

**INSURER’S FILING DECLARATORY
RELIEF ACTION RESULTS IN MALICIOUS
PROSECUTION FINDING**

In the case of *Hillenbrand, Inc. vs. Insurance Company of North America* (2002) 104 Cal.App.4th 784, the Appellate Court for the Third District California upheld a jury’s finding that an insurer acted with malice in filing and pursuing a declaratory relief action and cross-action for reimbursement of defense costs. The court noted that “declaratory relief actions are disfavored because of the practical difficulties they create for an insured who must defend against two actions simultaneously.”

The case arose out of the construction of a condominium project in which Hillenbrand did the framing, sub-floors, decking, and installed siding on various condominium units. The homeowner’s association brought suit against the general contractor for negligent construction, and the general contractor demanded that Hillenbrand defend and indemnify it pursuant to the sub-contract. Allegations against Hillenbrand were that it failed to perform the work on the condominium project in a workman-like manner and furnished materials in a negligent manner.

Aetna Insurance Group agreed to defend Hillenbrand under a full reservation of rights, citing a faulty workmanship exclusion in its CGL policy. INA handled the investigation and processing of the claim, as well as the prosecution of the lawsuits against Hillenbrand. It was decided that although there may have been a duty to defend at least a portion of the claims, the declaratory relief action would resolve the issues as to damages for which the carrier was responsible.

Prior to any settlement conference in the third party action, the carrier filed a motion for summary judgment in the declaratory relief action. The motion was ultimately denied. The underlying action was settled, with the insurance carrier paying one-third of Hillenbrand’s settlement, and giving up its right to recover the amount from Hillenbrand. Nevertheless, the carrier continued with

the declaratory relief action. Hillenbrand thereafter obtained summary judgment against the insurance company in the declaratory relief action, the court stating that INA/Aetna did owe a duty to defend in the underlying action and could not recover its defense costs and fees.

Thereafter, Hillenbrand filed an action for malicious prosecution as both the complaint for declaratory relief and the cross-complaint to recover defense costs had been terminated in his favor. A jury trial awarded Hillenbrand \$1,445,000 in compensatory damages and \$14,000,000 in punitive damages, the punitive damages award later being reduced by the trial court to \$3,000,000.

In upholding the malicious prosecution verdict against the insurer, the court noted that an insurer bringing a declaratory relief action during the time in which an underlying claim is being litigated, causes harm to the insurer by compelling the insurer to defend against a claim involving psychological pressures while at the same time having additional stress of attempting to resist a suit commenced out of “spite or ill will, magnified by slanderous

Continued on page 3

IN THIS ISSUE

**EMPLOYEE’S AWARD FOR
PSYCHIATRIC INJURY CAUSED BY
EMPLOYER’S LAWFUL INVESTIGATION
OF RACIAL DISCRIMINATION
ALLEGATIONS IS NOT SUPPORTED BY
SUBSTANTIAL EVIDENCE 2**

NEW AT WESIERSKI & ZUREK 3

MEET STEVE ZIEMANN 4

EMPLOYEE'S AWARD FOR PSYCHIATRIC INJURY CAUSED BY EMPLOYER'S LAWFUL INVESTIGATION OF RACIAL DISCRIMINATION ALLEGATIONS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

In the recent case of *Northrop Grumman Corp., et al. v. Workers' Compensation Appeals Board and Robert C. Graves*, the court held that there was insufficient evidence to support an employee's award for psychiatric injury caused by the employer's internal investigation of racial discrimination.

The case arises out of allegations that Mr. Graves, a Caucasian male, engaged in practices of racial discrimination during his tenure as an employee at Northrop. From 1981 to 1999, Mr. Graves was employed at Northrop as a tooling inspector. It was his job to supervise and certify trainees to take aircraft measurements with certain equipment.

In 1997, an African-American man named Leon Johnson became his supervisor. Mr. Graves testified he did not have any problems on the job until March of 1998. However, in April of 1998, Mr. Graves was investigated following allegations he had racially discriminated against an African-American employee, Harold Lowe. Mr. Graves claimed that after these allegations, he suffered harassment from Mr. Johnson. A committee was then formed to investigate Mr. Graves' performance on the job, as well as the allegations of racially motivated disparate treatment of Mr. Lowe during his training and measurement approval process.

The investigation revealed that Mr. Graves had performed some of his duties negligently, as well as failing to "scan out" when he left the workplace on weekends. In addition, the committee reported that Mr. Lowe was a victim of disparate treatment by Mr. Graves, but it could not be determined that this treatment was racially motivated. Accordingly, Mr. Graves was issued a Final Warning Notice and given a three day disciplinary suspension.

The court begins its discussion of this case with the basic proposition that "the question of whether an injury is compensable is primarily one for the board to determine." As such, the court's review of the matter is limited and governed by the express language of Section 5952. The Supreme Court has held that: "In reviewing the evidence our legislative mandate and sole obligation under section 5952 is to review the entire record to determine whether the

board's conclusion was supported by substantial evidence." (Citations.) The Supreme Court has further noted that, "the reviewing court must consider the entire record and may not isolate only the evidence which supports the board's findings and thus disregard relevant evidence in the record." (Citations.)

Using this standard of review, the court found that the decision of the board was not supported by substantial evidence. Section 3208.3 controls the right to compensation for work-related psychiatric injury. Specifically, subsection (h) states: "No compensation under this division shall be paid by an employer for psychiatric injury if the injury was *substantially caused by a lawful, nondiscriminatory, good faith personnel action*. The burden of proof shall rest with the party asserting the issue." Subsection (a)(3) of 3208.3 defines 'substantial cause' as at least 35 to 40 percent of the causation from all sources combined.

Although section 3208.3 does not define "lawful, nondiscriminatory, good faith personnel action," the court uses an objective standard which places the trier of fact in the position of the "reasonable employer." A reviewing court must look at the totality of the circumstances in determining whether an employer acted in good faith, because a loose standard is needed to furnish employers a degree of freedom in making its regular and routine personnel decisions.

In this case, the workers' compensation judge awarded damages based on the notion that Northrop's personnel action was not taken in good faith. However, the record did not state how much the judge believed Mr. Grave's psychiatric injury arose from the subsequent purported harassment at the hands of Mr. Johnson.

Because there was an accusation of racial discrimination by an employee, the investigation ordered by Northrop was mandated by law. The employer's duty to prevent harassment and discrimination is an affirmative one. Therefore, although Mr. Graves had an unblemished employment record, Northrop was still obligated to

Continued on page 3

Continued from page 1

allegations in the pleadings.” It was further noted that although declaratory relief actions are appropriate vehicles for resolving contractual language disputes, they are disfavored because of the difficulties created for the insured who must defend against two actions simultaneously. In this case, the insurer knew before filing the declaratory relief action that the alleged damages in the third party case may have been caused by insured risks. Despite this knowledge, litigating the declaratory relief action clearly prejudiced the insured in a third party case.

The court further noted that the advice of counsel to file the declaratory relief action was not a viable defense. It stated that “reliance on advice of counsel is not a defense if the defendant knows, as the insurer did in this case, that it does not have probable cause to file a suit.” The court further held that the jury’s finding of malice against the insurance company in filing the declaratory relief action was justified, as they found that the insurance company’s true purpose in pursuing the declaratory relief action was to improperly further its own interests while recognizing its conduct subjected the insured to economic and emotional hardship.

- Ronald F. Templer

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NEW AT WESIERSKI & ZUREK

We proudly present our new attorneys:

Olga Tillman: Ms. Tillman attended California State University of Fullerton where she received a Bachelor of Arts degree. She studied law at Whittier Law School, specializing in intellectual property. She graduated Magna Cum Laude in the top 10% of her class.

While in law school, Ms. Tillman served as an extern for the Honorable Judge Robert Monarch of the Superior Court of Orange County. She was a member of the Trial Advocacy Honors Board. Ms. Tillman obtained her Juris Doctorate degree in May of 2002 and was admitted to the California State Bar the same year.

Prior to her employment with Wesierski & Zurek LLP, Ms. Tillman practiced in the areas of personal injury, premises liability, medical malpractice, and business litigation.

Joseph E. DuBois: Joe DuBois received his Bachelor of Science degree from the U.S. Military Academy, West Point, New York. His military qualifications included that of the elite Army Rangers, and he received numerous decorations including two Bronze Stars. He earned his Juris Doctorate degree from the University of San Diego Law School.

Before joining Wesierski & Zurek LLP, Mr. DuBois had his own private business and civil litigation practice. Prior to that, he spent ten years at a Newport Beach firm where he specialized in both business and construction litigation, and was formerly a principal in a large Los Angeles defense firm where he was responsible for the business transactions and litigation department.

Mr. DuBois has been an adjunct professor in the business department at several local universities. He has also lectured on contract law, corporations, business entities, and construction law and litigation.

Continued from page 2

conduct an investigation of the charges. The court also noted that the investigation of Mr. Graves was warranted because he was a supervisor employed by a defense contractor and his negligent work could have had a direct effect on our American military personnel.

- Sacha Caldemeyer

MEET STEVE ZIEMANN

Stephen M. Ziemann is the newest addition to the law firm of Wesierski & Zurek LLP. An attorney with 17 years of experience, Steve re-joins our practice as a litigator in the Los Angeles office.

Steve is a native of Southern California; raised in Thousand Oaks. Upon completing high school, Mr. Ziemann left the United States and lived in Japan for two years. He learned the Japanese language while enjoying the country's culture and cuisine. Following his return, Steve spent the next four years at Brigham Young University. He graduated in 1984 with a Bachelor of Science degree in psychology. Determined to return to Southern California, Steve enrolled in the University of Southern California's Law Center. As a law student, Steve was elected to participate in the Hale Moot Court Honors program, elected Student Body Vice President and clerked for a general litigation firm. He earned his Juris Doctorate degree in 1987. Steve was admitted to the California Bar that same year.

In his 17 years of practice Mr. Ziemann has handled and tried a variety of cases involving business related issues, wrongful termination, products and premises liability, usurping corporate opportunities and misappropriating trade secrets. In Mr. Ziemann's most recent trial, he represented a property owner against a claim of serious bodily injury arising out of an alleged dangerous condition of the property. The trial was venued in Van Nuys and lasted two weeks. The jury came back 12-0 in favor of the defense.

Mr. Ziemann is admitted to practice in all California State Courts, the U.S. District Court and the Ninth Circuit Court of Appeal.



In his spare time, Steve enjoys playing racquetball and golf, reading and watching USC football and L.A. Dodger games. He and his wife Lannie have three children, Danielle age 19, Nicholas age 15 and Stephanie age 12.

Editor

Paul J. Lipman