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No. 96185-9

SUPREME COURT OF STATE OF WASHINGTON

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

Petitioner,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

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**PETITIONER LAZURI DANIELS'  
SUPPLEMENTAL BRIEF**

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Matthew J. Ide, WSBA No. 26002  
Attorney for Lazuri Daniels,  
as Plaintiff/Appellant

IDE LAW OFFICE  
7900 SE 28<sup>th</sup> St., Ste. 500  
Mercer Island, WA 98040  
Telephone: (206) 625-1326

and

David R. Hallowell, WSBA No. 13500  
LAW OFFICE OF DAVID R. HALLOWELL  
7900 SE 28<sup>th</sup> St., Ste. 500  
Mercer Island, WA 98040  
Telephone: (206) 587-0344

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## **I. IDENTITY OF PETITIONER**

The Petitioner is Lazuri Daniels, Appellant in the Court of Appeals and plaintiff and proposed class action representative in the Superior Court. Ms. Daniels submits the following in supplement to the briefing already filed in this matter.

## **II. INTRODUCTION AND SUMMARY OF ARGUMENTS**

This matter should have been resolved as a run of the mill make whole doctrine case. Daniels suffered a property damage loss to her automobile. Daniels sought compensation for the loss from her automobile insurer, State Farm. Daniels thereafter received payment from State Farm, but not for the entire amount of the loss. Instead, pursuant to her collision coverage deductible, Daniels was left out of pocket for \$500 of the loss.

State Farm sought to obtain compensatory funds from the allegedly responsible person (insured by Geico). Geico agreed to accept partial liability, and sent State Farm a check for about 70% of Daniels' total loss. It is undisputed that at that time, Daniels was still out of pocket \$500 for her automobile property damage. State Farm did not send \$500 of the tortfeasor funds to Daniels, however, instead sending only \$350; State Farm keep the rest of the funds for itself as compensation for its insurance payments.

At this point, the ordinary and usual application of the “make whole” doctrine would tell us that what State Farm did here is wrong. The doctrine, a longstanding principle of Washington insurance law, provides that an insured has the right be fully compensated for a loss (*i.e.*, “made whole”) before the insurer is entitled to recoup any of the insurance money it paid for that loss. It is a simple, clear rule of priority for determining who is first entitled to funds that are recovered from the person responsible for the loss: as between insured and insurer, the less-than-fully-compensated insured stands first in line. Hence, State Farm should have turned over \$500 to Daniels before keeping any of the tortfeasor compensatory funds to reimburse itself for its insurance payments.

Unfortunately, standing in the way of this straightforward resolution is the opinion in *Averill v. Farmers Ins. Co. of Washington*, 155 Wn. App. 106, 229 P.3d 830 (2010), which held that the make whole rule is inapplicable in just such a circumstance. The shortcomings with *Averill*, however, are as plain as they are significant.

For example, *Averill* held that the broad principle of the make whole doctrine is actually narrowly tailored and “precise,” in that it *only* applies to situations where the insured recovers the third party funds, and not where the insurer does. In other words, under *Averill*, where the funds come from or what they represent (*i.e.*, compensation for the insured’s

property damages loss) matters not at all; it only matters who obtains them. This narrow reading conflicts with the broadness of the principle as expressed in numerous Washington cases, and other than *Averill* itself there is no support for such a limited and restrictive interpretation.

Another problem is that *Averill* supported its result by asserting that to hold otherwise (*i.e.*, to provide full compensation to the insured) would write the deductible out of the policy. This is both incorrect and analytically inconsistent. It is incorrect because the insured in such an instance still pays or incurs the deductible in every claim, without any guarantee that there will ever be a later recovery from the tortfeasor (an entirely separate process in any event).

It is analytically inconsistent for at least two reasons. One is because *Averill* held that the insured *would be* entitled to recoup the entire loss represented by the deductible if the *insured* secured the money from the tortfeasor (the insurer in *Averill*, Farmers, agreed). But would that not also be “writing the deductible out of the policy,” to the extent that assertion has any merit? The second reason is because even the end result tacitly approved by *Averill* – the insured’s pro rata recovery of the deductible – would still be “writing the deductible out” (if that were truly the case), just to a lesser extent.

In sum, *Averill* provides no reasoned basis<sup>1</sup> to depart so dramatically from the well-established make whole doctrine, and its holding should be overturned so as to provide: (i) one rule applicable to all insurers in Washington that is also (ii) consistent with the longstanding principles and oft-repeated goals of the make whole doctrine.

Separate from any issues with *Averill* and the common law rule, the fact is that State Farm's policy independently and explicitly provided for the full compensation of its insured before it had the right to recoup its insurance payments. The Court of Appeals below erred in finding two reasons why State Farm's promise was not what it plainly seemed. One was that it misconstrued Daniels' argument, asserting Daniels was arguing for State Farm to reimburse her deductible before State Farm or anyone else could seek compensatory funds from the tortfeasor. This is not accurate. Daniels has been clear that she has no issue with State Farm seeking to obtain compensatory funds from the tortfeasor – the issue is who has first “dibs” on any such funds recovered (regardless of who secures them). Consistent with the make whole doctrine and State Farm's own policy language, the “who” is the not-fully-compensated insured.

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<sup>1</sup> As pointed out in earlier briefing, the entire make whole analysis in *Averill* is also analytically unsound because it clearly confuses and intermixes parts of the common fund fee sharing rule in its analysis – though the common fund doctrine had nothing to do with resolution of the case.

Second, the Court of Appeals created a special, arguably oxymoronic definition of “full compensation” solely for use in matters involving insurance deductibles and (presumably) others forms of partial risk of loss self-retention. For these matters, the Court of Appeals states that an insured has been “full compensated” upon receipt of payments made by the insurance company – regardless of the extent of the actual loss sustained by the insured. This is inconsistent with, among other cases, *Sherry v. Financial Indemnity Co.*, 160 Wn.2d 611, 160 P.3d 31 (2007) and *Bordeaux, Inc. v. American Safety Ins. Co.*, 145 Wn. App. 687, 186 P.3d 1188 (2008), *rev. denied*, 165 Wn.2d 1035, 203 P.3d 380 (2009). For these and the other reasons discussed in this and prior briefing, this Court should reverse the Court of Appeals and remand to the trial court.

### **III. SUMMARY OF FACTS<sup>2</sup>**

The facts for the most part are undisputed. Daniels made a claim under her collision coverage with State Farm after her car was damaged in a three car accident. CP 2.<sup>3</sup> After insurance payments from State Farm,<sup>4</sup>

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<sup>2</sup> For purposes of State Farm’s motion to dismiss, all facts pled and hypothetical facts reasonably inferred must be construed in favor of Ms. Daniels. *See, e.g., Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (citing *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998)); *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978).

<sup>3</sup> Complaint at 2, ¶¶ 6-10.

<sup>4</sup> It is reasonable to presume that the collision coverage claim file was closed after State Farm made payment.

Daniels still had \$500 of uncompensated property damage as represented by her collision deductible. CP 2.<sup>5</sup>

Subsequently, State Farm sought to obtain compensation for Daniels' property damage from the allegedly responsible parties. CP 2.<sup>6</sup> Geico, as the insurer for one of the other cars involved, agreed to accept 70% fault, sending State Farm funds to cover about 70% of Daniels' property damage loss. CP 2.<sup>7</sup> From the compensatory payment sent by Geico, State Farm sent Daniels only \$350, and kept the rest for itself. CP 2.<sup>8</sup> It is undisputed that at that time Daniels was still out of pocket \$150 for her property damage loss. CP 2.<sup>9</sup>

In earlier briefing, State Farm asserts that it later sent Daniels another \$150. Though there is nothing in the record to support it,<sup>10</sup> the Court of Appeals mistakenly accepted the assertion and erroneously reflected it in the opinion. Daniels is hopeful that State Farm will not continue to misrepresent the record in its supplemental briefing, but if

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<sup>5</sup> Complaint at 2, ¶ 8.

<sup>6</sup> Complaint at 2, ¶ 11.

<sup>7</sup> Complaint at 2, ¶¶ 7, 11. There was no indication of any fault on the part of Daniels; the other 30% was at the time apparently being attributed to the third car involved.

<sup>8</sup> Complaint at 2, ¶ 12.

<sup>9</sup> Complaint at 2, ¶ 12.

<sup>10</sup> The Clerk's Papers citation State Farm continues to make is just to an unsupported assertion it makes in the argument section of its reply brief in the trial court.

State Farm persists the Court should not be misled by it.<sup>11</sup>

State Farm's policy specifies that once it makes the property damage insurance payments to its insured, it can seek to enforce its insured's right to seek compensatory payments from allegedly responsible persons (such as the Geico insured here):

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**. ...

CP 2-3 (Policy's General Provisions, 12.c.) (applicable to collision coverage).<sup>12</sup> But the policy also expressly specifies a prerequisite on State Farm's right to obtain repayment of its *own* ("**our**") insurance payments:<sup>13</sup>

**Our Right to Recover Our Payments**

...

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

CP 3 (Policy's General Provisions, 12).<sup>14</sup>

This suit was filed because before Daniels was fully compensated for her property damage, State Farm repaid itself for its insurance

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<sup>11</sup> Furthermore, as pointed out by Judge Becker in her dissent, for resolution of the legal issues here it is irrelevant in any event.

<sup>12</sup> Complaint at 2-3, ¶¶ 13 (bold & italics in original).

<sup>13</sup> This prerequisite is a global limitation on State Farm's rights for repayment (not just on collision coverage payments), including PIP and UIM.

<sup>14</sup> Complaint at 3, ¶¶ 13 (bold & italics in original, underscoring added).

payments from the compensatory funds obtained from Geico.

#### **IV. SUPPLEMENTAL ARGUMENT**

##### **A. State Farm's Conduct Is Contrary to Washington's Make Whole Doctrine**

For the assertion that its conduct does not violate the common law make whole rule, State Farm relies on *Averill*. As discussed below, *Averill* is inconsistent with Washington make whole jurisprudence, and should be rejected.

##### **1. Washington's Make Whole Doctrine**

In numerous cases Washington has identified the doctrine – seeing that injured persons are fully compensated for their losses whenever possible – as an important, nearly paramount, public policy. Beginning with *Thiringer v. American Motors Ins.*, 91 Wn.2d 215, 588 P.2d 191 (1978), where the Supreme Court was asked to determine priority, as between an insurer and its insured, for the proceeds of a settlement of the insured's bodily injury claim. *Id.* at 216. The insured recovered from the tortfeasor, but the amount was insufficient to fully compensate him. Thus, the insured sought further compensation under his PIP coverage, and filed suit when the insurer refused to pay. *Id.* As stated by the Court:

The decisive issue before us concerns the allocation of the proceeds of the settlement, as between the insured and the insurer. It is the contention of the insurer that they should be allocated first to the special damages covered by the PIP

provision or, in the alternative, prorated between the general damages and the PIP damages.

*Id.* at 219.

The Court ruled in favor of the insured, holding that the proceeds obtained from the tortfeasor should first be applied to the insured's loss until he was fully compensated, and then any excess funds could be applied to the insurer's PIP obligation.<sup>15</sup> *See id.* at 217-18. In other words, an insured's right to be fully compensated had priority over the insurer's right to recoup (or offset) its insurance payments.

A significant line of cases since *Thiringer* have reaffirmed the application of this basic rule in various circumstances.<sup>16</sup> Indeed, the make

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<sup>15</sup> It is always the insurer's burden to establish that its insured has made such a double recovery in the first instance. *See, e.g., Puget Sound Energy v. ALBA Gen. Ins.*, 149 Wn.2d 135, 142, 68 P.3d 1061 (2003).

<sup>16</sup> *See also Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 650, 272 P.3d 802 (2012) (insurer recouping insurance payments "is appropriate so long as the injured party is made whole before any right to reimbursement is fulfilled"); *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 309, 88 P.3d 395 (2004) (insurer may seek reimbursement for benefits previously paid "when the insured receives [a] full recovery"); *Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 878-79, 31 P.3d 1164 (2001) (recognizing "the long established equitable principles set down by this Court [that a]n insurer is not entitled to recover until its insured is fully compensated and restored to his or her pre-accident position") (citing *Thiringer*, 91 Wn.2d at 219); *Weyerhaeuser v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 672, 15 P.3d 115 (2000) ("the insured must first be fully compensated for its loss before any setoff is ever allowed"); *Mahler v. Szucs*, 135 Wn.2d 398, 416-17, 957 P.2d 632 (1998) ("with respect to the allocation of benefits, we articulated a rule of full compensation, that is, no right of reimbursement existed for the insurer until the insured was fully compensated for a loss"); *Elovich v. Nationwide Ins. Co.*, 104 Wn.2d 543, 556, 707 P.2d 1319 (1985) ("the insurance company's subrogation rights arise only after the plaintiffs have received full compensation for their injuries.") (citations omitted); *S&K Motors, Inc. v. Harco Nat'l Ins. Co.*, 151 Wn. App. 633, 635, 213 P.3d 630 (2009) ("an insured must be fully compensated for its loss before the insurer can benefit from any third-party recovery");

whole doctrine is such an important expression of Washington public policy that this Court has, for example, held that even a negligent insured is entitled to the benefit of the make whole doctrine. *See Sherry v. Financial Indemnity Co.*, 160 Wn.2d 611, 621, 625, 160 P.3d 31 (2007).

## **2. Application of the Doctrine Does Not Depend on Who Obtained the Funds From the Tortfeasor**

The *Averill* opinion summarily dismisses *Thiringer* and all of its progeny with the assertion that the make whole doctrine they describe *only* applies if the *insured* is the one who obtains the funds from the tortfeasor. According to the opinion, the doctrine never applies if the insurer obtains the funds from the tortfeasor. *See Averill*, 155 Wn. App. at 112 (“This articulation of the rule is precise in that it applies to cases where the insured recovers the payment and the insurer is seeking reimbursement, *not vice versa*.”) (emphasis added; footnote & citation omitted). This is entirely inconsistent with other make whole cases, and bears no relation to the purpose and reasoning behind the doctrine itself.

For example, in *Sherry* the Supreme Court did not limit its description of the make whole doctrine in the manner the *Averill* opinion

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*Polygon NW. v. American Nat'l Fire Ins. Co.*, 143 Wn. App. 753, 782, 189 P.3d 777 (2008) (right of insurer to share in third party recoveries does not arise until the insured “has first been ‘made whole’”) (citation omitted); *Jones v. Firemen’s Relief Bd.*, 48 Wn. App. 262, 268, 738 P.2d 1068 (1987) (“the policy of fully compensating victims has repeatedly been held by our courts to be extremely important”) (citing *Thiringer*, 91 Wn.2d at 220).

suggests. Rather, the Court indicated that any right of the insurer to recoup its insurance payments was subordinate to the insured's right to full compensation, regardless of the method an insurer might employ to seek repayment (specifically listing one method being "subrogation"):

after an insured is "fully compensated for his loss," an insurer may seek an offset, **subrogation**, or reimbursement for [insurance] benefits already paid. *Thiringer v. Am. Motors Ins. Co.*, 91 Wn.2d 215, 219, 588 P.2d 191 (1978); see also ... *Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 876, 31 P.3d 1164 (2001) ("the insured must be fully compensated before the insurer may recoup benefits paid")....

160 Wn.2d at 618 (bold added).

Similarly, in *Bordeaux, Inc. v. American Safety Ins. Co.*, 145 Wn. App. 687, 186 P.3d 1188 (2008), *rev. denied*, 165 Wn.2d 1035, 203 P.3d 380 (2009), the insurer (American Safety) contended that it was entitled to recover its insurance payments from third party funds before the insured was made whole, specifically based on a claimed right of *subrogation*:

American Safety contends the SIRs operate as primary insurance and therefore its policies provide "excess" insurance. Thus, it argues, its rights to **subrogation** are superior to [its insureds'] and it is entitled to recover third-party settlement funds before its insureds.

*Id.* at 684 (bold added). The insurer's argument was rejected:

[t]he long-standing rule of *Thiringer v. American Motors Insurance Co.* and its progeny favoring full compensation of insureds over **subrogation rights** of insurers applies here. The trial court properly ruled that Bordeaux and

Cameray were entitled to be made whole before any third-party recovery funds are paid to the insurers.

*Id.* at 696-97 (bold added).

Moreover, the *Averill* approach cannot be reconciled with the purpose and reasoning underlying the make whole doctrine. It is important to remember that the doctrine is informed by two closely related principles: (i) an insured is entitled, so much as can be, to be fully compensated for a loss, but (ii) is not entitled to a “double recovery” for that loss. *E.g., Sherry*, 160 Wn.2d at 618. As a result, the consistent theme running throughout the make whole cases is that any repayment of an insurer’s insurance payments comes from the excess *after* an insured is made whole (in other words, from what would otherwise constitute a double recovery by the insured). In fact, as the Court previously stated, the “**key factor** [in *Thiringer*] was the presence or absence of double recovery.” *Keenan v. Industrial Indem. Ins. Co.*, 108 Wn.2d 314, 319, 738 P.2d 270 (1987) (bold added) (citing *Thiringer*, 91 Wn.2d at 219-20).

The undisputable fact here is that Daniels did not make a double recovery on her property damage, and in fact clearly remained less than fully compensated for her property damage loss even while State Farm was repaying itself. But under *Averill’s* misguided analysis, the question of the insured’s excess or double recovery never even gets asked.

### **3. The Portion of a Loss Represented By An Insured's Deductible Is Indeed A "Loss"**

Excepting only *Averill*, there are no Washington cases that stand for the proposition that the amount of an insured's loss represented by "retained risk of loss," such as an insurance deductible, is excluded from the make whole doctrine. In fact, as discussed above, such a proposition is inconsistent with *Bordeaux*, where the Court of Appeals applied the make whole doctrine in the context of self-insured retentions ("SIRs"), a functional equivalent of a deductible. 145 Wn. App. 696-97.

The *Averill* opinion claimed its decision was consistent with the purpose behind an insurance deductible (and that conversely, if *Averill* were to be made whole, it would "rewrite the policy" to be "one without a deductible."). *Averill*, 155 Wn. App. at 114. This evinces an erroneous view of what actually transpires in such a matter.

*Averill* agreed to be out of the pocket the initial \$500 of the loss, and if no recovery was made from the tortfeasor, she would have remained out of pocket the \$500. Likewise, Farmers (the insurer in *Averill*) agreed to be out of pocket for the property damage loss that exceeded \$500, and if no recovery was made from the tortfeasor, Farmers would have remained out of pocket that amount. *Neither of these observations answers the entirely different question of what happens when funds are recovered from*

*the person actually responsible for the property damage.* In short, *Averill* is incorrect that allowing an insured to share in the compensatory funds obtained by the insurer for the insured's property damage loss would turn the policy into one without a deductible, or undermine the purpose of the deductible in any conceivable way.

#### **4. Washington Insurance Regulation**

State Farm points to the current applicable insurance regulation, which permits pro rata sharing of third party recoveries, and asserts that it demonstrates the Insurance Commissioner's belief that such a split is proper. This ignores the applicable history and sequence of events.

Originally, (former) WAC § 284-30-3905 (repealed Aug. 21, 2009), permitted proportionately splitting third party recoveries. In 2009, however, the Insurance Commissioner changed the regulation to require that "[s]ubrogation recoveries must be allocated *first* to the insured for any deductible(s) incurred in the loss." *See* (former) WAC § 284-30-393 (2009) (emphasis added) (The change was likely to bring the regulation in line with the then-recent *Bordeaux* case.) In other words, the regulation was changed to reflect the belief that the make whole doctrine equally applied with full force in matters involving deductibles.

It was only after the *Averill* opinion was issued in 2010 that necessitated the insurance commissioner change the regulation once again,

this time turning things somewhat backwards in an apparent effort to comply with *Averill*. (*Averill* specifically held that the “OIC’s interpretation of *Thiringer* is wrong as matter of law.” 155 Wn. App. at 117.) Thus, it appears that for this reason only the regulation was altered. To be clear, it still provides that “recoveries must be allocated first to the insured for any deductible(s) incurred in the loss,” it just adds the qualification: “less applicable comparable fault.” See § 284-30-393 (effective July 8, 2011). Absent *Averill*, the regulation would undoubtedly still require application of the make whole doctrine in matters involving deductibles, as the OIC apparently believed before *Averill*.

In any event, it is worth pointing out that current WAC § 284-30-393, in attempting to “split the baby,” is actually irreconcilable with the dictates of *Averill*.<sup>17</sup> The opinion was clear: the make whole rule has *no application* when the compensatory funds from the tortfeasor are obtained by the insurer, and the insured is not entitled to *any portion* of the funds recovered by the insurer in such an instance. See 155 Wn. App. at 114-15 (“*Averill* is not entitled to recover her deductible from funds obtained by Farmers under subrogation from the third party’s insurer.”). See also *id.* at 119 (“The policy does not entitle *Averill* to recover her deductible from

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<sup>17</sup> For that matter, the regulation is likewise irreconcilable with *Sherry*, 160 Wn.2d 611, which tells us that a “loss” for make whole purposes is not reduced to reflect any alleged fault of the insured.

Farmers' recovery of its subrogation interest from the tortfeasor.”).

Hence, if *Averill* was held to be good law, the current insurance regulation on the matter appears indefensible.

**B. The Court Erred By Interpreting the Policy Language in Favor of State Farm**

The Court of Appeals cited the applicable law concerning the requirement that language of an insurance policy must be viewed in the light most favorable to the insured, liberally construed in favor of the insured and as an average person would construe it, and to resolve ambiguities in favor of the insured. Unfortunately, the majority opinion failed to actually follow these mandates.

The policy language here indicated that State Farm's ability to be repaid its insurance payments would be subject to its insured first being fully compensated for the loss. A fair reading by a common purchaser of insurance is that the full compensation of the insured is the superior right. To the extent the provision is not entirely clear, it would nonetheless have to be construed in Ms. Daniels' favor. The Court of Appeals, however, failed to even consider the provision from the perspective of the insured.

The Court of Appeals majority stated that “the only reasonable interpretation of the term “fully compensated” as used in the insurance contract ...does not include the amount of deductible paid by the insured.”

Slip. op. at 7. It based that on the contention that if the policy language was read literally, it would bar State Farm from even seeking to secure compensatory funds from the tortfeasor unless it had first given money to Daniels to cover her remaining loss (as represented by her deductible). There is simply no need for such a strained and convoluted interpretation.

The most natural and sensible way to read the insurance policy provisions is that once State Farm makes insurance payments, it is permitted to seek compensatory funds for the insured's loss from the allegedly responsible person. As provided in the policy: If State Farm makes payments for which the insured has the right to seek payment "from another, then the right of recovery of such party passes to **us. ...**" CP 2-3 (Policy's General Provisions, 12.c.) (bold in original). Under this plain language, it appears that the entire right to pursue compensation from the tortfeasor passes to State Farm, which includes not just State Farm's insurance payments but any remaining uncompensated loss of the insured.<sup>18</sup> This makes sense because as between insured and insurer, it is likely that the insurer will often have the larger interest in securing a property damage recovery from the responsible person.

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<sup>18</sup> This likely has to be the case, as it is doubtful that the property damage claim could be split between State Farm and its insured.

But then, once compensatory funds are obtained, the policy plainly provides that the insured must first be made whole for any remaining loss before State Farm can repay itself for its insurance payments: “*Our* right to recover *our* payments applies only after the *insured* has been fully compensated for the *bodily injury, property damage* or *loss*. CP 3 (Policy’s General Provisions, 12) (bold & italics in original, underscoring added). It is worth noting that the provision makes special identification of this being a limitation not on seeking compensatory payments from a third party, but a limitation on State Farm recouping its own insurance payments (State Farm is entitled to repayment of its insurance payments (“*our* payments”) after the insured is fully compensated).

In sum, permitting the insurer (who might have the largest interest at stake) proceed against the alleged tortfeasor for the (entire) property damage loss, even while maintaining the insured’s right to be first in line for any funds recovered (until fully compensated), seems to be the most reasonable way to reconcile not just the different interests (insured vs. insurer), but the language of the policy.

## V. CONCLUSION

Ms. Daniels suffered a loss, and secured partial compensation from her insurer. The tortfeasor (the person responsible for the loss) remitted compensatory funds to her insurer for in partial payment of Daniels’

property damage loss. Some of these funds from the tortfeasor went to Daniels, but not enough to cover her entire loss; she remained out of pocket \$150. Even so, her insurer repaid itself from the funds for some of the insurance payments it had made. In short, Daniels did not make a full recovery (much less any amount of double recovery), yet her insurer has recaptured some of its insurance payments. Such a result cannot be squared with any version of the make whole doctrine.

The only thing standing between Daniels and the routine application of the make whole doctrine in this case is the misguided opinion in *Averill*. The line in *Averill* that perhaps most evinces the erroneous nature make whole analysis is the following: “The made whole doctrine is a limitation on the recovery of the insurer...” 155 Wn. App. 114. But the doctrine is not focused on the insurer – it is focused on the insured. Specifically, it’s focused on seeing the insured fully compensated for a loss where possible. Making the outcome determined by who secures the compensatory funds from the tortfeasor is simply form over substance.

There is only one source of third party funds potentially available to compensate the insured (for the insured’s loss) and the insurer (to the extent the insurer pays for part of the insured’s loss). It should not matter who gets there first. Money is fungible: there is no reason to hold that

such funds when secured by the insured are more special than when secured by the insurer. At bottom, *Averill* provides no convincing, much less compelling reason to hold that the make whole analysis or result should be different depending on who (insured or insurer) obtains the compensatory funds from the actually responsible person.

As for the contract issue, whether the Court rejects the rule of *Averill* or not, it should nonetheless hold that the State Farm policy, properly interpreted consistent with Washington insurance law, promised that Daniels would be fully compensated for her entire property damage before State Farm was entitled to keep any third party money for itself.

Daniels asks this Court to reverse the order of dismissal, hold as a matter of law that the make whole doctrine applies in these circumstances, and that as a matter of law State Farm's conduct violated the make whole doctrine, award fees and costs to Daniels on this appeal, and remand to the trial court to proceed consistent with this Court's opinion.

December 28, 2018.

s/Matthew J. Ide, WSBA No. 26002  
Matthew J. Ide, WSBA No. 26002  
IDE LAW OFFICE  
7900 SE 28<sup>th</sup> Street, Suite 500  
Mercer Island, WA 98040  
Tel.: (206) 625-1326  
mjide@yahoo.com

David R. Hallowell, WSBA No. 13500  
LAW OFFICE OF DAVID R. HALLOWELL  
7900 SE 28<sup>th</sup> Street, Suite 500

Mercer Island, WA 98040  
Tel.: (206) 587-0344  
Dave @dhallowell.com

Attorneys for Petitioner Lazuri Daniels

#### DECLARATION OF SERVICE

I certify that on December 28, 2018, I caused to be filed with the Washington Supreme Court, via e-file, the foregoing Lazuri Daniels' Supplemental Brief, which will caused to be delivered, via email, a true and accurate copy to:

Joseph D. Hampton  
(jhampton@bpmlaw.com)  
Kathryn N. Boling  
(kboling@bpmlaw.com)  
Betts, Patterson & Mines, P.S.  
701 Pike Street, Suite 1400  
Seattle, WA 98101-3927

*Attorneys for Respondent  
State Farm Mut. Auto. Ins. Co.*

Frank Falzetta  
(FFalzetta@SheppardMullin.com)  
Jennifer Hoffman  
(JHoffman@SheppardMullin.com)  
Sheppard Mullin Richter & Hampton,  
LLP  
333 South Hope Street, 43rd Floor  
Los Angeles, CA 90071

*Attorneys for Respondent  
State Farm Mut. Auto. Ins. Co.*

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

Executed in Mercer Island, Washington, this 28th day of  
December, 2018.

s/Matthew J. Ide  
Matthew J. Ide

**IDE LAW OFFICE**

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- klangridge@bpmlaw.com

**Comments:**

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Sender Name: Matthew Ide - Email: mjide@yahoo.com  
Address:  
7900 SE 28TH ST STE 500  
MERCER ISLAND, WA, 98040-6004  
Phone: 206-625-1326

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