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No. 64169-7I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ANNE HORNER, individually
and on behalf of all those similarly situated,

Appellant/Plaintiff,

v.

FARMERS INSURANCE COMPANY OF
WASHINGTON,

Respondent/Defendant

AMENDED APPELLANT'S REPLY BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellee/Defendant Farmers Insurance Company of Washington (“Farmers”) Response Brief is long on invoking the equitable doctrine of subrogation (which, as a matter of law, cannot be asserted by an insurer against an insured) and almost totally avoids addressing (until page 21 of its Response) the plain “right of recovery” language of the very insurance policy it made Appellant Anne Horner (“Horner”) sign to obtain homeowners insurance. Horner establishes here:

- (1) It is this policy language that controls the disposition of this appeal.
- (2) It is this policy language that limits Farmers’ “right of recovery” to a situation not present, (i.e., where Farmers’ payment exceeds the amount of damages sustained by Horner).
- (3) It is this policy language that Farmers’ own managing agents gave binding testimony about which is utterly inconsistent with how such language is now being characterized by Farmers’ counsel on appeal.
- (4) It is this policy language that defeats Farmers’ spurious argument that Horner (not Farmers) breached this provision of the insurance contract by not making an assignment of the proceeds of a settlement that Horner, with absolutely no help from Farmers, had already recovered from the third party tortfeasor, the Jordans.
- (5) It is this policy language which refutes Farmers’ curious argument that it could obtain an assignment of Horner’s “rights of recovery” after such a settlement is reached where the at-fault third party is also an insured

of Farmers and against whom Farmers similarly has no right of recovery or of equitable subrogation.

- (6) It is this policy language and the case law cited in Horner's Opening Brief that establish that Horner has received no "double recovery" whatsoever because the term "double recovery" is recovery that exceeds the applicable measure of damages set forth in the insurance policy. Since the insurance policy here limits Farmers' right of recovery to the excess of what she received from the third party over what Farmers' paid her for, by definition no "double recovery" has been had.

Put simply, Farmers' arguments are a house of cards which collapses as soon as the actual policy language is considered. Farmers' insistence that it has a common law, equitable right of subrogation against its insured Horner, even where the policy language it inserted into the contract of insurance completely defeats such subrogation claim, is novel in the law. No Washington case law supports such a result or conclusion. In fact, Washington case law decisively refutes it. Nor does Farmers' Response answer the simple question: how could Farmers assert an equitable right of subrogation against its own insured? This appeal allows this court to bind Farmers to the policy language it wrote into its policies rather than avoid the consequences of such language by sleight of hand and vague appeals to equitable doctrines.

II. LEGAL ARGUMENT

A. FARMERS HAS NO CONTRACTUAL OR COMMON LAW RIGHT TO SUBROGATION AT ALL, LET ALONE ONE THAT CONFLICTS WITH THE POLICY LANGUAGE LIMITATIONS FARMERS HAS PLACED UPON ITSELF.

Farmers' Response spends the better part of the first 20 pages in a futile attempt to convince this court that it enjoyed some contractual or common law right of subrogation against Horner's recovery from the Jordans that went far beyond that allowed in its subrogation clause. This argument is refuted quite simply:

- (1) An insurer has no right of subrogation against an insured particularly where the third party tortfeasor from whom recovery is made is also an insured of the same insurance company. *Mahler v. Szucs*, 135 Wn.2d 398, 413 (1998) *Reichl v. State Farm Insurance Company*, 75 Wn. App. 454, 880 P.2d 558 (1994), quoting *Ferrell v. Nationwide Mutual Ins. Co.* 217 W. Va. 243, 245-146, 617 S.E.2d 790 (2005): "No right of subrogation can arise in favor of an insurer against its own insured, since by definition subrogation arises only with respect to rights of the insured against third persons to whom the insurer owes no duty."
- (2) Farmers' argument that the equitable right of subrogation can be enforced against an insured, by filing a "lien against any recovery its insured secures from a third party" (Response at p.3) is an incomplete statement of the law but in any event is irrelevant because Farmers filed no lien against Horner's recovery.
- (3) In *Mahler v. Szucs*, 135 Wn2d 398, 412-417, 957 P.2d 632 (1998) the court cited the case of *Metropolitan Life*

Ins. Co. v. Ritz, 70 Wn2d 317, 422 P.2d 780 (1967) and noted “The [*Metropolitan Life*] court held the insurer could secure reimbursement from the insured's recovery from the tortfeasor, **subject to the insurer's obligation to share proportionately in the insured's expenses incurred to obtain the settlement.**” *Mahler* at p.416 (emphasis added) and see *Mahler* at pp.426-427. Here, of course, Farmers concedes that it refused to honor any attempt by Horner to recover her expenses incurred in obtaining the settlement. See Response at p.8. Thus, the rule of law asserted by Farmers is not applicable.

- (4) Farmers ignores the key holding of *Fisher v. Aldi Tire, Inc.*, 78 Wn.App. 902, 908, 902 P.2d 166 (1995)(and the other cases cited on pp.26-27 of Horner’s Opening Brief) where the court held that the parties may modify or extinguish, by agreement, common law subrogation rights. And see *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Construc., Inc.*, 119 Wn2d 334, 831 P.2d 724 (1992)(parties may be agreement waive their rights to subrogation).

Farmers wants its cake and eat it too. Farmers asks this court to ignore the language of its own insurance policy it wrote and made Horner sign to obtain insurance and find instead that some common law right of subrogation trumps that language. It cites no case at all for this proposition. All of the case law cited by Horner explicitly refutes this notion. The courts will uphold, not ignore, policy language which conditions, modifies or extinguishes the common law subrogation rights, as here. Simply put, the contract language controls. Farmers only citation to *Fisher, supra*, quotes the opinion for the unremarkable and inapposite proposition that equitable subrogation can prevent unjust enrichment. But

there is nothing “unjust” about holding Farmers to the language of the policy it wrote, i.e., by conditioning Farmers’ rights, if any, of subrogation to the clear terms of insurance contract which provides for such subrogation rights but only if certain criteria are met. Farmers undoubtedly felt that it needed the policy language which modified the common law or else it would not have placed this language in the policy. Farmers wants this court to allow it to get out from under the contractual limitations it placed on itself. This is something the court cannot and should not do. The court’s duty is to uphold the contractual provisions agreed to, not enable Farmers in pretending they do not exist.

For these reasons, the law is clear that the contractual limitations on Farmers subrogation rights control the disposition of this case, not common law subrogation doctrines. But even if the court were to ignore the contractual limitations, common law subrogation avails Farmers not.

B. THE COURT SHOULD UPHOLD THE PLAIN READING OF THE POLICY LANGUAGE AND REJECT FARMERS’ REQUEST THAT IT REWRITE IT TO SUIT ITS PURPOSES.

Farmers’ Response finally addresses the “subrogation clause” language of its insurance contract on p.21 of its brief. Yet its efforts to explain away the clear language or even clean up the ambiguities of that language (see Horner’s Opening Brief at pp.12-18.) fall far short.

Farmers is bound by the testimony of its CR 30(b)(6) managing agents Putich and Ballard as to the meaning it attaches to this clause. See *Id.*, quotes on pp.14-17. Yet its' counsel fails to cite let alone be bound by any such testimony. Rather it claims that such evidence is inadmissible "extrinsic evidence". In fact, under CR 30(b)(6) Farmers is bound by such testimony. It cannot be ignored. But if such testimony is extrinsic evidence, Farmers cannot now substitute its' counsels' "extrinsic evidence" for such testimony, especially since it invents even more bizarre reasons why the court should read this language right out of the contract.

It is now Farmers' position, previously unexpressed, that "Farmers' 'right of recovery' refers to the **assigned** right of recover from the insured." Response at p.22. Farmers' managing agents gave no such explanation. In short, Farmers now wants this court to add the term "assigned" to modify the phrase "right of recovery". This effort runs afoul of every Washington case which discusses a court's role in interpreting contractual provisions. The court cannot add a key term to substantively change the meaning of a clause just because the carrier might have intended it that way. See, e.g., *Getz v. Progressive Specialty Insurance*, 106 *Wn. App.* 184, 188, 22 *P.3d* 835 (2001) ("[A]n insurance policy is not interpreted simply to give effect to what the carrier may have intended to accomplish.") At best, such a strained reading of the phrase creates an

ambiguity which should be resolved against the insurer and in favor of the insured. *State Farm Mut. Auto Ins. v. Johnson*, 72 Wn. App. 580, 589, 871 P.2d 1066 (1994).

Farmers next contends that “under [Horners’] interpretation there would never be a valid subrogation claim” because Farmers payments would never exceed the amount of damages sustained by the insured. Response at p.23. Not true. Farmers cites no case law that allows a court to help Farmers get out from under a clause it wrote into the policy just because it “doesn’t make any sense” as written. But Farmers might well make payments to an insured that turns out to exceed the actual provable damages the insured sustained. It is completely foreseeable that Farmers could make payments based upon initial evidence proffered by the insured that turns out to be inadequate to prove actual damages or which a jury or fact finder rejects as unproven or unworthy. Under this clause, it has a right to recover such payments that exceed the actual damages the insured suffers.

Farmers next contends that the “right of recovery” language must be read in the context of the other sentences of the clause including references to “assignment” and “recovery” in the same paragraph. To the contrary, it is Horner who gives context and the same meaning to all of the

key words and sentences, rather than trying to change one to suit Farmers' interests.

The first sentence of the "subrogation clause" deals with the insured's waiver "before a loss" all **rights of recovery**. Horner Declaration, Ex. 12, CP78. Tellingly, this sentence uses the term "**rights of recovery**" not the word "recovery." These two phrases mean different things. A **right of recovery** is inchoate, an expectancy not realized; or recovery has not occurred yet. A "recovery" means that funds are already at hand; a settlement with a third party has already been reached.

Again in the second sentence, the policy language states the "If not waived, [Farmers] may require an assignment of **rights of recovery** for a loss to the extent that payment is made by us." Again, the phrase used by Farmers is "**rights of recovery**" not "recovery". Farmers contends that it was entitled to make Horner assign her "recovery" to it because such request for an assignment came AFTER Horner had a recovery. It made no request that Horner assign her "right to recovery" to Farmers before the settlement. In short, Farmers' position is that it can lie in the weeds, not ask its insured to assign it the **right of recovery** (which would of necessity require Farmers, not the insured, to obtain such a recovery in the first place) but, after the insured had spent considerable time, effort, attorney fees and costs to obtain such a judgment, pop up and say in essence: "OK,

insured, you did all the work now you have to give us an assignment of your recovery so we can get our money back, and not even pay a Mahler fee.”

This is backwards logic. It makes no sense. It inappropriately puts Farmers interests far ahead of the insured. Why would Farmers even ask for an assignment of the right of recovery, (and thereby placing the onus upon it to obtain a recovery) if they could just wait around until the insured did all the work to receive a recovery and then force the insured to assign it to them? The court should read the term “right” in “right of recovery” as a recovery that has not yet occurred. This is its clear meaning. If Farmers wanted to grant itself the right to require an assignment of an actual recovery already obtained, it could easily have said so. It did not. It chose other terms. It should be held to its choice in the words it used. This is the court to do so.

It is Farmers which contends that the phrase “right of recovery” means different things in the same clause. Such a reading is the definition of an ambiguity. It can only be construed against, not in favor of, Farmers.

C. THERE WAS NO “DOUBLE RECOVERY” BY HORNER

Farmers makes no focused response to Horner’s argument and case authority which establishes that there is no “double recovery” where the policy language sets the conditions for the “applicable measure of

damages”. See Horner’s Opening Brief at pp.19-20. Farmers Response utterly fails to distinguish the case of *Maziarski v. Bair*, 83 Wn. App. 835, 844, 924 P.2d 409 (1996) which holds “If the policy says [insured] can receive and retain PIP payments, as well as damages attributable to [the third party’s] fault, that is the applicable measure of damages. If the policy says [insured] must disgorge PIP payments once he receives all damages attributable to her fault, that is the applicable measure.” This court held there was no “double recovery” even though the insured had received PIP benefits for which there was not “offset” to the verdict for that amount paid. And see *Barney v. Safeco*, 763 Wn. App. 426, 429, 869 P.2d 1093 (1994)(insured entitled to payment both under PIP and UIM as “his bargain included payment under both coverages, without offset.”) In short, the policy language controls.

Here the same logic applies. First Farmers unfairly asks this court to assume facts NOT in evidence, i.e., that Horner’s compromise settlement of \$290,000 included payment to her for every penny of her property damages—instead of a pro rata reduction of that amount based upon the compromise reached in settlement of all elements of her damages. But even if this were true, there is no double recovery because the language of the policy allows Horner to keep ALL of her recovery of property damages unless they exceeded the amount paid by Farmers.

Farmers could easily have said it differently and thus established its right to recovery any amount Horner received in settlement up to the amount it had paid her for such loss. But it chose not to. The courts of justice are not instituted to let Farmers off the hook for the choices it makes in its own policy language. “ They made their bed, now let them lie in it.”

D. HORNER DID NOT BREACH THE INSURANCE CONTRACT BY NOT ASSIGNING HER RECOVERY TO IT AFTER IT WAS OBTAINED.

For the clear reasons stated above, the mere tedious repetition of a falsehood—that Horner breached the insurance contract by not assigning her recovery to Farmers—does not make it true. There can be no breach of contract if the insured was within her rights to not assign her recovery. There is no breach of contract where Farmers could not legitimately ask her to assign her rights against its own insured, the Jordans. Farmers might have been able to ask Horner to assign her “rights of recovery” to it prior to the actual recovery but only IF it had the right to subrogation against the third party at fault—the Jordans. But it didn’t because of the anti-subrogation rule. And it had no right to require Horner to assign any of her recovery to it. Farmers wants this court to relieve it of its obligations under the terms of the insurance policy AND relieve it of the operation of the anti-subrogation rule. How could Farmers have collected

any subrogation rights against the Jordans? If the answer is “It could not have”, then by what legal doctrine can they force Horner to assign to Farmers such non-existent rights of recovery? There is none.

III. CONCLUSION

For all the foregoing reasons, the decision of the trial court misapplied the law by ignoring the clear language of the policy and failing to hold Farmers to account for that language. On de novo review, this court can uphold that policy language, force Farmers to abide by it, and order that summary judgment be entered for Horner on her claim that Farmers had no right to any portion of her settlement with the Jordans. The court should reverse and order judgment for Plaintiff Anne Horner.

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CERTIFICATE OF SERVICE

I, Ronnette Peters Megrey, declare as follows: on March 10, 2010, I caused to be served upon Respondents, at the address stated below, via the method of service indicated, a true and correct copy of the following document:

AMENDED APPELLANT'S REPLY BRIEF

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

DATED at Seattle, Washington this 10th day of March, 2010.



Ronnette Peters Megrey