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No. 62767-8 I

COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON  
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PEARL C. AVERILL, on behalf of herself  
and all others similarly situated,

Respondent,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Petitioner.

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**PEARL C. AVERILL'S BRIEF OF RESPONDENT**

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**ORIGINAL**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
I. INTRODUCTION.....	1
II. COUNTERSTATEMENT OF THE ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR.....	5
III. COUNTERSTATEMENT OF THE CASE.....	6
A. Procedural history .....	6
B. Facts .....	7
IV. ARGUMENT .....	9
A. Standard of Review .....	9
1. Standard Of Review For the Order Denying Farmers' Motion to Dismiss the Breach of Contract Claim Under CR 12(b)(6) .....	9
2. Standard Of Review For the Order Granting Plaintiff Partial Summary Judgment On the Breach of Contract Claim .....	10
B. As a Matter of Washington Law, the Made Whole Doctrine Applies to Collision Deductibles .....	11
1. The Made Whole Doctrine Is a Longstanding Basic, Tenet of Washington Insurance Law .....	11
2. In the Made Whole Analysis, the Amount of the Insured's Loss Is Her Total Loss, Without Reduction for Attributed Fault .....	14
3. Retained Risks of Loss, Such As Deductibles, Are Not Excluded From the Made Whole Doctrine .....	18

4.	Farmers’ Distinguishable & Otherwise Inapt Authorities .....	20
5.	Incorrect & Outdated Insurance Regulations Cannot Trump Established Law & Public Policy .....	27
C.	Farmers’ Policy Language Makes the Made Whole Doctrine Applicable to the Collision Deductible .....	30
1.	Interpretation of Insurance Policy Is A Question of Law; To Be Construed As Average Insured Would .....	30
2.	The Insurance Policy Language Expressly Adopted the Make Whole Doctrine .....	31
D.	Request For Attorneys Fees .....	32
V.	CONCLUSION.....	33

## TABLE OF AUTHORITIES

### Washington Cases

<i>American Nat'l Fire Ins. Co. v. B&amp;L Trucking &amp; Constr. Co.</i> , 134 Wn.2d 413, 951 P.2d 250 (1998) .....	31
<i>Barney v. Safeco Ins. Co.</i> , 73 Wn. App. 426, 869 P.2d 1093 (1994) .....	16, 31
<i>Bordeaux v. American Safety Ins. Co.</i> , 145 Wn. App. 687, 186 P.3d 1188 (2008) .....	passim
<i>Bravo v. Dolsen Cos.</i> , 125 Wn.2d 745, 888 P.2d 147 (1995) .....	9
<i>Brown v. Snohomish Cty. Phys. Corp.</i> , 120 Wn.2d 747, 845 P.2d 334 (1993) .....	13, 29
<i>Butzberger v. Foster</i> , 151 Wn.2d 396, 89 P.3d 689 (2004) .....	30
<i>Chen v. State Farm Mut. Auto. Ins. Co.</i> , 123 Wn. App. 150, 94 P.3d 326 (2004) .....	21
<i>Denaxas v. Sandstone Court of Bellevue, L.L.C.</i> , 148 Wn.2d 654, 63 P.3d 125 (2003) .....	11
<i>Elovich v. Nationwide Ins. Co.</i> , 104 Wn.2d 543, 707 P.2d 1319 (1985) .....	13
<i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998) .....	11
<i>Halvorson v. Dahl</i> , 89 Wn.2d 673, 574 P.2d 1190 (1978) .....	10
<i>Hamm v. State Farm Mut. Auto. Ins. Co.</i> , 151 Wn.2d 303, 88 P.3d 395 (2004) .....	13, 16, 17, 30

<i>Hoffer v. State</i> , 110 Wn.2d 415, 755 P.2d 781 (1988) .....	10
<i>Jones v. Firemen’s Relief Bd.</i> , 48 Wn. App. 262, 738 P.2d 1068 (1987) .....	14
<i>Keenan v. Industrial Indem. Ins. Co.</i> , 108 Wn.2d 314, 738 P.2d 270 (1987) .....	34
<i>Kinney v. Cook</i> , 159 Wn.2d 837, 154 P.3d 206 (2007) .....	10
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998) .....	13, 16, 17
<i>Meas v. State Farm Fire &amp; Cas. Co.</i> , 130 Wn. App. 527, 13 P.2d 519 (2005) .....	21
<i>Mercer Place Condo. v. State Farm</i> , 104 Wn. App. 597, 17 P.3d 626 (2000) .....	30
<i>Olympic Steamship Co. v. Centennial Ins. Co.</i> , 117 Wn.2d 37, 811 P.2d 673 (1991) .....	33
<i>Oregon Auto. Ins. Co. v. Salzberg</i> , 85 Wn.2d 372, 535 P.2d 816 (1975) .....	31
<i>Orwick v. Seattle</i> , 103 Wn.2d 249, 692 P.2d 793 (1984) .....	10
<i>Osborn v. Mason Cty.</i> , 157 Wn.2d 18, 134 P.3d 197 (2006) .....	10, 11
<i>Panorama Vill. Condo. Owners Ass’n v. Allstate Ins. Co.</i> , 144 Wn.2d 130, 26 P.3d 910 (2001) .....	30
<i>Pederson’s Fryer Farms, Inc. v. Transamerica Ins. Co.</i> , 83 Wn. App. 432, 922 P.2d 126 (1996) .....	13
<i>Polygon NW. v. American Nat’l Fire Ins. Co.</i> , 143 Wn. App. 753, 189 P.3d 777 (2008) .....	13

<i>Post v. City of Tacoma</i> , 140 Wn. App. 155, 165 P.3d 37 (2007) .....	11
<i>Puget Sound Energy v. ALBA Gen. Ins.</i> , 149 Wn.2d 135, 68 P.3d 1061 (2003) .....	13
<i>Roller v. Stonewall Ins. Co.</i> , 115 Wn.2d 679, 801 P.2d 207 (1990) .....	30, 31
<i>Safeco Ins. Co. v. Woodley</i> , 150 Wn.2d 765, 82 P.3d 660 (2004) .....	16, 17, 33
<i>San Juan Cty. v. No New Gas Tax</i> , 160 Wn.2d 141, 157 P.3d 831 (2007) .....	9, 10
<i>Sherry v. Financial Indem. Co.</i> , 160 Wn.2d 611, 160 P.3d 31 (2007) .....	passim
<i>Stamp v. Dep't of Labor &amp; Indus.</i> , 122 Wn.2d 536, 859 P.2d 597 (1993) .....	19, 20
<i>Tenore v. AT&amp;T Wireless Servs.</i> , 136 Wn.2d 322, 962 P.2d 104 (1998) .....	9, 10
<i>Thiringer v. American Motors Ins. Co.</i> , 91 Wn.2d 215, 588 P.2d 191 (1978) .....	passim
<i>Weyerhaeuser Co. v. Commercial Union Ins. Co.</i> , 142 Wn.2d 654, 15 P.3d 115 (2000) .....	11, 13
<i>Winters v. State Farm Mut. Auto. Ins. Co.</i> , 144 Wn.2d 869, 31 P.3d 1164 (2001) .....	13, 16, 17
<i>Woo v. Fireman's Fund Ins.</i> , 161 Wn.2d 43, 164 P.3d 454 (2007) .....	11, 30

**Other Cases**

*Birch v. Fire Ins. Exchange*,  
122 P.3d 696 (Utah 2005) ..... 22-24, 26

*Ex Parte State Farm Fire & Cas. Co.*,  
764 So.2d 543 (Ala. 2000) ..... 25

*Monte de Oca v. State Farm Fire & Cas.*,  
897 So.2d 471 (Fla. App. 3 Dist. 2004) ..... 23-24

*National Continental Ins. Co. v. Perez*,  
897 So.2d 492 (Fla. App. 3 Dist. 2005) ..... 24

*Schonau v. GEICO Gen. Ins. Co.*,  
903 So.2d 285 (Fla. App. 4 Dist. 2005) ..... 24

**Acts, Statutes & Regulations**

WAC § 284-30-390 ..... 32

WAC § 284-30-3901 to -3915 ..... 32

WAC § 284-30-3905 ..... 26-27, 29-30,32

**Rules**

CR 12(b)(6) ..... 6

CR 56 ..... 6, 11

RAP 18.1 ..... 32

**Other**

2 Allan D. Windt, Insurance Claims & Disputes,  
§ 10.6 (5<sup>th</sup> ed.) ..... 25-26

OIC’s Comments to Proposed Rules,  
Wash. St. Reg. 03-03-132 (Jan. 22, 2003) ..... 32

OIC Fact Sheet, Subrogation and Your Rights (Jan. 2007) ..... 28

Pearl C. Averill, as an individual and the proposed class action representative, is the Plaintiff below and the Respondent herein. She hereby submits her Brief of Respondent in response to the Appellant's Opening Brief submitted by the defendant below, Farmers Insurance Company of Washington ("Farmers").

## **I. INTRODUCTION**

It is important to recognize what this case is not about. This case does not concern whether Farmers could in the first place seek to recover funds from a third party tortfeasor. The case also does not concern whether Farmers paid the correct sum to Averill under the policy's collision coverage. Similarly, the case does not involve any claim by Averill for further insurance payments by Farmers under that coverage, or any other insurance coverage for that matter, or any attempt by Averill to obtain a better insurance policy than she purchased. None of these questions are the issue. In addition, it is also important to recognize that the funds at the center of the case are not funds from Farmers; the funds represent money from the tortfeasor in payment of Averill's property damage loss. The mere fact that Farmers initially obtained the money is meaningless.

What this case does concern is the question of who is entitled to those funds: the funds obtained from the tortfeasor in payment of

Averill's property damage loss. More specifically, it is about who has priority, or who is first in line for such funds when there is not enough to make whole both the insured and the insurer.

The answer to the question is found in the "made whole" doctrine that has long been recognized and applied in Washington. It provides that an insured is entitled to be fully compensated for her loss before an insurer is entitled to recoup any insurance payments made for that loss. The doctrine reflects the public policy in Washington of favoring the full compensation of the victims of accidents over reimbursing insurers. It also reflects the very nature of the insurance relationship: the insurer agrees, for a price, to accept the risk that there is no responsible third party that can make both insured and insurer whole.

Although this appeal turns on the single question of the application of the made whole doctrine, there are actually two, alternative bases for sustaining the trial court's ruling on that question. The first is that the made whole doctrine applies to insurance deductibles as a matter of Washington law. The second, alternative basis is that, regardless of the requirements of Washington law, Farmers expressly incorporated the made whole doctrine into its insurance policy and made it applicable to the collision coverage. On either basis, the trial court's ruling on the issue should be sustained.

Farmers asks the Court to create a previously unknown exception to the established made whole doctrine, and makes several misguided assertions and arguments in its brief to that end. For example, Farmers asserts that “every published case” that has addressed the issue has held that the made whole doctrine does not apply in the context of deductibles. Farmers Br. at 1. As was shown in the trial court, however, Farmers so-called “authorities” are distinguishable at best, and in at least one instance, wholly irreconcilable with established, controlling Washington authority. Farmers also makes reference to insurance treatises, but they are likewise unhelpful: either providing no support for their broad declarations, or merely citing the same inapplicable or irreconcilable cases as Farmers.

Farmers also contends that Washington case law has only addressed the made whole doctrine in the context of insured and underinsured losses, not deductible-type retained risks. Farmers Br. at 1-2. The contention is patently incorrect. Just last year this Court addressed the issue in the context of a deductible equivalent, self-insured retentions, in the *Bordeaux*<sup>1</sup> case, and held that the made whole doctrine applied.

Farmers also asserts that the made whole doctrine only comes into play if the insured and insurer compete for limited funds. Farmers Br. at

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<sup>1</sup> *Bordeaux v. American Safety Ins. Co.*, 145 Wn. App. 687, 186 P.3d 1188 (2008).

2. This argument actually undermines Farmers' position. Although Farmers tries to make available "funds" to mean all funds potentially available from the tortfeasor, Farmers fails to recognize that where there is comparative fault, the truly recoverable funds will be reduced to reflect the allocation of fault, and the actual pool of third party funds will plainly not be sufficient to cover 100% of the claimant's loss. As Farmers itself admits, when the funds are not sufficient, the insured "eats first."

Farmers also tries to rely on an outdated insurance regulation. There are multiple problems with this argument as well, such as that the regulation only provides for a purported "minimum" standard, and the language in Farmers' policy goes well beyond it. More importantly, the regulation is inconsistent with the made whole doctrine as expressed by numerous Washington courts, in particular with the *Sherry*<sup>2</sup> and *Bordeaux* cases.

Finally, Farmers attempts to portray this case as Averill seeking more insurance than she purchased. This portrayal, however, does not survive scrutiny. First, it mischaracterizes the source of the money at issue: it is not money from Farmers, it is money from the tortfeasor. Second, the money does not represent additional collision insurance

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<sup>2</sup> *Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 160 P.3d 31 (2007).

payments, it represents the payment of property loss damages by the tortfeasor. Despite Farmers attempted mischaracterization, the fact is that Farmers is not being asked to give one more dime of collision coverage. The only money Farmers was asked to pay was Averill's property damage loss to the extent it exceeded \$500. That Farmers initially secured and maintains possession of the money from the tortfeasor does not alter these facts, nor does it say anything about who is lawfully entitled to that money.

In sum, this case presents a straightforward application of the well-established made whole doctrine to an insured who has plainly not been made whole for her loss, and her insurer who has nonetheless recouped its insurance payments.

## **II. COUNTERSTATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

**A.** Is there a previously unknown exception to the "made whole" doctrine that permits an insurer to avoid complying with it in the context of collision deductibles?

**B.** Regardless of whether the "made whole" doctrine applies to collision deductibles as a matter of Washington law, does the language of Averill's insurance policy make the "made whole" doctrine applicable to collision deductibles?

### III. COUNTERSTATEMENT OF THE CASE

#### A. Procedural History

Averill's original complaint asserted claims against Farmers for CPA violations, bad faith, negligence, breach of contract and unjust enrichment. CP 3-12. The parties filed and argued cross-motions: Farmers in support of dismissal of the complaint under CR 12(b)(6), and Averill in support of partial summary judgment under CR 56. Farmers states that the motions focused on "whether Farmers was required to compensate Averill for the balance of the deductible ... as a condition of exercising its subrogation rights against" the tortfeasor's insurer, Farmers Br. at 7, but this misstates the question and the money at issue. As identified by the trial court, the "central issue involve[d] the proper interpretation and application of the made whole doctrine...." CP 243. More specifically, the question was the same as it is here: whether Averill is entitled to be made whole before Farmers can recoup its payments from money paid by the tortfeasor for Averill's property damage loss.

After a series of hearings and additional briefing, the Court entered an order dated December 3, 2008, in which the trial court for the most part denied without prejudice Farmers' motion to dismiss the complaint,<sup>3</sup> and

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<sup>3</sup> The trial court granted Farmers' motion to dismiss, without prejudice, Averill's unjust enrichment claim.

for the most part denied Averill's motions for partial summary judgment, likewise without prejudice. CP 238-40. Applying the made whole doctrine to the case, and because Farmers retained proceeds obtained from the tortfeasor for Averill's property damage loss before Averill was made whole, the trial court granted summary judgment in favor of Averill on her breach of contract claim. CP 239-40. Farmers sought discretionary review as a result of that ruling. CP 258.

By order dated December 11, 2008, the trial court granted plaintiff leave to file her amended complaint, CP 246-47, which she did on December 12, 2008. The primary difference between the original and the First Amended Complaint is that the latter adds a claim for conversion and omits the unjust enrichment claim. CP 248-57. In her First Amended Complaint, Averill seeks, *inter alia*, damages and injunctive relief on behalf of herself and all other similarly situated. In accordance with the agreement of the parties, the motion for a class determination has not yet been filed.

## **B. Facts**

On February 27, 2007, Averill's 2007 Honda Accord was involved in a motor vehicle accident. The Accord, being operated at the time by Averill's daughter, sustained heavy damage. At the time of the accident, the Accord was insured by a motor vehicle liability insurance policy

issued to Averill by Farmers. The other vehicle involved in the accident was insured under a policy issued by State Farm. CP 4, 14.

Because of the heavy damage, Farmers determined that it would treat the Accord as a total loss, and calculated Averill's property damage loss to be \$16,254.10. Because the policy included a collision deductible of \$500.00, Farmers only paid Averill \$15,754.10, leaving her out of pocket for the rest of her property damage loss (*i.e.*, \$500). CP 4-5, 14.

Thereafter, Farmers submitted a claim in arbitration against State Farm in the amount of \$15,611.65 (\$15,111.65 Farmers claimed, plus \$500.00 for the amount of Averill's still-uncompensated loss). The arbitration determined that the driver of Averill's vehicle and the State Farm insured were each 50% at fault for the accident, and thus awarded a total of \$7,805.83 (1/2 of the total \$15,611.65 requested). State Farm thereafter made payment by two checks: one in the amount of \$250 to Averill,<sup>4</sup> and the other to Farmers for \$7,555.83. CP 4-5, 14.

Averill still had an uncompensated loss of \$250. CP 14. Even so, Farmers kept all the money it obtained from the tortfeasor representing payment of the property damage loss. CP 14; Farmers Br. at 6.

Separate from any requirement of Washington law, Farmers

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<sup>4</sup> The check was made payable to Fusae Arnold, Ms. Averill's mother, who is on the vehicle's title as a lien holder.

insurance policy includes the following under the section addressing Farmers' "Right to Recover Payment:"<sup>5</sup>

When a person has been paid damages by us under this policy and also recovers from another, we shall be reimbursed to the extent of our payment after that person has been fully compensated for his or her loss. Except as limited above, we are entitled to all rights of recovery of the person to whom payment was made against another. [Emphasis added.]

Ms. Averill has obviously not been fully compensated for her property damage loss, in that she remains out of pocket \$250. CP 14.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

##### **1. Standard Of Review For the Order Denying Farmers' Motion to Dismiss the Breach of Contract Claim Under CR 12(b)(6)**

The appropriateness of a dismissal under CR 12(b)(6) is reviewed *de novo*. *San Juan Cty. v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007); *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998). Dismissal is not appropriate unless it appears beyond doubt that the plaintiff cannot prove any set of facts, consistent with the complaint, that would justify recovery. *San Juan Cty.*, 160 Wn.2d at 164 (citing *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d

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<sup>5</sup> CP 35 (Farmers policy, at 12, No. 5).

147 (1995)); *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (citing *Tenore*, 136 Wn.2d at 330).

Motions to dismiss should be granted “sparingly and with care,” and only in the unusual case in which the plaintiff’s allegations show on the face of the complaint an insuperable bar to relief. *San Juan Cty.*, 160 Wn.2d at 164 (citing *Tenore*, 136 Wn.2d at 330; *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)). When considering the motion, the court presumes that all facts alleged in the complaint are true, and may also consider hypothetical facts supporting the plaintiff’s claims. *Kinney*, 159 Wn.2d at 842 (citing *Tenore*, 136 Wn.2d at 330). Indeed, “any hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff’s claim.” *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978) (emphasis added). Moreover, a motion to dismiss “must be tested in light of CR 8(a)(1) which only requires ‘a short and plain statement of the claim.’” *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984) (emphasis added).

## **2. Standard Of Review For the Order Granting Plaintiff Partial Summary Judgment On the Breach of Contract Claim**

“A motion for summary judgment presents a question of law reviewed *de novo*.” *Osborn v. Mason Cty.*, 157 Wn.2d 18, 22, 134 P.3d

197 (2006) (citing *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 662, 63 P.3d 125 (2003)). Thus, the reviewing court engages in the same inquiry as the trial court. *Woo v. Fireman's Fund Ins.*, 161 Wn.2d 43, 54, 164 P.3d 454 (2007) (citing *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 692 n.17, 15 P.3d 115 (2000)). For purposes of the summary judgment analysis, the reviewing court will “construe the evidence in the light most favorable to the nonmoving party, *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998), and grant summary judgment if ‘there is no genuine issue as to any material fact’ and ‘the moving party is entitled to a judgment as a matter of law.’” *Osborn*, 157 Wn.2d at 22 (quoting CR 56(c)). *See also Post v. City of Tacoma*, 140 Wn. App. 155, 161, 165 P.3d 37 (2007) (“Summary judgment is rendered where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.”) (citing CR 56(c)).

**B. As a Matter of Washington Law, the Made Whole Doctrine Applies to Collision Deductibles**

**1. The Made Whole Doctrine Is a Longstanding Basic, Tenet of Washington Insurance Law**

The made whole doctrine has long been recognized as a basic tenet of Washington insurance law. More than 30 years ago, the Supreme Court

decided *Thiringer*,<sup>6</sup> a case in many ways analogous to this one. In *Thiringer*, the Court was asked to determine who had priority, as between an insurer and its insured, for the proceeds of a settlement for the insured's bodily injury claim. *Id.* at 216. The insured had effected a recovery from the tortfeasor. Since the amount recovered was insufficient to fully compensate him for his loss, however, the insured sought payment from his insurer under his PIP coverage.<sup>7</sup> *Id.* at 217. Suit was filed after the insurer refused. *Id.* The Court stated the issue, and the insurer's argument, as follows:

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.

Citing case law and treatises going back to 1933, the Court started by acknowledging the longstanding general rule:

The general rule is that, while an insurer is entitled to be reimbursed to the extent that its insured recovers payment for the same loss from a tort-feasor responsible for the damage, it can recover only the excess which the insured

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<sup>6</sup> *Thiringer v. American Motors Ins.*, 91 Wn.2d 215, 588 P.2d 191 (1978)

<sup>7</sup> The insurer had previously refused (wrongfully) to pay under PIP because the tortfeasor had insurance, and the insurer took the position that its insured had to first proceed against the tortfeasor. *See id.* at 216-17.

has received from the wrongdoer, remaining after the insured is fully compensated for his loss.

*Id.* at 219-20 (emphasis added; citations omitted). Finding nothing in the case to warrant a departure from the rule, the Court upheld the trial court's ruling that the proceeds of the settlement should first be applied to the insured's loss until made whole, and then any excess to the insurer's PIP obligation.<sup>8</sup> See *id.* at 217-18.

This general rule – that an insured's right to be fully compensated takes priority over the insurer's right to seek to recoup its insurance payments – continues to be an unquestionable bedrock of Washington insurance law.<sup>9</sup> This includes recent reaffirmation by the Supreme Court

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<sup>8</sup> It is 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); *Weyerhaeuser v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 673-74, 15 P.3d 115 (2000); *Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn. App. 432, 451-52, 922 P.2d 126 (1996); *Brown v. Snohomish Cty. Phys. Corp.*, 120 Wn.2d 747, 758-59, 845 P.2d 334 (1993).

<sup>9</sup> See also *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); *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

in its *Sherry* decision, discussed in more detail below. *See Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 625, 160 P.3d 31 (2007) (“We hold that an insurer is entitled to [seek recovery of its payments] only when its insureds are fully compensated...”)(emphasis added).

**2. In the Made Whole Analysis, the Amount of the Insured’s Loss Is Her Total Loss, Without Reduction for Attributed Fault**

Although Farmers tries to avoid acknowledging the fact, it is clear that Averill was reimbursed for her collision deductible in proportion to the alleged fault of her vehicle’s driver in the accident. The only way such a pro-rata recovery could constitute full compensation, however, is if Averill’s “loss” can be reduced to reflect such attributed fault. *Sherry* forecloses any such possibility.

Sherry, the insured, received PIP insurance benefits from his motor vehicle insurer, FIC, for a loss Sherry sustained when he was struck by a car. Sherry also made a claim under his FIC policy’s UIM coverage.<sup>10</sup> Because Sherry and FIC could not agree on the amount of UIM benefits to which Sherry was entitled, they took the dispute to arbitration. 160 Wn.2d

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‘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).

<sup>10</sup> Essentially a claim against the tortfeasor, into whose shoes FIC stepped for such purposes.

at 615. The arbitrator determined the total amount of Sherry's loss, but reduced the amount actually awarded by 70% because he determined that Sherry was 70% at fault. *Id.*

Sherry thereafter sought to confirm the arbitration award. FIC, however, sought to have the amount further reduced by requesting an offset to reflect FIC's purported right to recover from Sherry the PIP payments it had made for him. *Id.* FIC asserted it possessed this right to repayment because Sherry had recovered everything he was "legally entitled" to recover from the tortfeasor, and thus he received "full compensation." *See id.* at 619-20. The trial court granted FIC the amount of the requested offset (less its share of attorney's fees). *Id.* at 616.

On appeal, the Court of Appeals stated that an insurer is only entitled to recovery of its payments if its insured is first fully compensated for his entire, actual loss, not just that portion of the loss an insured might recover from a tortfeasor. *See id.* Because Sherry had plainly not been fully compensated for his loss (since the UIM award was reduced to reflect Sherry's share of fault), the Court of Appeals held that FIC was not entitled to recover its payments through the requested offset, and reversed the trial court. *See id.*

In a thorough opinion, the Supreme Court agreed with the Court of Appeals. The Court started acknowledging the basic tenet that, although

an insured is not entitled to a double recovery, an insured is entitled to be fully compensated for the loss before the insurer is entitled to any recovery of its payments, whether that recovery be by offset, reimbursement or subrogation:

It is well established in Washington that insureds are not entitled to double recovery, and thus after an insured is “fully compensated for his loss,” an insurer may seek an offset, subrogation, or reimbursement for PIP benefits already paid. *Thiringer v. Am. Motors Ins. Co.*, 91 Wn.2d 215, 219, 588 P.2d 191 (1978); *see also Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 309, 88 P.3d 395 (2004); *Safeco Ins. Co. v. Woodley*, 150 Wn.2d 765, 770, 82 P.3d 660 (2004); *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”); *Mahler v. Szucs*, 135 Wn.2d 398, 407, 957 P.2d 632 (1998).

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

The Court set out the “two step” approach to determine whether an insurer might be entitled to a recovery of its insurance payments:

An insurer is entitled to an offset, setoff, or reimbursement when both: (1) the contract itself authorizes it and (2) the insured is fully compensated by the relevant “applicable measure of damages.” *Barney [v. Safeco Ins. Co. of Am.]*, 73 Wn. App. [426,] 429-31[, 869 P.2d 1093 (1994)].

160 Wn.2d at 619 (emphasis added). Finding the first step satisfied, the Court proceeded to the second, dispositive step – the full compensation issue.

On this issue, Sherry argued that “full” compensation meant simply that: the insured makes a complete recovery of the full, actual losses suffered, in accordance with the rule long ago laid out in *Thiringer*. *Id.* Conversely, FIC argued that “full compensation” meant something less – only the amount of damages that the insured could recover from a tortfeasor, taking into consideration reductions for the insured’s share of fault. *See id.* The Court rejected FIC’s argument:

This court has never limited full recovery to the amount recoverable under UIM coverage [*i.e.*, from a tortfeasor]. Rather, our opinions suggest insureds are not fully compensated until they have recovered all of their damages as a result of a motor vehicle accident. *See, e.g., Thiringer*, 91 Wn.2d at 219; *see also Hamm*, 151 Wn.2d at 309; *Woodley*, 150 Wn.2d at 770; *Winters*, 144 Wn.2d at 876; *Mahler*, 135 Wn.2d at 407. Double recovery, a prerequisite for the insurer’s offset rights, cannot occur unless an insured has first been fully compensated for the loss.

*Id.* at 621-22 (emphasis added). Moreover:

Adopting the approach urged by FIC would result in a very narrow view of what damages must be recovered before duplication occurs, and one that is not consistent with the general policy that insureds receive full compensation before an insurer can seek reimbursement.

*Id.* at 623 (emphasis added).

In light of *Sherry*, there can be no serious dispute as to two principles: (i) until such time as they are made whole, insured’s continue to stand ahead of insurers when it comes to funds obtained from

tortfeasors; and (ii) “full compensation” means the insured recovers for the entire loss sustained, without any reduction for the insured’s share of fault.

### **3. Retained Risks of Loss, Such As Deductibles, Are Not Excluded From the Made Whole Doctrine**

Farmers contends that the amount of an insured’s loss represented by “retained risk,” such as an insurance deductible, is excluded from the made whole doctrine, stating that “no Washington cases” have applied the doctrine to such losses. Farmers Br. at 11 (emphasis added). This is not true. Just last year, Division One decided *Bordeaux*,<sup>11</sup> which applied the made whole doctrine in the context of “self-insured retentions” (“SIRs”), which are functionally deductibles.

“The fundamental dispute [in *Bordeaux*] concern[ed] the nature and meaning of the SIR provisions in the American Safety policies held by [its insureds].”<sup>12</sup> *Id.* at 684. *Bordeaux* was sued for construction defects in condominiums it had developed. *Bordeaux* tendered its defense to its insurers, one of which was American Safety. The American Safety policy contained an SIR provision, which obligated *Bordeaux* itself to cover the first \$100,000 of the loss. *Id.* at 690-91. After the case against *Bordeaux* was settled, *Bordeaux* settled claims it had against several of the third-

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<sup>11</sup> *Bordeaux, Inc. v. American Safety Ins. Co.*, 145 Wn. App. 687, 186 P.3d 1188 (2008).

<sup>12</sup> *Bordeaux*’s sister company, *Cameray*, was also a plaintiff in the suit on the same issues, but related to a different development project.

party subcontractors. These funds recovered from the subcontractors were at issue in *Bordeaux*. *Id.* at 692.

Echoing arguments Farmers has raised in this case, American Safety contended that it was entitled to reimbursement from those funds even before Bordeaux was made whole:

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. The Court rejected the assertion, holding that the SIR, as a form of “self-insurance,” was not “insurance” in the traditional sense, and that merely retaining some risk did not turn Bordeaux into an insurer. *Id.* at 689. “The fact that Bordeaux and Cameray each chose to retain the risk of paying up to \$100,000 for homeowners’ construction defect claims does not convert them into ‘primary insurers’ for purposes of subrogation against third-party claims if they face greater losses which are covered by their insurers.” *Id.* at 697.

Notably, in reaching the decision, the Court directly analogized self-insurance by the SIRs to collision deductibles:

Washington courts have rejected the argument that self-insurance constitutes “insurance.” The court in *Stamp* explained the distinction between self-insurance and primary insurance as follows:

“[Self-insurance] is analogous to the more common types of direct insurance such as automobile collision coverage or major medical coverage, wherein there is usually a stated deductible amount, the effect of which is, in simplest terms, to make the insured ‘self-insured[.]’ for any loss up to the amount of the deductible. No one has yet to suggest in such instances that the insured, being self-insured up to the amount of the deductible, is an ‘insurer’ who has merely ‘reinsured’ the risk above a certain limit.”

*Id.* at 695 (brackets in original; emphasis added; footnotes omitted)

(quoting *Stamp v. Dep’t of Labor & Indus.*, 122 Wn.2d 536, 543, 859 P.2d 597 (1993); other citations omitted). Ultimately, the Court concluded that:

[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 (footnotes omitted).<sup>13</sup>

#### **4. Farmers’ Distinguishable & Otherwise Inapt Authorities**

Farmers cites and discusses several cases and secondary authorities that are plainly distinguishable or otherwise inapt, such as that they are

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<sup>13</sup> American Safety argued that *Stamp* (and another case) involved “definitional issues” not involved in *Bordeaux*, but the Court found “[t]heir “distinction” is one without a difference.” *Id.* at 695. Speaking of the SIRs, the Court also “suggest[ed] that courts be more precise in characterizing the nature of these payments lest we risk converting conventional deductibles to true ‘self insurance.’” *Id.* at 695 n.16.

contrary to Washington law or provide no support for their overbroad statements.

For example, Farmers cites to *Meas v. State Farm Fire & Cas. Co.*, 130 Wn. App. 527, 13 P.2d 519 (2005), but the case is plainly distinguishable. The central point of *Meas* is simply that in determining whether an insured has received “full compensation,” you look at the insured’s monetary recovery for the same loss covered by the applicable insurance payments. In other words, when looking at PIP payments, look to the insured’s bodily injury recovery, and when looking at collision payments, look to the insured’s recovery for her property damage loss. For that reason, *Meas* has no bearing on this case. It is distinguishable in any event, however, because unlike in *Averill*’s case, in *Meas* the insured actually recovered 100% of his deductible. *See* 130 Wn. App. at 531.

Farmers also cites to *Chen v. State Farm Mut. Auto. Ins. Co.*, 123 Wn. App. 150, 94 P.3d 326 (2004), but this case is equally irrelevant. In *Chen*, the insured received both PIP and property damage payments from her insurer. *Chen* claimed, among other things, that her insurer was required to pay a share of attorneys fees to her in connection with the property damage recovery from the tortfeasor. The problem, however, was that *Chen* did not secure the property damage recovery – her insurer did so by pursuing the claim itself. Thus, the Court merely found that

Chen was not entitled to have her insurer pay a portion of the attorney fees attributable to the property damage because Chen had not done anything to create a common fund. *Id.* at 158. The case does not even mention the word “deductible.”

Although Farmers has tried repeatedly to depict the question here as whether an insurer can pursue a subrogation claim before its insured is made whole, that is plainly not the case: the question here is who is entitled to the money ultimately recovered from the tortfeasor. It is no different than the question of who is entitled to the proceeds from a bodily injury recovery when PIP has been paid. In that situation, it is usually the insured that pursues the tortfeasor and effects a monetary recovery from the tortfeasor. But the mere fact that the insured has pursued the claim and secured the money does not necessarily mean that the insured is entitled to keep all of it. It must still be determined whether the insured has been made whole for the applicable loss, and if so, the insurer is entitled to receive the amount that represents a double recovery by the insured.

Farmers also again cites to plainly inapt cases from Utah and Florida. For example, *Birch v. Fire Ins. Exchange*, 122 P.3d 696 (Utah 2005) is inapplicable because the court found that the insured had been

fully compensated for his total loss (in fact, overcompensated<sup>14</sup>). The Court simply observed that: “None of the Utah cases relied upon by Birch holds that an insured is entitled to recover more than his or her actual damages.” *Id.* at 699 (emphasis added). Because the insured’s replacement cost coverage had already paid him more (\$7,707.91) than the actual value of his loss (\$7,346.26), the unpaid portion of the insured’s deductible never factored into the full compensation calculation. In contrast, Averill has undeniably not recovered her full property damage loss.

Even so, it is notable that *Birch* recognize that there is a distinction between the insurer’s payments under the policy versus money obtained from the tortfeasor for the insured’s property damage loss. *See id.* at 699-700. In its arguments, Farmers repeatedly has tried to conflate the two, although the former is simply not at issue here.

Farmers’ reliance on *Monte de Oca v. State Farm Fire & Cas.*, 897 So.2d 471 (Fla. App. 3 Dist. 2004) is equally misplaced. As was noted by the trial court,<sup>15</sup> the result in *Monte de Oca* is contrary to the principle of

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<sup>14</sup> The insured ended up with more than his “damages” because he had purchased “cost of replacement” insurance, and the cost to replace was higher than the actual value of the property damaged. *See id.*, 122 P.3d at 699-700.

<sup>15</sup> *See* CP 244 (“The Court finds the case *Monte de Oca* ... must be rejected because its resolution is directly contrary to the law of *Sherry*.”).

*Sherry* that “full compensation” is measured by the insured’s total loss, without reduction for the insured’s fault or what the insured might be entitled to recover in tort.<sup>16</sup> The observation of the dissent highlights this point:

The majority disregards this long-standing precedent to focus on what the insured may legally recover after considering the insured’s fault (comparative negligence), rather than on the insured’s loss. I cannot agree with this new formulation of the law.

*Id.* at 475 (Wells, J., dissenting<sup>17</sup>). Although the case must be rejected as contrary to *Sherry*, the following astute observation by the dissent highlights a problem Farmers has here:

[A]lthough the majority is correct when it states that the purpose of subrogation is to prevent a double recovery by the insured, Monte de Oca and Snell will receive no double recovery if the entire amount of their deductibles is paid to them from the settlement funds obtained by their insurers.

*Id.* at 476-477 (Wells, J., dissenting) (emphasis added). Similarly, Farmers cannot identify a double recovery by Averill – a prerequisite before it can recoup its payments.

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<sup>16</sup> Farmers similarly cites *National Continental Ins. Co. v. Perez*, 897 So.2d 492 (Fla. App. 3 Dist. 2005). This four-sentence opinion, however, provides nothing more than a reference to *Monte de Oca*. Farmers’ other Florida authority, *Schonau v. GEICO Gen. Ins. Co.*, 903 So.2d 285 (Fla. App. 4 Dist. 2005), must likewise be rejected for its contradiction to Washington law.

<sup>17</sup> Three other judges concurred in the dissent in this 5-4 decision.

Other cases cited by Farmers are equally inapplicable and unhelpful. For example, Farmers cites *Ex Parte State Farm Fire & Cas. Co.*, 764 So.2d 543 (Ala. 2000). Farmers uses the case to flog its oft repeated strawman that Averill is claiming Farmers had no right to even seek money from the tortfeasor until she was made whole. No matter how many times Farmers repeats it, though, that is not the issue. The issue is who is entitled to the money once it is recovered from the tortfeasor.<sup>18</sup>

Quoting *Ex Parte State Farm*,<sup>19</sup> Farmers goes on to warn that applying the make whole doctrine to deductibles will benefit tortfeasors by allowing them to escape liability. The case, however, plainly rests on the unique controlling (Alabama) precedent discussed in the opinion, *see id.* at 545, which is not an issue in Washington. Moreover, the absurdity of the argument is highlighted by the fact that Farmers has already recovered the property damages from the tortfeasor in this case, and nothing at issue in this case would alter that.

Farmers also cites the Windt treatise for the proposition that deductibles are somehow excluded from the made whole doctrine.<sup>20</sup> Windt, however, provides only a single case in support of this broad

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<sup>18</sup> This would be the issue regardless of which one, Farmers or Averill, had recovered it.

<sup>19</sup> The material quoted in Farmers' Brief (at 26-27) is actually not from the Alabama Supreme Court's opinion, but from the underlying court of appeals' opinion in the case.

<sup>20</sup> 2 Allan D. Windt, *Insurance Claims & Disputes*, § 10.6 (5th ed.).

assertion: the *Birch* case from Utah that is thoroughly discredited above on this point. *See* Windt, § 10.6, at 10-38 & 39.

In the trial court, Farmers cited more extensively from Windt, including a detailed hypothetical ostensibly to illustrate how the process should work. Farmers does not make the same mistake here, as the example shows that Windt is entirely wrong on this issue under Washington law. To summarize the hypothetical, an insured has a policy with a \$10,000 deductible and \$50,000 of coverage. A fire causes \$100,000 in damage. Since the deductible is exceeded, the insurer pays the insured the \$50,000 in coverage. A recovery of \$60,000 is made from the tortfeasor. According to the treatise, the first \$40,000 goes to the insured for the excess loss not compensated. Then, however, the remaining \$10,000 – all of it – must go to the insurer, who must be made whole before the insured can be permitted to recoup any part of her deductible. *See* Windt, § 10.6, at 10-39 & 40. Such a result is utterly contrary to Washington law.

For example, in Washington, there is simply no “made whole” rule for insurers. Also, the distribution in the hypothetical would be unlawful in Washington, as it would violate the very regulation cited by Farmers, WAC § 284-30-3905, which requires that an insurer must, at a minimum, proportionally share a recovered deductible. Even Farmers has never

argued that it can stand ahead of its own insured. Since the treatise is so inaccurate on even the basics of the made whole doctrine in Washington,<sup>21</sup> its unsupported, overbroad statement on the issue of deductibles is entitled to no weight.

#### **5. Incorrect & Outdated Insurance Regulations Cannot Trump Established Law & Public Policy**

Farmers cites to an outdated, pre-*Sherry* insurance regulation for support. There are multiple problems with this argument. The first is the language of the regulation, which is not exactly a model of clarity:

If my insurer collects my deductible back, will I recover the full amount of my deductible?

(1) At a minimum, recovery will be shared on a proportionate basis with your insurer.

WAC § 284-30-3905 (emphasis added). To begin with, the language does not actually say what Farmers claims, or stand for the proposition upon which Farmers relies here: nowhere does it state that if the insurer recovers money from the tortfeasor for the insured's property damage loss, that money will be shared on a "proportionate" basis. Rather, the regulation actually states that if the insurer recovers the insured's

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<sup>21</sup> This is why the trial court rejected it: "Although one insurance treatise [Windt] states that the made whole doctrine does not apply to deductibles ... the Court finds that its basic premise (that deductibles are excluded because they are self-insured risk) is inconsistent with the made whole doctrine in Washington." CP 244.

deductible, that money – the insured’s deductible – will be (at a minimum) shared with the insured.

Even more problematic, the regulation does not indicate what “proportionate” basis means – in proportion to what? Could the recovery of the insured’s deductible be split between the insurer and insured in proportion to the amount each has paid (for example, if the insured paid \$500 and the insurer \$9,500, could the insurer keep 95% of the insured’s deductible that had been recovered)? Even Farmers does not argue for this interpretation, but surprisingly, this is exactly the “proportionate” split the OIC is apparently talking about (although it changes the term to “*pro rata*”):

If your company does not collect 100 percent of the amount they demand, your policy may also allow for a “pro rata” refund of your deductible. Pro rata means your insurance company divides the recovered money proportionately between itself and you based on the amount you each paid out.

See OIC Fact Sheet, Subrogation and Your Rights, at 1 (Jan. 2007)

(emphasis added).<sup>22</sup> Of course, no one has identified any legal basis for this sort of “proportionate” split of proceeds. Moreover, to add even more

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<sup>22</sup> Notably Pre-*Sherry*, the Fact Sheet was available online as of June 29, 2009 at: <http://www.insurance.wa.gov/publications/auto/subrogation.pdf>.

ambiguity, the same document then turns around and states somewhat the opposite:

Previous court cases determined the insured person's financial interest comes before an insurance company. As a result, if the at-fault party's limits are not enough to cover your loss, your insurance company may not recover all of its payments.

OIC Fact Sheet, at 2 (emphasis added).

In short, there is little about the regulation<sup>23</sup> that is clear, but to the extent that it is read as Farmers desires, there is little about it that does not impermissibly conflict with the made whole doctrine. Indeed, it simply cannot, as the trial court recognized, stand in the face of *Sherry*. See CP 244 (“the Court finds that the regulation, WAC § 284-30-3905, cannot be reconciled with *Sherry*. The Court notes that the regulation was issued before the 2007 *Sherry* decision.”). See also *Brown v. Snohomish Cty. Phys. Corp.*, 120 Wn.2d 747, 760, 845 P.2d 334 (1993) (“our decision is based upon public policy and is not founded on the Insurance Commissioner’s approval or disapproval ...”).

Secondly, even taking the regulation at face value and then reading into it all that Farmers requires for its argument, it merely provides that, at a minimum, the insurer must share the recovered deductible with its

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<sup>23</sup> Or the OIC brochures, for that matter. In fairness, it is unlikely the OIC expects anyone to rely on its brochures as substantive law.

insured. *See* WAC § 284-30-3905. This does nothing for Farmers, considering that the plain language of its policy provides otherwise, recognizing that its right to reimbursement only comes after the full compensation of its insured. *See infra*, Part III.C.

**C. Farmers' Policy Language Makes the Made Whole Doctrine Applicable to the Collision Deductible**

Independent of the requirements of Washington law, the language of the Farmers policy makes the made whole doctrine applicable to collision deductibles.

**1. Interpretation of Insurance Policy Is A Question of Law; To Be Construed As Average Insured Would**

To the extent this Court finds it necessary to look to the policy, the “[i]nterpretation of an insurance contract is a question of law reviewed de novo.” *Woo v. Fireman’s Fund Ins.*, 161 Wn.2d 43, 54, 164 P.3d 454 (2007) (citing *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 682, 801 P.2d 207 (1990), *overruled on other grds. by Butzberger v. Foster*, 151 Wn.2d 396, 89 P.3d 689 (2004)). “[C]ourts justifiably look [at insurance contracts] in a light most favorable to the insured.” *Hamm*, 151 Wn.2d at 323 (Sweeney, J., dissenting) (citing *Panorama Vill. Condo. Owners Ass’n v. Allstate Ins. Co.*, 144 Wn.2d 130, 137-38, 26 P.3d 910 (2001)). *See also Mercer Place Condo. v. State Farm*, 104 Wn. App. 597, 602-03, 17 P.3d 626 (2000) (insurance policies liberally construed in favor of the

insured). When the Court construes insurance policy language, it must “give it the same construction that an ‘average person purchasing insurance’ would give the contract.” *Id.* (emphasis added; quoting *Roller*, 115 Wn.2d at 682). *See also American Nat’l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 134 Wn.2d 413, 427, 951 P.2d 250 (1998) (policy interpreted as average insurance purchaser would understand it). Any ambiguity in the policy language must be resolved in favor of the insured. *E.g., Barney v. Safeco Ins. Co.*, 73 Wn. App. 426, 429, 869 P.2d 1093 (1994). Moreover, “insurance policies ... are simply unlike traditional contracts, *i.e.*, they are not purely private affairs but abound with public policy considerations...” *Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 376, 535 P.2d 816 (1975) (emphasis added).

## **2. The Insurance Policy Language Expressly Adopted the Make Whole Doctrine**

To begin with, there is nothing in the language of Farmers’ policy that would inform an insured that the made whole doctrine would not apply to collision deductibles. *See Thiringer*, 91 Wn.2d at 220 (there is “nothing in the language of the policy to indicate that the parties agreed that a different principle [other than the make whole doctrine] would apply to this contract.”). But more than that, the policy actually acknowledged and fully adopted the made whole doctrine: “we shall be reimbursed to

the extent of our payment after that person has been fully compensated for his or her loss.” CP 35 (emphasis added). Compare this language to the analogous provision in *Bordeaux*, where the Court found the made whole doctrine applied, even though the provision was just a straight subrogation provision and made no mention of the insured’s full compensation as a prerequisite. *See Bordeaux*, 145 Wn. App. at 691 (“The American Safety policy also contains a subrogation provision which states, ‘[i]f the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us.’”).

In sum, whether or not Farmers could have structured its policy to circumvent the made whole doctrine or to provide only the purported WAC “minimum” allocation, the simple fact is that it did not.<sup>24</sup> Farmers cannot now simply ignore its very own policy language.

#### **D. Request For Attorneys Fees**

In accordance with RAP 18.1, Averill requests her Attorneys’ fees and expenses on this appeal. This request is based on the doctrine

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<sup>24</sup> Comments by the OIC to (at the time) proposed WAC § 284-30-3905 indicated that the “at a minimum” language was specifically inserted to allow for insurers whose policy language provided for a better recovery for their insureds. *See* OIC’s Comments to Proposed Rules, Wash. St. Reg. 03-03-132 (Jan. 22, 2003) (because “an insurer stated that their recovery provision was more generous than contemplated by the proposed WAC[, t]he language was modified [by adding “at a minimum”] to account for this possibility.”) (emphasis added). Before the 2003 promulgation of WAC §§ 284-30-3901 to -3915, WAC § 284-30-390 was a sort of omnibus regulation that covered many of the same matters. The pre-2003 version of -390 did not have the “at a minimum” language.

expressed in *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), and subsequent cases. Under the rule of *Olympic Steamship*, an insured is entitled to an award of fees where the insurer compels the insured to assume the burden of legal action to obtain the full benefit of her insurance contract. *See* 117 Wn.2d at 53. Since the present case involves a dispute over a benefit owed under the insurance contract (the insured's right to be made whole), fees under the rule of *Olympic Steamship* are triggered. *See also Safeco Ins. Co. v. Woodley*, 150 Wn.2d 765, 774-75, 82 P.3d 660 (2004) (fees appropriate where the dispute involves a vindication of the insured's right to the full benefit of the policy provisions).

## V. CONCLUSION

Washington has long held the made whole doctrine as a basic tenet of its insurance law. An insured is entitled only to be made whole, however, not to receive a double recovery. Thus, in the interest of fairness, the equitable principle of subrogation developed to permit an insurer to recoup its payments once the insured has been fully compensated. The key factor, however, is that the insured must first be made whole and in possession of a double recovery. Indeed, 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) (emphasis added) (citing *Thiringer*, 91 Wn.2d at 219-20).

Farmers, however, cannot show that Averill has been made whole, much less that she has received any sort of double recovery. That is because Averill clearly has not been made whole for her property damage loss, as even Farmers acknowledges she is still out of pocket a portion of the loss. Whether we look at *Thiringer*, *Sherry* or *Bordeaux*, or any other applicable Washington made whole case, the conclusion is the same: Farmers holds funds recovered from a tortfeasor that in part belong to Averill.

While Farmers contends that making Averill whole for her loss is somehow contrary to the notion of a deductible, the argument fails when examined.<sup>25</sup> The parties' bargain was that Averill would pay the first \$500 of a property damage loss, and Farmers would pay the rest. And that is what occurred. Contrary to Farmers' contention, there is no claim for further payment by Farmers under the collision coverage. If there had been no recovery from the tortfeasor – whether because he was impecunious or because Averill was wholly at fault – Averill would have been out her \$500, and Farmers out the rest, just as the parties agreed.

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<sup>25</sup> From the insurer's perspective, reasons for a deductible include giving its insureds an incentive to use care to avoid loss, as well as to discourage its insureds from submitting numerous small claims. Neither would be impacted by the result that should obtain here.

But money was thereafter recovered from the tortfeasor, and it was that money that necessitated the analysis of who was entitled to it. Whether we look at Washington law, public policy or the Farmers insurance policy, the answer is the same: since Averill was still less than fully compensated, she was entitled to that portion of the money from the tortfeasor necessary to make her whole.

At bottom, Farmers is not arguing that Averill has been made whole; instead, Farmers argues that Averill is not entitled to be made whole. The long line of Washington made whole case law establishes otherwise.

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DECLARATION OF SERVICE

I certify that on June 29, 2009, I caused to be filed with the Court of Appeals, Division I, via messenger, the foregoing Pearl C. Averill's Brief of Respondent, and caused to be delivered, via messenger, a true and accurate copy to:

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

Executed in Seattle, Washington, this 29th day of June, 2009.

  
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Matthew J. Ide

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