal citations omitted). The Court's decision was consistent with a number of other jurisdictions which have analyzed the issue. *See, e.g., Monte de Oca v. State Farm Fire & Cas. Co./Snell v. Allstate Indem. Co., et al.*, 897 So.2d 471 (Fla. Dist. Ct. App. 2004); *Harnick v. State Farm Mut. Auto Ins. Co.*, 2009 WL 579378 (E.D. Penn. 2009); *Sorge v. Nat'l Car Rental Sys., Inc.*, 470 N.W.2d 5 (Wis. Ct. App. 1991); *Birch v. Fire Insurance Exchange*, 122 P.3d 696 (Utah Ct. App. 2005).

There is no dispute here that Allstate, and not Somal, sought recovery from the tortfeasor. The made whole doctrine thus "has no application" to Somal's request for relief. *Averill*, 155 Wn. App. at 114.

Somal, represented by the same counsel that represented the insured in *Averill*, now seeks a different result. In so doing, Somal repeats the same arguments that were considered and rejected last year, essentially taking a second bite at the apple. The Court should summarily decline Somal's invitation to reconsider its well-reasoned decision in *Averill*.

2. Somal Continues to Ignore the Nature and Purpose of a Deductible

The *Averill* Court's decision rested largely on the nature and purpose of a collision deductible, which is to share and allocate risk between the insurer and the insured.

A deductible indicates the amount of risk retained by the insured. The insurance policy shifts the remaining risk of any damages above the deductible to the insurance company. Averill contracted to be out of pocket for the first \$500. Farmers' subrogation interest was for the amount of the loss it paid to Averill, not including the deductible amount. When Farmers pursued its subrogation interest, that interest did not include Averill's deductible. Allowing Averill to recover her deductible from Farmers' subrogation recovery would have changed the insurance contract to one without a deductible. We are not at liberty to rewrite the policy in this matter.

Averill, 155 Wn. App. at 114 (emphasis added).

In applying the made whole rule, courts have thus distinguished between (i) insurance benefits, and (ii) deductibles. With insurance benefits, the insurer has agreed to assume responsibility for those amounts. With deductibles, the insured has agreed to assume responsibility for his or her deductible before insurance benefits ever come into play. As a leading commentator explains:

[T]he made whole doctrine does not apply to deductibles. If the insured were to be reimbursed for its deductible before the insurer is made whole, the insured would be receiving an unbargained for, unpaid for, windfall. Under the terms of the insurance policy, it was agreed that, as a condition precedent to the insurer being out-of-pocket for even one dollar, the insured had to first be out-of-pocket the amount of the deductible. The made whole doctrine deals with situations in which the combination of the amount of the deductible and the amount of the insurance payment is a sum that was sufficient to make the insured whole, and a recovery is made from a third party (typically the insurer for the tortfeasor that injured the insured).

2 Allan D. Windt, Insurance Claims and Deductibles § 10.6 at 10-38, 39 (5th ed.) (emphasis added).

Washington courts before *Averill* have made that same distinction. For example, in *Meas v. State Farm Fire & Cas. Co.*, 130 Wn. App. 527, 123 P.3d 519 (2005), *rev. denied*, 157 Wn.2d 1018, 142 P.3d 607 (2006), this Court held that an insured with a collision coverage policy was “made whole” for his property loss when he received payment of his collision insurance benefits, distinguishing between payment of benefits and reimbursement of his deductible. *Id.* at 538; *see also Stamp v. Dep’t of Labor & Indus.*, 122 Wn.2d 536, 543, 859 P.2d 597 (1993) (noting that in “common types of direct insurance such as automobile collision coverage . . . there is usually a stated deductible amount, the effect of which is, in its simplest terms, to make the insured ‘self-insured’ up to the amount of the deductible.”).

If, as Somal suggests, Allstate is required to reimburse its insureds their entire deductible following the insurer’s recovery against the

tortfeasor, then in that circumstance the insured has retained no risk. Nor would the insured have lived up to its promise to be out of pocket for the first \$500. Indeed, Somal's interpretation of the law would create a perverse incentive for insurers to not seek recovery in smaller damages cases, as the entire deductible amount would be obligated to the insured notwithstanding the insured's agreement to share the risk.

Somal cites *Bordeaux v. American Safety Ins. Co.*, 145 Wn. App. 687, 186 P.3d 1188 (2008), rev. denied, 165 Wn.2d 1035 (2009), for the proposition that the made whole doctrine applies to insurance deductibles. Somal's reliance on *Bordeaux* is misplaced. First, *Bordeaux* does not involve collision deductibles, it involves self-insured retentions. Second, and more importantly, in *Bordeaux*, the insurer sought reimbursement from self-insured developers who collected recovery from third parties. The facts here and in *Averill* are inapposite: the insurers, and not the insureds, sought the recovery. Nowhere in the *Bordeaux* opinion does the court contradict *Averill's* holding that the made whole doctrine does not apply in the opposite circumstance when the insurer has itself pursued recovery of its subrogation interests from third parties.

Finally, Somal argues that where there is no recovery, the insured has retained the risk because he or she is still out of pocket the amount of the collision deductible. This misses the point entirely. In both *Averill* and in the present case, there was a recovery by the insurer. In such a circumstance, Somal's argument would re-allocate risk away from the

insured and onto the carrier (notwithstanding the insured's agreement to assume the risk up to the deductible) because the insured would be refunded the deductible every time there was a recovery—a result clearly at odds with the nature and purpose of the deductible as articulated by *Averill*.

B. THE ALLSTATE CONTRACT DOES NOT SUPPORT THE TRIAL COURT'S ERRONEOUS RULINGS

Nothing in the Allstate contract requires Allstate to reimburse its insured's deductibles following Allstate's recovery against the third party tortfeasor. In fact, the policy language that Somal relies on does not even discuss the circumstances of a recovery by Allstate. Instead, it addresses the scope of Allstate's subrogation rights following the insured's recovery against anyone else. It reads: "When we pay, your rights of recovery from anyone else become ours up to the amount we have paid. However, we may recover only the excess amount you have received after being fully compensated for the loss." CP at 5.

Somal argues that the Allstate policy is ambiguous, and does not relate to amounts the insured has received from others. As its sole example, Somal argues that phrase "the excess amount you have received after being fully compensated for the loss" could refer to collision coverage or other payments provided by the insurer. The relevant clause is two sentences long. Somal's interpretation ignores plain language in both sentences.

The first sentence states that the clause refers to recovery the insurer seeks from someone else other than the insurer: “When we pay, your rights of recovery from anyone else become ours up to the amount we have paid.” CP at 5 (emphasis added). The clause is not, as Somal suggests, discussing the insurer’s right to recover against funds the insurer has already paid to the insured. It refers to amounts the insurer may seek from the insured’s recovery “from anyone else.” That is also the only interpretation consistent with the right of recovery “becom[ing] ours up to the amount we have paid.”

The second sentence qualifies the first, and states that “However, we may recover only the excess amount you have received after being fully compensated for the loss.” Somal’s example of collision coverage is not an “excess amount” the insured “has received.” It is instead a contractual benefit. Moreover, as discussed above, an insured need not be refunded its deductible in order to be considered “fully compensated for the loss.” A deductible represents the risk allocated and retained by the insured, not part of the loss. *Averill*, 155 Wn. App. at 114; *Meas*, 130 Wn. App. at 538. And because the second sentence qualifies the first (“However, . . .”), it necessarily refers to amounts the insured receives from someone other than the insurer.

Even if the Allstate policy was ambiguous, however, it must in any event be construed consistent with existing law. *See Silverstreak, Inc. v. Washington State Dept. of Labor and Industries*, 159 Wn.2d 868, 890, 154

P.3d 891 (2007) and other authorities cited at p. 11 of Allstate's brief. As *Averill* makes clear, Washington law does not, and did not, require Allstate to refund its insured's deductible where Allstate has sought recovery. The contract should not be contorted to read otherwise.

C. THE INSURANCE REGULATIONS DO NOT SUPPORT THE TRIAL COURT'S ERRONEOUS RULINGS

Somal asks that insurance regulations, promulgated after this case was filed, be applied retroactively to provide a basis for upholding the trial court's 11/16/09 Orders. The new regulation provides:

The insurer must include the insured's deductible, if any, in its subrogation demands. Subrogation recoveries must be allocated first to the insured for any deductible(s) incurred in the loss.

WAC § 284-30-393.

Somal asserts that the new regulation should be applied retroactively because it is "remedial or curative" and was "meant to bring the regulation into accord with the law as it has existed since *Thiringer*." *Brief of Respondent* at 22-23. This issue is resolved: this Court already held that the new regulation was not remedial. *Averill*, 155 Wn. App. at 115.

Somal's position makes sense only if this Court ignores the opposite conclusion that it reached in *Averill*—i.e., that under the Washington made whole doctrine, an insurer has no duty to reimburse its insured's deductible following recovery by the insurer. *Averill*, 155 Wn. App. at 114. "The new regulation clearly changes the obligations of

an insurer from the predecessor rules. . . . The new regulation did not merely clarify the previous regulations, but imposed on insurers a new obligation and provided the insured new benefits.” *Id.* at 116.

III. CONCLUSION

For these reasons and all of the reasons stated in Allstate’s opening brief, the 11/16/09 Orders were errors of law. The Court has already decided the issues. The Allstate contract does not compel a different result. This case should be reversed and remanded for dismissal.

Respectfully submitted this 27th day of May, 2011.

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