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No. 64626-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON
AT SEATTLE

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CLERK OF COURT
APPELLATE DIVISION

DALJEET SOMAL,

individually, and on behalf of all those similarly situated,

Appellee/Plaintiff

v.

ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,

Appellant/Defendant.

REVIEW FROM THE SUPERIOR COURT FOR KING COUNTY
King County Superior Court No. 09-2-23688-7 SEA
THE HONORABLE SUZANNE M. BARNETT

BRIEF OF APPELLANT/DEFENDANT ALLSTATE PROPERTY
AND CASUALTY INSURANCE COMPANY

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ORIGINAL

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I. INTRODUCTION

This appeal requires the Court to do no more than apply its recent holding in *Averill v. Farmers Ins. Co. of Wash.*, 155 Wn. App. 106, 229 P.2d 830 (2010), *rev. denied* 169 Wn.2d 1017 (“Averill”).

The Petitioner, Allstate Property and Casualty Insurance Company (“Allstate”), defendant in the case below, seeks reversal of the King County Superior Court’s Orders Denying Defendant’s Motion to Dismiss and Granting Plaintiff’s Motion for Partial Summary Judgment dated November 16, 2009 (“11/16/09 Orders”). In the 11/16/09 Orders, the trial court concluded that Washington’s made whole doctrine required Allstate to reimburse Respondent/Plaintiff Somal (“Somal”) his entire collision insurance deductible before Allstate could retain any monies it recovered in subrogation from a third party tortfeasor, regardless of Plaintiff’s comparative fault or the amount Plaintiff could have recovered from the third party had he proceeded on his own.

The trial court’s reasoning has since been rejected by this Court, compelling a different result to be entered in this matter. On March 15, 2010, this Court issued an opinion in a case involving substantially similar facts (and, indeed, prosecuted by the same counsel) as this case. In *Averill*, this Court held that the common law made whole doctrine did not

apply to an insurer's right to subrogation, and thus did not require Farmers to make Ms. Averill whole by reimbursing her for the unrecovered portion of her deductible. The Court also held that based on the fundamental nature of a deductible – to share and allocate risk – Ms. Averill did not have a contractual right to reimbursement of the unrecovered portion of the deductible.

Averill is binding authority. The analysis there applies equally here. The 11/16/09 Orders should be reversed.

II. ASSIGNMENTS OF ERROR

1. The 11/16/09 Orders were errors of law. Neither Washington's made whole doctrine, nor the policy language, required Allstate to reimburse Somal's entire collision insurance deductible following Allstate's subrogation recovery.

2. In the alternative, the trial court erred when it granted summary judgment in Somal's favor, despite contested issues of material fact.

III. STATEMENT OF THE CASE

Like *Averill*, this case involves application of Washington's made whole doctrine to reimbursement of an insured's collision automobile insurance deductible following subrogation recovery by the insurer, where

the insured was at least partially at fault for his or her accident. Somal's vehicle was involved in an automobile accident in Kent, Washington on January 12, 2009. CP at 4. At the time, his vehicle was insured by an automobile liability insurance policy issued by Allstate. *Id.* The policy included collision coverage, with a \$500 deductible. *Id.*

The policy provides, in pertinent part, that "When we pay, your rights of recovery from anyone else become ours up to the amount we have paid. However, we may recover only the excess amount you have received after being fully compensated for the loss." (emphasis added) *Id.* at 5. This policy language thus applies only where the insured obtains the recovery on his/her own, and not where the insurance company pursues its own subrogation interest against the tortfeasor.

Somal sought repair of the vehicle, claiming a total of \$1,970.76 in repair costs under his collision coverage. *Id.* at 106 Allstate paid \$1,470.76 in benefits under Somal's policy. *Id.* Somal paid his agreed \$500 deductible toward the repair costs. *Id.*

Allstate subsequently sought recovery in subrogation from the other driver's carrier, State Farm. Based on the facts of the accident, Allstate and State Farm determined that Somal was 60% at fault and the

other driver was 40% at fault. *Id.* State Farm reimbursed 40% of the total repair costs. *Id.*

Allstate issued a check to Somal for \$200 on March 12, 2009. *Id.* at 107. This represented Somal's pro rata share of his deductible reduced by the comparative fault determination, i.e., 40% of his \$500 deductible. *Id.*

Somal's position is that he was entitled to reimbursement of his entire deductible payment. His Class Action Complaint asserts causes of action for violation of the Washington Consumer Protection Act, Bad Faith, Conversion and Breach of Contract. *Id.* at 3-11. Somal does not claim that Allstate failed to pay him insurance benefits he was entitled to, only that it failed to reimburse him his full deductible.

Allstate moved to dismiss, arguing that Somal had no legal right to recover 100% of his deductible from Allstate, regardless of his comparative fault. *Id.* at 1-43. Somal cross-moved for summary judgment on the same issue. *Id.* at 7-82. Allstate opposed Somal's motion on the bases set forth in its own motion to dismiss, and on the basis of the existence of disputed issues of material fact as to whether Somal had released, waived, made an accord and satisfaction, or was estopped from asserting his claims. *Id.* at 8-101.

On November 16, 2009, the trial court issued orders denying Allstate's Motion to Dismiss and granting Plaintiff's Motion for Partial Summary Judgment ("11/16/09 Orders"). *Id.* at 167-70. In so doing, the trial court ruled that Allstate acted wrongfully when it retained monies obtained from the third party tortfeasor representing payment for Somal's property damage loss, before Somal had been fully compensated for his property damage loss.

On December 29, 2009, Allstate filed a motion for discretionary review of the 11/16/09 Orders. App. A. On February 9, 2010, Commissioner William Ellis issued a ruling granting review and staying the appeal because the issues were the same as those presented in another case pending at that time: *Averill*. App. B. The Order Granting Review provided:

The critical issue is whether Allstate is obligated to fully reimburse Somal for his deductible after a subrogation recovery when Somal was partially at fault. This Court previously accepted the same issue in [*Averill*] . . . and heard oral argument on the merits on January 10, 2010.

The trial court's certification in this case is accepted and review shall be granted under RAP 2.3(b)(4). The hearing set for February 12, 2010 shall be stricken. Because the issue presented in this case may be shortly resolved, this appeal shall be stayed pending issuance of the mandate in *Averill*.

Id. (emphasis added).

On March 15, 2010, this Court issued a published opinion in *Averill*, reversing and remanding for dismissal of Ms. Averill's claims. App. C. The opinion stated, "Neither the common law made whole rule, the insurance commissioner regulations, nor the insurance contract require Farmers to make Averill whole for her deductible funds recovered by the insurer under its subrogation interests asserted against a third party. Averill has no claims as a matter of law." *Id.*

On October 8, 2010, Allstate filed a Motion for Accelerated Review under RAP 18.12. App. D. The Motion sought expedited reversal of the 11/16/09 Orders. In opposing the Motion, Somal conceded – as he must in light of *Averill*– that neither Washington's made whole doctrine nor the insurance commissioner regulations required Allstate to reimburse his entire deductible. App. E. Somal instead asserted that his insurance contract imposes on Allstate a duty not otherwise imposed by law. *Id.*

On November 15, 2010, Commissioner Mary Neel denied Allstate's Motion for Accelerated Review, on the grounds that the Accelerated Review process did not provide a mechanism for expedited reversal. App. F. "The motion is denied as Allstate has the ability to expedite review by promptly perfecting the record, filing its opening brief, and filing any reply brief." *Id.* Allstate now submits its opening brief.

IV. ARGUMENT

A. Summary of Argument

The 11/16/09 Orders are contrary to this Court's binding precedent in *Averill*. Somal cannot present any valid reason why his claims are not disposed of by that case. Washington's made whole doctrine does not require Allstate to reimburse Somal his entire deductible before Allstate can retain amounts it has recovered.

Nor does the Allstate insurance policy provide Somal a right to be compensated the entire deductible amount. As stated in *Averill*, the nature and purpose of a deductible is to share and allocate risk between the insurer and insured. If the insured always gets 100% of the deductible, then there is no sharing or allocation. And the applicable policy language, like the made whole doctrine, applies only where the insured obtains the recovery – not where, as here, the insurer obtains the recovery.

B. Standard of Review

Washington appellate courts review de novo orders on summary judgment. *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn. App. 334, 339, 35 P.3d 383 (2001).

C. *Averill* Requires Reversal of the 11/16/09 Orders

The trial court determined that Washington's made whole doctrine required Allstate to reimburse Somal his entire insurance deductible before

Allstate could retain any of its recovery against the tortfeasor. The trial court's determination is diametrically opposed to this Court's ruling in *Averill*.

The made whole doctrine is a limitation on the recovery of the insurer when it seeks reimbursement from its insured for a loss it has previously paid to the insured. *Averill* did not recover funds from the tortfeasor, and Farmers made no claim for reimbursement from *Averill* for the loss it paid to her. Instead, Farmers pursued its own subrogation interest against the tortfeasor. The made whole doctrine has no application to this recovery.

Averill, 155 Wn. App. at 114 (internal citations omitted).

D. Somal's Contract-Based Argument Ignores *Averill* and the Plain Policy Language

Recognizing that his common law argument is no longer valid, Somal has in recent pleadings turned to his contract-based argument (a re-packaging of his common law claim) as grounds to require Allstate to reimburse his entire deductible. *See* Opp. to Mtn. for Accel. Rev., App. E.

Somal's insurance policy included a \$500 collision deductible. Somal asserts that Allstate was contractually obligated to refund the entire deductible amount, notwithstanding the facts that Allstate obtained the recovery, and that Somal was found 40% at fault for the accident. Somal's assertion fails because it ignores the fundamental purpose of a deductible,

which is to share and allocate risk between the insurer and the insured. As this Court stated in *Averill*:

A deductible indicates the amount of risk retained by the insured. The insurance policy shifts the remaining risk of any damages above the deductible to the insurance company. Averill contracted to be out of pocket for the first \$500. Farmers' subrogation interest was for the amount of the loss it paid to Averill, not including the deductible amount. When Farmers pursued its subrogation interest, that interest did not include Averill's deductible. Allowing Averill to recover her deductible from Farmers' subrogation recovery would have changed the insurance contract to one without a deductible. We are not at liberty to rewrite the policy in this manner.

Averill, 155 Wn. App. at 114 (emphasis added).

The same analysis applies here. If Allstate is required to reimburse Somal his entire deductible amount, then Somal has retained no risk. Allowing Somal to recover a portion of his deductible would be doing precisely what *Averill* prohibits: rewriting the contract from one with a deductible to one without a deductible.

Somal's demand for complete reimbursement of his deductible also ignores the plain language of the policy. It provides, in pertinent part, that Allstate "[M]ay recover only the excess amount you have received after being fully compensated for the loss." In other words, if the insured obtains recovery and has "received" excess amounts from the tortfeasor,

then Allstate may also recover. In contrast, here Allstate received funds from the tortfeasor.

Somal has repeatedly characterized this contract language as nothing more than a restatement of Washington's made whole doctrine. *See, e.g.*, Plaintiff's Motion for Partial Summary Judgment at 10 ("Independent of the foregoing principles of Washington insurance law, Allstate's policy language incorporates the made whole doctrine and makes it applicable to collision deductibles."); *id.* at 12 ("Allstate expressly incorporated the made whole doctrine into its Policy, and cannot now simply ignore its very own language"); *id.* ("this is true whether we look to longstanding principles of Washington insurance law, or to Allstate's own Policy language."). (CP 79 -81).

The problem for Somal is that, under *Averill*, the made whole doctrine has "no application" where the insurer obtains its own recovery. *Averill*, 155 Wn. App. at 114. Accordingly, Somal's contract claim must be rejected for the very same reason that Ms. Averill's was rejected:

Averill argues she has a separate claim for recovery of her full deductible based on the language of the contract. Averill contends that the insurance policy language expressly adopted the made whole doctrine.

...

Averill argues the policy incorporates the made whole doctrine, essentially stating Washington law. Assuming it does, her contract claim fails for the same reasons the common law claim failed. Applying the language of the policy, Averill did recover under the policy and did recover half her deductible from another. Farmers is entitled to be reimbursed to the extent of its payment to Averill after she has been fully compensated for her loss. But, Farmers did not seek reimbursement out of the funds Averill recovered from the tortfeasor. The policy does not entitle Averill to recover her deductible from Farmers' recovery of its subrogation interest from the tortfeasor. Therefore, the trial court erred in granting Averill's motion for partial summary judgment.

Averill, 155 Wn. App. at 118-19.

Somal was fully compensated under the law by receiving the same amount from Allstate that Plaintiff would have recovered from the other driver on his own, i.e., 40% of his deductible. Anything more would be a windfall and a rewrite of the parties' contract. There was no breach, and merely missing out on a windfall does not establish a cause of action.

Finally, Somal cannot claim that the phrase "fully compensated" in his contract has a different meaning than under Washington law. Somal never pleaded any such unique or different meaning, and it is presumed that any contract "is made in contemplation of existing law." *Silverstreak, Inc. v. Washington State Dept. of Labor and Industries*, 159 Wn.2d 868, 890, 154 P.3d 891 (2007) (quoting *Shoreline Cmty. Coll. Dist. No. 7 v. Employment Sec. Dept.*, 120 Wn.2d 394, 410, 842 P.2d 938 (1992)). The

Court does not construe the contract to include a broader right of recovery than is supported by the law or the express contract language, notwithstanding Somal's subjective interpretation of the contract. *Polygon Northwest Co. v. American Nat. Fire Ins. Co.*, 143 Wn. App. 753, 775, 189 P.3d 777 (2008) ("Washington law does not, in fact force insurers to pay for losses that they have not contracted to insure.").

Averill is dispositive. The Allstate policy mirrors Washington law and must be construed consistent with Washington law. The made whole doctrine does not apply to deductibles. Nor does it apply when the insurer – and not the insured – obtains recovery. Reversal is appropriate.

E. In the Alternative, Factual Issues Precluded the Trial Court from Granting Summary Judgment in Somal's Favor

Even if Somal had a legal right to 100% reimbursement of his deductible (he did not), summary judgment was inappropriate because there was a dispute of material fact regarding whether Somal's acceptance of his pro rata share of his deductible from Allstate – without objection, and with full knowledge throughout the subrogation process that Allstate intended to make a pro rata reimbursement – barred his claims under the doctrines of release, accord and satisfaction, and estoppel. *See CP* at 83-89 and 105-118.

V. CONCLUSION

This Court granted discretionary review of the 11/16/09 Orders, pending the Court's ruling on the same issues in *Averill*. The *Averill* opinion was issued on March 15, 2010. It precludes Somal's claims and it is binding authority. The 11/16/09 Orders should be reversed. Somal has no right, in common law or in contract, to be reimbursed his entire deductible amount.

Respectfully submitted this 30th day of March, 2011.

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APPENDIX A

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COURT OF APPEALS
DIVISION ONE

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NO. 64626-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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and on behalf of themselves and all other similarly situated,

Respondent/Plaintiff,

v.

ALLSTATE INSURANCE COMPANY AND
ALLSTATE INDEMNITY COMPANY,

Petitioners/Defendant.

REVIEW FROM THE SUPERIOR COURT FOR KING COUNTY
King County Superior Court No. 09-2-23688-7 SEA
THE HONORABLE SUSAN M. BARNETT

MOTION FOR DISCRETIONARY REVIEW
OF PETITIONERS/DEFENDANT
ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY

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2 Allan D. Windt, Insurance Claims and Deductibles §
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I. IDENTITY OF PETITIONER AND DECISION BELOW

The Petitioner, Allstate Property and Casualty Insurance Company (“Allstate”), defendant in the case below, seeks discretionary review of the King Superior Court’s Orders Denying Defendant’s Motion to Dismiss and Granting Plaintiff’s Motion for Partial Summary Judgment dated November 16, 2009 (“11/16/09 Orders”). *Appendix A & B*. In the 11/16/09 Orders, the trial court concluded that Washington’s made whole doctrine required Allstate to reimburse Plaintiff his entire collision insurance deductible before Allstate could retain any monies it recovered in subrogation from a third party tortfeasor, regardless of Plaintiff’s comparative fault or the amount Plaintiff could have recovered from the third party had he proceeded on his own.

For reasons explained below, the 11/16/09 Orders constitute, at minimum, probable error. They also substantially alter the status quo and limit Allstate’s freedom to recover payments it has made on behalf of its partially at-fault insureds. Discretionary review is therefore warranted. RAP 2.3(b)(2).

A motion to certify the 11/16/09 Orders under RAP 2.3(b)(4) is currently pending with the trial court. Certification is appropriate here; if review is accepted and resolved in Allstate’s favor, the case will likely terminate. The undersigned counsel understands that, due to the holidays, the trial court will not rule on that motion until early January 2010. Allstate therefore reserves the right to supplement the record and this

request for discretionary review, if appropriate, after the trial court rules on that motion.

II. ISSUES PRESENTED FOR REVIEW

Whether Washington's made whole doctrine requires that an insured who is at least partially at fault in an automobile accident, and is therefore barred by comparative fault principles from recovering for all of his or her deductible from the other involved driver, nonetheless be reimbursed for his or her entire collision automobile insurance deductible by his or her insurer before that insurer is entitled to recover from the other driver any payments it made under its policy.

III. STATEMENT OF THE CASE

This case involves application of Washington's made whole doctrine to reimbursement of an insured's collision automobile insurance deductible following a subrogation recovery by the insurer, where the insured was at least partially at fault for his or her accident. Plaintiff Daljeet Somal's vehicle was involved in an automobile accident in Kent, Washington on January 12, 2009. At the time, his vehicle was insured by an automobile liability insurance policy issued by Allstate that included collision coverage. Plaintiff had a \$500 deductible on his collision coverage.

Plaintiff sought repair of his vehicle, claiming a total of \$1,970.76 in repair costs under his collision coverage. Allstate paid \$1,470.76 in

benefits under Plaintiff's policy. Plaintiff paid his \$500 deductible toward repair costs.

Allstate subsequently sought recovery in subrogation from the other driver's carrier, State Farm. Based on the facts of the accident, Allstate and State Farm determined that plaintiff Somal was 60% at fault and the other driver was 40% at fault. State Farm reimbursed 40% of the total repair costs.

Allstate issued a check to plaintiff for \$200 on March 12, 2009. This represented Plaintiff's pro rata share of his deductible reduced by the comparative fault determination, i.e., 40% of his \$500 deductible.

Plaintiff's position is that he was entitled to reimbursement of his entire deductible payment. His Class Action Complaint asserts causes of action for violation of the Washington Consumer Protection Act, Bad Faith, Conversion and Breach of Contract. Plaintiff does not claim that Allstate failed to pay him insurance benefits that he was entitled to, only that it failed to reimburse his full deductible.

Allstate moved to dismiss, arguing that Plaintiff had no legal right to recover 100% of his deductible from Allstate, regardless of his comparative fault. Plaintiff cross-moved for summary judgment on the same issue. Allstate opposed Plaintiff's motion on the bases set forth in its own motion to dismiss, and on the basis of the existence of disputed issues of material facts as to whether Plaintiff had released, waived, made an accord and satisfaction, or was estopped from raising his claims.

On November 16, 2009, the trial court issued orders denying Allstate's Motion to Dismiss and granting Plaintiff's Motion for Partial Summary Judgment. In so doing, the trial court ruled that Allstate acted wrongfully when it retained monies obtained from the third party tortfeasor representing payment for Somal's property damage loss, before Somal had been fully compensated for his property damage loss.

A case involving substantially similar issues is currently pending in this Court: *Farmer's Ins. Co. of Wash. v. Averill*, No. 62767-8-I ("*Averill*"). Discretionary review was accepted in that case on December 26, 2008, and it is set for oral argument on January 11, 2010.

IV. SUMMARY OF ARGUMENT

The trial court's decision is contrary to Washington law. It is also contrary to the law of other jurisdictions and to applicable secondary authorities. Washington courts (like other courts across the country and leading commentators) distinguish between those situations involving reductions to insurance benefits (e.g., *Sherry, infra*) and cases involving deductibles, which are not insurance benefits and to which the doctrine does not apply. The trial court's application of the made whole doctrine to deductibles confuses the two distinct concepts of insurance benefits and deductibles. It is without precedent in Washington and amounts, at a minimum, to probable legal error that substantially changes Allstate's freedom to be compensated for funds it has advanced on behalf of its insureds and requires it to pay additional amounts to its insured above and

beyond the amounts that Allstate and its insureds contracted for in the insurance policy.

This Court has already accepted review of a substantially similar issue in *Averill*, a virtually identical case brought by the same plaintiff's counsel against Farmers Insurance. The issue presented in that case was whether the made whole doctrine applies to deductibles. For all of the same reasons the Court accepted review in *Averill*, it should do so here.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Plaintiff's claims are based on the assertion that he is entitled to recover 100% of his deductible, regardless of his comparative fault, before Allstate may retain any amounts it recovers in subrogation as reimbursement for repair payments it made under Plaintiff's collision coverage. That premise wrong, and the trial court committed probable error by accepting it.

A. Washington Case Law Does Not Support Plaintiff's Legal Theory

The trial courts in this case and in *Averill* have acknowledged that no Washington case speaks directly to the applicability of the made whole doctrine to collision deductibles. This Court also acknowledged that in granting discretionary review in *Averill*. Appendix D. The trial court committed error because Washington law does not give Plaintiff a right to recover 100% of his deductible amount, regardless of his comparative

fault, before Allstate may retain any portion of funds recovered in subrogation.

Courts distinguish between insurance benefits and deductibles in applying the made whole rule. With insurance benefits, the insurer has agreed to assume responsibility for those amounts. Therefore, an insured and an insurer are competing for the same funds. With deductibles, the insurer and insured are not competing because the insured has agreed to assume responsibility for his or her deductible before insurance benefits ever come into play. As a leading commentator explains:

[T]he made whole doctrine does not apply to deductibles. If the insured were to be reimbursed for its deductible before the insurer is made whole, the insured would be receiving an unbargained for, unpaid for, windfall. Under the terms of the insurance policy, it was agreed that, as a condition precedent to the insurer being out of pocket for even one dollar, the insured had to first be out-of-pocket the amount of the deductible. **The made whole doctrine deals with situations in which the combination of the amount of the deductible and the amount of the insurance payment is a sum that was insufficient to make the insured whole,** and a recover is made from a third party (typically the insurer for the tortfeasor that injured the insured).

2 Allan D. Windt, Insurance Claims and Deductibles § 10.6 at 10-38, 39 (5th ed.) (emphasis added).

Washington courts make that distinction. For example, in *Meas v. State Farm Fire & Cas. Co.*, 130 Wn. App. 527, 13 P.3d 519 (2005), *rev. denied*, 167 Wn.2d 1018, 142 P.3d 607 (2006), this Court held that an insured with a collision coverage policy was “made whole” for his

property loss when he received payment of his collision insurance benefits, distinguishing between that payment of benefits and reimbursement of his deductible. *Id.* at 538 (“Here, Meas was fully compensated or ‘made whole’ for the property loss claimed under his collision coverage when he received payment from State Farm. Further, State Farm recovered his deductible and paid it to him.”)¹; *see also Stamp v. Dep’t of Labor & Indus.*, 122 Wn.2d 536, 543, 859 P.2d 597 (1993) (nothing that in “common types of direct insurance such as automobile collision coverage . . . there is usually a stated deductible amount, the effect of which is, in simplest terms, to make the insured ‘self-insured’ up to the amount of the deductible.”).

The Washington Administrative Code, as written during the time relevant to Plaintiff’s complaint and the class period, expressly recognized that a carrier who recovers in subrogation may prorate the amount it repays to its insureds:

If my insurer collects my deductible back, will I recover the full amount of my deductible? (1) At a minimum, recovery

¹ Mr. Meas would have been paid collision benefits from his carrier long before he received any reimbursement of his deductible (his carrier could not pursue subrogation and recover his deductible until it paid his benefits). Yet this Court said he was “made whole” when he received his collision benefits, and not only after he received reimbursement of his deductible. Plaintiff Somal is in the same position. He was paid benefits under his collision policy within three weeks of his accident, but was not reimbursed for his deductible until two months later when Allstate recovered from State Farm in subrogation. Like Mr. Meas, Plaintiff Somal was “made whole” when Allstate paid him collision benefits on January 31, 2009.

will be shared on a **proportionate basis** with your insurer.
(2) No deduction for expenses can be made from the deductible recovery unless an outside attorney is retained to collect such recovery, and then only for the pro rata share of the allocated loss adjustment expense.

WAC 284-30-3905 (emphasis added).

That WAC provision was recently repealed, effective August 21, 2009. The new provision (WAC 284-30-393)² states in relevant part:

The insurer must include the insured's deductible, if any, in its subrogation demands. **Subrogation recoveries must be allocated first to the insured for any deductible(s) incurred in the loss.**

WAC 284-30-393 (effective August 21, 2009) (emphasis added). The new regulation works a change in the law, making it plain that proration based on comparative fault was permitted under Washington law at the time of Plaintiff's accident and during the class period.

Allstate was entitled to pursue recovery from the at-fault driver's carrier. Washington law authorizes Allstate to proceed in subrogation against a tortfeasor once it has paid insurance benefits for a loss under its policy, giving Allstate the same right to recover enjoyed by the insured whose loss it has paid. *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 423 (2008) (subrogation is "[t]he principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with

² Plaintiff's claim arose in January 2009 and his deductible was reimbursed in March 2009. His claim was therefore governed by WAC

respect to any loss covered under the policy”). Allstate’s insurance policy with Plaintiff also gives Allstate a contractual right to subrogation up to the amount Allstate has paid. *See* Complaint at ¶ 12; *see also Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 417 (1985).

Like other states, Washington recognizes that the doctrine of subrogation seeks to impose ultimate responsibility for a loss on the party who, “in equity and good conscious, ought to bear it.” *Mahler v. Szuchs*, 135 Wn.2d 398, 411 (1988). “The general purpose of subrogation is to facilitate placement of the financial consequences of loss on the party primarily responsible in law for such loss.” *Id.* (citation omitted).

The above principles justify Allstate’s to prorate the amount of Plaintiff’s deductible reimbursed to him based on his comparative fault. A plaintiff who is 60% at fault for his accident can recover only 40% of his total damages if he proceeds on his own against the other driver. He must bear the financial consequences of the other 60% of the loss, as he should in equity and good conscious. However, Plaintiff Somal actual had 100% of his losses paid, less his deductible, through his collision coverage from Allstate. After paying, Allstate was entitled to pursue subrogation against the other driver, but only to the same extent that Plaintiff could have done so, i.e., Allstate could only recover 40% of the loss because Plaintiff only had a right to recover that amount.

284-30-3905.

The trial court's 11/16/09 Orders provide Plaintiff with a windfall by putting him in a better position than he would otherwise enjoy if Allstate was required to pay 100% of his deductible regardless of his comparative fault. Plaintiff has already been "fully compensated" by receiving his pro rata share of his deductible, i.e., the 40% that he could recover on his own.

Plaintiff argued that *Sherry v. Financial Indemnity Co.*, 160 Wn.2d 611, 160 P.3d 31 (2007) required Allstate to reimburse Plaintiff 100% of his collision deductible. The trial court apparently agreed. This interpretation of *Sherry*, however, is incorrect. *Sherry* dealt with insurance benefits, not deductibles – a key distinction under the made whole doctrine. It considered only the narrow issue of whether an insurance carrier could offset previously-paid personal injury protection (PIP) benefits (a form of no-fault medical insurance) against a later uninsured motorist (UIM) award. *Sherry* held that in the unique context of UIM and PIP coverage,³ insureds were not considered to receive "full compensation" until "they have made a complete recovery of the actual losses suffered as a result of the automobile accident as determined by a

³ The court in *Sherry* explained that UIM and PIP coverage are both unique "creatures of public policy" that the state legally requires all carriers to offer their insureds. *Id.* at 620. The court held that UIM is "unique among insurance" because it does not provide full compensation and instead simply "provides additional insurance to cover any judgment that might be entered in favor of the insured against an underinsured motorist." *Id.* at 622.

court or arbitrator.” *Id.* at 614. The court explained that allowing offsets in such circumstances would essentially reduce the insured’s PIP benefits by the percentage of his comparative fault even though the PIP coverage was supposed to be “no fault.” *Id.* at 625.

Unlike *Sherry*, this is a case about deductibles. Neither UIM or PIP insurance benefits or offsets of benefits are at issue here. Plaintiff’s collision coverage is not reduced if Allstate prorates the repayment of his deductible based on his comparative fault because Plaintiff has no right in the instance to coverage for his deductible amount. *Sherry* is inapplicable.

B. The Bases Underlying the 11/16/09 Orders Have Been Rejected

1. Court’s Have Repeatedly Rejected the Conclusion Reached by the Trial Court

Other courts have rejected claims virtually identical to Plaintiff’s. For example, in *Monte de Oca v. State Farm Fire & Cas. Co. v. Allstate Indem. Co., et al.*, 897 So.2d 471 (Fla. Dist. Ct. App. 2004), the *en banc* Florida District Court of Appeal held that a class of insureds did not state a legal claim with allegations that Allstate and State Farm were required to reimburse the plaintiffs 100% of their collision coverage deductible before keeping any payments as reimbursement, even when the insured class members were partially at fault. In *Monte de Oca*, State Farm paid to repair accident damage to its insured’s vehicle under his collision coverage, then pursued a subrogation claim for its payments against the other involved driver. After the subrogation claim was resolved on the

basis that both drivers were 50% at fault, State Farm received 50% of its repair costs back and reimbursed its insured for 50% of his deductible. On similar facts, Allstate recovered 75% of its subrogation demand from the other involved driver, then refunded 75% of the plaintiff's deductible.

The two insureds brought separate lawsuits against the two carriers, demanding 100% of their deductibles back. The trial court dismissed both complaints for failure to state a claim. On a consolidated appeal, the *en banc* court first reviewed the purposes of subrogation, which included preventing overcompensation of an insured and ensuring that a “wrongdoer who is legally responsible for the harm should not receive the windfall of being absolved from liability.” *Id.* at 473. Applying those principles, the court held that the plaintiffs did not state a legal claim:

The Insured is demanding the second \$250 of the deductible based on his contention that without his receiving it he has not been made whole. However, it is to be recalled that the Insured is a “wrongdoer” – actually one of the two wrongdoers – as the Insured and the other driver were both 50% comparatively negligent. As we previously observed, *Florida Farm Bureau v. Martin, supra*, a wrongdoer legally responsible for harm should not receive a windfall of being absolved from liability.

The Insured, as a wrongdoer legally responsible for 50% of the harm, is not entitled to be totally absolved from liability and must not receive a windfall. His liability as a 50% comparative wrongdoer is for half of the deductible. Under this formula Monte de Oca and Snell under his facts, have been made whole and thus have no cause of action.

Id. See also *National Continental Ins. Co. v. Perez*, 897 So.2d 492 (Fla.

Dist. Ct. App. 2005) (applying *Monte de Oca* and vacating order certifying class of insureds who claimed they were not fully compensated for their losses where their carrier returned only a prorated portion of their collision deductibles that was calculated based on their contributory negligence).

The conclusion reached by the trial court was again rejected in *Harnick v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 579378 (E.D.Penn. Mar. 5, 2009), where the court dismissed, for failure to state a claim, a class action lawsuit alleging that State Farm's practice of prorating repayment of the plaintiff's collision coverage deductible based on comparative fault following a successful subrogation recovery was improper. In *Harnick*, State Farm paid benefits to plaintiff under her collision policy, less plaintiff's \$500 deductible, then pursued a subrogation claim against the other driver involved in the accident. State Farm and the other driver settled on 50% comparative fault, and the other driver paid 50% of State Farm's repair costs. State Farm then reimbursed 50% of the plaintiff's deductible (\$250). Plaintiff sued to recover her full deductible, arguing that she had a right to be "made whole" for that amount before her insurer could retain any portion of the recovered funds.

State Farm moved to dismiss, arguing that proration of the plaintiff's deductible was proper under a Pennsylvania state insurance regulation stating that "[s]ubrogation recoveries shall be shared on a proportionate basis with the first-party claimant, unless the deductible amount has been otherwise recovered." *Id.* at 2, citing 31 Pa.Code §

146.8(c). The court held that regulation gave State Farm “the right to prorate the deductible precisely as they are alleged to have done in this case.” *Id.* The court also held that “[t]he behavior complained of by the plaintiffs ... cannot violate the common law ‘made whole’ doctrine” because that doctrine “does not describe a right of the insured to the recovery of the full amount of his contractually required deductible when the insurer recovers in subrogation from a third party.” *Id.* at 3 & n.1.

2. The building blocks and logical underpinnings of Plaintiff’s theory against Allstate have also been repeatedly rejected

The trial court’s conclusion that Plaintiff is not “made whole” until he receives 100% of his deductible was rejected in *Sorge v. Nat’l Car Rental Sys., Inc.*, 470 N.W.2d 5 (Wis. Ct. App. 1991). In *Sorge*, the Wisconsin Court of Appeals held that “a negligent insured is made whole in terms of equity when [it] receives payment for that percentage of [its] damages for which [it] was not at fault.” *Id.* at 7. The insured in *Sorge* settled a claim arising from her injuries in an automobile accident for less than her uninsured losses. *Id.* at 6. Her recovery was reduced due to her contributory negligence. *Id.* Her carriers then filed suit against her for reimbursement of payments made for her injuries. *Id.* The plaintiff argued her insurers could not recover because she was not made whole by the settlement. *Id.* The Wisconsin Court of Appeals held that the settlement compensated the plaintiff for “all the damages to which she is legally entitled,” and therefore the “made whole” doctrine did not bar her

carriers from recovery after application of comparative fault principles. *Id.* at 7. Explaining that the "made whole" doctrine applied only where equitable, the court found it unjust to permit an insured to invoke the "made whole" doctrine when her own fault prevented her from receiving a complete recovery. *Id.* at 6-7. Accordingly, the insured was made whole when she recovered all the damages she would be entitled to after reduction for her comparative fault. *Id.*

The Utah Court of Appeals reached a similar conclusion in *Birch v. Fire Insurance Exchange*, 122 P.3d 696 (Utah Ct. App. 2005). There, an insured brought a class action against his property insurer seeking to recover the full amount of his deductible, rather than a pro rata share of it, from his carrier's recovery in a subrogation action. The plaintiff argued that the "made whole" rule required repayment of 100% of his deductible before his insurer could keep any portion of the replacement cost reimbursement it received, asserting that the focus of the made whole rule was on the total loss he sustained instead of on what he could legally recover from the tort-feasor – the same argument that Plaintiff Somal made in this case. *Id.* at 698-99. The carrier argued that the insured was made whole for all of the damages that he could have recovered on his own from the tort-feasor (because his recovery would have been reduced by the same amount for depreciation anyway), and that plaintiff was seeking a double recovery by attempting to allocate the subrogation recovery to an uninsured portion of the loss. *Id.* at 699.

The court in *Birch* agreed with the carrier. Like the court in *Monte de Oca*, it recognized that a chief purpose of subrogation was to prevent the insured from receiving a double recovery. *Id.* at 698. The insured had only a contractual right to payment *above* the deductible; he had no contractual right to recover any portion of his deductible. *Id.* at 700. In tort, the insured could recover only up to the percentage of replacement cost reimbursed to his carrier, 95%. Accordingly, he was only entitled to recover an equal percentage – 95% – of his deductible. *Id.*

The 11/16/09 Orders are not supported by case law.

C. **Review Should be Accepted for the Same Reasons The Court Accepted Review in *Averill***

This case involves the same central issue as that posed in the *Averill* case, which is currently pending before this Court and set for oral argument on January 11, 2010: i.e., whether an insured must be reimbursed for his or her entire collision automobile insurance deductible before the insurer is entitled to recovery any payments it made under its collision coverage. In certifying his order pursuant to RAP 2.3.(b)(4) in the *Averill* case, King County Superior Court Judge Heller stated:

Notwithstanding its holding, **the Court recognizes that whether the made whole doctrine requires that an insured be reimbursed for her entire deductible before an insurer is entitled to recover its payments made under the applicable coverage has not been directly addressed in Washington. Under these circumstances, therefore, the Court hereby certifies that this holding involves a controlling question of law as to which there is substantial ground for a difference of opinion.**

Furthermore, because this question is also the central issue

in the case, the Court certifies that immediate review of its order granting partial summary judgment may materially advance the ultimate termination of this litigation.

Appendix C (emphasis added).

In accepting discretionary review, the Commissioner's letter ruling provided:

I agree completely with the trial court's certification. The breach of contract issue is a controlling question of law. Despite Averill's reluctance to admit it, there clearly are substantial grounds for a difference of opinion whether the make whole doctrine extends to agreed deductibles. And immediate review of the breach of contract ruling may materially advance the ultimate termination of the litigation because other issues in the litigation will be impacted by that determination.

Appendix D (emphasis added).

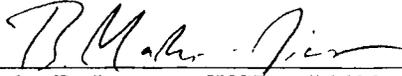
The same result is warranted here.

VI. CONCLUSION

For the reasons stated, the trial court's application of the made whole doctrine to collision deductibles was a probable, if not obvious, error which substantially limits Allstate's ability to retain subrogation funds. This Court should accept discretionary review of the 11/16/09 Orders.

Respectfully submitted this 29th day of December, 2009.

RIDDELL WILLIAMS P.S.



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APPENDIX A

Honorable Suzanne Barnett
Hearing Date: November 16, 2009, at 4:00 pm
With Oral Argument

SUPERIOR COURT OF WASHINGTON, COUNTY OF KING

DALJEET SOMAL, individually, and on behalf
of all those similarly situated,

Plaintiff,

vs.

ALLSTATE PROPERTY AND CASUALTY
INSURANCE COMPANY,

Defendant.

Case No.: 09-2-23688-7 SEA

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS UNDER CR
12(b)(6) [~~PROPOSED~~]

THIS MATTER came before the Court on Defendant's Motion to Dismiss Pursuant to CR 12(b)(6). The Court has heard the arguments of counsel and has reviewed the records and files herein, including:

1. Defendant's Motion to Dismiss Pursuant to CR 12(b)(6), and supporting declarations.
2. Plaintiff's Opposition to Defendant's Motion to Dismiss, and supporting declarations;
3. Defendant's Reply in Support of Motion to Dismiss Pursuant to CR 12(b)(6), and supporting declarations; ~~and~~

~~4~~ _____
Based upon the foregoing, it is hereby ORDERED, ADJUDGED, and DECREED that:

ORDER DENYING DEFENDANT'S MOTION TO DISMISS
UNDER CR 12(B)(6) - 1

IDE LAW OFFICE
801 SECOND AVENUE, SUITE 1502
SEATTLE, WASHINGTON 98104-1500
PH: 206 625-1326

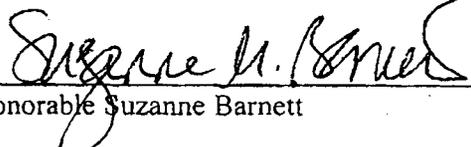
ORIGINAL

1. Defendant's Motion to Dismiss Pursuant to CR 12(b)(6) is DENIED; and

~~2.~~

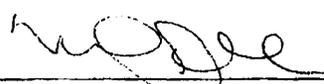
IT IS SO ORDERED.

ENTER: November 16, 2009


Honorable Suzanne Barnett

Presented by:

IDE LAW OFFICE


Matthew J. Ide, WSBA No. 26002

- and -

David R. Hallowell, WSBA No. 13500
LAW OFFICE OF DAVID R. HALLOWELL

Attorneys for Plaintiff

ORDER DENYING DEFENDANT'S MOTION TO DISMISS
UNDER CR 12(B)(6) - 2

IDE LAW OFFICE
801 SECOND AVENUE, SUITE 1502
SEATTLE, WASHINGTON 98104-1500
PH.: 206 625-1326

APPENDIX B

Honorable Suzanne Barnett
Hearing Date: November 16, 2009, at 4:00 pm
With Oral Argument

SUPERIOR COURT OF WASHINGTON, COUNTY OF KING

DALJEET SOMAL, individually, and on behalf
of all those similarly situated,

Plaintiff,

vs.

ALLSTATE PROPERTY AND CASUALTY
INSURANCE COMPANY,

Defendant.

Case No.: 09-2-23688-7 SEA

ORDER GRANTING PARTIAL
SUMMARY JUDGMENT IN FAVOR OF
PLAINTIFF ~~[PROPOSED]~~

THIS MATTER came before the Court on Plaintiff's Motion For Partial Summary Judgment. The Court has heard the arguments of counsel and has reviewed the records and files herein, including:

1. Plaintiff's Motion For Partial Summary Judgment, and supporting declarations.
2. Defendant Allstate Property and Casualty Insurance Company's Opposition to Plaintiff's Motion for Partial Summary Judgment, and supporting declarations;
3. Plaintiff's Reply in Support of Motion for Partial Summary Judgment, and supporting declarations; and

~~4.~~

Based upon the foregoing, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Plaintiff's Motion for Partial Summary Judgment is GRANTED.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN
FAVOR OF PLAINTIFF - 1

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801 SECOND AVENUE, SUITE 1502
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APPENDIX C

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Honorable Bruce Heller

STOEL RIVLS LLP

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JUDGE BRUCE E. HELLER
DEPARTMENT 6

SUPERIOR COURT OF WASHINGTON, COUNTY OF KING

PEARL C. AVERILL, individually, and on behalf of all others similarly situated,

Case No.: 07-2-35285-6 SEA

Plaintiff,

ORDER DENYING DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT UNDER CR 54(b); CERTIFYING RULING FOR DISCRETIONARY REVIEW UNDER RAP 2.3(b)(4)

vs.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Defendant.

CLERK'S ACTION REQUIRED

THIS MATTER came before the Court on Defendant Farmers Insurance Company of Washington's motion for the entry of judgment under CR 54(b). The Court has heard the arguments of counsel and has reviewed the records and files herein, including:

1. Defendant Farmers Insurance Company of Washington's Motion For Certification of Ruling Under CR 54(b) and supporting Memorandum;
2. Plaintiff's Opposition to Defendant's Motion For Certification of Ruling Under CR 54(b), and
3. Farmers' Reply in Support of Farmers' Motion For Certification of Ruling Under CR 54(b).

ORDER DENYING DEF.'S MOTION FOR ENTRY OF JUDGMENT UNDER CR 54(B); CERTIFYING RULING FOR DISCRETIONARY REV. UNDER RAP 2.3(B)(4) - 1

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ORIGINAL

1 In her Complaint, Averill asserts claims for violation of the CPA, bad faith, negligence,
2 breach of contract and unjust enrichment. The Court finds that the central issue involves the
3 proper interpretation and application of the made whole doctrine, however, and that the several
4 claims are really just different theories that articulate a single claim for relief. For that reason,
5 the Court finds that this case is unsuitable for entry of judgment under CR 54(b). See *Nelbro*
6 *Packing v. Baypack Fisheries*, 101 Wn. App. 517, 524, 6 P.3d 22 (2000).

7 For the reasons that follow, however, the Court finds that this case is suitable for
8 certification for discretionary review under RAP 2.3(b)(4).

9 A number of cases in Washington have addressed the "made whole" doctrine. In
10 *Thiringer v. Am. Motors Ins. Co.*, 91 Wn.2d 215, 219, 588 P.2d 191 (1978), the Supreme Court
11 stated that the insured is entitled to be made whole first, and only after an insured has made a
12 "full recovery" of his damages" does the insurer's right of recovery arise. In *Sherry v. Financial*
13 *Indemnity Company*, 160 Wn.2d 611, 618, 160 P.3d 31 (2007), the Supreme Court pointed out
14 that a insured is not entitled to a double recovery, and thus after an insured is "fully
15 compensated for his loss," the insurer is entitled to (in that case) an offset.

16 In neither *Thiringer* nor *Sherry* did the Supreme Court define what "full recovery for
17 damages" or "full compensation for loss" means. In *Sherry*, however, the Supreme Court held
18 that for purposes of offsetting previously paid PIP benefits from UIM benefits, "full
19 compensation" does not include a reduction to account for comparable fault.

20 The only case of which this Court is aware that mentions deductibles in the context of
21 the made whole doctrine is *Meas v. State Farm Fire & Casualty Co.*, 130 Wn. App. 527, 123
22 P.3d 519 (2005), *rev. denied*, 157 Wn.2d 1018 (2006). The central point of *Meas*, however, is
23 that the question of "full compensation" is whether the insured has received full compensation
24 for the same loss covered by the insurance payments at issue. In addition, unlike in the case at
25 bar, in *Meas* the insured in fact recovered 100% of his deductible.

26 Thus, the Court finds that while the relevant Washington cases are helpful in establishing

1 the general principles of the made whole doctrine, they do not explicitly provide an answer to
2 the specific question posed in this case. Moreover, regulations issued by the Washington Office
3 of Insurance Commissioner are in apparent conflict with the made whole rule in general, and
4 specifically as enunciated by the Supreme Court in *Sherry*. Indeed, the Court finds that the
5 regulation, WAC § 284-30-3905, cannot be reconciled with *Sherry*. The Court notes that the
6 regulation was issued before the 2007 *Sherry* decision.

7 Although one insurance treatise states that the made whole doctrine does not apply to
8 deductibles, see 2 Allan D. Windt, Insurance Claims & Disputes, § 10.6, at 10-38 (5th ed.), the
9 Court finds that its basic premise (that deductibles are excluded because they are self-insured
10 risk) is inconsistent with the made whole doctrine in Washington. The Court finds that the case
11 *Birch v. Fire Ins. Exchange*, 122 P.3d 696, 699 (Utah 2005) is distinguishable, because in Birch
12 the plaintiff had already received more than full compensation, which is not true here with
13 Averill. The Court finds the case *Monte de Oca v. State Farm Fire & Cas.*, 897 So.2d 471, 475
14 (Fla. App. 3 Dist. 2004), although most similar to the facts here, must be rejected because its
15 resolution is directly contrary to the law of *Sherry*.

16 Given the foregoing, the Courts has ruled that this case is controlled by the rule laid out
17 in *Sherry*. Because Averill did not recover the full amount of her property damage loss
18 represented by her collision deductible, Averill was not fully compensated for her property
19 damage loss. As a consequence, the Court has ruled that Farmers acted wrongfully in keeping
20 sums obtained from State Farm as a recovery of its collision payments without first seeing that
21 Averill received full compensation for her property damage loss. On that basis, by separate
22 order the Court has granted plaintiff's motion for partial summary judgment on her breach of
23 contract claim.

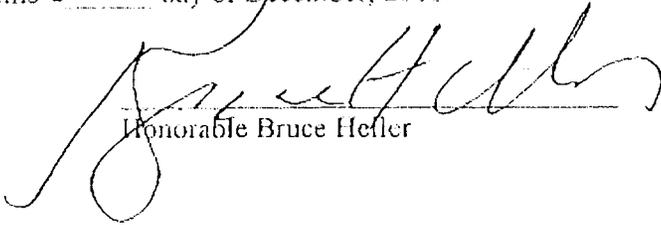
24 Notwithstanding its holding, the Court recognizes that whether the made whole doctrine
25 requires that an insured be reimbursed for her entire deductible before an insurer is entitle to
26 recover its payments made under the applicable coverage has not been directly addressed in

1 Washington. Under the circumstances, therefore, the Court hereby certifies that this holding
2 involves a controlling question of law as to which there is substantial ground for a difference of
3 opinion. Furthermore, because this question is also the central issue in the case, the Court
4 certifies that immediate review of its order granting partial summary judgment may materially
5 advance the ultimate termination of this litigation

6 Based upon the foregoing, it is hereby ORDERED, ADJUDGED, and DECREED that:

- 7 1. Defendant's Motion For Certification of Ruling Under CR 54(b) is DENIED;
8 2. The Court hereby CERTIFIES its order granting partial summary judgment in
9 favor of Averil on her breach of contract claim for discretionary review under RAP 2.3(b)(4);
10 and

11
12 ~~DONE IN OPEN COURT~~ this 3rd day of December, 2008.

13
14 
15 Honorable Bruce Hefler

16 Presented by:

17 IDE LAW OFFICE

18 
19 Matthew J. Ide, WSBA No. 26002

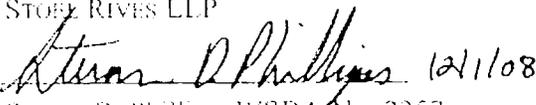
20 and

21 David R. Hallowell, WSBA No. 13500
22 Law Office of David R. Hallowell
23 Attorneys for Plaintiff

24 Copy Received;

25 Notice of Presentation Waived.

26 STOEY RIVES LLP


27 Stevan D. Phillips, WSBA No. 2257

Rita V. Latsimova, WSBA No. 24447

Attorneys for Defendant

ORDER DENYING DEF.'S MOTION FOR ENTRY OF
JUDGMENT UNDER CR 54(B); CERTIFYING RULING FOR
DISCRETIONARY REV. UNDER RAP 2.3(B)(4) - 5

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APPENDIX D

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

DIVISION I
One Union Square
600 University Street
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February 11, 2009

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FEB 13 2009

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Seattle, WA, 98101-3197

CASE #: 62767-8-1

Pearl C. Averill, Respondent v. Farmers Insurance Company of Wa, Petitioner

Counsel:

The following notation ruling by Commissioner James Verellen of the Court was entered on February 10, 2009, regarding 's Petitioner's motion for discretionary review and motion of Geico General Insurance Company for leave to submit amicus memorandum:

Farmers Insurance Company of Washington seeks discretionary review of the partial summary judgment that Farmers breached the terms of its insurance contact with Averill by "...failing to see that Averill was fully compensated for her property damage loss before Farmers retained proceeds obtained from the third party tortfeasor for that property damage loss...." The essence of the trial court's ruling is that the make whole doctrine recognized in Sherry v. Financial Indemnity Company, 160 Wn.2d 611, 618, 160 P.3d 31 (2007) requires that the insured be fully compensated for her loss, including her collision deductible, before the insurer may retain funds obtained on its subrogation claims against a third party. The trial court recognized that this approach conflicts with insurance regulations (WAC 284-30-3905) promulgated prior to the Sherry decision.

In a detailed and carefully analyzed order, the trial court certified under RAP 2.3(b)(4) that its breach of contract determination involves a controlling question of law as to which there is substantial grounds for a difference of opinion, and "because this question is also the central issue in the case, the Court certifies that immediate review of its order granting partial summary judgment may materially advance the ultimate termination of this litigation."

Averill does not oppose discretionary review but notes that she is unable to concede that there is a substantial grounds for a difference of opinion for purposes of RAP 2.3(b)(4) or that the trial court committed obvious or probable error for purposes of RAP 2.3(b)(1) or (2).

Rather than requiring the parties to incur the expense of appearing for oral argument on February 13, 2009, I can rule based on the materials before me. I agree completely with the trial court's certification. The breach of contract issue is a controlling question of law. Despite Averill's reluctance to admit it, there clearly are substantial grounds for a difference of opinion whether the make whole doctrine extends to agreed deductibles. And immediate review of the breach of contract ruling may materially advance the ultimate termination of the litigation because other issues in the litigation will be impacted by that determination.

Discretionary review of the trial court's ruling that Farmers has breached its contract with Averill is warranted under RAP 2.3(b)(4).

As to Geico's motion to submit an amicus memorandum in support of the motion for discretionary review, I decline the offer.

Therefore, it is

ORDERED that Geico's motion to submit an amicus memorandum in support of the motion for discretionary review is denied. It is further

ORDERED that discretionary review is granted of the trial court's ruling that Farmers has breached its contract with Averill and the clerk shall set a perfection schedule.

No. 62767-8-I
Page 3 of 3

Please be advised a ruling by a Commissioner "is not subject to review by the Supreme Court." RAP 13.3(e)

Should counsel choose to object, RAP 17.7 provides for review of a ruling of the Commissioner. Please note that a "motion to modify the ruling must be served... and filed in the appellate court not later than 30 days after the ruling is filed."

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

LAM

cc. The Honorable Bruce Heller

APPENDIX B

RICHARD D. JOHNSON,
Court Administrator/Clerk

*The Court of Appeals
of the
State of Washington*

DIVISION I
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Seattle, WA
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February 9, 2010

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RECEIVED

FEB 10 2010

RIDDELL WILLIAMS P.S.

Gavin W Skok
Riddell Williams PS
1001 4th Ave Ste 4500
Seattle, WA, 98154-1065

CASE #: 64626-5-1
Daljeet Somal, Respondent v. Allstate Property and Casualty Insurance Company, Petitioner

Counsel:

The following notation ruling by Commissioner William Ellis of the Court was entered on February 9, 2010 :

**64626-5, Somal v. Allstate
Ruling Granting Review, Striking Hearing, and Staying Appeal
February 9, 2010**

Allstate seeks discretionary review of a trial court order granting Somal partial summary judgment and denying Allstate's motion to dismiss. The trial court has certified that its order is appropriate for review under RAP 2.3(b)(4). Somal disagrees with the certification but does not oppose granting review pursuant to it.

The critical issue is whether Allstate is obligated to fully reimburse Somal for his deductible after a subrogation recovery when Somal was partially at fault. This Court previously accepted review of the same issue in *Farmer's Insurance Co. of Wash. v. Averill*, No. 62767-8-1, and heard oral argument on the merits on January 10, 2010.

The trial court's certification in this case is accepted and review shall be granted under RAP 2.3(b)(4). The hearing set for February 12, 2010 shall be stricken. Because the issue presented in this case may be shortly resolved, this appeal shall be stayed pending issuance of the mandate in *Averill*.

Now, therefore, it is hereby

ORDERED that Allstate's motion for discretionary review is granted; it is further

ORDERED that the hearing set for February 12, 2010, is stricken; and, it is further

ORDERED that perfection of the appeal in this case shall be stayed pending issuance of the mandate in Averill.

William H. Ellis
Commissioner

Sincerely,

A handwritten signature in black ink, appearing to read 'R.D. Johnson', with a long horizontal line extending to the right.

Richard D. Johnson
Court Administrator/Clerk

ssd

APPENDIX C



Judges and Attorneys

Court of Appeals of Washington,
Division 1.

Pearl C. AVERILL, individually, and on behalf of
all those similarly situated, Respondent,

v.

FARMERS INSURANCE COMPANY OF WASH-
INGTON, Petitioner.

No. 62767-8-I.

March 15, 2010.

Background: Automobile insured brought action against her insurer on claims for violations of Consumer Protection Act, breach of contract, and unjust enrichment, seeking to recover portion of \$500 deductible that was not paid to her by other driver's insurer. The Superior Court, King County, Bruce Heller, J., entered partial summary judgment in insured's favor, and insurer appealed.

Holdings: The Court of Appeals, Appelwick, J., held that:

(1) common law "made whole" doctrine did not apply to insurer's right of subrogation, and thus, did not require automobile insurer to make insured whole by reimbursing her for unrecovered portion of deductible;

(2) amended insurance regulation requiring that insureds be fully reimbursed for their deductibles from any recovery obtained by the insurance company in the course of pursuing its subrogation interest did not apply retroactively; and

(3) insured did not have contractual right under policy to reimbursement of unrecovered portion of deductible.

Reversed and remanded.

West Headnotes

[1] **Insurance 217** **3514(2)****217 Insurance**

217XXX Recovery of Payments by Insurer

217k3511 Subrogation Against Third Parties;
Right to Proceeds of Action or Settlement

217k3514 Payment to Insured or Injured
Person

217k3514(2) k. Adequate compensation of insured; "made whole" doctrine. Most Cited Cases

Common law "made whole" doctrine did not apply to automobile insurer's right of subrogation to recover loss paid to insured from other driver's insurer, and thus, did not require automobile insurer to make insured whole by reimbursing her for unrecovered portion of \$500 deductible.

[2] Insurance 217 **3509****217 Insurance**

217XXX Recovery of Payments by Insurer

217k3509 k. Reimbursement and subrogation distinguished. Most Cited Cases

"Reimbursement" comes into play where an insurer is permitted to recoup its payment out of the proceeds of an insured's recovery from the tortfeasor; in this situation, the insurer's right of recoupment is contingent upon a third-party recovery by the insured, which is distinct from "subrogation," where the insurer pursues recovery from the wrongdoer.

[3] Insurance 217 **3514(2)****217 Insurance**

217XXX Recovery of Payments by Insurer

217k3511 Subrogation Against Third Parties;
Right to Proceeds of Action or Settlement

217k3514 Payment to Insured or Injured
Person

217k3514(2) k. Adequate compensation of insured; "made whole" doctrine. Most Cited Cases

The "made whole" doctrine is a limitation on the recovery of the insurer when it seeks reimburse-

ment from its insured from proceeds paid to the insured by the tortfeasor for a loss it has previously paid to the insured.

[4] Insurance 217 ↪2106

217 Insurance

217XV Coverage--in General

217k2106 k. Deductible amounts and co-payments. Most Cited Cases

A deductible indicates the amount of risk retained by the insured, and the insurance policy shifts the remaining risk of any damages above the deductible to the insurance company.

[5] Insurance 217 ↪2106

217 Insurance

217XV Coverage--in General

217k2106 k. Deductible amounts and co-payments. Most Cited Cases

Insurance 217 ↪3527

217 Insurance

217XXX Recovery of Payments by Insurer

217k3511 Subrogation Against Third Parties; Right to Proceeds of Action or Settlement

217k3527 k. Amount of recovery and relief granted, in general. Most Cited Cases

Amended insurance regulation requiring that insureds be fully reimbursed for their deductibles from any recovery obtained by the insurance company in the course of pursuing its subrogation interest did not apply retroactively to automobile insured's claim that insurer was required to reimburse her for unrecovered portion of \$500 deductible when it sought to recover subrogation interest for loss paid to insured from other driver's insurer; regulation did not state that it applied retroactively, effect of amendment was not remedial or curative, and it did not simply clarify previous regulation, but changed insurer's obligation to recover insured's deductible while pursuing its subrogated interest. WAC 284-30-393.

[6] Administrative Law and Procedure 15A ↪

419

15A Administrative Law and Procedure

15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents

15AIV(C) Rules and Regulations

15Ak416 Effect

15Ak419 k. Retroactivity. Most Cited

Cases

Courts may apply an amendment to an administrative regulation retroactively if either (1) the agency intended the amendment to apply retroactively, (2) the effect of the amendment is remedial or curative, or (3) the amendment serves to clarify the purpose of the existing rule.

[7] Insurance 217 ↪2716

217 Insurance

217XXII Coverage--Automobile Insurance

217XXII(B) Property Coverage

217k2713 Amount of Insurance

217k2716 k. Deductible amounts.

Most Cited Cases

Insurance 217 ↪3503(1)

217 Insurance

217XXX Recovery of Payments by Insurer

217k3501 Reimbursement of Payments

217k3503 Reimbursement from Insured

217k3503(1) k. In general. Most Cited

Cases

Insurance 217 ↪3514(2)

217 Insurance

217XXX Recovery of Payments by Insurer

217k3511 Subrogation Against Third Parties;

Right to Proceeds of Action or Settlement

217k3514 Payment to Insured or Injured

Person

217k3514(2) k. Adequate compensation of insured; "made whole" doctrine. Most Cited Cases

Insurance 217 ↪3527

217 Insurance

217XXX Recovery of Payments by Insurer
217k3511 Subrogation Against Third Parties;
Right to Proceeds of Action or Settlement
217k3527 k. Amount of recovery and relief granted, in general. Most Cited Cases

Provision in automobile insurance policy that, in event insured also recovered from tortfeasor, insurer would be reimbursed to extent of its payment after insured was fully compensated, did not require insurer to reimburse insured for unrecovered portion of \$500 deductible in pursuing its subrogation interest against other driver's insurer.

[8] Insurance 217 1863

217 Insurance

217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1863 k. Questions of law or fact.
Most Cited Cases

Interpretation of an insurance contract is a question of law.

[9] Insurance 217 1715

217 Insurance

217XIII Contracts and Policies
217XIII(A) In General
217k1711 Nature of Contracts or Policies
217k1715 k. Adhesion contracts. Most Cited Cases

Insurance 217 1833

217 Insurance

217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1833 k. Status or bargaining power of insureds. Most Cited Cases

Because they are generally contracts of adhesion, courts look at insurance contracts in a light most favorable to the insured.

[10] Insurance 217 1820

217 Insurance

217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1819 Understanding of Ordinary or Average Persons
217k1820 k. In general. Most Cited Cases

A court must give the language of an insurance policy the same construction that an average person purchasing insurance would give the contract.

****831** Stevan David Phillips, Margarita V. Latsinova, Steel Rives LLP, Seattle, WA, for Petitioner.

David R. Hallowell, Matthew James Ide, Attorney at Law, Seattle, WA, for Respondent.

APPELWICK, J.

109** ¶ 1 Farmers appeals the grant of partial summary judgment in favor of Averill and denial of Farmers' CR 12(b)(6) motion to dismiss. Farmers paid its insured Averill for the loss of her automobile in an accident, then sought recovery of its subrogated interests in arbitration with the other driver's insurer. Farmers also sought recovery of Averill's deductible on her behalf. The arbitrator *832** determined that each party was 50 percent at fault and awarded Farmers and Averill each 50 percent of the amount claimed. Averill sued Farmers to recover the other 50 percent of her deductible on the theory that she was not made whole. Neither the common law made whole rule, the insurance commissioner regulations, nor the insurance contract require Farmers to make Averill whole for her deductible from funds recovered by the insurer under its subrogation interests asserted against a third party. Averill has no claim as a matter of law. We reverse and remand for dismissal.

***110 FACTS**

¶ 2 Pearl Averill's daughter was in a motor vehicle accident while driving Averill's Honda Accord. Farmers Insurance Company of Washington insured the Accord under a motor vehicle liability

insurance policy, which included collision coverage with a \$500 deductible. State Farm Mutual Insurance Company insured the other driver. Farmers found the Accord to be a total loss, valued at \$16,254. Under the policy's collision coverage, Farmers paid Averill for the loss, less her \$500 deductible.

¶ 3 Farmers then submitted a claim against State Farm via inter-company arbitration seeking recovery of its payment and Averill's \$500 deductible. The arbitrator determined that each driver was 50 percent at fault for the accident and awarded one-half of Farmers' request for itself and one-half of Averill's deductible. State Farm then paid \$7,556 to Farmers and \$250 to Averill. Averill took no action related to recovering either the property damage or her deductible from the other party or its insurer.

¶ 4 Averill sued Farmers for Consumer Protection Act (CPA), chapter 19.86 RCW, violations, bad faith, negligence, breach of contract, and unjust enrichment. Farmers filed a motion to dismiss under CR 12(b)(6). Averill filed a motion for partial summary judgment under CR 56, arguing that she was entitled to reimbursement for her deductible as a matter of law and contract. The trial court granted Farmers' motion to dismiss the unjust enrichment claim and otherwise denied the motion. The trial court granted Averill's motion for partial summary judgment on the contract claim and denied summary judgment on the CPA, negligence, and bad faith claims.

¶ 5 Farmers sought discretionary review of the trial court's ruling. The trial court certified its ruling for discretionary review under RAP 2.3(b)(4).

*111 DISCUSSION

I. *Standard of Review*

¶ 6 Whether dismissal was appropriate under CR 12(b)(6) is a question of law that the court reviews *de novo*. *San Juan County v. No New Gas Tax*, 160 Wash.2d 141, 164, 157 P.3d 831 (2007). Under CR 12(b)(6), dismissal is appropriate only

when it appears beyond doubt that the claimant can prove no set of facts, consistent with the complaint,^{FN1} which would justify recovery. *Id.* Such motions 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. *Id.*

FN1. We will consider Averill's insurance policy in evaluating the motion to dismiss, because Averill incorporated it into the complaint. *Rodriguez v. Loudeye Corp.*, 144 Wash.App. 709, 725-26, 189 P.3d 168 (2008).

¶ 7 A motion for summary judgment presents a question of law reviewed *de novo*. *Osborn v. Mason County*, 157 Wash.2d 18, 22, 134 P.3d 197 (2006). We construe the evidence in the light most favorable to the nonmoving party, *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998), and affirm 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." CR 56(c).

II. *The Common Law Made Whole Doctrine*

[1] ¶ 8 The parties here ask the court to determine whether the made whole doctrine applies to insurance policy deductibles. Averill argues that until she has recovered the full damages for the loss of her vehicle, including**833 her deductible, she has not been "made whole" and as a matter of law Farmers is not entitled to recovery. Averill argues that the fact that the recovery is from the tortfeasor is the key to the made whole doctrine, not whether the insured or the insurer made the recovery. Farmers concedes that where the insured recovered from the tortfeasor on her own, she would obtain the priority of recovery afforded by *112 the made whole doctrine and would recover her entire deductible. However, Farmers argues that the made whole doctrine does not apply when the insurance company has pursued recovery of its subrogation interests.

[2] ¶ 9 The Washington Supreme Court an-

nounced the made whole doctrine in *Thiringer v. American Motors Insurance Co.*, 91 Wash.2d 215, 219-20, 588 P.2d 191 (1978). In *Thiringer*, an insurer refused to pay personal injury protection (PIP) benefits to its insured, and the insured settled with the tortfeasor. *Id.* at 216-17, 588 P.2d 191. The insured then demanded PIP benefits, because his damages exceeded the amount of the settlement. *Id.* at 217, 588 P.2d 191. The trial court held that the settlement amount should first be applied to the insured's general damages and then, if any excess remained, toward the payment of the special damages to which the PIP coverage applied. *Id.* at 217-18, 588 P.2d 191. The Supreme Court affirmed, articulating the "made whole 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 has received from the wrongdoer, remaining after the insured is fully compensated for his loss.

Id. at 219, 588 P.2d 191. This articulation of the rule is precise in that it applies to cases where the insured recovers the payment and the insurer is seeking reimbursement,^{FN2} not vice versa. *Id.* Subsequent cases applied this doctrine only where the *113 insurer sought reimbursement out of third party funds recovered by the insured. See, e.g., *Sherry v. Fin. Indem. Co.*, 160 Wash.2d 611, 615, 160 P.3d 31 (2007) (Sherry pursued arbitration and recovered underinsured motorist (UIM) benefits from his insurer); *Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wash.2d 869, 872, 31 P.3d 1164, 63 P.3d 764 (2001) (insured recovered from the tortfeasor and from his UIM coverage); *Mahler v. Szucs*, 135 Wash.2d 398, 404-405, 957 P.2d 632 (1998) ("In this case we analyze an insurer's right to recover payments made to an insured pursuant to a [PIP] provision in a liability insurance policy when an insured recovers against a tortfeasor.") (emphasis added); *S & K Motors Inc. v. Harco Nat'l Ins. Co.*, 151 Wash.App. 633, 635, 213 P.3d 630

(2009) (insured collected third party recovery); *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wash.App. 687, 689, 186 P.3d 1188 (2008) (insurer sought reimbursement from developers who collected recovery from third parties), review denied, 165 Wash.2d 1035, 203 P.3d 380 (2009). None of these cases discussed recovery of deductibles.^{FN3}

FN2. "The term 'reimbursement' comes into play where an insurer is permitted to recoup its payment out of the proceeds of an insured's recovery from the tortfeasor. In this situation the insurer's right of recoupment is contingent upon a third-party recovery by the insured." *Mahler v. Szucs*, 135 Wash.2d 398, 420 n. 9, 957 P.2d 632 (1998). Reimbursement is distinct from subrogation, where the insurer pursues recovery from the wrongdoer. See *id.*, at 415 n. 8, 957 P.2d 632 ("Usually, subrogation allows an insurer to recover what it pays to an insured under a policy by suing the wrongdoer. The insurer steps 'into the shoes of its insured.'" (quoting *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 119 Wash.2d 334, 341, 831 P.2d 724 (1992))); see also *id.* at 419, 957 P.2d 632 ("No right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty." (quoting *Stetina v. State Farm Mut. Auto. Ins. Co.*, 196 Neb. 441, 243 N.W.2d 341, 346 (1976); 16 GEORGE J. COUCH, INSURANCE § 61:136, at 195-96 (2d ed. 1983))).

FN3. Two other cases involved the insurer's pursuit of recovery, but neither involved the allocation of the insured's deductible. See *Meas v. State Farm Fire & Cas. Co.*, 130 Wash.App. 527, 531, 123 P.3d 519 (2005) (insured recovered his

\$250 deductible in full when State Farm pursued recovery from the tortfeasors insurance); *Chen v. State Farm Mut. Auto. Ins. Co.*, 123 Wash.App. 150, 152, 94 P.3d 326 (2004) (no discussion regarding deductible).

****834** ¶ 10 Farmers has acknowledged that the made whole doctrine would limit its reimbursement if Averill had recovered directly from the tortfeasor for the property damage. We agree. In that scenario, the combination of the property loss insurance payments and the third party recovery would have created a common fund. *Mahler*, 135 Wash.2d at 426-27, 957 P.2d 632. Any claim by Farmers for reimbursement of the property loss payments would have been limited by the made whole rule. *Id.* at 417-18, 957 P.2d 632. Under those facts, Averill would have been entitled to recover her full deductible before any obligation to reimburse Farmers. And, pro-rata fee sharing would have applied. *Id.* at 426-427. 957 P.2d 632.

[3] ***114** ¶ 11 But, the same is not true where the insurer collects its subrogation interest from the tortfeasor. The made whole doctrine is a limitation on the recovery of the insurer when it seeks reimbursement from its insured for a loss it has previously paid to the insured. *Thiringer*, 91 Wash.2d at 219, 588 P.2d 191. Averill did not recover funds from the tortfeasor, and Farmers made no claim for reimbursement from Averill for the loss it paid to her. Instead, Farmers pursued its own subrogation interest against the tortfeasor. The made whole doctrine has no application to this recovery.

[4] ¶ 12 This result is consistent with the purpose of the deductible. A deductible indicates the amount of risk retained by the insured. *See Bordeaux*, 145 Wash.App. at 695-96, 186 P.3d 1188. The insurance policy shifts the remaining risk of any damages above the deductible to the insurance company. *Id.* Averill contracted to be out of pocket for the first \$500. Farmers' subrogation interest was for the amount of the loss it paid Averill, not including the deductible amount. When Farmers pur-

sued its subrogation interest, that interest did not include Averill's deductible. Allowing Averill to recover her deductible from Farmers' subrogation recovery would have changed the insurance contract to one without a deductible. We are not at liberty to rewrite the policy in this manner.^{FN4}

FN4. Averill argues that failing to apply the made whole doctrine results in the recovery of her deductible being reduced for fault (she recovered only \$250 of her deductible from the arbitration, reduced due to the determination that she was 50 percent at fault). Averill argues that such a result is foreclosed by *Sherry*. However, *Sherry* is distinguishable because that case is comparable to an insured recovering from the tortfeasor. *Sherry*, 160 Wash.2d at 615, 160 P.3d 31; *see also Winters*, 144 Wash.2d at 880, 31 P.3d 1164, 63 P.3d 764 ("The UIM payments are treated as if made by the tortfeasor."). There, the fault issue only affected the amount of offset to be allowed against the UIM coverage for prior PIP payments. *Id.* at 625, 160 P.3d 31. An offset such as in *Sherry* is akin to a reimbursement claim from a common fund and, unlike in this case, the made whole doctrine was triggered.

¶ 13 Recovery by the insurer from a tortfeasor, under its subrogation interest for losses paid to its insured, is not the equivalent to a claim for reimbursement against a fund recovered by the insured and does not invoke the made whole doctrine. Averill is not entitled to recover her deductible from ***115** funds obtained by Farmers under subrogation from the third party's insurer.

III. Insurance Regulations on Recovery of Deductibles

[5] ¶ 14 The current Office of the Insurance Commissioner (OIC) regulation requires an insurance company to pursue recovery of the insured's deductible when pursuing its own subrogation interest. WAC 284-30-393.^{FN5} It also requires that

insureds be fully reimbursed for their deductibles from any recovery obtained by the insurance company, something the previous rule did not require. Compare WAC 284-30-393 with former WAC 284-30-3905 (2003), repealed by, WASH **835 ST. REG. (WSR) 09-11-129 (Aug. 21, 2009). The OIC adopted the new regulation after the accident, payment by the insurer, and inter-agency arbitration at issue in this case. WAC 284-30-393. We must therefore decide whether the new regulation applies retroactively.

FN5. WAC 284-30-393 reads, "The insurer must include the insured's deductible, if any, in its subrogation demands. Subrogation recoveries must be allocated first to the insured for any deductible(s) incurred in the loss. Deductions for expenses must not be made from the deductible recovery unless an outside attorney is retained to collect the recovery. The deduction may then be made only as a pro rata share of the allocated loss adjustment expense. The insurer must keep its insured regularly informed of its efforts related to the progress of subrogation claims. 'Regularly informed' means that the insurer must contact its insured within sixty days after the start of the subrogation process, and no less frequently than every one hundred eighty days until the insured's interest is resolved."

[6] ¶ 15 Courts may apply an amendment to an administrative regulation retroactively if either (1) the agency intended the amendment to apply retroactively, (2) the effect of the amendment is remedial or curative, or (3) the amendment serves to clarify the purpose of the existing rule. *Champagne v. Thurston County*, 163 Wash.2d 69, 79, 178 P.3d 936 (2008). There is no indication that the agency intended the amendment to be retroactive, nor is the effect remedial. WAC 284-30-393; OIC, Con[c]ise Exp[lanatory] Statement; Responsiveness Summary; Rule Development Process; and Implementa-

tion Plan Relating to the Adoption of Chapter 284-30 WAC The Unfair Claims Settlement Practices Regulation (May 20, 2009) (unpublished document, on *116 file with the OIC) (CES); WSR 09-11-129 (May 20, 2009). Therefore, it may only be applied retroactively if it merely clarifies, rather than changes, existing law. *Champagne*, 163 Wash.2d at 79, 178 P.3d 936.

¶ 16 The new regulation clearly changes the obligations of an insurer from the predecessor rules. Former WAC 284-30-3904, repealed by WSR 09-11-129 (May 20, 2009), required insurers to recover the insured's deductible while pursuing its subrogated interest only if requested by their insureds.^{FN6} Former WAC 284-30-3905 permitted recovery to be shared on a proportionate basis between the insurer and the insured.^{FN7} The new regulation changed the insurer's obligation to a mandatory obligation to include the insured's deductible when pursuing collection of its subrogation interests. WAC 284-30-393. WAC 284-30-393 also requires that insureds be fully reimbursed for their deductibles from any recovery obtained by the insurance company. The new regulation did not merely clarify the previous regulations, but imposed on insurers a new obligation and provided the insured new benefits.

FN6. Former WAC 284-30-3904 read,

Will my insurer pursue collection of my deductible? (1) Yes, if your insurer is pursuing collection of its interest, you may request they pursue collection of your deductible for you.

(2) Your insurer will inform you of its efforts relative to collection of your deductible.

(Boldface omitted.)

FN7. Former WAC 284-30-3905 read,

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.

(2) No deduction for expenses can be made from the deductible recovery unless an outside attorney is retained to collect such recovery, and then only for the pro rata share of the allocated loss adjustment expense.

(Boldface omitted.)

¶ 17 Averill points out that the OIC stated that these amendments only clarify existing rules. The OIC stated, “These rules clarify and recodify numerous sections of chapter 284-30 WAC.... The amendments do not make substantive changes to these rules; the amendments and ***117** new sections refine or clarify existing rules.” WSR 09-11-129 (May 20, 2009). The rulemaking file indicates that the OIC believed that case law, specifically the made whole doctrine of *Thiringer*, already required the insurance company to pay the insured's entire deductible from its recovery. See CES, *supra*, at 6-7.^{FN8} ****836** The OIC's interpretation is entitled to great deference as an agency's interpretation of its own properly promulgated regulations. *Silverstreak, Inc. v. Dept. of Labor Indus.*, 159 Wash.2d 868, 885, 154 P.3d 891 (2007). Here, the issue is not one of interpretation of a regulation issued by the OIC, but of the underlying decisional law, which is the province of the courts to interpret and apply. *Int'l Longshoremen's Ass'n v. Nat'l Labor Relations Bd.*, 56 F.3d 205, 212 (D.C.Cir.1995). The OIC's interpretation of *Thiringer* is wrong as a matter of law. *Thiringer* does not require that the insured be made whole for its deductible when the insurer pursues its subrogation interest.

^{FN8}. The originally proposed WAC 284-30-393 included the sentence, “Subrogation recoveries must be shared on a proportionate basis with the insured, unless the deductible amount has been otherwise recovered.” WSR 09-03-106 (Feb. 4,

2009). The OIC received the following comment during the public comment period,

We respectfully request that [proposed WAC 284-30-393] be amended in order to conform to Washington's “insured made whole” rule as set forth in the *Thiringer* case and its progeny....

...

The proposed rule would improperly supersede both longstanding public policy and standardized insurance policy language, giving the insurer rights that they never contracted for and which Washington courts have recognized they should not have. We submit to [*sic*] the Office of the Insurance Commissioner should not generally enact regulations that override clear Washington law that protects consumers.

CES, *supra*, at 6. The OIC agreed and replaced the sentence with, “Subrogation recoveries must be allocated first to the insured for any deductible(s) incurred in the loss.” CES, *supra*, at 7.

¶ 18 The new regulation did not merely clarify or codify a duty of the insurer already required by case law.^{FN9} WAC 284-30-393 in fact changed an insurers affirmative obligations concerning recovery of deductibles. Therefore, the new ***118** regulation may not be applied retroactively. *Champagne*, 163 Wash.2d at 79, 178 P.3d 936. The former insurance regulations did not require Farmers to pay Averill's full deductible.

^{FN9}. Farmers has not challenged the validity of the regulation, and we do not address that issue.

IV. Averill's Insurance Contract Claims

[7] ¶ 19 Averill argues she has a separate claim for recovery of her full deductible based on the lan-

guage of the contract. Averill contends that the insurance policy language expressly adopted the made whole doctrine. Farmers argues that the policy requires that the insured recover from another in order to invoke the made whole doctrine.

[8][9][10] ¶ 20 Interpretation of an insurance contract is a question of law reviewed de novo. *Woo v. Fireman's Fund Ins. Co.*, 161 Wash.2d 43, 52, 164 P.3d 454 (2007). Because they are generally contracts of adhesion, courts look at insurance contracts in a light most favorable to the insured. *Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wash.2d 130, 141, 26 P.3d 910 (2001). A court must give the language of an insurance policy the same construction that an average person purchasing insurance would give the contract. *Id.* at 137-38, 26 P.3d 910.

¶ 21 The policy language at issue stated:

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 the rights of recovery of the person to whom payment was made against another.

Averill argues the policy incorporates the made whole doctrine, essentially stating Washington law. Assuming it does, her contract claim fails for the same reasons the common law claim failed. Applying the language of the policy, Averill did recover under the policy and did recover half her deductible from another. Farmers is entitled to be reimbursed to the extent of its payment to Averill after she has been fully compensated for her loss. But, Farmers did not seek reimbursement out of the funds Averill recovered *119 from the tortfeasor. The policy does not entitle Averill to recover her deductible from Farmers's recovery of its subrogation interest from the tortfeasor. Therefore, the trial court erred in granting Averill's motion for partial summary judgment.

¶ 22 Averill's remaining claims, specifically the CPA violations, bad faith, and negligence, are all based on the foundational argument that Farmers wrongly withheld payment of Averill's remaining deductible. Because Farmers was not required to compensate Averill for her remaining deductible, Averill's remaining claims are without merit. Because Averill had no claim as a matter of law, under common law, regulation, or contract the trial court erred in denying State Farm's 12(b)(6) motion to dismiss.

V. Attorney Fees

¶ 23 Averill seeks attorney fees under *Olympic Steamship Co. Inc., v. Centennial Insurance Co.*, 117 Wash.2d 37, 54, 811 P.2d 673 (1991). Because Averill is not the prevailing**837 party, she is not entitled to fees under *Olympic Steamship*.

¶ 24 We reverse and remand for dismissal.

WE CONCUR: DWYER, A.C.J., and ELLINGTON, J.

Wash.App. Div. 1,2010.
Averill v. Farmers Ins. Co. of Washington
155 Wash.App. 106, 229 P.3d 830

Judges and Attorneys(Back to top)

Judges | Attorneys

Judges

• **Appelwick, Hon. Marlin J.**

State of Washington Court of Appeals, 1st Division
Washington
Litigation History Report | Judicial Reversal Report
| Judicial Expert Challenge Report | Profiler

• **Dwyer, Hon. Stephen J.**

State of Washington Court of Appeals, 1st Division
Washington
Litigation History Report | Judicial Reversal Report
| Judicial Expert Challenge Report | Profiler

• **Ellington, Hon. Anne L.**
State of Washington Court of Appeals, 1st Division
Washington
Litigation History Report | Judicial Reversal Report
| Judicial Expert Challenge Report | Profiler

• **Heller, Hon. Bruce E.**
State of Washington Superior Court, King County
Washington
Litigation History Report | Judicial Reversal Report
| Profiler

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• **Ide, Matthew J.**
Washington, District of Columbia
Litigation History Report | Profiler

END OF DOCUMENT

APPENDIX D

NO. 64626-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

DALJEET SOMAL,
and on behalf of themselves and all other similarly situated,

Respondent/Plaintiff,

v.

ALLSTATE INSURANCE COMPANY AND
ALLSTATE INDEMNITY COMPANY,

Petitioners/Defendant.

RECEIVED
COURT OF APPEALS
DIVISION ONE
OCT 08 2010

REVIEW FROM THE SUPERIOR COURT FOR KING COUNTY
King County Superior Court No. 09-2-23688-7 SEA
THE HONORABLE SUZANNE M. BARNETT

MOTION FOR ACCELERATED REVIEW
OF PETITIONERS/DEFENDANT
ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY

RIDDELL WILLIAMS P.S.
John D. Lowery, WSBA No. 6633
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Attorneys for Petitioners/Defendant
Allstate Property and Casualty Insurance Company

NO. 64626-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

DALJEET SOMAL,
and on behalf of themselves and all other similarly situated,

Respondent/Plaintiff,

v.

ALLSTATE INSURANCE COMPANY AND
ALLSTATE INDEMNITY COMPANY,

Petitioners/Defendant.

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THE HONORABLE SUZANNE M. BARNETT

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OF PETITIONERS/DEFENDANT
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RECEIVED
OCT 08 2010
David R. Hallowell

NO. 64626-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

DALJEET SOMAL,
and on behalf of themselves and all other similarly situated,

Respondent/Plaintiff,

v.

ALLSTATE INSURANCE COMPANY AND
ALLSTATE INDEMNITY COMPANY,

Petitioners/Defendant.

RECEIVED
OCT 8 2010
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REVIEW FROM THE SUPERIOR COURT FOR KING COUNTY
King County Superior Court No. 09-2-23688-7 SEA
THE HONORABLE SUZANNE M. BARNETT

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NO. 64626-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

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FILE

I. IDENTITY OF PETITIONER AND RELIEF SOUGHT

The Petitioner, Allstate Property and Casualty Insurance Company (“Allstate”), defendant in the case below, seeks an order for accelerated review, and reversing the King County Superior Court’s Orders Denying Defendant’s Motion to Dismiss and Granting Plaintiff’s Motion for Partial Summary Judgment dated November 16, 2009 (“11/16/09 Orders”). *Appendix A & B*. Pursuant to this Court’s March 15, 2010 opinion in *Farmer’s Insurance Co. of Wash. v. Averill*, No. 62767-8-I (“*Averill*”), which is now final, the 11/16/09 Orders were errors of law.

In the 11/16/09 Orders, the trial court concluded that Washington’s made whole doctrine required Allstate to reimburse Plaintiff his entire collision insurance deductible before Allstate could retain any monies it recovered in subrogation from a third party tortfeasor, regardless of Plaintiff’s comparative fault or the amount Plaintiff could have recovered from the third party had he proceeded on his own.

This Court decided the same in issue in *Averill*, ruling that an insurance company is not required to reimburse its insured his or her entire collision deductible before the insurance company can retain any money it recovers in subrogation from a third party tortfeasor, regardless of the insured’s comparative fault or the amount the insured could have recovered from the third party had he or she proceeded on his own. Accordingly, the *Averill* trial court’s orders denying Farmer’s motion to dismiss and granting Ms. Averill’s motion for partial summary judgment – like the 11/16/09 Orders in this case – were errors of law.

Allstate respectfully requests that this Court accelerate review, reverse the 11/16/09 Orders and remand for dismissal of Respondent/Plaintiff's claims.

II. ISSUE PRESENTED

Whether accelerated review and reversal of the 11/16/09 Orders is appropriate where, pursuant to this Court's ruling on the same issue, the 11/16/09 Orders were errors of law.

III. FACTS RELEVANT TO MOTION

On December 29, 2009, Allstate filed a motion for discretionary review of the 11/16/09 Orders. *Appendix C*. On February 9, 2010, this Court issued a ruling granting review then staying the appeal because the issues were the same as in the *Averill* case, which was already pending at that time ("Order Granting Review"). *Appendix D*. The Order Granting Review provided:

The critical issue is whether Allstate is obligated to fully reimburse Somal for his deductible after a subrogation recovery when Somal was partially at fault. This Court previously accepted the same issue in [*Averill*] . . . and heard oral argument on the merits on January 10, 2010.

The trial court's certification in this case is accepted and review shall be granted under RAP 2.3(b)(4). The hearing set for February 12, 2010 shall be stricken. Because the issue presented in this case may be shortly resolved, this appeal shall be stayed pending issuance of the mandate in *Averill*.

Id. (emphasis added)

On March 15, 2010, this Court issued a published opinion in *Averill*, reversing and remanding for dismissal of Ms. Averill's claims. *Appendix E*. The opinion stated, "Neither the common law made whole rule, the insurance commissioner regulations, nor the insurance contract require Farmers to make Averill whole for her deductible funds recovered by the insurer under its subrogation interests asserted against a third party. Averill has no claim as a matter of law." *Id.*

Ms. Averill filed in the Supreme Court of Washington a Petition for Review. The Petition was denied on September 7, 2010, rendering this Court's decision in *Averill* final. *Appendix F*.

IV. ARGUMENT

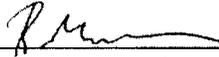
Under RAP 18.12, the Court may set any review proceeding for accelerated disposition. This matter should be accelerated. Given this Court's opinion in *Averill*, the 11/16/09 Orders, on the same issue, were errors of law. Further delay and additional briefing would be a waste of the parties' and the Court's resources.

V. CONCLUSION

Under this Court's decision in *Averill*, the 11/16/09 Orders were errors of law. Allstate's motion for accelerated review should be granted and the 11/16/09 Orders should be reversed.

Respectfully submitted this 8th day of October, 2010.

RIDDELL WILLIAMS P.S.



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APPENDIX A

Honorable Suzanne Barnett
Hearing Date: November 16, 2009, at 4:00 pm
With Oral Argument

SUPERIOR COURT OF WASHINGTON, COUNTY OF KING

DALJEET SOMAL, individually, and on behalf
of all those similarly situated,

Plaintiff,

vs.

ALLSTATE PROPERTY AND CASUALTY
INSURANCE COMPANY,

Defendant.

Case No.: 09-2-23688-7 SEA

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS UNDER CR
12(b)(6) [~~PROPOSED~~]

THIS MATTER came before the Court on Defendant's Motion to Dismiss Pursuant to CR 12(b)(6). The Court has heard the arguments of counsel and has reviewed the records and files herein, including:

1. Defendant's Motion to Dismiss Pursuant to CR 12(b)(6), and supporting declarations.
2. Plaintiff's Opposition to Defendant's Motion to Dismiss, and supporting declarations;
3. Defendant's Reply in Support of Motion to Dismiss Pursuant to CR 12(b)(6), and supporting declarations; ~~and~~

~~4.~~
Based upon the foregoing, it is hereby ORDERED, ADJUDGED, and DECREED that:

ORDER DENYING DEFENDANT'S MOTION TO DISMISS
UNDER CR 12(B)(6) - 1

IDE LAW OFFICE
801 SECOND AVENUE, SUITE 1502
SEATTLE, WASHINGTON 98104-1500
PH: 206 625-1326

ORIGINAL

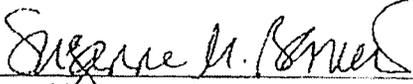
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1. Defendant's Motion to Dismiss Pursuant to CR 12(b)(6) is DENIED; and

2.

IT IS SO ORDERED.

ENTER: November 16, 2009


Honorable Suzanne Barnett

Presented by:

IDE LAW OFFICE


Matthew J. Ide, WSBA No. 26002

- and -

David R. Hallowell, WSBA No. 13500
LAW OFFICE OF DAVID R. HALLOWELL

Attorneys for Plaintiff

APPENDIX B

Honorable Suzanne Barnett
Hearing Date: November 16, 2009, at 4:00 pm
With Oral Argument

SUPERIOR COURT OF WASHINGTON, COUNTY OF KING

DALJEET SOMAL, individually, and on behalf
of all those similarly situated,

Plaintiff,

vs.

ALLSTATE PROPERTY AND CASUALTY
INSURANCE COMPANY,

Defendant.

Case No.: 09-2-23688-7 SEA

ORDER GRANTING PARTIAL
SUMMARY JUDGMENT IN FAVOR OF
PLAINTIFF ~~PROPOSED~~

THIS MATTER came before the Court on Plaintiff's Motion For Partial Summary Judgment. The Court has heard the arguments of counsel and has reviewed the records and files herein, including:

1. Plaintiff's Motion For Partial Summary Judgment, and supporting declarations.
2. Defendant Allstate Property and Casualty Insurance Company's Opposition to Plaintiff's Motion for Partial Summary Judgment, and supporting declarations;
3. Plaintiff's Reply in Support of Motion for Partial Summary Judgment, and supporting declarations; and

4. _____

Based upon the foregoing, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Plaintiff's Motion for Partial Summary Judgment is GRANTED.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN
FAVOR OF PLAINTIFF - 1

IDE LAW OFFICE
801 SECOND AVENUE, SUITE 1502
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PH: 206 625-1326

ORIGINAL

1 2. Somal is entitled to be made whole for his property damage loss before Allstate,
2 as his property damage insurer, is entitled to retain funds recovered from the third party
3 tortfeasor representing payment for Somal's property damage loss.

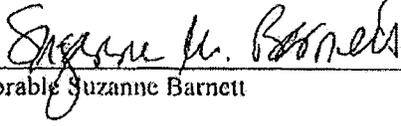
4 3. Consequently, Allstate acted wrongfully when it retained monies obtained from
5 the third party tortfeasor representing payment for Somal's property damage loss, before Somal
6 had been fully compensated for his property damage loss.

7 3. The Court is not, at this time, ruling on the measure, type or scope of relief
8 available to plaintiff for the foregoing.

9

10 IT IS SO ORDERED.

11 ENTER: November 16, 2009


Honorable Suzanne Barnett

12
13 Presented by:

14 IDE LAW OFFICE

15

16 
17 Matthew J. Ide, WSBA No. 26002

18 - and -

19 David R. Hallowell, WSBA No. 13500
20 LAW OFFICE OF DAVID R. HALLOWELL

21 Attorneys for Plaintiff

22

23

24

25

26

APPENDIX C

NO. 64626-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

DALJEET SOMAL,
and on behalf of themselves and all other similarly situated,

Respondent/Plaintiff,

v.

ALLSTATE INSURANCE COMPANY AND
ALLSTATE INDEMNITY COMPANY,

Petitioners/Defendant.

REVIEW FROM THE SUPERIOR COURT FOR KING COUNTY
King County Superior Court No. 09-2-23688-7 SEA
THE HONORABLE SUSAN M. BARNETT

MOTION FOR DISCRETIONARY REVIEW
OF PETITIONERS/DEFENDANT
ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY

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WASHINGTON INSURANCE REGULATIONS

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WAC 284-30-393 8

OTHER AUTHORITIES

2 Allan D. Windt, Insurance Claims and Deductibles §
10.6 at 10-38, 39 (5th ed.) 6

APPENDICES

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Appendix B..... 1

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I. IDENTITY OF PETITIONER AND DECISION BELOW

The Petitioner, Allstate Property and Casualty Insurance Company (“Allstate”), defendant in the case below, seeks discretionary review of the King Superior Court’s Orders Denying Defendant’s Motion to Dismiss and Granting Plaintiff’s Motion for Partial Summary Judgment dated November 16, 2009 (“11/16/09 Orders”). *Appendix A & B*. In the 11/16/09 Orders, the trial court concluded that Washington’s made whole doctrine required Allstate to reimburse Plaintiff his entire collision insurance deductible before Allstate could retain any monies it recovered in subrogation from a third party tortfeasor, regardless of Plaintiff’s comparative fault or the amount Plaintiff could have recovered from the third party had he proceeded on his own.

For reasons explained below, the 11/16/09 Orders constitute, at minimum, probable error. They also substantially alter the status quo and limit Allstate’s freedom to recover payments it has made on behalf of its partially at-fault insureds. Discretionary review is therefore warranted. RAP 2.3(b)(2).

A motion to certify the 11/16/09 Orders under RAP 2.3(b)(4) is currently pending with the trial court. Certification is appropriate here; if review is accepted and resolved in Allstate’s favor, the case will likely terminate. The undersigned counsel understands that, due to the holidays, the trial court will not rule on that motion until early January 2010. Allstate therefore reserves the right to supplement the record and this

request for discretionary review, if appropriate, after the trial court rules on that motion.

II. ISSUES PRESENTED FOR REVIEW

Whether Washington's made whole doctrine requires that an insured who is at least partially at fault in an automobile accident, and is therefore barred by comparative fault principles from recovering for all of his or her deductible from the other involved driver, nonetheless be reimbursed for his or her entire collision automobile insurance deductible by his or her insurer before that insurer is entitled to recover from the other driver any payments it made under its policy.

III. STATEMENT OF THE CASE

This case involves application of Washington's made whole doctrine to reimbursement of an insured's collision automobile insurance deductible following a subrogation recovery by the insurer, where the insured was at least partially at fault for his or her accident. Plaintiff Daljeet Somal's vehicle was involved in an automobile accident in Kent, Washington on January 12, 2009. At the time, his vehicle was insured by an automobile liability insurance policy issued by Allstate that included collision coverage. Plaintiff had a \$500 deductible on his collision coverage.

Plaintiff sought repair of his vehicle, claiming a total of \$1,970.76 in repair costs under his collision coverage. Allstate paid \$1,470.76 in

benefits under Plaintiff's policy. Plaintiff paid his \$500 deductible toward repair costs.

Allstate subsequently sought recovery in subrogation from the other driver's carrier, State Farm. Based on the facts of the accident, Allstate and State Farm determined that plaintiff Somal was 60% at fault and the other driver was 40% at fault. State Farm reimbursed 40% of the total repair costs.

Allstate issued a check to plaintiff for \$200 on March 12, 2009. This represented Plaintiff's pro rata share of his deductible reduced by the comparative fault determination, i.e., 40% of his \$500 deductible.

Plaintiff's position is that he was entitled to reimbursement of his entire deductible payment. His Class Action Complaint asserts causes of action for violation of the Washington Consumer Protection Act, Bad Faith, Conversion and Breach of Contract. Plaintiff does not claim that Allstate failed to pay him insurance benefits that he was entitled to, only that it failed to reimburse his full deductible.

Allstate moved to dismiss, arguing that Plaintiff had no legal right to recover 100% of his deductible from Allstate, regardless of his comparative fault. Plaintiff cross-moved for summary judgment on the same issue. Allstate opposed Plaintiff's motion on the bases set forth in its own motion to dismiss, and on the basis of the existence of disputed issues of material facts as to whether Plaintiff had released, waived, made an accord and satisfaction, or was estopped from raising his claims.

On November 16, 2009, the trial court issued orders denying Allstate's Motion to Dismiss and granting Plaintiff's Motion for Partial Summary Judgment. In so doing, the trial court ruled that Allstate acted wrongfully when it retained monies obtained from the third party tortfeasor representing payment for Somal's property damage loss, before Somal had been fully compensated for his property damage loss.

A case involving substantially similar issues is currently pending in this Court: *Farmer's Ins. Co. of Wash. v. Averill*, No. 62767-8-1 ("*Averill*"). Discretionary review was accepted in that case on December 26, 2008, and it is set for oral argument on January 11, 2010.

IV. SUMMARY OF ARGUMENT

The trial court's decision is contrary to Washington law. It is also contrary to the law of other jurisdictions and to applicable secondary authorities. Washington courts (like other courts across the country and leading commentators) distinguish between those situations involving reductions to insurance benefits (e.g., *Sherry, infra*) and cases involving deductibles, which are not insurance benefits and to which the doctrine does not apply. The trial court's application of the made whole doctrine to deductibles confuses the two distinct concepts of insurance benefits and deductibles. It is without precedent in Washington and amounts, at a minimum, to probable legal error that substantially changes Allstate's freedom to be compensated for funds it has advanced on behalf of its insureds and requires it to pay additional amounts to its insured above and

beyond the amounts that Allstate and its insureds contracted for in the insurance policy.

This Court has already accepted review of a substantially similar issue in *Averill*, a virtually identical case brought by the same plaintiff's counsel against Farmers Insurance. The issue presented in that case was whether the made whole doctrine applies to deductibles. For all of the same reasons the Court accepted review in *Averill*, it should do so here.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Plaintiff's claims are based on the assertion that he is entitled to recover 100% of his deductible, regardless of his comparative fault, before Allstate may retain any amounts it recovers in subrogation as reimbursement for repair payments it made under Plaintiff's collision coverage. That premise is wrong, and the trial court committed probable error by accepting it.

A. Washington Case Law Does Not Support Plaintiff's Legal Theory

The trial courts in this case and in *Averill* have acknowledged that no Washington case speaks directly to the applicability of the made whole doctrine to collision deductibles. This Court also acknowledged that in granting discretionary review in *Averill*. Appendix D. The trial court committed error because Washington law does not give Plaintiff a right to recover 100% of his deductible amount, regardless of his comparative

fault, before Allstate may retain any portion of funds recovered in subrogation.

Courts distinguish between insurance benefits and deductibles in applying the made whole rule. With insurance benefits, the insurer has agreed to assume responsibility for those amounts. Therefore, an insured and an insurer are competing for the same funds. With deductibles, the insurer and insured are not competing because the insured has agreed to assume responsibility for his or her deductible before insurance benefits ever come into play. As a leading commentator explains:

[T]he made whole doctrine does not apply to deductibles. If the insured were to be reimbursed for its deductible before the insurer is made whole, the insured would be receiving an unbargained for, unpaid for, windfall. Under the terms of the insurance policy, it was agreed that, as a condition precedent to the insurer being out of pocket for even one dollar, the insured had to first be out-of-pocket the amount of the deductible. **The made whole doctrine deals with situations in which the combination of the amount of the deductible and the amount of the insurance payment is a sum that was insufficient to make the insured whole,** and a recover is made from a third party (typically the insurer for the tortfeasor that injured the insured).

2 Allan D. Windt, Insurance Claims and Deductibles § 10.6 at 10-38, 39 (5th ed.) (emphasis added).

Washington courts make that distinction. For example, in *Meas v. State Farm Fire & Cas. Co.*, 130 Wn. App. 527, 13 P.3d 519 (2005), *rev. denied*, 167 Wn.2d 1018, 142 P.3d 607 (2006), this Court held that an insured with a collision coverage policy was “made whole” for his

property loss when he received payment of his collision insurance benefits, distinguishing between that payment of benefits and reimbursement of his deductible. *Id.* at 538 (“Here, Meas was fully compensated or ‘made whole’ for the property loss claimed under his collision coverage when he received payment from State Farm. Further, State Farm recovered his deductible and paid it to him.”)¹; *see also Stamp v. Dep’t of Labor & Indus.*, 122 Wn.2d 536, 543, 859 P.2d 597 (1993) (nothing that in “common types of direct insurance such as automobile collision coverage . . . there is usually a stated deductible amount, the effect of which is, in simplest terms, to make the insured ‘self-insured’ up to the amount of the deductible.”).

The Washington Administrative Code, as written during the time relevant to Plaintiff’s complaint and the class period, expressly recognized that a carrier who recovers in subrogation may prorate the amount it repays to its insureds:

If my insurer collects my deductible back, will I recover the full amount of my deductible? (1) At a minimum, recovery

¹ Mr. Meas would have been paid collision benefits from his carrier long before he received any reimbursement of his deductible (his carrier could not pursue subrogation and recover his deductible until it paid his benefits). Yet this Court said he was “made whole” when he received his collision benefits, and not only after he received reimbursement of his deductible. Plaintiff Somal is in the same position. He was paid benefits under his collision policy within three weeks of his accident, but was not reimbursed for his deductible until two months later when Allstate recovered from State Farm in subrogation. Like Mr. Meas, Plaintiff Somal was “made whole” when Allstate paid him collision benefits on January 31, 2009.

will be shared on a **proportionate basis** with your insurer.
(2) No deduction for expenses can be made from the deductible recovery unless an outside attorney is retained to collect such recovery, and then only for the pro rata share of the allocated loss adjustment expense.

WAC 284-30-3905 (emphasis added).

That WAC provision was recently repealed, effective August 21, 2009. The new provision (WAC 284-30-393)² states in relevant part:

The insurer must include the insured's deductible, if any, in its subrogation demands. **Subrogation recoveries must be allocated first to the insured for any deductible(s) incurred in the loss.**

WAC 284-30-393 (effective August 21, 2009) (emphasis added). The new regulation works a change in the law, making it plain that proration based on comparative fault was permitted under Washington law at the time of Plaintiff's accident and during the class period.

Allstate was entitled to pursue recovery from the at-fault driver's carrier. Washington law authorizes Allstate to proceed in subrogation against a tortfeasor once it has paid insurance benefits for a loss under its policy, giving Allstate the same right to recover enjoyed by the insured whose loss it has paid. *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 423 (2008) (subrogation is "[t]he principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with

² Plaintiff's claim arose in January 2009 and his deductible was reimbursed in March 2009. His claim was therefore governed by WAC

respect to any loss covered under the policy”). Allstate’s insurance policy with Plaintiff also gives Allstate a contractual right to subrogation up to the amount Allstate has paid. *See* Complaint at ¶ 12; *see also Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 417 (1985).

Like other states, Washington recognizes that the doctrine of subrogation seeks to impose ultimate responsibility for a loss on the party who, “in equity and good conscious, ought to bear it.” *Mahler v. Szuchs*, 135 Wn.2d 398, 411 (1988). “The general purpose of subrogation is to facilitate placement of the financial consequences of loss on the party primarily responsible in law for such loss.” *Id.* (citation omitted).

The above principles justify Allstate’s to prorate the amount of Plaintiff’s deductible reimbursed to him based on his comparative fault. A plaintiff who is 60% at fault for his accident can recover only 40% of his total damages if he proceeds on his own against the other driver. He must bear the financial consequences of the other 60% of the loss, as he should in equity and good conscious. However, Plaintiff Somal actual had 100% of his losses paid, less his deductible, through his collision coverage from Allstate. After paying, Allstate was entitled to pursue subrogation against the other driver, but only to the same extent that Plaintiff could have done so, i.e., Allstate could only recover 40% of the loss because Plaintiff only had a right to recover that amount.

The trial court's 11/16/09 Orders provide Plaintiff with a windfall by putting him in a better position than he would otherwise enjoy if Allstate was required to pay 100% of his deductible regardless of his comparative fault. Plaintiff has already been "fully compensated" by receiving his pro rata share of his deductible, i.e., the 40% that he could recover on his own.

Plaintiff argued that *Sherry v. Financial Indemnity Co.*, 160 Wn.2d 611, 160 P.3d 31 (2007) required Allstate to reimburse Plaintiff 100% of his collision deductible. The trial court apparently agreed. This interpretation of *Sherry*, however, is incorrect. *Sherry* dealt with insurance benefits, not deductibles -- a key distinction under the made whole doctrine. It considered only the narrow issue of whether an insurance carrier could offset previously-paid personal injury protection (PIP) benefits (a form of no-fault medical insurance) against a later uninsured motorist (UIM) award. *Sherry* held that in the unique context of UIM and PIP coverage,³ insureds were not considered to receive "full compensation" until "they have made a complete recovery of the actual losses suffered as a result of the automobile accident as determined by a

³ The court in *Sherry* explained that UIM and PIP coverage are both unique "creatures of public policy" that the state legally requires all carriers to offer their insureds. *Id.* at 620. The court held that UIM is "unique among insurance" because it does not provide full compensation and instead simply "provides additional insurance to cover any judgment that might be entered in favor of the insured against an underinsured motorist." *Id.* at 622.

court or arbitrator.” *Id.* at 614. The court explained that allowing offsets in such circumstances would essentially reduce the insured’s PIP benefits by the percentage of his comparative fault even though the PIP coverage was supposed to be “no fault.” *Id.* at 625.

Unlike *Sherry*, this is a case about deductibles. Neither UIM or PIP insurance benefits or offsets of benefits are at issue here. Plaintiff’s collision coverage is not reduced if Allstate prorates the repayment of his deductible based on his comparative fault because Plaintiff has no right in the instance to coverage for his deductible amount. *Sherry* is inapplicable.

B. The Bases Underlying the 11/16/09 Orders Have Been Rejected

1. Court’s Have Repeatedly Rejected the Conclusion Reached by the Trial Court

Other courts have rejected claims virtually identical to Plaintiff’s. For example, in *Monte de Oca v. State Farm Fire & Cas. Co. v. Allstate Indem. Co., et al.*, 897 So.2d 471 (Fla. Dist. Ct. App. 2004), the *en banc* Florida District Court of Appeal held that a class of insureds did not state a legal claim with allegations that Allstate and State Farm were required to reimburse the plaintiffs 100% of their collision coverage deductible before keeping any payments as reimbursement, even when the insured class members were partially at fault. In *Monte de Oca*, State Farm paid to repair accident damage to its insured’s vehicle under his collision coverage, then pursued a subrogation claim for its payments against the other involved driver. After the subrogation claim was resolved on the

basis that both drivers were 50% at fault, State Farm received 50% of its repair costs back and reimbursed its insured for 50% of his deductible. On similar facts, Allstate recovered 75% of its subrogation demand from the other involved driver, then refunded 75% of the plaintiff's deductible.

The two insureds brought separate lawsuits against the two carriers, demanding 100% of their deductibles back. The trial court dismissed both complaints for failure to state a claim. On a consolidated appeal, the *en banc* court first reviewed the purposes of subrogation, which included preventing overcompensation of an insured and ensuring that a “wrongdoer who is legally responsible for the harm should not receive the windfall of being absolved from liability.” *Id.* at 473.

Applying those principles, the court held that the plaintiffs did not state a legal claim:

The Insured is demanding the second \$250 of the deductible based on his contention that without his receiving it he has not been made whole. However, it is to be recalled that the Insured is a “wrongdoer” – actually one of the two wrongdoers – as the Insured and the other driver were both 50% comparatively negligent. As we previously observed, *Florida Farm Bureau v. Martin, supra*, a wrongdoer legally responsible for harm should not receive a windfall of being absolved from liability.

The Insured, as a wrongdoer legally responsible for 50% of the harm, is not entitled to be totally absolved from liability and must not receive a windfall. His liability as a 50% comparative wrongdoer is for half of the deductible. Under this formula Monte de Oca and Snell under his facts, have been made whole and thus have no cause of action.

Id. See also *National Continental Ins. Co. v. Perez*, 897 So.2d 492 (Fla.

Dist. Ct. App. 2005) (applying *Monte de Oca* and vacating order certifying class of insureds who claimed they were not fully compensated for their losses where their carrier returned only a prorated portion of their collision deductibles that was calculated based on their contributory negligence).

The conclusion reached by the trial court was again rejected in *Harnick v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 579378 (E.D.Penn. Mar. 5, 2009), where the court dismissed, for failure to state a claim, a class action lawsuit alleging that State Farm's practice of prorating repayment of the plaintiff's collision coverage deductible based on comparative fault following a successful subrogation recovery was improper. In *Harnick*, State Farm paid benefits to plaintiff under her collision policy, less plaintiff's \$500 deductible, then pursued a subrogation claim against the other driver involved in the accident. State Farm and the other driver settled on 50% comparative fault, and the other driver paid 50% of State Farm's repair costs. State Farm then reimbursed 50% of the plaintiff's deductible (\$250). Plaintiff sued to recover her full deductible, arguing that she had a right to be "made whole" for that amount before her insurer could retain any portion of the recovered funds.

State Farm moved to dismiss, arguing that proration of the plaintiff's deductible was proper under a Pennsylvania state insurance regulation stating that "[s]ubrogation recoveries shall be shared on a proportionate basis with the first-party claimant, unless the deductible amount has been otherwise recovered." *Id.* at 2, citing 31 Pa.Code §

146.8(c). The court held that regulation gave State Farm “the right to prorate the deductible precisely as they are alleged to have done in this case.” *Id.* The court also held that “[t]he behavior complained of by the plaintiffs ... cannot violate the common law ‘made whole’ doctrine” because that doctrine “does not describe a right of the insured to the recovery of the full amount of his contractually required deductible when the insurer recovers in subrogation from a third party.” *Id.* at 3 & n.1.

2. The building blocks and logical underpinnings of Plaintiff’s theory against Allstate have also been repeatedly rejected

The trial court’s conclusion that Plaintiff is not “made whole” until he receives 100% of his deductible was rejected in *Sorge v. Nat’l Car Rental Sys., Inc.*, 470 N.W.2d 5 (Wis. Ct. App. 1991). In *Sorge*, the Wisconsin Court of Appeals held that “a negligent insured is made whole in terms of equity when [it] receives payment for that percentage of [its] damages for which [it] was not at fault.” *Id.* at 7. The insured in *Sorge* settled a claim arising from her injuries in an automobile accident for less than her uninsured losses. *Id.* at 6. Her recovery was reduced due to her contributory negligence. *Id.* Her carriers then filed suit against her for reimbursement of payments made for her injuries. *Id.* The plaintiff argued her insurers could not recover because she was not made whole by the settlement. *Id.* The Wisconsin Court of Appeals held that the settlement compensated the plaintiff for “all the damages to which she is legally entitled,” and therefore the “made whole” doctrine did not bar her

carriers from recovery after application of comparative fault principles. *Id.* at 7. Explaining that the "made whole" doctrine applied only where equitable, the court found it unjust to permit an insured to invoke the "made whole" doctrine when her own fault prevented her from receiving a complete recovery. *Id.* at 6-7. Accordingly, the insured was made whole when she recovered all the damages she would be entitled to after reduction for her comparative fault. *Id.*

The Utah Court of Appeals reached a similar conclusion in *Birch v. Fire Insurance Exchange*, 122 P.3d 696 (Utah Ct. App. 2005). There, an insured brought a class action against his property insurer seeking to recover the full amount of his deductible, rather than a pro rata share of it, from his carrier's recovery in a subrogation action. The plaintiff argued that the "made whole" rule required repayment of 100% of his deductible before his insurer could keep any portion of the replacement cost reimbursement it received, asserting that the focus of the made whole rule was on the total loss he sustained instead of on what he could legally recover from the tort-feasor – the same argument that Plaintiff Somal made in this case. *Id.* at 698-99. The carrier argued that the insured was made whole for all of the damages that he could have recovered on his own from the tort-feasor (because his recovery would have been reduced by the same amount for depreciation anyway), and that plaintiff was seeking a double recovery by attempting to allocate the subrogation recovery to an uninsured portion of the loss. *Id.* at 699.

The court in *Birch* agreed with the carrier. Like the court in *Monte de Oca*, it recognized that a chief purpose of subrogation was to prevent the insured from receiving a double recovery. *Id.* at 698. The insured had only a contractual right to payment *above* the deductible; he had no contractual right to recover any portion of his deductible. *Id.* at 700. In tort, the insured could recover only up to the percentage of replacement cost reimbursed to his carrier, 95%. Accordingly, he was only entitled to recover an equal percentage – 95% – of his deductible. *Id.*

The 11/16/09 Orders are not supported by case law.

C. **Review Should be Accepted for the Same Reasons The Court Accepted Review in *Averill***

This case involves the same central issue as that posed in the *Averill* case, which is currently pending before this Court and set for oral argument on January 11, 2010: i.e., whether an insured must be reimbursed for his or her entire collision automobile insurance deductible before the insurer is entitled to recovery any payments it made under its collision coverage. In certifying his order pursuant to RAP 2.3.(b)(4) in the *Averill* case, King County Superior Court Judge Heller stated:

Notwithstanding its holding, **the Court recognizes that whether the made whole doctrine requires that an insured be reimbursed for her entire deductible before an insurer is entitled to recover its payments made under the applicable coverage has not been directly addressed in Washington. Under these circumstances, therefore, the Court hereby certifies that this holding involves a controlling question of law as to which there is substantial ground for a difference of opinion.**

Furthermore, because this question is also the central issue

in the case, the Court certifies that immediate review of its order granting partial summary judgment may materially advance the ultimate termination of this litigation.

Appendix C (emphasis added).

In accepting discretionary review, the Commissioner's letter ruling provided:

I agree completely with the trial court's certification. The breach of contract issue is a controlling question of law. Despite Averill's reluctance to admit it, there clearly are substantial grounds for a difference of opinion whether the make whole doctrine extends to agreed deductibles. And immediate review of the breach of contract ruling may materially advance the ultimate termination of the litigation because other issues in the litigation will be impacted by that determination.

Appendix D (emphasis added).

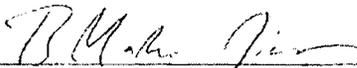
The same result is warranted here.

VI. CONCLUSION

For the reasons stated, the trial court's application of the made whole doctrine to collision deductibles was a probable, if not obvious, error which substantially limits Allstate's ability to retain subrogation funds. This Court should accept discretionary review of the 11/16/09 Orders.

Respectfully submitted this 29th day of December, 2009.

RIDDELL WILLIAMS P.S.



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Gavin W. Skok, WSBA # 29766
Blake Marks-Dias, WSBA #28169
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APPENDIX A

Honorable Suzanne Barnett
Hearing Date: November 16, 2009, at 4:00 pm
With Oral Argument

SUPERIOR COURT OF WASHINGTON, COUNTY OF KING

DALJEET SOMAL, individually, and on behalf
of all those similarly situated,

Plaintiff,

vs.

ALLSTATE PROPERTY AND CASUALTY
INSURANCE COMPANY,

Defendant.

Case No.: 09-2-23688-7 SEA

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS UNDER CR
12(b)(6) [~~PROPOSED~~]

THIS MATTER came before the Court on Defendant's Motion to Dismiss Pursuant to CR 12(b)(6). The Court has heard the arguments of counsel and has reviewed the records and files herein, including:

1. Defendant's Motion to Dismiss Pursuant to CR 12(b)(6), and supporting declarations.
2. Plaintiff's Opposition to Defendant's Motion to Dismiss, and supporting declarations;
3. Defendant's Reply in Support of Motion to Dismiss Pursuant to CR 12(b)(6), and supporting declarations; and

~~4.~~
Based upon the foregoing, it is hereby ORDERED, ADJUDGED, and DECREED that:

ORDER DENYING DEFENDANT'S MOTION TO DISMISS
UNDER CR 12(B)(6) - 1

IDE LAW OFFICE
801 SECOND AVENUE, SUITE 1502
SEATTLE, WASHINGTON 98104-1500
PH: 206 625-1326

ORIGINAL

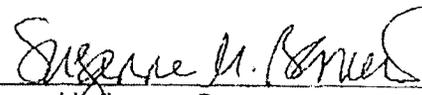
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1. Defendant's Motion to Dismiss Pursuant to CR 12(b)(6) is DENIED; and

2

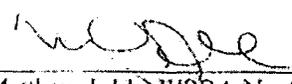
IT IS SO ORDERED.

ENTER: November 16, 2009


Honorable Suzanne Barnett

Presented by:

IDE LAW OFFICE


Matthew J. Ide, WSBA No. 26002

- and -

David R. Hallowell, WSBA No. 13500
LAW OFFICE OF DAVID R. HALLOWELL

Attorneys for Plaintiff

APPENDIX B

Honorable Suzanne Barnett
Hearing Date: November 16, 2009, at 4:00 pm
With Oral Argument

SUPERIOR COURT OF WASHINGTON, COUNTY OF KING

DALJEET SOMAL, individually, and on behalf
of all those similarly situated,

Plaintiff,

vs.

ALLSTATE PROPERTY AND CASUALTY
INSURANCE COMPANY,

Defendant.

Case No.: 09-2-23688-7 SEA

ORDER GRANTING PARTIAL
SUMMARY JUDGMENT IN FAVOR OF
PLAINTIFF ~~[PROPOSED]~~

THIS MATTER came before the Court on Plaintiff's Motion For Partial Summary Judgment. The Court has heard the arguments of counsel and has reviewed the records and files herein, including:

1. Plaintiff's Motion For Partial Summary Judgment, and supporting declarations.
2. Defendant Allstate Property and Casualty Insurance Company's Opposition to Plaintiff's Motion for Partial Summary Judgment, and supporting declarations;
3. Plaintiff's Reply in Support of Motion for Partial Summary Judgment, and supporting declarations; and

~~4.~~

Based upon the foregoing, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Plaintiff's Motion for Partial Summary Judgment is GRANTED.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN
FAVOR OF PLAINTIFF - 1

IDE LAW OFFICE
801 SECOND AVENUE, SUITE 1502
SEATTLE, WASHINGTON 98104-1500
PH.: 206 625-1326

ORIGINAL

1 2. Somal is entitled to be made whole for his property damage loss before Allstate,
2 as his property damage insurer, is entitled to retain funds recovered from the third party
3 tortfeasor representing payment for Somal's property damage loss.

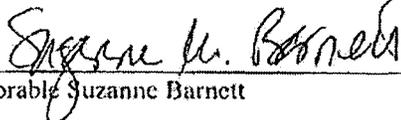
4 3. Consequently, Allstate acted wrongfully when it retained monies obtained from
5 the third party tortfeasor representing payment for Somal's property damage loss, before Somal
6 had been fully compensated for his property damage loss.

7 3. The Court is not, at this time, ruling on the measure, type or scope of relief
8 available to plaintiff for the foregoing.

9 ~~4.~~

10 IT IS SO ORDERED.

11 ENTER: November 16, 2009


Honorable Suzanne Barnett

13 Presented by:

14 IDE LAW OFFICE

15 
16 Matthew J. Ide, WSBA No. 26002

18 - and -

19 David R. Hallowell, WSBA No. 13500
20 LAW OFFICE OF DAVID R. HALLOWELL

21 Attorneys for Plaintiff

22
23
24
25
26

APPENDIX C

FILED
KING COUNTY, WASHINGTON

DEC 04 2008

SUPERIOR COURT CLERK
BY JANIE SMOTER
DEPUTY

RECEIVED

DEC 02 2008

JUDGE BRUCE E. HELLEF
DEPARTMENT 52

Honorable Bruce Heller

SUPERIOR COURT OF WASHINGTON, COUNTY OF KING

PEARL C. AVERILL, individually, and on
behalf of all others similarly situated,

Plaintiff,

vs.

FARMERS INSURANCE COMPANY OF
WASHINGTON,

Defendant.

Case No.: 07-2-35285-6 SEA

ORDER DENYING DEFENDANT'S
MOTION FOR ENTRY OF JUDGMENT
UNDER CR 54(b); CERTIFYING RULING
FOR DISCRETIONARY REVIEW UNDER
RAP 2.3(b)(4)

CLERK'S ACTION REQUIRED

THIS MATTER came before the Court on Defendant Farmers Insurance Company of Washington's motion for the entry of judgment under CR 54(b). The Court has heard the arguments of counsel and has reviewed the records and files herein, including:

1. Defendant Farmers Insurance Company of Washington's Motion For Certification of Ruling Under CR 54(b) and supporting Memorandum;
2. Plaintiff's Opposition to Defendant's Motion For Certification of Ruling Under CR 54(b); and
3. Farmers' Reply in Support of Farmers' Motion For Certification of Ruling Under CR 54(b).

ORDER DENYING DEF.'S MOTION FOR ENTRY OF
JUDGMENT UNDER CR 54(B); CERTIFYING RULING FOR
DISCRETIONARY REV. UNDER RAP 2.3(B)(4) - 1

IDE LAW OFFICE
801 SECOND AVENUE, SUITE 1502
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ORIGINAL

1 In her Complaint, Averill asserts claims for violation of the CPA, bad faith, negligence,
2 breach of contract and unjust enrichment. The Court finds that the central issue involves the
3 proper interpretation and application of the made whole doctrine, however, and that the several
4 claims are really just different theories that articulate a single claim for relief. For that reason,
5 the Court finds that this case is unsuitable for entry of judgment under CR 54(b). See *Nelbro*
6 *Packing v. Baypack Fisheries*, 101 Wn. App. 517, 524, 6 P.3d 22 (2000).

7 For the reasons that follow, however, the Court finds that this case is suitable for
8 certification for discretionary review under RAP 2.3(b)(4).

9 A number of cases in Washington have addressed the “made whole” doctrine. In
10 *Thiringer v. Am. Motors Ins. Co.*, 91 Wn.2d 215, 219, 588 P.2d 191 (1978), the Supreme Court
11 stated that the insured is entitled to be made whole first, and only after an insured has made a
12 “full recovery” of his damages” does the insurer’s right of recovery arise. In *Sherry v. Financial*
13 *Indemnity Company*, 160 Wn.2d 611, 618, 160 P.3d 31 (2007), the Supreme Court pointed out
14 that a insured is not entitled to a double recovery, and thus after an insured is “fully
15 compensated for his loss,” the insurer is entitled to (in that case) an offset.

16 In neither *Thiringer* nor *Sherry* did the Supreme Court define what “full recovery for
17 damages” or “full compensation for loss” means. In *Sherry*, however, the Supreme Court held
18 that for purposes of offsetting previously paid PIP benefits from UIM benefits, “full
19 compensation” does not include a reduction to account for comparable fault.

20 The only case of which this Court is aware that mentions deductibles in the context of
21 the made whole doctrine is *Meas v. State Farm Fire & Casualty Co.*, 130 Wn. App. 527, 123
22 P.3d 519 (2005), *rev. denied*, 157 Wn.2d 1018 (2006). The central point of *Meas*, however, is
23 that the question of “full compensation” is whether the insured has received full compensation
24 for the same loss covered by the insurance payments at issue. In addition, unlike in the case at
25 bar, in *Meas* the insured in fact recovered 100% of his deductible.

26 Thus, the Court finds that while the relevant Washington cases are helpful in establishing

1 the general principles of the made whole doctrine, they do not explicitly provide an answer to
2 the specific question posed in this case. Moreover, regulations issued by the Washington Office
3 of Insurance Commissioner are in apparent conflict with the made whole rule in general, and
4 specifically as enunciated by the Supreme Court in *Sherry*. Indeed, the Court finds that the
5 regulation, WAC § 284-30-3905, cannot be reconciled with *Sherry*. The Court notes that the
6 regulation was issued before the 2007 *Sherry* decision.

7 Although one insurance treatise states that the made whole doctrine does not apply to
8 deductibles, *see* 2 Allan D. Windt, *Insurance Claims & Disputes*, § 10.6, at 10-38 (5th ed.), the
9 Court finds that its basic premise (that deductibles are excluded because they are self-insured
10 risk) is inconsistent with the made whole doctrine in Washington. The Court finds that the case
11 *Birch v. Fire Ins. Exchange*, 122 P.3d 696, 699 (Utah 2005) is distinguishable, because in *Birch*
12 the plaintiff had already received more than full compensation, which is not true here with
13 *Averill*. The Court finds the case *Monte de Oca v. State Farm Fire & Cas.*, 897 So.2d 471, 475
14 (Fla. App. 3 Dist. 2004), although most similar to the facts here, must be rejected because its
15 resolution is directly contrary to the law of *Sherry*.

16 Given the foregoing, the Courts has ruled that this case is controlled by the rule laid out
17 in *Sherry*. Because *Averill* did not recover the full amount of her property damage loss
18 represented by her collision deductible, *Averill* was not fully compensated for her property
19 damage loss. As a consequence, the Court has ruled that *Farmers* acted wrongfully in keeping
20 sums obtained from *State Farm* as a recovery of its collision payments without first seeing that
21 *Averill* received full compensation for her property damage loss. On that basis, by separate
22 order the Court has granted plaintiff's motion for partial summary judgment on her breach of
23 contract claim.

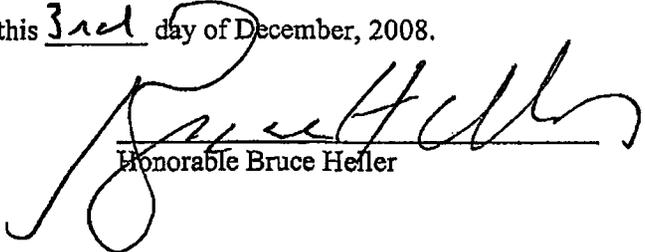
24 Notwithstanding its holding, the Court recognizes that whether the made whole doctrine
25 requires that an insured be reimbursed for her entire deductible before an insurer is entitle to
26 recover its payments made under the applicable coverage has not been directly addressed in

1 Washington. Under the circumstances, therefore, the Court hereby certifies that this holding
2 involves a controlling question of law as to which there is substantial ground for a difference of
3 opinion. Furthermore, because this question is also the central issue in the case, the Court
4 certifies that immediate review of its order granting partial summary judgment may materially
5 advance the ultimate termination of this litigation.

6 Based upon the foregoing, it is hereby ORDERED, ADJUDGED, and DECREED that:

- 7 1. Defendant's Motion For Certification of Ruling Under CR 54(b) is DENIED;
8 2. The Court hereby CERTIFIES its order granting partial summary judgment in
9 favor of Averill on her breach of contract claim for discretionary review under RAP 2.3(b)(4);
10 and

11 ~~3.~~
12 DONE ~~IN OPEN COURT~~ this 3rd day of December, 2008.

13 
14 Honorable Bruce Heller

15 Presented by:

16 IDE LAW OFFICE

17 
18 Matthew J. Ide, WSBA No. 26002

19 - and -

20 David R. Hallowell, WSBA No. 13500

21 Law Office of David R. Hallowell

22 Attorneys for Plaintiff

23 Copy Received;

24 Notice of Presentation Waived:

25 STOEEL RIVES LLP

26  12/11/08
Stevan D. Phillips, WSBA No. 2257

Rita V. Latsinova, WSBA No. 24447

Attorneys for Defendant

ORDER DENYING DEF.'S MOTION FOR ENTRY OF
JUDGMENT UNDER CR 54(B); CERTIFYING RULING FOR
DISCRETIONARY REV. UNDER RAP 2.3(B)(4) - 5

IDE LAW OFFICE
801 SECOND AVENUE, SUITE 1502
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APPENDIX D

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

DIVISION I
One Union Square
600 University Street
(206) 464-7750
TDD: (206) 587-5505

February 11, 2009

RECEIVED

FEB 12 2009

Stoel Rives LLP

FEB 13 2009

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Margarita V Latsinova
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CASE #: 62767-8-1

Pearl C. Averill, Respondent v. Farmers Insurance Company of Wa, Petitioner

Counsel:

The following notation ruling by Commissioner James Verellen of the Court was entered on February 10, 2009, regarding 's Petitioner's motion for discretionary review and motion of Gelco General Insurance Company for leave to submit amicus memorandum:

Farmers Insurance Company of Washington seeks discretionary review of the partial summary judgment that Farmers breached the terms of its insurance contract with Averill by "...failing to see that Averill was fully compensated for her property damage loss before Farmers retained proceeds obtained from the third party tortfeasor for that property damage loss..." The essence of the trial court's ruling is that the make whole doctrine recognized in Sherry v. Financial Indemnity Company, 160 Wn.2d 611, 618, 160 P.3d 31 (2007) requires that the insured be fully compensated for her loss, including her collision deductible, before the insurer may retain funds obtained on its subrogation claims against a third party. The trial court recognized that this approach conflicts with insurance regulations (WAC 284-30-3905) promulgated prior to the Sherry decision.

In a detailed and carefully analyzed order, the trial court certified under RAP 2.3(b)(4) that its breach of contract determination involves a controlling question of law as to which there is substantial grounds for a difference of opinion, and "because this question is also the central issue in the case, the Court certifies that immediate review of its order granting partial summary judgment may materially advance the ultimate termination of this litigation."

Averill does not oppose discretionary review but notes that she is unable to concede that there is a substantial grounds for a difference of opinion for purposes of RAP 2.3(b)(4) or that the trial court committed obvious or probable error for purposes of RAP 2.3(b)(1) or (2).

Rather than requiring the parties to incur the expense of appearing for oral argument on February 13, 2009, I can rule based on the materials before me. I agree completely with the trial court's certification. The breach of contract issue is a controlling question of law. Despite Averill's reluctance to admit it, there clearly are substantial grounds for a difference of opinion whether the make whole doctrine extends to agreed deductibles. And immediate review of the breach of contract ruling may materially advance the ultimate termination of the litigation because other issues in the litigation will be impacted by that determination.

Discretionary review of the trial court's ruling that Farmers has breached its contract with Averill is warranted under RAP 2.3(b)(4).

As to Geico's motion to submit an amicus memorandum in support of the motion for discretionary review, I decline the offer.

Therefore, it is

ORDERED that Geico's motion to submit an amicus memorandum in support of the motion for discretionary review is denied. It is further

ORDERED that discretionary review is granted of the trial court's ruling that Farmers has breached its contract with Averill and the clerk shall set a perfection schedule.

No. 62767-8-I
Page 3 of 3

Please be advised a ruling by a Commissioner "is not subject to review by the Supreme Court." RAP 13.3(e)

Should counsel choose to object, RAP 17.7 provides for review of a ruling of the Commissioner. Please note that a "motion to modify the ruling must be served... and filed in the appellate court not later than 30 days after the ruling is filed."

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

LAM

cc. The Honorable Bruce Heller

APPENDIX D

RICHARD D. JOHNSON,
Court Administrator/Clerk

*The Court of Appeals
of the
State of Washington*

DIVISION I
One Union Square
600 University
Street
Seattle, WA
98101-4170
(206) 464-7750
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5505

February 9, 2010

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RECEIVED

FEB 11 2010

RIDDELL WILLIAMS P.S.

Gavin W Skok
Riddell Williams PS
1001 4th Ave Ste 4500
Seattle, WA, 98154-1065

CASE #: 64626-5-1
Daljeet Somal, Respondent v. Allstate Property and Casualty Insurance Company, Petitioner

Counsel:

The following notation ruling by Commissioner William Ellis of the Court was entered on February 9, 2010 :

**64626-5, Somal v. Allstate
Ruling Granting Review, Striking Hearing, and Staying Appeal
February 9, 2010**

Allstate seeks discretionary review of a trial court order granting Somal partial summary judgment and denying Allstate's motion to dismiss. The trial court has certified that its order is appropriate for review under RAP 2.3(b)(4). Somal disagrees with the certification but does not oppose granting review pursuant to it.

The critical issue is whether Allstate is obligated to fully reimburse Somal for his deductible after a subrogation recovery when Somal was partially at fault. This Court previously accepted review of the same issue in *Farmer's Insurance Co. of Wash. v. Averill*, No. 62767-8-1, and heard oral argument on the merits on January 10, 2010.

The trial court's certification in this case is accepted and review shall be granted under RAP 2.3(b)(4). The hearing set for February 12, 2010 shall be stricken. Because the issue presented in this case may be shortly resolved, this appeal shall be stayed pending issuance of the mandate in *Averill*.

Now, therefore, it is hereby

ORDERED that Allstate's motion for discretionary review is granted; it is further

ORDERED that the hearing set for February 12, 2010, is stricken; and, it is further

ORDERED that perfection of the appeal in this case shall be stayed pending issuance of the mandate in Averill.

William H. Eills
Commissioner

Sincerely,

A handwritten signature in black ink, appearing to read "R.D. Johnson", with a long horizontal flourish extending to the right.

Richard D. Johnson
Court Administrator/Clerk

ssd

APPENDIX E

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

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March 15, 2010

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CASE #: 62767-8-1
Pearl C. Averill, Respondent v. Farmers Insurance Company of Wa, Appellant
King County, Cause No. 07-2-35285-6 SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"We reverse and remand for dismissal."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of \$200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

LAM

Enclosure

c: The Honorable Bruce Heller

No. 62767-8-1/2

her deductible from funds recovered by the insurer under its subrogation interests asserted against a third party. Averill has no claim as a matter of law. We reverse and remand for dismissal.

FACTS

Pearl Averill's daughter was in a motor vehicle accident while driving Averill's Honda Accord. Farmers Insurance Company of Washington insured the Accord under a motor vehicle liability insurance policy, which included collision coverage with a \$500 deductible. State Farm Mutual Insurance Company insured the other driver. Farmers found the Accord to be a total loss, valued at \$16,254. Under the policy's collision coverage, Farmers paid Averill for the loss, less her \$500 deductible.

Farmers then submitted a claim against State Farm via inter-company arbitration seeking recovery of its payment and Averill's \$500 deductible. The arbitrator determined that each driver was 50 percent at fault for the accident and awarded one-half of Farmers' request for itself and one-half of Averill's deductible. State Farm then paid \$7,556 to Farmers and \$250 to Averill. Averill took no action related to recovering either the property damage or her deductible from the other party or its insurer.

Averill sued Farmers for Consumer Protection Act (CPA), chapter 19.86 RCW, violations, bad faith, negligence, breach of contract, and unjust enrichment. Farmers filed a motion to dismiss under CR 12(b)(6). Averill filed a motion for partial summary judgment under CR 56, arguing that she was entitled to reimbursement for her deductible as a matter of law and contract. The trial

No. 62767-8-1/3

court granted Farmers' motion to dismiss the unjust enrichment claim and otherwise denied the motion. The trial court granted Averill's motion for partial summary judgment on the contract claim and denied summary judgment on the CPA, negligence, and bad faith claims.

Farmers sought discretionary review of the trial court's ruling. The trial court certified its ruling for discretionary review under RAP 2.3(b)(4).

DISCUSSION

I. Standard of Review

Whether dismissal was appropriate under CR 12(b)(6) is a question of law that the court reviews de novo. San Juan County v. No New Gas Tax, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). Under CR 12(b)(6), dismissal is appropriate only when it appears beyond doubt that the claimant can prove no set of facts, consistent with the complaint,¹ which would justify recovery. Id. Such motions 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. Id.

A motion for summary judgment presents a question of law reviewed de novo. Osborne v. Mason County, 157 Wn.2d 18, 22, 134 P.3d 197 (2006). We 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 affirm summary

¹ We will consider Averill's insurance policy in evaluating the motion to dismiss, because Averill incorporated it into the complaint. Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 725-26, 189 P.3d 168 (2008).

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.” CR 56(c).

II. The Common Law Made Whole Doctrine

The parties here ask the court to determine whether the made whole doctrine applies to insurance policy deductibles. Averill argues that until she has recovered the full damages for the loss of her vehicle, including her deductible, she has not been “made whole” and as a matter of law Farmers is not entitled to recovery. Averill argues that the fact that the recovery is from the tortfeasor is the key to the made whole doctrine, not whether the insured or the insurer made the recovery. Farmers concedes that where the insured recovered from the tortfeasor on her own, she would obtain the priority of recovery afforded by the made whole doctrine and would recover her entire deductible. However, Farmers argues that the made whole doctrine does not apply when the insurance company has pursued recovery of its subrogation interests.

The Washington Supreme Court announced the made whole doctrine in Thiringer v. American Motors Insurance Co., 91 Wn.2d 215, 219–20, 588 P.2d 191 (1978). In Thiringer, an insurer refused to pay personal injury protection (PIP) benefits to its insured, and the insured settled with the tortfeasor. Id. at 216–17. The insured then demanded PIP benefits, because his damages exceeded the amount of the settlement. Id. at 217. The trial court held that the settlement amount should first be applied to the insured’s general damages and then, if any excess remained, toward the payment of the special damages to

which the PIP coverage applied. Id. at 217–18. The Supreme Court affirmed, articulating the “made whole 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 has received from the wrongdoer, remaining after the insured is fully compensated for his loss.

Id. at 219. This articulation of the rule is precise in that it applies to cases where the insured recovers the payment and the insurer is seeking reimbursement,² not vice versa. Id. Subsequent cases applied this doctrine only where the insurer sought reimbursement out of third party funds recovered by the insured. See, e.g., Sherry v. Fin. Indem. Co., 160 Wn.2d 611, 615, 160 P.3d 31 (2007) (Sherry pursued arbitration and recovered underinsured motorist (UIM) benefits from his insurer); Winters v. State Farm Mut. Auto. Ins. Co., 144 Wn.2d 869, 872, 31 P.3d 1164, 63 P.3d 764 (2001) (insured recovered from the tortfeasor and from his UIM coverage); Mahler v. Szucs, 135 Wn.2d 398, 404–405, 957 P.2d 632 (1998) (“In this case we analyze an insurer’s right to recover payments made to an insured pursuant to a [PIP] provision in a liability insurance policy *when an*

² “The term ‘reimbursement’ comes into play where an insurer is permitted to recoup its payment out of the proceeds of an insured’s recovery from the tortfeasor. In this situation the insurer’s right of recoupment is contingent upon a third-party recovery by the insured.” Mahler v. Szucs, 135 Wn.2d 398, 420 n.9, 957 P.2d 632 (1998). Reimbursement is distinct from subrogation, where the insurer pursues recovery from the wrongdoer. See id., at 415 n.8 (“Usually, subrogation allows an insurer to recover what it pays to an insured under a policy by suing the wrongdoer. The insurer steps “into the shoes” of its insured.” (quoting Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc., 119 Wn.2d 334, 341, 831 P.2d 724 (1992))); see also id. at 419 (“No right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty.” (quoting Stetina v. State Farm Mut. Auto. Ins. Co., 196 Neb. 441, 243 N.W.2d 341, 346 (1976); 16 GEORGE J. COUCH, INSURANCE § 61:136, at 195–96 (2d ed.1983))).

No. 62767-8-1/6

insured recovers against a tortfeasor.”) (emphasis added); S&K Motors Inc. v. Harco Nat’l Ins. Co., 151 Wn. App. 633, 635, 213 P.3d 630 (2009) (insured collected third party recovery); Bordeaux, Inc. v. Am. Safety Ins. Co., 145 Wn. App. 687, 689, 186 P.3d 1188 (2008) (insurer sought reimbursement from developers who collected recovery from third parties), review denied, 165 Wn.2d 1035, 203 P.3d 380 (2009). None of these cases discussed recovery of deductibles.³

Farmers has acknowledged that the made whole doctrine would limit its reimbursement if Averill had recovered directly from the tortfeasor for the property damage. We agree. In that scenario, the combination of the property loss insurance payments and the third party recovery would have created a common fund. Mahler, 135 Wn.2d at 426–27. Any claim by Farmers for reimbursement of the property loss payments would have been limited by the made whole rule. Id. at 417–18. Under those facts, Averill would have been entitled to recover her full deductible before any obligation to reimburse Farmers. And, pro-rata fee sharing would have applied. Id. at 426–427.

But, the same is not true where the insurer collects its subrogation interest from the tortfeasor. The made whole doctrine is a limitation on the recovery of the insurer when it seeks reimbursement from its insured for a loss it has previously paid to the insured. Thiringer, 91 Wn.2d at 219. Averill did not

³ Two other cases involved the insurer’s pursuit of recovery, but neither involved the allocation of the insured’s deductible. See Meas v. State Farm Fire & Cas. Co., 130 Wn. App. 527, 531, 123 P.3d 519 (2005) (insured recovered his \$250 deductible in full when State Farm pursued recovery from the tortfeasors insurance); Chen v. State Farm Mut. Auto. Ins. Co., 123 Wn. App. 150, 152, 94 P.3d 326 (2004) (no discussion regarding deductible).

recover funds from the tortfeasor, and Farmers made no claim for reimbursement from Averill for the loss it paid to her. Instead, Farmers pursued its own subrogation interest against the tortfeasor. The made whole doctrine has no application to this recovery.

This result is consistent with the purpose of the deductible. A deductible indicates the amount of risk retained by the insured. See Bordeaux, 145 Wn. App. at 695–96. The insurance policy shifts the remaining risk of any damages above the deductible to the insurance company. Id. Averill contracted to be out of pocket for the first \$500. Farmers' subrogation interest was for the amount of the loss it paid Averill, not including the deductible amount. When Farmers pursued its subrogation interest, that interest did not include Averill's deductible. Allowing Averill to recover her deductible from Farmers' subrogation recovery would have changed the insurance contract to one without a deductible. We are not at liberty to rewrite the policy in this manner.⁴

Recovery by the insurer from a tortfeasor, under its subrogation interest for losses paid to its insured, is not the equivalent to a claim for reimbursement against a fund recovered by the insured and does not invoke the made whole

⁴ Averill argues that failing to apply the made whole doctrine results in the recovery of her deductible being reduced for fault (she recovered only \$250 of her deductible from the arbitration, reduced due to the determination that she was 50 percent at fault). Averill argues that such a result is foreclosed by Sherry. However, Sherry is distinguishable because that case is comparable to an insured recovering from the tortfeasor. Sherry, 160 Wn.2d at 615; see also Winters, 144 Wn.2d at 880 ("The UIM payments are treated as if made by the tortfeasor."). There, the fault issue only affected the amount of offset to be allowed against the UIM coverage for prior PIP payments. Id. at 625. An offset such as in Sherry is akin to a reimbursement claim from a common fund and, unlike in this case, the made whole doctrine was triggered.

doctrine. Averill is not entitled to recover her deductible from funds obtained by Farmers under subrogation from the third party's insurer.

III. Insurance Regulations on Recovery of Deductibles

The current Office of the Insurance Commissioner (OIC) regulation requires an insurance company to pursue recovery of the insured's deductible when pursuing its own subrogation interest. WAC 284-30-393.⁵ It also requires that insureds be fully reimbursed for their deductibles from any recovery obtained by the insurance company, something the previous rule did not require. Compare WAC 284-30-393 with former WAC 284-30-3905 (2003), repealed by, WASH ST. REG. (WSR) 09-11-129 (Aug. 21, 2009). The OIC adopted the new regulation after the accident, payment by the insurer, and inter-agency arbitration at issue in this case. WAC 284-30-393. We must therefore decide whether the new regulation applies retroactively.

Courts may apply an amendment to an administrative regulation retroactively if either (1) the agency intended the amendment to apply retroactively, (2) the effect of the amendment is remedial or curative, or (3) the amendment serves to clarify the purpose of the existing rule. Champagne v. Thurston County, 163 Wn.2d 69, 79, 178 P.3d 936 (2008). There is no indication

⁵ WAC 284-30-393 reads, "The insurer must include the insured's deductible, if any, in its subrogation demands. Subrogation recoveries must be allocated first to the insured for any deductible(s) incurred in the loss. Deductions for expenses must not be made from the deductible recovery unless an outside attorney is retained to collect the recovery. The deduction may then be made only as a pro rata share of the allocated loss adjustment expense. The insurer must keep its insured regularly informed of its efforts related to the progress of subrogation claims. 'Regularly informed' means that the insurer must contact its insured within sixty days after the start of the subrogation process, and no less frequently than every one hundred eighty days until the insured's interest is resolved."

that the agency intended the amendment to be retroactive, nor is the effect remedial. WAC 284-30-393; OIC, Concise Explanatory Statement; Responsiveness Summary; Rule Development Process; and Implementation Plan Relating to the Adoption of Chapter 284-30 WAC The Unfair Claims Settlement Practices Regulation (May 20, 2009) (unpublished document, on file with the OIC) (CES); WSR 09-11-129 (May 20, 2009). Therefore, it may only be applied retroactively if it merely clarifies, rather than changes, existing law. Champagne, 163 Wn.2d at 79.

The new regulation clearly changes the obligations of an insurer from the predecessor rules. Former WAC 284-30-3904, repealed by WSR 09-11-129 (May 20, 2009), required insurers to recover the insured's deductible while pursuing its subrogated interest only if requested by their insureds.⁶ Former WAC 284-30-3905 permitted recovery to be shared on a proportionate basis between the insurer and the insured.⁷ The new regulation changed the insurer's obligation to a mandatory obligation to include the insured's deductible when pursuing collection of its subrogation interests. WAC 284-30-393. WAC 284-30-

⁶ Former WAC 284-30-3904 read,

Will my insurer pursue collection of my deductible? (1) Yes, if your insurer is pursuing collection of its interest, you may request they pursue collection of your deductible for you.

(2) Your insurer will inform you of its efforts relative to collection of your deductible.

(Boldface omitted.)

⁷ Former WAC 284-30-3905 read,

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.

(2) No deduction for expenses can be made from the deductible recovery unless an outside attorney is retained to collect such recovery, and then only for the pro rata share of the allocated loss adjustment expense.

(Boldface omitted.)

393 also requires that insureds be fully reimbursed for their deductibles from any recovery obtained by the insurance company. The new regulation did not merely clarify the previous regulations, but imposed on insurers a new obligation and provided the insured new benefits.

Averill points out that the OIC stated that these amendments only clarify existing rules. The OIC stated, "These rules clarify and recodify numerous sections of chapter 284-30 WAC The amendments do not make substantive changes to these rules; the amendments and new sections refine or clarify existing rules." WSR 09-11-129 (May 20, 2009). The rulemaking file indicates that the OIC believed that case law, specifically the made whole doctrine of Thiringer, already required the insurance company to pay the insured's entire deductible from its recovery. See CES, *supra*, at 6-7.⁸ The OIC's interpretation is entitled to great deference as an agency's interpretation of its own properly promulgated regulations. Silverstreak, Inc. v. Dep't of Labor & Indus., 159 Wn.2d 868, 885, 154 P.3d 891 (2007). Here, the issue is not one of interpretation of a regulation issued by the OIC, but of the underlying decisional

⁸ The originally proposed WAC 284-30-393 included the sentence, "Subrogation recoveries must be shared on a proportionate basis with the insured, unless the deductible amount has been otherwise recovered." WSR 09-03-106 (Feb. 4, 2009). The OIC received the following comment during the public comment period,

We respectfully request that [proposed WAC 284-30-393] be amended in order to conform to Washington's "insured made whole" rule as set forth in the Thiringer case and its progeny. . . .

...
The proposed rule would improperly supersede both longstanding public policy and standardized insurance policy language, giving the insurer rights that they never contracted for and which Washington courts have recognized they should not have. We submit to [sic] the Office of the Insurance Commissioner should not generally enact regulations that override clear Washington law that protects consumers.

CES, *supra*, at 6. The OIC agreed and replaced the sentence with, "Subrogation recoveries must be allocated first to the insured for any deductible(s) incurred in the loss." CES, *supra*, at 7.

law, which is the province of the courts to interpret and apply. Int'l Longshoremen's Ass'n v. Nat'l Labor Relations Bd., 56 F.3d 205, 212 (D.C. Cir. 1995). The OIC's interpretation of Thiringer is wrong as a matter of law. Thiringer does not require that the insured be made whole for its deductible when the insurer pursues its subrogation interest.

The new regulation did not merely clarify or codify a duty of the insurer already required by case law.⁹ WAC 284-30-393 in fact changed an insurer's affirmative obligations concerning recovery of deductibles. Therefore, the new regulation may not be applied retroactively. Champagne, 163 Wn.2d at 79. The former insurance regulations did not require Farmers to pay Averill's full deductible.

IV. Averill's Insurance Contract Claims

Averill argues she has a separate claim for recovery of her full deductible based on the language of the contract. Averill contends that the insurance policy language expressly adopted the made whole doctrine. Farmers argues that the policy requires that the insured recover from another in order to invoke the made whole doctrine.

Interpretation of an insurance contract is a question of law reviewed de novo. Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 52, 164 P.3d 454 (2007). Because they are generally contracts of adhesion, courts look at insurance contracts in a light most favorable to the insured. Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co., 144 Wn.2d 130, 141, 26 P.3d 910 (2001).

⁹Farmers has not challenged the validity of the regulation, and we do not address that issue.

No. 62767-8-1/12

A court must give the language of an insurance policy the same construction that an average person purchasing insurance would give the contract. Id. at 137–38.

The policy language at issue stated:

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 the rights of recovery of the person to whom payment was made against another.

Averill argues the policy incorporates the made whole doctrine, essentially stating Washington law. Assuming it does, her contract claim fails for the same reasons the common law claim failed. Applying the language of the policy, Averill did recover under the policy and did recover half her deductible from another. Farmers is entitled to be reimbursed to the extent of its payment to Averill after she has been fully compensated for her loss. But, Farmers did not seek reimbursement out of the funds Averill recovered from the tortfeasor. The policy does not entitle Averill to recover her deductible from Farmers's recovery of its subrogation interest from the tortfeasor. Therefore, the trial court erred in granting Averill's motion for partial summary judgment.

Averill's remaining claims, specifically the CPA violations, bad faith, and negligence, are all based on the foundational argument that Farmers wrongly withheld payment of Averill's remaining deductible. Because Farmers was not required to compensate Averill for her remaining deductible, Averill's remaining claims are without merit. Because Averill had no claim as a matter of law, under

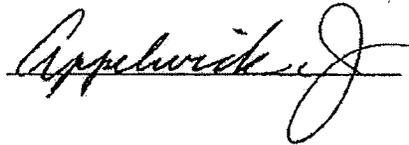
No. 62767-8-1/13

common law, regulation, or contract the trial court erred in denying State Farm's 12(b)(6) motion to dismiss.

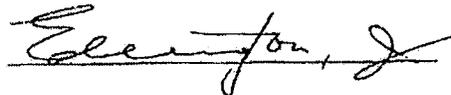
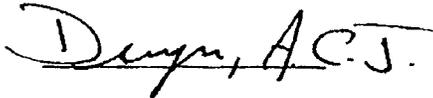
V. Attorney Fees

Averill seeks attorney fees under Olympic Steamship Co. Inc., v. Centennial Insurance Co., 117 Wn.2d 37, 54, 811 P.2d 673 (1991). Because Averill is not the prevailing party, she is not entitled to fees under Olympic Steamship.

We reverse and remand for dismissal.



WE CONCUR:



APPENDIX F

RONALD R. CARPENTER
SUPREME COURT CLERK

THE SUPREME COURT
STATE OF WASHINGTON



SUSAN L. CARLSON
DEPUTY CLERK / CHIEF STAFF ATTORNEY

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SEP 09 2010

September 7, 2010

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Re: Supreme Court No. 84462-3 - Pearl C. Averill v. Farmers Insurance Company of
Washington
Court of Appeals No. 62767-8-I

Counsel:

Enclosed is a copy of the Order entered following consideration of the above matter on the
Court's September 7, 2010, Motion Calendar.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald R. Carpenter".

Ronald. R. Carpenter
Supreme Court Clerk

RRC:daf

Enclosure as referenced



THE SUPREME COURT OF WASHINGTON

PEARL C. AVERILL, individually, and on behalf of all those similarly situated, Petitioner, v. FARMERS INSURANCE COMPANY OF WASHINGTON, Respondent.

NO. 84462-3

ORDER

C/A NO. 62767-8-I

RECEIVED SEP 09 2010 STOEL RIVES LLP

FILED SUPREME COURT STATE OF WASHINGTON 2010 SEP -7 P 2:25 BY RONALD S. GERREITER CLERK

Department I of the Court, composed of Chief Justice Madsen and Justices C. Johnson, Sanders, Owens and J. Johnson, considered at its September 7, 2010, Motion Calendar, whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 7th day of September, 2010.

For the Court

Madsen, C. J. CHIEF JUSTICE

593/66

APPENDIX E

No. 64626-5 I

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

DALJEET SOMAL, individually,
and on behalf of all those similarly situated,

Respondent,

v.

ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,

Appellant.

**RESPONDENT DALJEET SOMAL'S ANSWER TO MOTION FOR
ACCELERATED REVIEW BY APPELLANT ALLSTATE
PROPERTY AND CASUALTY INSURANCE COMPANY**

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Attorney for Daljeet Somal,
as Respondent

IDE LAW OFFICE
801 Second Avenue, Suite 1502
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and

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INTRODUCTION

Allstate is not entirely candid with the Court. Its motion, ill-conceived in the first instance, is based on Allstate's representation that the *Averill*¹ decision is on all fours with this case, and wholly dispositive of the issues here. This is patently untrue.

There are at least two bases upon which the trial court's grant of partial summary judgment in favor of Somal can be sustained. One is the common law made whole doctrine, and another is the language of Allstate's insurance contract. While *Averill* may be applicable to the first, it plainly has no bearing on the second. This is for a simple and indisputable reason: *Averill* dealt with the language of a Farmers Insurance insurance contract, and this case deals with the altogether different language of Allstate's insurance contract. These differences matter, and for this reason alone Allstate's motion should be denied.

I. IDENTITY OF RESPONDENT

Daljeet Somal, as an individual and the proposed class action representative herein, hereby submits his Answer to the Motion for Accelerated Review filed by Appellant Allstate Property and Casualty Insurance Company ("Allstate").

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

II. ISSUES PRESENTED FOR RESOLUTION

A. Is the relief Allstate purports to seek under RAP 18.12 even proper under that Rule?

B. Should the Court grant Allstate's motion to deny Respondent/Plaintiff the opportunity to brief and argue the issues in this case, based on Allstate's incorrect assertion that *Averill* is wholly dispositive?

III. RELEVANT FACTS

Mr. Somal is an Allstate insured who suffered a property damage loss to his auto as a result of accident. Allstate *partially* compensated Somal under his collision coverage with Allstate, but left him with a \$500 property loss because of the collision coverage deductible.²

Allstate sought and obtained from the tortfeasor money representing compensation for Somal's property damage loss. The money obtained from the tortfeasor did not cover the full amount of the property damage loss. Thus, Allstate remitted only \$200 of those funds to Somal, and kept the rest as compensation for itself.

Allstate's right to recover its payments is governed by, *inter alia*,

² These facts are taken from Plaintiff's Motion for Partial Summary Judgment, attached for the Court's convenience as Appendix A. Many of these facts are also found in Allstate's Motion for Discretionary Review (Appendix C to Allstate's Motion for Accelerated Review).

the language of its insurance contract. That contract contains the following provision under “Subrogation Rights” in Part VII, “Protection Against Loss to the Auto:”

When we pay, your rights of recovery from anyone else become ours up to the amount we have paid. However, we may recover only the excess amount you have received after being fully compensated for the loss. [Bold omitted.]

At the time that Allstate kept money from the tortfeasor as compensation for itself, Somal had not been fully compensated for the property damage loss. Clearly, Somal was still out \$300 of that loss.

In the trial court, the parties filed and argued cross-motions: Allstate in support of dismissal of the complaint under CR 12(b)(6), and Somal in support of partial summary judgment. In his motion, Somal argued that the result was dictated not only by the common law made whole doctrine, but expressly argued that the result was also mandated by the language of Allstate’s insurance contract.³ *See, e.g.*, Plaintiff’s Motion for Partial Summary Judgment at 2 (“Allstate ignored ... the terms of its own insurance agreement.”); 2 (“A straightforward application of ... Allstate’s own policy language”); 4 (“Because this violates ... Allstate’s own policy language”); 10 (“Independent of the foregoing principles of

³ Somal pointed out in his earlier Answer to Allstate’s Petition for Discretionary Review that the trial court’s ruling was supported by, among other things, Allstate’s own policy language. *See* Somal’s Answer to Allstate’s Motion for Discretionary Review, at 1.

Washington insurance law, Allstate's policy language incorporates the made whole doctrine and makes it applicable to collision deductibles."); 12 ("Allstate expressly incorporated the made whole doctrine into its Policy, and cannot now simply ignore its very own language"); 12 ("this is true whether we look to the longstanding principles of Washington insurance law, or to Allstate's own Policy language.").

The trial court denied Allstate's motion, and granted Somal's motion for partial summary judgment. The ruling stated that "Somal is entitled to be made whole for his property damage loss before Allstate, as his property damage insurer, is entitled to retain funds recovered from the third party tortfeasor representing payment for Somal's property damage loss." *See* Order Granting Partial Summary Judgment in Favor of Plaintiff, at 2 (Appendix B to Allstate's Motion for Accelerated Review).

IV. ARGUMENT

A. Allstate's Motion for Accelerated Review Is Ill Conceived.

Allstate ostensibly seeks review under RAP 18.12. That Rule merely provides that:

The appellate court ... may set any review proceeding for accelerated disposition. The appellate court clerk will notify the parties of the setting and any orders entered to promote the accelerated disposition under rules 1.2(c) and 18.8(a).

RAP 18.12. Following RAP 18.12 are additional, more specific rules regarding accelerated disposition. *See* RAP 18.13 (Accelerated Review of Dispositions in Juvenile Offense Proceedings), RAP 18.13A (Accelerated Review of Juvenile Dependency Disposition Orders and Orders Terminating Parental Rights), RAP 18.15 (Accelerated Review of Adult Sentencings). Considered collectively, it is clear that the purpose behind accelerated review is not to short-circuit review, but to provide a mechanism for review to move forward more quickly in appropriate circumstances. These circumstances include where an individual's liberty is at stake, or involving dependency or parental rights. *See* RAP 18.13; RAP 18.13A; RAP 18.15. *See also In re C.B.*, 134 Wn. App. 942, 960 143 P.3d 846 (2006) (appeal from orders terminating parental rights over three children); *Custody of Osborne*, 119 Wn. App. 133, 148 n.8, 79 P.3d 465 (2003) (concerning a parenting plan and proposed relocation of child).

Circumstances appropriate for accelerated review might also include those where time is arguably of the essence. *See, e.g., Futurewise v. Reed*, 161 Wn.2d 407, 410, 166 P.3d 708 (2007) (concerning ballot initiative); *In re Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 621, 121 P.3d 1166 (2005) (condemning and taking of private property for public use to construct monorail); *Maleng v. King Cty. Corr. Guild*, 150 Wn.2d

325, 328, 76 P.3d 727 (2003) (pre-election challenge to a proposed initiative).

In contrast, there is no indication that accelerated review is meant as a mechanism to deny a party the opportunity to brief and argue his case, or to deny a full and fair hearing on the merits. Indeed, such an interpretation is contrary to RAP 1.2(a) (“These rules will be liberally interpreted to promote justice *and facilitate the decision of cases on the merits.*”) (emphasis added).

There is nothing to indicate any reason to accelerate the review of this case. Even so, if that was all Allstate was truly seeking – that the review proceedings move quicker – Somal would have no objection. For example, Somal would have no objection to a shortened briefing schedule. In fact, since Allstate has stated that no further briefing is needed, Somal would agree to have Allstate forego its briefing and rely solely on *Averill*, with Somal submitting only a Respondent’s Brief.⁴

It is clear that what Allstate really seeks is to prevent Somal from a full and fair opportunity to present his case on the merits – a case where he was successful in the trial court and is the *Respondent* here. For these reasons, therefore, Allstate’s motion under RAP 18.12 should be denied.

⁴ Somal suspects that if Allstate’s motion is denied, Allstate will suddenly find that extensive briefing is required.

B. *Averill* Is Not Dispositive of the Issues Presented In This Appeal.

Contrary to Allstate's representation, *Averill* is not dispositive of the issues presented in this appeal. In *Averill*, the trial court ruled in favor of the plaintiff on a claim similar to the claim asserted by Somal in this case. On appeal, the plaintiff argued that the trial court's ruling should be sustained on, *inter alia*, two independent grounds: that the result was correct under the made whole doctrine, and/or that the result was correct under the language of the Farmers insurance policy. *See Averill*, 155 Wn.App. at 111, 118 (respectively). The Court of Appeals reversed, rejecting both arguments.

On the insurance contract language question, however, it is important to recognize that the language at issue in *Averill* is different from the language at issue here. In *Averill*, the language came from Farmers' insurance policy, which provided:

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."

Id. at 118. In contrast, the language here comes from Allstate's insurance policy, which provides:

When we pay, your rights of recovery from anyone else

become ours up to the amount we have paid. However, we may recover only the excess amount you have received after being fully compensated for the loss. [Bold omitted.]

That the wording of the two policies is significantly different is facially apparent. More importantly, it is Somal's contention that this plain difference in language leads to a plainly different result as well.

Allstate, of course, will likely argue that the different language still leads to the same result. The fact that Allstate even has to make the argument, however, amply illustrates why this is a matter that must receive a full opportunity for briefing and argument. Indeed, the more argument on this issue that Allstate presents in its reply brief will just further highlight how the result in *Averill* in no way resolves this case.

In short, it is clear this is not a case where it would be fair, just or appropriate to summarily adjudicate the case while denying Respondent the opportunity to present his legal theories and argument. Moreover, this is especially true here because the case involves an insurance contract, and insurance contracts, as contracts of adhesion, are construed against the insurer and in favor of the insured. *See, e.g., Mercer Place Condo. v. State Farm*, 104 Wn.App. 597, 602-03, 17 P.3d 626 (2000); *Barney v. Safeco Ins. Co.*, 73 Wn.App. 426, 429, 869 P.2d 1093 (1994). As a result, even small changes in policy language can make for dramatically different results.

V. CONCLUSION

The relief Allstate actually seeks in its motion is not in accord with the apparent purpose and aim of the Rule upon which it relies, RAP 18.12. For that reason alone, its motion should be denied.

Furthermore, *Averill* plainly does not answer all of the issues presented in this case. Specifically, *Averill* does not, and cannot, answer the question of whether the trial court's ruling is a valid interpretation of the language of *Allstate's* insurance policy – a contract that must be construed in favor of Mr. Somal. Consequently, completion of the appellate process would not be a waste of time for the parties or the Court. What would be a waste of time, however, would be a hearing on Allstate's specious motion. The Court should deny it without entertaining argument.

For the foregoing reasons, therefore, Respondent Somal asks that Allstate's motion for accelerated review be denied.

October 29, 2010.



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DECLARATION OF SERVICE

I certify that on October 29, 2010, I caused to be filed with the Court of Appeals, Division I, via messenger, Respondent Daljeet Somal's Answer to Motion for Accelerated Review by Appellant Allstate Property and Casualty Insurance Company, and caused to be delivered, via messenger, true and accurate copies to:

John D. Lowery
Gavin W. Skok
Riddell Williams P.S.
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154

Attorneys for Allstate Property and
Casualty Insurance Company

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Executed in Seattle, Washington, this 29th day of October, 2010.



Matthew J. Ide

APPENDIX A

SUPERIOR COURT OF WASHINGTON, COUNTY OF KING

DALJEET SOMAL, individually, and on behalf
of all those similarly situated,

Plaintiff,

vs.

ALLSTATE PROPERTY AND CASUALTY
INSURANCE COMPANY,

Defendant.

Case No.: 09-2-23688-7 SEA

PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT

INTRODUCTION

When an insurer makes payments to its insured for a loss, but responsibility for the loss actually rests with another person (*i.e.*, a tortfeasor), the insurer may in certain circumstances seek to recoup the insurance payments made to its insured. To do this, the insurer might proceed directly against the tortfeasor, or might seek reimbursement from its insured. Either way, there are well-settled limitations and conditions on the insurer who seeks such a recovery. Most importantly, the insurer can recoup its payments only after its insured has first been fully compensated, or "made whole" for the loss. In practical terms, the insured is entitled to every dollar recovered from the tortfeasor until such time as the insured has been fully compensated for the applicable loss; until (and unless) that point is reached, the insurer is not entitled to retain any amount. Once the insured is made fully whole, the insurer can retain the sums remaining.

1 This arrangement recognizes and reconciles two principles. First, and paramount, is the
2 public policy interest in seeing tort victims fully compensated for their losses whenever possible.
3 The second is the desire to avoid an insured from receiving more than full compensation for the
4 loss (*i.e.*, a “double recovery”). The reconciliation of these two principles, which puts the
5 insured first, also underlies an essential construct of the insurance agreement: the insurer agrees
6 to take the risk that if one of them (the insured or the insurer) is to be left out of pocket, it will be
7 the insurer.

8 In this case, Allstate ignored the well-established “made whole” doctrine and the terms
9 of its own insurance agreement. After its insured, Mr. Somal, suffered a property damage loss
10 in a motor vehicle accident, Allstate provided partial compensation for the loss under his
11 policy’s Collision coverage. It was only partial compensation because the policy included a
12 Collision deductible of \$500, which meant that even after the insurance payments, Mr. Somal
13 was still \$500 out of pocket.

14 Seeking to recover its insurance payments, Allstate sought money from the tortfeasor for
15 Somal’s property damage loss. Allstate agreed with the tortfeasor’s insurance company to
16 allocate fault 60/40 against Mr. Somal, and thus agreed to accept a payment of 40% of Somal’s
17 property damage loss. As a result, the recovered funds were plainly insufficient to make both
18 Mr. Somal and Allstate whole.¹ Consequently, Allstate was obligated to turn over to Mr. Somal
19 that portion of the funds necessary to fully compensate him for his loss (and Allstate could keep
20 the remainder). A straightforward application of the made whole doctrine and Allstate’s own
21 policy language.

22 Allstate, however, “pro rated” the money from the tortfeasor. Since Allstate had agreed
23 with the other insurer to attribute fault 60/40 against Mr. Somal, it split the recovery with him
24 along similar lines and sent him a check for only \$200. This left Mr. Somal still out of pocket

25 ¹ Insufficient to compensate Mr. Somal for the remaining part of his property damage loss as well as fully reimburse
26 Allstate for the insurance payments it had made to Mr. Somal.

1 \$300 for his property damage loss. Allstate's basis for this split is unclear, as there is nothing in
2 either Washington law or the insurance agreement to support it. Indeed, by placing itself at the
3 same level of priority as its insured, Allstate indisputably violated the basic tenet of the "made
4 whole" doctrine: the insured stands first in line. As a result, Allstate wrongfully placed into its
5 pocket a sum of money that rightfully belongs to Mr. Somal.

6 Accordingly, Mr. Somal instituted this action, asserting claims for violation of the
7 Washington CPA, Bad Faith, Conversion, and Breach of Contract. The Complaint seeks, *inter*
8 *alia*, damages and injunctive relief. Furthermore, because Allstate's conduct towards Mr. Somal
9 is believed to be consistent with its treatment of other insureds in similar circumstances, Mr.
10 Somal brought this case as a putative class action.

11 As specified below, this motion for partial summary judgment is narrow, seeking only to
12 establish as a matter of law that Mr. Somal is entitled to be made whole before Allstate is
13 entitled to recoup its insurance payments, and that Allstate acted wrongfully when it failed to act
14 in accordance with this rule. At this time, plaintiff is not seeking a ruling on the scope, form or
15 extent of any available relief or damages.

16 I. RELIEF REQUESTED

17 Plaintiff asks that the Court enter the proposed Order submitted herewith, ruling as a
18 matter of law that Allstate acted wrongfully when it retained monies obtained from the third
19 party tortfeasor representing payment for Somal's property damage loss, before Somal had been
20 fully compensated for his property damage loss.

21 II. STATEMENT OF FACTS

22 The pertinent facts are straightforward and essentially uncontested.² On January 12,
23 2009, Mr. Somal's 1997 Ford Explorer was involved in a motor vehicle accident, wherein it
24 sustained significant damage. The vehicle was covered by an insurance policy issued by

25 ² The facts in the following paragraphs are taken from paragraphs 5 - 15 of the Complaint, which are similarly
26 referenced in Allstate's concurrent Motion to Dismiss, at 1- 3.

1 Allstate, which included Collision coverage with a deductible of \$500 (the "Policy"). The other
2 vehicle involved in the accident was insured by State Farm.

3 Somal had his vehicle repaired, paying \$500 of the cost himself, with Allstate covering
4 the rest. Allstate then sought to recover the property damage loss from the other driver,
5 eventually agreeing with State Farm to accept payment of 40% of the loss to reflect their belief
6 that fault should be attributed 60/40 against Somal. Allstate then sent Somal a check for \$200,
7 representing 40% of his Collision deductible, leaving him out of pocket the remaining \$300.

8 In addition to the Washington rule that Allstate is only entitled to recoup its payments if
9 its insured is first fully compensated, the Policy explicitly provided the same thing under
10 "Subrogation Rights" in Part VII, "Protection Against Loss to the Auto:"³

11 When **we** pay, **your** rights of recovery from anyone else become **ours** up
12 to the amount **we** have paid. However, **we** may recover only the excess
13 amount **you** have received after being fully compensated for the loss.
[Bold in original, underscoring added.]

14 Somal, still out of pocket the \$300, has plainly not been fully compensated for his
15 property damage loss.

16 III. STATEMENT OF ISSUES

17 1. In Washington, an insured must first receive full compensation for a loss, or be
18 "made whole," before his insurer can recoup its payments for that loss. The undisputed facts
19 establish that Somal has not recovered all his property damage loss, yet Allstate retained
20 property damage payments from the tortfeasor to reimburse itself for its payments. Because this
21 violates the well-established "made whole" doctrine, as well as Allstate's own policy language,
22 should the Court rule that Allstate acted wrongfully?

23 IV. EVIDENCE RELIED UPON

24 The evidence relied upon for this motion includes the records and pleadings previously

25
26 ³ See Complaint, ¶ 12.

1 filed herein, including the records and pleadings filed during the time this matter was removed
2 to the U.S.D.C. for the Western District of Washington.

3 V. ARGUMENT

4 A. APPLICABLE LEGAL STANDARD

5 The burden on a motion for summary judgment is on the moving party to initially show
6 the absence of an issue of material fact. *See, e.g., Young v. Key Pharmaceuticals*, 112 Wn.2d
7 216, 225, 770 P.2d 182 (1989) (citing *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299
8 (1975)). “A material fact exists when the outcome of the litigation depends on its resolution.”
9 *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 830, 92 P.3d 243 (2004) (citing
10 *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993)). “If no genuine
11 issue of material fact exists it must then be determined whether the moving party is entitled to
12 judgment as a matter of law.” *LaPlante*, 85 Wn.2d at 158 (citing CR 56(c); *Brannon v. Harmon*,
13 56 Wn.2d 826, 355 P.2d 792 (1960)). Summary judgment should be granted if reasonable
14 persons could reach but one conclusion. *Seattle Police*, 151 Wn.2d at 830 (citing *Clements*, 121
15 Wn.2d at 249; *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000)). In deciding
16 the motion for summary judgment, the court must resolve all reasonable inferences in favor of
17 the non-moving party. *See id.*

18 B. THE “MADE WHOLE” DOCTRINE DICTATES THE RESULT

19 It is important to distinguish what this case does not concern. This case does not concern
20 whether Allstate had the right to pursue the tortfeasor and try to obtain payment for Somal’s
21 property damage loss. This case also does not concern whether Allstate paid the correct sum to
22 Somal under the Policy’s Collision coverage, and does not concern a claim for further payments
23 under that coverage. Rather, this case concerns who has priority for funds obtained from the
24 tortfeasor if they are insufficient to make both the insured and the insurer whole.
25
26

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

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

5 The made whole doctrine has long been recognized as a basic tenet of Washington
6 insurance law. More than 30 years ago, the Washington Supreme Court decided *Thiringer*,⁴ a
7 case in many ways analogous to this one. In *Thiringer*, the Court was asked to determine who
8 had priority, as between an insurer and its insured, for the proceeds of a settlement for the
9 insured's bodily injury claim. *Id.* at 216. The insured had effected a recovery from the
10 tortfeasor. Since the amount recovered was insufficient to fully compensate him for his loss,
11 however, the insured sought payment from his insurer under his PIP coverage.⁵ *Id.* at 217. Suit
12 was filed after the insurer refused. *Id.* The Court stated the issue, and the insurer's argument, as
13 follows:

14 The decisive issue before us concerns the allocation of the proceeds of the
15 settlement, as between the insured and the insurer. It is the contention of the
16 insurer that they should be allocated first to the special damages covered by the
17 PIP provision or, in the alternative, prorated between the general damages and the
18 PIP damages.

18 *Id.* at 219.

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

21 The general rule is that, while an insurer is entitled to be reimbursed to the extent
22 that its insured recovers payment for the same loss from a tort-feasor responsible
23 for the damage, it can recover only the excess which the insured has received
24 from the wrongdoer, remaining after the insured is fully compensated for his loss.

25 ⁴ *Thiringer v. American Motors Ins.*, 91 Wn.2d 215, 588 P.2d 191 (1978).

26 ⁵ 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.

1 *Id.* at 219-20 (emphasis added; citations omitted). Finding no reason to warrant a departure
2 from the rule, the Court upheld the trial court’s ruling that the proceeds of the settlement should
3 first be applied to the insured’s loss until he was made whole,⁶ and then any excess could go to
4 the insurer’s PIP obligation.⁷ See *id.* at 217-18.

6 This general rule – that an insured’s right to be fully compensated takes priority over the
7 insurer’s right to recoup its insurance payments – continues to be a bedrock of Washington
8 insurance law.⁸ This includes recent reaffirmation by the Washington Supreme Court in its
9 *Sherry* decision, discussed in more detail below. See *Sherry v. Financial Indem. Co.*, 160
10 Wn.2d 611, 625, 160 P.3d 31 (2007) (“We hold that an insurer is entitled to [seek recovery of its
11 payments] only when its insureds are fully compensated...” (emphasis added)).

16 ⁶ It is the insurer’s burden to establish that its insured has made such a double recovery in the first instance. See,
17 e.g., *Puget Sound Energy v. ALBA Gen. Ins.*, 149 Wn.2d 135, 142, 68 P.3d 1061 (2003); *Weyerhaeuser v.*
18 *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).

19 ⁷ See *supra*, note 6.

20 ⁸ See, e.g., *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 309, 88 P.3d 395 (2004) (insurer may seek
21 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
22 principles set down by this Court [that a]n insurer is not entitled to recover until its insured is fully compensated and
23 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
24 before any setoff is ever allowed”); *Mahler v. Szucs*, 135 Wn.2d 398, 416-17, 957 P.2d 632 (1998) (“with respect to
25 the allocation of benefits, we articulated a rule of full compensation, that is, no right of reimbursement existed for
26 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 ‘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).

1 **b. In the “Made Whole” Analysis, the Amount of the Insured’s**
2 **“Loss” Is Not Reduced to Reflect the Insured’s Fault**

3 It is clear that the funds from the tortfeasor that Allstate turned over to Somal represented
4 a *pro rata* portion of his Collision deductible. Allstate took the deductible (*i.e.*, Somal’s
5 uncompensated loss), and reduced it to reflect the attribution of fault agreed to by Allstate and
6 State Farm (60/40). In essence, Allstate took the position that “full compensation” for Somal
7 did not mean the \$500 he was clearly out of pocket, but only \$200 of that amount because he
8 was allegedly 60% at fault for the accident. This argument is completely foreclosed by *Sherry*.

9 In that case, Sherry, the insured, received PIP insurance benefits from his motor vehicle
10 insurer, FIC, for a loss Sherry sustained when he was struck by a car. Sherry also made a claim
11 under his FIC policy’s UIM coverage.⁹ Because Sherry and FIC could not agree on the amount
12 of UIM benefits to which Sherry was entitled, they took the dispute to arbitration. 160 Wn.2d at
13 615. The arbitrator determined the total amount of Sherry’s loss, but reduced the amount
14 actually awarded by 70% because he determined that Sherry was 70% at fault. *Id.*

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

21 On appeal, the Washington Court of Appeals stated that an insurer is only entitled to
22 recovery of its payments if its insured is first fully compensated for his entire, actual loss, not

23
24
25
26 ⁹ Essentially a claim against the tortfeasor, into whose shoes FIC stepped for such purposes.

1 just that portion of the loss an insured might recover from a tortfeasor. *See id.* Because Sherry
2 had plainly not been fully compensated for his loss (since the UIM award was reduced to reflect
3 Sherry's share of fault), the Court of Appeals held that FIC was not entitled to recover its
4 payments through the requested offset, and reversed the trial court. *See id.*

5 In a thorough opinion, the Washington Supreme Court agreed with the Court of Appeals.
6 The Court started by acknowledging the basic tenet that, although an insured is not entitled to a
7 double recovery, an insured is entitled to be fully compensated for the loss before the insurer is
8 entitled to any recovery of its payments (whether that recovery be by offset, reimbursement or
9 subrogation):
10

11 It is well established in Washington that insureds are not entitled to double
12 recovery, and thus after an insured is "fully compensated for his loss," an insurer
13 may seek an offset, subrogation, or reimbursement for PIP benefits already paid.
14 *Thiringer v. Am. Motors Ins. Co.*, 91 Wn.2d 215, 219, 588 P.2d 191 (1978); *see*
15 *also Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 309, 88 P.3d 395
16 (2004); *Safeco Ins. Co. v. Woodley*, 150 Wn.2d 765, 770, 82 P.3d 660 (2004);
17 *Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 876, 31 P.3d 1164
18 (2001) ("the insured must be fully compensated before the insurer may recoup
19 benefits paid"); *Mahler v. Szucs*, 135 Wn.2d 398, 407, 957 P.2d 632 (1998).

20 160 Wn.2d at 618 (emphasis added).

21 The Court set out a "two step" approach to determine whether an insurer might be
22 entitled to a recovery of its insurance payments:
23

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

27 160 Wn.2d at 619 (emphasis added). Finding the first step satisfied, the Court proceeded to the
28 second, dispositive step – the "full compensation" issue.

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

8 This court has never limited full recovery to the amount recoverable under UIM
9 coverage [*i.e.*, from a tortfeasor]. Rather, our opinions suggest insureds are not
10 fully compensated until they have recovered all of their damages as a result of a
11 motor vehicle accident. *See, e.g., Thiringer*, 91 Wn.2d at 219; *see also Hamm*,
12 151 Wn.2d at 309; *Woodley*, 150 Wn.2d at 770; *Winters*, 144 Wn.2d at 876;
13 *Mahler*, 135 Wn.2d at 407. Double recovery, a prerequisite for the insurer’s
14 offset rights, cannot occur unless an insured has first been fully compensated for
15 the loss.

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

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

17 *Id.* at 623 (emphasis added).

18 In light of *Sherry*, there can be no serious dispute as to two principles: (i) until such time
19 as he is made whole, the insured continues to stand ahead of the insurer when it comes to funds
20 obtained from tortfeasors; and (ii) “full compensation” means the insured recovers for the entire
21 loss sustained, without any reduction for the insured’s share of fault (real or alleged). It is clear
22 that Allstate’s conduct and position here is inconsistent with these principles.

23 C. Allstate’s Policy Language Incorporates the Made Whole Doctrine

24 Independent of the foregoing principles of Washington insurance law, Allstate’s policy
25 language incorporates the made whole doctrine and makes it applicable to collision deductibles.
26

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

3 To the extent this Court finds it necessary to look to the policy, the “[i]nterpretation of an
4 insurance contract is a question of law reviewed de novo.” *Woo v. Fireman's Fund Ins.*, 161
5 Wn.2d 43, 54, 164 P.3d 454 (2007) (citing *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 682,
6 801 P.2d 207 (1990), *overruled on other grds. by Butzberger v. Foster*, 151 Wn.2d 396, 89 P.3d
7 689 (2004)). “[C]ourts justifiably look [at insurance contracts] in a light most favorable to the
8 insured.” *Hamm*, 151 Wn.2d at 323 (Sweeney, J., dissenting) (citing *Panorama Vill. Condo.*
9 *Owners Ass'n v. Allstate Ins. Co.*, 144 Wn.2d 130, 137-38, 26 P.3d 910 (2001)). *See also*
10 *Mercer Place Condo. v. State Farm*, 104 Wn. App. 597, 602-03, 17 P.3d 626 (2000) (insurance
11 policies liberally construed in favor of the insured). When the Court construes insurance policy
12 language, it must “give it the same construction that an ‘average person purchasing insurance’
13 would give the contract.” *Id.* (emphasis added; quoting *Roller*, 115 Wn.2d at 682). *See also*
14 *American Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 134 Wn.2d 413, 427, 951 P.2d
15 250 (1998) (policy interpreted as average insurance purchaser would understand it). Any
16 ambiguity in the policy language must be resolved in favor of the insured. *E.g., Barney v.*
17 *Safeco Ins. Co.*, 73 Wn. App. 426, 429, 869 P.2d 1093 (1994). Moreover, “insurance policies ...
18 are simply unlike traditional contracts, *i.e.*, they are not purely private affairs but abound with
19 public policy considerations....” *Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 376, 535
20 P.2d 816 (1975) (emphasis added).
21
22

23 **2. The Insurance Policy Expressly Adopted the Make Whole**
24 **Doctrine**

25 To begin with, there is nothing in the language of the Policy that would notify an insured
26 that the well-established make whole doctrine would not apply to collision deductibles. *See*

1 *Thiringer*, 91 Wn.2d at 220 (there is “nothing in the language of the policy to indicate that the
2 parties agreed that a different principle [other than the make whole doctrine] would apply to this
3 contract.”). But more than that, the Policy actually acknowledges and fully adopts the made
4 whole doctrine: “**we** may recover only the excess amount **you** have received after being fully
5 compensated for the loss.”¹⁰ Indeed, this language compares favorably to the analogous
6 provision in the recent *Bordeaux* case,¹¹ where the Court of Appeals found the made whole
7 doctrine applied, even though that case involved a straight subrogation provision that made no
8 mention of the insured’s right to full compensation as a prerequisite. *See Bordeaux*, 145 Wn.
9 App. at 691 (“The American Safety policy also contains a subrogation provision which states,
10 ‘[i]f the insured has rights to recover all or part of any payment we have made under this
11 Coverage Part, those rights are transferred to us.’”).
12

13 In short, Allstate expressly incorporated the made whole doctrine into its Policy, and
14 cannot now simply ignore its very own language.

15 VI. CONCLUSION

16 The salient facts are clear: Mr. Somal was not made whole for the property damage loss
17 he sustained in the motor vehicle accident, yet his insurer, Allstate, recouped and kept funds
18 from the third party tortfeasor made in payment of that property damage loss. The rule of
19 decision is likewise clear: Mr. Somal was entitled to any funds recovered from the tortfeasor
20 until he was fully compensated for the loss – meaning his total loss, without reduction for
21 alleged fault – only then was Allstate entitled to the remainder as reimbursement for its
22 insurance payments. Moreover, this is true whether we look to the longstanding principles of
23 Washington insurance law, or to Allstate’s own Policy language.
24

25 ¹⁰ See Complaint, ¶ 12 (bold in original, underscoring added).

26 ¹¹ *Bordeaux v. American Safety Ins. Co.*, 145 Wn. App. 687, 186 P.3d 1188 (2008).

APPENDIX F

*The Court of Appeals
of the
State of Washington*

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November 15, 2010

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CASE #: 64626-5-I

Daljeet Somal, Respondent v. Allstate Property and Casualty Insurance Company,
Petitioner

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on November 15, 2010, regarding petitioner's motion for accelerated review:

NOTATION RULING

Somal v. Allstate Insur. Co., No. 64626-5-I
November 15, 2010

Before me is petitioner Allstate Insurance Co.'s motion for accelerated review under RAP 18.12. The motion is denied as Allstate has the ability to expedite review by promptly perfecting the record, filing its opening brief, and filing any reply brief.

Allstate filed a motion for discretionary review of a trial court order granting partial summary judgment for respondent Dajeet Somal and denying Allstate's motion to dismiss Somal's complaint. The key issue is whether Allstate is obligated to fully reimburse Somal for his deductible after a subrogation recovery when Somal was partially at fault for the accident. On February 9, 2011, a commissioner of this court granted discretionary review and stayed review pending the decision in Farmer's Insur. Co. v. Averill, No. 62767-8-I. The decision in Averill was filed March 15, 2010.

Somal v. Allstate Insur. Co., No. 64626-5-I
November 15, 2010

In October 2010, Allstate filed a motion for accelerated review. On October 11, 2010, the stay was lifted, and on November 12, 2010 I heard argument on Allstate's motion for accelerated review. Allstate argues that the issue in this case is controlled by the decision in Averill. Somal disagrees.

Allstate's motion for accelerated review under RAP 18.12 is denied. However, as the appellant Allstate has the ability to expedite review by promptly perfecting the record, filing its opening brief, and filing any reply brief after respondent files his brief. Once the briefing is complete, the court will determine whether the appeal will be decided by a panel of judges with or without oral argument.

Now, therefore, it is

ORDERED that Allstate's motion for accelerated review is denied.

Mary S. Neel
Commissioner

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

ssd

2011 MAR 30 PM 3:13

No. 64626-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON
AT SEATTLE

DALJEET SOMAL,

individually, and on behalf of all those similarly situated,

Appellee/Plaintiff

v.

ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,

Appellant/Defendant.

REVIEW FROM THE SUPERIOR COURT FOR KING COUNTY
King County Superior Court No. 09-2-23688-7 SEA
THE HONORABLE SUZANNE M. BARNETT

CERTIFICATE OF SERVICE RE
BRIEF OF APPELLANT/DEFENDANT ALLSTATE PROPERTY
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ORIGINAL

CERTIFICATE OF SERVICE

I, Donna Hammonds, an employee of Riddell Williams P.S., hereby declare that I am over eighteen years of age, am competent to testify, and that on March 30, 2011, I caused to be served a true and correct copy of the following:

- Brief Of Appellant/Defendant Allstate Property And Casualty Insurance Company; and
- this Certificate of Service thereto

upon the below following, via hand delivery:

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