On Law

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Cummings • McClorey Davis & Acho, P.L.C.
Attorneys and Counselors At Law

CMDA Now Handles Patents

Firm Adds Patent Law Services to Established Intellectual Property Practice Group

Michael O. Cummings

We are pleased to announce the addition of patent law services to the Firm's established intellectual property practice group.

Michael O. Cummings, an experienced and skillful patent law attorney, has joined our Firm. Mr. Cummings understands and appreciates the importance of patents for commercial success. Patents are valuable assets, and he is committed to protecting them for our clients.

CMDA strives to provide clients with the strongest and broadest intellectual property protection and adding the services of a patent law attorney is a natural fit. While we have handled a comprehensive range of legal services relating to trademarks, copyrights, domain names, and trade secrets for many years, patent law was one area we would refer to attorneys outside our Firm. This is no longer the case as we can now efficiently provide clients with the services of a patent law attorney in-house.

Mr. Cummings provides clients a full range of patent law services, including:

- Preparing and negotiating patent licenses
- Preparing, filing, and prosecuting United States and international patent applications
- Researching and writing opinion letters on patent issues
- Preparing concise, effective patent claims
- Conducting due diligence investigations of patent portfolios
- Litigating patent disputes in court, on appeal, or in arbitration
- Writing and answering cease and desist letters
- Working closely with clients on invention disclosures and records of invention

Developing and implementing a suitable intellectual property strategy is critical to the growth of a business. Regardless if a client's innovative idea is big or small, it is important to have a trustworthy attorney with the knowledge and skill necessary to protect the idea.

Mr. Cummings graduated with honors from Columbia University School of Law and has distinguished himself at two of the largest law firms in the world. He is joining our Firm as an Of Counsel attorney and is admitted to practice law in New York and New Jersey. He is registered to practice before the United States Patent and Trademark Office (USPTO) and is authorized to represent clients anywhere in the world. Mr. Cummings works with domestic and international clients across all industries.

Patent law is national in scope and is not state or county regulated. By its very nature, it encompasses the entire country, which is important in that the protection a client is seeking for their invention will also be national in scope. Therefore, a patent law attorney does not need to be from the same state as the individual or business entity that is seeking patent law services.

Please contact CMDA to further discuss how attorneys in our intellectual property practice group can assist and protect the growth of your business.

Michael Cummings may be reached at (973) 256-4580 or mcummings@cmda-law.com.

Christopher G. Schultz, Managing Partner

in this **issue**

Slip and Fall on Condominium Premises

Does the Condominium Owe a Statutory Duty to its Co-owners?

Joe Wloszek

What happens if a Co-owner slips and falls on the condominium premises? Does the Co-owner have a right to sue the Association or its property manager for failing to maintain the common areas in reasonable repair? On October 15, 2015, in a case of first impression, the Michigan Court of Appeals determined that a Co-owner who slipped and fell on an icy, snow-covered sidewalk resulting in severe injuries to the Co-owner's hand and wrist, cannot recover damages from his Association or its property manager for breach of contract or negligence. This decision represents a major victory for every Association and property manager in Michigan.

The general rule in Michigan is that open and obvious dangers are not recoverable absent 'special aspects' of the condition to justify imposing liability on a defendant. In *Lugo v Ameritech Corp*, 464 Mich 512 (2001), the Michigan Supreme Court held that a pothole in a parking lot was open and obvious and therefore the plaintiff could not recover for the damages sustained after a fall. Often times, Michigan attorneys will refer to this defense as the Open and Obvious Doctrine. Similar to open and obvious potholes in a parking lot, the general rule is that snow and ice are normally open and obvious in Michigan and do not present 'special aspects' to justify imposing liability on a defendant. See *Hoffner v Lanctoe*, 492 Mich 450 (2012). Since the publication of *Lugo*, Plaintiff's attorneys have attempted to find new and creative ways to avoid the Open and Obvious Doctrine in order to recover damages for their clients.

As with most general rules, there are typically exceptions. In residential landlord-tenant cases, there is an exception to the Open and Obvious Doctrine. In *Allison v AEW Capital Mgt, LLP*, 481 Mich 419 (2008), the Michigan Supreme Court held that "a defendant cannot use the 'open and obvious' danger doctrine to avoid liability when the defendant has a **statutory** duty to maintain the premises…." Emphasis added. Thus, if there is a statutory duty to maintain the premises, then the Open and Obvious Doctrine does not apply as a defense.

Under MCL 554.139(2), in residential landlord-tenant situations, there is a statutory duty imposed by law on the landlord to maintain the premises in reasonable repair unless modified by the parties to the lease. The question becomes, "Does a condominium Association or its property manager have a statutory duty to maintain the condominium premises in reasonable repair?" In a recent decision, the answer is surprisingly no.

In *Francescutti v. Fox Chase Condominium Association*, __ Mich App __ (2015) (Docket No. 323111), Mr. Francescutti (the "Co-owner") was walking his dog on the condominium premises and he slipped and fell. The Co-owner sustained severe injuries to his hand and wrist and sued his Association and its property manager for Breach of Contract and Negligence.

First, the Co-owner argued that MCL 554.139 imposes a duty on the Association and its property manager to maintain the property in reasonable repair. The Co-owner's argument was premised on the Condominium Act, specifically MCL 559.136, which states, "The master deed may provide that undivided interests in land may be added to the condominium project as common elements in which land the co-owners may be tenants in common, joint tenants, or life tenants with other persons." The Co-owner argued that he was a 'tenant in common' with the other Co-owners of the common areas of the development. The Michigan Court of Appeals disagreed and held that MCL 559.139 only applies to lessors of land and the Association did not 'lease' land to the Co-owner.

Second, the Co-owner argued that he was a licensee to the common areas of the condominium premises. The Court of Appeals held that a licensee is a person privileged to enter the land of another. Since the Co-owner owned the common areas with all of the other Co-owners, the Co-owner did not enter the land of another.

Third, the Co-owner relied upon the Association's Snow Removal Policy as the alleged basis for a 'duty' imposed on the Association to maintain the condominium premises in reasonable repair. The Court of Appeals held that the Snow Removal Policy did not represent a contract that actually created a duty, much less any evidence that any such duty was actually breached.

This recent, published decision represents an important protection in favor of Associations and their property managers. Co-owners should be aware of this decision and exercise additional caution on the condominium premises. While not addressed in this case, the question becomes whether your condominium Bylaws or Association's snow removal contract creates a contractual duty to maintain the premises in reasonable repair. Such a determination will be on a case-by-case basis and your Association should review its Bylaws and snow removal contracts with an experienced attorney.

Joe Wloszek

Joe Wloszek is an attorney in our Livonia office where he focuses his practice on dispute avoidance, condominium law, commercial litigation, commercial real estate, large contractual disputes, and title litigation. He may be reached at (734) 261-2400 or jwloszek@cmda-law.com.

An Employee's Motivation is No Longer Determinative in a Whistleblower Protection Claim


Suzanne P. Bartos

[Editor's Note: This article first appeared in the March 2016 Michigan PRIMA newsletter.]

The Michigan Supreme Court has recently held that the employee's motivation is no longer a determining factor in whether the Whistleblower Protection Act (WPA) protects the employee from an adverse employment action.

Since the underlying purpose of the Act is to protect the public, municipalities are most vulnerable to a WPA claim. If government officials, who are bound to serve the public and violate laws, designed to protect the public, then employees who at their own risk blow the whistle on such illegality necessarily serve the public interest and are protected by the WPA. The WPA prohibits an employer from taking adverse action against an employee for reporting, or about to report, a violation of law. If an employee is demoted, disciplined or terminated and a link can be made between this and his reporting of a violation, he can then sue his employer for violating the WPA.

In one of the first decisions to interpret the WPA, *Shallal v. Catholic Services of Wayne County*, the court determined that the critical inquiry is whether the employee acted in good faith and with "a desire to inform the public on matters of public concern." If the employee did not have a genuine motive behind the reporting they could not avail themselves of the protection of the Act.

This reasoning was reinforced in the decision in *Whitman v. City of Burton*. Police Chief Whitman claimed his contract was not renewed due to his public objections to the City's non-payment of overtime wages. The Chief argued that this was a violation of the City ordinance, and therefore, protected activity. The Court of Appeals, on two occasions, ruled that the Chief was not acting to advance the public interest and, therefore, he was not to be considered a whistleblower.

The Court of Appeals ruling was vacated, in part, by the Michigan Supreme Court in February 2016. The Supreme Court refused to accept the opinion of the Court of Appeals that an employee's motivation in reporting a violation of law must be to advance the public interest for him to have the protection of the Act. Even though the Supreme Court has determined motivation is not a determining factor, they did uphold the dismissal of the Chief's claim based on an unrelated issue. One has to wonder if the Court would have found the Chief's motivation was not determinative if there was not another basis upon which he could be denied the protection of the Act.

Based upon this recent *Whitman* decision, it is evident that the employee need not have the advancement of the public interest at heart when they report a wrongdoing to avail themselves of the protection of the WPA.

Suzanne P. Bartos

Suzanne P. Bartos is an attorney in our Livonia office where she focuses her practice on employment and labor law, insurance defense, municipal law, education law, and litigation. She may be reached at (734) 261-2400 or sbartos@cmda-law.com.

Attorneys Give Presentation to Police Chiefs on Garrity Protection

Elizabeth Rae-O'Donnell and Sue Bartos, both attorneys in our Livonia office, recently gave a presentation to police chiefs on Garrity Protection. The Garrity principle is an important tool to provide officers the necessary protection while still enabling departments to conduct thorough and complete internal investigations.

In *Garrity v. New Jersey*, the Supreme Court held that officers are not required to sacrifice their rights against self-incrimination in order to retain their jobs. The basic premise of the Garrity protection is straightforward. First, an officer cannot be compelled, by the threat of serious discipline, to make statements that may be used in a subsequent criminal proceeding. Second, an officer cannot be terminated for refusing to waive his Fifth Amendment right to remain silent. Therefore, an officer who has been ordered to give a statement is given immunity from the use of the statement in a criminal proceeding.

Garrity Protection applies to all public employees, not just law enforcement. If your governmental entity is interested in a similar presentation on Garrity Protection, please contact either Ms. Rae-O'Donnell at (734) 261-2400 or erae@cmda-law.com or Ms. Bartos at (734) 261-2400 or sbartos@cmda-law.com.

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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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