PIERCE DAVIS & PERRITANO LLP

Developments in Municipal Law

A Year in Review, 2015

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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What's inside this issue?

NOTABLE FIRM VICTORIES

Notable Firm Victories in 2015

Superior Court Judge Extends Anti-SLAPP Protection to the Town of Auburn for Clerk's Call to the Police. Robidoux v. Town of Auburn, 1585-CV-01378 (Mass. Super. Ct. 2015).

PD&P recently obtained a dismissal in favor of the Town of Auburn in a negligent infliction of emotional distress claim brought against the Town by a resident, Michael Robidoux. Mr. Robidoux ran for a seat on the Auburn Board of Selectmen, losing by eight votes. According to the Town Clerk, Mr. Robidoux, who had a prior history of angry outbursts at Town offices and meetings, confronted the Clerk and a Town volunteer in the Clerk's office, angrily exclaiming that they had somehow cost him the election. Mr. Robidoux reportedly threatened to "take out" the Clerk and, according to security footage, invaded the personal space of the Town volunteer in a threatening manner. The Clerk, in fear for the safety of herself and others, called the police to have Mr. Robidoux removed from the Town Hall. The police investigated and brought assault charges with respect to the confrontation with the Town volunteer, although those charges were later dropped after a show-cause hearing. Mr. Robidoux subsequently sued the Town for negligent infliction of emotional distress under the Massachusetts Tort Claims Act (MTCA), claiming that the Clerk's call to the police, along with the criminal charges and publicity that followed, caused him severe emotional distress.

In response to Mr. Robidoux's lawsuit, PD&P filed a Special Motion to Dismiss, arguing that the Clerk's call to the police was the sole basis of the lawsuit and constituted a "petitioning activity" protected by the so-called Anti-SLAPP statute. M.G.L. ch. 231, §59H. Although calls to the police to report suspected criminal activity have long been considered "petitioning activity" under the statute, the motion was nevertheless problematic in two respects. First, public employers have historically been denied Anti-SLAPP protection for the conduct of public officials on the ground that the government "cannot petition itself."

Moriarty v. City of Holyoke, 71 Mass. App. Ct. 442 (2008). Second, as dictated by Section 2 of the MTCA, the Town was the party in the lawsuit, not the Clerk. By its terms, the Anti-SLAPP statute applies only to "parties" who are sued for their own petitioning activity, not to a petitioner's employer.

PD&P argued that the rational in Moriarty did not apply because the Town Clerk was acting in her personal capacity, as opposed to her *official* capacity as Town Clerk, when she called the police. As such, no government activity was involved. As to the second issue, we noted that lawsuits for negligence based upon the conduct of public employees must always be filed against the public employer, per the mandate of Section 2 of the MTCA. As such, to deny public employees Anti-SLAPP protection when their employer is sued for negligence purely as a result of their petitioning activity is to forever deprive all public employees and officials of this critical protection, because public employees can never be a "party" to a negligence claim. We stressed to the court that, at a time when mass murders are being reported on an almost weekly basis, no person, whether public employee or private individual, should ever hesitate to call the police for fear that their employer could be sued. That would be a dangerous end-run to a critical statutory protection at a time when society needs it more than ever before. The Court agreed with the Town on both counts and dismissed the case.

The Robidoux case represents an unprecedented expansion of the Anti-SLAPP statute as there are no reported cases where the statute was applied to a public employer for the conduct of a public official, or to any petitioning party's employer for that matter. This should prove to be a useful protection for public employees and officials going forward. Attorney Michael Leedberg represented the Town in obtaining this dismissal.

Federal Jury Finds Police Officer Not Liable in Excessive Force Case Defended by PD&P – McDonald v. Saunders, C.A. No. 1:13-cv-11161-LTS (D. Mass. May 18, 2015).

An eight-member federal court jury recently returned a defense verdict in favor of Hull Police Officer Scott Saunders in a civil rights suit brought against him by a Hull teen, James McDonald. In his complaint, McDonald alleged that in April 2010, while attending a large party of under-aged drinkers on Nantasket Beach, Officer Saunders unlawfully detained him without reasonable suspicion and by means of excessive force in violation of his Fourth Amendment rights. At trial, McDonald testified that, along with other partiers, he promptly fled the beach when police officers arrived shortly after 9:00 p.m. However, as he was running in soft sand, McDonald was allegedly tackled from behind by Officer Saunders and taken to the ground, fracturing his right femur and dislocating his right hip in the fall. Plaintiff further testified that, since the incident, he has suffered from flashbacks and nightmares and was diagnosed with Post-Traumatic Stress Disorder. The plaintiff was neither arrested nor charged with any crime as a result of his participation in the party.

Officer Saunders testified that, in responding to a call of a possible disturbance on the beach involving approximately 50 under-aged drinkers, he heard yelling and screaming immediately upon exiting his cruiser. As he was standing on the beach speaking with three young males, Officer Saunders heard and saw the plaintiff scream profanities "at the top of his lungs" in the direction of another officer. Officer Saunders testified that he then instructed the plaintiff to "stop" for questioning; instead, the plaintiff took off. After pursuing the youth for approximately 25 yards, Officer Saunders reached out and grabbed plaintiff's right shoulder with his right hand. As he did so, the two men tumbled to the sand, with Officer Saunders landing on top of the plaintiff. Officer Saunders admitted he intended to detain the plaintiff, but denied he intended to tackle

him to the ground; the fall was an accident.

After five hours of deliberations, the jury confirmed that they believed Officer Saunders. In answers to special questions, the jury denied that Officer Saunders violated plaintiff's Fourth Amendment rights by wrongfully detaining him and/or using excessive force, denied that Officer Saunders violated plaintiff's Fourteenth Amendment due process rights by his deliberate indifference to plaintiff's serious medical needs, and denied that Officer Saunders intentionally inflicted emotional distress. (Notably, the plaintiff did not pursue a claim for negligence against Officer Saunders' employer, the Town of Hull, pursuant to the Massachusetts Tort Claims Act.)

The Court thereafter entered judgment in favor of the defendant. The plaintiff took no appeal.

Critical to the outcome of the case was the Court's pre-trial questioning of prospective jurors during voir dire designed to identify potential anti-police bias in the wake of recent, widely-publicized events in Ferguson, MO, North Charleston, SC, and Baltimore, MD. Yet, as demonstrated by the McDonald verdict, law enforcement officers can still receive fair jury trials in the current political climate. Defense counsel must, nonetheless, remain alert to the potential impact reports of current events in the media and on the Internet may have on the views of a prospective jury pool.

Officer Saunders was represented at trial by Attorneys John Davis and Jason Crotty.

Attorney John Davis

Attorney Jason Crotty

Superior Court Dismisses Plaintiffs' Claims for Inadequate Staffing and Loss of Consortium; City Held Not a "Person" Within Meaning of Loss of Consortium Statute: DeMello v. New Bedford, 1573-CV-00618 (Mass. Super. Ct. 2015).

PD&P recently obtained the dismissal of a number of claims in favor of the City of New Bedford in a case involving a student's alleged injuries suffered while at play during a recess period in a New Bedford elementary school. Plaintiffs alleged their minor child was running in an outdoor courtyard when he fell and fractured his femur. The plaintiffs alleged the City caused injury to their minor son (who was then three years old and attending a summer program), by (1) failing to supervise the minor appropriately and (2) failing to adequately staff the public school he attended. They brought claims for negligent supervision, negligent staffing, and

loss of consortium of their son.

Prior to the commencement of discovery, PD&P filed a motion to dismiss a number of claims contained in plaintiffs' Complaint pursuant to Mass. R. Civ. P. 12(b)6), on the grounds that: (1) the City is immune from liability as to claims for "inadequate staffing," which is a discretionary function under M.G.L. c. 258, § 10(b); (2) the plaintiffs failed to comply with the presentment requirements contained in M.G.L. c. 258, § 4; and (3) plaintiffs cannot recover against the City on their respective parental loss of consortium claims because the City is not a "person" within the meaning of M.G. L. c. 231 § 85X. Plaintiffs' presentment letters failed to reference any claim for loss of consortium of the minor child's father.

Following oral argument on the motion to dismiss, the court dismissed the plaintiffs' claim premised on inadequate staffing on the basis that it was a discretionary function within the purview of G. L. c.258, § 10(b) and, as such, the City is immune from liability. The court further held that the plaintiffs have a cause of action for loss of consortium of a seriously injured minor child "against any person" who is legally responsible for causing the injury, pursuant to the loss of consortium statute, M.G. L. c. 231 § 85X. However, the term "person" does not ordinarily include municipal or government entities. Fran's Lunch. Inc. v. Alcoholic Beverages Control Comm'n, 45 Mass. App. Ct. 663, 665 (1998) (applying G. L. c. 4, § 7, "[i]t is a generally accepted rule of statutory construction that the word 'person' when used in a statute will not ordinarily be construed to include the State or political subdivisions thereof'). In the absence of any indication of statutory intent to the contrary, the court accepted PD&P's argument and found that the City was not a "person" within the meaning of the loss of consortium statute, and dismissed the plaintiffs' loss of consortium claims.

Attorney John Wilusz represented the City in obtaining this favorable decision.

Attorney John Wilusz

PD&P offers this newsletter as a free informational service to clients, and others, interested in developments concerning municipal liability. This newsletter does not provide legal opinions or legal advice.

For questions, suggestions or copies of materials referenced in the newsletter, please contact Seth Barnett at 617-350-0950 or visit our website at www.piercedavis.com

Superior Court Grants Summary Judgment in Case Involving Bicycle Accident in a Construction Zone: Devereaux v. Needham, 1384-CV-04171 (Mass. Super. Ct. 2015).

PD&P successfully argued a Motion for Summary Judgment in a case involving a woman who was seriously injured while riding a bicycle through a road construction zone after work had ceased for the day. The injured woman reached a pre-suit settlement with the insurer of the general contractor who had been retained by the Town to perform the road work project. After the settlement was reached, the contractor's insurer brought a subrogation action against the Town and another party involved in the project in an effort to recoup the six figure settlement paid to the injured cyclist.

The suit against the Town, which sought contribution and indemnification, alleged that the Town was responsible for ensuring that the public way on which the construction project was taking place was safe for vehicle and pedestrian travel after construction activities ceased at the end of each work day. Plaintiff claimed that the Town was negligent in failing to properly warn the public of the dangers of the construction zone and for failing to put temporary pavement over sections of the roadway that were left exposed at the end of each work day. Plaintiff sought recovery under M.G.L. c. 258, the Massachusetts Tort Claims Act (MTCA).

At the conclusion of discovery, the Town served and then filed a Motion for Summary Judgment. In that mo-

tion PD&P argued that the plaintiff's claim was in fact governed by M.G.L. c. 84 § 15, the so-called "Highway Defects Statute," not the MTCA. This distinction is important because while the MTCA allows recovery up to $100,000, Chapter 84 limits recovery to a traveler in the public way to only $5,000. Accordingly, Attorney Crotty argued that the right of recovery under Chapter 84 is limited only to travelers who sustain "bodily injury or damage in [their] property." The insurer who sought recovery was not a "traveler", nor did it seek recovery for bodily injury or property damage. Rather, it sought recovery based on a theory of "contribution and indemnification." Yet, a contribution and indemnification claimant cannot recover under Chapter 84. Sullivan v. United States, 866 F. Supp. 654, 656 (D. Mass. 1994); Correa v. Moncouski, Middlesex Sup. Ct., C.A. No. 97-3155 (Mass. Super. 1997).

The Superior Court accepted this argument that M.G.L. c. 84, § 15, exclusively applied to the plaintiff's claim and that neither contribution nor indemnification was recoverable, despite the plaintiff's artful pleadings. Going forward, this decision should prove helpful in defending future claims in which a plaintiff seeks to circumvent the statutory recovery limits of M.G.L. c. 84 for the more generous provisions of M.G.L. c. 258. Attorney Jason Crotty represented the Town in obtaining this favorable decision.

Attorney Jason Crotty

PD&P Obtains Defense Verdict in Favor of the Town of Marblehead for Personally Injury Claimed By Participant in Women's Self-Defense Course. Whitehill v. Town of Marblehead, ESCV2012-00665 (Mass. Super. Ct. 2015).

PD&P recently obtained a defense verdict in favor of the Town of Marblehead in a personal injury action involving a high school senior who claimed that she was injured during an optional self-defense course offered by the Marblehead Police Department through a Health & Wellness class at Marblehead High School. The plaintiff claimed that on April 2, 2009, she was participating in the optional simulated attack portion of the course when she suffered a spiral fracture of the fibula bone in her left leg. This portion of the course involved a volunteer police officer, dressed head to toe in a thickly padded "Michelin Man" suit, accosting, harassing and attempting to restrain the student, at which point the student was to use the physical techniques taught during the prior classroom instruction to disable the officer or to otherwise prevail to a position of safety. There were no limits on the amount of force that the student could use upon the officer. The plaintiff claimed that the program was unreasonably dangerous and that the officer conducting the simulated attack was insufficiently trained and otherwise negligent and reckless in his actions.

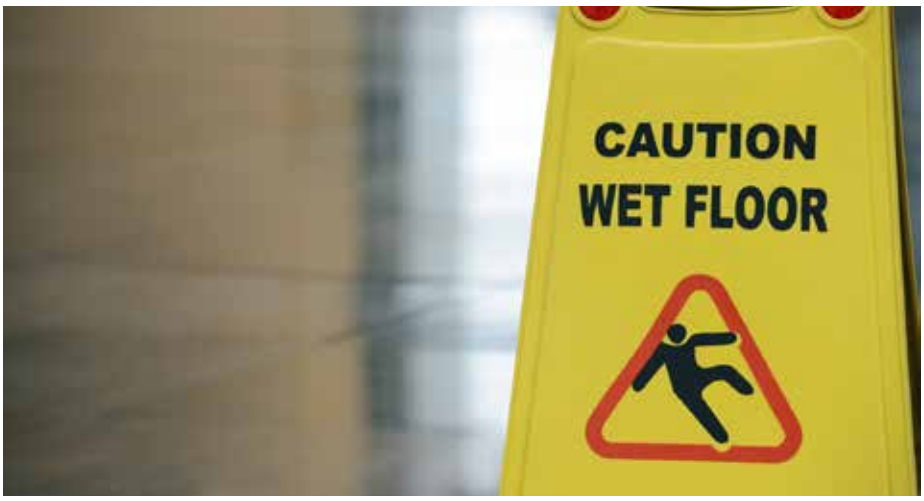
Although the students' parents were required to sign a release before their children could participate, the plaintiff's class folder went missing at some time after the incident and her release form was lost. Despite that fact, the Court, Judge James F. Lang, allowed the question to go to the jury regarding whether a release form was, in fact, signed by her parents. A blank copy of the 2008-09 form was in evidence.

The plaintiff's account at trial varied greatly from other eyewitness accounts, the medical evidence and statements that she admitted to making at the scene. Witnesses at the scene testified that the plaintiff turned abruptly to face the simulated attacker, at which point she cried out in pain and began to crumble to the ground before the officer even engaged her. The officer tried to keep her from falling, but was unable to, and the two fell together to the ground. According to all eyewitnesses, including the plaintiff, immediately after the incident she cried out, "my body turned but my foot stayed planted." The plaintiff later reported to her treating physicians, however, that the officer caused the injury by, "accidentally fell on my leg." Then at trial, the plaintiff offered yet a third account, testifying that her leg fractured when the officer viciously tackled her to the ground.

When asked to reconcile her statement at the scene with her contention of how the accident happened before the jury, the plaintiff was unable to intelligibly do so. Moreover, the medical evidence was that she suffered a spiral fracture, which experts on both sides agreed is a twisting injury – consistent with her admitted statement at the scene. The Town's orthopedic expert further testified that if the fracture occurred as a result of blunt force to her leg from the officer's weight, as the plaintiff claimed at trial, then he would expect a tranverse fracture, not a spiral fracture. The Town argued that the injury occurred as the plaintiff twisted awkwardly and aggressively to face the officer and that it was nothing more than a freak accident that the Town could not have reasonably prevented. After deliberating less than 30 minutes, the jury unanimously agreed with the Town. Interestingly, the jury also concluded that the plaintiff's parents had indeed signed the missing release form. Although the issue was mooted by the jury's finding in favor of the Town on the question of liability, it was extraordinary that the Court was otherwise prepared to enforce a missing release. The Town was represented at trial by Attorney Michael Leedberg.

PDP Obtains Defense Verdict In Favor of the Town of Bellingham In Student Slip and Fall Case. Schilke v. Town of Bellingham, NOCV2012-01409 (Mass. Super. Ct. 2015).

PD&P recently obtained a defense verdict in favor of the Town of Bellingham in a personal injury action involving a high school senior who fractured her elbow after slipping and falling in her classroom. The plaintiff claimed that during an art class on October 15, 2010, she slipped in a puddle that had accumulated on the classroom floor as a result of the teacher propping open an exterior door during a rainstorm. The teacher and two other students testified, however, that there was no puddle and further that the plaintiff had snuck outside in the rain to send a text message. It was undisputed that the plaintiff was wearing rubber flip-flops at the time of her fall, but the plaintiff denied stepping outside. The Town argued that the plaintiff's flip-flops became wet when she snuck outside to send a text message – in violation of school policy – and that this was the cause of her fall. The jury of 14 men and women deliberated for just over 30 minutes before rendering a unanimous verdict that rejected the plaintiff's claim that the teacher acted negligently. The Town was represented at trial by Attorney Michael Leedberg.



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