Wrongful Termination; Retaliation

Plaintiff's tortious termination claim against juvenile social services agency is not barred by California Child Day Care Act.

Boston v Penny Lane Ctrs., Inc. (2009) 170 CA4th 936, 88 CR3d 707

LaToya Boston was terminated from her job as a therapist for Penny Lane, a social services agency that conducts group therapy for juveniles, many of whom have criminal histories. Boston had complained several times to her supervisor that Penny Lane's increasing client load and decreased staff created unsafe conditions. After she was injured when a fight broke out in one of her group sessions, Boston continued to insist that safety concerns required more staff, and was terminated for poor performance. She sued Penny Lane, alleging, among other things, tortious termination in violation of public policy. The jury found in her favor. Defendant appealed, arguing that plaintiff failed to exhaust administrative remedies because her exclusive remedy was under the California Child Day Care Act (Health & S C §§1596.70–1596.895), which governs licensing and staffing of child care facilities.

The Second District Court of Appeal affirmed. Sections 1596.881–1596.882 of the Act prohibit employer retaliation against an employee who complains about employer violations, and require an employee claiming retaliation to follow certain administrative procedures. Assuming for the purposes of discussion that the Act applies to defendant, it nevertheless does not apply here because plaintiff did not bring her claim under the Act or claim she was retaliated against for reporting violations of the Act, such as licensing violations or staff-child ratio violations. Rather, her complaints were aimed more broadly at the unsafe workplace environment. Plaintiff made out a valid case for tortious termination in violation of fundamental public policy and "tethered her claim" to the fundamental public policy embodied in Lab C §6310, which prohibits retaliation against an employee who complains about occupational safety or health. See *Green v Ralee Eng'g Co.* (1998) 19 C4th 66, 71, 78 CR2d 16. Thus, her claim is not barred by Health & S C §§1596.881–1596.882.

CROSS-REFERENCE: For a summary of the court's decision concerning testimony by plaintiff's expert witnesses, see p 55.

Insurance Litigation

Bad Faith

Trial court properly refused to give jury instruction on "genuine dispute"; instruction on issue of reasonableness of insurer's conduct was sufficient.

McCoy v Progressive W. Ins. Co. (2009) 171 CA4th 785, 90 CR3d 74

The insured sued the insurer for bad faith after it denied his vehicle theft claim. At trial, the insured denied having anything to do with the theft of his vehicle. On the other side, an investigator and a representative for the insurer testified that they believed that the insured was involved in his car's theft. Each side presented evidence on whether the insurer acted reasonably and consistent with insurance industry practice standards in taking so long to deny the claim, far beyond the required 80 days when fraud is suspected. The jury found in the insured's favor. The insurer appealed.

The Second District Court of Appeal affirmed. The trial court properly refused to give the insurer's requested "genuine dispute" instructions, finding that the genuine dispute doctrine is subsumed within the concept of what is reasonable and unreasonable. See *Chateau Chamberay Homeowners Ass'n v Associated Int'l Ins. Co.* (2001) 90 CA4th 335, 108 CR2d 776. A genuine dispute exists only when the insurer's position is maintained in good faith and on reasonable grounds. The trial court properly instructed the jury on the issue of reasonableness; no further instruction was necessary.

COMMENT: Although Sue Popik continues to deny it, I have written that the death knell was administered to the insurers' beloved "genuine issue" doctrine (also known as the genuine dispute doctrine) in *Wilson v 21st Century Ins. Co.* (2007) 42 C4th 713, 68 CR3d 746.

In *McCoy,* the court opened the grave, dug up the coffin, slammed another nail in it, and reburied it. As the court said (171 CA4th at 794), "[The insurer] has cited no applicable authority, nor have we found any, which would compel [a genuine issue jury] instruction." Amen.

The *McCoy* court, quoting from *Wilson,* explains that the so-called "genuine issue" doctrine is nothing more than shorthand for circumstances in which a court may hold, as a matter of law, that there is insufficient evidence to support a claim that the insurer acted unreasonably. However, this does not suggest in any way that a jury instruction referencing a "genuine issue" concept is permissible. As *McCoy* points out, the CACI bad faith instructions provided all the necessary instructions.—*Arnold R. Levinson*

COMMENT: It's a little hard to know what to make of *McCoy.* Mr. Levinson interprets the case as (1) confirming that the "genuine dispute" doctrine is dead and buried, and (2) holding that the doctrine is necessarily subsumed within the general rubric of "bad faith," thus precluding an instruction based on the doctrine. I know he's wrong about the first and suspect he's wrong about the second as well.

As to the alleged demise of the genuine dispute doctrine, one need look no further than the *McCoy* court's discussion of the issue to realize that the doctrine is alive and kicking. Were that not so, the court need not have discussed the doctrine at all. Instead, it could have affirmed the trial court's refusal to instruct on the issue on the ground that the supreme court annihilated the doctrine in *Wilson*. Instead, the *McCoy* court devotes several pages to explaining why, under the facts before it, the trial court did not err in refusing the carrier's requested instructions based on the doctrine.

The opinion is not so clear with respect to whether an instruction based on the genuine dispute doctrine is ever appropriate. I admit it is possible to read the opinion as concluding that the doctrine applies only in the context of summary judgment motions and that, as a consequence, it is not the stuff of which jury instructions are made. That said, however, the court does not explicitly reject the propriety of such an instruction in all cases; rather, having observed that the governing cases did not involve jury trials, the court concludes that these authorities did not "compel" such an instruction. However, given that a court cannot reverse on the basis of instruction error unless the appellant can show actual prejudice resulting from the failure to give the requested instruction (among other things), the court's failure to do so is hardly tantamount to a hard-and-fast ruling that a genuine dispute instruction is *improper*. Thus, although I personally believe the genuine dispute doctrine is most effectively used as a means of obtaining a pretrial adjudication that the carrier did not act in bad faith—thus avoiding a trial altogether—I do not think *McCoy* forecloses the possibility of a genuine dispute instruction in all cases. In other words, although the CACI instructions may provide the general framework by which a jury can determine what constitutes bad faith, the existence of those instructions should not preclude a more specific instruction based on the genuine dispute doctrine when the facts warrant it.—*Susan M. Popik*

Reasonable trier of fact could find that insurer breached its duty of good faith and fair dealing when it failed to investigate whether it had issued any other policy that might cover her claim.

Safeco Ins. Co. v Parks (2009) 170 CA4th 992, 88 CR3d 730

Parks was struck by a passing motorist and seriously injured while walking on the side of the freeway. Parks was on the side of the freeway because his then girlfriend, 16-year-old Michelle Miller, and her friends forced him out of their car because he was acting violently. Parks sued Miller, who tendered defense to the insurer as an additional insured under the homeowners policy it had issued to Miller's mother's boyfriend. At the time, Miller lived with her father and grandmother in her grandmother's rented condominium, but sometimes stayed with her mother at her mother's boyfriend's house. The insurer concluded Miller was not an additional insured under the mother's boyfriend's policy and declined coverage. Miller settled with Parks by assigning to him any claims she might have against the insurer. Parks then sued the insurer for bad faith. After testifying at trial, Miller's father discovered that the insurer had issued Miller's grandmother a renter's insurance policy on her condominium. Parks made a demand under the grandmother's policy, which the insurer promptly paid. Parks then amended his complaint to allege bad faith in refusing to defend or indemnify under the grandmother's policy. The trial court denied the insurer's motions for summary adjudication and the jury found for Parks. The insurer appealed.

The Second District Court of Appeal affirmed. The duty of good faith and fair dealing implied in every insurance contract includes the insurer's duty to investigate claims submitted by its insured. An insured's failure to comply with a policy's notice or claims provisions will not excuse the insurer's obligations under the policy unless the insurer proves it was substantially prejudiced by the late notice. *Clemmer v Hartford Ins. Co.* (1978) 22 C3d 865, 881, 151 CR 285. The trial court properly denied summary adjudication because it concluded that the facts were in dispute concerning the adequacy of the insurer's claims investigation. There was evidence from which a reasonable trier of fact could find that the insurer breached its duties under the grandmother's policy when it failed, in response to Miller's claim under her mother's boyfriend's policy, to investigate whether it had issued any other policy that might cover her claim. It was unreasonable for the insurer not to search for other policies it had issued after concluding that there was no coverage under the mother's boyfriend's policy. The insurer did not establish that it was prejudiced by the delayed notice.

COMMENT: This is yet another case in which an insurer is bound by a judgment in an action in which it refused to defend. As in *Executive Risk Indem., Inc. v Jones* (2009) 171 CA4th 319, 89 CR3d 747, discussed on p 65, an insurer does not get two bites at the apple. It cannot wrongfully deny a duty to defend and then, when a judgment is entered against its insured, claim that it is entitled to relitigate the case. Although the facts here are somewhat unusual in that the insured was unaware of the policy that provided a defense, the insurer should have known about it and so advised the insured.

In finding that the insurer was obligated to investigate the possibility of a second policy, the court said that (170 CA4th at 1007):

> [a]n insurer's duty to conduct a reasonable investigation is not narrowly confined to the facts or theories of coverage relied on by its insured . . . [T]he insurer's duty to investigate may extend beyond the facts and coverage theories advanced in an insured's claim.

The insurer knew that there was a possibility of other applicable coverage; all it needed to do was check its records of the parties involved and the other coverage would have popped up.

It is common for insurers whose insureds have been sued to look for other applicable policies, but the reason for doing this is often the desire to secure other coverage so as to reduce its own exposure. Here, the court finds that an insurer has a similar duty to protect its insured. It may not simply look at the one policy under which a claim is tendered and deny coverage because the claim has technically not been submitted under another policy. It must do a reasonable investigation to determine whether it has a duty to defend the insured. That duty includes