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CMDA ON LAW

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MUNICIPAL, BUSINESS AND INDIVIDUAL CLIENTS RECEIVE POSITIVE RESULTS FROM CUMMINGS, MCCLOREY, DAVIS & ACHO, P.L.C.

Attorneys from Cummings, McClorey, Davis &Acho handle numerous litigated matters each year. As you can imagine, some cases are relatively simple while others can be more complex. Regardless of the size or intensity of the case, our highly skilled and experienced attorneys work hard to receive positive results for our clients. We thought you would enjoy reading about some cases that we recently won for our clients. A few victories that we are especially proud of are described below. To respect the privacy of our clients, their names have been purposely left out.

Popular Concert Venue Not Liable

Joe Seward, a partner in our Livonia office, defended a popular concert venue in metropolitan Detroit when a man filed suit claiming his second vertebrae was fractured while attending a concert there. The man, who was drinking heavily, repeatedly got up from his seat and stood in the aisle. Each time he did this, personnel from the theatre told him to sit back in his seat. After he continued to ignore personnel, he, along with his girlfriend, was escorted out of the venue. Outside the venue, police officers from the community were present and took him to the police station. He was later taken to the hospital after complaining about neck pains. He was diagnosed with having a fractured second vertebrae. He brought suit against the concert venue claiming the personnel escorting him out of the building caused the injury. Joe, an experienced litigation attorney, presented overwhelming evidence that the man's neck injury existed before attending the concert. He succeeded in convincing the jury of this fact and received a No Cause jury verdict for the concert venue.

Trip and Fall - Store Not to Blame

On August 24, Chris Cooke, a partner in our Traverse City office, received a No Cause jury verdict. He represented a major department store in a slip and fall action brought by a female plaintiff and her husband. The plaintiff alleged that the store was negligent for allowing a small tear to exist on a large rubber backed floor mat, for using the mat in the first place and for allowing an accumulation of water to gather in the vestibule. She claimed she tripped on a torn mat and stumbled through the vestibule falling on her knees. The plaintiff continued to have problems with her right knee and, 9 months later, had arthrosporic surgery. Her surgeon related this to her fall at the store.

CMDA succeeded in excluding her wage loss claim and a subsequent surgery to her knee from evidence since the plaintiff failed to supplement discovery answers. In closing arguments, the plaintiff's attorneys black boarded $200,000 in damages for pain and suffering and other non-economic damages for her and her husband. Chris argued that the store's response to the water problem was reasonable, under the circumstances, the mats were not torn and the condition was open and obvious. The court refused to direct a verdict in our favor, but the jury agreed that the store was not negligent.

Woman Attacked by Stray Dogs- Who's to Blame?

Pat Moritz, a seasoned litigation attorney in our Livonia office, received a unanimous jury verdict in the Wayne County Circuit Court. The case involved a woman who was attacked by two Pit Bulls and a German Shepherd in front of the defendent's house while walking to her car on a residential sidewalk. The plaintiff claimed that the defendant either owned or harbored the dogs and should be held liable for the attack. At the trial, it was proven that our client did not own or harbor the dogs and that they were strays that had terrorized the neighborhood for several days.

Bicyclist Injured- Police Officer Not Responsible

Pat Mortiz also obtained a unanimous jury verdict in Oakland County Circuit Court. The case involved a bicyclist who claimed a local police department's patrol car struck him while it was on an emergency run. The plaintiff suffered multiple injuries and was hospitalized for several weeks. At trial, CMDA proved that the plaintiff had actually run into the patrol car and that the officer had no chance to avoid the accident. Pat was also able to prove that the plaintiff was legally intoxicated at the time.

In the past year, CMDA has obtained very favorable results for our clients. Our firm has obtained 42 voluntary dismissals of law suits with no payments to the plaintiff whatsoever; 24 summary judgments, without trial, resulting in the plaintiff in each case getting nothing; 12 jury trials resulting in favorable verdicts for our clients, which also resulted in no payment for the plaintiff; and significant, favorable results in the Court of Appeals and the Michigan Supreme Court, some of which resulted in complete dismissal of those cases and without any payment to the opposing party.

Timothy Young, Managing Partner

in this issue

Attorney Profile

Jeffrey J. Noorman

Jeff focuses his practice on municipal and governmental entity law, professional liability defense, employment and labor law and insurance defense litigation. He received his Juris Doctorate from Michigan State University's Detroit College of Law in 1997.

Jeff is a member of the State Bar of Michigan and the Economics Club of Traverse City. He has published several articles, including *If It's Not on Fox...It Could Be In A Court Room Near You*, which appeared in the Michigan Defense Quarterly, and *Searches of Students, Lockers & Automobiles*, which appeared in LPR Publications.

He received his Bachelor of Arts degree in Political Science and English Writing from Hope College in 1991. He can be reached at jnoorman@cmda-law.com or by calling our Traverse City office at 231.938.2888.

Gregory L. Ulrich

Greg, a partner, focuses his practice on real estate, employment, alternative dispute resolution, business, contracts, estates and technology and computers. He received his Juris Doctorate from the University of Detroit School of Law in 1977.

He was recently elected to the State Bar of Michigan's Board of Commissioners and is active in the American Bar Association. Greg is a Councilmember with the State Bar of Michigan's Computer Law Section and has over 20 years of experience in technology and computer law.

Greg received his undergraduate degree, *Magna Cum Laude*, from the University of Detroit in 1974. He can be reached at gulrich@cmda-law.com or by calling our Livonia office at 734.261.2400.

UNDERSTANDING PRIVACY LAW:

WHAT YOU SHOULD BE AWARE OF WHEN E-MAILING FROM THE WORKPLACE

Did you think sending E-mail is just as secure as sending a First Class letter, only faster? The level of security available in the traditional land-based method of sending letters or documents is not always found in the cyber communications world. In fact, communications that go directly through a Web site may offer no protections at all.

E-mail has facilitated the delivery of services around the world and around the clock. It is in the workplace that privacy concerns have grown more important. Unless a workplace E-mail communication is encrypted and within the protection of a firewall, access to the message can be readily obtained. An appropriate company-wide policy is necessary to establish ground rules for use of technology and conditions of use. Insiders, with unfettered system access, have to be a primary concern for employers. Other employees expect their personal privacy will not be violated.

In the United States, we have not yet achieved a comfort level in determining what constitutes a violation of privacy in electronic communications. Some recently passed laws that govern e-commerce and the privacy related to business transactions include the Children's On Line Privacy Protection Act and the U.S. Department of Health and Human Services rules under the Health Insurance Portability and Accountability Act of 1996. These rules clearly impact any business dealing with private personal data. The widely announced Gramm-Leach-Bliley Act for financial services has been the most recent attempt to protect the use by third parties of communications between parties, including by E-mail. However, a more comprehensive approach as is found in Australia, Canada or the European community has not yet arrived on American shores. Some aspects of the European Union's Directive on Data Protection threaten trans-border movement of data without adequate protection and may impact U.S. based business.

The best recommendation is to not use E-mail, voice mail or other technology in any fashion that would violate work policy. The presumption should be that any communication on a workplace system or communication into the workplace system from outside is without any privacy protection and fully accessible to the management of the company. The same holds true in the governmental setting, with even greater ramifications, since public access to government information is common.

Of particular concern to employers is the electronic record that can result where workplace misconduct, including sexual harassment, discrimination or other employment-related problems are stored in a system.

Improvements in technology bring new issues and problems in communication privacy. To avoid mistakes, do the following:

- Publish clear policies on use of technology and stored information
- Limit use of technology by employees or users to protect trade secrets and confidentiality
- Disclose how information will be used
- Maintain security of systems and user access
- Preserve evidence of cyber-attacks
- Maintain compliance with policies and laws
- Stay on top of technology law changes
- Do a technology security audit

Our firm advises business, municipal and individual clients on the evolving state of privacy law and technology related issues. An experienced attorney from CMDA can assist you in answering any, and all, of your specific questions relating to privacy and technology law.

Gregory L. Ulrich

IF IT'S NOT ON FOX... IT COULD BE IN A COURT ROOM NEAR YOU

A CASE IN NORTHERN MICHIGAN DEMONSTRATES THE NEED FOR VIDEO SURVEILLANCE EQUIPMENT IN SQUAD CARS

During the many times I've seen "Most Dangerous Arrests Caught on Tape," the thought that always comes to mind is how fortunate police officers are to have video surveillance equipment capturing everything done and said during an arrest. But, as with cities throughout the nation, many police departments in Michigan use squad cars that are not equipped with video surveillance equipment. A recent incident in Northern Michigan, where an officer did not have video surveillance equipment in his squad car, resulted in a 42 USC 1983 lawsuit.

If video surveillance equipment is not available, an officer's best defense to a civil rights lawsuit is good judgment and accurate and complete report writing. The dilemma facing the officer in this particular situation was the completeness of his report and the reasonableness of his decision to forcibly apprehend an individual for violation of a city ordinance.

Homeowners were sent a letter informing them that the power company was going to be coming through their neighborhood clearing branches away from suspended wires. After the power company cut the branches, the plaintiff had a problem with their procedure and threw the branches that had collected in his yard into the street. A neighbor immediately called the police to complain about what the plaintiff had done, which the neighbor viewed as a "potential traffic hazard." The plaintiff was asked by the officer to remove the branches from the street and told him that if he did so, the officer would "go away happy." The plaintiff refused and was then asked by the officer for his identification so a simple citation could be issued. Again, the plaintiff refused. The plaintiff was then told that if he did not clean up the mess or produce the requested information, a warrant for his arrest would be issued. The plaintiff refused for a third time, cursed the officer and slammed the front door of his house in the officer's face. The officer wrote his report and left.

Some time between a few minutes after this encounter and midnight (approximately 6 hours), the concerned wife of the plaintiff cleared the branches from the street. The exact time this occurred was disputed. The plaintiff claimed this was done while the officer sat in his squad car at the scene completing paperwork. The officer claimed he had no knowledge that "someone" had cleared the branches from the street until he drove past the plaintiff's residence several hours later and after his report was submitted. The officer did not amend his report. Regardless, the plaintiff admitted on deposition that he, personally, did not clear the branches from the street and that it was the power company's mess and, therefore, their responsibility.

Eight days after the officer submitted his report a warrant for the homeowner's arrest was issued. It was served that afternoon. The officer traveled to the plaintiff's residence where he found him working in his yard. Rather than encumber his hands with paperwork, the warrant was left in his squad car. The officer informed the plaintiff of the warrant and extended the opportunity to voluntarily accompany him to the police station. The plaintiff refused, and instead demanded to see the warrant. He was told it was in the car and he could see it there. The plaintiff wouldn't budge and instead became even more belligerent. Because of this, the officer attempted to handcuff the plaintiff and a struggle ensued. The specific facts surrounding the struggle were disputed, but the homeowner claimed he suffered a torn rotator cuff as a result.

The criminal charges pending against the homeowner were dismissed upon the Magistrate learning that the mess had been cleared. A lawsuit alleging claims of excessive force, false arrest, false imprisonment and malicious prosecution was filed against the arresting officer. The officer was successful in getting the false arrest, false imprisonment and malicious prosecution dismissed as civil rights' claims because probable cause for his arrest was established (the officer had a judicially secured warrant).

The officer-defendant was unsuccessful, however, in disposing of the plaintiff's excessive force claim. The officer-defendant argued he was entitled to immunity from this claim as well, but the court disagreed. All claims that a police officer used excessive force in the course of an arrest, investigatory stop or other "seizure" should be analyzed under the Forth Amendment and its "reasonable" standard. The Supreme Court states that:

> [t]he "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Not surprisingly, whenever the word "reasonableness" appears in a "standard," the existence of a fact question is probable. Accordingly, the District Court allowed a jury to weigh the reasonableness of the officer's conduct.

The one device that could have precluded a trial in this matter was a video tape documenting what specifically happened when the warrant was served. According to the officer, this video tape would have shown the plaintiff poking him in the chest with his finger and elbowing him in his stomach prior to being handcuffed, thereby warranting the use of "reasonable force." However, neither the poking nor the elbowing was mentioned in the officer's final report. That is why it is not only helpful to have video surveillance equipment documenting what happened, but also that officers write accurate and complete reports. That case, unfortunately, ended in a settlement that would have easily purchased enough video cameras to equip every squad car in the city (two). Maybe a little extra…

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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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