

ORIGINAL

No. 96185-9

NO. 75727-0

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

LAZURI DANIELS,
individually, and on behalf of all those similarly situated,

Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This is the third time Appellant Lazuri Daniels’ (“Daniels”) counsel has tried to convince this Court that an auto insurer should not be allowed to refund collision deductibles with a reduction for “applicable fault.” This Court rejected their prior attempts in one published decision (*Averill v. Farmers Ins. Co. of Wash.*, 155 Wn. App. 106, 229 P.3d 830 (2010)), and one unpublished decision (*Somal v. Allstate Prop. & Cas. Ins. Co.*, 64626-5-I, 2012 Wash. App. LEXIS 41 (Jan. 17, 2012) ¹).

Daniels tries to distance this case from *Averill* – though not by much. She first argues that her auto policy language mandates a different result than Washington’s common law “made whole” rule as applied in *Averill*. But the same considerations that led this Court to reject the plaintiff’s contract-based argument in *Averill* (and *Somal*) also exist here.

Daniels then switches gears and launches a frontal attack on *Averill*, arguing that it is wrongly decided and should be reversed. She cannot, however, articulate any sound basis to question *Averill*, which the Washington Supreme Court declined to review and the Insurance Commissioner has endorsed.

It is important to review this Court’s holdings in *Averill*, and the amendment to WAC 284-30-393 that followed *Averill*, to understand the genesis of this case and why all of Daniels’ arguments fail.

¹ State Farm cites *Somal* here solely for context, not for any precedential or authoritative value.

The facts of *Averill* mirror those alleged here. After Averill's vehicle was involved in a collision, her auto insurer, Farmers, paid her property damage claim, less her \$500 deductible. Farmers then pursued its subrogation right to recover its payment by arbitration with the other driver's insurance carrier. The arbitrator found Averill's daughter (the driver of her vehicle) 50% at fault, and awarded 50% of Farmers' payment and 50% of Averill's deductible. Farmers accordingly refunded Averill 50% of her deductible (or \$250).

In response, Averill hired Daniels' counsel and sued her insurer to recover the remaining \$250. Averill made three arguments in support of her case – one based on the common law “made whole” rule, one based on WAC 284-30-393, and one based on Farmers' policy language. This Court rejected all three.

First, this Court found that the “made whole” rule, which prevents an insurer from recovering its payments before an insured is “fully compensated” for their loss, only applies when an insurer seeks *reimbursement* from the *insured* after the insured has sought and obtained a recovery from the at-fault party. It does not apply where the insurer asserts its own *subrogation rights* against a *third party*. *Averill*, 155 Wn. App. at 114.

Second, this Court rejected Averill's argument that deductible refunds accounting for fault violated former WAC 284-30-393 (effective 2009), which did not expressly allow a fault reduction. The Court held that, to the extent the 2009 regulation reflected the Insurance

Commissioner's interpretation of the common law "made whole" rule, that interpretation was "wrong as a matter of law." *Id.* at 117. The common law rule, *Averill* reiterated, "does not require that the insured be made whole for its deductible when the insurer pursues its subrogation interest." *Id.*

Third, this Court rejected the argument that *Averill's* insurance contract obligated Farmers to fully refund her deductible: "Averill argues the policy incorporates the made whole doctrine, essentially stating Washington law. Assuming it does, her contract claim fails for the same reasons the common law claim failed." *Id.* at 118.

The Washington Supreme Court denied *Averill's* petition for review. *Averill v. Farmers Ins. Co.*, 169 Wn.2d 1017, 238 P.3d 502 (2010). The Insurance Commissioner thereafter adopted the current version of WAC 284-30-393, which expressly allows a subrogating insurer to refund its insured's deductible "less applicable comparable fault." WAC 284-30-393. The Commissioner explained that the amendment would "better match existing practice and the *Averill v. Farmers* court decision." (Clerk's Papers ("CP"), p. 33.)

Daniels' counsel mounted their next challenge in *Somal*, a case nearly identical to *Averill* which this Court stayed pending its resolution. *Somal* made the same arguments that Daniels makes here: (1) that *Averill* was wrongly decided; and (2) that the terms of *Somal's* auto policy differed from *Averill's* and compelled a different result. This Court rejected both arguments. In an unpublished opinion, it refused to reverse

Averill and adopt a rule compelling a subrogating insurer to fully refund an insured's collision deductible out of its own subrogation recovery already reduced for fault, whether under the policy or the common law. As before, the Washington Supreme Court denied review. *Somal v. Allstate Prop. & Cas. Ins. Co.*, 174 Wn.2d 1007, 278 P.3d 1112 (2012).

Undeterred, Daniels filed the present class action against respondent State Farm Mutual Automobile Insurance Company ("State Farm") in an attempt to relitigate many of the same arguments that this Court considered and rejected in *Averill* and *Somal*.

Like the plaintiff in *Somal*, Daniels urges the Court to reverse *Averill* and find that the common law "made whole" rule applies in the collision deductible context. But Daniels' only criticism of *Averill* relates to a hypothetical the Court discussed in dicta. Contrary to Daniels' claim, there was nothing incorrect in that hypothetical and, in any event, the hypothetical in no way supports reversal of *Averill*'s actual holding that the common law "made whole" rule does not apply here.

Daniels also contends (as did *Somal*), that *Averill* does not control because State Farm's policy language differs from the policy language considered in *Averill*. But the policy language at the heart of all three cases – "fully compensated" – is the same.²

² Daniels' policy provides in part: "***Our*** right to recover ***our*** payments applies only after the insured has been fully compensated for the ***bodily injury, property damage, or loss.***" (CP, p. 80; Appendix A.)

In *Averill*, Daniels' counsel argued that the phrase "fully compensated" incorporated the common law "made whole" rule. They now abandon that "incorporation" argument, and instead urge the Court to interpret "fully compensated" according to Washington's ordinary rules of contract interpretation. That argument does not assist Daniels either because, under those rules and Division Two's published decision in *Meas v. State Farm Fire & Cas. Co.*, 130 Wn. App. 527, 123 P.3d 519 (2005) – which involved the same State Farm policy language at issue here – "fully compensated" means payment of the insured's collision loss less the deductible. Under *Meas*, the "fully compensated" language simply governs when State Farm's recovery rights are triggered, which may be at different times for different coverages. In the collision context, State Farm's contractual subrogation right arises upon payment of the loss under the policy (*i.e.* less the deductible).

Not only does *Meas*' interpretation control, it is the only one that makes sense. Under Daniels' view, the "fully compensated" language means that State Farm has *no subrogation rights at all* unless and until the insured first obtains a full deductible refund from the third party. In other words, State Farm would have no right to assert a subrogation claim against a responsible third party – and therefore no standing to pursue the insured's deductible claim under WAC 284-30-393 – until the insured, on its own, obtains a full deductible refund from the third party. That places the onus solely *on the insured* to pursue and recover a deductible refund.

That absurd result runs contrary to the policy behind WAC 284-30-393, which was designed to take the burden of recovering a deductible off of the insured and place it on a subrogating insurer. The Insurance Commissioner understood that insureds often lack the resources or incentive to pursue recovery of a generally small deductible amount, and placing the burden on the subrogating insurer helps ensure that an at-fault party bears responsibility for the entire loss.

Daniels' policy interpretation would also read the deductible out of the policy. This violates the basic rule that an insurance policy is to be construed as a whole with each provision given force and effect. As *Averill* recognized, the Court is "not at liberty to rewrite the policy" so as to shift the risk of the collision deductible back to the insurer. *Averill*, 155 Wn. App. at 114.

Finally, Daniels claims that she alleges a violation of WAC 284-30-393, because that regulation only permits reducing deductible refunds where the insured is at fault and the Complaint does not allege that she bore any fault. But WAC 284-30-393 does not say that, and courts will not read words into a regulation that are not there.

In sum, neither State Farm's policy language, the common law, nor WAC 284-30-393 supports liability here, and no amendment of the Complaint will change that. The Courts of Appeal got it right in *Averill* and *Meas*, the trial court got it right below, and this Court should affirm.

II. STATEMENT OF ISSUES

1. Was the trial court correct in following *Averill* and agreeing that the common law “made whole” rule does not apply in the subrogation and collision deductible refund context?

2. Was the trial court correct in interpreting Daniels’ auto insurance policy consistent with its plain language and controlling authority, including *Meas*?

3. Was the trial court correct in rejecting Daniels’ strained interpretation of WAC 284-30-393, which requires the Court to read words into the regulation that are not there?

4. Was the trial court correct in declining leave to amend where it is clear that Daniels may not recover under any set of facts alleged?

III. STATEMENT OF THE CASE

A. Daniels’ Claim

On July 25, 2015, Daniels’ vehicle was in the middle of a three-car collision. (CP, p. 2.) At the time, Daniels held a personal automobile policy issued by State Farm which included collision coverage subject to a \$500 deductible. (*Id.*) State Farm paid all costs to repair the vehicle, less Daniels’ \$500 deductible. (*Id.*)

State Farm then asserted a subrogation claim against GEICO, which insured the vehicle behind Daniels. (*Id.*) GEICO initially accepted that its driver was 70% at fault for the accident, and issued payment to State Farm “representing approximately 70% of the cost to repair the vehicle.” (*Id.*) In other words, GEICO paid State Farm 70% of its collision payments and 70% of Daniels’ deductible. State Farm then sent Daniels a check for 70% of her deductible, or \$350.00. (*Id.*)

State Farm was not satisfied with GEICO’s payment. It pursued arbitration against GEICO and Liberty Mutual, which insured the first car in the collision. In May 2016, the arbitrator found GEICO’s insured 100% at fault and ordered GEICO to pay the remaining 30% of State Farm’s collision payment and Daniels’ deductible. (CP, p. 65.) Thereafter, State Farm paid Daniels the remaining 30% of her deductible. (*Id.*)

B. Daniels’ Complaint

Daniels did not wait for State Farm’s subrogation efforts to conclude. Instead, immediately after receiving her 70% deductible refund payment, she filed this suit against State Farm.

The Complaint alleges that State Farm should have reimbursed Daniels’ entire deductible out of its initial 70% subrogation recovery from GEICO, even though Daniels could *not* have obtained more against GEICO at that time had she pursued GEICO directly. Appellant alleges

individual and class claims against State Farm for breach of contract, bad faith and conversion. (CP, pp. 5-7.)

C. State Farm’s Motion to Dismiss

On, June 21, 2016, State Farm filed its Motion to Dismiss. To the extent Daniels’ claims were based on the common law “made whole” rule, State Farm explained, they failed under *Averill*. (CP, pp. 19-22.) To the extent they were based on regulatory law, they failed because current WAC 284-30-393 expressly permits reducing deductible refunds for comparative fault. (CP, pp. 22-24.)

Finally, to the extent Daniels’ claims were based on State Farm’s policy language, they failed for several reasons. First, nothing in the express terms of Daniels’ policy entitled her to recover her collision deductible from State Farm’s subrogation recovery. (CP, p. 24.) Second, under rules of contract interpretation and *Meas*, Daniels was “fully compensated” for purposes of her collision coverage when she received payment of her collision loss less the deductible. (CP, pp. 27-28.)

Daniels opposed State Farm’s Motion, arguing that *Averill* was distinguishable, *Meas*’ holding was dicta, and the only “proper” interpretation of WAC 284-30-393 was to interpret “applicable comparable fault” as applicable comparable fault *of the insured*. (CP, pp. 42-58.)

The parties reiterated their arguments during oral argument on July 29, 2016. Skeptical, the Court pressed Daniels' counsel on her regulatory argument, and the following exchange took place:

The Court: So what is the reading [of WAC 284-30-393] that requires only applying that to fault on the part of the insured?

Mr. Ide: Because it's less applicable comparable fault. ... She's not at fault. Let the insurance companies fight it out. That's what we do in intercompany arbitration. They pay the collision claim, let them go fight it out. ...

The Court: Well, they would pay the claim absent the deductible, correct? I may be missing something here –

Mr. Ide: Right. Sure.

The Court: -- so I have to ask these questions to make sure I'm understanding. The obligation of the insurance company is to pay the claim, absent the deductible – minus the deductible.

Mr. Ide: After the insured has incurred the deductible to pay the remainder of the loss. Correct.

The Court: Right. Right. So they have an obligation to go after the deductible when they –

Mr. Ide: If they're going to pursue their own recovery rights if they had any.

The Court: Right. Right. Which they did in this case. So where – where it is that they have an obligation to get the entire – let's say they're only able to get 70 percent from whichever one it was, Geico –

Mr. Ide: Sure.

The Court: -- and they aren't able to get the other 30 percent from the other insurance company; where does the obligation to pay the other 30 percent come from?

(Report of Proceedings (“RP”), pp. 22:18-24:4.) Unable to point to the contract or a common law rule requiring that result, Daniels' counsel responded by simply urging the court to read WAC 284-30-393 so as to create such an obligation. (RP, pp. 24:5-25:4.)

D. The Trial Court's Order

On August 1, 2016, the trial court issued its order granting State Farm's Motion. In a well-reasoned Order, the trial court addressed each argument made by Daniels' counsel in turn:

The complaint alleges that under plaintiff's policy and under Washington law State Farm may not recoup payments made to or for plaintiff, such as the payments made here under her collision policy coverage, if plaintiff is not first fully compensated for the applicable loss which must include her entire collision deductible.

Averill v. Farmers Insurance, 155 Wn. App. 106 (2010) establishes that Washington's "made whole" rule only applies where the insurer seeks reimbursement from its insured for a loss that it had previously paid to the insured. *Id.* at 114. This case, like *Averill*, involves subrogation, not reimbursement and that distinction is made clear in *Mahler v. Szucs*, 135 Wn.2d 398, 420, fn. 9 (1998). Therefore, the Washington "made whole" rule does not apply to this case.

WAC 284-30-393 provides that funds obtained by the insurer through subrogation should first be allocated to an insured's deductible "less applicable comparable fault." State Farm did exactly as this WAC required. Plaintiff's argument that comparative fault should be read as only referring to fault on the part of the insured is not persuasive. The Court will not read into the WAC words that are not there, particularly in view of the fact that the WAC was designed to comport with the holding in the *Averill* case.

Finally, the policy itself does not entitle plaintiff to recover 100% of her deductible from defendant's subrogation recovery. First of all, the policy does not mention the deductible in Paragraph 12. Secondly, plaintiff was fully compensated for her property loss claimed under her collision coverage when she accepted payment from State Farm. *Meas v. State Farm*, 130 Wn. App. 527 (2005). At the time plaintiff accepted payment for her property loss, her claim passed to State Farm whose obligation to pursue recovery of the deductible derived from WAC 284-30-393 which as stated above, did not require State Farm to reimburse plaintiff for 100% of her deductible. See also, *Chen v. State Farm*, 123 Wn. App. 150, 157 (2004).

(CP, pp. 69-70.) Daniels thereafter filed this appeal.

IV. ARGUMENT

A. Daniels' Common Law Argument Fails Under *Averill*.

Daniels contends that the common law “made whole” rule applies here and that this Court should reconsider and reverse its decision in *Averill*, which rejected that argument. However, Daniels does not attack the reasoning of *Averill*'s actual holding. Instead, she complains that *Averill* purportedly intermixed the common law “made whole” with the “common fund” doctrine in a hypothetical.

In fact, the “common fund” doctrine had nothing to do with *Averill*'s holding. That doctrine applies only in the reimbursement context, which *Averill* noted was distinct from the subrogation context at issue. Relying on controlling Washington Supreme Court authority, *Averill* explained: “The term “reimbursement” comes into play where an insurer is permitted to recoup its payment out of the proceeds of an insured's recovery from the tortfeasor. In this situation the insurer's right of recoupment is contingent upon a third party recovery by the insured.” *Id.* at 113 n. 2 (quoting *Mahler v. Szucs*, 135 Wn.2d 398, 420 n. 9, 957 P.2d 632 (1998)) (internal quotations omitted). Reimbursement “is distinct from subrogation, where the insurer pursues recovery from the wrongdoer.” *Id.* Reimbursement is a right an insurer has against an

insured, while subrogation, in contrast, is a right an insurer has against a third party: “No right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty.” *Id.* (citation omitted).

Averill went on to explain that the common law “made whole” rule articulated by the Washington Supreme Court in *Thiringer v. American Motors Ins. Co.*, 91 Wn.2d 215, 588 P.2d 191 (1978), applied only in the *reimbursement* context. *Averill*, 155 Wn. App. at 112 (quoting *Thiringer*, 91 Wn.2d at 219). *Averill* then surveyed cases decided after *Thiringer* and found that they also applied the “made whole” rule only “where the insurer sought reimbursement out of the third party funds recovered by the insured.” *Id.* at 113 (citing *Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 615, 160 P.3d 31 (2001), *Winters v. State Farm Mut. Auto Ins. Co.*, 144 Wn.2d 869, 872, 31 P.3d 1164 (2001), *Mahler v. Szucs*, 135 Wn.2d 398, 404-405, 957 P.2d 632 (1998), *S&K Motors, Inc. v. Harco National Ins. Co.*, 151 Wn. App. 633, 635, 213 P.3d 630 (2009), and *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn. App. 687, 689, 186 P.3d 1188 (2008)).

Consistent with that long-standing and controlling authority, *Averill* held that the “made whole” rule does *not* apply in the subrogation context. *Id.* at 114. Consequently, Farmers had no common law duty to

fully refund Averill's collision deductible out of its own subrogation recovery reduced for fault. *Id.*

This result, the *Averill* court continued, was "consistent with the purpose of the deductible." *Id.* at 114. The court explained:

A deductible indicates the amount of risk retained by the insured. *See Bordeaux*, 145 Wn. App. at 695-96. The insurance policy shifts the remaining risk of any damages above the deductible to the insurance company. *Id.* 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 manner.

Averill, 155 Wn. App. at 114.³

Daniels does not attack *Averill*'s reasoning or the other authority discussed above. Instead, she complains about a hypothetical the Court used to illustrate how the result would be different if reimbursement,

³ *Averill*'s holding is also good policy. It furthers the underlying purpose of subrogation – to hold the at-fault party liable – by not penalizing a subrogating insurer that uses its own resources to pursue the third party. *Mahler*, 135 Wn.2d at 412. At the same time, it recognizes that an insured who risks their own resources in pursuing the third party, while his or her insurer sits on the sidelines, should also be rewarded for their efforts. In that reimbursement context, where the insured pursues and obtains recovery against a third party, the "made whole" rule would apply and, according to *Averill*, allow the insured to retain a full deductible refund regardless of fault. *Averill*, 155 Wn. App. at 111-112.

rather than subrogation, were at issue. *Id.* at 113-114. The Court explained its reimbursement hypothetical as follows:

In that scenario, the combination of the property loss insurance payments and the third party recovery would have created a common fund. *Mahler*, 135 Wn.2d at 426-27. Any claim by Farmers for reimbursement of the property loss payments would have been limited by the made whole rule. *Id.* at 417-18. Under those facts, Averill would have been entitled to recover her full deductible before any obligation to reimburse Farmers. And, pro-rata fee sharing would have applied. *Id.* at 426-27.

Averill, 155 Wn. App. at 113-14.

Daniels argues that this discussion illogically “bounce[es] back and forth between” the common fund doctrine and made whole rule – “two separate doctrines.” (Appellant’s Opening Brief (“AOB”), p. 19.) She ignores that both relate to the reimbursement context – the subject of the hypothetical.

Daniels then misconstrues the Court’s discussion, asserting it states “the reason” the made whole doctrine limited Farmers recovery is “because the insured has created a common fund.” (AOB, p. 19.) But the Court does not say that. It discusses both the common fund doctrine and the made whole rule, but does not connect those concepts in the way Daniels claims.

Finally, Daniels contends that the Court was “profoundly and fundamentally wrong” when it wrote that “the property loss insurance payments and the third party recovery would have created a common

fund” because, she contends, “the common fund would comprise just the funds recovered from the third party.” (AOB, p. 21.) The Court’s discussion does not disagree. It simply recognized that a common fund cannot exist unless it is for the benefit of both the insurer and insured, and it cannot benefit the insurer unless the insurer has a reimbursement right. As the Court correctly understood, an insurer can have no reimbursement right in the collision context absent a “property loss insurance payment.”

In sum, Daniels offers no valid criticism of *Averill*, much less any basis to overturn its central holding that the common law “made whole” rule does not apply in this context.

B. Daniels’ Contract Argument Fails under *Meas* and Basic Rules of Contract Interpretation.

Attempting to distance this case from *Averill*, Daniels alternatively frames her appeal as presenting a pure policy interpretation issue. That policy provides, in relevant part:

12. Our Right to Recover Our Payments

* * *

- c. Underinsured Motor Vehicle Property Damage Coverage and Physical Damage Coverages

If *we* are obligated under this policy to make payment to or for a party who has a legal right to collect from another, then the right of recovery of such party passes to *us*.

* * *

Our right to recover *our* payments applies only after the insured has been fully compensated for the *bodily injury, property damage, or loss.*

(CP, p. 80; also attached as Appendix A.)⁴ (underline added.)

According to Daniels, the closing paragraph underlined above unambiguously provides that “[w]hatever rights State Farm may have to recover its payments, it does not have those rights until after its insured has been fully compensated for the loss.” (AOB, p. 15.)

State Farm does not disagree. But Daniels ignores that “fully compensated” in the *collision* context means what the controlling authority says it means: payment of the collision loss under the policy, less the deductible. *Meas v. State Farm Fire & Cas. Co.*, 130 Wn. App. 527, 123 P.3d 519 (2005); *Chen v. State Farm Mutual Auto. Ins. Co.*, 123 Wn. App. 150, 94 P.3d 326 (2004). *Meas* and *Chen* not only control, but their interpretation of “fully compensated” in this context is the only reasonable one. As discussed below, Daniels’ interpretation violates basic rules of contract interpretation and would lead to absurd results.

⁴ Appendix A is a copy of the policy page on which the subject language appears. It appears in the record at page 80 of the Clerk’s Papers.

1. Under *Meas* and *Chen*, “Fully Compensated” in this Context Means Payment of the Collision Loss Less Deductible.

In *Meas*, plaintiff Meas was involved in an auto accident which caused both property damage and bodily injury. At the time, Meas held a State Farm auto policy which, like Appellant’s, provided:

Our right to recover our payments applies only after the *insured* has been fully compensated for the *bodily injury, property damage* or *loss*.

Meas, 130 Wn. App. at 530.

Meas complained that State Farm had violated this provision by asserting its subrogation right for its collision payment against the other driver’s insurer before he received compensation for his bodily injury. He demanded that State Farm tender its entire subrogation recovery to Meas until all his claims were settled. *Id.* at 531. According to Meas, State Farm could not yet pursue subrogation because he was not yet “fully compensated” for his loss.

Division Two of the Court of Appeals disagreed. Finding State Farm’s policy language “clear and unambiguous,” the court held that Meas was “fully compensated” under the policy for his collision loss when State Farm paid the covered repair costs for the vehicle. *Id.* at 533, 538-39. That happened *before* Meas received a deductible refund, a fact the *Meas* court expressly noted. *Id.* at 531, 538. *Meas* explained:

Here, Meas was fully compensated or “made whole” for the property loss claimed under his collision coverage when he received payment from State Farm. Further, State Farm recovered his deductible and paid it to him. Under the express language of the policy and in accordance with *Mahler* and *Thiringer*, State Farm was entitled to directly recover its payment from Allied.

Meas, 130 Wn. App. at 538-39. Moreover, because “the subrogated property damage claim was distinctly different and separate from the personal injury,” *Meas* continued, “State Farm could settle the [collision] matter *at any time*, even prior to settlement of the personal injury” claim. *Id.* (emphasis added). Thus, *Meas* found “full compensation” for the collision loss when State Farm paid to repair the vehicle, even though the insured had not recovered *any* of his collision deductible at that time.

In so holding, *Meas* interpreted State Farm’s policy language in light of the particular coverage at issue, and relied on *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998), and *Chen v. State Farm Mutual Auto. Ins. Co.*, 123 Wn. App. 150, 94 P.3d 326 (2004), which did the same. *Meas*, 130 Wn. App. at 534-37. As *Meas* explained, *Chen* held “as a matter of law that State Farm’s payment for collision damages, and the insured’s acceptance of that payment, triggered the assignment of the insured’s right to recover for property damage to State Farm under the policy’s express language.” *Meas*, 130 Wn. App. at 537; *Chen*, 123 Wn. App. at 157.

Thus, as *Meas* and *Chen* reasoned, the subject policy language simply provides when State Farm’s subrogation or reimbursement rights are triggered, which may be at different times for different coverages. Indeed, the “Our Rights to Recover Our Payments” section relates to many different coverages. (CP, p. 80; Appendix A.) Depending on the coverage, the policy provides State Farm with (i) no recovery rights, (ii) subrogation rights only, or (iii) subrogation and reimbursement rights. (*Id.*) In the *collision* context, the policy provides only a “traditional subrogation right.” *Mahler*, 135 Wn.2d at 420. And in that context, State Farm’s subrogation right arises upon payment of the collision loss, regardless of whether or when the insured has yet obtained a collision deductible refund. *Meas*, 130 Wn. App. at 537-39.⁵

Daniels offers no cogent response to *Meas*. Below, she argued that *Meas* was wrongly decided because interpreting the policy’s “fully compensated” language in light of the particular coverage or recovery right at issue (subrogation versus reimbursement) is improper. (CP, p. 55:11-20.) Daniels now abandons that argument, acknowledging that

⁵ This interpretation is also consistent with WAC 284-30-393, which assumes that an insurer’s subrogation right for its collision payments arises *before* an insured receives a deductible refund. That regulation obligates an insurer to pursue its insured’s deductible *along with* its own subrogation claim, and to refund any deductible with reduction for comparable fault.

Washington law requires a court to consider context and the particular coverage at issue in analyzing an insurer's recovery rights. (AOB, p. 22-23) (acknowledging that, under *Meas*, a court should apply an "apples to apples" analysis "as far as coverage go".)

Now, Daniels' central response to *Meas* is that the distinction between when Meas was "fully compensated" under the policy and when he received a deductible refund was dicta. (AOB, p. 23.) Not so. The timing of when Meas was "fully compensated" under the policy was *central* in *Meas*. Meas complained that State Farm had no contractual subrogation right to recover its collision payments until "its insured has been fully compensated for *all of his or her damages*." *Meas*, 130 Wn. App. at 537 (emphasis added). The court squarely rejected that claim. *Id.* at 538.

Daniels also attempts to compartmentalize *Meas* by arguing that its "ultimate holding" related to the "made whole" rule. Again, she is mistaken. *Meas* considered both the common law "made whole" rule and the *same* State Farm policy language at issue here, and held that neither required State Farm to wait to pursue subrogation until after all of Meas' claims had been settled. *Id.* at 539. Instead, "Meas was fully compensated or 'made whole' for the property loss claimed under his collision coverage when he received payment from State Farm" for the

collision loss less deductible. *Id.* at 538. That payment gave State Farm the right “under the express language of the policy and in accordance with *Mahler and Thiringer*” to assert and settle its subrogated property damage claim “at any time” thereafter. *Id.* at 538-539.

2. Daniels’ Interpretation of “Fully Compensated” in this Context is Not Reasonable.

Even if controlling authority did not conclusively negate Daniels’ proffered interpretation of the policy in this context, which it does, rules of contract interpretation and common sense do.

Washington courts give insurance contracts “a practical and reasonable rather than a literal interpretation.” *Morgan v. Prudential Ins. Co. of Am.*, 86 Wn.2d 432, 435, 545 P.2d 1193 (1976). The Washington Supreme Court directs courts to give an insurance policy “a fair, reasonable and sensible construction, consonant with the apparent object and intent of the parties....” *Morgan*, 86 Wn.2d at 434-35. Policies “should not be given a strained or forced construction which would lead to an extension or restriction of the policy beyond what is fairly within its terms, or which would lead to an absurd conclusion, or render the policy nonsensical or ineffective.” *Id.* In addition, the provisions of an insurance policy should be construed “together” so as to give “force and effect to each clause.” *Id.*

Washington courts also avoid broad interpretations of undefined terms that would reach “odd results.” *Black v. National Merit Ins. Co.*, 154 Wn. App. 674, 683, 226 P.3d 175 (2010) (rejecting insured’s broad interpretation of “any covered auto” which could result in the insurer taking on risk for the universe of insured vehicles, whether insured by it or another insurer, as unreasonable); *Matthews v. Penn-America Ins. Co.*, 106 Wn. App. 745, 25 P.3d 451 (2001) (rejecting insured’s broad interpretation of “family” in favor of “traditional” interpretation requiring legal or blood relationship).

Daniels either ignores or fails to appreciate that her proffered interpretation would do just that. According to Daniels:

Under State Farm’s policy language ... State Farm has no [rights to seek recovery from a third party] until its insured receives full compensation. ... It’s akin to having a light switch ... that starts in the off position (State Farm has no rights), but that may be turned on (once the insured is fully compensated).

(AOB, p. 17.)

Because Daniels contends that “fully compensated” in this context means payment of the collision loss under the policy *plus* a full deductible refund, Daniels’ interpretation would mean that State Farm would have *no* right to assert a subrogation claim against a responsible third party – and therefore no standing to assert its insured’s deductible claim under the

WAC – until the insured has pursued and obtained a full deductible refund from the third party.

In other words, Daniels' interpretation places the onus to recover the collision deductible *solely on the insured*. State Farm would be powerless to pursue its subrogation claim (or the insured's deductible claim as required by the WAC) unless and until *the insured* successfully pursued and recovered that deductible on his or her own. Consequently, State Farm would never be able to recover – much less refund – an insured's deductible at all. That absurd result demonstrates the unreasonableness of Daniels' interpretation.

Moreover, the public policy of Washington in no way supports that result. The Insurance Commissioner adopted WAC 284-30-393 to take the burden of recovering collision deductibles off of the insured and place it on a subrogating insurer. The Commissioner understood that insureds often lack the resources or monetary incentive to recover the generally small amount of a deductible on their own. Even if an insured could hire an attorney to pursue their collision deductible from a third party, the attorneys' fees involved would likely exceed any recovery obtained. Given those practical considerations, leaving the burden to recover the deductible on the insured would often result in the insured not pursuing

the claim at all, which would allow the at-fault party to escape full liability for the loss.

Daniels' proffered interpretation would also negate State Farm's contractual subrogation right in the collision context. According to Daniels' "light switch" analogy, State Farm had no subrogation right unless and until she herself sought and recovered her entire deductible. (AOB, p. 17.) That absurd and apparently unintended result demonstrates the unreasonableness of Daniels' position.

Daniels' interpretation is also unreasonable because it reads the collision deductible – the portion of the collision risk she contracted to retain – out of the policy. *Averill*, 155 Wn. App. at 114. Daniels bargained for the collision deductible and paid premiums based on it. The collision deductible is a material term that serves several important purposes. It benefits insureds by lowering premiums. It also benefits the public generally. By "ensur[ing] that insureds share with their insurance companies the risk of damage to the vehicle," collision deductibles encourage loss avoidance and safe driving. *Jones v. Nationwide Prop. & Cas. Ins. Co.*, 32 A.3d 1261, 1271 (2011).

According to Daniels, the Court should ignore the collision deductible in interpreting the "fully compensated" language because "the collision coverage provision is essentially irrelevant" once the insurer pays

the collision loss. (AOB, p. 8 fn. 5.) That contention is untenable for at least three reasons.

First, it violates the basic rule that an insurance contract must be read as a whole and in context, and to give force and effect to each provision. *Morgan*, 86 Wn.2d at 434-35. As this Court recognized in *Averill*, it is “not at liberty to rewrite the policy” so as to change it “to one without a deductible.” *Averill*, 155 Wn. App. at 114.

Second, it ignores that the “Our Right to Recover Our Payments” provision expressly refers to and modifies the parties’ rights under various coverages, including the collision or “physical damage coverages.” (CP, p. 80; Appendix A.)

Third, it would compel State Farm to pay for a loss it did not contract to insure and provide at-fault insureds with an un-bargained for windfall by providing a greater recovery than they could have obtained directly against the other driver. Washington courts do not construe insurance policies so as to “force insurers to pay for losses that they have not contracted to insure.” *Polygon Northwest Co. v. American National Fire Ins. Co.*, 143 Wn. App. 753, 775, 189 P.3d 777 (2008); see also *Averill*, 155 Wn. App. at 114 (reasoning that it was “not at liberty” to rewrite the contract to one without a deductible, as Appellant’s counsel advocated). Rather, the *Polygon* court explained, “the contours of an

insurer's coverage obligations are defined by the specific language of the insurance contract interacting with the type of loss suffered by the insured." *Id.*

Nothing in the policy supports that the "fully compensated" language promises that State Farm will refund the *entire* collision deductible out of its own subrogation recovery already reduced for fault. The policy does not even obligate State Farm to pursue a deductible – only WAC 284-30-393 does. And that regulation contemplates what Washington insureds (including Appellant) already expect: that State Farm has an enforceable subrogation right for its collision payment that it can assert against a responsible third party *before* the insured receives any deductible refund. This Court may look to WAC 284-30-393, and the Commissioner's unequivocal endorsement of insurers both pursuing subrogation before payment of a deductible, and refunding collision deductibles with reduction for fault, in interpreting State Farm's policy. *Loran v. Dairyland Ins. Co.*, 42 Wn. App. 17, 20, 707 P.2d 1378 (1985) (looking to RCW sections relating to unemployment compensation in analyzing the meaning of the terms contained in income continuation benefits section of insured's PIP coverage); *Farmers Ins. Co. of Wash. v. Clure*, 41 Wn. App. 212, 702 P.2d 1247 (1985) (affirming trial court's interpretation of "occupying" in UM coverage as excluding coverage as

consistent with the extent of coverage required under Washington’s UM statute, RCW 48.22.030).

In sum, the only reasonable interpretation of “fully compensated” in the policy in this context is payment of the collision loss less the deductible, as *Meas* held. Under that interpretation, State Farm has the right to pursue its subrogation claim (and the insured’s deductible under WAC 284-30-393) upon payment of the collision loss to its insured under the policy.

3. *Sherry* Does Not Apply.

Failing to appreciate the unreasonableness of its proffered interpretation, and unable to distinguish *Meas*, Daniels argues that *Meas* “simply cannot stand” in the face of *Sherry v. Financial Indemnity*, 160 Wn.2d 611, 160 P.3d 31 (2007). (AOB, p. 23.) According to Daniels, *Sherry* governs the meaning of “full compensation” here. Daniels is wrong – *Sherry* does not apply.

Sherry arose in an entirely different context and expressly limited its holding to that context. *Sherry*, 160 Wn.2d at 614. *Sherry* addressed “full compensation” only to the extent it related to application of *Thiringer’s* common law “made whole” rule in the UIM and PIP offset context. *Id.* at 619-626. Neither of those coverages are at issue here.

Sherry did not involve collision coverage and, as *Averill* aptly noted, neither *Sherry* nor the cases on which it relied “discussed recovery of deductibles.” *Averill*, 155 Wn. App. at 112. That is because the UIM and PIP coverages involved in those cases did not include deductibles – they provided dollar-one coverage. Only *Averill* and *Meas* expressly involved collision coverage and deductibles, and both support State Farm’s position.

Considerations “unique” to UIM coverage also drove *Sherry*’s holding. *Sherry*, 160 Wn.2d at 622. In particular, *Sherry* explained that UIM coverage “floats on top of and is not a substitute for other insurance and benefits” *Id.* at 623. Offsetting PIP payments against a UIM award reduced for fault would eliminate the PIP coverage the insured had purchased for an additional premium: “[W]here an insurer has written two separate auto insurance coverages and received two separate premiums for those separate coverages, the insured should not be worse off simply because both were purchased from the same insurer.” *Id.* at 625.

Those considerations do not apply here. An insured receiving a deductible refund reduced for fault is *not* losing a coverage that she paid for – she is maintaining a risk she contracted to keep in exchange for lower premiums. Daniels contracted to bear the first \$500 of any covered collision loss and paid a premium based on that allocation of risk. The

policy interpretation she urges would provide partially at-fault insureds – who could not recover their full deductible against the tortfeasor – a right to recover their full deductible *against State Farm*. Nothing in Washington law or the policy terms supports such an inequitable result.

Moreover, *Sherry* did not involve interpretation of an insurance contract. It did not analyze what “fully compensated” means in the context of any policy, let alone Appellant’s policy, or in the context of collision coverage. All *Sherry* discussed was how to apply the common law “made whole” rule in the UIM and PIP offset context, and how to harmonize that rule and the common law rule against double recovery. *Id.* at 621-625. There is no offset here, no PIP or UIM coverage, and no possibility of double recovery.

Moreover, even assuming Daniels is correct and *Sherry* applies here, which it does not, then all that means is that “fully compensated” in the policy incorporates the common law “made whole” rule. Indeed, that was the central contract interpretation argument her counsel urged in *Averill*. *Averill*, 155 Wn. App. at 118. That theory does not assist Daniels, however, because, as *Averill* correctly reasoned, the “made whole” rule does *not* apply to the subrogation context or State Farm’s subrogation claim asserted in this case.

C. Appellant's WAC 284-30-393 Argument Fails.

Next, Daniels argues that, even if she failed to state a claim under the contract or common law, she alleged facts supporting a basis for liability under WAC 284-30-393. Accepting that argument would require this Court to read words into the regulation that are not there. The trial court declined to do so, and this Court should do the same.

WAC 284-30-393 provides in relevant part:

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

State Farm complied with that regulation: it included Appellant's deductible with its subrogation demand and, when GEICO initially accepted 70% fault for its insured, State Farm refunded 70% of Appellant's deductible. Because 30% fault had not yet been accepted by GEICO or any other insurer at that point, 30% was the claimed "applicable comparable fault" at that time.

Applying the plain meaning of the regulation does not render "applicable" extraneous or devoid of meaning as Appellant contends. (AOB, p. 27.) Nor does it violate rules of statutory construction – none of which Appellant actually cites in her brief.

Those rules direct Washington courts to apply statutes according to their plain meaning, and not read in words that are not there. *State v. LG Electronics, Inc.*, 18 Wn.2d 1, 9-10, 375 P.3d 636 (2016); *Umpqua Bank v. Shasta Apartments, LLC*, 194 Wn. App. 685, 696, 378 P.3d 585 (2016)

(rejecting proffered interpretation of statute that required the court to “read language into the Receivership Statute that is not there”). As the *Umpqua* court explained:

We do not “add words where the legislature has chosen not to include them,” and we construe statutes assuming that the legislature meant exactly what it said.”

Umpqua Bank, 194 Wn. App. at 693-94. Although this case involves a regulation, not a statute, the same general rules of interpretation apply. *Mader v. Health Care Auth.*, 149 Wn.2d 458, 472, 70 P.3d 931 (2003) (“We interpret regulations under the rules of statutory construction.”).

Daniels’ position violates these basic rules because it requires the court to read WAC 284-30-393 to provide: less applicable comparable fault *of the insured*. The regulation does not include the phrase “of the insured” and this Court is not at liberty to add it.

Moreover, adding that phrase would not be consistent with *Averill*. The Commissioner agreed with this Court’s holding in *Averill* and amended WAC 284-30-393 in response to it to expressly allow insurers to account for fault in refunding deductibles. Applying WAC 284-30-393 as Appellant urges would not have allowed for a fault reduction in the *Averill* case. That is because *Averill* involved an insured who was in no way at fault – her daughter was driving the car. *Averill*, 155 Wn. App. at 110. Under Daniels’ interpretation, no fault would have been “applicable” and Farmers would have had to refund the entire deductible. There is no reason to believe the Insurance Commissioner intended that result.

Instead, the Insurance Commissioner's decision to amend WAC 284-30-393 to be consistent with *Averill*, and this Court's holding that Farmers' partial deductible refund to Averill was proper, support the opposite.

Daniels also relies on a general statement purportedly found on the Insurance Commissioner's website that does not even mention WAC 284-30-393. Courts interpret regulations according to their plain meaning, not extrinsic statements by unknown authors appearing on a website. *Mader*, 149 Wn.2d at 472.

D. The Trial Court Did Not Abuse its Discretion in Denying Leave to Amend.

Daniels complains that the trial court denied her leave to amend. However, she still fails to identify any amendment she could make to her Complaint to state a valid claim against State Farm.

As Daniels concedes, a trial court's denial of leave to amend is reviewed for abuse of discretion. "A trial court's action in passing on a motion for leave to amend will not be disturbed on appeal except for a manifest abuse of discretion or a failure to exercise discretion." *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 351, 670 P.2d 240 (1983) (finding no abuse of discretion). Where a trial court could have determined that the proposed amendments were meritless, futile, or unfairly prejudicial, there is no abuse of discretion. *Haselwood v. Bremerton*, 137 Wn. App. 872, 889, 155 P.3d 952 (2007).

Given Daniels' continued failure to identify any valid claim she could state against State Farm, the record clearly supports that amendment would be futile.

E. There is no Basis to Award Fees.

There is no basis for awarding fees to Daniels. The trial court's order should stand and, regardless, *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), does not apply. *Olympic Steamship* applies where the insurer forces the insured to litigate over questions of coverage, not simply the amount of a claim. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 282, 876 P.2d 896 (1994); *Kroeger v. First National Ins. Co. of America*, 80 Wn. App. 207, 209-210, 908 P.2d 371 (1995). This case does not involve a denial of coverage or even a coverage question – State Farm allegedly accepted coverage for the collision claim.

V. CONCLUSION

Based on the foregoing, State Farm respectfully requests that the Court affirm the ruling below.

RESPECTFULLY SUBMITTED this 26th day of January, 2017.

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CERTIFICATE OF SERVICE

I, Karen Langridge, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) On January 26, 2017, I caused to be served upon counsel of record at the address and in the manner described below, the following document:

- Respondent’s Brief; and
- Certificate of Service.

Counsel for Plaintiff Lazuri Daniels
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Ide Law Office
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Mercer Island, WA 98040-6004

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- Facsimile
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Counsel for Plaintiff Lazuri Daniels
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- E-mail

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2017 JAN 26 PM 12:38

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26th day of January, 2017.

/s/ Karen Langridge
Karen Langridge

APPENDIX A

intent to conceal or misrepresent any material fact or circumstance in connection with any claim under this policy.

12. Our Right to Recover Our Payments

- a. Death, Dismemberment and Loss of Sight Coverage

Our payments are not recoverable by *us*.

- b. Personal Injury Protection Coverage, Medical Payments Coverage, and Underinsured Motor Vehicle Bodily Injury Coverage

(1) If *we* are obligated under this policy to make payment to or for a *person* who has a legal right to collect from another party, then *we* will be subrogated to that right to the extent of *our* payment.

(2) If *we* make payment under this policy and the *person* to or for whom *we* make payment recovers or has recovered from another party, then that *person* must:

- (a) hold in trust for *us* the proceeds of any recovery; and
(b) reimburse *us* to the extent of *our* payment.

(3) The *person* to or for whom *we* make payment must help *us* recover *our* payments by:

- (a) keeping *our* right to recover *our* payment in trust for *us* and doing nothing to impair that legal right;
(b) executing any documents *we* may need to assert that legal right; and
(c) taking legal action through *our* representatives when *we* ask.

- c. Underinsured Motor Vehicle Property Damage Coverage and Physical Damage Coverages

If *we* are obligated under this policy to make payment to or for a party who

has a legal right to collect from another, then the right of recovery of such party passes to *us*. Such party must help *us* recover *our* payments by:

- (1) keeping *our* right to recover *our* payment in trust for *us* and doing nothing to impair that legal right;
(2) executing any documents *we* may need to assert that legal right; and
(3) taking legal action through *our* representatives when *we* ask.

Our right to recover *our* payments applies only after the *insured* has been fully compensated for the *bodily injury, property damage, or loss*.

13. Legal Action Against Us

Legal action may not be brought against *us* until there has been full compliance with all the provisions of this policy. In addition, legal action may only be brought against *us* regarding:

- a. Liability Coverage after the amount of damages an *insured* is legally liable to pay has been finally determined by:
(1) judgment after an actual trial, and any appeals of that judgment if any appeals are taken; or
(2) agreement between the claimant and *us*.
- b. Personal Injury Protection Coverage 30 days or more after we get the *insured's* notice of accident.
- c. Medical Payments Coverage if the legal action relating to this coverage is brought against *us* within four years immediately following the date of the accident.
- d. Underinsured Motor Vehicle Coverage if the legal action is brought within one year from the time the cause of action accrues against *us*. This one year limitation does not apply to legal actions brought pursuant to the **Deciding Fault and Amount** provision of the Underinsured Motor Vehicle Coverage.