McCoy v Progressive West Insurance Co.

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Cedric McCoy s Ford Mustang was stolen while he was in Las Vegas in March of 2004. It was later recovered, burned and damaged, and of essentially no value. He reported the loss to his insurer, Progressive. A lengthy investigation culminated in denial of his claim. A suit for breach of the insurance contract and a violation of the covenant of good faith and fair dealing followed.

At trial, plaintiff denied calling his then-wife to report the theft, and denied telling his brother before the event that he wanted to get rid of the car. The special investigation unit representative from the defendant testified he believed plaintiff was involved in the theft, but admitted by 2006, *he had no specific proof*. He spoke to plaintiff s wife and she said her husband had talked about disposing of the car for some time. Plaintiff s brother confirmed plaintiff said he wanted to buy a more expensive car. The investigator knew plaintiff had divorced his wife in July 2004, and he had a strained relationship with his brother. She later recanted her story.

The investigator testified he was required to determine a claim was fraudulent before reporting it to the Department of Insurance or law enforcement. He admitted making reports to both before the fraud determination was made by the defendant in March 2005. The defendant s fire and theft representative testified *he suspected fraud* because plaintiff and his friend had traveled to Las Vegas in separate cars. He confirmed the theft fell within the policy coverage and agreed Progressive had a duty to affirm or deny a coverage claim within 80 days, even if fraud was suspected.

Plaintiff s expert testified (1) the defendant s claim handling was below industry standards, that (2) the defendant should have paid the claim, that (3) the wife and brother were *unreliable* witnesses and the company disregarded evidence favorable to plaintiff. The expert also noted (4) the defendant took much longer than 80 days to decide, (5) failed to comply with Department of Insurance regulations, and (6) failed to follow its own guidelines. The company also violated insurance industry practice by damaging the car further during the investigation so that any subsequent investigation would be hampered.

The defendant s expert testified the claim was handled reasonably and consistent with industry standards. The defendant s Branch Manager testified coverage would be denied for a fraudulent claim and it was his decision to deny this claim. He relied on the statements of the ex-wife and brother, and the fact two cars were driven to Las Vegas, testifying, *...this whole thing was planned. It was a setup*.

The jury returned a special verdict in favor of the plaintiff, and in a second phase, found punitive damages against the defendant. A motion for new trial concerning the exclusion of certain evidence and the genuine dispute rule was denied and this appeal followed.

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evidence Code section 352) **Prejudice** for purposes of section 352 means evidence that tends to evoke an emotional bias against the defendant. (*People v Crow* (2003) 31 Cal. 4th 822) While **collateral matters** are admissible for impeachment purposes, the collateral character of the evidence reduces its probative value and increases the possibility that it may prejudice or confuse the jury. The exclusion of impeachment evidence amounts to abuse of discretion only when the court acted arbitrarily, capriciously or in a patently absurd manner resulting in a manifest miscarriage of justice. (*People v Rodrigues* (1994) 8 Cal. 4th 1060)

On appeal, the defendant contended evidence of a 2003 automobile accident involving plaintiff (offered to show he had submitted an earlier fraudulent claim) should not have been excluded. That claim was settled by Progressive for $5,000. Defendant contended that since plaintiff initially denied any previous accident claims, it was relevant on the issue of credibility. The Second DCA held that the evidence was clearly collateral to the theft claim. Admission of evidence of marginal impeachment value would entail undue consumption of time and might have misled the jurors as to the actual issues to be decided. (See, *Kopfinger v Grand Central Public Market* (1964) 60 Cal.2d 852)

The defendant also claimed evidence of domestic violence by plaintiff against his ex-wife should not have been excluded as it was relevant to explain why she recanted. Evidence of domestic violence is irrelevant to any of the substantive issues in this case. The risk of creating confusion and misleading the jury about the issues to be decided far outweighed the minimal impeachment value of evidence that plaintiff had physically abused his wife. Additionally, the court was entitled to exclude evidence of domestic violence as likely to provoke emotional bias against plaintiff and create the danger that the jury might prejudge the issues based on extraneous factors. (See *People v Minifie* (1996) 13 Cal.4th 1055)

Next, the defendant complained it was error to exclude tapes, transcripts and summaries of all recorded statements taken during the investigation. The evidence was offered in its entirety without regard to hearsay and other issues. These items were not a business records exception to the hearsay rule. Nor were they admissible on the issue of reasonableness, rather than for the truth of the matter stated. Defendant did not establish the necessary foundation for admission of these items. (Evidence Code section 1271) The mere reliance of its investigators in resolving the coverage issue does not establish the foundation, and they were excluded under section 352.

The defendant carrier also contended exclusion of its entire claim file was improper. It argued for admission as a business record. The trial court did admit various parts of the file, but refused admission of the entire 337 page claim file based on Evidence Code section 352. The Court held the burden is on the insurer to show the relevance of each item and that its probative value outweighs any prejudice that might flow from its admission.

Progressive claimed on appeal there was no evidence of bad faith on its part because under the genuine dispute doctrine an insurer s denial of a claim is not unreasonable even if the court concludes that policy benefits are due. Where there is a genuine issue as to the insurer s liability under the policy for the claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute. (*Jordan v Allstate Ins. Co.* (2007)148 Cal. App.4th 1062)

The Justices commented that as the California Supreme Court has explained, in the insurance bad faith context, a dispute is not legitimate unless it is founded on a basis that is reasonable under all the circumstances. The Supreme Court further noted it found potentially misleading the statements in some decisions that under the genuine dispute rule bad faith cannot be established where the insurer s withholding of benefits is reasonable or is based on a legitimate dispute as to the insurer s liability. (*Wilson v 21st Century Ins. Co.* (2007) 42 Cal. 4th 713)

The genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate the insured s claim. A genuine dispute exists only where the insurer s position is maintained in good faith and on reasonable grounds. Here, the jury found Progressive breached the implied covenant of good faith and fair dealing and this finding is supported by the evidence.

Finally, the defendant asserts that punitive damages are not available in a breach of contract action. The Second DCA explained that punitive damages are proper in an insurance bad faith action. Where benefits are unreasonably denied, the insurer is exposed to the full panoply of tort remedies, including punitive damages. (*Jordan v Allstate Ins. Co.*(2007)148 Cal. App.4th 1062)

The judgment is affirmed. Plaintiff is to recover the costs of appeal.

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