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CMDA On Law

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

GOOD THINGS HAPPENING AT CMDA:

CASES WON, APPOINTMENTS ANNOUNCED, AWARDS GIVEN

NOVEMBER, 2001

Our firm won several big cases in the month of October, had an attorney appointed Special Assistant Attorney General and another presented with an award for his Pro Bono work.

Couple Drops $10 Million Lawsuit

Ron Acho and Karie Boylan were recently able to get a couple that filed a $10 million lawsuit against a metropolitan Detroit city and its fire and police departments to drop their suit. The couple, who filed the suit in January of 2001, had alleged mistreatment by police, fire and other City employees and representatives. The allegations were thoroughly investigated and were believed to have no foundation. Information made available to the couple through the Freedom of Information Act prior to the initiation of their lawsuit, supported the City's position that its employees and representatives acted appropriately. Shortly after Mr. Acho and Ms. Boylan filed a Motion for Summary Judgment on behalf of the Defendants, the couple agreed to voluntarily dismiss their lawsuit with prejudice.

City Did Not Discriminate

Patrick Moritz, Joseph Nimako and Karen Kuchek Sutliff recently defended a Michigan city in a discrimination case. The Plaintiff was an insulin-dependent diabetic who worked for the City as an Equipment Operator II. The position involved driving commercial vehicles, such as snowplows.

In order to operate commercial vehicles, a person must have a commercial driver's license (CDL). In order to get a CDL, a person must be medically certified unless a waiver is granted by the State of Michigan. The Plaintiff had a CDL, but he had never been medically certified because when the Motor Carrier Safety Act (MCSA) went into effect it provided for a grandfathering-in of everyone who already held a CDL, unless their medical condition had substantially changed since the original issuance of the CDL.

Although the Plaintiff had suffered from diabetes for over 20 years, he didn't become insulin-dependent until 1998. When the City found out about his insulin-dependency, it immediately sent him for a physical. The examining doctor determined the Plaintiff was unqualified for a CDL because he was an insulin-dependent diabetic, which is an automatically disqualifying medical condition under the MCSA. The doctor noted, however, that the Plaintiff could apply for a diabetes waiver if the City joined in on the application. The City refused to join in on the waiver application because of its concerns about the safety of, and potential liability to, third persons who could be injured by the Plaintiff while he was operating City-owned commercial vehicles. The Plaintiff then sued claiming he was being discriminated against because of his diabetes. He sought to compel the City to "accommodate" him by returning him to his Equipment Operator II position (he had been transferred to a lower paying laborer position) and joining in on his diabetes waiver application. He also sought monetary damages.

When the Plaintiff closed presentation of his case-in-chief, an immediate motion for directed verdict was made. After having denied the City's Motion for Summary Judgment several months earlier, the trial court sided with the City and directed a verdict in its favor. The Court held that even if the City had discriminated against the Plaintiff, he had failed to prove the professed concerns (safety and potential liability) were mere pretexts for the discrimination. The Court went on to rule that the "accommodation", which the Plaintiff requested for his diabetes, was not the type of accommodation the Persons With Disability Civil Rights Act (PWDCRA) contemplated.

In Other News

Attorney General Jennifer M. Granholm recently announced the appointment of Ron Acho as Special Assistant Attorney General. Mr. Acho will be working on various assigned projects on behalf of the Attorney General's office. At the firm, he focuses his practice on complex litigation and class actions, business litigation, labor, employment and workers' disability law.

Owen Cummings was recently awarded the "Certificate of Appreciation" by the United States District Court for the Eastern District of Michigan in recognition of his Pro Bono work. Mr. Cummings focuses his practice on municipal law, general civil litigation, wills, trusts and probate.

Lastly, when you get time, check out our updated website at www.cmda-law.com. On the site, you can read each attorney's biography (and look at their picture too), read about the history of our firm, send us an e-mail, read press releases and our monthly newsletter (before it arrives in your mailbox), find maps to our office locations, read about our specialized areas of practice and much more. We have tried to make the website very user-friendly, let us know what you think!

Timothy Young, Managing Partner

in this issue

IF YOU SPOIL IT, YOU MAY LOSE

The evidentiary doctrine of Spoliation of Evidence has gained increasing popularity and recognition as a viable and effective sword and shield in a trial attorney's arsenal. A Plaintiff can use the doctrine to gain exclusion of defense evidence, barring of certain witness' testimony and favorable instructions to a jury raising certain presumptions. A Defendant can use the doctrine in a similarly effective way and to sometimes gain complete dismissal of the Plaintiff's cause of action before trial.

In *Hamann v Ridge Tool*[1], the Michigan Court of Appeals recognized that the Plaintiff in a product liability action has an obligation to preserve evidence that might be important at trial. In *Hamann*, the Plaintiff fell from a gondola while working on the Zilwaulkee Bridge. A winch handle to the gondola broke into three pieces causing the failure of the gondola. Two of the three pieces were inadvertently lost by the Plaintiff's expert after a chemical and metallurgical analysis had been conducted, but before the defendant could analyze the evidence. The Court of Appeals ruled that no testimony regarding the microscopic or chemical analysis of the missing pieces could be introduced on retrial. This, of course, was a severe limitation with respect to the Plaintiff's proofs, but not fatal to the case.

More recently, the Court of Appeals went a step further in *Citizens v Juno Lighting*[2], in upholding the Circuit Court's dismissal of a subrogation action where the target Defendants had not been invited to the fire scene and allowed to conduct their own inspection. The ruling was particularly harsh in light of the fact that the scene investigation had taken place before *Hamann* had been announced. In essence, Michigan Courts expect insurance companies and other sophisticated litigants to anticipate changes in the law and conduct themselves accordingly.

Recently, CMDA utilized the Spoilation of Evidence doctrine successfully when the Judge threatened to dismiss the Plaintiff's claim if the Plaintiff did not accept the Defendant's offer to settle the Plaintiff's claim of $1 million for $150,000, that is $.15 on the dollar. The Plaintiff was forced to accept the offer because the Plaintiff failed to preserve evidence properly, and that case is now dismissed.

What is the practical affect of these decisions?

When you, as an investigator or insurance company, begin to handle a claim that may have subrogation possibilities, whether it be a fire, automobile accident, product liability claim, etc., you must take steps to preserve all the evidence.

How does this work as a practical matter?

If you are investigating a fire scene and a potential subrogation claim is developing, you must make an effort to put all potential Defendants on notice of your investigation, including manufacturers of the equipment or installation who might be responsible. This notice must take place before the fire scene is altered. Our attorneys have developed and used an approval protocol that has been effective in these situations.

How do you protect against a Plaintiff's argument of spoliation if you are a potential Defendant?

If you are, for example, a self-serve department store and receive notice that a patron has tripped and fallen in the vestibule, what steps should be in place to preserve evidence of the condition? Most merchants have a written form for the manager and/or the injured party to fill out. This form should contain sufficient detail as to time, place, date, relevant weather conditions, observed conditions with the claimed hazard, etc. that allow the store representative to accurately testify in the future. Photographs should be taken that document the condition. Witnesses to the condition or accident should be identified on the report or document as well.

Most importantly, the physical evidence should be retained. If the claim is a trip-and-fall over a torn mat, the mat should be marked, tagged and retained as evidence. If a shelf or display has collapsed, that item should be adequately photographed and, if it is not to be repaired and put back in service, it should be retained.

Certainly, in any situation where you have a concern about proper preservation of evidence, it would be wise to contact your legal representative. A little extra time at the beginning of the claim can improve your litigation position dramatically. As always, we at Cummings, McClorey, Davis & Acho are ready and willing to advise you regarding proper preservation of evidence issues.

[1] *Hamann v Ridge Tool*, 2h App 252, 539 NW 2nd 753 (1995).
[2] *Citizens v Juno Lighting*, Docket No. 220622 (August 24, 2001).

Christopher K. Cooke

Attorney Profile

Vahan Vanerian

Vahan focuses his practice on governmental entities, corporate and business litigation, plaintiff personal injury, workers' compensation, employment litigation and criminal defense. He received his Juris Doctorate degree from Loyola Law School in 1992.

Vahan is a member of the State Bar of Michigan, Oakland County Bar Association, Michigan Trial Lawyers Association and American Bar Association.

He received his Bachelor of Arts degree in Philosophy and Communication from the University of Michigan in 1987. Vahan can be reached at vvanerian@cmda-law.com or by calling our Livonia office at 734.261.2400.

Christopher K. Cooke

Chris, the partner managing our Traverse City office, concentrates his practice on personal injury, wrongful death and major property damage, subrogation cases, first and third party property cases, medical malpractice and construction defect. He received his Juris Doctorate, *cum laude*, from Thomas M. Cooley Law School in 1982.

Chris is a member of the State Bar of Michigan, the National College of District Attorneys Association and is admitted to the United States Court for the Western District and the Sixth Court of Appeals. He has taught numerous classes at the American Paralegal Institute, presented seminars at various businesses and is an instructor at the Michigan State Police Fire Academy.

He received his Bachelor of Science degree in Computational Mathematics and Economics from Albion College in 1977. Chris can be reached at ccooke@cmda-law.com or by calling our Traverse City office at 231.938.2888.

ARBITRATION: LESS EXPENSIVE, FASTER AND... BINDING

Arbitration, an increasingly popular alternative to Court resolution of civil disputes, offers the involved parties many advantages over protracted litigation and trial. Arbitration is generally less expensive, more expeditious and, because it is inherently contractual in nature, offers the parties a great deal of flexibility and control over the ultimate outcome. But perhaps the most defining characteristic of binding arbitration is its finality. Although arbitration can be non-binding, if provided for in the arbitration agreement, this article will discuss only binding forms of arbitration.

Because we live in a society of checks and balances and litigants are accustomed to multiple levels of review, parties often overlook the finality of binding arbitration. Consequently, if a party receives an arbitration award that they feel is erroneous and not supported by the law and evidence, they want to explore their options. Can the decision be appealed? Can the award get set aside?

The first place to look to determine if judicial review is possible is the arbitration agreement itself. If the parties specifically and expressly waived any right to judicial review, then under the Michigan Court Rules 3.602, the parties are conclusively bound by a binding arbitrator's decision unless:

- there is a showing that the award was obtained by duress or fraud,
- the arbitrator or another is guilty of corruption or misconduct that prejudiced the party's rights,
- the arbitrator exceeded his/her powers,
- the arbitrator refused to hear material evidence,
- the arbitrator refused to postpone the hearing on a showing of sufficient cause, or
- the arbitrator conducted the hearing in a way that prejudiced a party's rights.

The case of *Krist v Krist*[1], a divorce case, exemplifies the difficulties the Court typically encounters when one party attempts to have an arbitration award set aside. During the pendency of the divorce action, the parties entered into a settlement agreement which stated there would be no spousal support awarded to either party and that spousal support to either party was forever barred. The parties agreed to submit the remaining property division issues to binding arbitration. The binding arbitration decision stated that the husband shall pay a sum of money to the wife that was payable within 45 days, and that in the event the moneys were not paid "this amount shall be considered spousal support".

The husband appealed the arbitrator's decision on the basis that by awarding spousal support the arbitrator clearly exceeded the scope of his authority under the arbitration agreement. Although the Court of Appeals acknowledged that "at first blush" it appeared the arbitrator exceeded his authority by awarding spousal support, nevertheless, after splitting some very fine legal hairs to bring the award within the scope of the arbitrator's authority, the Court proceeded to affirm the arbitration award.

The bottom line is that although arbitration is generally less expensive and more expeditious, *it is binding*. Parties who agree to binding arbitration must be prepared to accept the finality of the arbitrator's decision, even if the award appears highly unjustified or unfounded. For more information on binding arbitration, contact one of our experienced attorneys.

[1]*Krist v Krist, 246 Mich App 59 (2001).*

Cummings, McClorey, Davis & Acho
Office Locations

MICHIGAN

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

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

Farmington Hills
30555 Northwestern Hwy.
Suite 200
Farmington Hills, MI 48334
Telephone: 248.737.3333
Fax: 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
Fax: 586.777.6896

Traverse City
3939 M-72 East
Williamsburg, MI 49630
Telephone: 231.938.2888
Fax: 231.938.2988

ARIZONA

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

CALIFORNIA

Woodland Hills
21031 Ventura Blvd.
Suite 1200
Woodland Hills, CA 91364
Telephone: 818. 884.6666
Fax: 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.

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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.

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