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SUPREME COURT OF THE STATE OF WASHINGTON

No. 75727-0-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

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

Petitioner,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

STATE FARM'S SUPPLEMENTAL BRIEF PURSUANT TO RAP 13.7(d)

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. CURRENT WAC 284-30-393 IS CONSISTENT WITH THE NAIC MODEL REGULATION AND OTHER STATES' LAWS.....	2
III. <i>AVERILL</i> CORRECTLY DISTINGUISHED <i>BORDEAUX</i>	6
IV. 10	
CONCLUSION	10

TABLE OF AUTHORITIES

<u>Cases</u>	Page(s)
<i>Averill v. Farmers Ins. Co. of Wash.</i> 155 Wn.App. 106, 229 P.3d 830, review denied, 169 Wn.2d 1017 (2010)	<i>passim</i>
<i>Bordeaux, Inc. v. Am. Safety Ins. Co.</i> 145 Wn.App. 687, 186 P.3d 1188 (2008), review denied, 165 Wn.2d 1035 (2009)	<i>passim</i>
<i>Chandler v. State Farm Mut. Auto Ins. Co.</i> 598 F.3d 1115 (9th Cir. 2010)	8, 9
<i>City of Sterling Heights Gen. Employees Ret. System v. Prudential Financial, Inc.</i> 2014 WL 2798581 (N.D. Cal. June 19, 2014)	2
<i>Harnick v. State Farm Mut. Auto Ins. Co.</i> 2009 WL 579378 (E.D. Pa. Mar. 5, 2009)	4, 5
<i>Jones v. Nationwide Prop. & Cas. Ins. Co.</i> 32 A.3d 1261 (Pa. 2011)	5
<i>Pacific Gas & Electric v. Superior Court</i> 144 Cal.App.4th 19 (2006)	7
 <u>Statutes and Other Authorities</u>	
215 ILCS § 5/143b	3
10 Cal. Code Regs. § 2695.7(q)	3
11 NYCRR § 216.7(g)	3, 4
31 Pa. Code § 146.8(c)	3
14 VAC 5-400-80 (c)	3
Ariz. Admin. Code § R20-6-801 (H) (4)	3

Ark. Admin. Code § 054.00.43-10 (d).....	3
NAIC Model Law	3
Nev. Rev. Stat. § 686A.680 (5).....	3
OAR § 836-080-0240 (10).....	3, 4
Ok. Admin. Code 365-15-3-8 (d)	3
Tenn. Comp. R. & Regs. 0780-01-05-.09 (3)	3
W. Va. Code St. R. 114-14-7.3(a).....	3
WAC 284-30-393.....	1, 2, 5
WAC 284-30-395.....	3, 4
WAC 284-30-3904.....	3
WAC 284-30-3905.....	3

I. INTRODUCTION

State Farm offers this supplemental brief to respond to several additional arguments raised by the Dissent below.

First, State Farm disagrees that *Averill*¹ provides the sole support for WAC 284-30-393's mandate that an insurer refund an insured's deductible "less applicable comparable fault." While the Washington Office of the Insurance Commissioner ("OIC") amended the regulation following *Averill*, it is not inconsistent with the model auto subrogation regulation published by the National Association of Insurance Commissioners ("NAIC"), which has been adopted in many other states. That model regulation requires an insurer to pursue the insured's deductible along with its subrogation claim, but only share its recovery with the insured on a "proportionate basis." At least one other court relied on such a regulation in dismissing a class action alleging the same theory that Daniels urges here.

Second, *Averill's* distinction of *Bordeaux*², while brief, was correct. Many facts distinguish *Bordeaux* from this case (e.g. *Bordeaux* did not involve a collision deductible or WAC 284-30-393, which controls). But, the distinction *Averill* noted—that *Bordeaux* involved an insurer seeking reimbursement from an insured's recovery rather than

¹ *Averill v. Farmers Ins. Co. of Wash.*, 155 Wn.App. 106, 229 P.3d 830, review denied, 169 Wn.2d 1017 (2010).

² *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn.App. 687, 186 P.3d 1188 (2008), review denied, 165 Wn.2d 1035 (2009).

subrogation directly from a third party tortfeasor—mattered because the insured in *Bordeaux* could not have obtained any more money from the tortfeasor. Here, in contrast, Daniels could have pursued the at-fault driver for her uncovered losses, including her remaining deductible. And contrary to the Dissent’s view, State Farm’s pursuit of Daniels’ deductible from the tortfeasor’s insurer, as mandated by WAC 284-30-393, did not prevent Daniels from suing the tortfeasor for her entire deductible under the rule against “claim splitting.” Nothing State Farm did prejudiced Daniels’ right to pursue her uninsured losses. Other courts have found such an absence of prejudice to be fatal to a claim for violation of the “made whole” rule, even if it could apply in this context.

II.

CURRENT WAC 284-30-393 IS CONSISTENT WITH THE NAIC MODEL REGULATION AND OTHER STATES’ LAWS

The Dissent below suggested that *Averill* provides the only support for current WAC 284-30-393. (Dissent, p. 27). In fact, the OIC’s amendment of WAC 284-30-393 to expressly permit deductible refunds less applicable fault not only made the regulation consistent with *Averill*, but also in line with the NAIC’s model property/casualty insurance subrogation regulation and the regulations of many other states.

The NAIC is “the U.S. standard setting and regulator support organization created and governed by the chief insurance regulators of the various states.” *City of Sterling Heights Gen. Employees Ret. System v. Prudential Financial, Inc.*, 2014 WL 2798581, *1 (N.D. Cal. June 19,

2014). The portion of the NAIC's model regulation that addresses auto subrogation and deductible refunds provides in part:

Insurers shall, upon the claimant's request, include the first party claimant's deductible, if any, in subrogation demands.

Subrogation recoveries shall be shared on a proportionate basis with the first party claimant, unless the deductible amount has been otherwise recovered.

NAIC Model Law, Regs. & Guidelines, Vol. 6, Unfair Property/Casualty Claims Settlement Practices Model Regulation, NAIC 902-1, Section 8, Standards for Prompt, Fair and Equitable Settlements Applicable to Automobile Insurance, Subsection (D) (emphasis added).³

Many states have adopted this model provision verbatim or in substantially similar form. 10 Cal. Code Regs. § 2695.7(q) (California); 31 Pa. Code § 146.8(c) (Pennsylvania); 11 NYCRR § 216.7(g) (New York); 215 ILCS § 5/143b (Illinois); Ok. Admin. Code 365-15-3-8 (d) (Oklahoma); 14 VAC 5-400-80 (c) (Virginia); Tenn. Comp. R. & Regs. 0780-01-05-.09 (3) (Tennessee); Ark. Admin. Code § 054.00.43-10 (d) (Arkansas); IAC § 191-15.43 (4) (Iowa); W. Va. Code St. R. 114-14-7.3(a) (West Virginia); Ariz. Admin. Code § R20-6-801 (H) (4) (Arizona); 806 Ky. Regs. 12:095 (d) (5) (Kentucky); UAC § R590-190 (5) (Utah); Nev. Rev. Stat. § 686A.680 (5) (Nevada); OAR § 836-080-0240 (10)

(Oregon); 20 Mo. Code St. Regs. 100-1.050 (2)(C) (Missouri); OAC § 3901-1-54 (H) (10) (Ohio).

Similar to Washington,⁴ these states all require insurers to include an insured's collision deductible in their subrogation demands to a third party tortfeasor, either as a matter of course or upon the insured's request, and to refund the insured's deductible from any recovery they receive on a proportionate basis. *Id.* Thus, these regulations clearly contemplate that an insured could receive *less than* his or her entire collision deductible from the insurer's recovery efforts, despite the common law "made whole" rule.⁵ *Id.*

³ A complete copy of the NAIC's Unfair Property/Casualty Claims Settlement Practices Model Regulation may be found online at <https://www.naic.org/store/free/MDL-902.pdf?66>

⁴ Washington's prior subrogation regulations (former WAC 284-30-3904 and WAC 284-30-3905) required an insurer to pursue the insured's deductible along with its own subrogation claim upon the insured's request, and provided for refunding the deductible from any recovery on "a proportionate basis." *See Averill*, 155 Wn.App. 106 at 116, fn. 6 and 7. In 2009, the OIC repealed those regulations and replaced them with a prior version of WAC 284-30-395, which mandated that the insurer pursue the insured's deductible without any request, and required any recovery to be "allocated first to the insured for any deductible incurred in the loss." *Id.* at 116-117. After *Averill*, the OIC amended WAC 284-30-393 to its current form, which only requires an insurer to allocate any recovery from the tortfeasor to the insured's deductible "less applicable comparable fault."

⁵ New York's regulation includes an illustration demonstrating this point. 11 NYCRR § 216.7(g).

A District Court in Pennsylvania relied on that state’s version of the regulation in dismissing a class action against State Farm alleging the same theory that Daniels argues here: that State Farm’s practice of “repaying a prorated deductible amount of their insureds’ deductibles after recovering amounts in excess of those deductibles ... violates [insureds’] rights to be ‘made whole’ by their insurer.” *Harnick v. State Farm Mut. Auto Ins. Co.*, 2009 WL 579378 (E.D. Pa. Mar. 5, 2009). *Harnick* reasoned that liability could not exist under the common law “made whole” rule where the insurer’s conduct complied with the regulation:

The behavior complained of by the plaintiffs, which is specifically permitted by Pennsylvania’s insurance regulations, cannot violate the common law “made whole” doctrine even assuming that the doctrine would in fact support a claim like that of these plaintiffs.

Harnick, 2009 WL 579378, *3.

After *Harnick*, the Pennsylvania Supreme Court held, consistent with *Averill* and the urging of Pennsylvania’s insurance commissioner, that the “made whole” rule—while generally applicable in Pennsylvania—does *not* apply in the collision deductible subrogation context. *Jones v. Nationwide Prop. & Cas. Ins. Co.*, 32 A.3d 1261, 1269 (Pa. 2011).

The same is true here. Daniels complains of conduct by State Farm that the current version of WAC 284-30-393 (applicable to Daniels’ claim) *expressly permits*. State Farm thus cannot be held liable for

purportedly violating a common law rule that the regulator has declared inapplicable to the subrogation and deductible refund context.

III.
AVERILL CORRECTLY DISTINGUISHED BORDEAUX

The Dissent also argues that “[i]n excluding deductibles from the made whole doctrine, *Averill* is inconsistent with [Division One’s] decision in *Bordeaux*.” (Dissent, p. 10). That statement misconstrues *Averill*. *Averill* did not exclude deductibles from the “made whole” doctrine generally. Instead, it found the “made whole” doctrine inapplicable to deductible refunds in the traditional subrogation context. *Averill* reached that conclusion after distinguishing *Bordeaux* as involving the *reimbursement* context. *Averill*, 155 Wn.App. at 113 (noting that *Bordeaux* involved an insurer seeking “reimbursement out of third party funds recovered by the insured”).

That distinction matters because, in *Bordeaux*’s reimbursement context, the insured had already sued and obtained a recovery from the tortfeasor when the insurer asserted its reimbursement right. At that point, the only funds available to satisfy both of their claims were the settlement proceeds from the insured’s lawsuit against the tortfeasor. Because neither the insured nor the insurer could recover any more from the tortfeasor, enforcing the insurer’s reimbursement claim would have necessarily reduced the insured’s recovery of its self-insured retention amounts.

Here, in contrast, neither Daniels nor State Farm filed suit against the at-fault driver. Instead, State Farm made a demand to the at-fault driver's insurer to pay its subrogation claim and Daniels' deductible. The insurer initially agreed to pay only 70% of the demand, and the companies submitted their remaining dispute to arbitration. Neither Daniels nor the other driver participated in or was bound by the results of that arbitration. Thus, contrary to the Dissent's view, Daniels always had the right to independently pursue the tortfeasor for any uninsured and unrecovered losses – including any unreimbursed portion of her deductible – without violating the rule against “claim splitting.”⁶ (Dissent, p. 8-9). That, of course, became unnecessary because State Farm ultimately recovered the remaining 30% of Daniels' deductible and refunded it to her. (Clerk's Papers (“CP”), p. 65).

Averill is also not alone in distinguishing reimbursement cases (like *Bordeaux*) from cases involving traditional subrogation. *Winkelman v. Excelsior Ins. Co.*, raised by the Dissent, made the same distinction in holding that the “made whole” rule did not bar an insurer from exercising

⁶ As *Averill* correctly observed, an insurer's subrogation right extends only to its indemnity payments made under the insurance contract; the *insured* retains all rights to pursue his or her deductible and any other uncovered losses. *Averill*, 155 Wn.App at 114. *Accord, Pacific Gas & Electric v. Superior Court*, 144 Cal.App.4th 19 (2006)(“PG&E”) (“It is well settled that, pursuant to principles of equitable subrogation, an insured retains a right to sue for uncompensated loss.”). Moreover, a regulation obligating an insurer to include a deductible with its own subrogation demand does not confer standing on an insurer to sue for an insured's deductible. *PG&E*, 144 Cal.App.4th at 25-26.

its subrogation right upon payment of the loss. 85 N.Y. 2d 577, 583, 650 N.E.2d 841 (1995).

In *Winkelman*, the subrogated insurer and its insureds joined in a recovery action against the tortfeasor. The tortfeasor separately offered to settle the insurer's subrogation claim and the insureds' tort claim. The insurer accepted the offer, but the insureds rejected it and filed suit against the tortfeasor. In their subsequent suit against the insurer for violation of the "made whole" rule, the insureds argued that the insurer's settlement diminished their bargaining power with the tortfeasor and thereby prejudiced their ability to recover their uninsured losses. *Id.* at 580.

The *Winkelman* court found the insured's suit premature because the insured "may yet recover the balance of their losses" against the tortfeasor. *Id.* The court observed that an insurer's pursuit of partial subrogation "will not necessarily interfere with the insured's right to be made whole by the tortfeasor and ... the insurer need not delay its subrogation claim against the third party to avoid impairing the insured's rights." *Id.* at 583. There "will be time enough to determine [the insureds'] rights vis-à-vis [their insurer's] when and if it is determined that the third-party tortfeasor is unable to pay the remainder of their loss." *Id.* at 584.

Chandler v. State Farm Mut. Auto Ins. Co., 598 F.3d 1115 (9th Cir. 2010), another case cited by the Dissent, also found the absence of prejudice fatal to a claim for violation of the "made whole" rule in this context.

In *Chandler*, the insured (Chandler) incurred car rental expenses while his vehicle was being repaired following an accident. Pursuant to his auto policy, State Farm paid 80% of those rental costs, or about \$300, and Chandler incurred the remaining 20%, or \$63.49. *Id.* at 1117. State Farm then made a subrogation demand for its indemnity payment and settled with the other driver's insurer for \$70. *Id.* When Chandler later asked the other driver's insurer to pay the uninsured portion of the rental expense he incurred, the other insurer refused. Chandler then sued State Farm, alleging that its settlement violated the "made whole" rule.

The Ninth Circuit rejected the theory, reasoning that the rationale behind the "made-whole" rule "is inapposite where, as here, the insured has not yet sought to recover from the third-party tortfeasor and the insurer seeks subrogation directly from the tortfeasor's insurer, because under such circumstances, there is no indication that the insured will not be made whole if he sues the third-party tortfeasor." *Id.* at 1120. Moreover, imposing "an obligation on an insurer to pay the insured out of proceeds obtained...for its out-of-pocket costs in paying the policyholder's claim would confer greater rights on the policyholder than provided in the policy and eliminate any incentive on the part of the policyholder to seek reimbursement from the tortfeasor. The policyholder's carrier would end up short changed, and the tortfeasor would be off the hook even though the tortfeasor caused the damage in the first place." *Id.* at 1116.

The Ninth Circuit went on to find that Chandler lacked standing to proceed with his claim against State Farm because "he has not alleged,

and indeed cannot allege at this juncture, sufficient facts to establish that his injury is fairly traceable to [State Farm's] conduct. ... Unless and until [Chandler] sues the third-party tortfeasor and is unable to recover the amount he claims he is owed, [Chandler] cannot claim that [State Farm] has prevented him from recovering that amount." *Id.* at 1123.

As in *Chandler* and *Winkelman*, Daniels cannot claim that State Farm's pursuit of its subrogation claim prevented her from recovering her full deductible. Daniels always retained the right to pursue recovery of her deductible from the tortfeasor. She just never had to do so, because State Farm ultimately refunded her entire deductible after successfully pursuing its subrogation demand to completion. (CP, p. 65).

IV.

CONCLUSION

For all of the foregoing reasons, and those briefed in State Farm's Respondent's Brief and Response to Petition For Review, State Farm respectfully requests that the Court affirm the Court of Appeal's ruling below.

RESPECTFULLY SUBMITTED this 28th day of December, 2018.

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