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No. 96185-9

SUPREME COURT OF STATE OF WASHINGTON

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

Petitioner,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

**PETITIONER LAZURI DANIELS' ANSWER TO AMICI BRIEFS
OF THE WASHINGTON STATE INSURANCE COMMISSIONER
MIKE KRIEDLER, WASHINGTON STATE ASSOCIATION FOR
JUSTICE FOUNDATION, AND APCIA and NAMIC**

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ARGUMENT 1

 A. Daniels Generally Agrees With The OIC
 And WSAJF 1

 1. Subrogation Is An Equitable Doctrine,
 Governed By Equitable Principles..... 2

 2. The Court Of Appeals Failed To Follow The
 Principles For Interpretation Of Insurance
 Contracts..... 3

 3. The Make Whole Doctrine Is Applicable Both As
 A Result Of State Farm’s Specific Policy
 Language And Under Washington’s Insurance
 Common Law..... 4

 4. An Insured’s “Loss” Includes That Portion
 Represented By A Deductible..... 5

 B. APCIA/NAMIC’S Arguments Are Equal Parts
 Specious, Incorrect And Irrelevant..... 7

 1. APCIA/NAMIC’S Assertion That The
 Insurance Regulation Required State Farm To
 Not Fully Compensate Daniels Is Specious 7

 2. APCIA/NAMIC’S Assertion That State Farm
 Complied With The Regulation Is Both
 Incorrect And Irrelevant 9

 3. The Court Should Declare WAC § 284-30-393
 Inconsistent With Washington Decisional Law.. 11

III. CONCLUSION..... 13

TABLE OF AUTHORITIES

Cases

<i>Averill v. Farmers Ins. Co. of Wash.</i> , 155 Wn. App. 106, 229 P.3d 830 (2010)	passim
<i>Daniels v. State Farm Mut. Auto. Ins. Co.</i> , 4 Wn. App. 2d 268, 421 P.3d 996, <i>review granted</i> , 192 Wn.2d 1001 (2018)	3, 6
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998)	2
<i>Meas v. State Farm Fire & Casualty Co.</i> , 130 Wn. App. 527, 123 P.3d 519 (2005)	5-6
<i>Sherry v. Financial Indemnity Co.</i> , 160 Wn.2d 611, 160 P.3d 31 (2007)	5
<i>Thiringer v. American Motors Ins. Co.</i> , 91 Wn.2d 215, 588 P.2d 191 (1978)	passim

Statutes

RCW § 48.05.140	8
RCW § 48.30.010	8

Regulations

WAC § 284-30-300	9
WAC § 284-30-393 (effective July 11, 2011)	7, 9, 11-12
WAC § 284-30-400	9

Other

OIC's Concise Explanatory Statement, June 2011	10
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I. INTRODUCTION

There are three briefs filed by four amici. The Washington State Insurance Commissioner Mike Kreidler (“OIC”) and the Washington State Association for Justice Foundation (“WSAJF”) each filed briefs generally in support of the Petitioner, Lazuri Daniels. The third is a joint brief filed by the American Property Casualty Insurance Association and the National Association of Mutual Insurance Companies (“APCIA/NAMIC”) in support of Respondent State Farm. For the most part, Daniels generally agrees with the arguments made by the OIC and WSAJF, and disagrees with the assertions of APCIA/NAMIC.

II. ARGUMENT

There are essentially three questions in a make whole doctrine case. The first is simply whether the make whole doctrine applies. The second is the appropriate measure of the insured’s “loss” for purposes of the make whole determination. And the third is whether the insured has been made whole (or fully compensated) for the applicable loss.

A. Daniels Generally Agrees With The OIC And WSAJF

The briefs filed by WSAJF and the OIC each provide important background and context on the issues underlying this appeal. Daniels has many areas of agreement with the arguments made in their respective

briefs. In order to avoid undue repetition, Daniels will simply point out those agreements and cite to the briefs of amici rather than repeat them.

**1. Subrogation Is An Equitable Doctrine,
Governed By Equitable Principles**

WSAJF's brief, for example, accurately explains that an insurer's subrogation rights are governed by equitable principles. WSAJF Br. at 4, 6. This is true whether the subrogation rights arise as a matter of law or contract, and as such the equitable principles are applied even in if it means altering contractual terms. WSAJF Br. at 6, 7. Importantly, WSAJF recognizes that the purpose of subrogation is to place the ultimate burden of the loss *on the wrongdoer*. WSAJF Br. at 7. See also *Mahler v. Szucs*, 135 Wn.2d 398, 411-412, 957 P.2d 632 (1998). It is not to place the insurer in a more favorable position vis-à-vis its insured.

WSAJF accurately explains that one of the important, longstanding governing equitable principles is that an insurer can only recoup its insurance payments after its insured has first been made whole for the applicable loss. WSAJF Br. at 7-9. WSAJF points out that the rule is informed by, inter alia, Washington's strong public policy of full compensation for those who sustain losses in accidents. WSAJ Br. at 4, 9.

WSAJF also identifies another important factor weighing on the relative equities between insurer and insured: the insurer has accepted

premiums to take on the risk of loss. WSAJF Br. at 4-5, 15 n.6, 16. This insight is reflected in the OIC's brief as well, OIC Br. at 17, as it was by Judge Becker in her dissent below. *See Daniels v. State Farm Mut. Auto. Ins. Co.*, 4 Wn. App. 2d 268, 421 P.3d 996, 1007 (Becker, J., *dissenting*), *review granted*, 192 Wn.2d 1001 (2018) ("Daniels suffered a loss, while State Farm incurred a business expense.").

2. The Court Of Appeals Failed To Follow The Principles For Interpretation Of Insurance Contracts

The OIC's brief correctly states the rules governing the proper interpretation of an insurance contract, including that it be interpreted as would an ordinary purchaser of insurance, and by resolving ambiguities in favor of the insured. OIC Br. at 9-10. These principles are also accurately reflected in WSAJF's brief. *See, e.g.*, WSAJF Br. at 10-11. The OIC goes on to accurately detail several ways in which the Court of Appeals failed to adhere these principles in interpreting the State Farm provision at issue. *See generally* OIC Br. at 10-13.

The OIC also provides instructive discussion on how the insurer's duty under Washington law of good faith and fair dealing informs on the contract interpretation issues involved. Importantly, it includes that an insurer is prohibited from prioritizing its own interests above that of its insured. *See generally* OIC Br. at 15-17. Both the OIC and WSAJF

accurately explain why the decision below (and the opinion in *Averill*) are contrary to the foregoing principles. Daniels agrees that State Farm's interpretation of contract language would (impermissibly) permit State Farm to prioritize its interests over that of its insureds by being able to seek recovery of its payments before its insured could seek to do so. OIC Br. at 16.

3. The Make Whole Doctrine Is Applicable Both As A Result Of State Farm's Specific Policy Language And Under Washington's Insurance Common Law

Both WSAJF and the OIC accurately explain that, under the foregoing principles of contract interpretation (including the policy's plain language) the State Farm policy language essentially incorporates the make whole doctrine. In doing so, Daniels agrees that State Farm promised that Daniels was entitled to be fully compensated before State Farm would keep any money secured from the tortfeasor(s). *E.g.*, OIC Br. at 10, WSAJF Br. at 9-11.

But regardless of the State Farm contract language, both amici go on to accurately explain why pursuant to Washington public policy, Washington insurance law, and the above referenced equitable principles governing subrogation, application of the make whole doctrine in these circumstances is required in any event. *E.g.*, OIC Br. at 17-20, WSAJF Br. at 11-12. Daniels agrees.

Daniels also agrees that WSAJ is correct in observing that there is no basis in logic or law for application of the make whole doctrine to depend on which party (insured or insurer) secures funds from the tortfeasor, particularly since an insurer pursuing subrogation does no more than step into the shoes of its insured. *See* WSAJF Br. at 7, 16.

The OIC also makes an important observation on the proper bottom-line framework, with which Daniels agrees: the insurer has the ability to *pursue* a recovery against the tortfeasor for the insured's entire loss (*i.e.*, payments made by the insurer and the insured's deductible), but the insurer's right to *keep* any such funds arises only *after* the insured has been fully compensated for that loss. OIC Br. at 13.

4. An Insured's "Loss" Includes That Portion Represented By A Deductible

WSAJF and the OIC also correctly point out that an insured's deductible plainly represents part of the insured's actual "loss," and that to interpret otherwise runs afoul of *Sherry*. Hence, WSAJF and the OIC are correct that an insurer can only recoup its payments after its insured has received full compensation for the loss, including that portion represented by the deductible. *E.g.*, OIC Br. at 17-20, WSAJF Br. at 11-12.

On this issue below, State Farm relied heavily on a case that appears relevant, but only on first blush: *Meas v. State Farm Fire and*

Cas. Co., 130 Wn. App. 527, 123 P.3d 519 (2005). The oft-quoted portion states that the insured was “fully compensated” for the loss claimed under his collision coverage when he received payment from his insurer (i.e., payment that did not include his deductible). *Id.* at 538. Reliance on *Meas* for the purported proposition, however, was rejected by the Court of Appeals because it recognized that the statement was little more than a casual observation of a matter not at issue in *Meas*. See *Daniels*, 421 P.3d at 1000, n.3 (“we do not find the case persuasive because the quoted assertion is made without analysis and was not germane to the central issue before the court.”). Notably, reliance on *Meas* was rejected for a similar reason in *Averill* as well. See 155 Wn. App. at 113 n.3 (“Two other cases involved the insurer’s pursuit of recovery, *but neither involved the allocation of the insured’s deductible*. See *Meas v. State Farm Fire & Cas. Co.*, 130 Wn. App. 527, 531, 123 P.3d 519 (2005) (insured recovered his \$250 deductible in full when State Farm pursued recovery from the tortfeasors insurance); *Chen v. State Farm Mut. Auto Ins. Co.*, 123 Wn. App. 150, 152, 94 P.3d 326 (2004) (no discussion regarding deductible).”) (emphasis added).

For these reasons, Daniels agrees with the OIC and WSAJF that the portion of loss represented by an insured’s deductible constitutes part of the insured’s loss for determining whether the insured has been fully

compensated, and this result is the only result consistent with this Court's decision in *Sherry*.

**B. APCIA/NAMIC'S ARGUMENTS ARE
EQUAL PARTS SPECIOUS, INCORRECT
AND IRRELEVANT**

In contrast to the briefs filed by the OIC and WSAJF, Amici APCIA/NAMIC is incorrect in their arguments in support of WAC § 284-30-393. Most obviously, their assertions as to history of the applicable regulation and the "clear intent of the [OIC]" must be rejected as contrary to the arguments expressly stated in the Insurance Commissioner's own amicus brief. In addition, their efforts to limit this Court authority to determine the decisional law, notwithstanding regulations to the contrary, must be rejected. Moreover, to the extent the regulation is otherwise applicable to this case, the OIC accurately explains how the regulation was incorrectly interpreted and applied here by both State Farm and the Court of Appeals.

**1. APCIA/NAMIC'S Assertion That The
Insurance Regulation *Required* State
Farm To Not Fully Compensate Daniels
Is Specious**

APCIA/NAMIC state that the applicable regulation, WAC § 284-30-393, is part of the Unfair Claims Settlement Practices Act (*sic*).

APCIA/ NAMIC Br. at 7.¹ APCIA/NAMIC correctly note that violations of the unfair claims settlement practices regulation are subject to (*inter alia*) the enforcement provisions of RCW § 48.30.010 (remedies and penalties for unfair practices in general). APCIA/NAMIC Br. at 7 (citing WAC § 284-30-400). APCIA/NAMIC go on to point out that failure to comply with applicable insurance regulations could subject an insurer to a claim for bad faith, APCIA/NAMIC Br. at 7, and that RCW § 48.05.140(1) provides the OIC with [discretionary] authority to “refuse, suspend, or revoke an insurer’s certificate of authority ...” if the insurer, among other things, “[f]ails to comply with any provision of this code.” APCIA/NAMIC Br. at 7-8.

In other words, APCIA/NAMIC takes the position that State Farm was actually *prohibited* from ensuring Daniels was fully compensated for her loss before State Farm took third party money for itself. According to their reasoning, if State Farm had first seen that Daniels had first received enough of the third party funds to make her whole (*i.e.*, the amount of her loss represented by her deductible), State Farm could have been subject to not just a claim for bad faith, but risk having its ability to even conduct

¹ Presumably, the reference to “Act” is simply a typo, as the provision is actually part of the “unfair claims settlement practices *regulation*.” See WAC § 284-30-300. (emphasis added).

business in Washington revoked. APCIA/NAMIC Br. at 7-8 (Section III.D); *see also* APCIA/NAMIC Br. at 3, *ll* 1-2.

The assertion is facially absurd. The insurance regulations provide for *minimum* standards of conduct for insurers – they in no way prohibit an insurer from going beyond that. *See, e.g.*, WAC 284-30-300 (“The purpose of this regulation, WAC 284-30-300 through 284-30-400, is to define certain *minimum* standards...”) (emphasis added). The fact that such a disingenuous assertion would even be advanced significantly tempers the credibility of any purported “friend of the court.”

2. APCIA/NAMIC’S Assertion That State Farm Complied With The Regulation Is Both Incorrect And Irrelevant

APCIA/NAMIC aver that “State Farm complied with the letter of the regulation,” APCIA/NAMIC Br. at 8, but provide no discussion supporting this conclusion. All they provide is the general observation that the regulation provides for return of the insured’s deductible “less applicable comparable fault.” APCIA/NAMIC Br. at 5. Regardless, APCIA/NAMIC’s assertion is both incorrect and irrelevant.

It is incorrect for reasons that include the discussion in the Insurance Commissioner’s brief, which specifically noted that “the Court of Appeals and State Farm have misunderstood and misapplied WAC 284-30-393.” OIC Br. at 7. As stated by the OIC, the regulation only permits

reduction in the recovery of the insured's deductible when it is the *insured* who is partially at fault. OIC Br. at 8 (citing OIC's Concise Explanatory Statement, June 2011 ("CES") at 4) (CP 36). This is consistent with the request made by Farmers Insurance in the first instance. *See* CES at 1 ("Farmers asked OIC to amend the regulation so that insurers may deduct the amount of an *insured's* comparative fault...") (emphasis added) (CP 33).²

Here, there is no disagreement: Daniels was not alleged to have been even partially at fault. Hence, even if the regulation accurately reflected Washington insurance law (it does not), State Farm did not comply with it as there was no basis to invoke the limited exception for proportionate sharing to reflect fault of the insured.

APCIA/NAMIC's (incorrect) assertion that State Farm complied with the regulation is in any event irrelevant. What APCIA/NAMIC ignores (but as pointed out by WSAJF and the OIC) is that through its policy language State Farm went further than the regulation's minimum and promised to make sure its insureds were fully compensated for a loss before it would recoup its own payments. Inarguably, State Farm failed to do so with respect to Daniels. So even if State Farm had met the

² And even if State Farm had believed that Daniels had some level of fault, the OIC's position is that the regulation required State Farm to so inform Daniels before taking "any action that has the potential to prejudice" her rights. OIC Br. at 8.

“minimum” imposed by the regulation, it failed to meet the heightened promises it made in its own contract.

3. The Court Should Declare WAC § 284-30-393 Inconsistent With Washington Decisional Law

APCIA/NAMIC urges the Court to not consider whether WAC § 284-30-393 accurately reflects Washington decisional law. The suggestion should be rejected. The regulation has been part of this case from the outset. Argument pertaining to the regulation has appeared in essentially every brief and order. State Farm relied extensively on it in its motion to dismiss. *See* CP 12-29. It was specifically cited as one basis for the trial court’s order dismissing the case, from which this appeal was taken. *See* CP 69-70. It was part of the opinion below, both majority and dissent. In her Supplemental Brief, Daniels specifically pointed out that the regulation was incompatible with Washington decisional law. *See* Daniels’ Supplemental Brief, Part IV.A.4.

In support of its request, APCIA/NAMIC argues that *Averill* did not determine that the former version of WAC § 284-30-393 was wrong as a matter of law. APCIA/NAMIC Br. at 8. But that is exactly what the Court of Appeals said: “The OIC’s interpretation of *Thiringer* is wrong as a matter of law.” *Averill*, 155 Wn. App. at 117. Similarly, APCIA/NAMIC argues that *Averill* does not support the proposition that a court

may declare a regulation wrong or invalid. APCA/NAMIC Br. at 9.

Again, we need only to turn to *Averill* to see that is also incorrect, where the Court made a distinction between an agency's interpretation of its regulations as opposed interpretation of decisional law:

The OIC's interpretation is entitled to great deference as an agency's interpretation of its own properly promulgated regulations. *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 885, 154 P.3d 891 (2007). Here, the issue is not one of interpretation of a regulation issued by the OIC, but of the underlying decisional law, which is the *province of the courts to interpret and apply*. [Citation omitted.]

155 Wn. App. at 117 (emphasis added). It was upon this distinction that the *Averill* court had no issue stating that the "OIC's interpretation of *Thiringer* is wrong as a matter of law." *Id.*

The OIC clearly stated that it understood the make whole rule to require an insured to recoup the amount of her loss represented by the deductible out of any third party recovery by the insurer, and only changed the regulation after the *Averill* Court opined that this belief was incorrect. But it is *Averill's* holding that is actually wrong, however, and so the change in the regulation that it produced is necessarily wrong as well. Thus, this Court should take the opportunity to declare that, consistent with *Thiringer* and other cases, the current version of WAC § 284-30-393 is wrong as a matter of law, and thereby invalid.

III. CONCLUSION

For these reasons and the reasons previously stated, Daniels asks the Court to reverse the Court of Appeals.

April 19, 2019.

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DECLARATION OF SERVICE

I certify that on April 19, 2019, I caused to be filed with the Washington Supreme Court, via e-file, the foregoing Lazuri Daniels' Answer to Amici, which will caused to be delivered, via email, a true and accurate copy to all counsel of record.

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, WA, this 19th day of April, 2019.

s/Matthew J. Ide
Matthew J. Ide

IDE LAW OFFICE

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