IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRK WELDAY, AN INDIVIDUAL,
Appellant,
vs.
SUMMERLIN LIFE & HEALTH INSURANCE COMPANY, A NEVADA CORPORATION,
Respondent.

No. 52557

FILED

FEB 03 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment in an insurance subrogation action. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Kirk Welday was injured in a motorcycle accident while maintaining a health insurance policy with respondent Summerlin Life & Health Insurance Company (Summerlin). The policy contains a subrogation and reimbursement clause, which provides that Summerlin "will be subrogated to all rights of recovery [that Welday] has against any person or organization" and is "the first priority lien holder[ ] from any recovery, settlement or judgment." Summerlin paid for most of Welday's medical expenses. Welday received an additional recovery from the third-party tortfeasor's insurance company and his own underinsured motorist policy. Based on the subrogation provision, Summerlin sought reimbursement of the sum it paid for Welday's injuries. Welday filed a complaint for declaratory relief and a motion for summary judgment, asserting that because his total loss exceeded his total recovery, the make-whole doctrine nullified Summerlin's right to reimbursement. Summerlin opposed Welday's motion and filed a countermotion for summary

judgment, arguing that while Canfora v. Coast Hotels & Casinos, Inc., 121 Nev. 771, 121 P.3d 599 (2005), recognizes the make-whole doctrine, it also establishes that the doctrine may be overridden by express contractual language. Ultimately, citing Canfora, the district court determined that the make-whole doctrine is a default rule that can be eliminated by express contractual provisions. It found that Summerlin's insurance policy expressly excluded application of the make-whole doctrine. Accordingly, the district court determined that Summerlin was entitled to reimbursement and therefore granted Summerlin's countermotion for summary judgment. Welday now appeals.[1]

The primary issue on appeal is whether the district court erred in interpreting Summerlin's insurance policy as excluding application of the make-whole doctrine. We conclude that it did not, and we therefore affirm the order of the district court. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

DISCUSSION

The district court properly construed Summerlin's insurance policy as excluding application of the make-whole doctrine

Welday argues that the district court erred in interpreting the insurance policy as explicitly excluding the make-whole doctrine. He

[1]We note that the Nevada Justice Association submitted an amicus curiae brief in support of Welday and that the National Association of Subrogation Professionals submitted an amicus curiae brief in support of Summerlin. We have fully considered the arguments raised and briefed by the amici curiae for purposes of this appeal.

contends that the subrogation clause is ambiguous and not sufficiently express as to exclude the rule from application.[2]

Standard of review

We review "a district court's grant of summary judgment de novo." Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when the pleadings and other evidence establish that "no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" Id. (alteration in original) (quoting NRCP 56(c)). Issues of contractual construction present questions of law and are suitable for determination by summary judgment. Kassbaum v. Steppenwolf Productions, Inc., 236 F.3d 487, 491 (9th Cir. 2000).

Summerlin's insurance policy is unambiguous and abrogated the make-whole doctrine

In general, when a contract is clear on its face, it "will be construed from the written language and enforced as written." Ellison v. C.S.A.A., 106 Nev. 601, 603, 797 P.2d 975, 977 (1990). "A contract is ambiguous, [however,] when it is subject to more than one reasonable

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[2]Welday also asserts that (1) in light of Maxwell v. Allstate Ins. Co., 102 Nev. 502, 728 P.2d 812 (1986), Summerlin's right of subrogation and reimbursement is void as violative of public policy; (2) Summerlin waived its right to subrogation because it did not assist him in the recovery of a settlement; and (3) the recovery from his underinsured motorist carrier is exempt from his obligation to reimburse Summerlin. We decline to consider these arguments, however, because they were not asserted below and are asserted for the first time on appeal. Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

interpretation." Anvui, LLC v. G.L. Dragon, LLC, 123 Nev. 212, 215, 163 P.3d 405, 407 (2007). We give contractual terms their plain and ordinary meaning. Traffic Control Servs. v. United Rentals, 120 Nev. 168, 174, 87 P.3d 1054, 1058 (2004).

In Canfora, we discussed the make-whole doctrine, describing it as

> a general equitable principle of insurance law that prevents an insurance company from enforcing its subrogation rights before the insured has been fully reimbursed for their losses. Under the doctrine, an insured who has settled with a third-party tortfeasor is liable to the insurer-subrogee only for the excess received over the total amount of his loss. . . . The make-whole doctrine limits a plan's subrogation rights where an insured has not received compensation for his total loss, i.e., has not been made whole.

121 Nev. at 777-78, 121 P.3d at 604 (internal quotations and citations omitted). We further stated that "[u]nless it is explicitly excluded, the make-whole doctrine operates as a default rule that is read into insurance contracts."[3] Id. at 777, 121 P.3d at 604.

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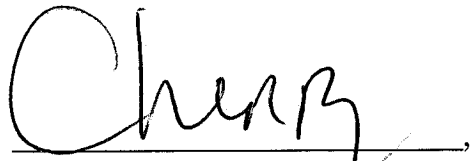
[3]We recognize that in Canfora we "reserve[ed] ruling on the application of the make-whole doctrine in those cases where the recovery amount is inadequate to fully compensate the insured for their losses." Id. at 778 n.21, 121 P.3d at 604 n.21. We decline at this time, however, to revisit our statements in Canfora—specifically, that the make-whole doctrine is a default rule that may be overridden by express contractual provisions.

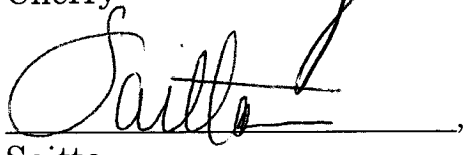
Summerlin's insurance policy states that Summerlin "will be subrogated to all rights of recovery [that Welday] has against any person or organization" and is "the first priority lien holder[ ] from any recovery, settlement or judgment." These provisions are clear and unambiguous. The policy clearly provides that Summerlin's right to subrogation and reimbursement extends to any recovery or settlement and, crucially, that Summerlin has first priority to the recovery or settlement. Because the insurance policy provides Summerlin with the first priority to any recovery or settlement, it expressly abrogates the make-whole doctrine. See, e.g., Moore v. Capitalcare, Inc., 461 F.3d 1, 10 & n.12 (D.C. Cir. 2006) (holding "any rights of recovery" sufficient to supersede make-whole doctrine and noting that a plan's silence concerning partial or total recovery may signify nothing more than that the insurer is entitled to reimbursement regardless of the amount of recovery); Barnes v. Independent Auto. Dealers of California, 64 F.3d 1389, 1395 (9th Cir. 1995) (an ERISA plan overrides the make-whole doctrine if it includes language "specifically allow[ing] the Plan the right of first reimbursement out of any recovery [the participant] was able to obtain"); Fields v. Farmers Ins. Co., Inc., 18 F.3d 831, 835-36 (10th Cir. 1994) (contract language providing that insurer "shall be subrogated to any recovery that plaintiff receives from the negligent third party or its insurer" is sufficient to abrogate the make-whole doctrine). Because Summerlin's insurance policy is unambiguous and expressly overrides the make-whole doctrine,

we conclude that the district court properly granted summary judgment.[4] We therefore

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry



_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Stephen E. Haberfeld, Settlement Judge
Prince & Keating, LLP
Pisanelli Bice, PLLC
Peter Chase Neumann
Gibson & Sharps, PSC
Eighth District Court Clerk

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[4]Because we conclude that the policy is unambiguous and abrogates the make-whole doctrine, we need not reach any issue relating to the lien and agreement.