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FOCUS ON FAMILY LAW

HIDDEN HEROES

Suffolk County Family Court 18b Panel

By Jennifer A. Mendelsohn

This article is dedicated to the men and women of the Suffolk County Family Court 18b Panel. These individuals are hardworking, dedicated lawyers who go above and beyond the call of duty, despite the fact that they are paid well below the customary hourly rate for attorneys.

When interviewing members of the 18b Panel I discovered the following altruistic acts performed by these attorneys:


Jennifer Mendelsohn

- Supervision of a client's visitation when no one else would do so. This included allowing the client to put a blow up bouncy house on the lawn of the attorney's office building so that the client's children could play in it.
- Daily phone calls to a client who lives in Ohio, including nights and weekends, to try and get the client's baby returned to her.
- Bringing gifts to a client's child who otherwise would not have received Christmas presents.
- Checking on a client every week to make sure he stayed in his program.
- Giving money out of their own pockets to clients for food and transportation.
- Going to Walmart to buy a stroller and diapers for a client's baby.
- Approaching the Suffolk County Bar Association Charity Foundation and imploring its members to give a gift card to a client so that the client could buy food for Thanksgiving for herself and her seven children.
- Gathering donated holiday gifts and delivering them to clients' homes to give to their children.
- Traveling to a nursing home on many occasions to make sure all of the necessary adoption paperwork was in order and signed by a client who was in renal failure.
- Driving clients to the train station.
- Meeting clients at their homes, which sometimes are rooming hous-

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Photo by Barry Smolowitz

People of all ages enjoy Cohalan Cares for Kids fundraiser at the SCBA

Past president Sheryl Randazzo's daughter, Ruby, decided to take a chance with the auction baskets at the Cohalan Cares for Kids fundraiser at the SCBA. Later she won! See article on page 3 and photos on page 17.

PRESIDENT'S MESSAGE

Top 10 Reasons to Join the Suffolk County Bar Association

Over 2,500 attorneys enjoy these member benefits. You should too...


John Calcagni

By John R. Calcagni

We often hear the question: "Why join the Bar Association?" It's not an easy question to answer as the benefits of joining the SCBA are continually evolving in response to members' needs and requests. The leaders and staff work constantly to provide our members with services that will help them manage their practices more effectively and enhance the quality of their professional lives.

I would argue that bar association membership, especially on a local level, is an integral part of practicing law. While the SCBA serves the public, our primary focus is to serve our members, helping them to advance their careers and practices through professional development and a distinctive array of member benefits.

Just how does our Association work to accomplish these goals and what are the advantages of belonging to our bar association? In no particular order, here are the top 10 reasons to be a member of our Association.

Networking opportunities

Now more than ever networking is an essential tool in business development and professional success. SCBA members can tap into the Association's net-

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BAR EVENTS

Defensive Driving Course
Thursday, April 20, at 6 p.m.
Bar Center
Recognized and approved by all insurance carriers. The presenter is Max Gershfeld, Certified Instructor Empire Safety Council. $70 pp or $80 same day registration.

Annual Meeting
Monday, May 1, at 6 p.m.
Bar Center
Election of officers, directors, members of the Nominating Committee. Awards of Recognition. Everyone is invited to attend.

Charity Foundation Fundraiser
Friday, May 19, at 6 p.m.
Gateway Playhouse, Bellport
Rent, the rock musical, will be performed. Dinner under the tent on the grounds of the playhouse. $100 pp. See more info in this issue.

FOCUS ON
FAMILY COURT
SPECIAL EDITION

MUNICIPAL

High Standard for Municipal Liability in a Federal Civil Rights Action

By Annemarie Jones

With the news flooded with alleged constitutional violations of citizens — beatings, false arrests, shootings, prisoner misconduct — a common misconception today is that a municipality can be held liable for the conduct of its employees in an action brought pursuant to Title 42, Section 1983 of the United States Code ("Section 1983"). In actuality, establishing liability for an alleged civil-rights violation under Section 1983 against a municipality is a high standard that few plaintiffs can meet.

Before a court will even analyze liability against a municipality, a plaintiff must prove liability for a constitutional violation against the individual defendants (commonly the acting police officer, correctional officers, etc.). If plaintiff has met this first hurdle, unlike in a state court negligence action, a municipality cannot be held liable under Section 1983 on the basis of *respondeat superior* simply because it employs an alleged tortfeasor. A municipality's liability is based on direct causation rather than *respondeat superior*. Under the United States Supreme Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), in order to prevail on liability against a municipality under Section 1983, a plaintiff must prove a municipal "policy" or "custom" caused the deprivation of her constitutional rights. A plaintiff can prove the existence of a municipal policy or custom in one of four ways.

First, a plaintiff can establish the existence of a formal policy, which is officially endorsed by the municipality. Practically speaking, this means the plaintiff will try to prove that a written policy of the municipality is unconstitutional on its face. For obvious reasons, a municipality will seldom formalize in writing a policy that blatantly violates the Constitution.

Annemarie Jones

Second, a plaintiff can try to show an action taken or a decision made by a municipal official with "final decision making authority" was the cause of the constitutional violation. Generally, in order to prove the second test, plaintiff will need to adduce evidence proving an official that is high-ranking (such as a sheriff, police commissioner, executive, district attorney, or any other municipal employee with a supervisory or policymaking role) engaged in an action that violated the Constitution. This is sometimes shown by a high-ranking official formally or informally acquiescing in the unconstitutional behavior of lower-level employees.

Third, plaintiff can plead and prove a practice so persistent and widespread that it constitutes a custom or usage of which constructive knowledge can be implied on the part of the policymaking officials of the municipality. This standard is often frequently pleaded and misunderstood. The courts in the Second Circuit have made clear that proving conduct that rises to the level of a custom to which knowledge can be imputed to policymaking officials is a very high burden to meet. Generally, the alleged unconstitutional act must be widespread. The courts have not articulated a specific number as to how many times an act must have occurred and by how many employees it must have been committed to rise to the level of a widespread custom. Case law in the Second Circuit has shot down liability for alleged patterns of conduct occurring two, three, and even four times. What is clear, however, is that a single incident involving an employee below the policymaking level will seldom suffice to support an inference of municipal custom or policy. This means that pleading that the very incident alleged in the complaint constitutes the custom will often not suffice to withstand a motion to dismiss.

Finally, a plaintiff can try to prove municipal liability by showing a failure of a municipal policymaker to properly train or supervise her subordinates. The Supreme Court has cautioned a municipality's culpability for a deprivation of civil rights is at its most tenuous where a claim turns on a failure to train. Even if there is some evidence of a failure to train on a particular subject matter causally related to the alleged constitutional violation, the decision not to train rises to the level of an official government policy only if the failure to train amounts to deliberate indifference. Deliberate indifference is a stringent standard of fault, which requires proof that a municipal actor disregarded a known or obvious consequence of the particular failure in training. This typically means a municipal official must be on actual or constructive notice that a particular omission in their training program causes employees to violate the constitutional rights of citizens. This is because without notice that a course of training is deficient in a particular respect, a policymaker can hardly be said to have deliberately chosen a training program that caused violations of constitutional rights.

As in state court negligence actions, the plaintiff in a Section 1983 matter must also establish a causal connection — an affirmative link — between the policy or custom of the municipality and the deprivation of plaintiff's constitutional rights. In other words, a plaintiff must demonstrate an identified municipal policy or practice was the moving force behind the constitutional violation. Based on these numerous hurdles a plaintiff must jump over, establishing liability for an alleged civil-rights violation under Section 1983 against a municipality is a high standard that few plaintiffs can meet.

Note: Annemarie Jones is an associate at Lewis Johs Avallone Aviles LLP in Islandia, New York. Annemarie focuses her practice on the representation of commercial clients in complex civil litigation. Annemarie also focuses her practice on the defense of municipalities. Annemarie represents government officials, correctional officers, and police officers in Section 1983 civil-rights litigation involving claims of inmate suicide, police pursuits, excessive force, false arrest, and malicious prosecution.

CORPORATE

Lender Liability and the Implied Covenant of Good Faith and Fair Dealing

By Gisella Rivera

As transactional attorneys, we know of businesses who prefer not to hire legal counsel when borrowing from banks because they believe that banks are generally unwilling to change their "standard" loan agreements or that a bank cannot act arbitrarily because of New York's implied covenant of good faith and fair dealing (the "Good Faith Covenant"). These beliefs are misplaced.

Though lenders are resistant to changes to loan agreements, they have accepted changes depending, as always, on the changes requested and how much the lender wants the borrower's business. Further, while the Good Faith Covenant "covers any promise which a reasonable person in the position of the promisee would be justified in understanding were included,"[1] the duty of good faith and fair dealing does not impose an obligation on a lender where such obligation "would be inconsistent with other terms of the contractual relationship."[2]

Gisella Rivera

In particular, the Good Faith Covenant can be held inapplicable to a lender's action where the loan agreement specifically authorizes it to act "in its sole and absolute discretion," most notably in provisions allowing the lender the right to deny requests for advances or condition its approval or consent for any reason. Unless expressly modified so that the exercise of a lender's sole and absolute discretion is made in "good faith," then a lender is permitted to act exactly as written: "in its sole and absolute discretion." This means a lender is not liable for and need not consider, in any manner, the effects of such action on the borrower, including if such action will put the borrower out of business or is motivated by the lender's desire to drive the borrower to bankruptcy, liquidation or dissolution.

The right of lenders to act as authorized by the plain language of the loan agreement is made clear by the 1st Judicial Department, in its decision dated February 28, 2017, in *Transit Funding Associates, LLC v Capital One Equipment Finance Corp.*, 2017 NY Slip Op 01525.

In the instant case, Transit Funding Associates, LLC (TFA) entered into a joint venture with Capital One Equipment Finance Corp. (Capital One) in 2009, whereby Capital One provided financing to enable TFA to make medallion loans. During the course of the joint venture, the credit line provided by Capital One increased from $35 million in 2009 to $80 million in 2012 and TFA's business grew from 130 medallion loans to 750 medallion loans. The loan agreement provided:

> "Notwithstanding anything to the contrary herein, [Capital One] reserves the right to make or decline any request for an Advance in its sole and absolute discretion and may condition the availability of an Advance upon, among other things … any other reason determined by [Capital One] in its sole

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