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No. 96185-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LAZURI DANIELS, individually and on behalf of all those similarly
situated,

Plaintiff/Petitioner,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant/Respondent.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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On behalf of
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TABLE OF CONTENTS

	Page
I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. INTRODUCTION AND STATEMENT OF THE CASE	1
III. ISSUES PRESENTED	3
IV. SUMMARY OF ARGUMENT	3
V. ARGUMENT	5
A. Overview Of Washington Law Regarding An Insurer’s Right To Be Reimbursed Amounts Paid To Its Insured.	5
B. An Insured Must Be “Made Whole” Before An Insurer May Recover From A Tortfeasor Amounts Paid For Benefits To Its Insured.	7
C. Insurance Policy Collision Coverage That Precludes Insurer Recovery Until After The Insured “Has Been Fully Compensated For The... Loss” Requires That The Insured Recover The Entire Policy Deductible Before Any Insurer Recovery.	9
D. The Make Whole Doctrine Applies To An Insurer’s Recovery From A Tortfeasor Of Amounts The Insurer Paid To Its Insured, Whether That Recovery Is Obtained By An Action Brought By The Insured Against The Tortfeasor Or By A Subrogation Action Brought By The Insurer.	11
E. Equitable Principles Governing Subrogation Require Full Compensation To The Insured, Including Recovery Of The Insured’s Deductible, Before The Insurer Takes A Recovery From The Tortfeasor For Amounts Paid To Its Insured.	14
VI. CONCLUSION	17

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Alaska Pac. S.S. Co. v. Sperry Flour Co.</i> , 94 Wash. 227, 162 P. 26 (1917).....	15
<i>Averill v. Farmers Ins. Co. of Washington</i> , 155 Wn. App. 106, 229 P.3d 830, review denied, 169 Wn.2d 1017 (2010).....	11, 12, 13, 14
<i>Brown v. Snohomish Cty. Physicians Corp.</i> , 120 Wn.2d 747, 845 P.2d 334 (1993).....	9, 15
<i>Columbia Riverkeeper v. Port of Vancouver USA</i> , 188 Wn.2d 80, 392 P.3d 1025 (2017).....	17
<i>Coy v. Raabe</i> , 69 Wn.2d 346, 418 P.2d 728 (1966).....	7
<i>Daniels v. State Farm Mut. Auto. Ins. Co.</i> , 4 Wn. App. 2d 268, 421 P.3d 996, review granted, 192 Wn.2d 1001 (2018).....	passim
<i>Gen. Ins. Co. of Am. v. Stoddard Wendle Ford Motors</i> , 67 Wn.2d 973, 410 P.2d 904 (1966).....	6
<i>Keenan v. Indus. Indem. Ins. Co. of the Nw.</i> , 108 Wn.2d 314, 319, 738 P.2d 270 (1987), overruled on other grounds by <i>Price v. Farmers Ins. Co. of Wash.</i> , 133 Wn.2d 490, 946 P.2d 388 (1997).....	5, 6
<i>Kut Suen Lui v. Essex Ins. Co.</i> , 185 Wn.2d 703, 375 P.3d 596 (2016).....	11
<i>Leader Nat. Ins. Co. v. Torres</i> , 113 Wn.2d 366, 779 P.2d 722 (1989).....	8, 15, 16
<i>Liberty Mut. Ins. Co. v. Tripp</i> , 144 Wn.2d 1, 25 P.3d 997 (2001).....	7
<i>Livingston v. Shelton</i> , 85 Wn.2d 615, 537 P.2d 774 (1975).....	5

<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998).....	passim
<i>Millers Cas. Ins. Co. of Texas v. Briggs</i> , 100 Wn.2d 9, 665 P.2d 887 (1983);.....	7
<i>Mut. of Enumclaw Ins. Co. v. USF Ins. Co.</i> , 164 Wn.2d 411, 191 P.3d 866 (2008);.....	6, 7
<i>Oregon Auto. Ins. Co. v. Salzberg</i> , 85 Wn.2d 372, 535 P.2d 816 (1975).....	15
<i>Potter v. Washington State Patrol</i> , 165 Wn.2d 67, 196 P.3d 691 (2008).....	16
<i>Sherry v. Fin. Indem. Co.</i> , 160 Wn.2d 611, 160 P.3d 31 (2007).....	passim
<i>Thiringer v. Am. Motors Ins. Co.</i> , 91 Wn.2d 215, 588 P.2d 191 (1978).....	passim
<i>Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Const. Inc.</i> , 119 Wn.2d 334, 831 P.2d 724 (1992).....	7
<i>Transamerica Title Ins. Co. v. Johnson</i> , 103 Wn.2d 409, 693 P.2d 697 (1985).....	6, 15
<i>Vision One, LLC v. Philadelphia Indem. Ins. Co.</i> , 174 Wn.2d 501, 276 P.3d 300 (2012).....	11
<i>Winters v. State Farm Mut. Auto. Ins. Co.</i> , 144 Wn.2d 869, 31 P.3d 1164 (2001).....	5, 8, 13
<i>Witherspoon v. St. Paul Fire & Marine Ins. Co.</i> , 86 Wn.2d 641, 548 P.2d 302 (1976).....	10
<i>Xia v. ProBuilders Specialty Ins. Co.</i> , 188 Wn.2d 171, 400 P.3d 1234 (2017).....	10

Statutes

RCW 48.01.030.	15
---------------------	----

Rules

CR 12(b)(6).....	2
------------------	---

Regulations

WAC 284-30-393.....16

Other Authorities

Elaine M. Rinaldi, *Apportionment of Recovery Between Insured and Insurer in A Subrogation Case*,
 29 Tort & Ins. L.J. 803 (1994)..... 9

Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped In the Mystery of Insurance Subrogation*,
 70 Mo. L. Rev. 723 (2005) 6

Keith E. Edeus, Jr., Comment, *Subrogation of Personal Injury Claims: Toward Ending an Inequitable Practice*,
 17 N. Ill. U.L. Rev. 509 (1997)..... 9

Thomas V. Harris, WASHINGTON INSURANCE LAW
 (3rd ed., 2010).....5, 9

Webster's Third New International Dictionary (1993).....11

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in an insured's right to be made whole prior to an insurer's recovery of benefits paid under subrogation or reimbursement rights.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case concerns an automobile insurer's subrogation rights under collision coverage. The facts are drawn from the Court of Appeals' opinion and the briefing of the parties. *See Daniels v. State Farm Mut. Auto. Ins. Co.*, 4 Wn. App. 2d 268, 421 P.3d 996, *review granted*, 192 Wn.2d 1001 (2018); Daniels' Pet. for Rev. at 4-9; State Farm's Ans. to Pet. for Rev. at 6-11; Daniels' Supp. Br. at 5-8.

Lazuri Daniels purchased an automobile insurance policy from State Farm. The policy included collision coverage with a \$500 deductible. The policy included the following language:

12. Our Right to Recover Our Payments

...

c. Underinsured Motor Vehicle Property Damage Coverage and Physical Damage Coverages

If we are obligated under this policy to make payment to or for a party who has a legal right to collect from another, then the right of

recovery of such party passes to us. Such party must help us recover our payments by:

- (1) keeping our right to recover our payment in trust for us and doing nothing to impair that legal right;
- (2) executing any documents we may need to assert that legal right;
- and
- (3) taking legal action through our representatives when we ask.

Our right to recover our payments applies only after the insured has been fully compensated for the bodily injury, property damage, or loss.

Daniels, 4 Wn. App. 2d at 273.

Daniels' car was damaged in a three-car accident. Daniels paid her \$500 deductible and State Farm paid the remaining cost to repair her vehicle. State Farm filed an arbitration demand against the insurance carriers for the other two drivers involved in the accident, and included Daniels' deductible in the claim. One insurer paid 70% of the repair costs representing what it agreed was its insured's percentage of fault. State Farm gave Daniels \$350, representing 70% of her deductible. Daniels claimed that State Farm violated its insurance policy because she should have received 100% of her deductible from this initial recovery.

Daniels sued, pleading claims for breach of contract, bad faith and conversion, and requested class action certification. Meanwhile, State Farm was not satisfied with the 70% reimbursement from the other insurance carrier, and sought arbitration. The arbitrator determined that the other driver was 100% at fault for the accident. State Farm recovered and contends that it gave Daniels the remaining \$150 of her deductible, which Daniels disputes. State Farm filed a CR 12(b)(6) motion to dismiss Daniels' lawsuit, contending that it satisfied the policy's terms because the policy

language “fully compensated” means payment of the insured’s property loss less the deductible. The trial court agreed with State Farm and dismissed the lawsuit.

Daniels appealed. The Court of Appeals, Division 1, affirmed in a 2-1 decision, holding that the only reasonable interpretation of the term “fully compensated” as used in the insurance policy does not include the amount of the deductible paid by the insured. *See Daniels*, 4 Wn. App. 2d at 271, 276. The court held that State Farm fully compensated Daniels for her loss when it paid the cost to repair her car. *See id.*, 4 Wn. App. 2d at 271. The court contrasted State Farm’s subrogation recovery from cases where the insured recovered from the tortfeasor and the insurer sought reimbursement, stating that in the latter cases “the term ‘fully compensated’ takes on a more expansive meaning.” *Id.* at 278 n.4.

Daniels’ petition for review was granted November 28, 2018.

III. ISSUES PRESENTED

- 1) Whether an insurer that takes a subrogation recovery from a tortfeasor without first reimbursing the entire policy deductible to its insured breaches a contractual subrogation clause that precludes the insurer from recovery before the insured is fully compensated.
- 2) Whether an insurer is prohibited under the make whole doctrine from taking a subrogation recovery from a tortfeasor without first reimbursing the entire policy deductible to its insured.

IV. SUMMARY OF ARGUMENT

An insurer may be entitled to recover amounts paid to an insured either through a reimbursement claim against its insured who recovered damages from the party at fault, or through a subrogation claim against the

party at fault. Subrogation may be equitable or contractual, but in either form subrogation is an equitable remedy subject to equitable principles.

At least since 1978 Washington law has been clear that notwithstanding contractual language, an insurer cannot recover amounts paid its insured from its insured's recovery from the tortfeasor until its insured is fully compensated. This "made whole" doctrine is an equitable principle that embodies the strong public policy in Washington favoring full compensation of the innocent victims of automobile accidents. The "made whole" doctrine governs an insurer's right to recover amounts paid its insured, whether the insurer seeks to enforce that right through a reimbursement claim against its insured or a subrogation action against the tortfeasor. An insured is made whole when she is fully compensated, *i.e.*, she has made a complete recovery of the actual losses suffered as a result of an automobile accident.

In *Daniels*, State Farm's policy language incorporates the "made whole" doctrine. Daniels is entitled to a complete recovery of her actual losses before State Farm recovers from the tortfeasor the amounts it paid Daniels, both under the terms of its insurance policy and under the equitable principles governing subrogation. Daniels' actual losses include the amount of her policy deductible, which she is entitled to recover before State Farm recovers its subrogation claim. Balancing the equities between the insured who has not been fully compensated for her loss against the insurer who has not been fully compensated for its loss, but has been paid premiums by its

insured to accept the risk of losses, should result in the insured receiving the first dollar recovery from the tortfeasor.

V. ARGUMENT

A. Overview of Washington Law Regarding An Insurer's Right To Be Reimbursed Amounts Paid To Its Insured.

An insurer may be entitled to recover amounts paid to its insured for policy benefits either: 1) through a reimbursement claim against its insured who recovered damages from a tortfeasor; or 2) through a subrogation claim against a tortfeasor who caused the loss. *See* Thomas V. Harris, WASHINGTON INSURANCE LAW, § 52.01, at 52-1 (3rd ed., 2010). These rights are distinct. *See id.* "Reimbursement" allows an insurer to seek to recover the amount of benefits paid from proceeds its insured collects directly from the party at fault. *See Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 876, 31 P.3d 1164 (2001). An insurer may enforce a contractual right to reimbursement to recover from its insured the amount of payments made from any recovery the insured obtains from the tortfeasor. *See Mahler v. Szucs*, 135 Wn.2d 398, 415, 957 P.2d 632 (1998).

Subrogation exists as a three-party transaction, "permitting one who has paid benefits to one party to collect from another." *Winters*, 144 Wn.2d at 875; *see also Livingston v. Shelton*, 85 Wn.2d 615, 618, 537 P.2d 774 (1975). The purpose of subrogation is to impose liability on the party responsible in law for the loss. *See Mahler*, 135 Wn.2d at 411-12.¹ There

¹ This Court rejects the rationale that subrogation in the insurance context is to prevent unjust enrichment of the insured. *See Mahler*, 135 Wn.2d at 412 n.4. Nonetheless, "double recovery" by the insured still has significance in subrogation cases, in that it may signal that the insured has received full compensation for his or her loss. *See Keenan v. Indus. Indem. Ins. Co. of the Nw.*, 108 Wn.2d 314, 319, 738 P.2d 270 (1987), *overruled on other*

are two types of subrogation: equitable (also referred to as legal subrogation) which arises as a matter of law, and contractual (also referred to as conventional subrogation) which arises by contract. *See Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 423, 191 P.3d 866 (2008); *Mahler*, 135 Wn.2d at 412.

Whether arising as a matter of law or as a matter of contract, subrogation is an equitable remedy subject to equitable principles. *See Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 417, 693 P.2d 697 (1985). Subrogation arises independently of a contract provision, “and will be enforced or not according to the dictates of equity and good conscience.” *Gen. Ins. Co. of Am. v. Stoddard Wendle Ford Motors*, 67 Wn.2d 973, 976, 410 P.2d 904 (1966). The Washington Supreme Court disagrees with those courts in other jurisdictions that hold equitable principles cannot be applied to change the terms of contractual subrogation. “We... follow those courts which hold that ‘the better rule is that regardless of the source of the right of subrogation, the right will only be enforced in favor of a meritorious claim and after a balancing of the equities.’” *Transamerica Title Ins. Co.*, 103 Wn.2d at 417 (citation omitted).² Subrogation is not an absolute right,

grounds by Price v. Farmers Ins. Co. of Wash., 133 Wn.2d 490, 946 P.2d 388 (1997); *Thiringer v. Am. Motors Ins. Co.*, 91 Wn.2d 215, 220, 588 P.2d 191 (1978).

² *See also* Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped In the Mystery of Insurance Subrogation*, 70 Mo. L. Rev. 723, 727-28 (2005): "The distinction between legal, conventional and statutory subrogation does not call for a *per se* rule that equitable principles have no application in conventional and statutory subrogation cases. One explanation for this view is that the right of insurance companies to freely contract and limit their liability or impose conditions they deem appropriate upon their obligation to provide coverage in a contract of insurance may not be exercised in a manner inconsistent with public policy – either statutorily or judicially defined. Another explanation can be found in the rule that the right of subrogation is not absolute. Consequently, courts in the context of subrogation have reserved the right to regulate conventional and statutory subrogation in order to maintain fairness between the parties or to serve other important policy goals."

but one which depends upon the equities and facts of each case, and will be protected only when justice so requires. *See Millers Cas. Ins. Co. of Texas v. Briggs*, 100 Wn.2d 9, 13-14, 665 P.2d 887 (1983); *Coy v. Raabe*, 69 Wn.2d 346, 351, 418 P.2d 728 (1966).

Subrogation allows an insurer to recover what it paid to its insured by suing the wrongdoer. *See Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Const. Inc.*, 119 Wn.2d 334, 341, 831 P.2d 724 (1992). An insurer entitled to subrogation “steps into the shoes” of its insured and pursues an action in the insured’s name against the responsible party, and is entitled to the same rights and subject to the same defenses as the insured. *See Mut. of Enumclaw Ins. Co.*, 164 Wn.2d at 424; *Mahler*, 135 Wn.2d at 413; *Touchet Valley Grain Growers*, 119 Wn.2d at 341.

B. An Insured Must Be “Made Whole” Before An Insurer May Recover From A Tortfeasor Amounts Paid For Benefits To Its Insured.

At least since 1978, Washington law has been clear that notwithstanding contractual language, an insurer cannot recover amounts paid for benefits which its insured recovered from the tortfeasor “unless and until” its insured is fully compensated. *Liberty Mut. Ins. Co. v. Tripp*, 144 Wn.2d 1, 21, 25 P.3d 997 (2001). The insurer “can recover only the excess which the insured has received from the wrongdoer, remaining after the insured is fully compensated for his loss.” *Thiringer v. Am. Motors Ins. Co.*, 91 Wn.2d 215, 219, 588 P.2d 191 (1978).

Thiringer concerned a PIP insurer's recovery rights in the context of reimbursement from its insured's policy limits settlement with the tortfeasor's liability insurer. The Court discussed the PIP policy:

[The policy language] provides that, if payment under the PIP coverage is made to the insured, the insurer shall be reimbursed to the extent that the insured recovers such damages from a person legally responsible for the injury. It does not provide that if the insured recovers less than his total damages from such party, the amount recovered shall be allocated first to those losses covered by the PIP endorsement and then to other damages suffered by the insured. Such a provision, were it included, would be obviously unfair, since the insured pays a premium for the PIP coverage and has a right to expect that the payments promised under this coverage will be available to him if the amount he is able to recover from other sources, after diligent effort, is less than his general damages.

91 Wn.2d at 220 (brackets added).

Whether by reimbursement or subrogation, and whether subrogation is equitable or contractual, the enforcement of the insurer's interest "is governed by the general policy of full compensation of the insured." *Mahler*, 135 Wn.2d at 417-18. "[S]ubrogation is an equitable doctrine and resolution of each case should be based upon 'the equitable factors involved, guided by the principle that a party suffering compensable injury is entitled to be made whole.'" *Leader Nat. Ins. Co. v. Torres*, 113 Wn.2d 366, 369, 779 P.2d 772 (1989) (citation omitted; brackets added). Whatever the basis for an insurer's recovery, *i.e.*, whether by offset, subrogation or reimbursement, "the insured must be fully compensated before the insurer may recoup benefits paid." *Winters*, 144 Wn.2d at 876; *see also Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 618, 160 P.3d 31 (2007). An insured is fully compensated when she has "made a complete recovery of the *actual*

losses suffered as a result of an automobile accident.” *Sherry*, 160 Wn.2d at 614 (emphasis added).

This “full compensation for the insured” rule “is in accord with the great majority of jurisdictions.” *Mahler*, 135 Wn.2d at 417.³ The principle that a party suffering compensable injury is entitled to be made whole prior to recovery by the insurer “embodies a policy deemed socially desirable in this state, in that it fosters the adequate indemnification of innocent automobile accident victims.” *Thiringer*, 91 Wn.2d at 220; *see also Mahler*, 135 Wn.2d at 417. This Court has described full compensation of innocent automobile accident victims as a “strong public policy” in Washington. *Brown v. Snohomish Cty. Physicians Corp.*, 120 Wn.2d 747, 758, 845 P.2d 334 (1993).

C. Insurance Policy Collision Coverage That Precludes Insurer Recovery Until After The Insured “Has Been Fully Compensated For The ... Loss” Requires That The Insured Recover The Entire Policy Deductible Before Any Insurer Recovery.

In *Daniels*, State Farm’s collision coverage⁴ includes a subrogation provision with language that incorporates *Thiringer*’s made whole doctrine: “Our right to recover our payments applies only after the insured has been

³ *See also* Keith E. Edeus, Jr., Comment, *Subrogation of Personal Injury Claims: Toward Ending an Inequitable Practice*, 17 N. Ill. U.L. Rev. 509, 517 (1997) (“A majority of jurisdictions have adopted the ‘insured whole’ doctrine. The rationale behind this doctrine is that where either the insured or the insurer must bear a loss due to the fault of some third party, the insurer should bear the loss since it has been paid to assume such a risk”); Elaine M. Rinaldi, *Apportionment of Recovery Between Insured and Insurer in A Subrogation Case*, 29 Tort & Ins. L.J. 803, 807 (1994) (“Most courts have held that the insured must be fully compensated for any uninsured loss before the insurer may share in the proceeds of the recovery from the tortfeasor”).

⁴ Collision coverage is no-fault coverage which allows an insured to recover for collision damage to her vehicle. *See* Thomas V. Harris, WASHINGTON INSURANCE LAW, § 43.02, at 43-6 (3rd ed., 2010).

fully compensated for the bodily injury, property damage, or loss.” 4 Wn. App. 2d at 274. The Court of Appeals concluded that “the only reasonable interpretation” of “fully compensated” within the meaning of the policy does not include the amount of the \$500 deductible paid by Daniels. *See id.* at 276. That interpretation ignores Washington’s well-known rules for interpreting insurance policies.

This Court construes insurance policies as contracts, “giving them a ‘fair, reasonable and sensible construction as would be given to the contract by the average person purchasing insurance.’” *Xia v. ProBuilders Specialty Ins. Co.*, 188 Wn.2d 171, 181, 400 P.3d 1234 (2017) (citation omitted). The language in an insurance policy is interpreted “in accordance with the way it would be understood by the ordinary man buying insurance, ‘even though a different meaning may have been intended by the insurer.’” *Witherspoon v. St. Paul Fire & Marine Ins. Co.*, 86 Wn.2d 641, 650, 548 P.2d 302 (1976) (citation omitted). When a term in an insurance policy is undefined, it is given its plain, ordinary and popular meaning. *See Xia*, 188 Wn.2d at 181-82.

Here, Daniels automobile was damaged in an accident, and the costs of repair were paid by her insurer, subject to Daniels’ payment of the \$500 deductible. Daniels’ insurance policy provided that her insurer could recover the payments it made for her repairs “only after the insured has been fully compensated for the... loss.” The average person reading that policy and giving the terms “fully compensated for the loss” their plain and ordinary meaning, would interpret being fully compensated as recovering

the entire costs of repair to the damaged automobile, including the \$500 deductible.⁵

Even if State Farm's strained construction of "fully compensated" could reasonably be interpreted to mean the costs of repair to the damaged automobile less the \$500 deductible, such interpretation would, at best, create an ambiguity in the policy. Ambiguities in insurance policy language are construed against the drafter-insurer and in favor of the insured. *See Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300 (2012). Even if the policy terms "fully compensated" could be considered ambiguous, construing such ambiguity in favor of Daniels results in interpreting State Farm's subrogation provision to apply only after Daniels is reimbursed her \$500 deductible.

D. The Make Whole Doctrine Applies To An Insurer's Recovery From A Tortfeasor Of Amounts The Insurer Paid To Its Insured, Whether That Recovery Is Obtained By An Action Brought By The Insured Against The Tortfeasor Or By A Subrogation Action Brought By The Insurer.

Whether an insurer breaches a subrogation clause by taking a subrogation recovery under insurance policy collision coverage without first reimbursing its insured for the deductible was previously considered by Division 1 in *Averill v. Farmers Ins. Co. of Washington*, 155 Wn. App. 106, 229 P.3d 830, *review denied*, 169 Wn.2d 1017 (2010). While the court in both *Averill* and *Daniels* held the insured was not entitled to first dollar reimbursement of a deductible from collision coverage, the opinions differ

⁵ The Court may determine the ordinary meaning of undefined policy terms by reference to dictionary definitions. *See Kut Suen Lui v. Essex Ins. Co.*, 185 Wn.2d 703, 713, 375 P.3d 596 (2016). The dictionary definition of "fully" is "completely, entirely." Webster's Third New International Dictionary 919 (1993).

in their justifications for denying first dollar repayment of the deductible. In *Averill*, the court held that *Thiringer* does not apply to cases where the insurer recovers directly from the tortfeasor in subrogation. The court pointed out that *Thiringer*, *Sherry*, and *Mahler* all concerned cases where the insured recovered the payment from the third party and the insurer was seeking reimbursement from its insured, and none of the cases discussed recovery of deductibles. *See Averill*, 155 Wn. App. at 113. The court held that *Thiringer* “applies to cases where the insured recovers the payment and the insurer is seeking reimbursement, not vice versa.” *Id.* at 112. In addition, the court held that its result was consistent with the purpose of the deductible, stating that the deductible indicates the amount of risk retained by the insured, and *Averill* contracted to be out of pocket for the first \$500. “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.” *Id.* at 114.

In *Daniels*, the majority did not revisit its earlier holding in *Averill*, stating the case is inapposite because the contract language at issue in the cases was different. *See Daniels*, 4 Wn. App. 2d at 278 n.4. Instead, the majority in *Daniels* held that the only reasonable interpretation of the term “fully compensated” in State Farm’s policy does not include the amount of the deductible paid by the insured. *See id.* at 276. However, the court in *Daniels* echoed the reasoning from the *Averill* court’s decision, contrasting cases where the insurer sought reimbursement by its insured who recovered

from the tortfeasor from a subrogation claim brought by the insurer: “Those cases involved situations where the insured recovered directly from the tortfeasor. In those circumstances the term ‘fully compensated’ takes on a more expansive meaning.” *Id.* at 278 n.4.

There is no reasonable, or legal, basis for application of the made whole doctrine depending upon “whether the insured or the insurer made the recovery.” *See Daniels*, 4 Wn. App. 2d at 281-82 (Becker, J., dissenting). In *Mahler*, this Court held:

The enforcement of the [insurer’s reimbursement] interest, whether by a type of lien against the subrogor/insured’s recovery from a tortfeasor or by an action by the subrogee/insurer in the name of the insured against the tortfeasor, is governed by the general public policy of full compensation of the insured.

135 Wn.2d at 417-18 (brackets added).

The distinction drawn in *Averill* for application of the made whole doctrine based upon whether the insured or insurer brings the claim against the tortfeasor is inconsistent with the above-quoted statement from *Mahler*. *See also Winters*, 144 Wn.2d at 876. Consistent with *Thiringer*, *Mahler* and *Winters*, the made whole doctrine should be applied to State Farm’s subrogation claim. The general rule enunciated in *Thiringer* that an insurer is entitled to reimbursement but “it can recover only the excess which the insured has recovered from the wrongdoer, remaining after the insured is fully compensated for his loss,” “embodies a policy deemed socially desirable in this state, in that it fosters the adequate indemnification of innocent automobile accident victims.” *Thiringer*, 91 Wn.2d at 219-20. That policy is fostered through the full compensation of the insured,

whether the reimbursement from the tortfeasor occurs through an action initiated by the insured or by a subrogation action initiated by the insurer. Daniels should be fully compensated, including reimbursement of her deductible, before State Farm's recovery of the amounts paid to repair Daniels' vehicle.

E. Equitable Principles Governing Subrogation Require Full Compensation To The Insured, Including Recovery Of The Insured's Deductible, Before The Insurer Takes A Recovery From The Tortfeasor For Amounts Paid To Its Insured.

The differing justifications in *Daniels* and *Averill* for denying first dollar reimbursement to the insured of a collision policy deductible in an insurer's subrogation recovery ignore the equitable principles that govern contractual subrogation. The policy language in *Daniels* allowing State Farm to recover its payments "only after the insured has been fully compensated" is derived from the *Thiringer* made whole doctrine. This doctrine is based upon both the equitable principle that a party suffering compensable injury is entitled to be made whole, as well as Washington's "strong public policy" to fully compensate the victims of automobile accidents.

The insurer/insured relationship is imbued with public policy considerations:

[I]nsurance policies... are simply unlike traditional contracts, *i.e.*, they are not purely private affairs but abound with public policy considerations, one of which is that the risk-spreading theory of such policies should operate to afford to affected members of the public – frequently innocent third persons – the maximum protection possible consonant with fairness to the insurer.

Oregon Auto. Ins. Co. v. Salzberg, 85 Wn.2d 372, 376-77, 535 P.2d 816 (1975) (brackets added). “Both insurer and insured, having entered into an insurance contract, are bound by the common law duty of good faith and fair dealing, as well as the statutory duty ‘to practice honesty and equity in all insurance matters.’ RCW 48.01.030.” *Mahler*, 135 Wn.2d at 414. This Court has said that RCW 48.01.030 “creates a fiduciary duty for insurers running to their insureds.” *Id.*

Subrogation, whether equitable or contractual, “will only be enforced... after a balancing of the equities.” *Transamerica Title Ins. Co.*, 103 Wn.2d at 417. Here, balancing the equities requires first dollar reimbursement of Daniels’ deductible. Subrogation is guided by the equitable principle that “a party suffering compensable injury is entitled to be made whole.” *Leader Nat. Ins. Co.*, 113 Wn.2d at 369. Subrogation is guided by the “strong public policy” favoring full compensation of innocent automobile accident victims. *See Brown*, 120 Wn.2d at 758; *see also Thiringer*, 91 Wn.2d at 220. An insured is fully compensated only when she “has made a complete recovery of the actual losses suffered as a result of an automobile accident.” *Sherry*, 160 Wn.2d at 614.⁶

An insurer does not meet its fiduciary responsibility to give equal consideration to its insured’s interests by offering a pro rata division of a subrogation recovery, rather than providing first dollar compensation for its

⁶ In an earlier decision, the Court noted, “[t]here is a fatal fallacy in the reasoning which concludes that the insured is made whole upon payment of the loss to him by the insurer, in that the premiums are not refunded to the insured so paid by him to the insurer for the policy of insurance and these premiums, if paid over some length of time, would aggregate a considerable sum of money.” *Alaska Pac. S.S. Co. v. Sperry Flour Co.*, 94 Wash. 227, 230, 162 P. 26 (1917) (brackets added).

insured's uncompensated loss. In the three-party transaction involving subrogation, the equitable principle that persons suffering compensable injury are entitled to be made whole requires the risk of loss be borne by the tortfeasor or the insurer that accepted the risk in exchange for premiums paid, rather than the insured who suffers the loss. *See Leader Nat. Ins. Co.*, 113 Wn.2d at 372.

In *Thiringer*, the Court stated that an insurance policy provision providing that if the insured recovered less than her total damages from a tortfeasor, the recovery would be first allocated to the losses covered by insurance and only then to the other damages suffered by the insured "would obviously be unfair." 91 Wn.2d at 220. Because the insured pays a premium for insurance coverage, the insured "has a right to expect that the payments promised under this coverage will be available to him if the amount he is able to recover... is less than his general damages." *Id.*

A subrogated insurer has only a derivative action, and "steps into the shoes" of its insured while seeking recovery of the damages caused by a tortfeasor. Balancing the equities between the insured who has not been fully compensated for her loss, and the insurer who has not been fully compensated for its loss, but received premium payments from its insured to accept the risk of its losses, should result in the insured receiving the first dollar recovery from the tortfeasor.⁷ A plaintiff "in the shoes" of the insured

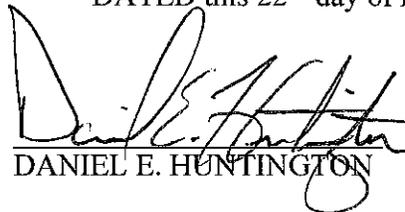
⁷ This result should not be affected by WAC 284-30-393, which provides in pertinent part: "The insurer must include the insured's deductible, if any, in its subrogation demands. Any recoveries must be allocated first to the insured for any deductible(s) incurred in the loss, less applicable comparable fault." The regulation "does not apply in this case, because there is no evidence that Daniels was at fault." *See Daniels*, 4 Wn. App. 2d at 300 (Becker, J., dissenting). Further, the regulation is inconsistent with this Court's holding in *Sherry* that

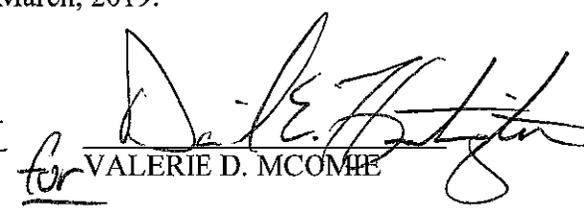
would apply any recovery from the tortfeasor first to the insured's uncompensated payment of her deductible, and only then to the insurance company's loss for payments for its insured's damages, which loss is a risk for which the insurance company has been paid premiums by its insured.

VI. CONCLUSION

The Court should adopt the arguments advanced in this brief in the course of resolving the issues on review.

DATED this 22nd day of March, 2019.


DANIEL E. HUNTINGTON

for 
VALERIE D. MCOMIE

On behalf of WSAJ Foundation

full recovery under the made whole doctrine is not reduced by an insured's comparative fault. *See Sherry*, 160 Wn.2d at 625. Administrative regulations are interpreted using rules of statutory construction. *See Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 90, 392 P.3d 1025 (2017). No intent to change the common law will be found unless it appears with clarity in a statute. *See Potter v. Washington State Patrol*, 165 Wn.2d 67, 76-77, 196 P.3d 691 (2008). Here, the Conclusion from the Office of the Insurance Commissioner addressing the amendment to WAC 284-30-393 which added the language "less applicable comparable fault," states the "qualitative analysis" of this amendment results in "a better alignment of the subrogation rules with court decisions." See Office of Ins. Comm'r, Final Cost Benefit Analysis: Chapter 284-30 WAC, Regarding How an Insurer Handles an Insured's Deductible in a Subrogation Demand (June 2011) (Clerk's Papers at 36). This amendment does not provide a clear intention to abrogate this Court's holding in *Sherry* and should not be construed to abrogate the well-established "made whole" doctrine.

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury, under the laws of the State of Washington, that on the 22nd day of March, 2019, I served the foregoing document by email to the following persons:

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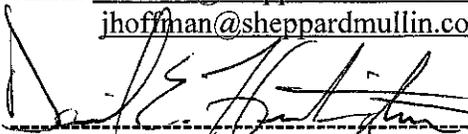
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