No. 96185-9

No. 75727-0-I

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

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

Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

OPENING BRIEF OF APPELLANT LAZURI DANIELS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 6

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 7

IV. STATEMENT OF THE CASE 8

V. ARGUMENT 10

A. STANDARD OF REVIEW & GOVERNING CONTRACT INTERPRETATION PRINCIPLES 10

1. Standard of Review for the Order of Dismissal.. 10

2. Insurance Policies Are Governed by Principles of Contract Interpretation and Construed in Favor of the Insured 12

B. THE COMPLAINT STATES A CLAIM BASED ON THE PLAIN LANGUAGE OF THE INSURANCE CONTRACT 14

1. The Policy Language Clearly Makes Daniels' Full Compensation a Condition Precedent to State Farm's Recovery Rights 14

2. *Averill* Does Not Provide a Basis for the Trial Court's Order of Dismissal 16

a. The Language of State Farm's Provision is Significantly Different from the Farmers Policy Language in *Averill*..... 16

b. The Reasoning of Averill is Facially Erroneous, and is Inconsistent with Washington's Made Whole Doctrine 18

3. Daniels Was Not Fully Compensated for her Property Damage Loss 22

C. STATE FARM'S CONDUCT VIOLATED WAC § 284-30-393, WHICH PROVIDES A SUFFICIENT BASIS TO STATE A CLAIM 26

D. THE TRIAL COURT SHOULD HAVE GRANTED LEAVE TO AMEND TO ADDRESS ANY DEFICIENCIES IN THE COMPLAINT 27

E. DANIELS IS ENTITLED TO FEES AND COSTS ON APPEAL 29

VI. CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Abbott v. General Accident Group,
39 Wn. App. 263, 693 P.2d 130 (1984) 12

American Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.,
134 Wn.2d 413, 951 P.2d 250 (1998) 12, 13

Averill v. Farmers Ins. Co. of Wash.,
155 Wn. App. 106, 229 P.3d 830 (2010) 5-6, 16-21

Boeing Co. v. Aetna Cas. & Sur. Co.,
113 Wn.2d 869, 784 P.2d 507 (1990) 12

Bravo v. Dolsen Cos.,
125 Wn.2d 745, 888 P.2d 147 (1995) 11

Butzberger v. Foster,
151 Wn.2d 396, 89 P.3d 689 (2004) 12

Caruso v. Local Union No. 690,
100 Wn.2d 343, 670 P.2d 240 (1983) 28

Halvorson v. Dahl,
89 Wn.2d 673, 574 P.2d 1190 (1978) 11

Hamm v. State Farm Mut. Auto. Ins. Co.,
151 Wn.2d 303, 88 P.3d 395 (2004) 14, 20

Hoffer v. State,
110 Wn.2d 415, 755 P.2d 781 (1988) 11

Kinney v. Cook,
159 Wn.2d 837, 154 P.3d 206 (2007) 11

Labberton v. General Cas. Co. of America,
53 Wn.2d 180, 332 P.2d 250 (1958) 14

Lui v. Essex Ins. Co.,
185 Wn.2d 703, 375 P.3d 596 (2016) 12

Mahler v. Szucs,
135 Wn.2d 398, 957 P.2d 632 (1998) 18, 20, 21

Matsyuk v. State Farm Fire & Casualty Co.,
173 Wn.2d 643, 272 P.3d 802 (2012) 20

Meas v. State Farm Fire & Casualty Company,
130 Wn. App. 527, 13 P.2d 519 (2005),
rev. denied, 167 Wn.2d 1018 (2006) 22-23, 25

Montana Auto-Finance Corp. v. British & Fed. Fire Underwriters,
72 Mont. 69, 232 Pac. 198 (1924) 14

Olympic Steamship Co. v. Centennial Insurance Co.,
117 Wn. 2d 37,811 P. 2d 673 (1991) 29

Orwick v. Seattle,
103 Wn.2d 249, 692 P.2d 793 (1984) 11

Quadrant Corp. v. Am. States Ins. Co.,
154 Wn.2d 165, 110 P.3d 733 (2005) 12

San Juan Cty. v. No New Gas Tax,
160 Wn.2d 141, 157 P.3d 831 (2007) 10-11

Sherry v Financial Indemnity,
160 Wn.2d 611, 160 P.3d 31 (2007) 24-25

State Farm Fire & Cas. Co. v. English Cove Ass'n,
121 Wn. App. 358, 88 P.3d 986 (2004) 13

State Farm General Ins. Co. v. Emerson,
102 Wn.2d 477, 687 P. 2d 1139 (1984) 12

Thiringer v. American Motors Ins. Co.,
91 Wn.2d 215, 588 P.2d 191 (1978) 24, 25

Tenore v. AT&T Wireless Servs.,
136 Wn.2d 322, 962 P.2d 104 10-11

Tucker v. Bankers Life & Cas. Co.,
67 Wn.2d 60, 406 P.2d 628 (1965) 12

Weyerhaeuser Co. v. Commercial Union Ins. Co.,
142 Wn.2d 654, 15 P.3d 115 (2000) 12

Wilson v. Horsley,
137 Wn.2d 500, 974 P.2d 316 (1999) 28

Winters v. State Farm Mut. Auto. Ins. Co.,
144 Wn.2d 869, 31 P.3d 1164 (2001) 20

Regulations

WAC § 284-30-393 ..... 4, 7, 26-27

Rules

CR 8 11

CR 12(b)(6) 10-11

RAP 18.1 29

Miscellaneous

"Subrogation and your rights,"
Office of the Insurance Commissioner website
(last visited Dec. 27, 2016) 27

I. INTRODUCTION

Defendant/Respondent State Farm Mutual Automobile Insurance Company drafted and issued an insurance policy to Plaintiff/Appellant Lazuri Daniels. Through the language of the contract of insurance it created, State Farm made promises and undertook obligations to its insured, Appellant Daniels. Like any insurance contract issued in Washington, State Farm's promises and obligations could not fall below certain minimums imposed by insurance law and regulation. But like any other insurer, State Farm was free to draft provisions that provided its insured with protections and benefits greater than any required minimums.

This case is about the latter: State Farm issued an insurance policy whose plain language provided benefits arguably not otherwise required under the minimums imposed by regulation or recent interpretation of common law. Specifically, the policy provided that State Farm would not recover payments it had made under its collision coverage[1] unless and until its insured had first been fully compensated for the applicable loss: "***Our*** right to recover ***our*** payments applies only after the ***insured*** has been fully compensated for the ***bodily injury***, ***property damage*** or ***loss***." CP 3 (Comp. at 3, ¶ 13) (bold & italics in original, underscoring added).

[1] The recovery provision is not limited to collision coverage, but a loss partially compensated under collision coverage is what is at issue here.

There is no dispute regarding what the insurance contract says. There is no dispute that the cited contract language is applicable to this controversy. The only dispute is over what that language means. In short, a case of contract interpretation.

The controlling principles for contract interpretation start with:

- If the language is plain, enforce it as written; and
- Do not create ambiguity where none exists.

Given the plain, unmistakable language of State Farm's policy, the trial court's analysis of State Farm's motion to dismiss should have started and ended here.

In this case, Daniels suffered a property damage loss and received partial compensation for that loss under her State Farm collision coverage. But because she had a deductible, Daniels was forced to shoulder $500 of the loss herself.

Later on, State Farm received reimbursement from a third party for about 70% of the total amount of Daniels' loss. At the time, Daniels was still short of full compensation by the $500 she had paid out of pocket. Reading the plain language of the policy as written, Daniels was entitled to get the rest of her loss taken care of before State Farm could keep any third party money for itself (State Farm could recover "only after the ***insured*** has been fully compensated for the ... ***loss***.").

But State Farm did not comply with the policy's plain language. Instead, State Farm turned over only $350 and kept the rest. There is no dispute that this left Daniels still $150 out of pocket for the loss.

Nevertheless, the trial court granted State Farm's motion to dismiss, finding no such obligation on the part of State Farm. The court did not, however, start with the language of the insurance contract. Instead, following State Farm's invitation, the trial court started with a recent interpretation of the common law made whole doctrine and the minimums imposed by insurance regulation. Neither was necessary for the court to apply the contract language as written. Worse, starting with this unnecessary analysis led the trial court down a misguided path that infected the court's analysis of the contract language, resulting in error.

When the trial court did turn to looking at the actual contract language ("Finally, the policy itself..." CP at 69) it violated the first rule of interpretation that requires enforcing plain language as written. Instead, the court parsed the provision, focusing not on the meaning of words used, but on words that weren't there. See CP 69. In this way, the trial court created ambiguity where none existed. Compounding the error, once this ambiguity was created, the trial court ignored most all other rules for insurance contract interpretation, including:

- Read it as an ordinary purchaser of insurance would read it;

- Construe the language against the insurer as drafter; and

- A reasonable interpretation by the insured prevails over even an equally reasonable interpretation by the insurer.

As discussed below, even after needlessly creating ambiguity, adhering to these additional principles should have led to a denial of State Farm's motion to dismiss in favor of Daniels' manifestly reasonable interpretation of the contract language.

Though the contract's plain language meant that the trial court need not have reached a discussion of insurance regulation, the fact is that State Farm did not comply with the regulation, and the trial court erred here as well. Specifically, WAC § 284-30-393 allows an insurer (subject to policy language to the contrary) to split recovered funds with its insureds by taking into account "*applicable* comparative fault" (emphasis added). The obvious meaning would seem to be less the comparative fault of the insured. Here, there was no evidence that Daniels had any fault in the accident,[2] which would mean that even under the regulation Daniels should have been fully compensated for her remaining $500 loss.

The trial court, however, already on the wrong path from its misguided common law analysis, held in essence that the cost of the 30%

[2] The remaining 30% (from the 70% paid by one third party) is explained by the fact it was a three car accident. There was no basis to attribute the other 30% fault to Daniels, who was rear-ended.

fault attributed to some unrelated third party could in fact be imposed on Daniels. Not only is this a wholly unsupported reading of the regulation in general – and the word "applicable" in particular – but it contradicts the OIC's own interpretation, as published on its website.

In its briefing below, State Farm relied heavily on the application of the made whole doctrine under common law, as interpreted by *Averill v. Farmers Insurance Company of Washington*.[3] There are three notable aspects of *Averill* as it relates (or doesn't) to this case. The first is that *Averill* involved a generally similar situation to the case here. By that we mean *Averill* also concerned an insured who believed she was entitled to be fully compensated for a property damage loss. But because facts matter, this superficial observation alone has little real import here.

The second notable aspect is that though the primary thrust of *Averill* centered on application of the made whole doctrine under common law, it did include a discussion of whether Averill was entitled to relief under the language of her policy. Though the *Averill* Court held it did not, two important takeaways from the discussion are that: (i) the broad insurance policy language here is patently different from the limited policy language in Averill; and (ii) the *Averill* opinion acknowledges that an

[3] 155 Wn. App. 106, 229 P.3d 830 (2010).

insurance policy can be written (as State Farm has done here) to provide the relief Daniels seeks (*i.e.*, doesn't violate any public policy or rule concerning deductibles, etc.).

The third notable aspect is that *Averill* is wrongly decided, contrary to pre-existing and subsequent made whole law. *Averill* was issued by this Division and Daniels means no disrespect to this Court. But as discussed below, a fresh reading of *Averill* ineluctably reveals that the Court's holding rests on facially flawed reasoning resulting from confusion between and intermixing of two entirely different doctrines: the insurance-specific made whole doctrine, and the entirely different common fund doctrine.

The case at bar turns on the plain language of the State Farm contract. But to the extent this Court disagrees or otherwise believes that the common law informs on the analysis, it should revisit *Averill* to correct it and hold that under Washington's made whole doctrine the same result should obtain even in the absence of State Farm's policy language.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by concluding that the Complaint failed to state a claim upon which relief could be granted, and by dismissing the case without leave to amend. (August 1, 2016 Order Granting [Defendant's] CR 12(b)(6) Motion to Dismiss).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in dismissing for failure to state a claim, given the plain language of State Farm's insurance contract provides for the relief Daniels' seeks?

2. Did the trial court err by creating ambiguity where none exists, and then by failing to apply the proper principles of contract interpretation in resolving that ambiguity?

3. Did the trial court err when it misinterpreted WAC § 284-30-393 to read it as requiring Daniels to shoulder the burden of fault not attributable to her?

4. Did the trial court err in equating the receipt of the limited payment under collision coverage with Daniels being "fully compensated" for her loss?

5. If the State Farm policy language does not provide a basis for the relief sought by Daniels, should the Court revisit *Averill* to correct it and hold that under Washington's made whole doctrine Daniels' Complaint states a claim for relief?

6. Did the trial court err by declining to permit Daniels an opportunity to amend the Complaint to cure any deficiencies?

IV. STATEMENT OF THE CASE

Daniels' car was damaged in a three car accident. CP 2 (Comp. at 2, ¶¶ 6, 9).[4] Nothing in the record indicates any fault on the part of Daniels. She had an insurance policy with State Farm and made a claim under her collision coverage. CP 2 (Comp. at 2, ¶¶ 8, 10). Pursuant to the collision coverage, State Farm paid only a portion of the loss; specifically, the amount of Daniels' loss, less a deductible. CP 2 (Comp. at 2, ¶ 8).

The deductible applicable to Daniels' property damage loss was $500. CP 2 (Comp. at 2, ¶ 8). As a result, State Farm's payment only compensated Daniels for some – but not all – of her property damage loss. CP 2 (Comp. at 2, ¶ 10). Specifically, even after State Farm's payment, Daniels still had uncompensated loss in the amount represented by her $500 deductible (for which she remained out of pocket). CP 2 (Comp. at 2, ¶ 10).[5]

Subsequently, State Farm sought to secure payment for Daniels' loss from one or more of the allegedly responsible parties. CP 2 (Comp. at 2, ¶ 11). Apparently, the insurer of the car that struck Daniels from behind

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[4] The statement of facts is taken from the Complaint (CP 1-7). These facts are presumed true for purposes of this review. (The majority of operative facts are undisputed in any event.)

[5] Though not alleged in the Complaint, it is eminently reasonable to infer the collision coverage claim file was closed at that time, and that the collision coverage provision is essentially irrelevant from that point forward.

(Geico) agreed to accept 70% fault for the accident. CP 2 (Comp. at 2, ¶¶ 7, 11). Consistent with agreeing to accept 70% fault for its insured, Geico sent State Farm funds representing about 70% of Daniels' total loss. CP 2 (Comp. at 2, ¶ 11).

Central to the resolution of this case, the State Farm insurance policy has a specific provision governing the rights to funds from such third parties. The provision is applicable to the entire policy, appearing in the "GENERAL TERMS" section:

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

CP 2-3 (Comp. at 2-3, ¶¶ 13 (bold & italics in original, underscoring added)).

Even so, State Farm did not send $500 of the Geico money to Daniels to see her fully compensated for the property damage loss. Instead, State Farm sent her only $350 of it, and kept the rest. CP 2

(Comp. at 2, ¶ 12). Thus, even after receipt of this portion of the Geico money, Daniels still had an out of pocket, uncompensated loss of $150. CP 2 (Comp. at 2, ¶ 12).

Based on the foregoing, Daniels filed suit. She asserts that the State Farm policy, while ostensibly giving the company the right to pursue third party recoveries, plainly makes that right entirely contingent on her first being fully compensated for her loss. The Complaint pleads claims breach of contract, bad faith and conversion, and seek declaratory relief and damages. CP 5-7 (Comp. at 5-7). Because it appears that State Farm's conduct with respect to Daniels is consistent with its conduct towards other insureds in similar circumstances, the Complaint seeks class-wide relief.[6] CP 3-5 (Comp. at 3-5).

V. ARGUMENT

A. STANDARD OF REVIEW & GOVERNING CONTRACT INTERPRETATION PRINCIPLES

1. Standard of Review For the Order of Dismissal

The appropriateness of a dismissal under CR 12(b)(6) is 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). Dismissal is not appropriate unless it appears

[6] No class determination had been made at the time of dismissal.

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 (emphasis added) (citing *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995)); *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (citing *Tenore*, 136 Wn.2d at 330).

Motions to dismiss should be granted "sparingly and with care," and only in the unusual case in which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief. *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)). 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*, 159 Wn.2d at 842 (citing *Tenore*, 136 Wn.2d at 330). Indeed, "any hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim." *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978) (emphasis added). Moreover, a motion to dismiss "must be tested in light of CR 8(a)(1) which only requires 'a short and plain statement of the claim.'" *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984) (emphasis added).

2. Insurance Policies Are Governed by Principles of Contract Interpretation and Construed in Favor of the Insured

In Washington, insurance policies are construed as contracts. *E.g., Lui v. Essex Ins. Co.*, 185 Wn.2d 703, 375 P.3d 596 (2016) (citing *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665, 15 P.3d 115 (2000)). Though basic principles of contract construction apply, a court should interpret insurance policy language as an average purchaser would, and should avoid technical interpretations. *See Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 881, 784 P.2d 507 (1990). Ultimately, the interpretation of the language of an insurance policy is a question of law. *Butzberger v. Foster*, 151 Wn.2d 396, 401, 89 P. 3d 689 (2004); *State Farm General Ins. Co. v. Emerson*, 102 Wn.2d 477, 480, 687 P. 2d 1139 (1984).

To begin with, "if the policy language is clear and unambiguous, [the court] must enforce it as written; [the court] may not modify it or create ambiguity where none exists." *Lui*, 185 Wn.2d at __ (slip op. at 7) (quoting *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). *See also Am. Nat'l Fire Ins. Co. v. B & L Trucking & Const. Co.*, 134 Wn.2d 413, 428, 951 P.2d 250 (1998); *Abbott v. General Accident Group*, 39 Wn. App. 263, 267, 693 P.2d 130 (1984); *Tucker v. Bankers Life & Cas. Co.*, 67 Wn.2d 60, 66, 406 P.2d 628 (1965)

(unambiguous policy language is not subject to construction and must be given effect according to its plain meaning).

If the language is unambiguous, that language controls the outcome; a court will not re-write an insurance company's plain policy language based on complaints of fairness or public policy:

> Northern contends the Court of Appeals opinion violates principles of fairness and public policy because it provides a policyholder who purchases just one year of insurance the same protection as those who purchase insurance annually. This argument is without merit. Northern drafted the policy language; it cannot now argue its own drafting is unfair. Further, because insurance policies are considered contracts, the policy language, and not public policy, controls. We will not add language to the policy that the insurer did not include.

Am. Nat'l Fire, 134 Wn.2d at 429-30.

An ambiguity does not arise simply because the parties argue conflicting interpretations; the interpretations proffered must be reasonable. *Am. Nat'l*, 134 Wn.2d at 428. Similarly, a provision is not ambiguous simply because the insurer could have further clarified it. *See State Farm Fire & Cas. Co. v. English Cove Ass'n*, 121 Wn. App. 358, 365, 88 P.3d 986 (2004).

Even so, because insurance policies are contracts of adhesion, when ambiguities do arise courts look at them in a light most favorable to

the insured. *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 323 (2004).

> The language of the policy is their language. They do not permit the insured to have a voice in the drawing of his own contract... The policies are prepared by skilled lawyers retained by the insurance companies, who through years of study and practice have become expert upon insurance law, and are fully capable of drawing a contract which will restrict the scope of the liability of the company with such clearness that the policy will be free from ambiguity, require no construction, but construe itself. Because of reasons such as these, whenever the contract of insurance is so drawn as to be ambiguous, uncertain and to require construction, the courts of this country resolve the doubt in favor of the insured and against the insurer...

Labberton v. General Cas. Co. of America, 53 Wn.2d 180, 187, 332 P.2d 250 (1958) (quoting *Montana Auto-Finance Corp. v. British & Fed. Fire Underwriters*, 72 Mont. 69, 232 Pac. 198 (1924)). These contract interpretation principles mandate a reversal of the order granting State Farm's motion to dismiss.

B. THE COMPLAINT STATES A CLAIM BASED ON THE PLAIN LANGUAGE OF THE INSURANCE CONTRACT

1. The Policy Language Clearly Makes Daniels' Full Compensation a Condition Precedent to State Farm's Recovery Rights

Distilled to its most relevant part, the provision governing State Farm's recovery rights states:

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

CP 2-3 (Comp. at 2-3, ¶ 13) (bold in original, underscoring added). The language of the policy is clear and should be enforced as written.

There really is no other reasonable way to read this language: Whatever rights State Farm may have to recover its payments, it does not have those rights until after its insured has been fully compensated for the loss. If its insured has not yet been fully compensated, State Farm's does not yet have applicable recovery rights. It really is that simple, and as it's the language State Farm drafted and imposed on its insured, the provision should be enforced as written.

Moreover, even in the unlikely event that the provision could be construed as ambiguous, it could not help State Farm. If the provision were ambiguous, the contract interpretation principles discussed above (particularly as applicable to insurance contracts) would still result in Daniels' interpretation being favored over any interpretation proffered by State Farm, as long as Daniels' interpretation is reasonable. Daniels' interpretation is simply to read and accept the language at face value; such an interpretation is inherently reasonable.

2. *Averill* Does Not Provide a Basis for the Trial Court's Order of Dismissal

a. The Language of State Farm's Provision is Significantly Different from the Farmers Policy Language in *Averill*

State Farm will likely again put heavy emphasis on the *Averill* opinion. As noted previously, the superficial observation that *Averill* involved similar claims is of little help. The primary thrust of the claims in *Averill* was that application of the common law made whole rule provided for the relief sought there. *See id.* at 155 Wn. App. at 111-115. Here, the relief sought is centered on the plain language of the State Farm policy.

Even so, *Averill* does include a discussion of whether the plaintiff there could make a claim based on the language of the insurance contract at issue. Ultimately, the Court concluded it could not. Again, however, this is merely a superficial observation that is of little help.

Comparing the language of the recovery provision in *Averill* with the language of the provision here, however, is helpful, in that it exposes a critical, fundamental difference between the two. The policy in *Averill* did not have language making full compensation of the insured a condition precedent to all of Farmers' recovery rights. It stands in stark contrast to the State Farm provision here, which does just that:

Averill (Farmers Policy):	This case (State Farm Policy):
Except as limited above, we are entitled to all the rights of recovery...	***Our*** right to recover ***our*** payments applies only after the ***insured*** has been fully compensated...

See 155 Wn. App. at 118 (underscoring added); CP 2-3 (Comp. at 2-3, ¶ 13) (bold in original; underscoring added).

The direct comparison makes it obvious that the provisions are entirely different, both in operation and effect. With the language from *Averill*, Farmers starts out with all of the rights to seek recovery from a third party. These rights might then be reined in under specified conditions or circumstances ("except as limited"). Under State Farm's policy language, however, State Farm has no such rights until its insured receives full compensation ("only after...").

Indeed, the difference is night and day. It's akin to having a light switch that starts in the on position (Farmers has all rights to pursue recovery), but that may be turned off (in specified circumstances), compared to a light switch that starts in the off position (State Farm has no rights), but that may be turned on (once the insured is fully compensated). Because of these plain differences, to the extent *Averill* is helpful in this

regard, it is to highlight why there must be a different result in this case based on the State Farm language.[7]

b. The Reasoning of *Averill* is Facially Erroneous, and is Inconsistent with Washington's Made Whole Doctrine

Intending no disrespect to the Court that issued it, *Averill* erred in its identification and application of the common law made whole doctrine. Thus, to the extent *Averill* might be considered applicable to the claims here, the Court should take the opportunity to revisit it and correct the error.

The *Averill* opinion reveals some unfortunate intermixing and confusion between the make whole (or full compensation) doctrine and the altogether different common fund doctrine.[8] For example, the *Averill* Court stated:

> Farmers has acknowledged that the made whole doctrine would limit its reimbursement if Averill had recovered directly from the tortfeasor for the property damage. We agree. In that scenario, the combination of the property loss insurance payments and the third party recovery would have created a common fund. *Mahler*, 135 Wn.2d at 426-27. Any claim by Farmers for reimbursement of the

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[7] Both the Court and Farmers agreed that under the policy language there, if Averill had been the one to recover from the third party she would have been entitled to full compensation, including the loss represented by the deductible. *Id.* This undercuts any assertion that insurance policies can't be written to provide such full compensation to an insured, including the loss represented by the deductible.

[8] The common fund doctrine is designed to ensure that all persons who benefit from a fund created by another will bear their fair share of the costs it took to create that fund (the "common" fund).

> property loss payments would have been limited by the made whole rule. *Id.* at 417-18. Under those facts, Averill would have been entitled to recover her full deductible before any obligation to reimburse Farmers. And, pro-rata fee sharing would have applied. *Id.* at 426-27.

155 Wn. App. at 113-14. Truthfully, this quoted section is a series of *non sequiturs* that bounce back and forth between the two separate doctrines.

The Court starts off by stating that the made whole doctrine would limit Farmers' recovery if Averill had secured the third party recovery. But the Court next says the reason is because the insured has created a common fund. This is patently incorrect, and illustrates the erroneous intermixing of the two doctrines.

The reason Farmers' recovery rights would have been limited if Averill had secured the third party recovery is because, under the Farmers policy language, it incorporated the made whole doctrine whenever the insured is the one who recovers the third party funds. So if Averill had recovered the third party funds, Farmers would have been entitled to recover its payments only from whatever remained after Averill was made whole.

But the limitation on Farmers' recovery does not result from or depend on Averill's creation of a common fund; in fact, it has nothing to do with whether there is a common fund. Unless there is first the determination that Averill is made whole and thus Farmers is entitled to

seek recovery of its payments, a common fund vis-à-vis Averill and Farmers cannot even exist. In short, there is no common fund issue involved in this made whole analysis.

Further, if the determination is made that Farmers is entitled to seek to recover its payments (because Averill has been made whole), then (and only then) can the question arise as to whether any such monies recovered from third parties constitutes a 'common fund.' If both Averill and Farmers will benefit from (receive some of) the monies, it is a common fund. This would then lead to the issue of each one bearing a fair share of the costs incurred to secure the fund (*i.e.*, the *Mahler* line of cases[9]). But none of these questions on the common fund issue involve the issue of full compensation.

At bottom, these two determinations cannot be intermixed or happen simultaneously – they can only occur sequentially and wholly independently. And even that's only true when both issues are present in the same matter. For example, while the make whole/full compensation

[9] *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998); *Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 31 P.3d 1164 (2001); *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 88 P.3d 395 (2004); *Matsyuk v. State Farm Fire & Casualty Co.*, 173 Wn.2d 643, 272 P.3d 802 (2012).

doctrine is limited to the insurance context, the common fund doctrine is a much broader doctrine with no particular tie to the insurance context.[10]

One last example that underscores *Averill's* misguidance and confusion is that the Court misconstrued what would constitute the common fund to begin with. The Court states that "the property loss insurance payments and the third party recovery would have created a common fund." *Id.* This is profoundly and fundamentally wrong.

Actually, the common fund would comprise just the funds recovered from the third party. It is a 'common fund' because in that scenario, both Farmers and Averill will draw from it. And if both draw from it, it implicates the question of common fund fee sharing under the *Mahler* line of cases (see previous note). Again, this is entirely unrelated to question of full compensation. At bottom, the analysis in *Averill* is facially erroneous and should be corrected.

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[10] The confusion in *Averill* between the two different doctrines might be at least partially explained by the fact that in insurance cases addressing common fund questions, the made whole doctrine is often mentioned in passing. Not because the two are related or can be intermixed, but simply because having a fully compensated (made whole) insured is usually a prerequisite to reaching a common funds analysis in that context (because if the insured hasn't been made whole, the insurer isn't in a position to seek to recover its payments).

3. Daniels Was Not Fully Compensated For Her Property Damage Loss

In the order of dismissal, the trial court stated that Daniels was fully compensated once she received the partial payment for her loss under the collision coverage.[11] CP 69-70 (Order Granting MTD at 2-3). This is a plainly erroneous statement of the law. It is undisputed that at the time State Farm made payment under the collision coverage, Daniels was still out of pocket $500 for her property damage. Moreover, even later on when State Farm passed along some of the Geico money ($350), it is undisputed that Daniels remained out of pocket $150. There is simply no support for a finding that Daniels received full compensation.

The trial court based its opinion on a sentence that was arguably dicta in a case that, in any event, has been superseded on the relevant point. In *Meas*,[12] the ultimate holding dictated that when conducting a 'make whole' type analysis, you must compare 'apple to apples' as far as coverages go. In other words, to determine if an insured is made whole for a property damage loss, you look only to the amounts recovered for that property damage. Similarly, to determine if an insured is made whole for purposes of PIP or UIM, you look only to the amounts recovered for

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[11] In other words, even before Daniels received any of the Geico money.

[12] *Meas v. State Farm Fire & Casualty Company*, 130 Wn. App. 527, 13 P.2d 519 (2005), *rev. denied*, 167 Wn.2d 1018 (2006).

the bodily injury loss. The insured in *Meas* sought to lump all damages together (bodily injury and property damage loss), and assert that he wasn't 'made whole' for purposes of any coverage until he had recovered the entire amount. The *Meas* Court rejected the argument. *See* 130 Wn. App. at 538-39.

The sentence relied on by State Farm and the trial court is: "Here, Meas was fully compensated or 'made whole' for the property loss claimed under his collision coverage when he received payment from State Farm." 130 Wn. App. at 538. There are at least two problems with relying on that sentence.

First, the Court's next sentence is: "Further, State Farm recovered his deductible and paid it to him." *Id.* In other words, from the money received from the third party, the insurer had already given Meas enough to cover his full deductible.[13] This is entirely different from the undisputed facts here.

Second, any effort to take the sentence at face value (that receiving insurance proceeds for less than the total amount of a loss somehow constitutes 'full compensation' for the loss) simply cannot stand in the

[13] In fact, the insurer had given Meas money received from the third party to cover Meas rental expense too. *See id.*

face of the Supreme Court's later opinion in *Sherry v Financial Indemnity*, 160 Wn.2d 611, 160 P.3d 31 (2007).

Sherry argued that 'full' compensation meant exactly that: the insured completely recovers the full loss suffered. *Id.* at 619. Conversely, the insurer 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 Supreme Court rejected the insurer'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 <u>not fully compensated</u> until they have recovered <u>all of their damages</u> as a result of a motor vehicle accident. *See, e.g., Thiringer*, 91 Wn.2d at 219....

Id. at 621-22 (emphasis added), adding:

> Adopting the approach urged by [the insurer] 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 <u>full</u> compensation before an insurer can seek reimbursement.

Id. at 623 (emphasis added). The same analysis applies here.

To be clear, Daniels does not rely on *Sherry* for her claim that she is entitled to full compensation – Daniels needs only the State Farm policy language for that. What *Sherry* tells us for this case is how to <u>measure</u> full compensation, and *Sherry* is clear on that point: it is the recovery of <u>all</u> of

the person's loss. *See id.* at 621-22. Here, that means Daniels cannot be considered fully compensated until she has recovered that portion of her loss represented by the out of pocket deductible.

Notwithstanding these shortcomings, there is another part of the Court's opinion in *Meas* that gets overlooked even though it is integral to the holding. In its discussion of the insurer's subrogation right, the Court states:

> 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 Wash.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.

130 Wn. App. at 538 (italics in original, underscoring added). In other words, the actual holding of *Meas* stands for the proposition that, even with respect to property damage claims the insured must be made whole before the insurer can recover payments for that same loss. What *Meas* got 'wrong' was the offhand statement that an insured could be considered 'fully compensated' even while remaining out of pocket for the deductible.

C. STATE FARM'S CONDUCT VIOLATED WAC § 284-30-393, WHICH PROVIDES A SUFFICIENT BASIS TO STATE A CLAIM

Notwithstanding any other basis argued herein, the trial court's order of dismissal should be reversed because State Farm's conduct violated the same regulation it place such emphasis on in the trial court: WAC § 284-30-393. The regulation mandates that an insurer must pursue that portion of its insured's loss represented by the deductible if the insurer pursues recovery of its own payments. If the insurer succeeds in recovering funds from a third party, the regulation requires that:

> Any recoveries must be allocated first to the insured for any deductible(s) incurred in the loss, less applicable comparable fault.

WAC § 284-30-393 (emphasis added).

There is no dispute that State Farm did not allocate the funds from Geico to first cover Daniels' loss represented by her deductible. Instead, State Farm sent Daniels only enough to cover 70% of it.

Below, State Farm initially argued that this "split" was permissible because the reduction State Farm made to the Geico funds it sent to Daniels represented her portion of fault for the accident. CP 24-25 (State Farm's MTD, at 9-10). Once realizing that Daniels actually had no comparable fault, State Farm was forced to 'pivot' from this argument in its reply brief.

In dismissing the Complaint, the trial court accepted the later argument that "less applicable comparable fault" meant State Farm could reduce the Geico funds going to Daniels for fault attributable to third parties – not just for any fault attributable to Daniels herself (which was zero). This interpretation is unsupported and an unwarranted reading of the insurance regulation. Among other things, it would render the word "applicable" extraneous and devoid of meaning, contrary to statutory/ regulatory construction principles. But most importantly, it is directly contrary to the OIC's interpretation, as represented to the public on its website. *See, e.g.*, "Subrogation and Your Rights" ("If the accident investigation reveals that you're partially at fault, then you'll only recover a percentage of your deductible.") (Underscoring added).[14]

Once WAC § 284-30-393 is correctly construed, it is undisputed that State Farm's conduct failed to comply with its requirements.

D. THE TRIAL COURT SHOULD HAVE GRANTED LEAVE TO AMEND TO ADDRESS ANY DEFICIENCIES IN THE COMPLAINT

In her opposition to State Farm's motion to dismiss, Daniels requested that she be granted leave to amend the Complaint to address any

[14] Located at: [https://www.insurance.wa.gov/laws-rules/subrogation/]. Last visited Dec. 27, 2016. The page includes an example of the calculation involved, specifying the reduction as the "Percentage you're at fault for accident." (Underscoring added.) (Daniels request the Court to take judicial notice of this publicly verifiable government document.)

deficiencies found by the trial court. Amendment to pleadings is governed by CR 15, which provides in relevant part that a "a party may amend his pleading ... by leave of court ... and leave shall be freely given when justice so requires." "The decision to grant leave to amend the pleadings is within the discretion of the trial court." *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999) (citations omitted). "These rules serve to facilitate proper decisions on the merits ... and to allow amendment of the pleadings except where amendment would result in prejudice to the opposing party." *Wilson*, 137 Wn.2d at 505 (citations omitted). "The touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party." *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 350, 670 P.2d 240 (1983) (citations omitted). The appellate court reviews the denial of leave to amend for abuse of discretion. *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 351, 670 P.2d 240 (1983) (citations omitted).

The foregoing demonstrates that there is no insuperable bar to relief. In fact, Daniels believes she has established that her Complaint already adequately states a claim. If this Court holds otherwise, however, it should still find that the trial court abused its discretion in not granting leave to amend, as there is no indication that doing so would be unduly prejudicial to State Farm.

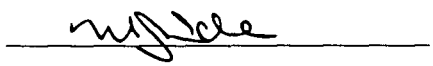
E. DANIELS IS ENTITLED TO FEES AND COSTS ON APPEAL

Under RAP 18.1(a), "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule." Daniels requests that the Court award attorney fees and costs incurred on appeal on the same basis as the superior court: under the fee shifting provision rule of *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn. 2d 37,811 P. 2d 673 (1991).

VI. CONCLUSION

State Farm wrote into its policy a right to recover its payments. But State Farm clearly and unequivocally conditioned that right on its insured first being fully compensated for the applicable loss. State Farm ignored the provision and kept money for itself that rightfully should have been used to make its insured whole. This misconduct alone is an adequate basis for the claims asserted.

For the reasons stated, Daniels asks the Court to reverse the order of dismissal and remand this case to the trial court for further proceedings on the claims asserted. In addition, Daniels asks the Court to award her fees and costs on appeal pursuant to RAP 18.1.

December 27, 2016. 

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* * *

DECLARATION OF SERVICE

I certify that on December 27, 2016, I caused to be filed with the Court of Appeals for the State of Washington, Division I, the foregoing Opening Brief of Appellant Lazuri Daniels, and caused to be delivered, via email, true and accurate copies to:

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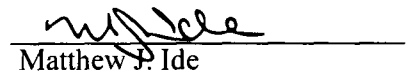
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed in Mercer Island, Washington, this 27th day of December, 2016.



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