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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ALLSTATE INDEMNITY COMPANY,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

DONNA COLLINS,

Real Party in Interest.

D049446

(San Diego County
Super. Ct. No. GIC857011)

PROCEEDINGS in mandate after the superior court denied petitioner's demurrer to first amended complaint. Kevin A. Enright, Judge. Petition granted.

Allstate Indemnity Company (Allstate Indemnity) petitions for a writ of mandate challenging the trial court's denial of its demurrer to the first amended complaint filed by Donna Collins. The legal issue in this case is identical to the issue in *Allstate Insurance*

Company v. Superior Court (Delanzo) (2007) __ Cal.App.4th ___, filed simultaneously with this opinion. Based on *Delanzo*, we conclude the court erred in overruling Allstate Indemnity's demurrer. We thus grant Allstate Indemnity's petition for writ of mandate, and order the court to vacate its order overruling Allstate Indemnity's demurrer and enter a new order sustaining the demurrer.

FACTUAL AND PROCEDURAL BACKGROUND

Collins filed a class action complaint against Allstate Indemnity, her automobile insurer. As amended, the complaint alleged that Collins's automobile policy with Allstate Indemnity included first party, no-fault medical payments insurance coverage (med-pay coverage).

On October 28, 2003, Collins allegedly suffered injuries resulting from an automobile accident with a third party. Under the policy's med-pay coverage provisions, Allstate Indemnity paid \$2,000 to Collins. Collins then settled her claim against the third party tortfeasor for \$10,000, and received the settlement payment in full. Collins allegedly incurred attorney fees of \$4,000 and costs of \$937.75 (for a total of \$4,937.75) to obtain this settlement.

Allstate Indemnity then requested that Collins repay the \$2,000 under Allstate Indemnity's reimbursement provision, which states: "Our Right to Recover Payment [¶] When we pay any person under this coverage: [¶] 1. we are entitled to reimbursement for amounts paid by us from the proceeds of any settlement or judgment the person recovers from a legally liable party or the party's insurer. [¶] 2. all rights of recovery

against any legally liable party or the party's insurer must be maintained and preserved for our benefit." (Boldface omitted.)

In response, Collins paid Allstate Indemnity \$890, which Allstate Indemnity agreed was in full satisfaction of its claim. Allstate Indemnity agreed to the reduction based on the "common fund" rule that an insurer is required to deduct from its reimbursement a pro rata portion of the insured's attorney fees incurred to recover covered losses against a third party tortfeasor when the insurer had knowledge of, but did not participate in, the litigation. (See *Lee v. State Farm Mut. Auto. Ins. Co.* (1976) 57 Cal.App.3d 458, 466-469.)

Based on these facts, Collins alleged four causes of action: (1) violation of Business and Professions Code section 17200, (2) conversion, (3) unjust enrichment, and (4) declaratory relief. The legal basis for each cause of action was Collins's assertion that Allstate Indemnity's claim for reimbursement was improper and unlawful because Collins was not first "made whole" by the third party settlement (\$10,000) plus the amount received from Allstate Indemnity (\$2,000), when taking into account the attorney fees and costs incurred to obtain the settlement (\$4,937.75). Collins did not dispute that the third party settlement (\$10,000) reflected full compensation for her injuries, but alleged she was not made whole by this amount because her total gross recovery of \$12,000 (\$10,000 from the settlement plus \$2,000 from Allstate Indemnity), *minus* the costs and attorney fees (\$4,937.75), was less than \$10,000.

Collins sought to represent the class of "all California insureds, past and present, of [Allstate Indemnity] who: 1) were not made whole after deducting attorney's fees and

costs from the money they received from the resolution of their claims against third party tortfeasors; 2) the amount paid by [Allstate Indemnity] to or on behalf of such insureds pursuant to the medical payments coverage contained in their personal automobile insurance policies was less than the amount paid by such insureds for such attorney's fees and costs; and 3) such insureds paid [Allstate Indemnity] money in response to its demand for reimbursement of payments it paid under such medical payments coverage."

Allstate Indemnity demurred to the complaint, arguing that Collins's claims did not state a cause of action under any legal theory because, under California law, the made-whole doctrine does not include a consideration of attorney fees and costs in determining whether a med-pay insured was made whole. Allstate Indemnity argued that Collins's view of the made-whole rule as including a consideration of these expenses was improper because it conflicted with the settled "equitable apportionment" or "common fund" rule that an insurer's reimbursement is subject to the requirement that it pay a proportionate amount of the insured's attorney fees incurred in obtaining the recovery. The trial court overruled the demurrer.

Allstate Indemnity filed a petition for writ of mandate, challenging the court's order. The parties asserted the same arguments as those asserted in the *Delanzo* case. Collins was represented by the same counsel as was the insured in the *Delanzo* case and Allstate Indemnity was represented by the same counsel as was the insurer in the *Delanzo* case. We issued an order to show cause, and issued an order stating Allstate Indemnity's writ petition would be considered with the *Delanzo* case, as well as with three other writ petitions raising the identical legal issue.

DISCUSSION

In *Delanzo, supra*, __ Cal.App.4th __, this court held that, in applying the made-whole doctrine in the context of med-pay coverage, the insured's attorney fees and costs incurred to obtain a recovery from a third party are not deducted from the insured's total recovery amount for purposes of determining whether the insured was made whole for his or her losses. Each of Collins's claims are predicated on Collins's assertion that she was not made whole because she was required to bear her attorney fees and costs in settling with the third party. Under *Delanzo*, Collins's claims do not state a valid cause of action under California law. We thus grant Allstate Indemnity's petition for writ of mandate, and order the court to vacate its order overruling defendant's demurrer and enter a new order sustaining the demurrer.¹

¹ As in *Delanzo*, we deny Collins's request that we take judicial notice of Allstate Indemnity's insurance filings. Because we do not consider Allstate Indemnity's argument that including attorney fees in the made-whole calculation will result in higher premium rates for med-pay coverage, the judicial notice materials are not relevant to our determination in this case.

DISPOSITION

Petition for writ of mandate granted. This court issues a writ of mandate directing the superior court to vacate its order overruling Allstate Indemnity's demurrer and enter a new order sustaining the demurrer. The parties to bear their own costs in the writ proceeding. The stay issued on November 3, 2006 is vacated.

HALLER, J.

I CONCUR:

McDONALD, J.

NARES, Acting P.J., dissenting:

For the reasons expressed in my dissent in *Allstate Insurance Company v. Superior Court (Delanzo)* (2007) __ Cal.App.4th ____, I respectfully dissent from the majority's opinion.

NARES, Acting P. J.