CUMMINGS • MCCLOREY
CMDA
DAVIS & ACHO, P.L.C.

CMDA ON LAW

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

OCTOBER, 2002

OUR ATTORNEYS GET RESULTS

Every couple months we highlight a few interesting cases our attorneys handled that we think our clients and friends would enjoy learning about. In this article, we briefly explain three cases and then go into more detail on an interesting police-related case on pages 3 and 4.

Former Shareholder *v* Service Station

James Acho, an associate in our Livonia office, tried a case through binding arbitration. He defended the owners of a garage/service station in a metropolitan Detroit city. A former shareholder was seeking an award of $250,000 ($100,000 for lost profits, $100,000 for his share of the value of the business and $50,000 in tools and assets). The plaintiff had been stealing from the company and was forced out by the defendant. After Jim put on his case, but before the arbitrator gave his ruling, the plaintiff agreed to settle for $1,200 ($248,800 less than the amount he was seeking).

Owner of Stolen Motorcycle *v* Township

In a recent case, **Jeff Clark**, a partner in our Livonia office, and **Karie Boylan**, an associate in our Livonia office, defended a local municipality after police seized a stolen motorcycle from the plaintiff's business. The plaintiff claimed that he bought the motorcycle not knowing it was stolen. Therefore, as a bona fide good faith purchaser of the motorcycle, his right to possess the motorcycle was superior to the person from whom it was stolen. The plaintiff filed a lawsuit alleging several theories of recovery including state law and federal tort claims. The case was removed to federal court but remanded to state court after the federal judge concluded that state claims predominated the case. At the close of discovery, a Motion for Summary Judgment was filed. The plaintiff stipulated to dismiss two of the four claims against the Township before oral argument. After oral argument, the state court Judge dismissed the state law claim, but refused to dismiss the plaintiff's federal constitutional claim under 42 U.S.C. 1983 stating there were questions of fact for the jury to decide.

After the Order was entered dismissing all state law tort claims, Karie removed the case, again, to federal court. The plaintiff's attorney vehemently opposed the removal. This time, however, the federal court refused to send the case back to a Michigan court. Karie filed another Motion for Summary Judgment in federal court arguing that there were no questions of fact and the federal claim should also be dismissed. The plaintiff's attorney filed a response to the Motion and attached deposition transcripts and affidavits purporting to create a question of fact for the jury. On the eve of oral argument, the court clerk informed the parties that the Judge would render a decision on the parties' briefs alone and no oral argument would be necessary. On August 19, 2002 the Judge issued a written opinion that dismissed the plaintiff's case against the Township with prejudice. Presently, our attorneys are in the process of petitioning the court for mediation sanctions based on the plaintiff's rejection of the case evaluation award more than one year before the case was dismissed.

Owner of Vehicle Seized by Police *v* Township

In another case, **Karie Boylan** represented a local municipality after a car owner filed suit to recover her vehicle that had been seized by the police. In this case, the Township police officers were acting on behalf of a county-wide undercover task force when they bought drugs from an unidentified drug dealer. After the purchase was made, uniformed officers attempted to arrest the driver, who then fled the scene in a car. Officers lost sight of the vehicle, but located it minutes later abandoned on a city street. The vehicle was seized by task force officers and held as evidence. Later that evening, the owner attempted to file a police report claiming the vehicle had been stolen. The prosecutor's office ordered the vehicle be held pending criminal prosecution against the drug dealer and, potentially, the car owner for filing a false police report. The owner sued the Township seeking return of her vehicle.

Karie filed a Motion to dismiss the lawsuit on the grounds that the Township was not the proper party. At oral argument on the Motion, the plaintiff's attorney did not present evidence to support a claim against the Township but promised he could present such evidence if the court scheduled the matter for an evidentiary hearing. The court declined to dismiss the case at that time and scheduled the matter for a hearing. On the day of the evidentiary hearing, the plaintiff failed to present any evidence to support a claim against the Township. On August 30, 2002, the Judge dismissed the case and awarded the Township costs and attorney fees for having to defend in a frivolous lawsuit.

Timothy Young, Executive Committee

in this issue

Public Duty Doctrine Examined 3
Attorney Profile 2-3
Office Locations 4

PUBLIC DUTY DOCTRINE EXAMINED:

DUTY TO THE PUBLIC VS. DUTY TO THE INDIVIDUAL

Police misconduct lawsuits typically involve the arrest of a subject and subsequent use of force during handcuffing. More often than not, the plaintiff's theories of recovery in civil litigation include the state law tort claims of false arrest, false imprisonment, excessive force, malicious prosecution and intentional infliction of emotional distress. Occasionally, a creative lawyer will attempt to recover money damages from a municipality based on a police officer's, or a police department's, failure to protect the plaintiff from criminal acts of a third party. Under those circumstances the theory of recovery is negligence. This article outlines the reasons why negligence claims against police officers, based on the alleged failure to protect, have all but disappeared in state court and discusses a July 9, 2002 Court of Appeals decision, in a case **Karie Boylan** defended, to illustrate the reasons why.

On July 9, 2002, the Court of Appeals affirmed dismissal of a lawsuit alleging negligence against a police officer in Detroit. The facts giving rise to Sinishtaj v City of Detroit et. al., are tragic. In 1997, Donna Sinishtaj filed a complaint for divorce from her husband Leka Sinishtaj and obtained a Personal Protection Order (PPO) against him based on several incidents of domestic violence that had been reported to the police. While the PPO was in effect, Leka broke into Donna's home, tied her with rope and threatened to sexually assault and kill her. Donna escaped and called police. The Investigator assigned to the case promised to "look into the matter" and "see what could be done to lock this guy up." Although a police report was prepared, nothing was done by the police to locate and arrest him, even though Leka resided in the same neighborhood as Donna. Five days later, Leka shot and killed Donna and then committed suicide.

The personal representative of Donna's estate filed a civil lawsuit against the Investigator, every police officer involved in any report of domestic violence involving the Sinishtajs after the PPO was issued, every Supervisory Officer whose subordinate had been involved with the Sinishtajs after the PPO had been issued and the Police Department, alleging that the defendants had actual or constructive notice of the PPO issued against Leka and that the defendants' failure to take steps to enforce the PPO and/or to locate and arrest Leka constituted gross negligence that was a proximate cause of Donna's death. The defendants argued the plaintiff's claims were barred by the Public Duty Doctrine and the case should be dismissed.

The common law Public Duty Doctrine fulfills a function similar to that of sovereign immunity, which grew out of the English truism "the King can do no wrong." Whereas sovereign immunity shields the state from suit, the Public Duty Doctrine protects employees of both the state and political subdivisions of the state, such as counties and municipalities. The principal justification given by courts for adopting the Public Duty Doctrine is that the burden of financial liability for every negligent act, especially acts involving an official's exercise of discretion, would cripple a government's ability and willingness to serve the needs of its citizens.

In White v Beasley, 453 Mich. 308 (1996), a plurality of our Supreme Court held the Public Duty Doctrine "is a part of the law of this state." The doctrine provides if the duty that the official authority imposes upon an officer is a duty to the public, failure to perform or an inadequate or erroneous performance must be a public, not an individual, injury and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong and may support an individual action for damages.

However, it was not entirely clear from the fractured decision in White whether application of the Public Duty Doctrine was intended to apply to all government employees or only to police officers. In Beaudrie v Henderson, 465 Mich. 124 (2001), the Michigan Supreme Court granted leave to consider whether the Public Duty Doctrine should be extended to protect governmental employees, other than police officers, who are alleged to have failed to provide protection from the criminal acts of third parties. Ultimately, the court held the doctrine should apply only to police officers.

As applied to police officers, the Public Duty Doctrine insulates officers from tort liability for the negligent failure to provide police protection unless an individual plaintiff satisfies the special relationship exception. The White Court adopted the test provided in Cuffy v City of New York, 69 N.Y.2d 255; 505 N.E.2d 937 (1987), to determine whether a special relationship existed between the officer and injured party. Under the Cuffy test, a special relationship is created when there is:

(a) an assumption by the police officer, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;
(b) knowledge on the part of the police officer that inaction could lead to harm;
(c) some form of direct contact between the police officer and the injured party; and
(d) that party's justifiable reliance on the police officer's affirmative undertaking.

White, 453 Mich. at 320-321, quoting Cuffy, 69 N.Y.2d at 260.

In the case of Donna Sinishtaj, all police officer defendants, except for one, were dismissed as parties to the lawsuit early in litigation because the plaintiff was unable to present evidence that the police officers had direct contact with Donna or assumed a duty to act on her behalf. Therefore, the plaintiff's claims were barred by the Public Duty Doctrine. The trial court denied the Investigator's request to be dismissed as a defendant, however, because he had promised to "look into the matter" and "see what could be done to lock this guy up." The court ruled that the Investigator's statements constituted an assumption of a duty to act on behalf of Donna and protect her from harm by Leka. The trial court further reasoned that Leka's history of domestic violence created a situation where a jury could reasonably infer that the investigator had knowledge his inaction could lead to harm. And, because Donna went about her daily activities, there was sufficient evidence for a jury to find that she relied on the Investigator's statements to her detriment. Thus, the Investigator was not entitled to invoke the Public Duty Doctrine as a defense and could be held liable.

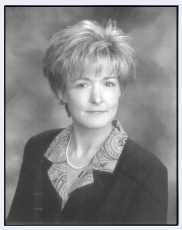
The fact that the trial court allowed the Investigator's case to proceed to trial should serve as a warning to police officers everywhere that they should be extremely careful not to make promises they cannot, or will not, keep. Fortunately for the Investigator in Sinishtaj, before the case went to trial, the Michigan Supreme Court issued its opinion in Robinson v City of Detroit, 462 Mich 439 (2000).

Robinson involved two consolidated cases arising out of separate police vehicle pursuits. In both cases, allegedly "innocent" passengers were killed when the vehicles they were riding in were involved in traffic accidents. In both cases, the police vehicles were not physically involved in the accidents. In both cases, the plaintiffs sued the individual police officers, seeking to hold the officers personally liable for negligent operation of a police vehicle predicated on the officers' deci-

(continued on page 3)

Attorney Profile

Karie Holder Boylan



Karie Holder Boylan concentrates her practice on Police Misconduct Defense, Civil Rights Litigation, Auto Negligence and Government Liability. Of the 51 cases she has handled this past year, 23 were dismissed on a motion or without her client having to pay any money. Presently, she has motions to dismiss in three separate lawsuits pending, but they have not yet been ruled on by the court.

Karie is a member of the State Bars of Michigan and Indiana, the National Council for Political Science and Public Administration and the International Academy of Trial Lawyers. Before becoming an attorney, she was a police officer for 10 years. Because of her experience in police-related matters, Karie is available to present 15 minute Role Call Sessions *free of charge* to police departments throughout metropolitan Detroit. Topics for the Roll Call Sessions include the Public Duty Doctrine, Use of Force, Laws of Arrest and Civil Rights Litigation. If interested, please call Karie to schedule a session.

Karie received her Juris Doctorate degree from Notre Dame Law School in 1996, her Bachelor of Science degree from Northern Michigan University in Business Management in 1982 and her Associate's degree from Oakland Community College in Criminal Justice in 1987. She can be reached by calling our Livonia office at (734) 261-2400 or via e-mail at kboylan@cmda-law.com.

PUBLIC DUTY DOCTRINE EXAMINED (CONT.)

sions to pursue the suspect vehicles, which ultimately resulted in a crash. The officers petitioned for summary disposition arguing, among other issues, the officers owed no common law duty to the passengers and the officers were entitled to statutory immunity under Michigan's Governmental Tort Liability Act (GTLA).

Pursuant to the GTLA, a government employee is immune from tort liability if all the following conditions are met:

> (a) The officer . . . is acting or reasonably believes he or she is acting within the scope of his or her authority,
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function, and
> (c) The officer's . . . conduct does not amount to gross negligence that is **the proximate cause** of the injury or damage. As used in this subdivision, "gross negligence" means conduct reckless as to demonstrate a substantial lack of concern for whether an injury results.
>
> MCL 691.1407(2) (emphasis added).

The Robinson parties did not dispute the fact that the pursuing police officers were acting within the scope of employment while the government was engaged in the discharge of a governmental function when the accidents occurred. The court further held that pursuing police officers owed a duty to the passengers at common law. Thus, the question for the Supreme Court to decide was whether "**the** proximate cause" as stated in subsection (c) of the GTLA also meant "**a** proximate cause." The court noted that the Legislature's use of the definite article "the" clearly evidenced intent to focus on just one cause. This was especially true considering the fact that, legally, the phrase "the proximate cause" is best understood to mean the one most immediate, efficient and direct cause preceding an injury.

Applying this construction to the Robinson cases, the Supreme Court held that the officers in question were immune from suit in tort because their pursuit of the fleeing vehicles was not, as a matter of law, "**the** proximate cause" of the injuries sustained by the plaintiffs. The one most immediate, efficient and direct cause of the plaintiffs' injuries were the reckless conduct of the drivers of the fleeing vehicles. Therefore, despite the fact that there was a duty owed, the plaintiffs' claims were barred by immunity granted under the GTLA.

Returning to Sinishtaj, immediately after the Robinson case was decided, but not before the Investigator was forced to endure nearly two years of discovery, the trial court granted the Investigator's Motion for Summary Disposition and dismissed the case in its entirety because the most immediate, efficient and direct cause of Donna's death was being shot by Leka. The dismissal was affirmed on appeal – as has happened in nearly all negligence claims filed against police officers within the last two years wherein the alleged failure to protect was the sole theory of recovery.

The combined effect of the Public Duty Doctrine and GTLA does not, however, insulate police officers from all liability arising out of the alleged failure to protect individuals from the criminal acts of third parties. Such claims may, in limited circumstances, be raised as a substantive due process claim in federal court under 42 U.S.C. § 1983.

The general rule of 42 U.S.C. § 1983 is that the Due Process Clause does not require the State to provide its citizens with particular protective services. Two exceptions, however, have been recognized. The first, or "special relationship" exception, occurs when the state restrains an individual so as to expose the individual to harm. The second, or "state created danger" exception, occurs when the state, through some affirmative conduct, places the individual in a position of danger.

For example, in 1998 the 6th Circuit held that municipalities could be held liable to its police officers under 42 U.S.C. § 1983 where the release of private information by the municipality places the officer at a substantial risk of harm. In Kallstrom v City of Columbus, 136 F.3d. 1055 (6th Cir. 1998) the city had released its police officers' personnel files to criminal defendants as part of discovery in a pending criminal prosecution. The officers filed suit alleging they had a constitutionally protected right to privacy in certain information contained within their personnel files. The court agreed and held the City could be liable for injuries causally related to release of the personnel files to third parties.

Also, a growing trend among plaintiffs has been to allege in federal courts that the "special relationship" exception to Due Process claims is satisfied by the issuance of a PPO by the courts and acceptance of the PPO by a Police Department. Some states, such as New York, have accepted that argument. The PPO/Special Relationship argument was raised in Sinishtaj but the case was decided on the issue of proximate cause that made the PPO issue moot. Then on July 16, 2002, the United States Court of Appeals for the Sixth Circuit, which includes federal courts in Michigan, expressly rejected a plaintiff's argument that the mere failure to enforce a PPO could result in police officer or a municipality liability for a substantive due process violation under 42 U.S.C. § 1983. See Jones v Union County, Tennessee, 296 F. 3d 417 (2002).

For more information on the Public Duty Doctrine or another other police-related matter, please contact one of our highly-skilled attorneys.

Cummings, McClorey, Davis & Acho
Office Locations

MICHIGAN

Livonia
33900 Schoolcraft
Livonia, MI 48150
Telephone: 734.261.2400
Facsimile: 734.261.4510

Battle Creek
25 West Michigan Ave.
Suite 909
Battle Creek, MI 49017
Telephone: 616.963.7800
Facsimile: 616.963.4707

Farmington Hills
30555 Northwestern Hwy.
Suite 200
Farmington Hills, MI 48334
Telephone: 248.737.3333
Facsimile: 248.737.3330

Marquette
307 South Front Street
Marquette, MI 49855
Telephone: 906.228.8263

Roseville
25509 Kelly Road Suite C
Roseville, MI 48066
Telephone: 586.775.5200
Facsimile: 586.777.6896

Traverse City
3939 M-72 East
Williamsburg, MI 49690
Telephone: 231.938.2888
Facsimile: 231.938.2988

ARIZONA

Phoenix
1850 North Central
Suite 1450
Phoenix, AZ 85004
Telephone: 602.207.2829
Facsimile: 602.207.6943

CALIFORNIA

Riverside
3801 University Avenue
Suite 700
Riverside, CA 92501
Telephone: 909.276.4080
Facsimile: 909.276.4405

Woodland Hills
21031 Ventura Blvd.
Suite 1200
Woodland Hills, CA 91364
Telephone: 818.884.6666
Fascimile: 818.884.8677

GERMANY

Berlin, Germany
Manquen, Lokau & Partner
Rechtsanwälte
Rheinstraße 45
12161 Berlin

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.

CUMMINGS • MCCLOREY
CMDA
DAVIS & ACHO, P.L.C.

On Law is a monthly publication from Cummings, McClorey, Davis & Acho, P.L.C.

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.

CMDA- On Law
33900 Schoolcraft
Livonia, Michigan 48150
1-800-865-7222 ext. 223
www.cmda-law.com
E-Mail: cmda@cmda-law.com

Editor-in-Chief/Graphic Designer:
Jennifer L. Sherman

Would you like to reference previous issues of On Law?
View them on-line at www.cmda-law.com