MAGLIACANE v. CITY OF GARDNER (2020)

Supreme Judicial Court of Massachusetts,

Janice MAGLIACANE 1 v. CITY OF GARDNER & others.2

SJC-12736

Decided: January 22, 2020

Present (Sitting at Barnstable): Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

The following submitted briefs for amici curiae: J. Raymond Miyares, Wellesley, Bryan F. Bertram, & Ivria Glass Fried, for department of public works of Wellesley. Michele E. Randazzo Boston, for Massachusetts Water Works Association & another. Cynthia L. Amara, Quincy, for Massachusetts Municipal Lawyers Association. Michelle H. Blauner, Boston, for the plaintiff. John J. Davis, Boston, for the defendants.

Plaintiff Janice Magliacane is a homeowner in the city of Gardner (city) whose hot water heating system failed prematurely three times due to corrosion of its copper heating coils. She replaced the coils on the first two occasions but, after the third malfunction, switched out her tankless hot water system for a water heater to avoid additional replacement costs. She was not alone; as alleged, the hot water heating systems of hundreds of other homeowners in the city also failed because of corroded copper heating coils.

Magliacane commenced this putative class action suit in the Superior Court alleging that the city and its private water supply contractors, AECOM Technical Services, Inc. (AECOM), and Suez Water Environmental Services, Inc. (Suez) (collectively, defendants), were negligent and grossly negligent and created a nuisance in knowingly supplying corrosive water to the city's residents. The city moved to dismiss the complaint pursuant to Mass. R. Civ. P. 12(b)(6), 365 Mass. 754 (1974), and for entry of separate and final judgment pursuant to Mass. R. Civ. P. 54(b), 365 Mass. 820 (1974). After a hearing, the judge allowed the city's motion to dismiss, concluding that Magliacane failed to make timely presentment as required by the Tort Claims Act (act), G. L. c. 258, § 4.[3] Magliacane filed a notice of appeal, and we transferred the appeal to this court on our own motion.

Magliacane contends that her class action claims fall outside the scope of the act because a city historically has been exempt from sovereign immunity when it acts in a "proprietary" or "commercial" capacity by selling water to its residents. She also argues that, even if her claims are covered by the act, she made timely presentment because the city fraudulently concealed her cause of action, thereby tolling the act's presentment requirement until she had actual knowledge of her claims.

We conclude that, apart from the exceptions set forth in the act, the act covers all claims brought against a city, even those arising from the city's sale of water to its residents. We also conclude that the judge erred in dismissing Magliacane's complaint for lack of timely presentment, where her complaint made specific allegations that, if true, would support factual findings (1) that the city fraudulently concealed her cause of action and (2) that she did not have actual knowledge of the city's responsibility for the corrosion of her heating coils until less than two years before the date of presentment. Because we look to the same record as the motion judge and because allowance of a motion to dismiss is a question of law, we also reach the arguments that the judge did not address and conclude (1) that Magliacane adequately gave notice of her nuisance claim in her presentment; (2) that she made proper presentment on behalf of the putative class; and (3) that the allegations in her complaint suffice to show that the city is not entitled to dismissal of the complaint under the statutory exceptions to liability under the act that it invoked.[4] We therefore vacate the judge's allowance of the city's motion to dismiss and remand this case for further proceedings consistent with this opinion.[5]

Background. We recite the facts, which are alleged in great detail in the complaint, as if they are true, because we must accept them as true in reviewing the allowance of a motion to dismiss. See Revere v. Massachusetts Gaming Comm'n, 476 Mass. 591, 595, 71 N.E.3d 457 (2017).

The city owns two water treatment plants at Crystal Lake and Snake Pond, and it sells and distributes water to the city's residents, property owners, and businesses. In 1998, the city entered into a contract with defendant AECOM [6] that privatized the city's water maintenance and distribution operation. The contract guaranteed that AECOM would operate and maintain the city's water system in accordance with "Good Industry Practices"; "use all reasonable means

and methods to insure the safety, integrity and quality of the [c]ity's water"; and perform its work in conformity with "the highest professional standard of care and practice customarily expected" of those engaged in comparable work. Defendant Suez acquired the contract and assumed all attendant obligations in 2008. Suez has operated the city's water facilities and distribution system since then.

The defendants knew for years that the water they sold and distributed to the city's residents was corrosive. In a 1994 report, city consultants stated that "the corrosive nature of the source water was causing leaching of lead and copper from building plumbing." The report concluded that "increasing the pH of the water entering the distribution system would reduce lead and copper solubility," and recommended that the city's water treatment facility at Crystal Lake "add a non-zinc based orthophosphate to . inhibit corrosion of the distribution system piping and plumbing." A 1998 letter from the same consultants recommended that the city's other water treatment facility at Snake Pond similarly implement "corrosion control using caustic soda and poly/orthophosphate blend." When the city constructed the plants at Crystal Lake and Snake Pond in the late 1990s, it and AECOM appeared to heed this advice, seeking and receiving approval from the Department of Environmental Protection (DEP) to incorporate orthophosphate into the design of both facilities as a corrosion inhibitor. But in 2002, AECOM sent a letter to the DEP stating that it did not believe that the corrosion control plan had been optimized and that it intended to "further optimize lead and copper control with orthophosphate treatment." Despite this apparent decision and DEP approval, the city and AECOM did not implement corrosion control plans at that time.

By 2009 or 2010, the city had received numerous complaints about copper water heater coil failures and had initiated an investigation into the issue. In 2011, the city engineer sought the guidance of an expert with the United States Environmental Protection Agency (EPA), who concluded that there were no issues with the coils themselves but that the water's alkalinity was low and ought to be increased. Although the city shared this information with Suez, neither entity acted on the recommendation.

Meanwhile, the heating coils of the city's residents continued to fail: by 2012, the city had received reports of more than 400 coil failures from 250 residents. In response, the city and Suez retained Microvision Laboratories (Microvision) to examine the heating coils and water samples. Microvision excluded coil quality as a cause of the failures and determined that the city's switch from chlorine to chloramine (two chemicals commonly used to disinfect public water systems) might have contributed to the corrosion problem. In its 2012 report, Microvision suggested that the city take "[a]dditional steps" to "minimize the risk of aggressive corrosion," specifically "the addition of a phosphate corrosion inhibitor." Based on the report, the city engineer stated in a memorandum that "it is incumbent upon [the city] as the supplier to improve water chemistry to make the water more protective of the copper pipe within the boiler heating environment." The memorandum also noted that the "[o]riginal studies in advance of the current water treatment facility construction called for the addition [of] soda ash for alkalinity control and non zinc orthophosphate for corrosion control. At some point the orthophosphate addition was dropped and is not used today." Again, the defendants took no action to improve the city's water chemistry.

In 2015, as the city continued to receive complaints, it and Suez retained yet another consultant, Corrosion Testing Laboratories (CTL), to test the leaking copper coils. CTL's 2015 report concluded that the leaks in the coils were caused by pinholes and that the pinholes were likely "related to soft water low alkalinity, and/or low dissolved inorganic carbon." CTL further opined that Suez's use of chloramine treatment was "associated with changing the alkalinity and dissolved inorganic carbonate levels" in the city's water supply.

Until September 2015, the city denied that the coil corrosion problem was caused by, or related to, the chemistry of its water. Instead, it publicly blamed the problem on the quality of the coils, although it knew this to be false. In response to a question about coil corrosion at a meeting of the public service committee of the city council in May 2013, the city engineer said, "[W]e have the water tested the water and it is not showing anything," even though the EPA and Microvision studies contradicted that statement. The defendants did not disclose the city consultant's opinions from the 1990s or Microvision's 2012 recommendations that the city ought to add orthophosphate to its water to mitigate coil corrosion.

In September 2015, the city issued a press release concerning the CTL study in which it acknowledged that "the soft water (low alkalinity) and a low level of Dissolved Inorganic Carbons" contributed to the coil failures. But the same press release asserted that "the failure of some copper coils has been potentially determined to be due to the natural state of the water itself and not due to any additives," notwithstanding CTL's opinion that Suez's use of chloramines to disinfect the water was a contributing factor to the corrosive water conditions.[7]

Following the press release, the city's mayor denied that the city had any culpability for the corrosion because the CTL report attributed the issue to the natural state of the water. And at a March 2016 meeting of the public service committee of the city council, the city engineer disclaimed the city's responsibility for the coil corrosion, stating that "we are not doing anything wrong" and that the corrosion occurred because of the city's "soft water, which is a natural occurrence."

Around the same time as the issuance of the press release, the city engineer noted in an internal memorandum that the city and Suez "have not looked at our corrosion control strategy" in years. The city then directed Suez to conduct such a strategy review, and in June 2016, the city and Suez sought approval from the DEP (for the second time) to add orthophosphate to the city's water treatment plants. After the DEP approved the request in August 2017, the city announced that it would add orthophosphates to the water supply to "make the situation go away." When Magliacane filed the present suit in December 2017, the city and Suez still had not implemented any coil corrosion mitigation plan.

On October 12, 2017, Magliacane sent a demand letter to the defendants, individually and on behalf of a class defined as "Gardner residents, property owners and businesses who have had to replace/purchase heating coils, boilers and/or hot water heaters since 2000 due to coil corrosion." The city responded to the presentment by letter dated December 4, 2017, and denied all responsibility and liability for Magliacane's claimed injuries. Magliacane then commenced this putative class action on December 13, 2017.

Discussion. "We review the allowance of a motion to dismiss de novo." Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676, 940 N.E.2d 413 (2011). "For purposes of that review, we accept as true the facts alleged in the plaintiffs' complaint and any exhibits attached thereto, drawing all reasonable inferences in the plaintiffs' favor." Revere, 476 Mass. at 595, 71 N.E.3d 457.

1. Tort Claims Act. Responding to the city's argument that she did not make timely presentment of her claims as required by the act, Magliacane asserts that the act does not apply to suits against a municipality acting in a "proprietary" or "commercial" capacity, such as with respect to the distribution and sale of water. Magliacane correctly notes that, before the enactment of the act in 1978, a municipality was not protected by sovereign immunity from liability arising from the distribution and sale of water. See Harvard Furniture Co. v. Cambridge, 320 Mass. 227, 229, 68 N.E.2d 684 (1946) ("in undertaking to supply water at a price, a municipality is not performing a governmental function but is engaging in trade, and is liable just as a private company would be for any negligence in the laying out of its pipes, in keeping them in repair, or in furnishing potable water through them"). See generally Morash & Sons, Inc. v. Commonwealth, 363 Mass. 612, 620-621, 296 N.E.2d 461 (1973) ("many cases have established that a municipality may be held liable for the negligence of its employees who are engaged in commercial activities of the city" where there is "the element of special corporate benefit or pecuniary profit"). She contends that, where such liability by a municipality was not barred by sovereign liability before the act, it should be deemed to be outside the scope of the act that was intended to limit the scope of sovereign immunity.

To resolve this question, we look to the history of sovereign immunity and the passage of the act. "[S]overeign immunity is a judicially created common law" doctrine that our Commonwealth adopted from English common law. Morash & Sons, Inc., 363 Mass. at 615, 296 N.E.2d 461. Based on the antiquated notion that the "King can do no wrong" and that "no one else could do wrong on his behalf," sovereign immunity prohibited private citizens from filing suit against the Commonwealth and its municipalities. See J.A. Sullivan Corp. v. Commonwealth, 397 Mass. 789, 793, 494 N.E.2d 374 (1986); Briggs v. Light-Boat Upper Cedar Point, 93 Mass. 157, 11 Allen 157, 162 (1865); Mower v. Leicester, 9 Mass. 247, 250 (1812).

But of course, the government can and sometimes does do wrong. Recognizing the unfairness, in some circumstances, of preventing those injured by the government's wrongful acts from seeking financial compensation though the judicial system, courts created a patchwork of exceptions to sovereign immunity. See Morash & Sons, Inc., 363 Mass. at 623, 296 N.E.2d 461 ("The judge made exceptions reflect a partial and piecemeal adjustment by the courts of a doctrine that, if applied in all cases indiscriminately, would bring about some unjust results"). In particular, courts distinguished between a municipality's acts undertaken for the common good of all, which were protected by sovereign immunity, and those undertaken for "special corporate benefit or pecuniary profit," which were not. Id. at 621, 296 N.E.2d 461.

This distinction seems simple in theory, but it proved quite troublesome in application, often leading to arbitrary results. Id. ("An injured person, for example, may recover against a city or town because of the fortuitous circumstance that the injury was caused by the activity of water department employees, rather than by fire department employees" [citations omitted]). As "fine distinctions" and "further refinements" were made, id. at 622, 296 N.E.2d 461, the resulting "liability by exceptions" was "grounded in factors that [had] no necessary relationship to accepted tort principles, equitable principles, or principles of sound public policy," id. at 621, 296 N.E.2d 461. Eventually, the patchwork of exceptions became a "crazy quilt" of complex and confusing distinctions, Rogers v. Metropolitan Dist. Comm'n, 18 Mass. App. Ct. 337, 339, 465 N.E.2d 280 (1984), and created such a "convoluted scheme of rules and exceptions" that were "unjust and indefensible as a matter of logic and sound public policy" that we declared our intention to abrogate sovereign immunity unless the Legislature "acted definitively as to the doctrine," Whitney v. Worcester, 373 Mass. 208, 209-210, 366 N.E.2d 1210 (1977).

In response, the Legislature promulgated the act in 1978, "the primary purpose of [which] was to replace the common-law doctrine of governmental immunity, and its myriad judicially created exceptions, with a comprehensive statutory scheme governing the tort liability of public employers." Morrissey v. New England Deaconess Ass'n – Abundant Life Communities, Inc., 458 Mass. 580, 590, 940 N.E.2d 391 (2010). The comprehensive nature of the statutory scheme is set forth in G. L. c. 258, § 2, which provides, in relevant part:

"Public employers shall be liable for injury or loss of property . caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances, except that public employers shall not be liable . for any amount in excess of $100,000 . The remedies provided by this chapter shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the public employer . Final judgment in an action brought against a public employer under this chapter shall constitute a complete bar to any action by a party to such judgment against such public employer or public employee by reason of the same subject matter."

If the historical context and this statutory language were not enough to clearly demonstrate the legislative intent to repeal the common-law patchwork of exceptions to sovereign liability, "the enabling legislation of the [a]ct expressed such an intent." Morrissey, 458 Mass. at 590, 940 N.E.2d 391. It states: "The provisions of this act shall be construed liberally for the accomplishment of the purposes thereof but shall not be construed to supersede or repeal [G. L. c. 81, § 18, and G. L. c. 84, §§ 15-25]. Any other provision of law inconsistent with any other provisions of this chapter shall not apply." St. 1978, c. 512, § 18.

In Morrissey, 458 Mass. at 590-591, 940 N.E.2d 391, we rejected the plaintiffs' argument that private nuisance claims against a municipality were not within the scope of the act because such claims were among the exceptions to sovereign immunity before its enactment. We reject Magliacane's comparable argument that the act does not cover claims arising from the city's sale of water because such claims were also among the exceptions to sovereign liability. See Wolf v. Boston Water & Sewer Comm'n, 408 Mass. 490, 492 n.4, 561 N.E.2d 867 (1990) ("distinction between governmental and nongovernmental or proprietary functions" was "abrogated" by act). We conclude that the act is the exclusive remedy for bringing tort claims against the Commonwealth and its municipalities, regardless of whether the tort claim was within or outside the scope of sovereign immunity before passage of the act. Because the act applies to Magliacane's claims against the city, we therefore turn to whether she complied with the statutory requirements for the presentment of those claims.

2. Presentment. a. Timeliness. Under the act, "[a] civil action shall not be instituted against a public employer on a claim for damages . unless the claimant shall have first presented his claim in writing to the executive officer of such public employer within two years after the date upon which the cause of action arose." G. L. c. 258, § 4. "This strict presentment requirement is a statutory prerequisite for recovery under the [a]ct," the purpose of which "is to allow public employers the opportunity to investigate and settle claims and to prevent future claims through notice to executive officers." Shapiro v. Worcester, 464 Mass. 261, 267-268, 982 N.E.2d 516 (2013). In allowing the city's motion to dismiss, the judge concluded that Magliacane's cause of action arose no later than September 2015, when the city issued its press release acknowledging that the city's water chemistry had contributed to the coil failures. According to that timeline, Magliacane sent her October 12, 2017 presentment letter a month too late.

A cause of action arises for purposes of presentment under § 4 when it accrues under our discovery rule. See Darius v. Boston, 433 Mass. 274, 275 n.3, 741 N.E.2d 52 (2001); Heck v. Commonwealth, 397 Mass. 336, 340, 491 N.E.2d 613 (1986). Under our common-law discovery rule, "a cause of action accrues when the plaintiff discovers or with reasonable diligence should have discovered that (1) [she] has suffered harm; (2) [her] harm was caused by the conduct of another; and (3) the defendant is the person who caused that harm." Harrington v. Costello, 467 Mass. 720, 727, 7 N.E.3d 449 (2014). In finding that the cause of action accrued no later than the issuance of the city's press release, the judge determined that, as a result of the press release, Magliacane knew or should have known that the city's water was a potential cause of the premature failure of her copper water heating coils and therefore "should have known that the [c]ity's conduct contributed to that harm."

Magliacane's complaint, however, alleges in substantial detail that the city fraudulently concealed her cause of action by declaring in the press release that "the failure of some copper coils has been potentially determined to be due to the natural state of the water itself and not due to any additives," when the city knew that the corrosive condition of the water had been caused in part by the city's addition of chloramine to the water. Where there is fraudulent concealment, the common-law discovery rule gives way to the statutory discovery rule set forth in G. L. c. 260, § 12: "If a person liable to a personal action fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action." See Hendrickson v. Sears, 365 Mass. 83, 89, 310 N.E.2d 131 (1974) ("Legislature has long provided a discovery rule for cases of fraudulent concealment").

Under this statutory discovery rule, fraudulent concealment tolls the statute of limitations where "the defendant[s] concealed the existence of a cause of action through some affirmative act done with intent to deceive." White v. Peabody Constr. Co., 386 Mass. 121, 133, 434 N.E.2d 1015 (1982). In such circumstances, the limitations period is tolled unless the plaintiff has actual knowledge of the claim. See Stolzoff v. Waste Sys. Int'l, Inc., 58 Mass. App. Ct. 747, 757, 792 N.E.2d 1031 (2003), citing Lynch v. Signal Fin. Co. of Quincy, 367 Mass. 503, 508, 327 N.E.2d 732 (1975). Where there is fraudulent concealment, "we have only attributed knowledge to a plaintiff who had actual knowledge of the facts, or had the means to acquire such facts, in circumstances where the probability of wrongdoing was so evident that possession of the means was equivalent to actual knowledge." Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 520 n.25, 677 N.E.2d 159 (1997).

We conclude that, where the complaint specifically alleged fraudulent concealment and alleged facts that, if true, would support such a finding, the judge should have applied this statutory discovery rule rather than the common-law discovery rule. We recognize that, until now, we have not specifically held that the doctrine of fraudulent concealment tolls the presentment requirement under § 4 of the act. But, in deciding that the discovery rule governed the interpretation of the act's presentment requirement, we intended "to avoid punishing 'blameless ignorance' of a plaintiff" by barring claims before the plaintiff could reasonably know about them. Heck, 397 Mass. at 340, 491 N.E.2d 613. The same logic applies to fraudulent concealment: it would be manifestly unfair to prevent plaintiffs from bringing claims due to untimely presentment where the defendant has taken steps to conceal the cause of action.

Taking the factual allegations in Magliacane's complaint as true and drawing all reasonable inferences in her favor, the city took active steps to conceal the fact that its conduct contributed to the coil corrosion problem, such as by claiming that the failure of the copper coils was "due to the natural state of the water itself" and was "not due to any additives." As alleged, the city was long aware that its addition of chloramines to the water likely contributed to the corrosion problem and that its failure to add orthophosphate to the water was a separate cause of the problem. Because the complaint sufficiently alleged that the city concealed the existence of Magliacane's cause of action through affirmative acts done with the intent to deceive, her presentment was timely unless she had actual knowledge of the city's responsibility for the corrosion problem before October 12, 2015. According to the complaint, Magliacane gained such actual knowledge only when the city announced its intention to add orthophosphate to the water to "make the situation go away" -- in effect admitting its responsibility for the problem -- on August 30, 2017. Her October 12, 2017 presentment letter therefore fell well within the act's two-year presentment period. Consequently, we vacate the judge's allowance of the city's motion to dismiss on the ground of untimely presentment.[8]

b. Nuisance claim. The city also contends that Magliacane's nuisance claim must be dismissed for lack of presentment under § 4 of the act, because her presentment alleged claims of negligence, breach of warranties, and violation of G. L. c. 93A, but not of nuisance. The city argues that the presentment letter must identify each legal claim or suffer dismissal of any omitted claim. We disagree.

The purpose of presentment is to "ensure[] that the responsible public official receives notice of the claim so that the official can investigate to determine whether or not a claim is valid, preclude payment of inflated or nonmeritorious claims, settle valid claims expeditiously, and take steps to ensure that similar claims will not be brought in the future." Richardson v. Dailey, 424 Mass. 258, 261, 675 N.E.2d 787 (1997), quoting Lodge v. District Attorney for the Suffolk Dist., 21 Mass. App. Ct. 277, 283, 486 N.E.2d 764 (1985). Therefore, a presentment letter "is adequate if it sets forth sufficient facts from which public officials reasonably can discern the legal basis of the claim, and determine whether it states a claim for which damages may be recovered under the act." Murray v. Hudson, 472 Mass. 376, 384, 34 N.E.3d 728 (2015). Where "all theories of liability argued by the plaintiff [a]re based on the same facts," the presentation of those facts gives the executive officer "the opportunity to investigate the circumstances of each claim." McAllister v. Boston Hous. Auth., 429 Mass. 300, 305 n.7, 708 N.E.2d 95 (1999). See Martin v. Commonwealth, 53 Mass. App. Ct. 526, 530, 760 N.E.2d 313 (2002) ("the presentment requirement is not intended to demand such rigid particularization as to . bar legitimate claims for failing to invoke perfectly the correct 'Open Sesame' ").

In short, where the facts are sufficiently presented, the presentment need not identify each and every legal claim the plaintiff ultimately includes in her complaint. Consequently, where a plaintiff alleged in a presentment that a housing authority was negligent for allowing ice to accumulate on the exterior stairs of the property, her breach of implied warranty claim was not barred even though not specified in the presentment. See McAllister, 429 Mass. at 301, 305 n.7, 708 N.E.2d 95. Where a presentment alleged that the Commonwealth's failure to restrain an individual negligently caused the death of the plaintiff's sister, the plaintiff was not barred from pursuing a claim of negligent infliction of emotional distress, even though that claim was not specified in the presentment. Gilmore v. Commonwealth, 417 Mass. 718, 719-720, 723, 632 N.E.2d 838 (1994). And where a plaintiff's presentment letter alleged that an executive department was negligent because, despite its certification that the premises were lead-free, the premises contained lead that resulted in her children having elevated blood levels of lead, it sufficed to provide notice of her claims of negligent infliction of emotional distress and loss of consortium arising from the children's ingestion of lead paint. See Martin, 53 Mass. App. Ct. at 527, 760 N.E.2d 313.

Magliacane's October 12, 2017 presentment letter laid out, in detail, her allegations that the city's use of chloramines contributed to the alkalinity of the water, that the city then failed to add orthophosphate to its water to correct the problem, and that she and other residents of the city sustained coil failures as a result. Her presentment was "not so obscure that educated public officials should find themselves baffled or misled" with respect to her assertion of a claim of nuisance. See Gilmore, 417 Mass. at 723, 632 N.E.2d 838. Nor would the nature of the official's investigation into the corrosion problem have been different because Magliacane failed to identify nuisance as a possible claim. Because Magliacane set forth a sufficient factual basis to provide the city with notice and to allow officials to investigate the city's liability under the act, we conclude that she adequately presented her nuisance claim.

c. Class presentment. The city also asserts that, even if Magliacane's letter sufficed as a presentment of her individual claims, it could not constitute presentment by the similarly situated class members she seeks to represent in a class action. The city does not argue that a class action cannot be brought under the act, but it does contend that each and every member of such a class must individually make a separate presentment to give the city the opportunity to investigate or resolve the individual claims.

As an initial matter, and somewhat surprisingly, we have yet to address the question whether plaintiffs can bring a class action under the act. Section 2 of the act declares that "[p]ublic employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances, except that public employers shall not be liable to levy of execution on any real and personal property to satisfy judgment, and shall not be liable for interest prior to judgment or for punitive damages or for any amount in excess of $100,000" (emphasis added). G. L. c. 258, § 2. Because a class action under Mass. R. Civ. P. 23, as amended, 471 Mass. 1491 (2015), may be brought against "a private individual under like circumstances," and because none of the exceptions precludes class relief, we conclude that a class action may be brought against a public employer under the act. The guidance provided in the enabling legislation of the act – that "[t]he provisions of this act shall be construed liberally for the accomplishment of the purposes thereof" – supports this conclusion.[9] St. 1978, c. 512, § 18.

If, as the city contends, each member of the class must serve a letter of presentment to participate in the class action, we would have to conclude, for all practical purposes, that the Legislature intended to permit class actions in theory, but not in fact. A prerequisite to a class action under Mass. R. Civ. P. 23(a)(1) is that "the class is so numerous that joinder of all members is impracticable." To require every member of a class this numerous to make a presentment would essentially grant plaintiffs the right under § 2 of the act to recover damages through a class action but, in all but the most unusual circumstances, deprive them of that right as a result of the presentment requirement under § 4 of the act. See, e.g., Crandall v. Denver, 143 P.3d 1105, 1112 (Colo. App. 2006), rev'd on other grounds, 161 P.3d 627 (Colo. 2007) ("requiring dismissal of all class plaintiffs who have not filed a notice of claim before commencement of the suit would make it virtually impossible to proceed with a class tort action against a public entity"); Houghton v. Dep't of Health, 2005 UT 63, ¶ 24, 125 P.3d 860 ("interpreting the notice of claim provision to require identification of every potential plaintiff in a class action lawsuit would nullify our class action rule").

We note that G. L. c. 93A, § 9(3), also requires a form of presentment: "At least thirty days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent." In Baldassari v. Public Fin. Trust, 369 Mass. 33, 42, 337 N.E.2d 701 (1975), we rejected the defendant's contention that each claimant must be identified in the c. 93A demand letter to seek redress under G. L. c. 93A. We declared, "If a proper demand is made by one plaintiff, identifying him as the claimant and reasonably describing the act or practice relied on and the injury suffered by him, we think he and others similarly situated may join in a class action to redress that injury and similar injuries caused by the same act or practice. Multiple demands for relief need not be filed on behalf of all the members of the class." Id. And we added that "[t]he modern class action is 'designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions.' " Id., quoting American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 550, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). We conclude that a comparable standard applies where a putative class representative makes a presentment on behalf of a class prior to filing a class action against a public employer under the act.[10]

Here, Magliacane's presentment letter clearly defined the claimants as "Magliacane, and a putative class of other similarly situated residents, property owners and businesses in Gardner who have had to replace heating coils, hot water heaters, furnaces and/or boilers since 2000 due to coil corrosion." Her presentment letter satisfied the statutory purpose of presentment under the act – to provide the government with "the opportunity to investigate and settle claims and to prevent future claims through notice to executive officers." Shapiro, 464 Mass. at 268, 982 N.E.2d 516. The presentment put the city on notice regarding the nature and scope of the class, and it enabled the city to investigate or settle the claims and to take steps to prevent similar claims from arising in the future. We conclude that Magliacane's October 12, 2017 letter adequately presented her claims and those of the putative class. To be clear, we do not address whether this action meets the requirements of Mass. R. Civ. P. 23 or whether it should be certified as a class action against the city; we simply conclude that lack of presentment is not a proper basis to dismiss the complaint as a class action.

3. Exceptions to liability under the act. The city further contends that, even if Magliacane made proper presentment on behalf of herself and the putative class, it is protected by sovereign immunity from her claims under two exceptions to the liability coverage provided by the act: the exception for claims based on a public employer's failure to prevent the harmful consequences of a condition not originally caused by the public employer, G. L. c. 258, § 10(j); and the discretionary function exception, G. L. c. 258, § 10(b).

a. Section 10(j) exception. Section 10(j) of the act bars "any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation . which is not originally caused by the public employer or any other person acting on behalf of the public employer." The purpose of § 10(j) is to preclude liability where the government fails to prevent harm from a privately created hazard, as opposed to a hazard that it has caused. See, e.g., Brum v. Dartmouth, 428 Mass. 684, 691-696, 704 N.E.2d 1147 (1999) (town not liable for stabbing of student based on claim that town failed to protect student from known threat); Stahr v. Lincoln Sudbury Regional High Sch. Dist., 93 Mass. App. Ct. 243, 247, 102 N.E.3d 995 (2018) (school district not liable for injury to field hockey player struck by teammate based on claim that school district was responsible due to inadequate instruction and lack of supervision).

The city argues that the alkalinity of the water was caused by "thousands of years of evolution," not an affirmative act by the city, and therefore it did not "originally cause" the corrosion that led to the failure of the copper heating coils. It contends that its failure to add orthophosphate to the water is the type of "failure to prevent harm" that constitutes an exception to liability under § 10(j) of the act.

Under this rationale, the city would also be immune from liability under the act if it had delivered water to its residents that contained unsafe amounts of lead or other contaminants dangerous to human health, provided that those contaminants were present in the water before it was treated and delivered. The flaw in this rationale, of course, is that where a city takes responsibility for the sale and distribution of water to its residents, the city is expected to treat the water in its reservoirs to ensure the water's safety before delivering that water to residents. The city ultimately is responsible for the quality of water that it delivers. Here, the city delivered to its residents water that it knew to be corrosive because of both what it added to the water and what it failed to add. In taking the affirmative act of delivering corrosive water, the city, not the water in its reservoirs, was the "original cause" of the corrosive water that led to Magliacane's copper coil failures. The § 10(j) exception does not protect the city from liability under the act under these circumstances.[11]

b. Discretionary function exception. Under the act's discretionary function exception, G. L. c. 258, § 10(b), public employers are not liable for "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused." The exception distinguishes between "discretionary" acts, defined as "conduct that involves policy making or planning," and "functionary" acts, that is, those actions that simply implement established policy. Harry Stoller & Co. v. Lowell, 412 Mass. 139, 141-142, 587 N.E.2d 780 (1992). That distinction is easy to articulate in theory, but difficult to apply in practice, because the determination whether an act is "discretionary" or "functionary" often depends on the particular facts of a case. See id. at 143, 587 N.E.2d 780 ("Because each case depends on its facts, the design of a comprehensive, all-purpose guide to the limits of the exception is not likely").

The act itself makes no attempt to define what governmental functions are to be deemed discretionary and therefore deserving of immunity. To aid in applying the statute's general language to the countless fact patterns that present themselves, we have developed a two-step analysis. First, the court must decide "whether the governmental actor had any discretion at all as to what course of conduct to follow." Harry Stoller & Co., 412 Mass. at 141, 587 N.E.2d 780. If the actor's conduct is prescribed by statute, regulation, or other readily ascertainable standard, the government has no discretion, and the exception does not apply. Id. If the first step does not resolve the issue, "[t]he second and far more difficult step is to determine whether the discretion that the actor had is that kind of discretion for which § 10(b) provides immunity from liability." Id. Although almost every act involves some degree of discretion, "[t]he discretionary function exception is narrow, 'providing immunity only for discretionary conduct that involves policy making or planning.' " Greenwood v. Easton, 444 Mass. 467, 470, 828 N.E.2d 945 (2005), quoting Harry Stoller & Co., supra. Discretionary acts do not include those that involve only the "carrying out of previously established policies or plans." Barnett v. Lynn, 433 Mass. 662, 664, 745 N.E.2d 344 (2001), quoting Whitney, 373 Mass. at 218, 366 N.E.2d 1210.

Here, Magliacane alleges that the city, knowing that its water was corrosive, adopted a plan to add orthophosphate to the water as early as 1998. It sought and received approval for the plan from the DEP in 1998 and again in 2016, but it had not implemented the plan by the time the complaint was filed. Magliacane asserts that the policy decision to add the orthophosphate was made in 1998 and that the failure to do so was a failure to implement the policy, which is the type of "functionary" act not entitled to immunity under § 10(b). The city counters that, even though it had planned to add orthophosphate to the water, its decision regarding if and when to purchase and install corrosion inhibitors is a separate discretionary decision, because "[t]he city has discretion in deciding how best to expend its resources in order to provide safe and secure conditions." Barnett, 433 Mass. at 664, 745 N.E.2d 344.

As these arguments make clear, the determination whether the city made a discretionary policy decision not to add orthophosphate to its water or simply failed to implement its policy decision to do so is too fact-intensive to be decided on a motion to dismiss. We therefore conclude that, at this time, based on the allegations in the complaint, the city is not entitled to dismissal on the ground of discretionary function immunity under § 10(b) of the act.

Conclusion. We vacate the order allowing the city's motion to dismiss and remand the case to the Superior Court for further proceedings consistent with this opinion.

So ordered.

FOOTNOTES

3. AECOM and Suez filed separate motions to dismiss, which are not before us. This opinion addresses only the city's liability.

4. The city claims that it is immune from liability under G. L. c. 258, § 10(j), because the corrosion of the heating coils was "not originally caused" by the city, and under G. L. c. 258, § 10(b), because the city's failure to address the corrosion problem in its water treatment was "the failure to exercise or perform a discretionary function."

5. We acknowledge the amicus briefs submitted by the Massachusetts Municipal Lawyers Association; the department of public works of Wellesley; and the Massachusetts Water Works Association and the city of Haverhill.

6. The original party to the contract was Earth Tech, Inc. (Earth Tech), a former subsidiary of Tyco International, Ltd. AECOM acquired Earth Tech in 2008. For purposes of clarity and consistency, we will not distinguish Earth Tech from AECOM.

7. The press release was not appended to the complaint and was not included in the appellate record.

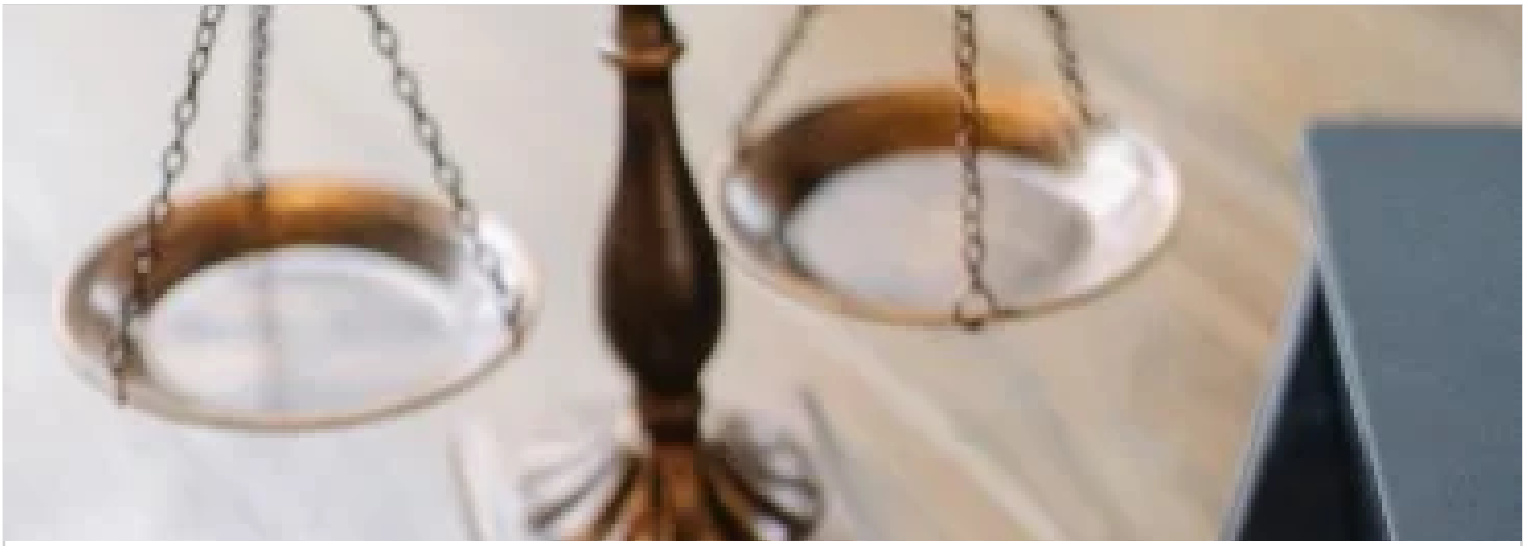
8. Nothing in this opinion bars the city from claiming on summary judgment or at trial that, based on the evidence presented, the presentment was not timely because the city did not fraudulently conceal the cause of action or because Magliacane had actual knowledge of the cause of action at the time of or prior to the press release.

9. We recognize that a State's tort claims act is a creature of statute and that, as we conclude in Massachusetts, the language of the statute may dictate whether class actions are permitted under the act. We note that the Supreme Courts of Arizona, California, Indiana, and Utah have held that, in the absence of statutory language specifically proscribing class actions, their States' respective statutes permit class actions against public entities. See Andrew S. Arena, Inc. v. Superior Court, 163 Ariz. 423, 425, 788 P.2d 1174 (1990) ("We find nothing . to suggest that the legislature intended to exempt public entities from either the burdens or the benefits of class actions in appropriate cases"); San Jose v. Superior Court of Santa Clara County, 12 Cal. 3d 447, 547, 115 Cal.Rptr. 797, 525 P.2d 701 (1974) ("We do not believe the claims statutes were intended to thwart class relief"); Budden v. Board of Sch. Comm'rs of Indianapolis, 698 N.E.2d 1157, 1163 (Ind. 1998) (Indiana Tort Claims Act not intended to create barriers to valid claims, including class actions); Houghton v. Department of Health, 2005 UT 63, ¶ 24, 125 P.3d 860 (where nothing in tort claims statute prohibits class actions, they are allowed). Appellate courts in Colorado and Washington have also so held. See Crandall v. Denver, 143 P.3d 1105, 1111–1112 (Colo. Ct. App. 2006), rev'd on other grounds, 161 P.3d 627 (Colo. 2007) (tort claims statute implicitly permits class actions where it limits amount of attorney's fees that prevailing plaintiff in class action may recover against public entity); Oda v. State, 111 Wash. App. 79, 86-88, 44 P.3d 8 (2002) (because tort claims statute "made the State liable for tortious conduct to the same extent as if it were a private person or corporation," class actions permitted [quotation and citation omitted]).

10. We note that Federal courts have reached different, and varying, conclusions under the Federal Tort Claims Act (FTCA). Under the FTCA, a plaintiff may not institute an action against the Federal government unless (1) the plaintiff has provided written notice of the claim to the appropriate Federal agency, and (2) the agency has denied the claim in writing or by failure to make a final disposition of the claim within six months of its filing. 28 U.S.C. § 2675(a). The written claim must demand a sum certain in money damages. 28 U.S.C. § 2675(b).Federal courts have generally recognized that a class action is theoretically possible under the FTCA. See Lunsford v. United States, 570 F.2d 221, 227 (8th Cir. 1977); Pennsylvania v. National Ass'n of Flood Insurers, 520 F.2d 11, 23 (3d Cir. 1975). However, "each of the claimants [must] have individually satisfied all of the jurisdictional requirements." Lunsford, supra. Some Federal courts have interpreted this to mean that "each claimant must submit an independent and separate claim to the appropriate administrative agency for review and possible settlement," including "submission of a sum certain." National Ass'n of Flood Insurers, supra. Other Federal courts would permit a class representative to file the claim, provided that the representative (1) establish his or her authority to present claims on behalf of the class, (2) name all the individual claimants, and (3) set forth a sum certain for each claimant, either by individually identifying the amount sought by each claimant or by identifying the lump sum sought by the class and asserting that each class member suffered the same amount of damages. See, e.g., Dalrymple v. United States, 460 F.3d 1318, 1325 (11th Cir. 2006) (dismissing FTCA claims because, in part, "the complaint [did] not provide information as to the amount of damages the individual plaintiffs in the . action sought, rather it provide[d] a total amount of damages for the multiple plaintiffs"); Luria v. Civil Aeronautics Bd., 473 F. Supp. 242, 245 (S.D.N.Y. 1979) ("Even were it possible to amend the claim to allege damages in a sum certain ., the Notice of Claim would still be defective because it listed the names of only about half of the purported class"); Kantor v. Kahn, 463 F. Supp. 1160, 1164 (S.D.N.Y. 1979) ("We do not find that [the lump sum damages demand] meets the sum certain requirement. There is nothing in the Notice of Claim which indicates that each consumer suffered the same damage"). See generally Lunsford, supra.Plaintiffs' failure or inability to comply with these stringent requirements has generally resulted in the dismissal of putative class actions under the FTCA. See, e.g., Lunsford, 570 F.2d at 222 (victims of flooding caused by cloud seeding); Caidin v. United States, 564 F.2d 284, 285 (9th Cir. 1977) (shareholders of failed bank); Blain v. United States, 552 F.2d 289, 290 (9th Cir. 1977) (per curiam) (victims of forest fire); In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 757, 760 (E.D.N.Y. 1980) (2.4 million victims of Agent Orange use in Vietnam); Kantor, 463 F. Supp. at 1161-1163 (40,000 victims of government failure to regulate travel charters).It bears note that the Federal courts characterize the agency notice and sum certain prerequisites as "[t]he administrative exhaustion requirement" of the FTCA, rather than as a mere presentment requirement. Lunsford, 570 F.2d at 224. See McNeil v. United States, 508 U.S. 106, 107, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993).

11. We leave open the possibility that the exception under G. L. c. 258, § 10(j), might apply if the city's water were contaminated by a saboteur in some way after it left the city's treatment plants, but that is not the situation before us.

GANTS, C.J.



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MAGLIACANE v. CITY OF GARDNER (2020)

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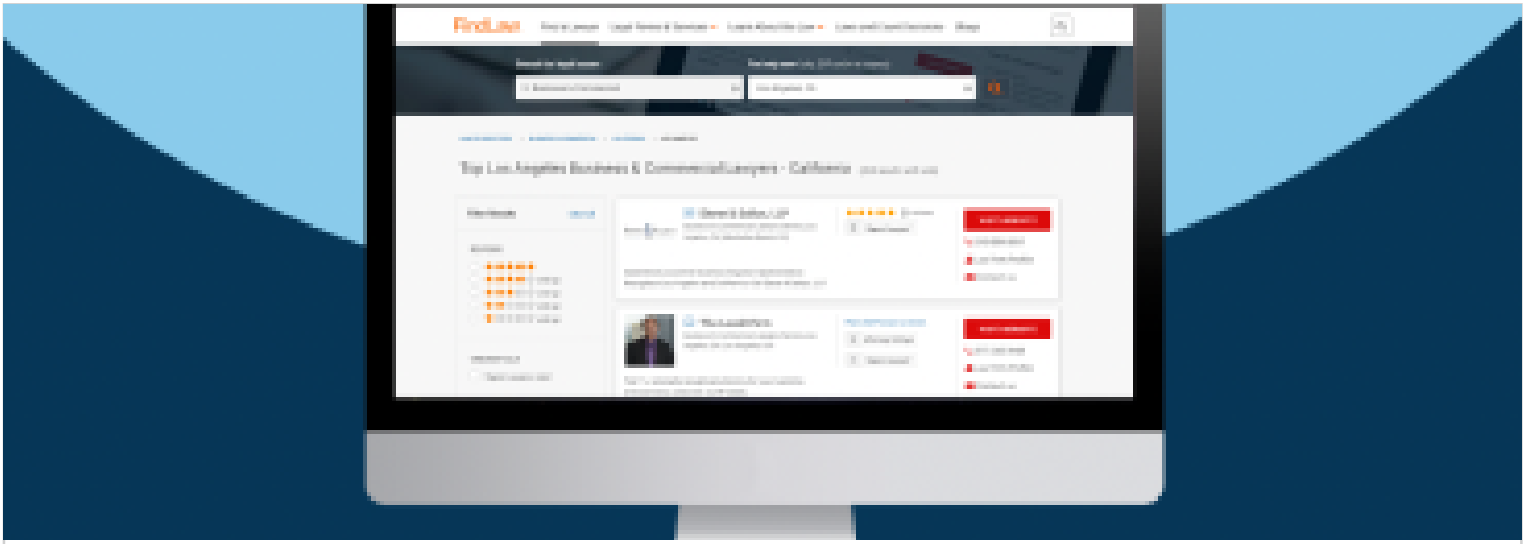
Decided: January 22, 2020

Court: Supreme Judicial Court of Massachusetts,



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