PIERCE, DAVIS & PERRITANO, LLP
WINTER 2014 NEWSLETTER
DEVELOPMENTS IN MUNICIPAL LAW

Case Comments

Money Damages Held Not Recoverable By A Contractor Denied Certification To Bid On Public Construction Projects: Mello Construction, Inc. v. Div. of Capital Asset Mgmt., 84 Mass. App. Ct. 625 (2013).

The Massachusetts Appeals Court recently affirmed the dismissal of a construction contractor's lawsuit seeking money damages against the Commonwealth. In, Mello Const., Inc. v. Div. of Capital Asset Mgmt., the Appeals Court addressed the issue of "whether a general contractor may sue the Division of Capital Asset Management (DCAM) for money damages after a discretionary decision to deny an annual application for certification to bid on public construction projects." In affirming the dismissal below, the Appeals Court interpreted the applicable DCAM regulations as not waiving the sovereign immunity for governmental licensing or certification decisions. The Appeals Court also addressed the availability of judicial remedies concerning DCAM decisions and considered the merits of the DCAM certification denial, deeming the denial well-founded. The case arose from the Massachusetts competitive bidding statute, under which every contract for the construction of public buildings estimated to cost more than $100,000 "shall be awarded to the lowest responsible and eligible general bidder." M.G.L. c. 149, § 44A(2)(D). The Legislature has charged DCAM with the duty of certifying bidder eligibility as a prerequisite to bidding on any public construction contracts. M.G.L. c. 149, § 44D(1)(a). Each year, a contractor must submit an application for certification to DCAM containing certain detailed information. M.G.L. c. 149, § 44D(2). DCAM's requirements and conditions for certification are lengthy, and provide various grounds for either mandatory or discretionary denial of an application for certification. When seeking certification in 2005, Mello Construction's application

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.

PIERCE, DAVIS & PERRITANO, LLP
90 Canal Street
Boston, MA 02114
(617) 350-0950
www.piercedavis.com

was denied because of it's (1) failure to achieve a minimum average project rating required for certification; (2) receipt of two failing scores on two public projects; (3) failure to disclose on it's application the termination from a third project; and (4) failure to disclose the invoking of a performance bond. Mello Construction disputed the negative project evaluations and argued that because the projects were embroiled in lawsuits, the evaluations were bound to be negative in order to support the litigation goals of the project owners.

Procedurally, the case was on appeal by petition for certiorari because the parties agreed there was no right to judicial review under the Administrative Procedures Act (M.G.L. c. 30A). Thus, the question before the Appeals Court was limited to whether the competitive bidding statute allowed an aggrieved applicant to seek money damages based on the denial of certification. Mello Construction argued money damages were available because the statute allows for applicants to pursue "the remedies at law." The Appeals Court read this provision restrictively, reasoning "the Commonwealth has not waived sovereign immunity with respect to any claims arising from the denial of, or refusal to, issue a license or certificate." The Appeals Court went further in its analysis by concluding that, even if there was no immunity, the statutory language did not infer a legislative intent of an implied right of action for money damages, and there was no common law right to money damages against DCAM. Perhaps the strongest language in the opinion rejecting the claim for money damages was when the Appeals Court nonetheless recognized the scope of harm resulting from a license denial:

> Licenses are required to engage in many occupations and businesses. The loss of a license may have devastating financial and emotional consequences. Typically, however, there is no right to money damages flowing from an improper licensing action. During the often long period of time between the suspension or revocation of a professional license and the decision of the reviewing court, the holder of the license is generally not entitled to a temporary stay and thus may not pursue his or her livelihood.

The Mello Construction decision should reinforce the immunity from money damages for local governments and the DCAM resulting from their discretionary licensing decisions. The Appeals Court went further and assessed the merits of the DCAM decision, finding it was not "arbitrary and capricious." This additional discussion provides guidance for those seeking to interpret the competitive bidding statute. The case also stands as a bell weather warning to contractors seeking an award of public construction contracts to fully disclose all blemishes on prior contract performance, and perhaps to avoid Mello Construction's history of "involvement in thirty-seven pending and concluded legal and administrative actions" at the time it was seeking certification.

Ninth Circuit Strikes Down L.A. Ordinance Authorizing Police Officers To Review Hotel Records on Demand: Patel v. City of Los Angeles, 2013 WL 6768090 (9th Cir. Dec. 24, 2013).

Sitting en banc, the Ninth Circuit recently held that a Los Angeles city ordinance authorizing police officers to inspect certain hotel records on demand, without consent or a search warrant, is facially invalid under the Fourth Amendment. Section 41.49 of the Los Angeles Municipal Code requires hotel and motel operators to collect and record certain detailed information about their guests in either

electronic or paper form. These records must be "kept on the hotel premises in the guest reception or guest check-in area or in an office adjacent to that area" for a period of 90 days. Section 41.49 also authorizes police officers to inspect such guest records at any time, without consent or a search warrant. Failure to comply with an officer's inspection demand is a misdemeanor, punishable by up to six months in jail and a file of $1000.

The plaintiffs, a collection of Los Angeles motel owners, were subjected to warrantless record inspections under Section 41.49. Although they did not challenge the record-keeping requirement of Section 41.49, the motel owners filed suit under 42 U.S.C. § 1983, seeking declaratory and injunctive relief barring the continued enforcement of the warrantless inspection provision of the Municipal Code. Following a bench trial, the District Court rejected the plaintiffs' argument that the inspection provision was facially invalid under the Fourth Amendment, and entered judgment in favor of the City of Los Angeles. The plaintiffs appealed, leaving the Ninth Circuit to consider whether a police-officer's non-consensual inspection of hotel guest records constitutes an unreasonable search and seizure in violation of the Fourth Amendment.

The Ninth Circuit concluded that a record inspection under Section 41.49 constitutes a "search" within the scope of the Fourth Amendment because the government is intruding upon a protected privacy interest of the motel owners. Specifically, the Court noted that "[t]he business records covered by § 41.49 are the hotel's private property, and the hotel therefore has both a possessory and an ownership interest in the records. By virtue of those property-based interests, the hotel has the right to exclude others from prying into the contents of its records, which is also the source of its expectation of privacy in the records."

Accordingly, the Ninth Circuit then turned to the more weighty issue of whether the searches authorized by Section 41.49 are "reasonable," so as to comply with the Fourth Amendment. To guide this inquiry, the Court applied several principles previously set forth by the United States Supreme Court. First, the government may require businesses to maintain records and make them available for routine inspection when necessary to further a legitimate regulatory interest. Second, the government may ordinarily compel the inspection of business records only through an inspection demand "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." Finally, the demand to inspect "may not be made and enforced by the inspector in the field." Instead, the party subject to the demand must be afforded an opportunity to "obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply."

The Ninth Circuit observed that Section 41.49 appears to satisfy the Fourth Amendment prerequisite of adequately specifying, and limiting the scope of, the records subject to inspection. However, the Court concluded that Section 41.49 lacks an essential procedural safeguard against arbitrary or abusive inspection demands because, as presently drafted, the ordinance provides no opportunity for pre-compliance judicial review of an officer's demand to inspect a hotel's guest records. To the contrary, if the hotel operator refuses a police officer's demand to inspect records under Section 41.49, the operator (without more) may be found guilty of a misdemeanor, punishable by up to six months in jail and a $1000 fine. Therefore, the Ninth Circuit held that Section 41.49's requirement that

hotel guest records "shall be made available to any officer of the Los Angeles Police Department for inspection" is facially invalid under the Fourth Amendment insofar as it authorizes inspections of those records without affording an opportunity to "obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply."

Internal Investigation Can Lead To Waiver of Attorney-Client Privilege: Koss v. Palmer Water District, 2013 WL 5564474 (U.S.D.C., D. Mass., October 7, 2013).

In a case of first impression, U.S. Magistrate Judge Kenneth P. Neiman recently ruled that the attorney-client privilege did not prevent a municipal employee from obtaining the municipality's internal investigation file into the employee's allegations of sexual harassment. In Koss v. Palmer Water Department, the plaintiff, Ms. Koss, an administrative assistant employed with the Palmer Water Department, claimed to have been the victim of sexual harassment by a co-worker from 2008 through 2012. She alleged she was subjected to sexual harassment and a hostile work environment, claiming that a co-worker made sexually suggestive comments to her, made inappropriate remarks about her relationship with her husband and, on at least one occasion, touched her in an inappropriate fashion. Plaintiff complained to a supervisor, who took steps to separate her from the co-worker in question. When she made additional complaints, the plaintiff claims her employer did not adequately address her concerns. Thereafter, plaintiff's schedule was reduced from full-time (40 hours) to part-time (16 hours), and she was ultimately terminated three months later. Subsequently, the plaintiff sued the Water Department and two of its employees for both sexual harassment and retaliation.

As part of its defense to plaintiff's action brought under Title VII, the Water Department asserted that it exercised reasonable care to prevent/correct any alleged harassment and that Koss had failed to avail herself of opportunities to avoid the harm she allegedly suffered. The Water Department also claimed, however, that it did not have to produce all documents relating to its investigation of the sexual harassment complaint because some of them were protected by the attorney-client privilege and work product doctrine. Plaintiff sought production of the Department's investigative material, arguing that, by raising the defense of reasonable care, the Department placed the investigation of plaintiff's claims at issue in the litigation.

The federal district court sided with the plaintiff. Relying on opinions from other federal districts, the Magistrate held that attorney-client privilege and work product protection had been waived, not only for the employer's investigation report, but also for "all documents, witness interviews, notes and memoranda created as part of and in furtherance of the investigation," including direct communications between the investigator and the attorneys who were advising the investigator. The court's reasoning was that, "although not personally conducting interviews, [the advising attorneys] not only directed and collaborated with [the investigator] but exercised significant control and influence over him throughout the investigation." Thus, from the standpoint of the court, the attorney-investigator communications were "part and parcel of the investigation which goes to the heart of the Defendants' affirmative defense."

While the Koss court's description of the waiver of privilege is broad, some limits on the ruling are discernible. First, Koss does not stand for the proposition that the attorney-client privilege and work product protections are waived whenever an employer's outside counsel communicates with his or her client about a sexual harassment investigation. Rather, the Koss court distinguished the Water Department's investigation from those in which an attorney communicated only with his client, the employer, and did not conduct interviews, make disciplinary decisions, or otherwise participate in the investigation itself. In those instances, no waiver of the privilege should be found.

Second, Koss does not hold that a waiver of privilege occurs whenever the employer's attorney communicates with the supervisor or employee conducting an internal investigation in a way that merely furthers the investigation, without the lawyer also becoming "part of" the investigation. Such potential scenarios include communications where the only contacts between the employer's attorney and the investigator were requests by the lawyer for an update on "the status of the matter," or where the lawyer was merely present in a meeting in which the investigator reported her findings. According to the Koss court, no waiver could be found in such circumstances because the attorney's brief contacts are "reflective of his role as a legal advisor only."

This decision should not dissuade employers and municipalities from conducting internal investigations where warranted. However, attorneys who are involved in the investigation and related litigation should be cognizant of their level of involvement and whether they exercise "significant control and influence" over the investigation. If an employer's attorney becomes overly-involved in a sexual harassment investigation (or any internal investigation), a waiver of attorney client-privilege and work product protection may occur if the investigation is offered as a defense to the sexual harassment claim. If an employer's lawyer has any contact with the employer's investigator, such contact should be "reflective" of the lawyer's role as "a legal advisor only" in order to maintain the attorney-client privilege. If a lawyer's investigative role is more active or hands-on, an employer may wish to think twice about raising the reasonable care defense in response to a claim of employee harassment or discrimination. Based on the Koss rationale, that defense may open up more than information than the employer planned.

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 http://www.piercedavis.com

Notable Decisions

Town Held Immune For First Responder's Misidentification Of Corpse: O'Hagan v. Town of Reading, MICV2013-01185 (Mass. Super. Ct. 2013).

PD&P recently obtained a dismissal in a case in which two sisters alleged that town employees caused the negligent misidentification of their mother after she died of natural causes at her Reading home. On January 13, 2012, Reading dispatch received a 911 call of an elderly woman in cardiac arrest and dispatched Reading Police and Fire personnel to the scene. Reading Fire/EMS rushed to the scene, but were tragically unable to revive the victim. While registering the body with hospital staff, one of the Reading EMS technicians allegedly gave the staff the incorrect biographical data card, which led the decedent to be identified as a much younger victim who had also died earlier that day. The mix-up was discovered and corrected by family members, but not before the State's Medical Examiner's Office took jurisdiction over the body and conducted an autopsy that would have otherwise not been required if the decedent's true identity had been known. The plaintiffs sued the town, alleging negligent infliction of emotional distress for the EMS employee's oversight.

The town moved to dismiss, arguing that it was immune from suit for the plaintiffs' claims pursuant to the provisions of Section 10(j) of the Massachusetts Tort Claims Act (MTCA). Added to the MTCA in 1994, Section 10(j) protects municipalities from failing to prevent or diminish the harmful consequences of a condition or situation that it did not originally cause, including (but not limited to) the tortious or wrongful conduct of a third party. On the strength of another PD&P case, Anderson v. City of Gloucester, 75 Mass.App.Ct. 429 (2009), the superior court agreed with the town and dismissed the case on the grounds that Section 10(j) protects municipalities from such claims. The court reasoned that the "original cause" of the condition or situation leading to the plaintiffs' alleged harm was their mother's death by natural causes. And, because the town played no affirmative role in that death or the resultant need for the body to be identified, it could not be held liable for failing to properly identify her.

Previously, in the Anderson case (reported in PD&P's Winter 2010 Newsletter), a resident's reckless ignition of fireworks indoors, near an un-watered Christmas tree, led to a house fire that caused the death of one of his female friends and severe smoke inhalation injuries to another. The women were so strikingly similar in appearance that an investigating police officer, who personally knew one of them, subsequently misidentified the survivor as the decedent and vice versa to hospital staff. Indeed, the Anderson victims were so similar in appearance that it was not until the survivor's condition had improved enough for her to be removed from breathing tubes and a hyperbaric chamber a week after the fire that the family standing vigil realized that she was not, in fact, their loved one. The true family of the survivor sued the city for causing them to falsely believe that their loved one was deceased for a week. The Appeals Court overturned the lower court's denial of the city's motion for summary judgment, reasoning that the "original cause" of the victims' injuries, including the resultant need to identify them, was the tortious conduct of a third party, a condition or situation for which the city could not be held liable for failing to rectify.

The O'Hagan case represents an expansion, albeit subtle, of the principles announced in Anderson. In the Anderson case, the original cause of the circumstances was the tortious (indeed criminal) conduct of a third party – the very example provided by the Legislature in Section 10(j) of the kind of condition or situation that a public employer cannot be held liable for failing to prevent. In contrast, the death in O'Hagan was by natural causes, a condition or situation not expressly illuminated by the Legislature. Application of Section 10(j) in the O'Hagan case signals a willingness on the part of the courts to protect first responders from mistakes made during the difficult process of identifying a body irrespective of the cause of death. The plaintiffs have chosen not to appeal.

Court Applies Highway Defect Statute To Contractor Electrocuted While Paving Sidewalk: Bruso v. National Grid v. Town of Webster, MICV2009-03530 (Mass.Super.Ct. 2013).

PD&P recently obtained summary judgment in favor of the Town of Webster in a case involving the non-fatal electrocution of a contractor's foreman while performing reconstruction work on a public sidewalk. The town entered into an agreement with the Commonwealth to reconstruct School Street, a local public way. The agreement provided that the town would handle project design and the Commonwealth would be responsible for project oversight. The Commonwealth then contracted out its obligations under the agreement to general contractor J.H. Lynch & Sons, Inc. The plaintiff, Albert Bruso, was an employee of J.H. Lynch, who was electrically shocked by an exposed wire owned by National Grid while compacting asphalt on the sidewalk adjacent School Street. Mr. Bruso sued National Grid for negligence and National Grid, in turn, filed third-party claims against the town and the Commonwealth for indemnity and contribution. No party sent written notice of the claim to either the town or the Commonwealth.

Both the town and the Commonwealth moved for summary judgment at the close of discovery, arguing that the Highway Defect Statute, M.G.L. c. 84, § 15 (M.G.L. c. 81, § 18, with regard to the Commonwealth) exclusively governed National Grid's third-party claims, and that such claims failed because National Grid neglected to serve written notice upon the third-party defendants as required by the statutes. In opposition, National Grid rejected the notion that electricity constituted a highway defect within the meaning of Chapters 81 and 84 and maintained, instead, that the Massachusetts Tort Claims Act (MTCA), M.G.L. c. 258 applied to workers injured on a public way during public works projects overseen by a public employer. Although National Grid conceded that it never sent written notice to the town or the Commonwealth, it argued that its claims nevertheless survived because the MTCA specifically exempts third-party claimants from the written notice requirements. Finding that electricity actually constitutes a "highway defect," and, strictly construing the exclusivity provision of Chapter 84, where the injury occurred on a public way (opposed to a state highway under Chapter 81) the court ruled in favor of the town and the Commonwealth and entered final judgment in favor of both.

The decision is notable for several reasons. First, as a matter of first impression, the court held that electricity can constitute a defect in a way within the meaning of Chapter 84. Second, the court stayed true to the exclusivity provision of Chapter 84, despite the unique "negligent supervision" aspect of Bruso's injury and the fact that he was not using the way as a"traveler" at the time.

Ever since the passage of the MTCA in 1978, litigants have persistently (and with increasing ingenuity) attempted to bring their "public way" cases within the ambit of the MTCA, presumably to enjoy its comparatively generous $100,000 cap on liability and its relaxed notice provisions. As National Grid did here, litigants typically argue that special circumstances take their claim outside the realm of the Highway Defect Statute and its $5,000 cap on liability, and place them instead under the umbrella of the MTCA. To date, this argument was successful in only one scenario. Gallant v. City of Worcester, 383 Mass. 707 (1981) (holding that highway *fatality* claims fall under the MTCA because the Highway Defect Statute only applies to *injuries*). Third, the decision is also significant in that the court held the third-party litigant must comply must comply with the written notice provisions of Chapter 84, even though written notice is not required of third-party litigants under the MTCA. The court recognized that Chapter 258 expressly exempts third-party litigants from the notice provisions while Chapter 84 doES not. Finally, to the extent the Commonwealth assumed responsibility for the reconstruction of School Street under its agreement with the town, the Commonwealth's liability was controlled by Chapter 84. As the court reasoned, any entity – even the Commonwealth – can become the "person by law obliged to repair" the public way and thus be subject to the liability provisions (and, as here, the protections) of the Highway Defect Statute.

For more information about our practice or the cases discussed in our newsletter, please contact a member of our Municipal Law Practice Group:

JOHN J. DAVIS
Partner
jdavis@piercedavis.com

JOHN J. CLOHERTY, III
Partner
jcloherty@piercedavis.com

ADAM SIMMS
Partner
asimms@piercedavis.com

MICHAEL D. LEEDBERG
Associate
mleedberg@piercedavis.com

SETH B. BARNETT
Associate
sbarnett@piercedavis.com

JASON W. CROTTY
Associate
jcrotty@piercedavis.com

JILL MURRAY
Associate
jmurray@piercedavis.com

SHAUNA TWOHIG
Associate
stwohig@piercedavis.com