

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

21ST CENTURY INSURANCE
COMPANY,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

SILVIA QUINTANA,

Real Party in Interest.

D049430

(San Diego County
Super. Ct. No. GIC857010)

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

21st Century Insurance Company (21st Century) petitions for a writ of mandate challenging the trial court's denial of its demurrer to the first amended complaint filed by Sylvia Quintana. 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 21st Century's demurrer. We thus grant 21st Century's petition for writ of mandate, and order the court to vacate its order overruling 21st Century's demurrer and enter a new order sustaining the demurrer.

FACTUAL AND PROCEDURAL BACKGROUND

Quintana filed a class action complaint against 21st Century, her former automobile insurer. As amended, the complaint alleged that Quintana's former automobile policy with 21st Century included first party, no-fault medical payments insurance coverage (med-pay coverage).

On December 8, 2003, Quintana allegedly suffered injuries resulting from an automobile accident with a third party. Under the policy's med-pay coverage provisions, 21st Century paid \$1,000 to Quintana. Quintana then settled her claim against the third party tortfeasor for \$6,000, and received the settlement payment in full. Quintana allegedly incurred attorney fees of \$2,000 and costs of \$106.50 (for a total of \$2,106.50) to obtain this settlement.

21st Century then requested that Quintana repay the \$1,000 under 21st Century's reimbursement provision, which states: "REIMBURSEMENT TO US - PART II [¶] If we make any payment under this Part and the person insured or for whom the payment is made recovers damages from another person or organization, the person insured shall: [¶] 1. hold in trust for us the proceeds of the recovery; and [¶] 2. reimburse us to the extent of our payment." (Boldface omitted.)

In response, Quintana paid 21st Century \$600, which 21st Century agreed was in full satisfaction of its claim. 21st Century 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, Quintana 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 Quintana's assertion that 21st Century's claim for reimbursement was improper and unlawful because Quintana was not first "made whole" by the third party settlement (\$6,000) plus the amount received from 21st Century (\$1,000), when taking into account the attorney fees and costs incurred to obtain the settlement (\$2,106.50). Quintana did not dispute that the third party settlement (\$6,000) reflected full compensation for her injuries, but alleged she was not made whole by this amount because her total gross recovery of \$7,000 (\$6,000 from the settlement plus \$1,000 from 21st Century), *minus* the costs and attorney fees (\$2,106.50), was less than \$6,000.

Quintana sought to represent the class of "all California insureds, past and present, of [21st Century] 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 [21st Century] 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 [21st Century] money in response to its demand for reimbursement of payments it paid under such medical payments coverage."

21st Century demurred to the complaint, arguing that Quintana'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. 21st Century argued that Quintana'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.

21st Century 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. Quintana was represented by the same counsel as was the insured in the *Delanzo* case and 21st Century 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 21st Century'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 Quintana's claims are predicated on Quintana'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*, Quintana's claims do not state a valid cause of action under California law. We thus grant 21st Century'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 Quintana's request that we take judicial notice of 21st Century's insurance filings. Because we do not consider 21st Century'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 21st Century'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.