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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

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

Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

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**REPLY BRIEF OF APPELLANT LAZURI DANIELS**

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## I. INTRODUCTION

State Farm expends significant effort in its Respondent's Brief on irrelevant and alternative facts. For example, State Farm states that it ultimately sent Daniels the remainder of her collision deductible. But there is nothing in the record (other than counsel's assertion) to support this proposed fact. Even if there were, however, it would be irrelevant to whether Daniels' complaint states a viable claim: the *actual* record indisputably establishes that State Farm kept money it received from Geico – money that should have gone to Daniels. If State Farm sent Daniels money later on it might go to the *extent* of her damages, but it would not eliminate Daniels' claim for the time State Farm wrongfully withheld her money,<sup>1</sup> or State Farm's misconduct in doing so.

Also, State Farm works to make sure the Court knows that the attorneys for Daniels here are the same attorneys who litigated the *Averill* and *Somal* cases, and that those two cases were not successful for the plaintiffs. It's part of State Farm's effort to create a narrative that this case is not really about Daniels and her claims based on language *specific to the State Farm policy*. Rather, State Farm strives to have it casually viewed as the third case by attorneys once again advancing a claim that

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<sup>1</sup> *E.g., Banuelos v. TSA Wash., Inc.*, 134 Wn. App. 603, 613-14, 141 P.3d 652 (2006).

supposedly has never found footing.

That the same attorneys have litigated the plaintiff side in this and two earlier cases is of course irrelevant.<sup>2</sup> This Court need not be told that the controversy before the Court is that of the parties, not their counsel, and is to be judged on the facts and merits of this particular case.

More concerning is that State Farm's otherwise irrelevant line of insinuation is not altogether truthful. The fact is, Washington cases asserting similar claims as here (and by these same plaintiff attorneys), *have* succeeded and resolved in favor of the plaintiff (on a class action basis no less), and occurred post-Averill. Why? *Because the words of the particular policy matters.*

The foregoing means two things. One is that State Farm's "plaintiff's counsel is tilting at windmills" narrative is not merely irrelevant, but actually false. (State Farm knows this.) The other is that some Washington insurers read their own policies with similar language as providing exactly what Daniels seeks here under the plain language of her State Farm policy. Hence, to permit State Farm to escape the obligations

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<sup>2</sup> State Farm's narrative of *Averill* and *Somal* implies that *Averill* was litigated through the Court of Appeals and then *Somal* was brought as some sort of second attempt. Another false narrative. *Somal* was instituted on June 23, 2009. This was after the *Averill* plaintiff had prevailed in the trial court and the case was up on appeal, but well before the *Averill* opinion issued on March 15, 2010. Indeed, the *Somal* plaintiff had likewise initially prevailed in the trial court before the *Averill* opinion was issued.

of its own policy language would provide the company with an unfair and unearned competitive advantage against other insurers in the state.

To be clear, Daniels does not contend that similar cases against other Washington insurers where plaintiffs succeeded are particularly relevant.<sup>3</sup> But mindful of the possible risk of letting State Farm's false narratives and alternative facts go unchallenged, Daniels merely points out that such other cases are no more irrelevant than State Farm's false claim that all such cases have been singularly unsuccessful.

On substance, State Farm has briefed these issues at least three times now. Yet no matter how clear Daniels makes it that her case centers on the plain language of the policy, State Farm continues to begin and center its argument on the common law rule discussion that dominated *Averill*. To be clear, Daniels in no way retreats from her position that *Averill* is facially flawed, fundamentally inconsistent with Washington made whole law, and ultimately wrongly decided. But given the plain policy language *in this case*, and its clear conditioning of State Farm's recovery rights on Daniels being fully compensated for the "loss", it is difficult to see how resolution of this case will get that far.

Specifically, State Farm now concedes what has been obvious

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<sup>3</sup> As matters of public record they would be subject to judicial notice.

from the start: the policy language is plain, and that plain language provides that Daniels must be fully compensated for the loss before State Farm can recoup its payments. Resp. Br. at 16. In addition, State Farm does not take issue with the proposition that while regulations and common and statutory law establish minimums for an insurer, nothing prevents an insurer from contracting to provide *greater* protections and benefits to its insureds. Thus, notwithstanding State Farm's argument for its preferred, anti-insured reading of WAC § 284-30-393, or its misplaced emphasis on *Averill* and the common law made whole doctrine issue, the fact is that State Farm cannot prevail unless it first shows – as a matter of law – that Daniels was *fully* compensated for her “loss,” even while she remained out of pocket \$500 for that loss.

## II. ARGUMENT

### A. Undisputed Facts Establish That Daniels Was Not Fully Compensated For Her “Loss” (Or “Property Damage”)

State Farm acknowledges that the insurance contract clearly provides that it had no recovery rights until Daniels was fully compensated for her loss. Resp. Br. at 17. State Farm's *entire* argument thereafter rests (necessarily) on its contention that Daniels was fully compensated for her loss once State Farm paid her an amount that was \$500 less than her actual, undisputed loss. To be clear, State Farm is not

arguing that Daniels was fully compensated after it passed on \$350 of the money Geico had provided (though even that would be wrong). State Farm's argument is (again, necessarily) that Daniels had been "fully compensated" for the damage to her vehicle by State Farm's collision payment *alone*. To support its contention, State Farm argues that "fully compensated" has different, much more limited meaning in the context of collision coverage, as opposed to other types of insurance coverage or under a layperson's straightforward understanding. Possibly even more importantly, State Farm's argument also ignores that the provision specifies that what must be fully compensated is the entire "loss."

Several important words are packed into State Farm's recovery right provision. Most of the attention has been directed at the term "fully compensated." But it is important to recognize that the "fully compensated" term does not stand in the abstract; it goes hand-in-hand with a specification of *what* must be fully compensated:

fully compensated for the ... ***property damage or loss***.

CP 2-3 (Comp. at 2-3, ¶ 13) (bold in original).

State Farm essentially ignores that this latter part of the provision language specifies the "what" that must be fully compensated – the "loss" (or the "property damage"). But this means that State Farm cannot prevail unless the amount of damages Daniels' incurred as represented by her

collision deductible is not either a “loss” or “property damage.” Such a position is facially fallacious and untenable.

As often the case with insurance contracts, the bold font in the above quoted section indicates that the terms are defined elsewhere in the policy. The pages of the policy on which those definitions appear are not in the record, however, as State Farm only included the single page on which the recovery rights provision appears.<sup>4</sup> Even so, our common understanding of automobile insurance highlights the breakdown in State Farm’s argument.

This case concerns collision coverage with a deductible. For there to be any coverage of course there must first be a covered “loss.” A loss for purposes of collision coverage is going to be for the damage to the vehicle.<sup>5</sup> Importantly, we must remember that State Farm has already agreed that Daniels had to be fully compensated for the “*loss*” before State Farm could recoup its payments. So the question becomes, what is a “*loss*”?

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<sup>4</sup> This provides another basis to reverse the trial court for its failure to provide leave to amend the complaint, as it is eminently reasonable to believe that Daniels can amend to include allegations that the policy’s specific definition of “loss” includes the entirety of a loss, not the actual loss less some specified amount (such as a deductible).

<sup>5</sup> Sometimes along with other things, such as contents, which we ignore here for simplicity. Also, the “collision” aspect of it adds nothing in the way of defining “loss”; the “collision” portion just adds limits to the applicable causes of the loss (i.e., not by causes that would fall under comprehensive coverage).

For State Farm to prevail in its argument, a “loss” would have to be defined as: the amount of property damage sustained by Daniels, *but minus \$500*. If this is State Farm’s position, it is at best a fundamental misunderstanding of its own policy (and insurance policies in general). Certainly State Farm has not provided the Court with anything that defines “loss” or “property damage” as something *less than the actual property damage* (or whatever damage) sustained by the insured.

In casualty type insurance, the insuring agreement (the insurer’s promise to pay) obligates the insurer to pay for a covered “loss,” less any deductible. Through such terms, the “loss” is obviously the totality of the damages sustained. Of that total amount of loss, the insurer’s actual contractual *payment* will be (for example) \$500 less to account for the deductible. But that which constitutes the “loss” has in no way changed: it is still the total amount of the insured’s damages.

Put another way, policies don’t define a “loss” as “the insured’s damages less \$500.” (That would simply represent the insurer’s payment obligation; the insured’s “loss,” is still the total). Indeed, logically a “loss” cannot already reflect a deductible; if it did an insurer’s promise to pay for a loss “less the deductible” would make no sense.<sup>6</sup>

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<sup>6</sup> Simply ignoring this would impermissibly write words out the policy.

So Daniels' "loss" here can logically only be her total amount of damages – not some lesser amount. That single understanding necessarily defeats State Farm's entire argument because Daniels clearly did not receive full compensation for that loss. And that is what State Farm expressly promised.

The same result is obtained if we view it under the "property damage" term of the recovery rights provision (it provides that the insured must be fully compensated for the loss or "property damage"). What "property damage" did Daniels sustain here? The answer is the cost to repair or replace her vehicle as a result of the accident. There is no support or reasoning that would lead to any other definition.

**B. *Meas*<sup>7</sup> Can't Stand In Light of *Sherry*<sup>8</sup>**

Daniels has not pivoted her argument on *Meas*. As discussed in her opening brief, the ultimate holding dictated that when conducting a "make whole" type analysis, you must compare apple to apples as far as coverages go (*i.e.*, a property damage loss analysis separate from bodily injury loss analysis). The insured in *Meas* sought to lump all damages together, which was rejected. *See* 130 Wn. App. at 538-39. Daniels

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<sup>7</sup> *Meas v. State Farm Fire & Casualty Company*, 130 Wn. App. 527, 13 P.2d 519 (2005), *rev. denied*, 167 Wn.2d 1018 (2006).

<sup>8</sup> *Sherry v Financial Indemnity*, 160 Wn.2d 611, 160 P.3d 31 (2007).

maintains that the sentence proffered by State Farm shows no real analysis and is not necessary for the Court's ultimate holding in that case.

Furthermore, Daniels points out in her opening brief that *Meas* is contrary to *Sherry*. State Farm's response is essentially to argue that *Sherry's* broad rule is actually very narrow and applicable only to PIP coverage. *Meas*, however, was decided by the Court of Appeals in 2005, while *Sherry* was decided by the Supreme Court in 2007. It cannot seriously be argued that *Meas* anticipated and is consistent with what many considered a new rule laid out in *Sherry*. Moreover, when our Supreme Court issues a decision that is taken to provide additional rights and protections for consumers in general, or insureds specifically, our courts historically read and apply those rights broadly, not narrowly. Thus, there is simply no basis to believe that our Supreme Court would so closely circumscribe the broad rule of *Sherry* so as to limit it to only PIP coverage. In fact, the Court warned as much *Sherry*. *E.g.*, at 623 (rejecting the insurer's "very narrow view" of relevant precedent).

### **C. *Averill* Is Inapt**

Predictably, State Farm leads in its brief with *Averill*. Daniels maintains her argument that *Averill* is inapt given the altogether different policy language at issue here, and that *Averill* was wrongly decided in any event for the reasons previously stated. But given State Farm's admission

that the plain language controls, and that the policy language does indeed require full compensation for the loss before State Farm can recoup its payments, it is difficult to see the Court reaching this question.

**D. WAC § 284-30-393 Should Be Read in Favor of Insureds**

Similarly, Daniels maintains that WAC § 284-30-393 is properly read as consistent with the interpretation gleaned from the Insurance Commissioner's website. Specifically, that if there is to be any reduction to an insured's deductible reimbursement based on comparative fault, it can only be reduced by the *insured's* comparative fault. Here, it is not disputed that Daniels had no fault in the accident.

State Farm argues that there is something unfair with the interpretation of regulation as argued by Daniels and gleaned from the OIC. But there is nothing unfair with giving preference to a *completely faultless insured*, such as Daniels, over her insurer.

**III. CONCLUSION**

This case is not *Averill III* (or *Somal II*). For that matter, this case isn't *Wright II*.<sup>9</sup> In *this* case, by its admittedly plain contract language

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<sup>9</sup> *Wright v. Geico General Ins. Co.*, No. 08-2-33156-3 (King Cty. Sup. Ct.). (*Wright* brought similar claims as in *Averill* and *Somal*. Shortly after the *Averill* opinion was issued the case nonetheless resolved in favor of plaintiff on a class action basis due to the actual Geico policy language, which is analogous to the State Farm language here. See *Wright* Dkt. Sub. 1 (Complaint at 3, ¶ 16).

State Farm agreed that Daniels was entitled to full compensation for her property damage/loss before State Farm could recoup its own payments. State Farm should be held to its contractual promise. State Farm's argument that Daniels was fully compensated for her "loss" when she indisputably remained out of pocket is contrary to a plain reading of the words used, common understanding and insurance policy norms, and Supreme Court precedent.

Similarly, the Court should reject the usual alarmist hand-wringing that holding it to the language of its policy doesn't make sense, isn't fair, or writes the deductible out of the policy. As discussed in Daniels' opening brief, such arguments are hollow and unsupported. There is nothing in Washington law that stands in the way of holding State Farm to its plain contractual promises, nor is it in any way unfair or inequitable. (Indeed, it would be unfair or inequitable to other Washington insurers with similar language who interpret it properly.) And the assertion that it effectively writes the deductible out of the policy is not just a farcical misstatement, but as *Averill* recognized there would be nothing improper even if it did.

For the reasons stated here and in Appellant's opening brief, the Court should reverse the order of dismissal and remand this case to the trial court, and award Daniels fees and costs pursuant to RAP 18.1.

February 27, 2017.

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DECLARATION OF SERVICE

I certify that on February 27, 2017, I caused to be filed with the Court of Appeals for the State of Washington, Division I, the foregoing Reply 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 February, 2017.

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