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NO. 64169-7

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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

Plaintiff/Appellant,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Defendant/Appellee.

RESPONSE BRIEF BY APPELLEE

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I. RELIEF REQUESTED

Respondent, Farmers Insurance Company of Washington (“Farmers”), asks this Court to affirm the King County Superior Court’s Order of August 18, 2009, granting Farmers’ motion for summary judgment and denying Anne Horner’s (“Horner”) motion for summary judgment.

II. COUNTERSTATEMENT OF ISSUES

Does Farmers, which insured Horner under a Homeowner’s Policy, have a right of equitable subrogation against the settlement fund provided by the liability insurer of her neighbors, whose negligent repairs had caused smoke damage to her condominium, when it is undisputed that:

- (1) Farmers fully compensated Horner for all property damage she claimed under her Homeowner’s Policy,
- (2) Horner refused to assign to Farmers her claim against the neighbors as required by the Homeowner’s Policy, and
- (3) Horner’s settlement with the neighbors included the same property damage Farmers had paid for?

III. SUMMARY OF ARGUMENT

At issue in this appeal and below are two competing positions on a purely legal issue represented by the parties' cross-motions for summary judgment. No facts are in dispute. The trial court properly rejected Horner's legal position and agreed with Farmers' position, and should be affirmed.

The trial court correctly construed the subrogation section of the Homeowner's Policy to apply when the insured assigns her claim against the tortfeasor to Farmers. If Horner had assigned her claim to Farmers, as required by her policy, Farmers would have obtained a conventional right of subrogation against the neighbors/tortfeasors. Her failure to do so took away Farmers' right of conventional subrogation and left it with an equitable right of subrogation against the settlement funds provided by the tortfeasors' insurer. Farmers' right of equitable subrogation arose automatically when Farmers paid Horner under her Homeowner's Policy.

The insurer's right of subrogation may arise by contract or "independently of [the] contract provision," in equity. *General Ins. Co. v. Stoddard Wendle Ford Motors*, 67 Wn.2d 973, 976, 410 P.2d 904 (1966). *See also Mahler v. Szucs*, 135 Wn.2d 398, 412, 415, 957 P.2d 632 (1998) (right to reimbursement may arise by operation of law, called "legal" or "equitable" subrogation, or by contract, called "conventional"

subrogation); *Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 417, 693 P.2d 697 (1985) (“whether arising by operation of law or under contract, subrogation is an equitable remedy subject to equitable defenses”); *Roberts v. Safeco Ins. Co.*, 87 Wn. App. 604, 607-608, 941 P.2d 668 (1997) (“Safeco’s subrogation rights arise in equity *and* by contract. . . . Thus, under both the insurance contract *and* equity, Safeco holds a subrogation interest in any recovery Roberts might obtain from the tortfeasor”) (emphasis added).

The insurer’s equitable right of subrogation/reimbursement arises when the insurer pays its insured for harm caused by a third party. *Mahler*, 135 Wn.2d at 413; *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 9, 13-14, 665 P.2d 887 (1983) (right to subrogation exists when party, not volunteer, pays another’s obligation for which subrogee has no primary liability in order to protect such subrogee’s own rights and interests). The insurer may enforce this right as a lien against any recovery its insured secures from the third party, or pursue an action in the insured’s name against the third party to enforce its equitable right. *Mahler*, 135 Wn.2d at 413.

Horner does not dispute Farmers paid her \$51,737.83 for property damage to her condominium caused by the fire that resulted from the neighbors’ negligent repairs. The payment triggered Farmers’ equitable

right of subrogation that is independent of its contract rights under the Homeowner's Policy. *Roberts*, 87 Wn. App. at 608-608; *Newcomer v. Masini*, 45 Wn. App. 284, 286, 724 P.2d 1122 (1986) (subrogation "applies where one advances money to pay the debt of another to protect his own rights. A court of equity substitutes him in place of the creditor as a matter of course, without any express agreement to that effect"). Horner's argument about the alleged ambiguities in the subrogation clause in the Homeowner's Policy is therefore irrelevant.

After receiving \$51,737.83 for her property damage from Farmers, Horner pursued a claim against her neighbors and settled for \$290,000 (CP 221, 223-224), which was \$210,000 under the limits of their \$500,000 liability policy. CP 203. The settlement states that it represents full consideration for *all* her claims, including "*property damages*, loss of use, subrogation, and personal injury suffered by Anne Horner arising out of [the fire]." CP 221. Horner's voluntary settlement fully compensated her for her loss, including any property loss paid by Farmers. *Truong v. Allstate Prop. & Cas. Ins. Co.*, 151 Wn. App. 195, 205, 211 P.3d 430 (2009) ("a settlement with a tortfeasor for less than limits is evidence that the PIP recipient received full compensation. . . . Truong had no obligation to settle if he felt the amount offered did not reflect his total damages.>").

By denying that Farmers has the right to subrogate for \$51,787.83 it had paid her for property damage from the settlement proceeds with the tortfeasor, which included payment for the same “property damage,” Horner seeks double recovery of the \$51,787.83. This is exactly what equitable subrogation is designed to prevent. *Thiringer v. American Motors Ins. Co.*, 91 Wn.2d 215, 220, 588 P.2d 191 (1978) (equitable subrogation prevents insured's double recovery from his insurer and the tortfeasor); *Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 618, 160 P.3d 31 (2007) (“It is well established in Washington that insureds are not entitled to double recovery, and thus after an insured is ‘fully compensated for his loss,’ an insurer may seek an offset, subrogation, or reimbursement for PIP benefits already paid.”).

Horner fails to recognize that under Washington law Farmers can subrogate both under contract and in equity. The trial court correctly recognized that having wrongfully deprived Farmers of the right to subrogate under contract, Horner cannot defeat Farmers’ independent right to subrogate in equity and reap double recovery for the same property damage. The order granting summary judgment to Farmers should be affirmed.

IV. STATEMENT OF FACTS

Anne Horner owns and resides in a condominium in Port Ludlow, Washington. CP 5 (Complaint, ¶ 4.1). On May 26, 2006, a contractor hired by her neighbors, Joyce and Weaver Jordan, accidentally started a fire in the polyvinyl chloride (PVC) pipes in the wall adjacent to Horner's unit. CP 5. The fire released sooty smoke, which caused damage to Horner's residence and its contents. *Id.* Horner alleges that the fire also released toxic fumes, which caused her personal injury. *Id.* Horner moved out of her condominium while it was being repaired. *Id.*

At the time of the fire, Horner was insured under Farmers' Townhouse/Condominium Owners' Insurance Policy No. 0926336824 ("Homeowner's Policy"). *Id.* (¶ 4.2); CP 128-146. This policy provided Horner first-party coverage for physical damage to and loss of personal property in her condominium and the loss of its use. *Id.* It did not provide coverage for damage to the common walls of the condominium¹ or for bodily injury. *Id.* Horner made a claim under her Homeowner's Policy for property damage, alternative living expenses, food, mileage, and copy expenses caused by the fire. CP 148-173. Farmers accepted her claim and

¹ Under RCW 64.34.352 (3)(d), the condominium common areas are insured by the homeowner's association.

paid Horner \$51,737.83. CP 175-76. Horner does not claim any further payments are owed to her under the Homeowner's Policy.

Shortly after the fire, Horner made a claim against the Jordans for the negligence of their contractor who started the fire. The Jordans were insured against liability by another Farmers' policy. In addition to personal injuries, her claim against the Jordans includes all of her personal property damage, replacement housing, and other expenses which had been paid for under her Homeowner's Policy. CP 178-203. In its capacity as liability carrier for the Jordans, Farmers accepted coverage and liability for Horner's claim. CP 206. It contested only one category of the damages she claimed, pain and suffering and loss of quality of life. *Id.*

In its capacity as Horner's insurer under the Homeowner's Policy, Farmers made a subrogation claim directly to the liability claims adjuster for the Jordans for the \$51,737.83 it had paid Horner for property damage under her Homeowner's Policy. CP 212, 215-217. Horner was informed that Farmers would assert its subrogation rights against the Jordans. CP 208-210.

On August 6, 2007, Horner and the Jordans participated in mediation. The mediation resulted in a settlement of all of Horner's claims against the Jordans, including her claims for personal property damage already paid by Farmers under Horner's Homeowner's Policy, in

the amount of \$290,000. CP 221. A handwritten settlement agreement drafted by Horner's counsel recognized Farmers' subrogation rights. *Id.*

As the liability insurer for the Jordans, Farmers paid Horner \$238,262.17, withholding \$51,737.83, the amount it had paid to Horner for property damage under the Homeowner's Policy. CP 240-241.

As part of her settlement with the Jordans, Horner signed a release, which discharged the Jordans and their contractor from all claims "related to injuries and property damage arising from an accident that occurred on or about the 26th of May 2006 at or near Port Ludlow, Washington." CP 221, 224. In the same release, Horner acknowledged that she had constructively received an additional \$51,737.83, which was "subject-to negotiation related to [her] homeowner's policy." CP 224.

Shortly after the mediation, counsel for Horner informed Farmers that the subrogated amount, \$51,237.83, constituted a common fund and claimed one-third of that amount as his attorney fees under *Mahler*.² CP 231. That position, now abandoned, is inconsistent with counsel's present argument that Farmers has no subrogation claim on the settlement funds.

² *Mahler* fees are based on the notion that when the insured has established a common fund that benefits a subrogating insurer, the insurer must pay a *pro rata* amount of the insured's attorney fees incurred in creating the fund. *See Mahler*, 135 Wn.2d at 426-427.

Following the mediation and payment to Horner, the parties corresponded about Farmers' subrogation claim and Horner's request for attorneys' fees. CP 226-244. Farmers repeatedly requested that Horner execute an assignment of her claim against the Jordans for the \$51,237.83 she had been paid under her Homeowner's Policy. CP 246-259. Horner refused to make the assignment and sued Farmers, seeking to establish a right to recover \$51,237.83 from *both* Farmers and the Jordans. The Complaint was styled as a class action. CP 3-16. The trial court denied Horner's motion for summary judgment and granted Farmers' motion for summary judgment on the subrogation issue. This appeal followed.

V. ARGUMENT

A. Standard of Review

This Court reviews summary judgment orders *de novo*. *Sheikh v. Choe*, 156 Wn. 2d 441, 447, 128 P.3d 574 (2006). Summary judgment is appropriate in resolving issues regarding the interpretation of an insurance policy unless the terms of the policy are ambiguous and the parties offer conflicting extrinsic evidence to clarify the ambiguity. *National Gen. Ins. Co. v. Sherouse*, 76 Wn. App. 159, 162, 882 P.2d 1207 (1994), *rev. denied*, 126 Wn.2d 1009 (1995). Insurance policies "are to be construed as contracts," in their entirety, "in order to give force and effect to each

clause.” *Washington Pub. Util. Dist. Sys. v. PUD 1*, 112 Wn.2d 1, 10-11, 771 P.2d 701 (1989).

This appeal presents a purely legal issue reviewed *de novo*. No material facts are in dispute. Farmers admits that the property damage caused by the fire was covered by Horner’s Homeowner’s Policy. Horner admits that Farmers paid her for all of the property damage she claimed under her Policy. She also admits that she seeks to recover for the same property damage twice. The only question is legal: whether Horner may defeat Farmers’ right of equitable subrogation and obtain double recovery. Because she cannot, the trial court’s dismissal of her claims should be affirmed.

B. Farmers’ Payment of Horner’s Property Loss Gave It a Legal and an Equitable Right of Subrogation

Subrogation is an equitable doctrine that allows the party that paid a loss to impose ultimate liability on the party who caused it and “in equity and good conscience, ought to bear it.” *Mahler*, 135 Wn.2d at 411-12. It can arise by contract, known as conventional subrogation, or by law, termed legal or equitable subrogation. *Id.* at 412. “In the insurance context, the ‘doctrine of subrogation enables an insurer that has paid an insured’s loss pursuant to a policy. . . to recoup the payment from the party responsible for the loss’.” *Id.* at 413 (citation omitted).

The paying insurer's subrogation right can be enforced (1) by a lien on the recovery obtained by the insured from the tortfeasor, or (2) directly, by standing in the shoes of the insured party and pursuing a claim in the insured party's name against the tortfeasor. *Mahler*, 135 Wn.2d at 413. Because insureds often recover all their damages, including the amounts paid by their own insurer directly from the tortfeasor, insurance policies typically contain a contractual right of reimbursement, which allows the insurer to recover its payments from the insured. *See Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 876, 31 P.3d 1164 (2001). The insurer's recovery is subject to the "make-whole rule," which provides that "while an insurer is entitled to be reimbursed to the extent that its insured recovers payment for the same loss from a tortfeasor 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.*" *Thiringer*, 91 Wn.2d at 219 (emphasis added).

Under Washington law, the insurer's right of equitable subrogation arises by virtue of the payments to its insured as a result of the actions of a third party, *independently of the contract provisions.* *Mahler*, 135 Wn.2d at 412-413, 415; *Roberts*, 87 Wn. App. at 607-608 ("subrogation rights arise in equity *and* by contract") (emphasis added); *Briggs*, 100 Wn.2d at

13-14 (right to subrogation exists when party, not volunteer, pays another's obligation for which subrogee has no primary liability in order to protect such subrogee's own rights and interests). *See also Stoddard*, 67 Wn.2d at 976 ("subrogation is an equitable right and will be enforced or not according to the dictates of equity and good conscience. ***It arises independently of contract provision.***") (emphasis added); *Livingston v. Shelton*, 85 Wn.2d 615, 619, 537 P.2d 774 (1975) ("It is . . . the universal rule that the right of legal subrogation need not rest upon any formal contract or written agreement, nor does it follow from any fixed law; but it exists on principles of mere equity . . . and is founded on the relationship of the parties.") (citations and quotations omitted); *Newcomer*, 45 Wn. App. at 286 (subrogation "applies where one advances money to pay the debt of another to protect his own rights. A court of equity substitutes him in place of the creditor as a matter of course, without any express agreement to that effect"); *National Union Fire Ins. Co. v. Greenwich Ins. Co.*, 2009 U.S. Dist. Lexis 12644 *18-24 (W.D. Wash. 2009) (recognizing an excess carrier's right to pursue subrogation both under contract ***and*** by equity—"Under principles of equitable subrogation, National Union is entitled to reimbursement from Greenwich for a portion of the outstanding defense costs that it paid.")

The majority of jurisdictions recognize that equitable and contractual subrogation are independent rights. See 2 Windt, *Insurance Claims and Disputes*, § 10:7 (5th ed. March 2008) (“In general, absent a statute to the contrary, an insurance company will, on making a payment to the insured required under the policy, always be subrogated either totally or partially (if the insurer pays less than the insured’s entire loss), to the insured’s rights and remedies against the wrongdoer.”) (citations omitted); 16 *Couch on Insurance* § 222:22 (3rd Ed. June 2009) (“[T]he principles of equitable subrogation have been held to govern . . . where, even though there is a subrogation clause, there is some question in equity about whether subrogation should be imposed, and where the subrogation clause does not provide terms upon which subrogation would occur.”). See also Robert Spake, Note: *The Roof is on Fire: When, Absent an Agreement Otherwise, May a Landlord’s Insurer Pursue a Subrogation Claim Against a Negligent Tenant?* 63 Wash & Lee L. Rev. 1743, 1749 (2006) (“Equitable subrogation . . . arises out of equitable principles, with or without a specific agreement”).

Horner argues that Farmers has no equitable right of subrogation because the Homeowner’s Policy contains a specific subrogation clause. Horner’s Opening Brief at 25-27. This argument is contrary to *Mahler*, *Roberts*, *Livingston* and *National Union*, which recognize that equitable

subrogation exists independently of the contract. *See National Union*, 2009 U.S. Dist. Lexis 12644 at 18-19 (“[a]n insurer who receives full contractual assignment of an insured’s rights may bring a conventional subrogation claim to enforce those rights National Union may also pursue remedies under the doctrine of equitable subrogation to recover the costs of defense paid on Harris’ behalf.”).

Horner turns the right to equitable subrogation into a nullity by arguing that it is destroyed when contractual subrogation fails. Horner’s Opening Brief at 26. She relies on *Fisher v. Aldi Tire, Inc.*, 78 Wn. App. 902, 902 P.2d 166 (1995), which was reviewed as part of the *Mahler* case. At issue in *Fisher* was fee sharing. The *Fisher* court held that an insurance carrier could eliminate its equitable obligation to pay a *pro rata* share of attorneys’ fees under the common fund doctrine by careful drafting of the insurance policy. *Mahler* approved the recovery of fees under the equitable common fund rule but declined to address the issue whether equity is trumped by a more restrictive contractual right to fee recovery. *Mahler*, 135 Wn.2d at 424, n.16. More importantly, the court in *Fisher* recognized that “equitable subrogation . . . applies to prevent unjust enrichment of the insured when an insurer fulfills its obligation pursuant to an insurance policy and the insured recovers that amount from the

tortfeasor.” *Fisher*, 78 Wn. App. at 906. This is precisely what Horner seeks by claiming the \$51,287.83 twice.

Horner also cites *Thiringer*, 91 Wn.2d 215, where the PIP insurer argued that the settlement received by the insured from the tortfeasor’s insurer should first be applied to his PIP claim and then to his general damages. Far from eliminating it, *Thiringer* recognized the right of equitable subrogation once the insured was fully compensated for his loss:

The general rule is that while an insurer is entitled to be reimbursed to the extent that its insured recovers payments for the same loss from a tortfeasor 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.

Neither case supports Horner’s argument that the existence of conventional subrogation eliminates equitable subrogation. The trial court correctly recognized Farmers’ right of equitable subrogation as an independent right. *See Mahler*, 135 Wn.2d at 412 (“Subrogation has existed in civil law longer than in common law. . . . Subrogation is favored in Washington law. Subrogation is always liberally allowed in the interests of justice and equity.”) (citations and quotations omitted).

C. Farmers Met All Prerequisites to Equitable Subrogation

An insurer seeking subrogation must establish three elements: (1) the existence of a debt or obligation for which the tortfeasor is primarily liable; (2) that the insurer has paid the obligation to the insured in order to protect its own rights and not as a volunteer; and (3) that enforcement of the insurer's subrogation right will not work an injustice on the tortfeasor or unfairly shift responsibility for the loss. *Livingston*, 85 Wn.2d at 618-619 (citation omitted). None of these elements are in dispute here.

The make-whole rule does not require that the insured be made whole for all her losses or injuries before subrogation is allowed. If the insured has been made whole for the insured loss, the insurer is entitled to pursue a subrogation claim against the tortfeasor, even if the insured has other uncompensated losses for which she has not recovered. *Meas v. State Farm Fire & Cas. Co.*, 130 Wn. App. 527, 529, 123 P.3d 519 (2005); *Chen v. State Farm Mut. Auto. Ins. Co.*, 123 Wn. App. 150, 94 P.3d 326 (2004).

In *Meas*, a first-party auto insurer, which paid its insured under the collision coverage, was entitled to assert its subrogation rights against the third-party tortfeasor even though the insured claimed he had not been

fully compensated for his personal injuries. Rejecting the insured's attempt to defeat subrogation, the court held:

Meas is correct in that *Mahler and Thiringer* implicate the insured's right of compensation for all of his or her loss caused by a third party. But the court in *Thiringer* stated that an insurer is entitled to reimbursement where its insured recovers payment for the *same loss* from a third party. *Thiringer*, 91 Wn.2d at 219, 588 P.2d 191. The meaning is plain that for *property damage* where there is classic subrogation, the insured is to be made whole for the same loss, *i.e.*, the *property damage* before the carrier can recover payment from the tortfeasor. But the property damage subrogation does not relate to the right of reimbursement for personal injuries under the policy language.

Here, Meas was fully compensated or "made whole" for the property loss claimed under his collision coverage when he received payment from State Farm."

Meas, 130 Wn. App. at 538 (emphasis in original).

Likewise, in *Chen*, the insurer, which had paid both personal injury and property damage benefits to its insured, was allowed to recover its subrogation claim for property damage directly from the tortfeasor:

State Farm had the right to pursue reimbursement directly from the tortfeasor for amounts paid to the insured under coverage for property damage . . . Because it was a classic subrogation right, the plaintiff assigned her rights to recover to State Farm when she accepted the check . . . for property damage under her collision policy. Therefore State Farm had the right to pursue property damages, and further, it did pursue it [sic] those rights on its own.

Chen, 123 Wn. App. at 157 (quotations omitted).

Under *Meas* and *Chen*, the fact that Horner suffered bodily injuries (which were not insured under her Homeowner's Policy) in addition to her property loss (which was insured and paid for under her Homeowner's Policy) does not prevent Farmers from asserting its subrogation rights against the proceeds of Horner's settlement with the Jordans. It is undisputed that Farmers paid Horner for all property damage she was entitled to under her Homeowner's Policy. Farmers therefore is entitled to seek reimbursement for those payments by way of subrogation from the settlement proceeds paid to Horner on the Jordans' behalf.

D. Having Settled Her Claim for All "Property Damages" With the Jordans for Less Than Their Liability Limits, Horner Cannot Argue That She Was Not Fully Compensated

Horner impermissibly argues for the first time on appeal that she was not made whole and that she did not recover her property damages in the settlement with the Jordans. Horner's Opening Brief at 19; RAP 2.5(a). Even if considered, however, her argument fails because it contradicts the settlement agreement that was drafted by Horner's counsel and that specifically states that Horner settled all "property damages" with the Jordans. CP 23. Horner offered no evidence below that her settlement with the Jordans involved different property damage than the property

damage paid for by Farmers. Neither does she argue that she was not made whole for any specific item of property damage.³

More importantly, having settled with the Jordan's liability carrier for \$290,000, \$210,000 less than their \$500,000 liability policy, Horner cannot rely on the make-whole rule as a matter of law. *See Truong*, 151 Wn. App. 195; *Peterson v. Safeco Ins. Co. of Illinois*, 95 Wn. App. 254, 976 P.2d 632 (1999).

In *Truong* the insured received PIP payments from his own auto insurer, Allstate. *Truong*, 151 Wn. App. at 199. He then made a personal injury claim against the other driver, who was insured by a policy with liability limits of \$25,000. *Id.* *Truong* demanded \$34,000, but ultimately settled his injury claim for \$9,347.54. *Id.* He then argued, relying on *Thiringer*, 91 Wn.2d 215, and *Sherry*, 160 Wn.2d 611, that Allstate was not entitled to reimbursement of its PIP payments because he was not fully compensated by the settlement, which he claimed was discounted by his comparative fault. *Truong*, 151 Wn. App. at 201. This Court disagreed. When the settlement is freely agreed to, as in *Truong* and here, it is *prima*

³ The Settlement Agreement between Horner and the Jordans acknowledges that the settlement fund of \$290,000 is "subject to a subrogation claim by Farmers." CP 23. Horner also signed a release acknowledging "constructive receipt" of \$51,737.83, "related to [her] homeowner's policy." CP 224. These are admissions by Horner that Farmers acquired a subrogation right when it paid \$51,737.83 for her property damage under the Homeowner's Policy. ER 801(d)(2); *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994).

facie evidence that the insured has been fully compensated. *See id.* at 201-202.

It is undisputed that Horner was represented by counsel at the mediation with the Jordans and their liability carrier, and that the resulting settlement was negotiated at arms' length. If Horner did not feel that the \$290,000 she received from the Jordan's liability carrier was adequate compensation for her claims, including property damage, she was not obligated to accept it. *See id.* at 205 ("If Allstate cannot now obtain reimbursement from the proceeds of the settlement, the effect would be to unfairly eliminate Allstate's subrogation interest in the PIP payments.").

Neither can Horner rely on the collateral source rule. The collateral source rule prevents the tortfeasor (here, the Jordans) from gaining the benefit that would arise because Horner had the foresight to purchase insurance against property damage they caused. The rule allows Horner to assert a claim against the Jordans for property damage already paid by her insurer. *Ciminski v. SCI Corp.*, 90 Wn.2d 802, 804-805, 585 P.2d 1182 (1978) (collateral source rule is not conditioned on some payment by the plaintiff for the benefit received); *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 798-799, 953 P.2d 800 (1998). But the collateral source rule does not allow Horner to recover a double payment:

It is well settled in tort actions that a party has a cause of action notwithstanding the payment of his loss by an insurance company The purpose of this rule is to implement the insurance company's right of subrogation, and not to afford the respondent a double recovery.

Consolidated Freightways v. Moore, 38 Wn.2d 427, 430, 229 P.2d 882 (1951) (citations omitted).

The rule does not apply “[w]here the source of the collateral payments is the tortfeasor or a fund created by him to make such payments” and “such payments may be proven at trial to prevent double recovery by the injured party from the tortfeasor.” *Lange v. Raef*, 34 Wn. App. 701, 704, 664 P.2d 1274 (1983). A fund created by the tortfeasor includes payments by his insurer. *Id.* at 705. The collateral source rule does not sanction Horner's attempt to obtain double recovery.

E. The Homeowner's Policy Did Not Eliminate Farmers' Right of Equitable Subrogation

Horner contends that Farmers has waived its right to subrogation in her Homeowner's Policy, which states:

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

If we seek an assignment, an insured will help us to secure these rights and do nothing to impair them.

CP 78 (Homeowners' Policy, General Conditions, #8).

Under the provision above, Farmers' "right of recovery" refers to the *assigned* right of recovery from the insured. It applies when the insured was paid by Farmers *and* seeks to recover for the same loss against the tortfeasor. Under that scenario, Farmers' payment to the insured for the same "loss" would represent an "excess" amount.

If Horner had not refused to assign to Farmers her rights of recovery against the Jordans, Farmers would have acquired a conventional right of subrogation. It does not matter that Farmers requested an assignment after Horner had been fully reimbursed for her property damage. The language above is absolute and does not depend on the timing of the request for an assignment. The only condition is that the insured cannot have not waived her rights of recovery in writing before the loss occurred. Farmers' request for an assignment was proper under the policy.

Horner contends that the sentence, which reads "*Our right of recovery is limited to that portion of our payment which exceeds that amount of damage sustained by you,*" prevents Farmers from asserting a subrogation claim against the Jordans because Farmers did not pay Horner any "excess" amount. But this sentence must be read in context. It applies where the insured has claims *and* is seeking reimbursement against

a third party responsible for the same loss. If the insured has previously waived her rights against the tortfeasor in writing (as commonly happens in a landlord/tenant or condominium situation),⁴ then Farmers' contractual right of subrogation would be eliminated because it cannot have greater rights as a subrogee than its insured. However, if there is no previous written waiver, then Farmers has the option to request that the insured assign her right of recovery to Farmers, to the extent of the payments Farmers has made to its insured. Once the assignment is made, Farmers acquires a "classic" conventional right of subrogation against the tortfeasor.

Horner reads the "our right to recovery" sentence out of the context of the paragraph where it belongs. The paragraph talks about "assignment" and "recovery against another person," which Horner completely ignores. Her reading deprives the sentence of any logic and makes the first two sentences of the paragraph meaningless. Under her interpretation there would never be a valid subrogation claim under the Homeowner's Policy because a payment by Farmers under the policy would never "exceed" the amount of the damages sustained by the insured

⁴ For example, all insurance policies carried by homeowners' associations in a condominium development must provide that the insurer "waives its right to subrogation under the policy against any unit owner, member of the owner's household, and lessee of the owner." RCW 64.34.352(3)(b).

except when Farmers made a gift to the insured in excess of her actual damages.⁵ But this ignores the references to “assignment” and “recovery” against a third party in the same paragraph.

Under the proper interpretation of the sentence that respects the context rule, Farmers obtains the right of conventional subrogation when the insured assigns to it her rights of recovery against the third party for the loss that Farmers already paid for. Because Horner refused to assign her rights of recovery against the Jordans to Farmers, Farmers did not acquire a conventional right of subrogation. It is limited to the independent equitable right of subrogation, which arose when Farmers paid Horner under the Homeowner’s Policy.

Horner makes much of the testimony of Farmers’ corporate witnesses and of the fact that the policy language was changed in 2006. Horner’s Opening Brief at 8, 11. But extrinsic evidence cannot create an ambiguity where none exists. *Tyrell v. Farmers Ins. Co.*, 140 Wn.2d 129, 133, 994 P.2d 833 (2000); *Mid-Century Ins. Co. v. Henault*, 128 Wn.2d 207, 213, 905 P.2d 379 (1995). A policy is not ambiguous because it is complicated or because a party finds it confusing. *See Schab v. State*

⁵ The party asserting waiver bears the burden of proving an intention to relinquish the right. *See U.S. Oil & Refining Co. v. Lee & Eastes Tank Lines, Inc.*, 104 Wn. App. 823, 831, 16 P.3d 1278 (2001) (failure to demand delivery of certificates of insurance did not constitute a waiver of right to claim breach of an agreement to insure a party). Horner has offered no such evidence.

Farm Mut. Auto Ins. Co., 41 Wn. App. 418, 421, 704 P.2d 621 (1985); *Mutual of Enumclaw Ins. Co. v. Grimstad-Hardy*, 71 Wn. App. 226, 243, 857 P.2d 1064 (1993); *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 734, 837 P.2d 1000 (1992).

To be sure, the 2006 version of the Policy is more explicit in that it makes the assignment of the insured's claim against the tortfeasor automatic upon payment:

When we pay for any loss or damage, an insured's right to recovery from anyone else for that loss or damage becomes our right up to the amount we have paid.

Horner's Opening Brief, at 11-12. Under the 2006 version, Farmers would not have had to ask Horner for an assignment. But this does not help Horner's argument.

Her policy plainly allows Farmers to ask for an assignment and requires that she give it upon request. Because Horner refused to do what she was required to do under the policy, Farmers could not acquire a conventional right of subrogation and was limited instead to its independent equitable right. Horner cannot use her own contract breach to gain a double recovery and destroy Farmers' independent right to equitable subrogation. See *Farmers Ins. Co. of Washington v. Lautenbach*, 93 Wn. App. 671, 679, 963 P.2d 965 (1998). See also

Fisher, 78 Wn. App. at 906 (“equitable subrogation . . . applies to prevent unjust enrichment”).

In *Lautenbach*, the insured claimed that Farmers had waived its ability to offset PIP payments against a recovery under the UIM coverage in the same policy because it did not require the PIP insured to agree in writing that such offset was allowed. The Court held that another section of the policy gave Farmers a right to recover such payments through reimbursement:

We agree with Farmers. While the provision cited by Smith permits Farmers to insist on a writing before paying the PIP benefit, nothing in this clause prevents Farmers from recovering such payments under a different clause of the contract. Thus Farmers waived only its right to require a written agreement to repay, not its right to recover the PIP payment.

Lautenbach, 93 Wn. App. at 680.

Likewise, the subrogation clause in Horner’s policy provides that Farmers may recover its payments for the same “loss” where the insured assigns to Farmers any “excess” recovery. Nothing in that clause prevents Farmers from asserting its independent equitable right of subrogation, which arises when it pays a loss that was caused by another. *Roberts*, 87 Wn. App. at 607-608 (“subrogation rights arise in equity and by contract”).

F. The Anti-Subrogation Rule Does Not Apply to Bar Farmers' Subrogation Claim

Horner argues that Farmers cannot assert its subrogation rights against the proceeds of the settlement with the Jordans because of the anti-subrogation rule. This rule prevents an insurer from subrogating against its own insured because it is unfair to allow an insurer to recover the risk of loss that the insured had passed along to the insurer and for which the insured had paid a premium. *Johnny's Seafood Co. v. Tacoma*, 73 Wn. App. 415, 422, 869 P.2d 1097 (1994); *Stoddard*, 67 Wn.2d at 979-80. Like all equitable rules, the anti-subrogation rule is not absolute, and its application depends on the particular circumstances in each case, the terms of the policy and the nature of the claimed loss.

Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 102 Wn. App. 488, 7 P.3d 861 (2000), illustrates that the anti-subrogation rule is fact-specific. In that case the insurer paid the owner for damages to its church caused by a fire. The fire was alleged to have been caused by the negligence of a heating subcontractor and the propane supplier. The heating subcontractor was a co-insured under the owner's policy. The propane supplier was its intended beneficiary. Both were negligent. The owner waived its claim against the heating contractor. Because the owner's insurer cannot acquire greater rights than its insured, it was

prevented from subrogating against the heating contractor. However, it was allowed to subrogate against the propane supplier. *See Ferrellagas*, 102 Wn. App. at 504 (“We reject the blanket rule that co-insured status for any loss under a builder’s risk policy automatically insulates the co-insured from subrogation by the insurer for damage to all property covered therein.”).

Reichl v. State Farm Mut. Auto. Ins. Co., 75 Wn. App. 452, 880 P.2d 558 (1994), which Horner cites but fails to discuss, is directly on point. Both parties to an auto accident were insured by the same carrier. State Farm as PIP insurer for Reichl was allowed to claim reimbursement from the proceeds of a judgment against its other insured. Reichl, the PIP insured, raised the anti-subrogation rule. The court concluded that State Farm in its capacity as PIP insurer could claim the right to reimbursement *from proceeds of the judgment*:

State Farm . . . is not attempting to subrogate against Stetz. Rather, it is claiming reimbursement from the proceeds of the Reichl-Stetz judgment. Since October 17, 1991, when the Reichl-Stetz judgment was satisfied by Stetz or someone on his behalf, the proceeds of that judgment have constituted a fund separate from Stetz, and State Farm can subrogate against that fund without breaching its promise to indemnify Stetz.

Id. at 457. Under *Reichl*, the proceeds of a settlement with the insured constitute a fund separate from the insured for the purposes of the anti-subrogation rule.

Out-of-state cases applying the rule where one insurer has insured both parties under different policies are not consistent. Compare *Fashion Tanning Co., Inc. v. Fulton County Elec. Contractors, Inc.*, 536 N.Y.S.2d 866, 869 (3d Dept. 1989);⁶ *Benge v. State Farm Mut. Auto. Ins. Co.*, 697 N.E.2d 914 (Ill. Ct. App. 1998);⁷ and *Transport Trailer Service, Inc. v.*

⁶ In *Fashion Tanning* the insurer, which paid a fire loss, asserted a subrogation claim against Stewart-Warner, a manufacturer of spray booths, for defective design. Stewart-Warner asserted the anti-subrogation rule because it was insured by an affiliate of the Kemper Group, to which the insurer belonged. The court refused to apply the rule:

[B]arring the subrogated claims might provide Stewart-Warner with an unbargained for, unpaid for windfall. . . . Surely, Stewart-Warner's liability . . . for damages the subrogors suffered by reason of Stewart-Warner's product which are in excess of the latter's liability coverage cannot fairly depend upon the fortuity that plaintiff's insurer is the Kemper Group. If that were so, a potential defendant could contrive to avoid being held accountable for the full measure of its product liability by merely securing small liability policies from a host of carriers, thereby frustrating any subrogation action being brought against it by any of those carriers.

Fashion Tanning, 536 N.Y.S.2d at 869.

⁷ *Benge* involved a proposed class action claiming that an auto insurer breached a policy by refusing to pay the insureds for physical damage benefits already paid by the same insurer as liability carrier for the tortfeasor. Because payment under the first-party policies automatically created a subrogation claim, the court held that there was no conflict of interest in allowing the insurer to assert its subrogation claim as a defense to payment of double benefits to the insureds. *See* 697 N.E.2d at 920.

The Upjohn Co., 506 F. Supp. 442 (E.D. Pa. 1981)⁸ with *Moring v. State Farm Mut. Auto. Ins. Co.*, 426 So. 2d 810 (Ala. 1982); *Home Ins. Co. v. Pinski Bros. Inc.*, 500 P.2d 945 (Mont. 1972). Courts in these cases were concerned about the potential for conflict, which may affect the insurer's incentive to provide a vigorous defense to its insured, when the insurer sues its insured. See *Benge*, 697 N.E.2d at 1071. In Washington, however, these concerns are academic because counsel appointed by the insurance company to represent an insured represents only the insured and not the insurance company. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986).

Furthermore, there is no potential conflict in this case because Farmers, in its capacity as Jordans' liability carrier, admitted liability and agreed with Horner on the value of her claim for property damage, for which she had previously collected. Thus, none of the conflict scenarios to the detriment of the Jordans could occur in this case. The Jordans were fully protected by the settlement and release and could suffer no potential prejudice by allowing Farmers, as Horner's insurer, to assert its subrogation claim against the proceeds of Horner's settlement with the Jordans' liability carrier. See *Allstate Ins. Co. v. LaRondeau*, 622 N.W.2d

⁸ In *Transport Trailer*, 506 F. Supp. at 444, a paying carrier was allowed to subrogate against its insured where the insured's deductible was not yet exhausted.

646 (Neb. 2001) (allowing subrogation and distinguishing *Stetina v. State Farm Mut. Auto Ins. Co.*, 243 N.W.2d 341 (Neb. 1976), on which Horner relies).

Ironically, it is not the Jordans (whom Farmers insured against liability) but Horner (who admits that Farmers fully paid her under the Homeowner's Policy) that invokes the anti-subrogation rule and claims prejudice here. Yet the only "prejudice" of Farmers' subrogation *to Horner* is her inability to recover double payment for property loss to which she is not entitled in the first place. The anti-subrogation rule is designed to protect the Jordans against unfair actions by their insurer, not provide a windfall to Horner.⁹ Because the Jordans are fully protected by the release, the rule does not apply here.

⁹ Horner seeks double recovery by relying on the "benefit of the bargain" rule, citing *Barney v. Safeco*, 73 Wn. App. 426, 869 P.2d 1093 (1994), *overruled on other grounds by Price v. Farmers Ins. Co.*, 133 An.2d 490, 946 P.2d 388 (1997), and *Maziarski v. Bair*, 83 Wn. App. 835, 924 P.2d 409 (1996). Horner's Opening Brief at 19. Neither helps her case.

In *Barney*, the insured was suing for insurance benefits due under the contract. *Barney*, 73 Wn. App. at 429. Horner is not seeking insurance benefits for which she paid a premium; she is seeking to prevent Farmers from recovering under its subrogation rights. Her claim is one in equity, not contract. *Barney* does not apply.

In *Maziarski*, the policy was not in evidence, therefore the court had "no way of knowing" whether the contractual offset was allowed. 83 Wn. App. at 844-845. In neither *Barney* or *Maziarski* was the insurer seeking an equitable right of subrogation against settlement funds provided by the tortfeasor's liability carrier, as is the case here.

More on point is *Boag v. Farmers Ins. Co. of Washington*, 128 Wn. App. 333, 115 P.3d 363 (2005), where a "right to recover clause" in an auto policy was held to give Farmers an offset of PIP payments paid against an award under the UIM coverage. "[W]e engage in a fair, reasonable, and sensible construction as would (...continued)

G. If Horner Can Defeat Farmers' Subrogation Right, She Is Liable to Farmers for Breach

In Washington, both parties to the insurance contract must act in good faith.

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rest the duty of preserving inviolate the integrity of insurance.

RCW 48.01.030.

Horner's policy specifically requires her to cooperate with Farmers in the handling of an assigned claim against a tortfeasor. "If we seek an assignment, an insured will help us secure these rights and do nothing to impair them." CP 78. Horner breached this provision of the policy by failing to honor a request for an assignment of her claim against the Jordans for property damages paid by Farmers and by impairing Farmers' rights to subrogate against the proceeds of the settlement fund created by the Jordans' liability carrier.

(...continued)

be given to the contract by the average person purchasing insurance . . . Under this construction, the "right to recover" clause in Boag's Farmers policy simply states that where Boag has been fully compensated, Farmers retains a right to recover an offset for any PIP payment it made to Boag where she recovered payment from another." *Id.* at 342 (quotations and citations omitted).

If Farmers loses its subrogation right because Horner failed to assign to Farmers her claim against the Jordans as the Policy required, she cannot reap a windfall from her breach. Farmers is entitled to recovery of damages from her breach, or in the alternative, under the theory of unjust enrichment.

VI. CONCLUSION

For the reasons stated, the trial court's Order granting summary judgment to Farmers and holding that Farmers has a valid subrogation claim against the proceeds of Horner's settlement with the Jordans in the amount of \$51,737.83 should be affirmed.

Respectfully submitted this 4th day of February 2010.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the date indicated below the foregoing RESPONSE BRIEF BY APPELLEE [Farmers] was caused to be served via Legal Messenger on the Attorney(s) for Appellant Horner at the address listed below:

Michael Withey
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Attorneys for Plaintiff-Appellant Anne Horner, individually and on behalf of all those similarly situated

DATED: February 4, 2010



Teresa Bitseff, Secretary
STOEL RIVES

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