PIERCE, DAVIS & PERRITANO, LLP
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Case Comments

SJC Nixes Natural v. Unnatural Distinction In Snow And Ice Cases: Papadopoulos v. Target Corp., 457 Mass. 368 (2010)

Recently, in Papadopoulos v. Target Corp., the Massachusetts Supreme Judicial Court abolished the distinction between natural and unnatural accumulations of snow and ice, holding that a landowner's duty of care to a lawful visitor encompasses an obligation to maintain his property reasonably free of accumulations of snow and ice regardless of the source. The underlying facts of the case comprise a familiar New England scenario. On December 20, 2002, the plaintiff slipped and fell on a patch of ice in Target's parking lot at the Liberty Tree Mall in Danvers, which had accumulated "naturally" (according to longstanding precedent) when snow melted from a nearby snow bank left by a snowplow and refroze. The Superior Court granted the defendant's motion for summary judgment on the ground that, as a matter of law, Target's duty of care to Papadopoulos did not encompass a duty to remove or warn of the "naturally" accumulated patch of ice. The Appeals Court affirmed in an unpublished memorandum and order issued under Rule 1:28.

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After allowing plaintiff's application for further appellate review, the SJC reversed. Tracing the history of the natural accumulation defense back to long-abandoned distinctions between a landowner's duty to an invitee, a tenant and a licensee, the SJC held that the artificial distinction between natural and unnatural accumulations created only confusion in the law and, as such, had earned a similar fate.

Papadopoulos is obviously a landmark decision, affecting both private and public landowners across the Commonwealth. But the SJC's rejection of one of the underlying justifications for the natural accumulation defense is arguably as significant as the decision itself. Specifically, after identifying the "open and obvious doctrine" as one of the key justifications of the natural accumulation defense, the SJC expressly endorsed the reasoning of the Appeals Court in Soederberg v. Concord Greene Condominium Ass'n, 76 Mass. App. Ct. 333 (2010), a case reported in our Summer 2010 newsletter. Just five months earlier, the Soederberg court held that the open and obvious doctrine does not discharge a landowner's duty to remedy an open and obvious defect where harm to others is reasonably foreseeable. Thus, a landowner who has reason to believe that a lawful visitor, behaving as a reasonable person, will confront (rather than avoid) a known or obvious danger because the advantages of confronting it outweigh the apparent risks, owes a duty to that visitor to remedy the danger. By requiring a landowner to remedy an open and obvious defect under such circumstances, the SJC has clearly undercut the longstanding notion that landowners owe no duty to those harmed by such defects.

Given the breadth of the language employed by the SJC, the Papadopoulos decision will likely have an impact far beyond snow and ice cases. Landowners, including municipalities, should recognize that, not only must they take reasonable steps to remove, treat or otherwise remedy natural accumulations of snow and ice, they must also correct open and obvious hazards whenever it is foreseeable that a lawful visitor will assume the risks posed by such risks and suffer harm as a result.

Supreme Court Extends Right To Bear Arms: McDonald v. City of Chicago, 130 S. Ct. 3020 (2010)

On June 28, 2010, the United States Supreme Court ruled in a 5-to-4 decision that the Second Amendment guarantee of an individual's right to bear arms applies to state and local gun control laws. The decision of McDonald v. City of Chicago was issued almost exactly two years after the Court first ruled that the Second Amendment protects an individual's right to own guns in District of Colombia v. Heller, 128 S. Ct. 2783 (2008), another 5-to-4 decision. Heller, however, addressed only federal law, leaving open the question of whether the Second Amendment protects gun owners from overreaching state and local governments as well.

Justice Samuel A. Alito Jr., writing for the majority, recognized that the right to self-defense as protected by the Second Amendment is fundamental to the American concept of ordered liberty. Like other fundamental protections preserved in the Bill of Rights, the Second Amendment must be applied to limit not only federal power, but also that of state and local governments. While the ruling is a significant symbolic victory for supporters of gun rights, its long-term practical effects remain unclear. As in Heller, the Supreme Court left for another day just what kinds of gun control laws can be reconciled with Second Amendment protection. The majority offered little more than assurance that

the constitutional guarantee includes a right to keep handguns in the home for self-defense. In fact, the Court failed even to decide the constitutionality of the two gun control laws at issue in the case, from Chicago and Oak Park, IL. Instead, the Court returned the case to the lower courts to decide whether the exceptionally strict laws in those cities, which effectively banned the possession of all handguns, can be reconciled with the Second Amendment.

Unfortunately, the majority offered lower courts little guidance on how much protection the Second Amendment actually affords. Justice Alito reiterated the caveats in the Heller decision, saying the Court did not mean to cast doubt on laws prohibiting possession of guns by felons or those who suffer from mental illness, forbidding the carrying of guns in sensitive places such as schools and government buildings, or regulating the commercial sale of firearms. But beyond such obvious restrictions, the McDonald decision left the scope of the right largely undefined.

Justices Stevens, Ginsburg, Breyer and Sotomayor dissented. In an opinion written by Justice Breyer, the dissenters criticized the previous Heller decision as incorrect, adding that they would not have extended its protections to state and local laws even if Heller was decided correctly. "Although the court's decision in this case might be seen as a mere adjunct to Heller," added Justice Stevens in a separate dissenting opinion, "the consequences could prove far more destructive – quite literally – to our nation's communities and to our constitutional structure." The dissenting justices argued that history did not provide clear answers and that empirical evidence regarding the consequences of gun control laws remains mixed. But there is evidence, Justice Breyer pointed out, that firearms cause 60,000 deaths and injuries in the United States each year and that Chicago's handgun ban had saved many hundreds of lives since its enactment in 1983. Such evidence, stated Justice Breyer, counsels in favor of giving deference to local elected officials in deciding how to regulate guns.

Justice Alito, writing for the majority, responded that many constitutional rights entail public safety costs, including those limiting the use of reliable evidence obtained through police misconduct. He further acknowledged that the majority decision limits the ability of states to address local issues with tailored gun regulations. "But this is always true," he concluded, "when a Bill of Rights provision is incorporated."

Town May Be Held Liable For Suicide Of Detainee After Release From Police Custody: Coscia v. Town of Pembroke, 715 F. Supp. 2d 212 (D. Mass. 2010)

In Coscia v. Town of Pembroke, the United States District Court for the District of Massachusetts opened the door for liability for suicide by a police detainee outside of police custody. On December 9, 2007, Jason Coscia was involved in a single-car accident. Police subsequently arrested Coscia and transported him to the police station. During the ride, Coscia told police he wanted to kill himself and intended to do so by jumping in front of a train. Once in his cell, Coscia repeated his plans to end his life by any means possible. He then attempted to bite off his handcuffs, to kick the walls, and to lick an electrical outlet. Police officers placed leg restraints on Coscia and completed a suicide evaluation form, concluding he had a "very high risk" of committing suicide. The police chief allegedly became aware of

the situation and of Coscia's statements, but took no action. At 6:00 p.m., police released Coscia without ever requesting or obtaining medical assistance for him. Fourteen hours later, at 7:50 a.m. the next day, Coscia stepped in front of a train and ended his life.

Coscia's estate brought a civil rights action against the officers and police chief claiming deliberate indifference to the decedent's medical needs while he was in police custody in violation of the Due Process Clause of the Fourteenth Amendment. The estate also brought a Section 1983 claim against the Town for failing to train its officers in suicide prevention. The defendants moved for judgment on the pleadings on the grounds that Coscia had no constitutional right to protection from harm while *outside* of police custody, individual officers were entitled to qualified immunity, and no Monell claim for municipal liability was available against the Town.

Noting that police officers are typically found not liable when a former detainee commits suicide subsequent to his release from custody, Judge Nancy Gertner explained that such liability may nonetheless be found upon a showing that police exhibited deliberate indifference in the face of an unusually strong risk of suicide. A municipality may also be subject to liability when a government policy or custom causes the constitutional violation. In short, if a failure to train rises to the level of deliberate indifference, such failure may be considered a policy or custom for purposes of establishing Monell liability. The Pembroke Police Department had a policy regarding suicide prevention, but it was too soon, at the outset of the litigation, to determine whether the Department effectively trained its officers in this aspect of their police work.

Coscia's statements and actions in the cell could be found to constitute a serious risk, and the police officers' actions in completing the suicide evaluation form constituted actual knowledge of that risk. With respect to the officers' failure to act, the Court noted that the Department had a policy whereby detainees with suicidal tendencies were to be taken to the hospital for evaluation. The officers' failure to comply with that policy, at the least, stated facts sufficient to withstand the defendants' dispositive motion. The Court also ruled that the estate had demonstrated plausible facts to support its argument that the defendants' actions caused Coscia's death; but for the officers' alleged failure to obtain medical assistance for Coscia, he might not have committed suicide. Lastly, the Court concluded the defendants were on notice that their failure to act could have violated Coscia's constitutional rights in light of the extensive case law regarding medical care for suicidal detainees and the Departmental policy regarding the evaluation and treatment of suicidal detainees. Therefore, the individual defendants were not entitled to qualified immunity.

The Court's denial of defendants' motion for judgment on the pleadings invites the possibility that deliberate indifference to a detainee's serious risk of suicide can be the proximate cause of self-inflicted harm long after a release from custody. Indeed, the Court seems to draw a line in the sand to eliminate "perverse incentives for [police officials] to intentionally release suicidal individuals to escape liability." The specter of liability for actions (or inactions) so remote from the ultimate act of the detainee should inspire municipalities and police departments to implement appropriate policies to process suicidal detainees, to provide adequate training to police officers, and, most importantly, to carry out those policies in order to avoid future liability.

The Supreme Court Weighs In On Employee Privacy Expectations: City of Ontario v. Quon, 130 S. Ct. 2619 (2010)

In a case it described as "touching issues of far reaching significance," the United States Supreme Court recently considered an employee's right to privacy in text messages sent and received on a work-provided pager and his employer's right to access records of those messages. In City of Ontario v. Quon, the City of Ontario, California acquired 20 pagers and distributed them to Quon, a police sergeant, and other members of the local SWAT team. Before distributing the pagers, the City published a policy specifying that "[the City reserves the] right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." While the policy did not apply to text messages on its face, Quon and other employees were told that texts sent on the pagers would be treated like email messages.

Over the following months, Quon exceeded his monthly text message usage and was reminded by a member of the police department that pagers were "considered email and could be audited." Quon paid the City for the overage charges rather than submit to an audit, an arrangement offered to other employees as well. When Quon continued to exceed allotted usage, the department finally decided to audit the messages to determine whether the character limit for text messages was too low and officers were being forced to pay for work-related overages or, conversely, whether many of the messages were personal in nature. A member of the police department contacted the wireless company, who provided him with a transcript of the text messages sent to and from Quon's pager. The transcript revealed that many of the messages were not work-related and, indeed, some were sexually explicit. A further internal affairs investigation, which was limited only to a review of the messages Quon sent during work hours, revealed an overwhelming misuse of the pager to send personal messages, in violation of department rules. Quon was disciplined by the department.

Quon, along with other officers, filed suit in United States District Court alleging that, in accessing the text messages, the City violated his Fourth Amendment rights and the federal Stored Communications Act, 18 U.S.C. § 2701, *et seq.* ("SCA"), and that the wireless company violated the SCA by turning over the records. The District Court held that Quon had a reasonable expectation of privacy in the messages, but that the reasonableness of the City's search of the records turned on the purpose for the search – *i.e.*, if it was to determine whether Quon was "wasting time" on the job, it would be improper, but if it was to determine whether officers were being forced to pay

work-related costs, it would be Constitutionally permissible. A jury subsequently determined that the purpose of the audit was to evaluate the efficacy of the text messaging program. The District Court accordingly held that the City did not violate the Fourth Amendment. On appeal, the Ninth Circuit reversed, agreeing that Quon had a right to privacy in the text messages, but instead holding that the search was unreasonable because there were a number of less-intrusive means to "verify the efficacy of the … character limit." The Ninth Circuit further held that, in turning over the transcript, the wireless company had violated the SCA.

In reversing the Ninth Court's decision with regards to the City, the Supreme Court first announced that it was declining to adopt a "[b]road holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment," cautioning that, "the judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." Instead, the Court fashioned its narrower holding on an application of the principles announced in O'Connor v. Ortega, 480 U.S. 709 (1987). Specifically, when conducted for a "non-investigatory, work-related purpose[e]" or for the "investigatio[n] of work-related misconduct," a government employer's warrantless search is reasonable if it is "justified at its inception" and "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of" the circumstances giving rise to the search. The Court held that the City's search of Quon's text messages was justified at its inception because, as a jury had found, the search was conducted to determine the sufficiency of the message limit in the City's contract with the wireless provider and, therefore, "necessary for a non-investigatory work-related purpose." Furthermore, the search was reasonable because it constituted "an efficient and expedient way" to determine the source of Quon's overage charges. Finally, the review was not "excessively intrusive" because the department reviewed only two months of Quon's messages, and redacted all messages he sent while off-duty.

In analyzing Quon's privacy interest, the Court stated that the "extent of an expectation is relevant to assessing whether the search was too intrusive." Quon, according to the Court, would have been unreasonable to expect that "his messages were in all circumstances immune from scrutiny," given the warnings of potential audits issued by his employer, and the likelihood of his actions coming under scrutiny in light of his status as a law enforcement officer. The Court further held that the search of Quon's messages on a work-issued pager was not as intrusive as a search of his personal e-mail or pager or a wiretap of his personal phone would have been. The Court rejected the Ninth Circuit's rationale that any Fourth Amendment search must be conducted in the least-intrusive manner, and noted that even if the wireless company violated the SCA by turning over the text transcript, this would not render the City's search of messages unreasonable.

The Court's decision, while specifically avoiding the announcement of a broad rule regarding employee's privacy interests in work-provided technological devices in favor of a more case-by-case analysis, nonetheless emphasizes that employees should not expect complete privacy on employer-provided devices. It also provides a roadmap (albeit a hazy one) for employers to follow in conducting Constitutionally-permissible searches in records of such communications.

SJC Upholds Town's Right To Exercise Discretion Under Pre-Qualifications Statute: Fordyce v. Town of Hanover, 457 Mass. 248 (2010)

In a recent decision, the Massachusetts Supreme Judicial Court held that a contactor's misrepresentations during the public bidding pre-qualification process did not constitute fraud for purposes of the competitive bidding statute. Ten taxpayers filed a lawsuit seeking to enjoin the Town of Hanover from making payments to a general contractor for the construction of Hanover High School. The Superior Court granted a preliminary injunction and ordered the Town to halt construction of the $46,000,000 school due to flaws in the bidding process. After a single justice of the Appeals Court vacated the injunction, the taxpayers appealed to the SJC.

Pursuant to M.G.L. c. 149, § 44A(2)(D), contracts for the construction of public buildings estimated to cost more than $100,000 shall be awarded to the "lowest responsible and eligible general bidder" through a competitive bidding process. First, a prospective contractor must show expertise and financial viability by obtaining a certificate of eligibility from the Commissioner of the Division of Capital Asset Management and Maintenance. Second, the contractor must be pre-qualified to bid on the project by a four member committee with authority to award the contract. The committee identifies potential contractors based on responses to a written request for qualifications.

In June 2009, Callahan, Inc., submitted a statement of qualification to the Town. Callahan was one of nine contractors pre-qualified by the committee to submit formal bids for the school construction project. In response to the lowest bid submitted by Callahan, several bid protests were filed with the Attorney General regarding misrepresentations made by Callahan concerning prior construction experience. Although the Attorney General requested a delay in construction pending an investigation, the Town entered into a contract with Callahan and proceeded with the project in October 2009.

Two weeks after construction commenced, the Attorney General concluded that Callahan had committed "fraud" through misrepresentation of material facts in its statement of qualifications with the intention to mislead the pre-qualifying committee. Specifically, Callahan had falsely claimed to be the successor corporation to J. T. Callahan & Sons ("JTC"). Although several Callahan managers were former employees of JTC, the entities were incorporated independently and shared no corporate officers. Callahan made the false statement in order to claim experience in the construction of 75 schools. Callahan also claimed to have performed work on a school construction project in 2005 when, in fact, JTC had been the general contractor on the job and had failed to complete the project because of financial difficulties. Further, Callahan failed to disclose legal proceedings against JTC and other alleged improprieties (as mandated by the request for qualifications). Based on her investigation, the Attorney General concluded that Callahan should not have been awarded the contract by the Town. After the Town made no effort to rescind the contract despite the Attorney General's decision, the plaintiffs sought temporary and permanent injunctive relief to halt construction on the grounds that Callahan should not have been considered a "responsible and eligible" bidder within the meaning of the competitive bidding statute.

On appeal, the SJC concluded that, without detrimental reliance on behalf of the pre-qualification committee, Callahan's misrepresentations did not constitute "fraud" for purposes of the competitive bidding statute. Pursuant to M.G.L. c. 149, § 44D½(h), all decisions of the committee "shall be final and shall not be subject to appeal except on grounds of arbitrariness, capriciousness, fraud or collusion." Under common law, fraud is a false representation of a material fact intended to induce another to act in detrimental reliance of such misrepresentation. Here, there was no allegation of corruption involving the pre-qualification committee, and the committee did not act in reliance upon any misrepresentations made by Callahan. Accordingly, the preliminary injunction could not survive since the plaintiffs were not likely to prove fraud at trial.

The local pre-qualification committee, the SJC noted, exercised sound discretion in making decisions during this process. This discretion, the Court reasoned, is not curtailed under circumstances in which a pre-qualification committee learns that a general contractor has made misrepresentations in a filing. A pre-qualification committee may still choose to pre-qualify that contractor under the circumstances, provided that it has not been deceived in any way during the process. Had the SJC held otherwise, the ramifications could have been significant for cities and towns as well as contractors across the Commonwealth. The Fordyce decision protects the integrity and recognizes the nuances of the pre-qualification process, while acknowledging the due diligence undertaken by pre-qualification committee members.

SJC Limits Protections Of Maternity Leave Act: Global NAPs, Inc. v. Awiszus, 457 Mass. 489 (2010)

In August 2010, the Supreme Judicial Court held that the Massachusetts Maternity Leave Act ("MMLA") furnishes protection to women on maternity leave for a period of only eight weeks. The MMLA provides that a female employee "absent from such employment for a period not exceeding eight weeks for the purpose of giving birth ... shall be restored to her previous, or a similar, position with the same status, pay, length of service credit and seniority, wherever applicable, as of the date of her leave." In Global NAPs, Inc. v. Awiszus, the SJC explained that a former employee of Global NAPs, Inc., Sandy Stephens, who was relieved of her employment during her maternity leave, could not maintain a claim under the statute because her maternity leave exceeded eight weeks.

The SJC explained that the statute was clear – MMLA protections are limited to eight weeks *only*. In so doing, the Court also noted that guidelines issued by the Massachusetts Commission Against Discrimination suggesting that the eight week statutory period can be extended are inconsistent with the language of the MMLA and do not have the force of law.

While the decision in Global NAPs limits the protections of the MMLA to the first eight weeks of maternity leave, employees should be aware that they may have additional rights under their employer's policies, based on other non-MMLA promises made by the employer, and/or under the federal Family and Medical Leave Act, which permits up to twelve weeks of leave. Going forward, this decision should provide some clarity to employers responding to employee requests regarding leave and in defending future claims brought by employees who were terminated or otherwise disciplined for taking extended maternity leave.