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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WAWANESA GENERAL INSURANCE
COMPANY,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

GHAFOUR AIMAQ,

Real Party in Interest.

D049675

(San Diego County
Super. Ct. No. GIC857012)

PROCEEDINGS in mandate after the superior court denied petitioner's demurrer to first amended complaint. Yuri R. Hofmann, Judge. Petition granted.

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

FACTUAL AND PROCEDURAL BACKGROUND

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

On December 29, 2002, Aimaq allegedly suffered injuries resulting from an automobile accident with a third party. Under the policy's med-pay coverage provisions, Wawanesa paid \$2,000 to Aimaq. Aimaq settled his claim against the third party tortfeasor for \$6,400, and received the settlement payment in full. Aimaq allegedly incurred attorney fees of \$2,560 and costs of \$500.25 (for a total of \$3,060.25) to obtain this settlement.

Wawanesa then requested that Aimaq repay the \$2,000 under Wawanesa's reimbursement provision, which states: "OUR RIGHT TO RECOVER PAYMENT. [¶] . . . [¶] B. If we make a payment under this policy and the person to or for whom this payment is made recovers damages from another, that person shall: [¶] 1. Hold in trust for us the proceeds of the recovery; and [¶] 2. Reimburse us to the extent of our payment." (Boldface and underscoring omitted.)

In response, Aimaq paid Wawanesa \$1,040, which Wawanesa agreed was in full satisfaction of its claim. Wawanesa 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, Aimaq 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 Aimaq's assertion that Wawanesa's claim for reimbursement was improper and unlawful because Aimaq was not first "made whole" by the third party settlement (\$6,400) plus the amount received from Wawanesa (\$2,000), when taking into account the attorney fees and costs incurred to obtain the settlement (\$3,060.25). Aimaq did not dispute that the third party settlement (\$6,400) constituted full compensation for his injuries, but alleged he was not made whole by this amount because his total gross recovery of \$8,400 (\$ 6,400 from the settlement plus \$2,000 from Wawanesa), *minus* the costs and attorney fees (\$3,060.25), was less than \$6,400.

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

Wawanesa demurred to the complaint, arguing that Aimaq'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 incurred by the insured in determining whether a med-pay insured was made whole. Wawanesa argued that Aimaq's view of the made-whole rule as including a consideration of these expenses was improper because it conflicted with the "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.

Wawanesa 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. Aimaq was represented by the same counsel as was the insured in the *Delanzo* case. We issued an order to show cause, and issued an order stating that we would consider the writ petition 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 Aimaq's claims are predicated on Aimaq's assertion that he was not made whole because he was required to bear his attorney fees and costs in settling with the third party. Under *Delanzo*, Aimaq's claims do not state a valid cause of action under California law. We thus grant Wawanesa'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

DISPOSITION

Petition for writ of mandate granted. This court issues a writ of mandate directing the superior court to vacate its order overruling Wawanesa'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.

¹ As in *Delanzo*, we deny Aimaq's request that we take judicial notice of Wawanesa's insurance filings. Because we do not consider Wawanesa'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.

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.