# PIERCE, DAVIS & PERRITANO, LLP
# FALL 2013 NEWSLETTER
# DEVELOPMENTS IN MUNICIPAL LAW

## Legislative Update

### Legislature Considers Proposed Changes to Massachusetts Tort Claims Act

In 2013, the Massachusetts legislature considered three proposed changes to G.L. c. 258, §§ 1, *et seq.*, the Massachusetts Tort Claims Act ("MTCA"), of which public employers, their officials and insurers should be aware. First, House Bill No. 1170, "An Act to reform the tort claims act," threatened to lift the $100,000 statutory cap on municipal liability for damages caused to real property. At present, Section 2 of the MTCA abrogates sovereign immunity for "injury or loss of property or personal injury or death" caused by the negligence of public employees, but guarantees that such liability shall not be "*for any amount in excess of $100,000.*" Under a bill proposed by State Representatives Denise Andrews of the 2nd Franklin District and Cory Atkins of the 14th Middlesex District, however, the following language would be added to Section 2 immediately after the seven words italicized above: "unless the claim for damage to real property exceeds $100,000. Any amount of compensatory damages in such instance shall reflect the full and fair cash valuation of the real property."

Whether House Bill No. 1170 was proposed in reaction to Morrissey v. New England Deaconess Ass'n, 458 Mass. 580 (2010), where the SJC held that actions for private nuisance against public employers are controlled by the exclusive remedy provisions of the MTCA, is not known. But the financial impact of the proposed amendment to cities and towns could be substantial. Not only does the proposed amendment waive municipal immunity for real property damage claims above the statutory cap, but it replaces such longstanding protection with nothing short of unlimited liability exposure. In other words, if House Bill No. 1170 becomes law, the Commonwealth and its political subdivisions (and, through them, the taxpayers) will be exposed to claims worth potentially millions of dollars in the event

## About the Firm

The partners of PD&P bring more than a century of litigation and trial experience to the firm. Our team of experienced and diverse associates is well-trained. We guarantee a quick and thoughtful response to each client's particular needs, as well as creative solutions to litigation.

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a water main break, toxic spill, fire or other incident attributable (or allegedly attributable) to the negligence of public employees should cause harm to a mall, warehouse, commercial structure, single-family dwelling, apartment complex, orchard, cranberry bog, or other real property. Adopting the "full and fair cash valuation" property assessment standard of M.G.L. c. 59, §§ 2A & 38, a municipality, under an amended MTCA, would be on the hook for real property either damaged or destroyed up to its fair market value, rather than the current maximum of $100,000 per plaintiff. Thus, without adequate insurance, a catastrophic loss could effectively bankrupt many cities and towns if House Bill No. 1170 becomes law.

A second proposed amendment to the MTCA appeared in House Bill No. 1267, "An Act relative to the liability standard of public employees." This bill, sponsored by several legislators, including State Representative Nick Collins of the 4th Suffolk District, proposes to add the following paragraph at the end of Section 2:

> Notwithstanding any special, general law or regulation to the contrary; in such cases where a public employee injured while in the performance of their duty, or the Executor of the estate of a public employee killed while in the performance of their duty can prove gross negligence of their employer contributed to said injury or death, the employee, or the estate of the employee, may pursue the employer in excess of one hundred thousand dollars.

Most cities and towns routinely protect municipal employees for on-the-job injuries under the Workers' Compensation Statute. Police and firefighters are similarly protected under G.L. c. 41, §§ 100 & 111F. But if a public employee should opt out of the applicable statutory compensation scheme, he can still bring suit against his employer under the MTCA. Monahan v. Town of Methuen, 408 Mass. 381, 387 (1990). If he should do so, his maximum recovery (under the current statute) is limited to $100,000. This is true regardless of whether the employee's injuries were caused by negligence or gross negligence on the part of his superiors, co-workers or fellow employees. See McNamara v. Honeyman, 406 Mass. 43, 46 (1989) (MTCA held applicable to negligence and gross negligence alike). But under House Bill No. 1267, this recovery limit would change. An employee who opts out of the remedies provided under Chapters 152 or 41, and who can prove that gross negligence on the part of his employer "contributed to [his] injury or death," shall be entitled "to pursue the employer in excess of one hundred thousand dollars." In short, there will be no limit on the amount the employee or his estate can recover against the grossly-negligent public employer for injuries or damages sustained as a result of an on-the-job injury.

Admittedly, few public employees waive the statutory benefits available under Chapters 152 and 41. But for those who do, the changes proposed in House Bill No. 1267 could prove a very valuable (and expensive) option. Perhaps more critical for cities and towns is the exposure they would face to injured *non-traditional* employees in the event House Bill No. 1267 should become law. While part-timers, volunteers, elected and appointed officials might not be entitled to recover Workers Compensation benefits for "on-the-job" injuries, they nonetheless qualify as "public employees" within the meaning of M.G.L. c. 258, § 1. Therefore, if they should suffer injury or death due to the gross negligence of their employer or fellow employees, their right of recovery as against the public employer will be without limit. As a consequence, if House Bill No. 1267 is adopted, cities and towns should consider discouraging the employment of part-timers and volunteers (including school volunteers) in order to minimize the risk of unlimited tort liability.

The final (and perhaps least threatening) proposed change to the MTCA appeared in Senate Bill No. 1294. Sponsored by State Senator James E. Timilty of the Bristol and Norfolk District, Senate Bill No. 1294, captioned "An Act relative to the indemnification of town administrators," recommends that amendments be made to Sections 9 and 13 of Chapter 258 concerning the indemnification of public employees for claims based on intentional torts and the alleged violation of another's civil rights. Specifically, Senate Bill No. 1294 proposes that (1) town managers and town administrators shall enjoy the same indemnification protection as other public employees and municipal officials; (2) such protection for town managers and town administrators shall be available even after they "separat[e] from service in the respective municipality"; and (3) the maximum limit for discretionary indemnification for all employees under Section 9 *only* (not Section 13) shall be increased from $1,000,000 to $2,000,000.

While Senate Bill No. 1294 (if adopted) would admittedly increase the potential exposure of public employers for the wrongful acts or omissions of their employees (particularly town managers and town administrators), it is not as troubling as House Bills No. 1170 or 1267, in that it was designed to better protect those who serve (or attempt to serve) municipal interests. In addition, the proposed increase in the maximum amount of discretionary indemnification under Section 9 may come as a welcome option to those communities that wish to "stand behind" their public officials sued for certain acts or omissions committed within the scope of their employment.

On balance, the proposed changes to the MTCA debated by the Massachusetts Legislature in 2013 are not municipally "friendly." Consequently, municipal officials would be well-advised to voice their concerns to legislators about making any statutory changes that may lead to increased municipal exposure at a time when public coffers are nearly bare. Certainly, this is not a time when cities and towns can afford to face additional tort liability.

# Case Comments

## First Circuit Affirms Ruling That Teacher is Ineligible for FMLA Leave: McArdle v. Town of Dracut, 732 F.3d 29 (1st Cir. 2013).

Recently, in McArdle v. Town of Dracut, the First Circuit Court of Appeals affirmed summary judgment in favor of the Town of Dracut on claims brought under the Family and Medical Leave Act ("FMLA") by Raymond McArdle, a former middle school English teacher in the Dracut school system, who began to experience personal issues that caused him to miss numerous school days during the 2008-2009 school year. The First Circuit held that McArdle (1) was not eligible to take FMLA leave because he had not worked 1,250 hours in the previous year; (2) could not establish that the Town's handling of his FMLA application caused him harm; and (3) was not fired for requesting FMLA leave but, instead, because of his indefinite absence.

In 2007-2008, McArdle went through a divorce and personal crises that caused him to miss work at the middle school. In fact, he went to work only ten of twenty-one school days in September of 2008,

and did not appear at all in October, November, or December of 2008. After the winter break, his record improved temporarily in 2009, but he did not work any days in June, the final month of the school year. In total, he came to school for only eighty-two days in the 2008–2009 school year. Throughout the school year, McArdle provided only cursory explanations for his absences – *e.g.*, two notes indicating he had a "medical condition" and was unable to work for "medical reasons." The school disciplined McArdle for not attending faculty meetings when he was absent from work. It also disciplined him for failing to leave lesson plans for a substitute with the vice-principal, even though the First Circuit found that he had done so.

McArdle easily exhausted his entire sick and personal leave time in the 2008–2009 year. He also exercised a contractual right to use his fifteen days of sick leave for the following 2009–2010 year to cover additional absences in the 2008–2009 school year. With regard to the remaining absences, McArdle had fifty-two "deduct days" during which school was in session but he was not paid.

On the first day of the 2009-2010 school year, McArdle did not report to work and informed the principal he had made the decision it was not in anyone's best interests for him to return to the school. When he stated that he wanted to apply for FMLA leave, the superintendent's office sent him the required paperwork. McArdle, however, did not send the superintendent the required written notice or a completed form from his physician.

Three weeks later, the principal sent McArdle a letter terminating his employment for reasons of abandonment. In response, McArdle finally requested FMLA leave in writing for the first time and demanded that the school district give him notice of its intent to terminate his employment before firing him. The school district, in turn, notified McArdle that it "intended" to terminate him, and allowed him 10 days to respond. Nine days later, McArdle resigned his position so as to avoid termination. He then sued the Town, its school district, and three individual school officials, alleging violations of the FMLA. The District Court allowed defendants' motion for summary judgment. On appeal, the First Circuit affirmed.

First addressing McArdle's eligibility to take FMLA leave, the First Circuit determined that the plaintiff had worked only 82 days during the last 12-month period prior to the start of his leave and, thus, was ineligible for FMLA protection. In reaching its conclusion, the Court rejected McArdle's argument that he should be considered to have worked on days for which he was paid without working (such as holidays and personal days). The Court determined that, even if he had worked additional days or hours from home, "[t]he gap between 615 hours and 1250 hours [the number required for FMLA leave eligibility] is so large that it is entirely implausible on this record that McArdle worked anywhere close to 1250 hours."

The Court next considered whether the school district interfered with McArdle's FMLA rights by failing to notify him of his leave eligibility, but declined to rule on the issue. Even if the school district violated the technical notice requirements of the statute, McArdle offered no evidence that he suffered any loss or harm as a result.

Finally, the First Circuit ruled that the school district did not unlawfully retaliate against McArdle for requesting FMLA leave. Recognizing "it is not clear that one not entitled to take FMLA leave

'avails himself of a protected right' when requesting to take such leave," the Court explicitly left open the possibility that an employee ineligible for FMLA leave may, nonetheless, state a viable retaliation claim, as he may not know of such ineligibility until he actually attempts to exercise his right. Here, the First Circuit's review of the summary judgment record found that the "only reasonable reading . . . is that McArdle was not fired for asking to take FMLA leave. Rather, he was fired because the town concluded that his renewed and indefinite absence, without advance notice, allowed it to fire him." The First Circuit therefore ruled that McArdle's absence from work was "fully sufficient to cause his termination," and that "no reasonable factfinder could find that the request for leave played any role in causing the town to fire [him]." Eligible or not, McArdle's request for FMLA leave was not the motivating factor in the school district's termination decision.

The First Circuit's decision in McArdle highlights the statutory requirement that an employee must work at least 1,250 hours with the employer during the previous 12-month period in order to be eligible for FMLA leave. While the Court stopped short of determining whether an employee ineligible for FMLA leave engaged in protected activity by requesting such leave, it still upheld a summary judgment ruling in favor of a public employer based on the facts presented.

## Massachusetts Lodging House Act Held Inapplicable to Off-Campus College Apartments: City of Worcester v. College Hill Properties, LLC, 465 Mass. 134 (2013).

In PD&P's Winter 2012 Newsletter, we reported on a recent decision in which the Massachusetts Appeals Court upheld sanctions issued against the operators of five unlicensed lodging houses located near the College of the Holy Cross. In May 2013, the Supreme Judicial Court, upon further appellate review, reversed the Appeals Court in a decision that will effectively prevent college cities and towns throughout Massachusetts from using the Lodging House Act, G.L. c. 140, §§ 22-32 ("the Act"), as a means of ensuring the safety of undergraduate students residing in off-campus apartments. The Act was initially passed during World War I, when thousands of residents lived in overcrowded lodging houses, many of them in the neighborhoods of Boston. The Act was intended to address public safety concerns, as many lodging houses were known to be unsanitary and disease-ridden, as well as public welfare concerns, as lodging houses were equally notorious as venues for "sexually loose" or otherwise "immoral" conduct. The Act defines a "lodging house" as "a house where lodgings are let to four or more persons not within second degree of kindred to the person conducting it . . .." G.L. c. 140, § 22. It requires a lodging house keeper to obtain an operating license, which, in turn, requires the keeper, among other things, to comply with a substantial number of monitoring and reporting requirements, and to install a sprinkler system in the premises (a modern proviso to the Act).

Today, many young adults journey to Massachusetts cities and towns to attend the over one hundred public and private colleges and universities located within the Commonwealth. Rather than reside in dormitories or lodging houses, college students frequently rent off-campus apartments or houses. But, due to limited availability and high rents, students are often compelled to share such apartments or houses with others – sometimes *several* others. As a result, many units located in close proximity to institutions of higher learning wind up housing more students than they were designed or zoned for, and often contain inadequate fire safety utilities or insufficient fire egresses for the number of occupants. Indeed, in recent years, several newsworthy fires in the Allston-Brighton neighborhoods of Boston have engulfed homes where seven or more college students resided. As the result of such tragic fires, several college students were injured in an attempt to flee the building, or died when trapped inside.

Faced with a similar situation, and seeking a means to ensure the safety of students residing in off-campus apartments, the City of Worcester issued citations to landlords who rented such apartments to college students, ordering them to cease and desist from operating unlicensed lodging houses in violation of the Act. When the landlords failed to comply with the City's orders to reduce the number of occupants in each apartment to no more than three unrelated adults, the City filed complaints in the Housing Court, seeking preliminary injunctions to enjoin the defendants from further noncompliance. Concluding that the apartments as occupied constituted "lodgings" under the Act, a Housing Court judge issued the injunctions. However, the resident students – college seniors who were then preparing for final exams – refused to vacate in response to notices to quit. As such, after show cause hearings, the judge found the defendants in contempt and issued monetary fines. The defendants appealed. But the Appeals Court affirmed the judgment of the Housing Court below, finding that the policies generally advanced by the Act – *i.e.,* to prevent the overcrowding of persons in an unsuitable space – were applicable to off-campus student housing. College roommates, reasoned the Appeals Court, are more akin to "lodgers" than they are to a "family unit." City of Worcester v. College Hill Properties, LLC, 80 Mass. App. Ct. 757, 761 (2011).

However, when the landlords reached the SJC on further appellate review in 2013, the SJC rejected the Appeals Court's reasoning and held that apartments shared by four or more unrelated adults (typically, college students) are *not* "lodging houses" within the meaning of the Act. In so ruling, the SJC observed that "lodgers" occupy only a specific room within a lodging house, and have a contractual interest only in that room, whereas tenants have the right to occupy and use the entire leased premises. The right is not merely contractual, it is a protected property interest. Additionally, the SJC noted that both the Massachusetts Sanitary and Fire Safety Codes effectively distinguish between "lodgings" and "apartments," in that they separately define the terms "rooming unit" and "dwelling unit," and impose distinct standards for each. See, *e.g.*, 105 C.M.R. §§ 410.00, 410.150 & 410.550. This regulatory scheme, the SJC concluded, evinces a legislative understanding that a rooming unit is not the same as a dwelling unit; therefore, "lodgings" within the meaning of the Act are not the same as apartments.

Following College Hill, cities and towns seeking to protect the safety of college students and other apartment-dwellers can no longer use the Lodging House Act as a means of doing so. Instead, concerns regarding over-crowding and fire-preparedness must be addressed through the enforcement of applicable zoning ordinances, and fire safety, sanitation, and building codes. The City of Boston, for example, recently amended its Zoning Code so that "a group of five or more persons who are enrolled as full-time, undergraduate students at a post-secondary educational institution" no longer qualify as a single "housekeeping unit" that may occupy a single dwelling. Nonetheless, the SJC's decision has left some in government and higher education to call upon the Legislature to amend the Act to encompass off-campus apartments, so as to avoid the need for inconsistent, piecemeal regulation and enforcement at the municipal level.

## Federal Appeals Court Upholds Discipline of Police Officer for Facebook Posts: Gresham v. City of Atlanta, 2013 WL 5645316 (11th Cir. 2013).

In recent years, considerable attention has been focused on whether and when an employer may discipline an employee for posts made on blogs and social media sites. Perhaps most notably, in 2011, the National Labor Relations Board ("NLRB") issued guidelines on what is, and what is not, protected social media conduct by employees. Despite a discernible trend toward the expansion of such protection, however, the United States Court of Appeals for the Eleventh Circuit recently affirmed a decision entered against an Atlanta police officer who claimed the Police Chief retaliated against her for criticizing a colleague on Facebook.

Gresham v. City of Atlanta arose when Officer Maria Gresham of the Atlanta Police Department posted on Facebook that a colleague had interfered "in an unethical manner" with an investigation of a person whom Gresham had arrested for fraud and financial identity theft. After discovering the post, the Department launched an investigation into whether Gresham had violated a Department regulation that required any criticism of a fellow officer to "be directed only through official Department channels," and not to be used "to the disadvantage of the reputation or operation of the Department or any employees." While the internal investigation was still pending, other officers were promoted to Department positions for which Gresham had applied and believed she was eligible. In a suit filed against the Department and the Police Chief, Gresham complained that she was passed over for promotion in retaliation for exercising her First Amendment rights. After a District Court judge allowed defendants' motion for summary judgment, Gresham appealed.

The Eleventh Circuit (in a *per curiam* opinion) analyzed Gresham's claim under the balancing test adopted by the Supreme Court in Pickering v. Board of Education, 391 U.S. 563 (1968). In Pickering, the Supreme Court held that a public employee who alleged she was retaliated against for exercising her rights to free speech as protected under the First Amendment must show (among other things) that her "interest in speaking outweighed the government's legitimate interest in efficient public service." Consistent with a long line of cases, the Eleventh Circuit reasoned that, because a police department is a "quasi-military organization," negative comments about colleagues (even on matters of public concern) can directly interfere with confidentiality, morale, and the efficient operation of the department. Thus, because Gresham failed the Pickering balancing test, summary judgment was appropriate.

The Gresham decision represents another victory for employers wrestling with the permissible boundaries that may be placed on social media conduct by employees. As the Eleventh Circuit recognized, employees do not have an unfettered right to carry workplace gripes into cyberspace, and government employers may still place reasonable limits upon employee efforts to publicly air their grievances.

# Notable Decisions

## School Held Immune for Student-On-Student Injury Suffered During Recess: Talbot v. Town of Hudson, MICV2013-01531 (Mass. Super. Ct. 2013).

Pierce, Davis & Perritano, LLP, recently obtained the dismissal of claims brought against the Town of Hudson by a high school student who claimed he tore his ACL when tackled by a fellow student during an impromptu game of football at recess. The plaintiff sued the Town for negligence, alleging that the tackle football game took place in full view of teachers who took no action to stop it. Specifically, in his Complaint, the plaintiff faulted the teachers for: (1) permitting the football game to take place in violation of the Town's own policies, rules, and regulations, and in "failing to stop it," thereby exposing the plaintiff to an unreasonably dangerous condition; (2) failing to adequately supervise the football game; and, (3) failing to provide the plaintiff with padding, helmets, and/or any other safety equipment.

The Town moved to dismiss the Complaint on the grounds it was immune under Section 10(j) of the Massachusetts Torts Claims Act ("MTCA"), which bars claims against public employers based upon their failure to prevent or diminish the harmful consequences of a condition or situation not originally caused by the employer, including the "violent or tortious conduct of a third party." G.L. c. 258, § 10(j). Superior Court Judge Dennis J. Curran granted the Town's Motion to Dismiss. In so doing, he ruled that the Town was not the "original cause" of plaintiff's injuries or damages and, therefore, could not be sued or held liable since neither the Town nor its employees took any affirmative act that caused the other student to tackle the plaintiff.

The Talbot decision is in accord with the immunity reserved to public schools under Section 10(j) since the Supreme Judicial Court decision in Brum v. Town of Dartmouth, 428 Mass. 684 (1999). It also signals a reluctance on the part of judges to follow Gennari v. Reading Public Schools, 77 Mass. App. Ct. 762 (2010), an Appeals Court decision that inexplicably disregarded the SJC's guidance that Section 10(j) "was intended to provide some substantial measure of immunity from tort liability to government employers." Brum, 428 Mass. at 695. In Gennari, the Appeals Court held that Section 10(j) immunity was unavailable to a public school for a claim brought against it by a first-grader who was injured during recess when he was accidently pushed from behind by a fellow student, causing him to fall and strike his face against a concrete bench. Specifically, in Gennari, the Appeals Court reasoned that the principal's "affirmative decision" to conduct recess in an unsafe, concrete courtyard was the "original cause" of the student's injuries, thereby divesting the school of Section 10(j) protection. In Talbot, however, Judge Curran noted that, unlike Gennari, the teachers affirmatively

instructed only that the students proceed outside for recess, and did not affirmatively order the students to play tackle football. Thus, the "originally caused" exception to Section 10(j) did not apply.

The Talbot decision is more in line with the holding of DiFabio v. City of Revere, 81 Mass. App. Ct. 1121 (2012). In DiFabio, the Appeals Court held that a school could not be sued or held liable for injuries sustained by a student who was tackled by a classmate while playing a game of touch football during sixth grade recess. Specifically, in its unpublished DiFabio decision, the Appeals Court reasoned that the teacher's affirmative act of allowing students to play touch football did not "originally cause" the student's injuries within the meaning of Section 10(j) because tackling is not a part of touch football, and because the teachers strictly forbade the students from playing tackle football.

Judge Curran explained that, even if the teachers in Talbot had permitted the plaintiff and his classmates to play tackle football, then failed to adequately supervise the game, any liability on the part of the Town would still be foreclosed by Section 10(j); although the teachers may have *permitted* the tackle football game to occur, they engaged in no *affirmative* acts which caused the other student to tackle the plaintiff. Not surprisingly, the plaintiff has appealed Judge Curran's decision to the Appeals Court. Any ruling from the Appeals Court will be reported in a future PD&P Newsletter.

## Massachusetts Appeals Court Holds Town Immune for Child Struck by Baseball: Moore v. Town of Billerica, 83 Mass. App. Ct. 729 (2013).

PD&P succeeded on appeal from a denial of summary judgment when the Massachusetts Appeals Court reversed and ordered that summary judgment should enter in favor of the firm's client, the Town of Billerica. The outcome of the case bolsters the strength of municipal immunity under the Massachusetts Tort Claims Act, G.L. c. 258, §§ 1, *et seq.*, and confirms the protection afforded to landowners who allow the public to use their property for recreational purposes free of charge.

The case arises from an accident involving a four-year-old girl who was picking flowers in a public playground when she was struck in the head by a baseball hit by a teenager playing "home run derby" at an adjacent little league field. The Town had strung netting between telephone poles along the right field fence abutting the playground in an effort to prevent baseballs from entering the area. The netting, however, did not extend far enough to the right to safeguard a part of the playground that contained a stage and picnic area. Both the little league field and playground were owned by the Town and made available for use by the public free of charge. While the minor plaintiff and a playmate were picking flowers in the playground picnic area, a group of teen-aged boys were playing baseball at the field, without a permit or prior notice to the Town and in violation of posted signage which stated that the field was for "use by permit only" and for children "12 years and under." One of the boys, aged 16, hit a home run over the right field fence that struck the child in the head after travelling a distance of over 150 feet. The child, as a result, suffered a brain injury that caused temporary right side paralysis and required extensive therapy. She still suffers a residual partial loss of use of her right hand and right foot.

The Town moved unsuccessfully for summary judgment, then filed an appeal, on the grounds that: (1) it was immune under G.L. c. 258, §10(j); (2) its decision not to erect more extensive netting around the ball field was protected as a discretionary function under G.L. c. 258, § 10(b); and (3) the Recreational Use Statute, G.L. c. 21, § 17C, precluded liability (absent willful, wanton or reckless conduct) because, at the time of her accident, the minor plaintiff was recreating on land open for use by the public free of charge.

Under the doctrine of present execution, the Appeals Court reversed the denial of summary judgment below, ruling that Section 10(j), as interpreted in Brum v. Town of Dartmouth, 428 Mass. 684 (1999), and Jacome v. Commonwealth, 56 Mass. App. Ct. 486, 489 (2002), applied to protect the Town from suit and liability. Plaintiff's claim was based on the Town's alleged failure to protect her from the harmful consequences (*i.e.*, a serious head injury) of a condition or situation (*i.e.,* the "home run derby.") Further, such harmful condition or situation was not "originally caused" by the Town's alleged failure to erect more extensive netting or to warn playground visitors of the risk of errant baseballs. In reaching its decision, the Court reasoned:

> There is potentially an infinite list of possible preventative actions that public employees could have taken in any situation. It is almost impossible to imagine an injury that could not have been prevented, so the failure to undertake such actions cannot be the basis of defeating the town's immunity under § 10(j).

The Appeals Court rejected plaintiff's argument that the failure to erect more netting constituted "negligent maintenance" of public property, an exception to immunity under Section 10(j)(3). Instead, the Court recognized that "maintenance" refers only to a facility or equipment that "has already been constructed." "The maintenance of a playground envisions the general upkeep of the playground's equipment and grounds, not preventing all risks of danger to its visitors." 83 Mass. App. Ct. at 733.

Having found in the Town's favor under Section 10(j), the Court declined to decide whether Section 10(b) also afforded immunity protection based on the Town's discretionary decisions. Nonetheless, the Court exercised its discretion to interpret and apply the so-called Recreational Use Statute, G.L. c. 21, § 17C. It was undisputed that plaintiff was using land open to the public for recreational purposes without paying a fee. Therefore, the Town was entitled to statutory protection. Plaintiff argued, however, that because a question of fact remained as to whether the Town's conduct was willful, wanton or reckless, summary judgment should be denied on this ground. But the Court (once again) agreed with the Town. "[A]s a matter of law, the town's actions (or inactions) regarding the playground were not willful, wanton, or reckless. Therefore, the town enjoys immunity from liability under the recreational use statute." The Court concluded that "the failure to extend the netting, erect a barrier, or post warning signs by the stage area does not rise to reckless conduct," nor was the risk of grave bodily injury "known or reasonably apparent" to the Town.

For several reasons, the Moore decision should prove valuable in defending future negligence actions brought against municipalities. First, if the harmful "condition or situation" is viewed as the close proximity of the little league field to the playground, Moore represents a rather unique occasion in which the "condition or situation" was actually owned by, and under the control of, the municipality. Still, the Court ruled that the harmful consequences of such condition or situation were not "originally caused" by the municipality for purposes of applying the exception to Section 10(j) immunity. Second, by interpreting the term "maintenance" to mean the "general upkeep" of a facility or equipment already constructed, the Court effectively prevents plaintiffs from invoking the exception in Section 10(j)(3) to cases involving the layout, planning, construction or installation of a new (or better) facility. The Section 10(j)(3) exception applies only to the "upkeep" of existing facilities – *i.e.,* the routine repair and preservation of places and things to address daily wear-and-tear.

The Court's strong language also undercuts other recent decisions reported by PD&P that may have been read to narrow the scope of immunity protection afforded under Section 10(j). See, *e.g.,* Devlin v. Commonwealth, 83 Mass. App. Ct. 530, 535-36 (2013) (affirmative decision by state hospital officials to allow convicted inmates to work in same area where civilly committed patients were housed held one of "original[ ] cause[s]" of assault upon plaintiff); Harrison v. Town of Mattapoisett, 78 Mass. App. Ct. 367, 371-72 (2010) (affirmative acts of police officers in continuing high-speed pursuit materially contributed to creation of specific condition or situation that resulted in harm to plaintiff struck by fleeing driver); Gennari v. Reading Pub. Schools, 77 Mass. App. Ct. 762, 765 (2010) (Section 10(j) held inapplicable to student injured in courtyard selected as recess site by school principal). Similarly, the protections of the Recreational Use Statute have been reinforced by the Moore decision.

# Firm Announcements

PD&P is pleased to announce that Shauna Twohig recently joined the firm as an associate. Ms. Twohig graduated from Northeastern University Law School in May 2012. During her time at Northeastern, Ms. Twohig completed internships with the United States Attorney's Office, Civil Division, and United States District Court Judge Nancy Gertner. Additionally, Ms. Twohig has served as both a Northeastern Law School research and teaching assistant. Prior to joining the firm, Ms. Twohig also gained civil litigation experience at a Boston-area law firm where she concentrated in the areas of employment, personal injury, health care, white-collar criminal defense, landlord-tenant litigation.

You can learn more about Attorney Twohig at http://www.piercedavis.com/.

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