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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

JEFFREY LIPSKY, *Plaintiff/Appellant*,

v.

SAFETY NATIONAL CASUALTY CORPORATION; GALLAGHER BASSETT SERVICES, INC.; SANDY POWELL; CSK AUTO, INC. dba O'REILLY AUTO PARTS, *Defendants/ Appellees*.

No. 1 CA-CV 15-0337
FILED 2-2-2017

Appeal from the Superior Court in Maricopa County
No. CV2012-018066
The Honorable Patricia Ann Starr, Judge

AFFIRMED, IN PART
REVERSED, IN PART

COUNSEL

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By Michael Doyle
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MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Maurice Portley[1] joined.

T H O M P S O N, Judge:

¶1 Plaintiff-appellant Jeffrey Lipsky appeals from the trial court's summary judgment in favor of O'Reilly Auto Parts on his wrongful termination claim and in favor of workers' compensation carrier Safety National Casualty Corporation, third-party administrator Gallagher Bassett Services, Inc., and adjuster Sandy Powell (collectively, Insurance Defendants) on his bad faith claims. We reverse summary judgment as to O'Reilly on the wrongful termination claim and as to Insurance Defendants on the bad faith claim. We vacate the award of costs to defendants. Summary judgment is affirmed as to Lipsky's punitive damages claim.

[1] Pursuant to Article VI, Section 3 of the Arizona Constitution, the Arizona Supreme Court designated the Honorable Maurice Portley, Retired Judge of the Court of Appeals, Division One, to sit in this matter.

FACTUAL AND PROCEDURAL HISTORY

A. Procedural History

¶2 In late 2012, Lipsky filed a claim against O'Reilly under the Arizona Employment Protection Act (AEPA), Arizona Revised Statutes (A.R.S.) § 23–1501 (2016), alleging retaliatory termination for his filing of a workers' compensation claim and against the Insurance Defendants alleging breach of the covenant of good faith and fair dealing, and aiding and abetting. Lipsky alleged he suffered severe economic damage and delayed medical treatment. He sought punitive damages.

¶3 O'Reilly moved for summary judgment asserting its termination of Lipsky comported with its neutral employment policies and that Lipsky had wrongfully failed to disclose a recent felony on his employment application. The Insurance Defendants filed a motion for summary judgment asserting they had a reasonable basis for their conduct and Lipsky had no actual damages as his medical bills and income benefits had been paid under the Arizona Workers' Compensation Act by the end of October 2012.

¶4 After briefing and argument, the trial court ruled in favor of all defendants. It found, as to O'Reilly:

> the evidence is undisputed that Lipsky returned to work after his injury, worked on modified duty, and was given a satisfactory job review. Moreover, while the ICA ultimately found Lipsky's neck injury compensable because it occurred on the job, at the time of his termination O'Reilly's insurance carrier had determined that the neck injury was non-compensable.

¶5 As to the Insurance Defendants, the court found there was no evidence of bad faith, stating:

> Here, Dr. McLean [the orthopedic surgeon] opined that the [2011] on the job injury at O'Reilly resulted in Lipsky's neck injury and need for surgery, and that the injury was not attributable to Lipsky's earlier [2001 neck] injury or [2003 neck] surgery. Dr. Beghin [the IME doctor] agreed with Dr. McLean's diagnosis but suggested the earlier surgery played a contributing role, the current injury by predisposing Lipsky to that injury. Lipsky later moved to reopen his [2001] claim regarding the prior injury. Given these facts,

> the insurance carrier had a reasonable basis to dispute Lipsky's claim.

¶6 Lipsky filed a motion for new trial. The defendants filed motions for attorneys' fees and costs, O'Reilly citing to A.R.S. § 12-341 and the Insurance Defendants to A.R.S. §§ 12-349 and -341.01. After briefing and oral argument, the trial court denied Lipsky's motion for a new trial. The court denied defendants' motions for attorneys' fees, indicating that attorneys' fees were not warranted. It noted that paying the nearly $10,000 in costs would be a hardship on Lipsky. This timely appeal followed.

A. Facts Specific to the Termination Claim

¶7 Lipsky was employed by O'Reilly Auto Parts on or about November 6, 2011; on December 31, 2011, he received a work related injury. He left work early, after advising his assistant manager of the injury, and he went to the emergency room the next day. Lipsky returned to work on January 3, 2012 at which time his employer made its report of injury. That report indicated the injury as "Trunk-Lower Back Area." Lipsky went to Concentra Medical Center on January 4, 2012 and advised the provider that he had lifted too much weight at his job "injuring my lower back and neck." He was diagnosed with a lumbar sprain/strain. Lipsky was put on modified work activity, including lifting restrictions, and assigned physical therapy. As of his physical therapy session on January 19, 2012, the provider reported that while his neck complaints continued, lumbar complaints were minimal.

¶8 At first, O'Reilly did not question Lipsky's injury; Lipsky continued to work for O'Reilly with the modified work restrictions for approximately two months. On February 21, 2012, Dr. McLean, Lipsky's prior orthopedic spine surgeon, evaluated Lipsky, determined him to be a surgical candidate, and advised him to take four to six weeks leave from work. Lipsky gave his employer the form in which Dr. McLean indicated he should be off work. On February 23, 2012, O'Reilly's third-party workers' compensation administrator determined that Lipsky's neck injury was not a work-related injury. It was undisputed that he had a compensable lumbar sprain/strain injury.

¶9 Pursuant to his doctor's orders, Lipsky did not return to work at O'Reilly; on March 5, 2012, Lipsky was advised by O'Reilly that his absence from work was not authorized by workers' compensation and that he was not eligible for either a Family and Medical Leave of Absence

or Personal Leave of Absence as he had not met the minimum six-month employment period needed to qualify for those two programs. Lipsky was advised that his absences, therefore, were not excused. O'Reilly advised Lipsky that there was still work available for him. On March 21, 2012, after not returning to work, Lipsky was terminated.

C. Facts Specific to the Bad Faith Claim

¶10 Lipsky was employed by O'Reilly on December 31, 2011 when he suffered a workers' compensation injury. Lipsky returned to work on January 3, 2012 at which time his employer made its report of injury. That report indicated the injury as "Trunk-Lower Back Area." Lipsky reported neck pain when examined at Concentra on January 4, 2012 and, thereafter, a progression of the neck pain in therapy.

¶11 As of January 19, 2012, the physical therapist noted that Lipsky's lumbar area complaints are "minimal," but his upper back and neck were aggravated with exercise. Concentra continued to list lumbar region sprain/strain as Lipsky's diagnosis. On January 25, 2012, Lipsky had an MRI which showed a large herniation at C4-5.

¶12 On February 2, 2012, Lipsky requested a referral to specialist Dr. McLean, his prior spine surgeon. On February 10, 2012 the claims file states that Lipsky retained an attorney. Lipsky received approval to see Dr. McLean, and soon thereafter, on February 21, 2012, Sandy Powell was assigned as the adjuster to Lipsky's case.

¶13 Dr. McLean saw Lipsky on February 21, 2012 and sent a surgical request to the carrier. In the report written to Lipsky's referring physician, Dr. Taxin, and cc'd to the insurance carrier, Dr. McLean stated "It would appear more probably than not, that the patient's lifting episode did result in his large extruded disk herniation at C4-5. There is significant cord compression and neural forminal narrowing on the left side . . . he is a surgical candidate. . . There is a causal relationship between this industrial injury and his herniation. It is not related to his prior injury or his prior surgery."

¶14 Between February 21 and February 23, Powell reviewed the current claim file, Concentra's medical records and contacted Lipsky's employer. The employer stated there was a concern that the injury was pre-existing given Lipsky's short time of employment and the quickness of getting a specialist involved. That same day the adjuster indicated that Lipsky originally reported a low back strain, but it became a cervical

injury and noted a concern that this injury was connected to his prior neck injury and neck surgery.

¶15 On February 23, 2012, the adjuster requested an independent medical examination (IME) of Lipsky, scheduled it for March 15, 2012, and issued a notice of claim status accepting his workers' compensation claim, but limiting the liability to the lumbar region. On February 27, 2012, the adjuster noted Lipsky was a match on the workers' compensation index for a 2001 cervical injury[2] and Lipsky was denied authorization for the neck surgery.

¶16 On March 6, 2012, the claims file notes receipt of Dr. McLean's report. On March 15, 2012, Lipsky attended the IME with Dr. Beghin. Dr. Beghin, in his report dated March 15, 2012, concluded that Lipsky had a C4-5 herniation which "probably originated with the industrial injury of December 31, 2011" and "probably would not have occurred with this industrial injury had the claimant not previously undergone anterior cervical discectomy and fusion at C5 to C7 with resultant deterioration to the C4-5 following the incident on December 31, 2011." Dr. McLean recommended Lipsky undergo anterior cervical discectomy and fusion at C4-5.

¶17 On April 21, 2012, the claims file notes that an investigator confirmed that a neighbor of Lipsky's had earlier come to O'Reilly with concerns that Lipsky's neck claim was invalid, that he had a prior injury, and that Lipsky would work for a while then get injured and sit around "taking life easy." On this same date, the carrier started a background check on Lipsky.

¶18 On May 18, 2012, the claims file notes that the IME "finds reason to believe the surgery is related to an alleged work incident." On April 25, 2012, Lipsky filed a motion to reopen his 2001 workers' compensation claim and on May 25, 2012 requested a hearing stating "applicant has sustained a new, additional or previously undiscovered disability or condition causally related to his industrial injury of 1/22/2001."

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[2] Lipsky had permanent impairment and permanent restrictions following his 2001 injury.

¶19 Lipsky protested the denial of his cervical claim and a hearing was set for June 4, 2012. The hearing was cancelled and rescheduled. Meanwhile litigation discovery was occurring. On July 23, 2012, Lipsky's attorney requested a 1061 order, requiring payment of medical and income benefits pending final resolution. A week later, the Industrial Commission did order O'Reilly to pay temporary benefits.

¶20 On August 20, 2012, the claims file notes "This claim is currently in litigation regarding the cervical injury. We have been ordered to pay TTD/TPD and medical benefits until the conclusion of the litigation. If it is determined that the claimant's need for surgery was the result of the prior claim, we will then need to seek reimbursement from the prior carrier. We will verify . . . when these benefits need to start."

¶21 The consolidated hearing to determine whether benefits would be paid from the reopened 2001 claim or the new 2011 claim, was held on September 20, 2012. Lipsky's attorney, on September 25, 2012, wrote to the carrier encouraging it to move forward on the calculation of claimant's average monthly wage to get "the back benefits paid."

¶22 The claims file shows that on October 3, 2012, a report was received from Dr. McLean indicating Lipsky should have another MRI, that many of his prior symptoms had returned to normal, and that "At present, I would postpone on any recommendations for surgery until he undergoes further testing." On October 4, 2012, the Industrial Commission of Arizona issued a Consolidated Decision Upon Hearing and Findings and Award on the 2011 surgery claim and the 2001 reopening claim. The decision denied Lipsky's his petition to reopen the 2001 claim and awarded all benefits under his 2011 claim. A check was manually issued to Lipsky on October 25, 2012.

DISCUSSION

¶23 On appeal, Lipsky asserts the trial court erred in granting summary judgment to defendants by (1) failing to apply the appropriate "reasonableness" and intent standards for bad faith, (2) improperly limiting the plain language of the AEPA, and (3) resolving questions of fact reserved for the jury.

¶24 We review de novo the grant or denial of a motion for summary judgment. *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 199, ¶ 15, 165 P.3d 173, 177 (App. 2007). We view the facts and the inferences drawn from those facts in the light most favorable to the party against whom judgment was entered. *Prince v. City of Apache*

Junction, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). Summary judgment should be granted "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

Wrongful Termination

¶25 Lipsky asserts he was exercising his workers' compensation rights at the time of his termination, specifically pursuing his surgery claim and seeking a hearing before the Industrial Commission. To this end he cites A.R.S. §§ 23-941(A) (2012), -1062(A) (2016), two statutes that expressly provide for these rights. He argues that his absences after February 21, 2012, were based on medical advice for a claim the Industrial Commission eventually found compensable and there "was no dispute that Lipsky gave timely notice to both the employer and the carrier of his industrial injury, medical records, reports, provider recommendations, and prognosis. "

¶26 O'Reilly asserts there was a neutral attendance policy, under which Lipsky did not qualify for personal leave and that it relied on the carrier's denial of his industrial injury claim. The trial court found dispositive that, at the time of termination, O'Reilly had been advised by the carrier that Lipsky's claim was not work related.

¶27 Arizona's Employment Protection Act provides, in pertinent part, that an employee may bring suit against an employer where:

> (c) The employer has terminated the employment relationship of an employee in retaliation for any of the following:
>
> …
>
> (iii) The exercise of rights under the workers' compensation statutes prescribed in chapter 6 of this title.

A.R.S. § 23–1501(c)(iii). To prevail on a wrongful termination claim, Lipsky must show that his filing a workers' compensation claim was a substantial factor in the decision to terminate his employment. *See Thompson v. Better–Bilt Aluminum Prods. Co.*, 187 Ariz. 121, 127, 927 P.2d 781, 787 (App. 1996).

¶28 We interpret statutes de novo. *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 178, ¶ 5, 181 P.3d 219, 225 (App. 2008). In interpreting a statute, we look first to the plain language as "the best and most reliable index of a statute's meaning." *Id. (*quoting *State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993)). When the statutory language is clear and unambiguous we will "simply apply it." *Id.* (citation omitted).

¶29 The plain language of the AEPA does not distinguish between situations where a claim is initially accepted by the carrier and a claim which requires further litigation before being vindicated. The AEPA, at A.R.S. § 23-1501(c)(iii), simply provides for a cause of action where an employee is terminated for exercising his workers' compensation rights. On review we find evidence in the record to support Lipsky's claim that O'Reilly knew he claimed an industrial injury and had filed a workers' compensation claim. We further find evidence in the record, namely Dr. McLean's "Work Capacities & Limitations Form," to support the claim that he was off work on doctor's orders and that this form was provided to his employer.[3] There was no other valid reason for the termination other than the absences. Summary judgment was inappropriate. We find that, under these facts, O'Reilly could not, as a matter of law, simply rely on the carrier's initial determination that the claim was uncompensable. Because a jury could reasonably find that Lipsky was terminated for exercising his protected rights under the AEPA, the trial court is reversed.

Bad Faith

¶30 Lipsky asserts that Insurance Defendants delayed and mismanaged his workers' compensation claim. The Insurance Defendants moved for summary judgment asserting they had a reasonable basis for prolonging the investigation into Lipsky's claim, that he had no tort damages, could not establish his entitlement to punitive damages, and that they could not "aid and abet" their own conduct.

¶31 The insurance relationship carries a duty of "[e]qual consideration, fairness and honesty." *Rawlings v. Apodaca*, 151 Ariz. 149, 155, 726 P.2d 565, 571 (1986). Generally, bad faith in workers' compensation cases "arises when the insurance company intentionally

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[3] The record is not clear as to whether Lipsky told his employer directly about the surgery or whether the employer had, or had knowledge of, Dr. McLean's report.

denies, fails to process or pay a claim without a reasonable basis for such action." *Merkens v. Federal Ins. Co.*, 237 Ariz. 274, 276, ¶ 9, 349 P.3d 1111, 1113 (App. 2015) (quoting *Noble v. Nat'l Am. Life Ins. Co.*, 128 Ariz. 188, 190, 624 P.2d 866, 868 (1981)). We have recognized that a workers' compensation carrier can be liable for bad faith because that tort is separate and "not a direct or natural consequence of the compensable industrial injury." *See id.* (citing *Franks v. U.S. Fidelity & Guaranty Co.*, 149 Ariz. 291, 718 P.2d 193 (App. 1985)); *Mendoza v. McDonald's Corp.*, 222 Ariz. 139, 149, ¶ 32, 213 P.3d 288, 298 (App. 2009).

¶32 To prove a bad faith denial of workers' compensation benefits by the Insurance Defendants, Lipsky must demonstrate: (1) the carrier and the injured worker had an insurer-insured relationship; (2) the absence of an objectively reasonable basis for denying benefits or handling of the claim; (3) "the carrier's [subjective] knowledge or reckless disregard of the lack of a reasonable basis to deny the claim; and (4) traditional tort damages proximately caused by the denial of workers' compensation benefits rather than the damages resulting from the workplace injury. *Merkens*, 237 Ariz. at 277-78, ¶¶ 14-16, 349 P.3d at 1114-15.

¶33 Here, the trial court found no evidence of bad faith, stating that while Dr. McLean opined that the 2011 injury at O'Reilly resulted in Lipsky's neck injury and a need for surgery, and the IME doctor, Dr. Beghin, agreed, the court noted that Dr. Beghin suggested Lipsky's 2003 neck surgery predisposed Lipsky to the current injury. The court noted that Lipsky, himself, moved to reopen his 2001 claim. It concluded "[e]ven taken in the light most favorable to Lipsky, no evidence of bad faith in investigating and denying part of Lipsky's claim exists . . . [n]or is there evidence supporting Lipsky's claim that the insurance carrier intentionally failed to pay him benefits in a timely manner. "

¶34 While insurers may challenge workers' compensation claims which are "fairly debatable," the insurer's belief in what is fairly debatable" is a question of fact for the jury." *Zilisch v. State Farm Mutual Auto. Ins. Co*, 196 Ariz. 234, 237, ¶ 20, 995 P.2d 276, 279 (2000) (quoting *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 539, 647 P.2d 1127, 1137 (1982)) (affirming trial court's denial of motion for directed verdict for bad faith and punitive damages in a workers' compensation case after a jury verdict in favor of claimant). A carrier has a duty to "immediately conduct an adequate investigation, act reasonably in evaluating the claim, and act promptly in paying a legitimate claim." *Id.* at 238, ¶ 21, 995 P.2d at 280. In *Zilisch*, the supreme court stated:

> while fair debatability is a necessary condition to avoid a claim of bad faith, it is not always a sufficient condition. The appropriate inquiry is whether there is sufficient evidence from which reasonable jurors could conclude that in the investigation, evaluation, and processing of the claim, the insurer acted unreasonably and either knew or was conscious of the fact that its conduct was unreasonable.

Id. at ¶ 22 (citing *Noble*, 128 Ariz. at 190, 624 P.2d at 868).

¶35 The carrier in *Zilisch* waited to evaluate and offer to settle "nearly ten months after receiving the demand [letter]" where, within approximately the first month after receiving that letter, the carrier had four written reports and two additional verbal reports confirming the permanency of claimant's injury. *Id.* at ¶ 23. Our supreme court found reasonable jurors could have found the issue of the permanency of the injury "was undisputed" and that further delays by the carrier were pretextual. *Id.* It found that a ten-month delay could not be decided to be reasonable or unreasonable as a matter of law. *Id.*

¶36 "In the field of Workmen's Compensation, the employer takes his employee as he is. In legal contemplation, if an injury, operating on an existing bodily condition or predisposition, produces a further injurious result, that result is caused by the injury." *Murray v. Indust, Comm'n*, 87 Ariz. 190, 199, 349 P.2d 627, 633 (1960). The "successive injury doctrine" essentially provides the last employer in the chain of employers is liable where the employee can show the new injury was caused by, triggered by, or aggravated by, work done for that employer. *See Indust. Indem. Co. v. Indust. Comm'n of Ariz.,* 152 Ariz. 195, 198, 731 P.2d 90, 93 (App. 1986); *Arellano v. Indust. Comm'n*, 25 Ariz.App. 598, 604, 545 P.2d 446, 452 (App. 1976).

¶37 It is undisputed that Lipsky began to complain of neck problems no later than January 3, 2012, just three days after the accident. And, by March 15, 2016, when Lipsky had his IME, both of the doctors on the case agreed the new neck injury was caused by his actions on December 31, 2011. There was also an MRI detailing the extent of the injury. Therefore, by the time the carrier received Lipsky's IME results, there was no medical dispute as to the injury, the need for surgery, and

that the injury occurred while working for O'Reilly. Thus, there was no dispute that O'Reilly would be the claim payor.[4]

¶38 For the reasons enumerated in *Zilisch*, we find a reasonable jury could find that Insurance Defendants unreasonably delayed payment to Lipsky from the date of the IME report's receipt, a delay of approximately seven months on Lipsky's wage benefits. A reasonable jury could also find the delay between the report and the paying of benefits, on the facts of this case, was not unreasonable. We cannot say, one way or another, as a matter of law. That is a determination for a jury. Summary judgment in favor of the Insurance Defendants is reversed and these claims are remanded to the trial court for proceedings consistent with this decision.

AIDING AND ABETTING

¶39 The aiding and abetting claim here was not specifically addressed in the trial court's decision; rather, summary judgment was granted to the Insurance Defendants on the issue of bad faith. We reverse the summary judgment granted by the trial court as to Gallagher and Powell.

¶40 Lipsky has asserted an "aiding and abetting" claim against Gallagher and Powell. Insurance Defendants assert Lipsky must prove three elements to establish his aiding and abetting claim against Gallagher and Powell: "(1) Safety committed a tort (bad faith) injuring the plaintiff; (2) Gallagher and Powell knew that Safety's conduct involved a breach of duty; and (3) Gallagher and Powell substantially assisted or encouraged that breach by Safety. *Wells Fargo Bank v. Ariz. Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 485 (2002) (citing *Gomez v. Hensley*, 145 Ariz. 176, 178 (Ariz. App. 1984) (emphasis added)." They argue because aiding and abetting is a form of secondary liability, there must first be a primary violation by another party, and the defendant must be aware of it. We reject this argument. *Chalpin v. Snyder*, 220 Ariz. 413, 424, 207 P.3d 666, 677 (App. 2008) (when a party's tortious

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[4] This is further supported by Sandy Powell, in her deposition. She stated that after Dr. Beghin's report she believed cervical spine surgery was necessary because of Lipsky's workplace injury.

actions, including bad faith, are based on the advice of attorneys, tort victim may sue attorneys for aiding and abetting).

¶41 Lipsky's bad faith claim is founded on the conduct of Gallagher and Powell during the course of their duties to Safety. The evidence adduced by Lipsky as to the conduct of Gallagher and Powell must be considered by a jury. *See Farr v. Transamerica Occidental Life Ins. Co.*, 145 Ariz. 1, 11, 699 P.2d 376, 385 (App. 1984) (reinstating jury verdict for claimant in bad faith suit against carrier and third-party administrator for non-payment of benefits) (citing *Sparks*, 132 Ariz. at 540, 647 P.2d at 1138). We reverse the grant of summary judgment.

DAMAGES

¶42 On summary judgment in the trial court, Insurance Defendants asserted that Lipsky had no actual damages after application of his workers' compensation benefits. We find Lipsky has presented sufficient evidence to survive summary judgment on tort damages. *See, e.g., Farr*, 145 Ariz. at 7, 699 P.2d at 382 (finding loss of credit reputation damages recoverable) (citation omitted). Lipsky did not make a punitive damages argument on appeal, and therefore we do not address it.

ATTORNEYS' FEES ON APPEAL

¶43 On appeal, O'Reilly requests attorneys' fees. This request is denied.

CONCLUSION

¶44 For the above stated reasons, the trial court is reversed as to the bad faith and wrongful termination claims. Summary judgment as to punitive damages is affirmed. The award of costs below is vacated.

AMY M. WOOD • Clerk of the Court
FILED: AA