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No. 64169-7

COURT OF APPEALS – DIVISION I
OF THE STATE OF WASHINGTON

ANNE HORNER, individually
and on behalf of all those similarly situated,

Appellant/Plaintiff,

v.

FARMERS INSURANCE COMPANY OF
WASHINGTON,

Respondent/Defendant

APPELLANT'S OPENING BRIEF

Michael Withey, WSBA #4787
601 Union Street, Suite 4200
Seattle, WA 98102
(206) 405-1800

Counsel for Appellant/Plaintiff

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I. NATURE OF RELIEF REQUESTED

Appellant Anne Horner (“Horner”) asks this Court to reverse the King County Superior Court’s Order Granting Defendant’s Motion Summary Judgment in favor of Respondent Farmer’s Insurance Company of Washington (“Farmers”) and to reverse its ruling which denied Appellant’s Motion for Summary Judgment brought below. Horner seeks an Order remanding this case to the King County Superior Court with the direction to enter judgment for Appellant.

II. ISSUES ON APPEAL

A. Does the “subrogation clause” in Farmers’ Homeowner’s insurance policy with Horner which provides: “Our right of recovery is limited to that portion of our payment which exceeds that amount of damages sustained by you,” allow Farmer’s the right to collect full reimbursement of all monies paid by Farmers to Horner after she won a recovery from a third party tortfeasor (who was also insured by Farmers) where Farmers’ payment to Horner did not exceed the amount of damages sustained by her.

B. Did the trial court err in entering judgment declaring that [Farmers] has a valid subrogation claim against the settlement proceeds of [Horner’s] settlement with the tortfeasor in the amount of \$51,737.83”?

C. Should the clause in Farmer's Homeowner's Insurance policy, which provides that its right of recovery is limited to that portion of Farmer's payment which exceeds the damages sustained by the insured, be interpreted in accordance with its plain meaning, thus allowing Farmer's no right of subrogation or recovery from Ms. Horner?

D. Alternatively, should this "right of recovery" clause be held to be "ambiguous" as to whether it allows Farmer's any right of recovery in these circumstances, with such ambiguity to be construed against Farmer's thus allowing Farmer's no right of recovery from Ms. Horner?

E. Does the conflict of interest between Farmer's duties to Ms. Horner, as its insured, and its duties to the third party tortfeasors prevent it as a matter of law, from recovering any subrogation or right of recovery in these circumstances?

III. SUMMARY OF LEGAL ARGUMENT

This case asks the Court to interpret a Homeowners' insurance policy issued by Farmers to Appellant Horner. Farmers contends, and Horner disputes, that a purported "subrogation clause" in the policy authorizes it to withhold tens of thousands of dollars (\$51,737.83) promised to her in a settlement agreement between the parties to an underlying lawsuit. Horner below sought a partial summary judgment

finding that the clause “Our right of recovery is limited to that portion of our payment which exceeds that amount of damages sustained by you” in her Farmers’ Homeowners’ insurance policy prevents Farmers from obtaining either subrogation or any “right of recovery” against Ms. Horner. Here it is undisputed that the amount of Farmer’s payment to Ms. Horner of \$51,737.83 did not exceed the damages sustained by her, which totaled at least \$290,000 of which \$51,737.83 were for her property damages. This controlling language in the policy either unambiguously denies any recovery to Farmers or is ambiguous and thus should have been construed against Farmers and found to be unenforceable against Ms. Horner. This appeal asked this Court to find that Farmers is not entitled to any subrogation or right of recovery against Ms. Horner and summary judgment on Horner’s contract claim should have been granted. This appeal asks this Court to reverse the Superior Court’s Order granting summary judgment to Farmers and to direct entry of judgment in favor of Horner.

IV. STATEMENT OF THE FACTS

Anne Horner sustained a debilitating lung injury as well as economic and property losses as the result of a house fire that occurred on May 26, 2006, in Port Ludlow, Washington. See Horner Declaration, CP 58. This house fire was caused by the negligence of Joyce and Weaver

Jordan who were the owners of the adjacent condominium at the time. The Jordans were insured by Farmers. See Horner Declaration, CP 57-58.

Horner settled her claims for damages against the Jordans who were represented by Defendant's claims adjustor Kyle Burns, on August 6, 2007, at a mediation convened by the Hon. Larry Jordan of Judicial Dispute Resolution in Seattle. As part of this settlement, Respondent Farmers Insurance Company of Washington agreed in writing to pay the sum of \$290,000 in damages to Anne Horner. See Withey Declaration, Ex. 1, CP 21 and Ex. 2, CP 23. In the release for such amount, drafted by Farmers' Kyle Burns, Ms. Horner acknowledged receipt of \$238,262.17 and the "constructive receipt" of \$51,737.83. At no time during the mediation did Farmers' agents on Ms. Horner's homeowners' policy ever assert any subrogation rights against the Jordans.

Coincidentally, Horner's Homeowners' Insurance policy which insured her against property loss or damage caused by fire was also issued by Farmers, policy number 0926336824. It is the subject matter of this action. See Horner Declaration, Ex. 1. CP 61-98. After the fire and before settlement with the Jordans, Horner submitted bills to her homeowner's adjustor and eventually received a total payment of \$51,737.83 in benefits. See Horner Declaration, CP 59. Farmers issued

both Horner's homeowners policy and the third party tortfeasor's homeowner's policy.

On September 5, 2007, in Seattle, Washington, Horner was informed in writing by the Jordan's adjustor Kyle Burns that Defendant was withholding \$51,737.83 of the settlement agreed to on August 6, 2007. See Withey Declaration, Ex. 3 at CP 25. Despite numerous attempts by Horner to recover this amount, and repeated requests that this portion of the settlement be placed into an interest bearing trust account pending resolution of this controversy, see Withey Declaration, Ex.'s 4, CP 27-29, 5 CP 31, and 6, CP 33-34, Farmers has refused to do so and has retained this sum. *Id.* Farmers stated that it was asserting a subrogation right against Horner's settlement funds for \$51,737.83 paid to her under her Homeowner's Policy. See Withey Declaration, Ex. 7. CP 36-38.

This policy, Section GENERAL CONDITIONS, number 8, ("subrogation" clause) specifically limits any right of subrogation or recovery. It states:

Subrogation.

An insured may waive in writing before a loss all rights of recovery against any person. If not waived, we may require an assignment of rights of recovery for a loss to the extent that payment is made by us. **Our right of recovery is limited to that portion of our payment which exceeds that amount of damages sustained by you.** If we seek an assignment, an insured

will help us to secure these rights and do nothing to impair them. Subrogation does not apply under Section II to Medical Payments to Others. (Emphasis added)

See Horner Declaration, Ex. 12. CP 78.

Farmers has articulated a wide assortment of purported justifications for retaining this \$51,737.83. It claimed that a “classic” right of subrogation allows it to pursue a subrogation claim against the 3rd party tortfeasor independent of the plaintiff insured. See Withey Declaration, Ex. 7, CP 36-38. It claimed that under her own homeowner’s policy, Horner is contractually bound to assign her right to recover property damage. See Withey Declaration, Ex. 8, CP 40-42. Farmers claimed falsely that it “negotiated” a settlement regarding property damages with the third party. See Withey Declaration, Ex. 7, CP 36-38.

Here the payments by Farmers to Ms. Horner are not in dispute: \$51,737.83. See Withey Declaration, Ex. 7, CP 36-38. The property damages sustained by Ms. Horner are similarly not contested. They are \$51,737.83. See Horner Declaration. CP 59. By simple math it is absolutely clear that the payments by Farmers and the damages sustained by its insured are the same. Therefore, Farmers’ right of recovery, being limited to the portion of Farmers’ payment which exceeds the amount of damages sustained by Ms. Horner, is zero.

Horner's Homeowners' Policy with Farmers does not provide any special definition for "damages sustained by you". Farmers disputed the plain meaning of the contract terms and stated by letter of September 7, 2007, that by "damages", Farmers meant "unindemnified" damages. See Withey Declaration, Ex. 7, CP 36-38. Farmers thus seeks to insert an additional term into the policy. See Withey Declaration, Ex. 7, CP 36-38. Payment to Horner under her Homeowner's Policy never exceeded her damages which Farmers conceded, on August 6, 2007, total at least \$290,000.

On August 27, 2007, Horner requested that the \$51,737.83 being withheld by Farmers from the settlement with the Jordans be placed in an interest bearing account and requested that this matter be submitted to arbitration. Farmers refused to place \$51,737.83 in an interest bearing account, refused to submit this matter to arbitration, and refused to pay her this amount. This lawsuit followed.

V. LEGAL ARGUMENT AND AUTHORITY

The purpose of summary judgment is to avoid a useless trial when there is no genuine issue of material fact. *Olympic Fish Products v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980). Summary judgment is appropriate "if the pleadings, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue of material fact and that the moving party is entitled to judgment as a matter of law.” CR 56; *Nivens v. 7-11 Hoagy’s Corner*, 133 Wn.2d 192, 197-98, 943 P.2d 286 (1997). A material fact is one upon which the outcome of the litigation depends. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992).

Here, the material facts are not in dispute and the Horner below sought a ruling as a matter of law on the legal issues presented. CP 99-121. There is no dispute how much Farmers paid to Ms. Horner. There is no dispute as to the amount of property damages Ms. Horner sustained. The language of the policy is not in dispute. The only issues are questions of law, i.e., the interpretation of the language in the “subrogation clause” which limited Farmer’s right of recovery to particular circumstances not present here.

- A. UNDEFINED POLICY TERMS WILL BE GIVEN THEIR ORDINARY MEANING THUS LIMITING FARMER’S “RIGHT OF RECOVERY” TO CIRCUMSTANCES NOT PRESENT HERE, I.E., WHERE ITS PAYMENTS TO AN INSURED EXCEEDED THE AMOUNT OF DAMAGES THE INSURED SUSTAINED.

The interpretation of the meaning of an insurance policy is a question of law. *Country Mut. Ins. Co. v. McCauley*, 95 Wn. App. 306, 308, 974 P.2d 1288 (1999). In construing an insurance policy, the policy should be given a fair, reasonable, and sensible construction consistent

with the understanding of an average person purchasing insurance. *Daley v. Allstate Ins. Co.*, 135 Wn.2d 777, 784, 958 P.2d 990 (1998). If terms are defined in a policy, the terms must be interpreted in accordance with that policy definition. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998).

If policy terms are undefined, however, they must be given their “plain, ordinary, and popular” meaning. *Boeing v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990). At issue in *Boeing* whether the costs incurred in cleaning up hazardous waste sites, ordered by the EPA, were covered by insurance policies that provided comprehensive general liability coverage for “all sums which the insured shall become obligated to pay *as damages* because of bodily injury or property damage”. Aetna argued that the clean-up costs were not “damages”. To determine the meaning of this undefined term, damages, the court looked to standard English language dictionaries.

The plain, ordinary meaning of damages as defined by the dictionary defeats insurers' argument. Standard dictionaries uniformly define the word "damages" inclusively, without making any distinction between sums awarded on a "legal" or "equitable" claim. For example, *Webster's Third New International Dictionary* 571 (1971) defines "damages" as "the estimated reparation in money for detriment or injury sustained". See also *The Random House Dictionary of the English Language* 504 (2d ed. 1987) (cost or expense). Indeed, even the insurers' own dictionaries define Page 878 "damages" in accordance with the ordinary, popular, lay

understanding: "Damages. *Legal*. The amount required to pay for a loss." Merit, *Glossary of Insurance Terms* 47 (1980); see also Rubin, *Barrons Dictionary of Insurance Terms* 71 (1987). Even a policyholder with an insurance dictionary at hand would not learn about the coverage-restricting connotation to "damages" that the insurers argue is obvious.

Id., at 878-9

If words have both a legal, technical meaning and a plain, ordinary meaning, the ordinary meaning will prevail unless it is clear that both parties intended the legal, technical meaning to apply. *Id.* at 882.

Here at least one of Farmer's CR 30(b)(6) managing agents has testified that the terms "damages sustained by you" means the amount of damages which the insured, here Ms. Horner, has verified has been paid to contractors, vendors and the like to fix the property damages she incurred. See Withey Declaration, Ex. 9, (Ballard deposition pages 34-35). CP 45-46. There is simply no dispute as to this amount. The term "our payment" is not in controversy. Farmers paid \$51, 737.83 to Ms. Horner. The term "exceeded" is well understood and plain. It means "more or greater than". Farmer's payment of \$51,737.83 does not "exceed" Ms. Horner's damages of \$51,737.83.

Farmers has contracted with Horner that its right to reimbursement only arises when an insured has been paid an amount more than her

damages. The policy states that “Our right of recovery is limited to that portion of our payment which exceeds that amount of damages sustained by you.” Farmers has stated that once the insured has been indemnified, their damages are “zero”. Farmers seeks to insert special meaning to the term “damages.” “[A]n insurance policy is not interpreted simply to give effect to what the carrier may have intended to accomplish.” *Getz v. Progressive Specialty Insurance*, 106 Wn. App. 184, 188, 22 P.3d 835 (2001). Secondly, it is well established that “parol or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict written instruments which are contractual in nature and which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake.” (Citations omitted.)” *Jackson v. Domschot*, 40 Wn.2d 30, 33, 239 P.2d 1058 (1952)

In recognition that Farmers’ policy does not provide subrogation or right of reimbursement, and in order to obtain subrogation, Farmers has since amended the subrogation policy language which since 2006 states:

When we pay for any loss or damage, an insured’s right to recover from anyone else for that loss or damage becomes our right up to the amount we have paid. Insureds must protect any of these rights and help us enforce them. However, an insured may waive in writing before a loss, all rights of recovery against any person. An insured may not waive after a loss any rights of recovery against any person. If not waived, we may require an assignment of rights of recovery for a loss to the extent that payment is made by us. If an assignment is sought, an insured must sign and deliver all related papers and cooperate with us. Subrogation does not apply under Section II – Liability Coverage. We are entitled to

payment, reimbursement and subrogation. Our right to recover will apply only after you have been fully compensated for a loss covered under this policy. (Emphasis added)

This language clearly demonstrated that Farmers knew how to protect its interest in any recoverable to reimbursable payments made to its insured. But the Horner policy language simply does not do it.

B. EVEN IF THE SUBROGATION CLAUSE’S TERMS ARE “AMBIGUOUS” THEY ARE TO BE CONSTRUED AGAINST FARMERS.

“Ambiguous clauses must be construed in favor of the insured, even though the insurer may have intended another meaning.” *State Farm Mut. Auto. Ins. v. Johnson*, 72 Wn. App. 580, 589, 871 P.2d 1066 (1994) (citing *Vadheim v. Continental Ins. Co.*, 107 Wn.2d 836, 840-41, 734 P.2d 17 (1987)). A term is ambiguous if it is susceptible to two different but reasonable interpretations. *Kitsap County*, 136 Wn.2d at 576. Whether an insurance policy contains an ambiguity is a question of law to be resolved by the court. *Baehmer v. Viking Ins. Co. of Wisconsin*, 65 Wn. App. 301, 303-04, 827 P.2d 1113 (1992). If policy language is ambiguous, and no genuine issues of material fact are in dispute, summary judgment must be entered in favor of the insured. *State Farm*, 72 Wn. App. At 584-87.

As noted above in the factual section Farmers has contorted the plain language of the subrogation clause to claim it means Farmers

payment must only exceed the “unindemnified” damages sustained by the insured. In short, Farmers asked the trial court to supply a term that is not in the contract negotiated between the parties. This no Court can do. *Boeing, supra*, at 878. Such a significant alteration is beyond that power of the court.

Horner deposed two CR 30(b)(6) managing agents selected by Farmers. The first, Chris Ballard, was designated to testify about the policy language used in the policy, including the subrogation clause. The second, Mark Putich, was deposed on the history of Farmer’s subrogation clause, including changes in policy language. Mr. Ballard at first testified that the term “damages sustained by the insured” used in the subrogation clause referred to the amount of damages sustained by the insured. See Withey Declaration, Ex. 9. (Ballard deposition, pages 34-36.). CP 45-47. Apparently aware that such a statement might mean Farmers was not entitled to any right of recovery, he then dissembled and explained that the phrase was actually referring to the damages suffered by Farmers for what it had paid to its insured! He was asked a hypothetical question where Farmers paid the insured for property damages and the bills for repairing such damage both amounted to \$10,000. Here is the exact passage of his testimony:

“Q: So how much did your payment exceed the amount of damages sustained by the insured in that hypothetical case?”

A: Well, in that hypothetical case, I'm going to guess there's two things, you know, in my mind that the damages were sustained by the insured, but they were paid by us. So under the principles of subrogation, we then step into the insured and assume those rights of recovery on her behalf since we're the ones that sustained those damages in her place.

Q: And where does it say that in the policy?

A: Well, I think that that's -- from my perspective, that's just our right of subrogation that we're asserting here. I understand what you're saying is the portion of our payment has to exceed the amount of damages sustained by you, but in this case, if we've paid those damages, we've then sustained them on behalf of that insured.

Q: Well, where does it say that Farmers' right of recovery is limited to that portion of our payment that exceeds the amount of damage sustained by Farmers? It doesn't say that, correct?

A: No, it says --

Q: Thank you. Does the term amount of damages sustained by Farmers appear in this paragraph?

A: No, it does not.

Q: Could Farmers have put that in the policy if it wanted to?

A: I suppose it could have.”

See Withey Declaration, Ex. 9 (Ballard Deposition at page 35, line 20 through page 36 line 23). CP 46-47.

When asked to interpret the policy language in Horner's policy, "Our right of recovery is limited to that portion of our payment which exceeds that amount of damages sustained by you" the following explanation was provided by Mark Putich, contracts manager for Farmers.

First Mr. Putich gave testimony about the meaning of the phrase "amount of damages sustained by you" which differed diametrically from the testimony offered by Farmers' other CR 30(b)(6) managing agent Mr. Ballard. Mr. Putich was asked:

Q: Okay. So the phrase, that amount of damages sustained by you means sustained by the insured, correct?

A: Yes.

Q: Not by Farmers, correct?

A: Yes.

See Withey Decl. Ex. 10, (Putich Deposition at page 45, lines 2-7). CP 51.

The evidence is that one of Farmers' managing agents (Ballard) testified that the phrase "damages sustained by you" actually means damages that Farmers' incurred because "we're [Farmers] the ones that sustained those damages in her place." See Withey Decl. Ex. 9, Ballard Deposition at page 36 lines 3-4. CP 47. The other managing agent (Putich) testified that the phrase referred to damages sustained by the insured, not Farmers. Such inconsistent testimony defines "ambiguity". If

two senior speaking agents from Farmers cannot themselves agree on what that key phrase means, this Court, on this de novo review, can and should find as a matter of law that the phrase is ambiguous and construe it against Farmers' interest. The trial court erred by failing to do so.

Another passage from Mr. Putich's deposition plays up the obfuscation practiced by Farmers in trying to avoid the plain meaning of the entire "our right of recovery" sentence quoted.

A: I understand the sentence to mean that we, you know, that once -- in looking at it, I understand it to mean that once you are paid for your damages, then we can, you know, then we can pursue our subrogation claim. That's one of the items I see under the sentence, that our ability to subrogate -- well, it's talking about that we're limited to the amount of our payment and then it's after that, you know, exceeds the amount of damages sustained by you.

Q: (BY MR. WITHEY) I didn't understand a word you said.

A: Sure.

See Withey declaration, Ex. 10 (Putich Deposition page 44 line 1-12), CP 50.

Later in the same deposition Mr. Putich testified:

A: Any other damages that -- we can't pursue our subrogation claim. I understand it to mean we can't pursue our subrogation claim until you've been made whole and it's after the damages that you have sustained. So if there's damages that she has sustained, we cannot pursue our subrogation claim.

See Withey Declaration, Ex.10 (Putich Deposition page 44 lines 21 through page 45 line 1). CP 50-51.

And finally when asked whether that sentence draws a “pecking order” distinction between general damages suffered by the insured and claims that can be subrogated, Mr. Putich testified:

A: Again, I did not draft the language. I cannot say what the person had in mind when they drafted it, but as I sit here today, looking at that it and as I've studied for my deposition, I think it kind of does, because it talks about exceeding the amount of damages sustained by you. We can't pursue our recovery. And recovery takes in different areas. It's not just pursuing a responsible third party, you know, who's caused the damages. It takes in other areas as well, but that our ability to recover is limited to our payment or exceeds or comes after, you know, those damages that you have sustained. And again, I understand that to mean damages that the insured has not been compensated for, which also, I think, falls underneath the insurance commissioner's bulletin.

See Withey Declaration, Ex. 10 (Putich Deposition page 46 lines 8-24) CP 52.

Farmers below claimed that Horner's “interpretation” of the phrase “Our right of recovery is limited to that portion of our payment which exceeds that amount of damages sustained by you” is “strained” and would lead to an “absurd conclusion.” By so arguing, Farmers asked the trial court to violate two very important principles of contractual construction: (1) to give meaning to the plain language of the contract

rather than interpret such language in a manner most favorable to the party drafting said language and (2) any ambiguities are to be resolved against Farmers, not its insureds. See *supra*. Horner did not ask the court to make any “interpretation” of the relevant language, “strained” or otherwise. She merely asked the trial court, and asks this Court on de novo review, to simply read it. No interpretation is needed. It clearly limits Farmers’ right of recover to “that portion of our payment which exceeds that amount of damages sustained by you.” Farmers essentially asked the trial court to find that “nobody in their right mind would actually propose anyone sign language like this, so it must not mean what it says.” But such a finding would mean there is an ambiguity that would be resolved in favor of Farmers and against its insured. Any contrary result would violate the rule that ambiguities are to be construed against the drafter. *State Farm Mut. Auto Ins. v. Johnson*, 72 Wn. App. 580, 589 (1994). “[A]n insurance policy is not interpreted simply to give effect to what the carrier may have intended to accomplish.” *Getz v. Progressive Specialty Insurance*, 106 Wn. App. 184, 188, 22 P.3d 835 (2001).

C. PLAINTIFF IS ENTITLED TO THE BENEFIT OF HER BARGAIN UNDER THE CONTRACT AND NO “DOUBLE RECOVERY” IS BEING SOUGHT.

Farmers suggested in its managing agent depositions and to the trial court below that to allow Horner both her recovery from the 3rd party

tortfeasor and from her own insurance company would constitute “double recovery”. As a preliminary matter the total amount of the settlement was \$290,000, which clearly did not make Horner “whole” given her extensive medical expenses, personal injuries and general damages. So to claim, as Farmers has, that ALL \$51,737.83 that they paid on the policy was recovered by Horner in the settlement and that they are entitled to all of that is simply not true. Furthermore, “double recovery” refers to damages recoverable in a tort action and that the claimant can receive only the amount necessary to compensate for the injuries sustained. In this case, Horner seeks to enforce her contract with Farmers and is entitled to the benefit of her bargain. Thus in *Barney v. Safeco*, 73 Wn. App. 426, 429, 869 P.2d 1093 (1994) the court held where an insurance contract for PIP benefits lacked an offset clause against payments under the UIM provisions, the insured was entitled to payment under both as “his bargain included payment under both coverages, without offset.”

In *Mazizarski v. Bair*, 83 Wn. App. 835, 924 P.2d 409 (1996), the pedestrian plaintiff had received benefits under the defendant’s PIP policy and the defendant at trial requested an “offset” to the verdict for the amount paid under the PIP policy.

Attempting to refute these conclusions, Bair argues that to deny her an offset is to grant Maziarski "double recovery." Her unstated premise is that recovery in excess of a tort

measure of damages (i.e., any recovery in excess of damages attributable to her fault) constitutes "double recovery." That premise, however, is flawed. "Double recovery" is recovery that exceeds the applicable measure of damages. Here, as already noted, the applicable measure of damages is whatever Bair's policy says it is. If the policy says Maziarski can receive and retain PIP payments, as well as damages attributable to Bair's fault, that is the applicable measure of damages. If the policy says Maziarski must disgorge PIP payments once he receives all damages attributable to her fault, that is the applicable measure.

Mazizarski, *supra*, at 844.

D. FARMERS HAS NO CONTRACTUAL OR COMMON LAW RIGHT TO SUBROGATION.

Subrogation is a doctrine that normally will allow an insurer to recoup from the party at fault payments made under a policy to its own insured. *Mahler v. Szucs*, 135 Wn.2d 398, 413 (1998).

In general, the right of reimbursement in the insurance setting may arise by contract or by equitable means. The right may be enforced contractually by an insurer's right to recover from the insured the amount of payments made from any recovery the insured secures from an insured against the tortfeasor or by a legal action in the name of the insured against the tortfeasor.

Mahler, at 415.

Farmers' homeowners' policy contract provides for subrogation and its subrogation rights are thereby limited to those contained in its policy. Farmers claimed that its policy with Horner allows it to enforce "classic" subrogation rights directly against the third party, ignoring the

anti-subrogation rule and ignoring the fact that the policy language in its contract does not provide for “classic” subrogation.

The anti-subrogation rule provides that subrogation by an insurer against a third party tortfeasor is not permitted where the insurer provides insurance coverage for both the insured and the third party. *Reichl v. State Farm Insurance Company*, 75 Wn. App. 454, 880 P.2d 558 (1994), *Mahler, supra*, at 420. This is because subrogation against the third party would breach the independent promise to indemnify the third party. The anti-subrogation rule is well settled:

See Lee R. Russ, 16 *Couch on Insurance, Third Edition* § 224.1 ("In accord with the basic definition of subrogation as a right that arises only with respect to rights of the insured against third persons to whom the insurer owes no duty, it has long been held that no right of subrogation can arise in favor of an insurer against its own insured."); *Irvin E. Schermer, et al., 1 Automobile Liability Insurance 3d*, § 19:8 ("It is well settled that an insurer can have no right of subrogation against its own insured."); 44A *Am.Jur.2d*, "Insurance," § 1770 ("Under the anti-subrogation rule, no right of subrogation can arise in favor of an insurer against its own insured or coinsured because, by definition, subrogation exists only with respect to the rights of an insurer against third persons, to whom the insurer owes no duty.").

Ferrell v. Nationwide Mutual Ins. Co., 217 W. Va. 243, 248, 617 S.E.2d 790 (2005).

Both *Mahler* and *Ferrell* rely on *Stetina v. State Farm Mut. Auto. Ins. Co.*, 196 Neb. 441, 423 N.W. 2d 341 (1976). In *Stetina* both the

plaintiff and the third party tortfeasor were insured by State Farm. The plaintiff settled with the tortfeasor and then claimed benefits under his own policy. State Farm argued that settlement with the tortfeasor destroyed State Farm's subrogation rights and so it could not be forced to pay benefits to plaintiff. *Stetina* held that State Farm had no subrogation rights against the tortfeasor which it also insured and so there could be no impairment of subrogation rights. Plaintiff was entitled to coverage under his own policy even though this might result in "double recovery."

Ferrell also addressed the enforceability of a subrogation clause where the same insurer provided coverage to both the insured and the third party tortfeasor. The court described it as situation "where an insurance carrier is claiming a right of subrogation against itself." The Court reasoned that:

To permit the insurer to sue its own insured for a liability covered by the insurance policy would violate these basic equity principles, as well as violate sound public policy. Such action, if permitted, would (1) allow the insurer to expend premiums collected from its insured to secure a judgment against the same insured on a risk insured against; (2) give judicial sanction to the breach of the insurance policy by the insurer; (3) permit the insurer to secure information from its insured under the guise of policy provisions available for later use in the insurer's subrogation action against its own insured; (4) allow the insurer to take advantage of its conduct and conflict of interest with its insured; and (5) constitute judicial approval of a breach of the insurer's relationship with its own insured....

No right of subrogation can arise in favor of an insurer against its own insured, since by definition subrogation arises only with respect to rights of the insured against third persons to whom the insurer owes no duty.

Ferrell, supra, at 245-46, citing *Richards v. Allstate Insurance Co.*, 193 W. Va. 244, at 246, 455 S.E. 2d 803 at 805 (quoting *Stetina v. State Farm Mut. Auto. Ins. Co.*, 196 Neb. 441, 451, 243 N. 2d 341, 346 (1976), quoting *Home Ins. Co. v. Pinski Bros., Inc.*, 160 Mont. 219, 225-26, 500 P.2d 945, 949 (1972)).

Ferrell held, citing *Reichl, supra*, as well as the majority position, that although subrogation against the insurer's own insured tortfeasor is not permitted, a reimbursement clause in a policy owned by the first party insured might be permitted, depending on the policy terms and language.

Thus State Farm in *Mahler* had policy language which claimed "subrogation" to the proceeds of any settlement with a third party. *Mahler* reiterates the general principle that no right of subrogation can arise in favor of an insurer against its own insured, in this case, the policy holder who has just settled. Any claim to the proceeds of a settlement is a contractual right to reimbursement, not a right to subrogation. *Mahler* at 420.

And from *Ferrell, supra*, at 247:

[T]he Court found unenforceable the contractual policy language giving an insurance company a right to "subrogation" from the plaintiff-insured, the Court went on to suggest that a different outcome might be reached if an insurance company were to employ policy language creating a right to "reimbursement." The Court stated,

[t]he best way an insurance carrier can prevent a situation like the present one from arising is to place clear and unambiguous language in its policy providing for the reimbursement of medical payments it may advance to its insured to the extent such medical payments are compensated by a settlement with or judgment against a tortfeasor whom it also insures. . . .

Finally, Allstate argues that to permit the plaintiffs a double recovery would allow them to receive an amount they did not bargain for in the contract. . . . Regardless of the merits of Allstate's contention with regard to its calculation of premiums for medical payments, Allstate is bound by the provisions of its own policy; and, if it desires to prevent double recoveries, it should place reimbursement language in its policies as previously discussed. . . .

In conclusion, we understand Allstate's concern with regard to preventing insureds from receiving double recoveries; nevertheless, we hold the best way to deal with this problem is not to permit an insurance carrier to assert a right of subrogation against one of its own insured, but rather to have an insurance carrier insert clear and unambiguous language with regard to reimbursement in its policies.

Richards, 193 W. Va at 249, 455 S.E.2d at 808.

“Classic” subrogation rights have been upheld in this jurisdiction where policy language explicitly provides that the right to collect for property damage has passed to the insurer. No such language is present in this case. Thus in both *Chen v. State Farm*, 123 Wn. App. 150, 94 P.3d 326 (2004) and *Meas v. State Farm*, 130 Wn. App. 527, 123 P.3d 510 (2005), “classic” subrogation against the third party tortfeasor was allowed where the policies provided that “...the right of recovery of any [insured] we pay passes to us.” According to these contracts, where the insured received payments from its insurer for a loss, the right to subrogate against the third party automatically passed, or was assigned, to the insurer. Farmer’s policy does not in any way provide for “classic” subrogation, Horner was entitled to bring her cause of action for personal injury and property loss, and Farmers’ right to “recovery”, if any, is solely for reimbursement allowed for under the policy language.

E. FARMERS HAS NO COMMON LAW “EQUITABLE RIGHTS OF SUBROGATION” THAT EXCEEDS OR VARIES FROM THE TERMS OF THE INSURANCE CONTRACT.

Farmers below made the assertion that it retained the common law right of equitable subrogation which was MORE extensive than the contractual agreement it reached with its insured and provided it a right of subrogation even if the contract did not. Farmers’ Opposition at p 1-3. CP

284-286. Farmers essentially said to the trial court: “ignore the words in the subrogation clause limiting our right of recovery, they don’t control.” This reasoning is in conflict with well established case law and with the intention of the parties, as expressed in the insurance contract.

In *Fisher v. Aldi Tire, Inc.*, 78 Wn.App. 902, 908, 902 P.2d 166 (1995) the Washington Court of Appeals answered the “critical question” posed as follows: “[w]hether parties to an insurance contract may agree to subrogation standards that deviate from, and thereby supplant, those developed at common law. We find that they may.” The court cited Washington cases and authority stating, “The right to subrogation as it would otherwise arise from the equities existing between the parties may be modified or extinguished by agreement.” 73 Am.Jur.2d Subrogation Section 8 (1980). In *Kish v. Insurance Co. of North Am.*, 125 Wn.2d 164, 883 P.2d 308 (1994) the court held that it is the insurance party that embodies the reasonable expectations and intent of the parties. *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen Constr., Inc.*, 119 Wn.2d 334, 831 P.2d 724 (1992) held that parties to a construction contract may totally waive their rights to subrogation. In *Thiringer v. American Motors Ins. Co.*, 91 Wn.2d. 215, 588 P.2d 191 (1978), the court held that it would apply equitable principles only after not finding anything in the language of the policy to indicate that the contracting

parties had agreed a different principle would apply. Here such a different standard (i.e., the contractual limitations on Farmers' subrogation rights) does exist. Farmers has no other right of subrogation which varies from this policy language.

F. FARMERS COULD NEVER EXERCISE ANY ASSIGNED "RIGHT OF RECOVERY" AGAINST THE JORDANS.

By its terms the insurance contract states that "An insured may waive in writing before a loss all rights of recovery against any person." Farmers admits that has not happened. The contract goes on to say, "If not waived, we may require an assignment of rights of recovery for a loss to the extent that payment is made by us." This wording is clear: it is the "rights of recovery against any person" that can be assigned, not the "recovery" itself. An assignment by definition is the assignment of rights against a third party, i.e., "against any person". Farmers proposed that the trial court (and this court on de novo review) rewrite this contract to say that Farmers may require its insured to assign to it their "recovery."

Farmers concedes that the anti-subrogation rule prevents it from subrogating against the Jordans. See Def. Opp. Page 9, line 15-22. CP 292. Farmers could never "stand in the shoes" of or sue the Jordans. Thus any assignment of rights of recovery to allow them to pursue a claim against the Jordans would be meaningless. Farmers then concedes that

they are limited to a right of reimbursement from Horner's recovery only, rendering *Meas v. State Farm Fire and Cas. Co.*, 130 Wn App. 528, 123 P.2d 519 (2005) and *Chen v. State Farm Mut. Auto Ins. Co.*, 123 Wn. App. 150, 94 P.3d 326 (2004), cases relied on heavily by Farmers, completely inapplicable.¹

VI. CONCLUSION

Farmers has no right to subrogation against the Jordans and any right to reimbursement from Horner's settlement is derived solely from the policy language. The policy language limits Farmers' right to reimbursement only to the amount, if any, its payments to the insured exceed the insured's damages. In this case, that amount is zero. Horner is entitled to the benefit of her bargain and the possibility of "double recovery" is irrelevant. If Farmers wished to avoid "double recovery" to its insured, it should have so provided in the policy language.

The trial court clearly erred in denying Horner's Motion for Partial Summary Judgment by granting Farmer's Motion for Summary Judgment. Appellant asks this Court to reverse this Order and direct the trial court to enter judgment for Appellant in the amount of \$51,737.83 plus interest,

¹ Both cases concern subrogation against third-party tortfeasors and contained clauses where an assignment automatically took place upon payment of any claim to the insured.

costs and fees. Appellant seeks an award of fees and costs for this appeal.

DATED: December 3, 2009 LAW OFFICES OF MICHAEL WITHEY

By: 
Michael E. Withey, WSBA No. 4787
Two Union Square
601 Union Street, Suite 4200
Seattle, WA 98101
Telephone: 206.405.1800
Facsimile: 866.793-7216

Attorneys for Appellant
Anne Horner

CERTIFICATE OF SERVICE

I, Ronnette Peters Megrey, declare as follows: on December 3, 2009, I caused to be served upon Respondents, at the address stated below, via the method of service indicated, a true and correct copy of the following document:

APPELLANT'S OPENING BRIEF

Steven D. Phillips
Rita Latsinova
Stoel Rives, LLP
600 University Street, Suite 3600
Seattle, WA 98101

via WA Legal Messenger
 via Facsimile
 via E-mail

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

DATED at Seattle, Washington this 3rd day of December, 2009.



Ronnette Peters Megrey