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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.

DALJEET SOMAL'S BRIEF OF RESPONDENT

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Daljeet Somal, as an individual and the proposed class action representative, is the Plaintiff below and the Respondent herein. He submits this Brief of Respondent in response to the Brief of Appellant submitted by the defendant below, Allstate Property and Casualty Insurance Company (“Allstate”).

I. INTRODUCTION

Somal prevailed below on his motion for partial summary judgment. As a result, to prevail in this appeal Somal can point to any basis in the record below to sustain the trial court’s ruling. In support of its appeal, however, Allstate makes essentially a single argument: the Court should mechanically apply the recent decision in *Averill v. Farmers Insurance Company of Washington*, 155 Wn.App. 106, 229 P.3d 830 (2010), which Allstate argues controls the outcome here. The Court should reject Allstate’s request for such a misguided, perfunctory analysis.

Underlying Allstate’s principle argument are necessarily two corollary assertions: that this case is factually identical to the facts in *Averill*, and that *Averill* accurately states the law on the make whole doctrine. As discussed below, Allstate’s argument falters on both these points.

One the first corollary assertion, it is important to recognize an important factual distinction between this case and *Averill*. Here, the

contract claim revolves around the language of the Allstate insurance policy. In *Averill*, the language at issue concerned a Farmers insurance policy. Importantly, the language of the two policies is plainly different. In construing an insurance policy *words matter*, and this fact alone prevents the over simplistic analysis Allstate seeks. More importantly, regardless of whether *Averill* even correctly states the law, the difference in language here mandates a different result, especially in light of the rule that ambiguous policy language be construed in favor of the insured.

One the second corollary assertion, Somal respectfully submits that *Averill* misstates the law of the make whole doctrine in Washington, and should be rejected. Stated succinctly, *Averill* stands for the proposition that the make whole doctrine does not apply when the insurer gets to the tortfeasor before the insured and gets the money before the insured does. Sort of a race to the tortfeasor. Such a rule is contrary to substantial Washington Supreme Court precedent.¹

¹ That the Supreme Court declined to review *Averill* is, of course, without meaning or relevance, and cannot be construed as approval of the decision's holding or reasoning, tacit or otherwise.

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

A. Does the language of Allstate's insurance policy provide a basis for sustaining the trial court's summary judgment ruling that Allstate acted wrongfully when it retained money from the tortfeasor representing payment for Somal's property damage loss before Somal had been fully compensated for that loss?

B. Does Washington's make whole doctrine provide a basis for sustaining the trial court's summary judgment ruling that Somal was entitled to be made whole for his property damage loss before his insurer is entitled to retain money from the tortfeasor representing payment for that loss?

III. COUNTERSTATEMENT OF THE CASE

A. Procedural History

Somal's complaint asserts claims against Allstate for CPA violations, bad faith, conversion and breach of contract. CP 3-11. The parties filed and argued cross-motions: Somal in support of partial summary judgment under CR 56, and Allstate in support of dismissal under CR 12(b)(6).

The trial court granted Somal's motion for partial summary judgment and denied Allstate's motion to dismiss. The summary

judgment order states 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,” and 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.” CP 170 (Order Granting Partial Summary Judgment in Favor of Plaintiff, at 2, ¶¶ 2 & 3).

Allstate sought discretionary review, which was granted and stayed pending the resolution of *Averill*. Subsequent to the *Averill* decision, Allstate filed an inappropriate motion for accelerated review,² which was denied.

B. Facts

The relevant facts are essentially undisputed.³ On January 12, 2009, Mr. Somal’s Ford Explorer sustained damage in a motor vehicle

² Allstate falsely states that in his opposition to the motion, Somal “conceded” that neither the make whole doctrine nor insurance regulations support the result Somal seeks. *See* AB at 6. Somal made no such concession. Somal made the rather bland acknowledgement that *Averill* “may be applicable” to the common law make whole doctrine question. *See* AB, Appx. E, at 1, 6 (Somal’s Answer to Motion for Accelerated Review). As for insurance regulations, Somal’s brief does not so much as mention them.

³ For the most part, the following facts are set out in paragraphs 5 through 15 of the Complaint (CP 3-5), and similarly referenced in Allstate’s Motion to Dismiss (CP 12-14).

accident. The vehicle was covered by an insurance policy issued by Allstate, including collision coverage with a \$500 deductible (the "Policy"). The other vehicle involved in the accident was insured by State Farm. Somal had his vehicle repaired, paying \$500 of the cost himself, with Allstate covering the rest under the collision coverage.

Thereafter, Allstate acted to recover the total property damage loss from the other driver, including the amount of loss represented by Somal's deductible. Allstate specifically advised Somal that it would act on his behalf, sending a letter that would encourage Somal to leave the property damage claim to Allstate:

We are writing to let you know that we have started our efforts to recover your deductible as well as the amount we paid in the loss listed above.

We want to assure you we will work aggressively to recover your deductible.

CP 110 (Feb. 12, 2009 Letter from Allstate to D. Somal).

Allstate decided with State Farm to attribute fault 60/40 against Somal, and accepted payment equal to 40% of Somal's total property damage loss. Allstate then sent Somal a check for \$200, representing 40% of his deductible, but leaving him out of pocket with a remaining, uncompensated loss of \$300.

C. Allstate’s “Subrogation” Provision

Regarding Allstate’s right to recover its insurance payments, the Policy provides the following:”

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.

CP 5⁴ (bold in original omitted, underscoring added). This language appears in Part VII of the Policy (concerning “Protection Against Loss to the Auto”), directly under the heading for “Subrogation Rights.”

IV. ARGUMENT

A. Standard Of Review

1. Standard Of Review For The Order Granting Plaintiff Partial Summary Judgment

“A motion for summary judgment presents a question of law reviewed *de novo*.” *Osborn v. Mason Cty.*, 157 Wn.2d 18, 22, 134 P.3d 197 (2006) (citing *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 662, 63 P.3d 125 (2003)). Thus, the reviewing court engages in the same inquiry as the trial court. *Woo v. Fireman’s Fund Ins.*, 161 Wn.2d 43, 54, 164 P.3d 454 (2007) (citing *Weyerhaeuser Co. v.*

⁴ Complaint at 3, ¶ 12.

Commercial Union Ins. Co., 142 Wn.2d 654, 692 n.17, 15 P.3d 115 (2000)).

Notably, “an appellate court may sustain a trial court *on any correct ground*, even though that ground was not considered by the trial court.” *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) (emphasis added) (citing *Reed v. Streib*, 65 Wn.2d 700, 709, 399 P.2d 338 (1965)). This is true so “long as the record has been sufficiently developed to fairly consider the ground.” *Caulfield v. Kitsap Cty.*, 108 Wn. App. 242, 251, 29 P.3d 738 (2001) (citing RAP 2.5(a); *Nast*, 107 Wn.2d at 308.).

2. Standard Of Review For The Order Denying Allstate’s CR 12(b)(6) Motion to Dismiss

The appropriateness of a dismissal under CR 12(b)(6) is also reviewed *de novo*. *San Juan Cty. v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007); *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998). When considering the motion, the court presumes that all facts alleged in the complaint are true, and may also consider hypothetical facts supporting the plaintiff’s claims. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (citing *Tenore*, 136 Wn.2d at 330). Dismissal is not appropriate unless it appears beyond doubt that the plaintiff cannot prove any set of facts, consistent with the complaint, that

would justify recovery. *San Juan Cty.*, 160 Wn.2d at 164 (citing *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995)); *Kinney*, 159 Wn.2d at 842 (citing *Tenore*, 136 Wn.2d at 330). Indeed, motions to dismiss should be granted only in the unusual case where the plaintiff's allegations show on the face of the complaint an insuperable bar to relief. *San Juan Cty.*, 160 Wn.2d at 164 (citing *Tenore*, 136 Wn.2d at 330; *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)).

B. The Policy Language Provides A Basis For Sustaining The Trial Court's Order Granting Partial Summary Judgment

1. The "Subrogation" Provision Must Be Construed In Favor Of Somal

Insurance contracts are contracts of adhesion. For that reason, as well as reasons of sound public policy, an insurance policy must be viewed in the light most favorable to the insured. *See e.g., Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 323, 88 P.3d 395 (2004) ("courts justifiably look [at insurance contracts] in a light most favorable to the insured.") (Sweeney, J., dissenting) (citation omitted); *Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 376, 535 P.2d 816 (1975) ("insurance policies ... are simply unlike traditional contracts, *i.e.*, they are not purely private affairs but *abound with public policy considerations...*") (emphasis added). *Mercer Place Condo. v. State Farm*, 104 Wn. App.

597, 602-03, 17 P.3d 626 (2000) (insurance policies liberally construed in favor of the insured). In its analysis, the Court must construe the policy language as an average person would. *American Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 134 Wn.2d 413, 427, 951 P.2d 250 (1998). Importantly, any ambiguities must be resolved in favor of the insured. *E.g., Barney v. Safeco Ins. Co.*, 73 Wn. App. 426, 429, 869 P.2d 1093 (1994).

2. Proper Interpretation Of The Policy Language Supports The Trial Court's Ruling

Allstate argues that the language of the Subrogation provision “applies only where the insured obtains recovery on his/her own, and not where the insurance company pursues its own subrogation interest....” AB at 3. In the first instance, the argument makes no sense: how can the self-titled “Subrogation” provision *not* apply to “subrogation?”

More importantly, Allstate is trying to read language into the provision that (in addition to contradicting its title) simply is not contained in the provision. The first sentence grants and describes Allstate right, vis-à-vis Somal, to recover its payments: “When we pay, your rights of recovery from anyone else become ours up to the amount we have paid.” The next sentence provides an express limitation on the right just granted in the previous sentence: “*However*, we may recover only the excess

amount you have received after being fully compensated for the loss.” In other words, the first sentence describes the entirety of Allstate’s *right to recover*, and the second sentence provides a limitation on that *right to recover*. This reading is also more consistent with the first part of the second sentence, which plainly speaks to the entire right: “However, we may recover only ...”

Allstate wants to focus on just three words and ignore the rest: “you have received.” AB at 3. According to Allstate, what these three words really mean is “what you have received *from the tortfeasor directly in your own action.*” The three words cannot sustain the burden Allstate puts on them.

The “you have received” language itself is, at best, ambiguous. Received from whom? Under the circumstances, it cannot be fairly said it can only mean received from the tortfeasor, as this would exclude amounts the insured received from the insurer under the collision coverage. That would make no sense under the circumstances, as the rationale for subrogation is to prevent a “double-recovery” by the insured. If we omit the money received from the insurer in determining whether the insured is fully compensated, there will never be an “excess amount you have received.” Indeed, the most reasonable reading is that “received” really means recovered in these circumstances, such that the provision would

read: “excess amount you have *recovered from any source* after being fully compensated for the loss.” Regardless, to read the three words as Allstate asks is an impermissible interpretation of policy language in favor of the insurer.

Allstate relies on *Averill*, but the case is unhelpful on this point due to the aforementioned differences in the language of the respective policies.⁵ The Farmers policy language, titled as its “Right to Recover Payment,” provided in relevant part:

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.

155 Wn.App. at 118 (emphasis added). On its face, Farmers’ “Right to Recover Payment” provision is plainly substantially different from Allstate’s “Subrogation” provision.⁶ For example, while Allstate’s policy vaguely says “you have received,” the Farmers policy specifies “and [the insured] *also recovers from another*.” In short, Allstate cannot have the

⁵ Despite Allstate’s heavy reliance on *Averill*, it is also worth noting that the contract claim discussion in the case is somewhat short and cursory.

⁶ In fact, that Allstate calls this its “Subrogation” provision, and then ostensibly creates and defines reimbursement rights against its insured, additionally makes this provision ambiguous. *See Averill*, 155 Wn.App. at 112 n.2 (noting difference between subrogation and right to reimbursement).

Court read language into it policy that only appears in the Farmers' policy in *Averill*.

C. The *Averill* Decision Misstates The Make Whole Doctrine And Is Contrary To Supreme Court Precedent

As the Court and counsel are aware, *Averill* is a recent decision from this Division of the Court of Appeals. With all due respect, Somal submits that it misstates the law applicable to the made whole doctrine as it applies to these circumstances. With due regard to the principle of *stare decisis*, the Court should take this opportunity to revisit and correct the errors of the case because it is a recent decision and its is misguided principles have not yet become unduly entrenched in our common law. Specifically, *Averill's* holding that the make whole doctrine only applies when the insurer is seeking funds directly from the insured should be rejected.

1. The Make Whole Doctrine Is a Longstanding Basic Tenet of Washington Insurance Law

The made whole doctrine has long been recognized as a basic tenet of Washington insurance law. More than 30 years ago, the Supreme Court decided *Thiringer*,⁷ a case in many ways analogous to this one. In *Thiringer*, the Court was asked to determine who had priority, as between an insurer and its insured, for the proceeds of a settlement for the insured's

⁷ *Thiringer v. American Motors Ins.*, 91 Wn.2d 215, 588 P.2d 191 (1978)

bodily injury claim. *Id.* at 216. The insured had effected a recovery from the tortfeasor. Since the amount recovered was insufficient to fully compensate him for his loss, however, the insured sought payment from his insurer under his PIP coverage. *Id.* at 217. Suit was filed after the insurer refused. *Id.* The Court stated the issue, and the insurer's argument, as follows:

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

Id. at 219. Citing case law and treatises going back to 1933, the Court started by acknowledging the longstanding general rule:

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

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

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

⁸ See also *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 309, 88 P.3d 395 (2004) (insurer may seek reimbursement for benefits previously paid “when the insured receives [a] full recovery”); *Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 878-79, 31 P.3d 1164 (2001) (recognizing “the long established equitable principles set down by this Court [that a]n insurer is not entitled to recover until its insured is fully compensated and restored to his or her pre-accident position”) (citing *Thiringer*, 91 Wn.2d at 219); *Weyerhaeuser v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 672, 15 P.3d 115 (2000) (“the insured must first be fully compensated for its loss before any setoff is ever allowed”); *Mahler v. Szucs*, 135 Wn.2d 398, 416-17, 957 P.2d 632 (1998) (“with respect to the allocation of benefits, we articulated a rule of full compensation, that is, no right of reimbursement existed for the insurer until the insured was fully compensated for a loss”); *Elovich v. Nationwide Ins. Co.*, 104 Wn.2d 543, 556, 707 P.2d 1319 (1985) (“the insurance company’s subrogation rights arise only after the plaintiffs have received full compensation for their injuries.”) (citations omitted); *Polygon NW. v. American Nat’l Fire Ins. Co.*, 143 Wn. App. 753, 782, 189 P.3d 777 (2008) (right of insurer to share in third party recoveries does not arise until the insured “has first been ‘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).

2. In the Make Whole Analysis, the Amount of the Insured's Loss Is His Total Loss, Without Reduction for Attributed Fault

Somewhat surprisingly, Allstate throws in an assertion that Somal has actually received full compensation for his loss. AB at 11-12. This is nonsense, and is completely contrary to the decision in *Sherry*.⁹

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

Sherry thereafter sought to confirm the arbitration award. FIC, however, sought to have the amount further reduced by requesting an offset to reflect FIC's purported right to recover from Sherry the PIP payments it had made for him. *Id.* Mirroring the argument Allstate makes here (*see* AB at 11), FIC asserted it possessed this right to repayment because Sherry had recovered everything he was "legally entitled" to

⁹ *Averill* does not support the argument either. *See* 155 Wn.App. at 113 (observing that if the facts were different, *Averill* would have been entitled to recoup the full amount of her deductible before she was considered fully compensated).

recover from the tortfeasor, and thus he received “full compensation.” *See id.* at 619-20. The trial court granted FIC the amount of the requested offset (less its share of attorney’s fees). *Id.* at 616.

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

The Supreme Court agreed with the Court of Appeals. The Court referenced the basic rule that, although an insured is not entitled to a double recovery, an insured *is* entitled to be fully compensated for the loss *before* the insurer is entitled to any recovery of its payments¹⁰:

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

¹⁰ Whether that recovery be by offset, reimbursement or subrogation.

770, 82 P.3d 660 (2004); *Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 876, 31 P.3d 1164 (2001) (“*the insured must be fully compensated before the insurer may recoup benefits paid*”); *Mahler v. Szucs*, 135 Wn.2d 398, 407, 957 P.2d 632 (1998).

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

Highlighting that an insurer’s “right” to recover payments is not a given, the Court set out the “two step” approach to determine whether an insurer might be so entitled:

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

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

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

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

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

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

Id. at 623 (emphasis added).

In light of *Sherry*, there should be no serious dispute as to two principles: (i) until such time as they are made whole, insured's stand ahead of insurers when it comes to funds obtained from tortfeasors; and (ii) "full compensation" means that the insured has recovered for the entire loss sustained, without any reduction for the insured's share of fault.

3. Deductibles Are Not Excluded From the Make Whole Doctrine

Allstate argues that the make whole doctrine simply does not apply to insurance deductibles. AB at 12. In point of fact, this assertion is actually *not* supported by *Averill*. *See* 155 Wn.App. at 113. Moreover, it

is contrary to another recent Court of Appeals case, *Bordeaux v. American Safety Insurance Company*, 145 Wn. App. 687, 186 P.3d 1188 (2008), *rev. denied*, 165 Wn.2d 1035 (2009).

Bordeaux applied the make whole doctrine in the context of self-insured retentions (“SIRs”), which are the functional equivalent of a deductible. “The fundamental dispute [in *Bordeaux*] concern[ed] the nature and meaning of the SIR provisions in the American Safety policies held by [its insureds].”¹¹ *Id.* at 684. *Bordeaux* was sued for construction defects in condominiums it had developed. *Bordeaux* tendered its defense to its insurers, one of which was American Safety. The American Safety policy contained an SIR provision, which obligated *Bordeaux* itself to cover the first \$100,000 of the loss. *Id.* at 690-91. After the case against *Bordeaux* was settled, *Bordeaux* settled claims it had against several of the third-party subcontractors. These funds recovered from the subcontractors were at issue in *Bordeaux*. *Id.* at 692.

American Safety contended that it was entitled to reimbursement from those funds even before *Bordeaux* was made whole:

American Safety contends the SIRs operate as primary insurance and therefore its policies provide “excess” insurance. Thus, it argues, its rights to subrogation are

¹¹ *Bordeaux*’s sister company, *Cameray*, was also a plaintiff in the suit on the same issues, but related to a different development project.

superior to [its insureds'] and it is entitled to recover third-party settlement funds before its insureds.

Id. at 684. The Court rejected the assertion, holding that the SIR, as a form of “self-insurance,” was not “insurance” in the traditional sense, and that merely retaining some risk did not turn Bordeaux into an insurer. *Id.* at 689. “The fact that Bordeaux and Cameray each chose to retain the risk of paying up to \$100,000 for homeowners’ construction defect claims does not convert them into ‘primary insurers’ for purposes of subrogation against third-party claims if they face greater losses which are covered by their insurers.” *Id.* at 697.

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

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

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

Id. at 695 (brackets in original; emphasis added; footnotes omitted)
(quoting *Stamp v. Dep't of Labor & Indus.*, 122 Wn.2d 536, 543, 859 P.2d
597 (1993); other citations omitted). Ultimately, the Court concluded that:

[t]he long-standing rule of *Thiringer v. American Motors Insurance Co.* and its progeny favoring full compensation of insureds over subrogation rights of insurers applies here. The trial court properly ruled that Bordeaux and Cameray were entitled to be made whole before any third-party recovery funds are paid to the insurers.

Id. at 696-97 (footnotes omitted). In short, Washington law on the make whole doctrine clearly does not exclude deductibles.

In summary, the “make whole” doctrine has been a bedrock principle of Washington insurance law for thirty-plus years. The doctrine provides that an insured has the right be fully compensated for his loss, or “made whole,” before his insurer is entitled to recoup any money it has paid for that loss. It is a simple, straightforward rule of priority: as between an insured and an insurer, the insured stands first in line. By holding that the make whole doctrine only applies when the insurer is seeking funds directly from the insured, the *Averill* opinion effectively guts the doctrine. Under *Averill*, for example, a PIP insurer can undercut an insured’s make whole rights simply by going to the tortfeasor first. There is no way to square this with *Mahler* and its progeny, and under the circumstances, it is *Averill* that must give way.

Averill is also contrary to the amended insurance regulations duly promulgated after this case was filed, but before the issuance of the *Averill* opinion. The application regulation, WAC § 284-30-393, provides in 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.* [Emphasis added.]

As pointed out by the plaintiff in *Averill*, the Insurance Commissioner took the position that the amended regulation was necessary to comport with existing law. *See* 155 Wn.App. at 116.

An amendment to a regulation can be applied retroactively under any of three bases: the agency intended it to apply retroactively; the effect of the amendment is remedial or curative; or the amendment serves to clarify. *See id.* at 115. While the *Averill* opinion rejects all three bases, it only really discusses one – the “clarify” alternative. *See id.* at 115-117. In that regard, the Court rejected the OIC’s position (stated in an accompanying Explanatory Statement) that the amended regulation merely clarified existing regulations, as the Court found it altered the obligations of insurers as compared to the previous regulation. *See id.* at 115-16.

Somal submits that the regulation should be applied retroactively under the second basis:¹² it is remedial or curative. That such is the case

¹² *Averill* did not argue for a retroactive application of the regulation.

here is established by the OIC's position that it was meant to bring the regulation into accord with the law as it has existed since *Thiringer*. See *id.*

D. Allstate's Miscellaneous Incorrect Statements And Assertions

To bolster its arguments, Allstate makes several incorrect and unsupported statements about Somal's position or the effect of the trial court's ruling. For example, Allstate repeats a claim that Somal seeks more than he could have recovered if he had proceeded against the responsible party. This is a patently untrue statement. If Somal had sued the other driver for his property damage, and even presuming liability would have resulted in the same 60/40 split the two insurance companies simply agreed upon, Somal would have collected 40% of the entire property damage loss – not just 40% of his deductible. Somal would then remit to Allstate any amount that exceeded his loss, which means Somal would clearly be entitled to keep **\$500** to cover his uncompensated loss, with the rest going to Allstate. In fact, Farmers conceded this point in *Averill*, and the Court of Appeals agreed. See 155 Wn.App. at 113.

Allstate also states that Somal's complaint is that Allstate did not "reimburse" him his deductible. AB at 4. Again, this is a misstatement. The money Somal seeks is not Allstate's money – Somal seeks his proper

share of the money provided by and recovered from the *party responsible for the loss*.

Allstate also claims that: “If the insured always gets 100% of the deductible, then there is no sharing or allocation” of risk. AB at 7. This statement is as false in its supposition as its conclusion. To begin with, there is no support for the claim that the deductible at issue here (a modest \$500 collision deductible) has as its *purpose* (as opposed to an effect) of risk allocation. More logically, the purpose of such a modest collision deductible is to give the insured an incentive to drive carefully, and to save the insurer from the administrative hassle of dealing with a claim for every door ding.

In any event, the result reached by the trial court would not, as Allstate claims, mean that an insured “always gets 100% of the deductible.” The fact remains that in each and every instance, the insured will be out the first several hundred dollars represented by the deductible. Indeed, that is the intended effect of the deductible: the insured is *initially* out the first dollars. If there is no one else at fault for the loss, the insured *remains* out of pocket that money. Allstate’s pretense that Somal is trying to eliminate the deductible from his policy is simply a false, red herring

argument that does not survive even cursory examination.¹³ In contrast, the question presented here concerns what happens to money that comes in later from a party responsible for the insured's loss? Who stands first in line for those funds, and does the answer to that question turn on who gets to the tortfeasor first?

E. Allstate Provides No Support For Its Assertion That Factual Issues Should Have Prevented Partial Summary Judgment

Allstate asserts that disputed factual issues should have prevented the entry of partial summary judgment. Allstate provides no specifics, however, instead just citing generally to previous briefing. For that reason alone, the argument should be summarily rejected.

F. Request For Attorneys Fees

In accordance with RAP 18.1, Somal requests his Attorneys' fees and expenses on this appeal. This request is based on the doctrine expressed in *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), and subsequent cases. Under the rule of *Olympic Steamship*, an insured is entitled to an award of fees where the insurer

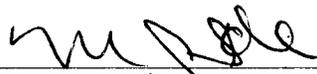
¹³ For the same reason the following statement in *Averill* is equally incorrect: "Allowing Averill to recover her deductible from Farmers' subrogation recovery would have changed the insurance contract to one without a deductible." 155 Wn. App. 114. In fact, the deductible, requiring Averill to initially be out the first several hundred dollars, and remain out of pocket if there was no recovery from someone else, would remain completely intact.

compels the insured to assume the burden of legal action to obtain the full benefit of his insurance contract. *See* 117 Wn.2d at 53. Since the present case involves a dispute over a benefit owed under the insurance contract (the insured's right to be made whole), fees under the rule of *Olympic Steamship* are triggered. *See also Safeco Ins. Co. v. Woodley*, 150 Wn.2d 765, 774-75, 82 P.3d 660 (2004) (fees appropriate where the dispute involves a vindication of the insured's right to the full benefit of the policy provisions).

V. CONCLUSION

Based on the language of the Allstate insurance policy alone, the Court should affirm the orders of the trial court granting Somal partial summary judgment, denying Allstate's motion to dismiss, and remand to the trial court for further proceedings. In addition, the Court should address and reject the holding of *Averill* to the extent it would result in the make whole doctrine being inapplicable to the facts of this case.

April 29, 2011.


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DECLARATION OF SERVICE

I certify that on April 29, 2011, I caused to be filed with the Court of Appeals, Division I, via messenger, the foregoing Daljeet Somal's Brief of Respondent, and caused to be delivered, via messenger, true and accurate copies to:

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

Executed in Seattle, Washington, this 29th day of April, 2011.



Matthew J. Ide

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