Justice Davis helps to revive class-action lawsuit concerning public defenders

3. December 2010 By Madelaine Lane

On November 30, 2010, the Michigan Supreme Court reinstated, *Duncan v. State of Michigan and Governor of Michigan*, Case Nos. 139345-7, a lawsuit filed by indigent criminal defendants alleging that the court-appointed counsel systems in Berrien, Genesee, and Muskegon Counties violate the defendants' constitutional rights. Specifically, plaintiffs assert that the indigent defense systems in these counties are underfunded and poorly administered. As a result, the court-appointed counsel do not have the resources to adequately investigate their client's cases or otherwise prepare a defense.

This consolidated case arises out of three separate lawsuits. On appeal, the defendants are contesting the trial court's denial of their motion for summary disposition on various theories including governmental immunity and jurisdictional questions. The defendants are also appealing, on leave granted, the trial court's order granting class certification.

This matter has a long and complicated procedural history. Prior to consolidation, the plaintiffs moved under MCR 7.211(c)(3) for an order affirming the trial court's order denying the defendants' motion for summary disposition. The defendants' argued in the trial court that the claims were barred because the defendants enjoyed governmental immunity. The Court of Appeals denied the request over a dissenting opinion written by then-Court of Appeals Judge Davis. The order is here. Justice Davis noted that he would have granted the motion to affirm because the trial court correctly denied defendants' motion for summary disposition. This is especially interesting to note because, since his appointment to the Michigan Supreme Court, Justice Davis has regularly recused himself from any case he participated in while in the Court of Appeals. He did not do so in this case, although admittedly he was not on the panel which released the merits opinion.

On June 11, 2009, the Court of Appeals issued its opinion in the consolidated case. The court affirmed the trial court's holding that the lawsuit was not jurisdictionally barred, not precluded by governmental immunity, was properly decided by the trial court rather than the Court of Claims, and that the Ingham County Circuit Court properly granted plaintiffs' motion for class certification.

The defendants appealed this ruling and on December 18, 2009, the Michigan Supreme Court granted leave to appeal. On April 30, 2010, the Court issued its order which vacated the portion of the Court of Appeals judgment which had affirmed the trial court's grant of class certification. Our post discussing the April 30, 2010 opinion is here. The Court remanded the case back to the trial court for reconsideration of the plaintiffs' motion for class certification in light of *Henry v. Dow Chemical Co.*, 484 Mich. 483 (2009). On July 16, 2010, however, the Court granted defendants' motion for reconsideration and vacated both its April 30, 2010 opinion and the June 11, 2009 Court of Appeals judgment, for the reasons stated in the Court of Appeals dissenting opinion. The July 16, 2010 order is here. The Court noted that the plaintiffs' claims are not justiciable. The matter was remanded back to the trial court for entry of an order of summary disposition in favor of defendants.

On November 30, 2010, the Court again reversed its decision. Justice Davis shifted the split among the Justices on this case and joined the dissenters from the July 16, 2010 motion for reconsideration. This time, the Court granted plaintiffs' motion for reconsideration. In so doing, the Court vacated its July 16, 2010 order and reinstated the April 30, 2010 order. Justice Davis authored the concurring opinion, joined by Justice Hathaway. In that opinion, Justice Davis stated the prior motion for reconsideration should have been denied because it added nothing new. Although there are concerns the April 30, 2010 order can not be complied with, Justice Davis does not share those concerns. Moreover, he believes that the trial court is best suited to address this matter. He reiterates that the case is still in its early stages and summary disposition on the merits is premature.

Justice Corrigan wrote separately to express her concern that the majority published this opinion without waiting for her dissenting opinion to be completed. She believes that the rush to release this opinion is designed to assure that this motion is decided before the new court takes the bench on January 1, 2011. Justice Markman also filed a dissent, which is nearly identical to his concurring opinion from the July 16, 2010 opinion.