



MASSACHUSETTS
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2019 LAWYERS OF THE YEAR



KEVIN J. POWERS

Mansfield



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Rarely in the course of a career does a lawyer have the opportunity to eliminate a barrier to relief for an entire category of plaintiffs.

Mansfield solo Kevin J. Powers did just that in *Meyer v. Veolia Energy North America*. Powers convinced the Supreme Judicial Court that the 30-

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day notice requirement in the state’s road defect statute did not apply to bar the negligence suit of a cyclist who alleged he crashed when his bike struck a misaligned utility cover on a Boston street.

After the accident, plaintiff Richard Meyer provided prompt notice to the city of Boston of his injuries, only to find out later that the maintenance of the utility cover was not the city’s responsibility but that of defendant Veolia Energy.

Powers successfully argued that only governmental and quasi-governmental entities are entitled to 30 days’ notice of a road defect claim under G.L.c. 84, §18. Accordingly, the SJC unanimously ruled in May 2019 that Meyer’s failure to provide statutory notice to Veolia was not fatal to his negligence suit, reversing a summary judgment in favor of the utility company.

Powers credits part of his success on appeal to the work of trial attorneys Andrew M. Fischer and Andrew J. Brodie in doing everything possible to provide statutory notice on behalf of their client. According to Powers, the Boston attorneys’ diligence at the lower court allowed him to present a compelling factual case demonstrating to the SJC the impracticality of requiring plaintiffs to give 30 days’ notice of a road defect claim to private entities that frequently are difficult to identify.

“What we wound up with on appeal was a factual record that was extremely compelling, because here’s a plaintiff whose trial counsel did everything right,” Powers says.

Why was the SJC’s decision an important win for the plaintiffs’ bar?

It’s important because the burden [of providing timely notice to a non-governmental defendant] on plaintiffs and plaintiffs’ counsel would have been

actually or practically impossible had this case gone the other way under the prior Appeals Court decisions that this case overruled.

It’s hard to imagine an injured plaintiff being able to not just identify [the governmental entity that] is responsible for the road but, more than that, the private entities responsible [for a particular road defect], to do all that and serve notice within 30 days.

You originally sought review at the Appeals Court, but then the SJC on its own motion took up the case. What were your thoughts when the

SJC transferred the case?

I thought that now we’ve got a shot at the “big argument.” When we thought the case was still going to be in the Appeals Court, I deliberately frontloaded as the lead argument in the brief an argument factually based that, in this particular instance, under these particular facts, the 30-day period should have been tolled until plaintiff and plaintiff’s counsel could have reasonably known the identity of the defendant.

When the SJC transferred the case, I thought realistically the only reason they were taking the case is to decide the big issue. But when the SJC takes a case, are they going to decide the issue the way you hope they will decide it? Or will they decide to essentially cement what the Appeals Court had essentially done [in prior cases]? From my perspective, it was wonderful to see them overrule those prior decisions.

The defendant argued that the 30-day notice requirement should apply because its duty to repair and maintain the utility cover was imposed by a Boston city ordinance. Why isn’t that argument persuasive?

The municipal code for the city of Boston contains quite a few provisions that put the responsibility for dealing with notice, and even ensuring that proper repairs are carried out, with specific city officials. Functionally, the obligation that was on Veolia under the municipal code was essentially, in layman’s terms, to put the road back together again after they dug it up. The municipal code didn’t tell Veolia, “You’re responsible for this utility cover and everything within 30 inches of it in any direction.”

The road defect statute speaks in terms of providing notice to responsible “persons” as well

as responsible cities, towns and counties. Did you see the case as an uphill struggle given the defense argument that the plain language of the statute affords notice to private entities just as it does governmental entities?

It’s always an uphill struggle when you’re the appellant. It’s even more of an uphill struggle when you’ve got a couple of Appeals Court decisions going the other way. Honestly, I don’t try to predict which way an appellate court is going to go in a particular case. I try in every appeal to make the best arguments possible. Once you’ve done that, it’s up to the court. I’ve learned that gut instinct is as often mistaken as it’s ever correct in terms of predicting, especially when it’s an issue that the court hasn’t addressed head-on.

How much do you think the practical difficulties of providing timely notice to non-governmental defendants weighed in the court’s decision?

The decision makes it clear that the court fully factored that into its decision. But taking the decision as a whole, I think it’s an instance where the historical aspects of the statute, the case law construing the statute and its antecedents, and the practicalities all combined to militate in favor of the result the court ultimately decided on.

What do you remember most about your oral argument before the SJC?

The court asked about a case I had not cited and defense counsel had not cited, but that an amicus who filed a brief in support of the defense did cite to. *Fisher v. Cushing* was an opinion written by Oliver Wendell Holmes [in 1883], less than three months on the bench of the SJC.

We think of Holmes as this U.S. Supreme Court justice, but *Fisher* is one of his earliest decisions, and he’s construing the same statute with slightly different language in remarkably similar circumstances. Thank God I had read the case myself.

The SJC ultimately held in *Fisher* that the private defendant was not entitled to notice under the statute, so in the end it ultimately helped us. But I’m standing there in the age of computers and smartphones thinking about having a conversation in 2019 on the meaning of statutory language as construed by Oliver Wendell Holmes less than 20 years after he ended his service in the Civil War. I thought this is the beauty of our common-law system of jurisprudence, that we can have conversations about the same laws that span not just generations but centuries.

— Pat Murphy