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ON LAW

A MONTHLY PUBLICATION FROM CUMMINGS, MCCLOREY, DAVIS & ACHO, P.L.C.

CUMMINGS, MCCLOREY, DAVIS & ACHO, P.L.C.
WORK HARD
TO OBTAIN POSITIVE RESULTS

OCTOBER, 2001

In September's newsletter we shared some recent cases in which we obtained positive results for our clients. Once again, we would like to highlight a few interesting cases that we thought you would enjoy learning about.

Landlord Not Liable for Postal Worker's Injuries

Mr. Young, our managing partner, defended a landlord in a severe dog bite case handled by Mr. Fieger's office on behalf of the Plaintiff. This was a case that received a lot of media publicity since the Plaintiff was a postal worker who was mauled by two Pit Bulls. Mr. Young filed a motion for summary judgment since the tenants had control and owned the dogs that attacked and injured the Plaintiff - not the landlord.

The Wayne County Circuit Court Judge denied the motion for summary judgment, and our client authorized Mr. Young to immediately file a claim of appeal. It took only two months for the Court of Appeals to summarily reverse the court's denial of summary judgment. Summary judgment was then entered in favor of the Defendant, and the case is now closed.

Partner Handles Lengthy Wrongful Death Claim

Mr. Young also handled a wrongful death claim involving a 12-year-old boy with nine heirs-at-law looking for a substantial recovery. This case was handled by Mr. Fieger on behalf of the Plaintiffs. The Co-Defendant refused to contribute to a settlement, so Mr. Young fully investigated the case and settled with Mr. Fieger for all claims against both Defendants. Mr. Young then prosecuted the remaining claim against the Co-Defendant. The settlement was in excess of $2,000,000.

It took a year and a half to prosecute the claim against the Co-Defendant, which included a declaratory judgment action against the Co-Defendant's primary and excess insurers. Tim obtained an Order Granting Summary Disposition in favor of his client and against the Co-Defendant for a complete recovery of the $2,000,000+ settlement amount in Wayne County Circuit Court.

Mr. Young then filed a motion for costs, interest and attorney fees and obtained a judgment for an additional $675,000 in favor of his client for the delay of the Co-Defendant and the insurers in refusing to contribute to the original settlement.

City Did Not Violate Elliott-Larsen Civil Rights Act

Tim Ferrand, a partner in our Roseville office, recently handled a case in which the Macomb County Circuit Court granted summary judgment to a metropolitan Detroit city where a woman was arrested on warrants during traffic court. She alleged that she and her minor children were arrested and detained because of her race in violation of the Elliott-Larsen Civil Rights Act. She also alleged false arrest, false imprisonment, intentional infliction of emotional distress and Fourth Amendment violations. Tim was able to prove to the Court that the Plaintiff was not treated differently because of her race, the arrest was warranted under the circumstances and the detention of her minor children, pending a guardian arrival, was not an arrest triggering Fourth Amendment rights or violating state law.

City Did Not Commit Racial Profiling

The United States District Court for the Eastern District of Michigan recently granted summary judgment in favor of a metropolitan Detroit city in a case involving eight separate claims of racial profiling and Fourth Amendment violations. Tim Ferrand convinced the Court that there was no evidence to support the Plaintiffs' claims, and that the city was not targeting any particular race for parking violations, moving vehicle violations or bike riding activity. Further, the Court concluded that there was no evidence to support the Plaintiffs' allegations that police services were denied because of race. Finally, the Court held that each individual encounter constituted a proper Fourth Amendment Terry Stop or arrest. In a companion case filed in the Macomb County Circuit Court, the Court granted summary judgment to the city on seven of the eight claims. A second motion for summary judgment regarding the last claim is now pending.

Finally, not all achievements come in the form of favorable verdicts or summary judgments. Recognizing when to settle and not go to trial can be just as beneficial. Pat Moritz recently handled a case against a local community college that involved an injury to a Fire Academy student during a training session. The College ran the academy. The Co-Defendant was another student who actually caused the accident that resulted in fairly significant injuries to the Plaintiff. The Co-Defendant was being defended under her homeowner's policy and that carrier refused to settle. On the eve of the trial, we settled for less than the mediation amount ascribed to our client, which was less than $40,000. At the trial against the Co-Defendant, the jury gave the Plaintiff a verdict in excess of $1,200,000 and allocated almost 50% fault against the College. Of course, the outcome may have been different if we had not settled and participated in the trial. But upon hearing the news about the verdict, the College was greatly relieved and extremely pleased with the "bargain basement price" for which we settled the case.

Timothy Young, Managing Partner

in this issue

Attorney Profile

Patrick A. Moritz

Pat focuses his practice on civil litigation, personal injury defense, municipal law, insurance coverage analysis and police misconduct. He received his Juris Doctorate, *Cum Laude*, from the Detroit College of Law in 1977.

He's a member of the State Bar of Michigan, Oakland County Bar Association, Detroit Bar Association, Michigan Defense Trial Counsel and the Defense Research Institute.

He received his Bachelor of Science degree in Psychology, *Cum Laude*, from the University of Michigan in 1973. Pat can be reached at pmoritz@cmda-law.com or by calling our Livonia office at 734.261.2400.

Gail P. Massad

Gail concentrates her practice as an appellate attorney focusing on municipal defense at both the state and federal levels. She received her Juris Doctorate from the Thomas M. Cooley Law School in 1981.

Gail is a member of the State Bar of Michigan. On September 21, 2001, she presented a lecture entitled *A Road Map for Pursuing or Defending Against Appeals in Police Misconduct Cases*, to lawyers, judges and law enforcement professionals at the Michigan Police Misconduct Seminar.

She received her Bachelor of Science degree in Political Science from Northern Michigan University in 1976. Gail can be reached at gmassad@cmda-law.com or by calling our Livonia office at 734.261.2400.

Insurer Properly Denied Insurance Coverage and a Defense for Home-Building Enterprise

Within the framework of a popular investment enterprise - the construction and sale of residential homes and profit reinvestment - the United States Court of Appeals for the Sixth Circuit recently ruled that an insurer properly denied providing insurance coverage and a defense to an insured under a standard homeowner's policy.

In *Lenning v Commercial Union Insurance Co*[1], the Plaintiff, a vice-president of a bank, collaborated with her bankrupt builder-husband to construct and sell residential homes. The profits would be used to finance additional construction. In the end, the Plaintiff and her husband hoped to amass enough money to comfortably retire.

After purchasing a lot to build on, the Plaintiff obtained, through an independent insurance agent, a custom homeowner's insurance policy. The policy set forth standard liability coverages and exclusions, including a builder's risk endorsement that would expire upon the completion of construction. The Plaintiff did not tell the agent or the insurer about a purchase contract she and her husband entered into with a third-party for the sale of the home prior to its completion. After closing on the sale, the purchaser sued the Plaintiff for defective and faulty craftsmanship. After investigating the claim, the insurer denied the Plaintiff a defense and coverage under the policy. The Plaintiff then sued the insurer. The District Court granted summary judgment in favor of the insurer and the Court of Appeals affirmed the ruling.

Even though the purchaser alleged that the Plaintiff and her husband had negligently constructed the home, improperly filed a mechanic's lien against the property and fraudulently misrepresented their construction practices, the Court held that the allegations could not be said to constitute an "occurrence" under the policy. The Court also held that the damages of which the purchaser complained were neither "bodily injury" nor "property damage" covered by the policy. The Court noted that the Plaintiff had purchased a simple homeowner's policy and not a broad CGL policy.

The Court went on to rule that the "business pursuit" exclusion and the "property owner" exclusion of the policy applied, and the insurer did not violate its duty of good faith.

Although the case was decided for the most part under Kentucky law, the Court's analysis and reasoning have application to similar cases that may arise in other states.

[1]*Lenning v Commercial Union Insurance Co*, Electronic Citation: 2001 FED App.0259P (6th Cir.).

Patrick A. Mortiz

MICHIGAN SUPREME COURT LIMITS PUBLIC DUTY DOCTRINE

The public duty doctrine provides that the duty of governmental employees to perform his/her job is a duty owed to the general public and not to one specific individual. In order for a governmental employee performing his/her job duties to have tort liability, a Plaintiff has to show there was a special relationship between the Plaintiff and the governmental employee. The public duty doctrine has been used effectively as a shield to tort actions resulting in the dismissal of those actions without the necessity of going to trial. Essentially we would argue that there was no duty owed to the Plaintiff, therefore, the employee should not be responsible to pay money damages if they failed to perform his/her job or performed their job duties in a negligent manner.

In 1996, the Michigan Supreme Court first recognized the public duty doctrine in *White v Beasley*[1]. However, the Michigan Court of Appeals has utilized the doctrine since 1970 and has applied it to various levels and types of governmental employees (city managers, police chiefs, building inspectors, city maintenance workers, medical examiners and fire fighters). As a result, governmental employees are able to successfully defend tort actions without going to trial by asserting the Plaintiff failed to state a necessary element for their claim. In all negligence tort actions, the Plaintiff must allege and prove that the Defendant owed a duty to the Plaintiff, the duty was breached and, as a result of the breach, the Plaintiff suffered an injury. Without a duty, there is no tort liability.

Recently, however, on July 27, 2001, the Michigan Supreme Court restricted cases in which the Plaintiff alleges an injury occurred as a result of a police officer failing to protect the Plaintiff from the criminal acts of a third party. In *Beaudrie v City of Dearborn*[2], the Court reasoned that there was no need to expand the public duty doctrine to other governmental employees because governmental employees are protected by the Governmental Immunity Statute.

Under the Governmental Immunity Statute, individual governmental employees are only liable for tort liability, with respect to the performance of the employee's job duties, if the Plaintiff can show their performance was grossly negligent and the gross negligence was **the** proximate cause of the Plaintiff's injury. Gross negligence has been defined by statute to be "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results". In *Beaudrie v City of Dearborn*, the Court further stated since the provisions of the statute also require the governmental entity to defend and indemnify individual governmental employees from tort liability, expansion of the public duty doctrine was unwarranted.

Police officers will be held liable under the "special relationship" exception to the public duty doctrine only if all of the following elements are met:

- An assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured.
- Knowledge on the part of the municipality's agent that inaction could lead to harm.
- Some form of direct contact between the municipality's agent and the injured party.
- The party's justifiable reliance on the municipality's affirmative undertaking.

As a result of the Supreme Court's restriction of the public duty doctrine to police officers, tort liability for other public employees will be determined analyzing the employees conduct pursuant to the Governmental Immunity Statue. The *Beaudrie v City of Dearborn* decision means that fewer tort actions against governmental employees will be dismissed on a summary basis and more cases will have to go through the discovery process. In many cases "gross negligence" must be determined under the particular facts of each case that will result in more actions going to trial.

Contact one of our experienced attorneys for further information on the public duty doctrine.

[1] *White v Beasley*, 453 Mich 308 (1996).
[2] *Beaudrie v City of Dearborn*, 2001 Mich LEXIS 1208 (2001).

Gail P. Massad

Employees at Cummings, McClorey, Davis & Acho were shocked and saddened over the tragedy that attacked our nation on September 11, 2001. As a way to help those in need, employees generously made monetary donations to the American Red Cross. Our firm then matched employee donations up to $10,000. Because of the generosity from both our employees and firm, we raised over $20,000 for the American Red Cross. Our hearts go out to everybody affected by this terrible tragedy.

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Our Vision

To meld our legal expertise, professional support staff, technical resources and variety of locations to deliver first rate legal services at a fair value to a full range of business, municipal, insurance and individual clients.

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Comments and questions regarding specific articles should be addressed to the attention of the contributing writer. Remarks concerning miscellaneous features or comments to the editor should be addressed to the attention of Jennifer Sherman.

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