SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH OF MASSACHUSETTS

CASE NO. SJC-12606

RICHARD MEYER,
Appellant-Plaintiff

v.

FEENEY BROTHERS EXCAVATION CORP.,
VEOLIA NORTH AMERICA, and VEOLIA ENERGY NORTH AMERICA,
Appellees-Defendants

ON APPEAL FROM A JUDGMENT FOR SUMMARY JUDGMENT
IN THE SUFFOLK SUPERIOR COURT

REPLY BRIEF FOR APPELLANT-PLAINTIFF RICHARD MEYER

Andrew M. Fischer, Esq.
Law Offices of
Jeffrey S. Glassman LLC
1 International Place
Suite 1810
Boston, MA 02110
Phone: (617) 367-2900
afischer@
jeffreysglassman.com
BBO No. 167040

Andrew Brodie, Esq.
Law Offices of
Jeffrey S. Glassman LLC
1 International Place
Suite 1810
Boston, MA 02110
Phone: (617) 367-2900
abrodie@
jeffreysglassman.com
BBO No. 661269

Kevin J. Powers, Esq.
Law Offices Of Kevin J. Powers
P.O. Box 1212
Mansfield, MA 02048
Phone: (508) 216-0268
kjpattorney@gmail.com
BBO No. 666323

September 2018

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ARGUMENT

I. THE SUPREME JUDICIAL COURT HAS YET TO FACE SQUARELY THE ISSUE OF WHETHER AN INTERNATIONAL FOR-PROFIT CORPORATION IS ENTITLED TO EVADE LIABILITY BY CO-OPTING A NOTICE REQUIREMENT ALWAYS INTENDED TO APPLY SOLELY TO GOVERNMENTAL ENTITIES OR TO PERSONS SERVING GOVERNMENTAL ROLES.

Veolia erroneously argues that the Supreme Judicial Court gave its imprimatur to the proposition that an international for-profit corporation is entitled to evade liability by donning the protective cloak of G. L. c. 84, § 18. See, e.g., Veolia Br. at 18, 27-28.[1] In fact, Veolia has misconstrued the relevant authorities or cited dicta as authoritative.

A. Veolia erroneously cites a case involving only governmental defendants for the proposition that international for-profit corporations are entitled to the protection of the G. L. c. 84, § 18 thirty-day notice requirement.

Veolia misrepresents the holding in Ram v. Town of Charlton, 409 Mass. 481 (1991), in an attempt to torture that holding into support for the proposition that "[t]he Supreme Judicial Court has held that the 30-day notice requirement is rationally related to the

[1] The brief of Appellee-Defendant Veolia Energy North America, LLC is cited "Veolia Br." followed by page number. The brief of Appellant-Plaintiff Richard Meyer is cited as "Meyer Br." followed by page number.

Legislative's [sic] objective of allowing private and governmental entities an opportunity to investigate and remedy such alleged defects promptly" (emphasis added). Veolia Br. at 27-28. Ram, an action against a municipality, contains no such holding with regard to private entities. Ram, 409 Mass. at 481.

1. Ram stands for the propositions that the legislative intent of G. L. c. 84, § 15 was to provide exclusive remedies against municipalities and the Commonwealth, and that the legislative intent of G. L. c. 84, § 18 was to safeguard public defendants.

The Ram Court held that "[i]t is obvious that the Legislature intended that these statutes provide exclusive remedies for actions against both municipalities and the Commonwealth for injuries caused by defects in ways under their control. The language . . . permits no other reasonable conclusion" (emphasis added). Ram, 409 Mass. at 486. The Ram Court further held that "[w]hen the Legislature waived [sovereign] immunity [against government entities for injuries caused by defects in public ways] . . . and allowed the Commonwealth and its political subdivisions to be sued in certain instances in the courts of the Commonwealth, it established limitations and conditions on that waiver" and "[t]he thirty-day

notice requirement was one such limitation." Id. at 490. Having clearly explained that G. L. c. 84, § 15 was always intended to deal with governmental entities, the Ram Court then held that the thirty-day notice requirement "is rationally related to a permissible legislative objective," to wit:

> The Legislature could have decided that the notice requirement is necessary to safeguard public defendants against frivolous claims and excessive liability . . . by allowing such defendants to investigate and remedy any defects expeditiously . . . and by allowing them to evaluate claims and to determine at an early stage whether liability could be imposed against them.

(emphasis added). Ram, 409 Mass. at 490-491.

2. The Ram Court's sole reference to private tortfeasors is dicta, because no private defendant was before the Ram Court.

The Ram Court made only one reference to private tortfeasors, but that reference did not apply to any party in Ram itself, because the sole defendants in Ram were a municipality and the Commonwealth. Ram, 409 Mass. at 482. Consequently, the sole reference to private tortfeasors in Ram is dicta when applied to private defendants because that reference had no application to any party in Ram itself; the Court referenced private tortfeasors only in order to

dispose of the plaintiff's equal protection argument:

> The Plaintiff first contends that the notice requirement violates equal protection of the laws . . . because it divides tortfeasors into two classes—private tortfeasors to whom no notice need be provided, and governmental tortfeasors to whom notice must be given. General Laws c. 84, § 15, does not create such a distinction. Both private parties and governmental entities are entitled to notice within thirty days when a defect in a way under their control is alleged under G. L. c. 84, § 15.

Id. at 489-490.

Further, the only cases cited by the Ram Court in addressing such hypothetical private tortfeasors in the equal protection context involved railroad corporations that actually owned the entire ways at issue. See, e.g., Murphy v. Boston & Maine R.R., 332 Mass. 123, 123-124 (1954) (injury sustained as victim crossed defendant's railroad tracks); Dobbins v. West End St. Ry. Co., 168 Mass. 556, 557 (1897) ("a defect in the highway between the railroad tracks").

B. Veolia erroneously cites a case involving only a municipal defendant and a municipal fire district for the proposition that international for-profit corporations are entitled to the protection of the G. L. c. 84, § 18 thirty-day notice requirement.

Veolia cites Hurlburt v. Town of Great Barrington, 300 Mass. 524 (1938), for the "holding" that "person" or "person by law obliged to repair the

same" "includes a corporation." Veolia Br. at 18. The language at issue is not a holding, but is, instead, mere dicta.

Hurlburt was an action against the Town of Great Barrington for damages due to defects in a sidewalk; the Town defended itself by arguing that the Great Barrington Fire District was the actual "person by law obliged to repair" the sidewalk. Hurlburt, 300 Mass. at 525-527. The Court described the Great Barrington Fire District, a municipal fire district or fire department, as "a quasi corporation performing municipal functions"; it was created by St. 1854, c. 350, and charged with authority over sidewalks pursuant to St. 1886, c. 279. Hurlburt, 300 Mass. at 525-526.

Hurlburt concerned liability of two governmental entities: a municipality and a municipal quasi-corporation. Id. at 526. No for-profit corporation was a party in Hurlburt. Id. at 527. Thus, Veolia's attempt to apply the language in Hurlburt regarding "a corporation" to an international for-profit corporation is misguided. Id. at 526. Applied to an international for-profit corporation, that language is, at best, dicta, and not a "holding" as Veolia

argues. See Meyer Br. at 32 & n.8.

II. THIS COURT SHOULD CATEGORICALLY REJECT VEOLIA'S ARGUMENT THAT G. L. C. 84, § 18 REQUIRES EVERY INJURED VICTIM IN MASSACHUSETTS TO UNDERTAKE A PROBING DETECTIVE INVESTIGATION AND SCOUR THE COMMONWEALTH FOR "IDENTIFYING CLUES" AS TO THE LATTER-DAY DESCENDANTS OF LONG-DEFUNCT CORPORATE TORTFEASORS.

Veolia argues that Meyer, within a mere thirty days of being injured, should have had the capacity, the wherewithal, and the ingenuity to leap into action and to undertake an expeditious investigation based upon mere "identifying clues" involving cryptic letters on the utility cover. Veolia Br. at 19-20, 32-33. This argument demonstrates the patently unreasonable burden that would be inflicted upon injured victims if each had to conduct a corporate genealogy search under such conditions and with such a deadline.

Thirty days is often sufficient time for an injured victim to notify the municipality, county, or state in which he or she was injured, because those governmental entities are all immediately identifiable based upon no more information than the location of the accident. By contrast, no injured victim can reasonably be expected to undertake the role of private detective and, in a mere thirty days of

frequently-horrific injuries, divine from mere "identifying clues" the currently extant progeny of a defunct corporate entity that placed a utility cover in a road decades prior. See Meyer Br. at 15-20, 45-46.

Veolia cites Farrell v. Boston Water & Sewer Comm'n, 24 Mass. App. Ct. 583 (1987), for the proposition that "[c]are must be taken in such circumstances, however, to select the correct entity against whom to proceed." Id. at 587 n.9. See Veolia Br. at 33. Farrell, however, involved a municipal water and sewer commission, not a defunct for-profit corporation later acquired by an international for-profit corporation whose identity could not reasonably be ascertained within thirty days of an injury.[2] Farrell, 24 Mass. App. Ct. at 585. Further, the plaintiff in Farrell "did not allege in their complaint that they had given any written notice to

[2] Even the language of G. L. c. 84, § 15 that contemplates liability for governmental water and sewer commissions refers only to a "county, city, town or local water and sewer commission" G. L. c. 84, § 15. Veolia is an international for-profit corporation and, thus, is neither a governmental entity, a water and sewer commission, or a "county, city, town or local" entity of any sort. Id.

the commission" (emphasis added). Id. at 585. Farrell thus stands in stark contrast to this case, where, after providing notice to the City of Boston seventeen (17) calendar days after the injury, Meyer then provided notice to Veolia twenty-five (25) business days after the injury and thirty-six (36) calendar days after the injury. See Meyer Br. at 23-24 & n.6.

III. APPEALS COURT DECISIONS APPLYING THE THIRTY-DAY NOTICE REQUIREMENT TO UTILITY COMPANIES VARIOUSLY LACK BINDING PRECEDENTIAL VALUE AND/OR ARE DISTINGUISHABLE ON THEIR FACTS.

Throughout its brief, Veolia cites Bartholomew v. Charter Communications, Inc., 84 Mass. App. Ct. 1104 (2013) (Rule 1:28) (attached), in a manner suggesting that Bartholomew is binding precedential authority with effect beyond its own limited facts, noting only in a passing footnote that Bartholomew is merely an order issued pursuant to Mass. App. Ct. R. 1:28. Veolia Br. at 15, 19, 21-22 & n.3, 25. Veolia does not attach a copy of Bartholomew to its brief. See Mass. App. Ct. R. 1:28 ("a party citing such an order shall include the full text of the order as an addendum to the brief or other filing"). The facts of Bartholomew illuminate why this Court ruled as it did

on those limited facts: in Bartholomew, the plaintiff did not give notice until he filed suit eighteen months after the injury, and the motorcycle in Bartholomew struck a sinkhole "in the area of the manhole" but apparently not the manhole itself. Bartholomew, 84 Mass. App. Ct. at 1104. See also Meyer Br. at 24, 39, 44-45 n.12.

Veolia cites Filepp v. Boston Gas Co., Inc., 85 Mass. App. Ct. 901 (2014) as "instructive." Veolia Br. at 24-25. However, Veolia incorrectly states the factual chronology that led to this Court's decision in Filepp; in fact, the victim in Filepp did not provide notice to Boston Gas Co., Inc. until nearly four months after the date of his injury, compelling this Court to describe the notice as "significantly more than thirty days after the date of his injury" (emphasis added). Filepp, 85 Mass. App. Ct. at 901 n.1. Meyer, by contrast, sent notice to the City of Boston seventeen (17) calendar days after the injury, and sent notice to Veolia a mere twenty-five (25) business days after the injury, only thirty-six (36) calendar days after the injury. See Meyer Br. at 24 & n.6.

IV. THE CITY OF BOSTON MUNICIPAL CODE IS A COMPREHENSIVE SCHEME, AND THE ORDINANCE DIRECTING ALL NOTICES OF ROAD DEFECTS TO THE CITY OF BOSTON COMMISSIONER OF PUBLIC WORKS CANNOT BE DIVORCED FROM THE ORDINANCE DISCUSSING RESPONSIBILITY FOR PAVEMENT.

Veolia argues that City of Boston Municipal Code § 11-6.20 grants a statutory right to notice to any entity encompassed by that ordinance. Veolia Br. at 20-23. Veolia arrives at this argument only by divorcing City of Boston Municipal Code § 11-6.20 from its context and failing to understand the City of Boston Municipal Code as a comprehensive scheme. The City of Boston Municipal Code deals with the issue of notice of defects, and places the burdens of record-keeping and repair entirely upon the Commissioner of Public Works. City of Boston Municipal Code § 11-6.28. See also Meyer Br. at 40-41.

V. THE THIRTY-DAY NOTICE REQUIREMENT OF G. L. c. 84, § 18 MUST BE TOLLED WHERE A VICTIM CANNOT DISCOVER THE IDENTITY OF A DEFENDANT THROUGH THE EXERCISE OF REASONABLE DILIGENCE.

Veolia argues that the general tolling provisions of the statute of limitations cannot apply because "Meyer's right to recover against Veolia is statutory" and cites Weaver v. Commonwealth, 389 Mass. 43 (1982), in support. Veolia Br. at 30. Veolia thereby misrepresents the holding of Weaver. In Weaver, the

defendant was the Commonwealth and "recovery against the Commonwealth in [Weaver] would be possible only under the [Massachusetts Tort Claims] Act, [G. L. c. 258], a recent statutory creation" that had abrogated the Commonwealth's sovereign immunity. Weaver, 389 Mass. at 50. Veolia, by contrast, is a private corporation, and no statutory abrogation of sovereign immunity was ever necessary for liability to attach to Veolia for its negligence; thus, this is not an action in which Meyer's right to recover "would be possible only under" G. L. c. 84. Id.

To illustrate the distinction, this Court need only consider that, if G. L. c. 84 and G. L. c. 258 were both abolished, the Commonwealth would be immune as a sovereign from liability under Weaver, but Veolia would remain liable in tort. See Smith v. Commonwealth, 347 Mass. 453, 455-456 (1964) ("It is fundamental that the Commonwealth, along with its duly constituted public agencies, cannot be sued for the torts of its officers, agents or employees except by a clear manifestation of consent thereto by statute").

VI. THE THIRTY-DAY NOTICE REQUIREMENT OF G. L. c. 84, § 18 DOES NOT APPLY TO VEOLIA BECAUSE VEOLIA'S NEGLIGENCE IN MAINTAINING THE UTILITY COVER DOES NOT IMPLICATE ANY DUTY THAT VEOLIA MAY OR MAY NOT HAVE HAD TO MAINTAIN THE WAY.

Veolia cites Minasian v. City of Somerville, 40 Mass. App. Ct. 25 (1996), for the proposition that Meyer's claim is governed by G. L. c. 84, § 15. Veolia Br. at 15-16. This case involves a utility cover, whereas Minasian involved a manhole without a manhole cover. Minasian, 40 Mass. App. Ct. at 25 (plaintiff "fell into an unattended, unguarded, open manhole in a sidewalk of a city street at night" [emphasis in original]).

A manhole is an opening in the road itself, not comparable to a utility cover, an object created and put into place by a private company. The issue before the Minasian Court was whether liability of the municipal defendant arose under G. L. c. 84 or G. L. c. 258, not whether liability of an international for-profit corporation for maintaining a utility cover is distinguishable from liability of the municipality for maintaining the way itself. See Minasian, 40 Mass. App. Ct. at 27 ("the open manhole without any warning of the danger posed falls within the broad definition of a 'defect,' 'anything in the state or condition of

the way that renders it unsafe or inconvenient for ordinary travel' . . . . Where the alleged negligence lies in street maintenance, the exclusive remedy lies with G. L. c. 84, and not with G. L. c. 258, as the plaintiff contends"). In Minasian, "the alleged negligence l[ay] in street maintenance," but here, the negligence lies in utility cover maintenance. Minasian, 40 Mass. App. Ct. at 27. See also Meyer Br. at 38-39.

CONCLUSION

Plaintiff Richard Meyer respectfully requests that this Court reverse the judgment of the trial court and remand the case for trial. Additionally, plaintiff requests appellate counsel fees and costs and respectfully requests leave to file an affidavit with invoices in accordance with the procedures set forth in Fabre v. Walton, 441 Mass. 9 (2004). Cf. Yorke Mgt. v. Castro, 406 Mass. 17 (1989).

/s/ Andrew M. Fischer
Andrew M. Fischer, Esq.
Law Offices of Jeffrey S. Glassman LLC
1 International Place
Suite 1810
Boston, MA 02110
Phone: (617) 367-2900
afischer@jeffreysglassman.com
BBO No. 167040

/s/ Andrew J. Brodie
Andrew Brodie, Esq.
Law Offices of Jeffrey S. Glassman LLC
1 International Place
Suite 1810
Boston, MA 02110
Phone: (617) 367-2900
abrodie@jeffreysglassman.com
BBO No. 661269

Kevin J. Powers, Esq.
Law Offices Of Kevin J. Powers
P.O. Box 1212
Mansfield, MA 02048
Phone: (508) 216-0268
kjpattorney@gmail.com
BBO No. 666323

Attorneys for Plaintiff Richard Meyer

Dated: May 18, 2018

RULE 16 CERTIFICATION

I, Andrew M. Fischer, hereby certify that the Brief herein complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(a)(6); Mass. R. App. P. 16(e); Mass. R. App. P. 16(f); Mass. R. App. P. 18; and Mass. R. App. P. 20.

/s/ Andrew M. Fischer
Andrew M. Fischer

CERTIFICATE OF SERVICE

I, Andrew J. Brodie, III, hereby certify that the May 18, 2018, I caused a complete copy of the Reply Brief For Plaintiff-Appellant Richard Meyer to be served upon all counsel of record for the Defendant/Appellant by e-filing the document through the eFileMA system.

/s/ Andrew J. Brodie
Andrew Brodie, Esq.
Law Offices of Jeffrey S. Glassman LLC
1 International Place
Suite 1810
Boston, MA 02110
Phone: (617) 367-2900
abrodie@jeffreysglassman.com
BBO No. 661269
Date: May 18, 2018

ADDENDA

City of Boston Municipal Code § 11-6.20

11-6.20 Responsibility for Condition and Maintenance of Pavement.

Any person, corporation, trust, partnership, governmental body, board, commission, authority, agency, or body politic and corporate who occupies the public or private ways of the City of Boston with proper permit from the Public Works Department or otherwise, as a condition of such occupation, shall be responsible and liable for the maintenance and restoration of all pavement within thirty (30") inches of any and all of the appurtenant structures where they intersect the surface of the public way, roadway or sidewalk, and shall maintain said areas and repair any defect in its entirety which lies wholly or in part in the said area. Defects shall include, but not be limited to: pot holes, chuckholes, frost heaves, cracking, spalling, settling, delaminating or patch repair. Repairs and restorations made by the above-mentioned parties shall be made in accordance with the specifications of, and under permit from the Boston Public Works Department, and at no cost to the City.

City of Boston Municipal Code § 11-6.28

11-6.28 Record of Notices of Defects.

The Commissioner shall keep a record of the notices of defects in streets sent to him, with the name of the person giving the notice and the time when given, and shall without delay cause the locality of the alleged defect to be examined, and, if the defect is of such a character as to endanger the safety of public travel, shall do whatever may be necessary to protect the public from injury by the defect, and shall cause it to be immediately repaired.

G. L. c. 84, § 15

§ 15. Personal injuries or property damage from defective ways

If a person sustains bodily injury or damage in his property by reason of a defect or a want of repair or a want of a sufficient railing in or upon a way, and such injury or damage might have been prevented, or such defect or want of repair or want of railing might have been remedied by reasonable care and diligence on the part of the county, city, town or person by law obliged to repair the same, he may, if such county, city, town or person had or, by the exercise of proper care and diligence, might have had reasonable notice of the defect or want of repair or want of a sufficient railing, recover damages therefor from such county, city, town or person; but he shall not recover from a county, city, town or local water and sewer commission more than one fifth of one per cent of its state valuation last preceding the commencement of the action nor more than five thousand dollars; nor shall a county, city or town be liable for an injury or damage sustained upon a way laid out and established in the manner prescribed by statute until after an entry has been made for the purpose of constructing the way, or during the construction and repairing thereof, provided that the way shall have been closed, or other sufficient means taken to caution the public against entering thereon. No action shall be maintained under this section by a person the combined weight of whose carriage or vehicle and load exceeds six tons.

G. L. c. 84, § 18

§ 18. Notice of injury; contents; limitation of action

A person so injured shall, within thirty days thereafter, give to the county, city, town or person by law obliged to keep said way in repair, notice of the name and place of residence of the person injured, and the time, place and cause of said injury or damage; and if the said county, city, town or person does not pay the amount thereof, he may recover the same in an action of tort if brought within three years after the date of such injury or damage. Such notice shall not be invalid or insufficient solely by reason of any inaccuracy in stating the name or place of residence of the person injured, or the time, place or cause of the injury, if it is shown that there was no intention to mislead and that the party entitled to notice was not in fact misled thereby. The words "place of residence of the person injured", as used in this and the two following sections, shall include the street and number, if any, of his residence as well as the name of the city or town thereof. Failure to give such notice for such injury or damage sustained by reason of snow or ice shall not be a defense under this section unless the defendant proves that he was prejudiced thereby.

G. L. c. 258, § 2

§ 2. Liability; exclusiveness of remedy; cooperation of public employee; subsequent actions; representation by public attorney

Public 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; provided, however, that all claims for serious bodily injury against the Massachusetts Bay Transportation Authority shall not be subject to a $100,000 limitation on compensatory damages. 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 or, the public employee or his estate whose negligent or wrongful act or omission gave rise to such claim, and no such public employee or the estate of such public employee shall be liable for any injury or loss of property or personal injury or death caused by his negligent or wrongful act or omission while acting within the scope of his office or employment; provided, however, that a public employee shall provide reasonable cooperation to the public employer in the defense of any action brought under this chapter. Failure to provide such reasonable cooperation on the part of a public employee shall cause the public employee to be jointly liable with the public employer, to the extent that the failure to provide reasonable cooperation prejudiced the defense of the action. Information obtained from the public employee in providing such reasonable cooperation may not be used as evidence in any disciplinary action against the employee. 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.

Notwithstanding that a public employee shall not be liable for negligent or wrongful acts as described in the preceding paragraph, if a cause of action is improperly commenced against a public employee of the commonwealth alleging injury or loss of property or personal injury or death as the result of the negligent or wrongful act or omission of such employee, said employee may request representation by the public attorney of the commonwealth. The public attorney shall defend the public employee with respect to the cause of action at no cost to the public employee; provided, however, that the public attorney determines that the public employee was acting within the scope of his office or employment at the time of the alleged loss, injury, or death, and, further, that said public employee provides reasonable cooperation to the public employer and public attorney in the defense of any action arising out of the same subject matter. If, in the opinion of the public attorney, representation of the public employee, under this paragraph would result in a conflict of interest, the public attorney shall not be required to represent the public employee. Under said circumstances, the commonwealth shall reimburse the public employee for reasonable attorney fees incurred by the public employee in his defense of the cause of action; provided, however, that the same conditions exist which are required for representation of said employee by the public attorney under this paragraph.

Mass. App. Ct. R. 1:28

Regulation of Appellate Practice Rule 1:28

Rule 1:28. Summary Disposition

At any time following the filing of the appendix (or the filing of the original record) and the briefs of the parties on any appeal in accordance with the applicable provisions of Rules 14(b), 18 and 19 of the Massachusetts Rules of Appellate Procedure, a panel of the justices of this court may determine that no substantial question of law is presented by the appeal or that some clear error of law has been committed which has injuriously affected the substantial rights of an appellant and may, by its written order, affirm, modify or reverse the action of the court below. The panel need not provide an opportunity for oral argument before disposing of cases under this rule. Any order entered under this rule shall be subject to the provisions of Rules 27 and 27.1 of the Massachusetts Rules of Appellate Procedure. If, in a brief or other filing, a party cites to an order issued under this rule, the party shall cite the case title, a citation to the Appeals Court Reports where issuance of the order is noted, and a notation that the order was issued pursuant to this rule; in addition, a party citing such an order shall include the full text of the order as an addendum to the brief or other filing. No such order issued before February 26, 2008, may be cited.

St. 1854, c. 350

Chap. 0350 An Act to establish a Fire Department in the Town of Great Barrington.

Be it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same, as follows :

Sect. 1. A fire department is hereby established in the town of Great Barrington, subject to all the duties and liabilities, and with all the powers and privileges, set forth and contained in an act entitled "An Act to regulate Fire Departments," passed on the ninth day of April, in the year one thousand eight hundred and thirty-nine.

Sect. 2. This act shall take effect from and after its passage. [Approved by the Governor, April 22, 1854.]

St. 1886, c. 279

Chap.0279 An Act RELATING TO SIDEWALKS, CROSSWALKS, COMMON SEWERS AND MAIN DRAINS IN THE FIRE DISTRICT OF THE TOWN OF GREAT RARRINGTON.

Be it enacted, etc., as follows:

Section. 1. The legal voters of Great Barrington fire district shall within six months from the passage of this act, at a meeting called for the purpose, elect by ballot a board of three commissioners, who shall be a board of commissioners of sidewalks, common sewers and main drains, all of whom shall be legal inhabitants and voters in said district; and one of said commissioners shall be elected for three years, one for two years, and one for one year from the time of the annual meeting of said fire district for the current year; and said district shall hereafter at each annual meeting elect by ballot one such commissioner, whose term of office shall be for three years ; and said district shall have authority to fill any vacancy in said board, at any meeting of said fire district, regularly called for that purpose. Said commissioner shall be sworn and shall receive such compensation as shall be fixed by a vote of said fire district at a meeting called for that purpose.

Section 2. Said district may, at meetings called for that purpose, raise money for the purpose of carrying out the provisions of this act, and said board shall expend the same for the purposes prescribed by vote of the district; and every member of said board of commissioners shall be accountable to the said district for any money received by him, and said district may maintain a suit therefor in the name of the inhabitants. Said board shall not expend any money which has not been duly appropriated by the district, and shall have no authority to bind the district to the payment of money in excess of its appropriations, or for any purpose not specified by the vote of the district appropriating the same.

Section 3. The clerk of the district shall certify to the assessors of the town of Great Barrington all sums voted to be raised by the district under the provisions of this act; which sums shall be assessed and collected by the officers of the town in the same

manner as the town taxes are assessed and collected, and shall be paid over to the treasurer of said district, who shall hold the same, subject to the order of said board. The clerk of said district shall act as clerk of said board, and shall enter all its proceedings in the records of said district.

Section. 4. It shall be the duty of said board, under the supervision and direction of said district, to construct, reconstruct, repair, maintain, and have charge of all main drains, common sewers, sidewalks and crosswalks in said fire district, and of all matters pertaining thereto as herein provided, and to keep maps and plans of all such main drains and common sewers constructed by said district.

Section 5. Said board shall have authority to determine the grade, width and material, including curbstone, of all sidewalks on the public streets and highways of said district; and to construct, reconstruct and repair such sidewalks in accordance with such determination. Upon the completion of any sidewalk by said board, or the completion of the reconstruction or repair of any sidewalk, said board shall ascertain, determine and certify the whole expense of such making, reconstruction or repair, and shall cause a record thereof to be made, and shall assess one-half of the amount of the same upon all the lands especially benefited by such making, reconstruction or repair, whether such lands abut on such sidewalk or not.

Section 6. Said board shall have power to determine when, in what manner, and to what extent, snow, ice, grass, herbage, trees and other obstructions, shall be removed from the sidewalks and crosswalks in said district, or from any of the same or any portion thereof, and to fix by-laws and penalties regulating the same, subject to the approval of said fire district, and also by-laws and penalties prohibiting the deposit of ashes, garbage, filth or other refuse matter, on the streets and sidewalks within the limits of said district.

Section 7. No sidewalk, graded, constructed, reconstructed or repaired in said district, in conformity to the provisions of this act, shall be dug up or obstructed in any part thereof, without the

consent of said board ; and whoever rides or drives a horse or team, or uses any vehicle moved by hand, other than those used for the carriage of children, invalids or persons disabled, upon or along such sidewalk, except to cross the same, or shall dig up or otherwise obstruct the same without such consent, shall forfeit a sum not less than one nor more than five dollars for each violation of the provisions of this section.

Section 8. Said fire district, at meetings called for that purpose, may order said board to construct crosswalks in any of the streets in said district on which they have authority to construct sidewalks. Said board shall construct all such crosswalks at the expense of said district, and shall repair and reconstruct the same when ordered by said district, and at its expense.

Section 9. Said board shall lay, make, reconstruct and maintain, in said fire district, all such main drains and common sewers as said fire district, at a legal meeting called for that purpose, shall, by vote, adjudge to be necessary for the public convenience or the public health, and may repair the same from time to time whenever necessary ; and for these purposes may take, in the manner hereinafter provided, any land which, in their opinion, may be necessary therefor. Upon the completion of any main drain or common sewer by said board, or the completion of the reconstruction or repair of such sewer or drain, said board shall ascertain, determine and certify the whole expense of such making, reconstruction or repair, and shall cause a record thereof to be made and kept; and said board shall then assess two-thirds of the said whole expense upon all lands in any way benefited by such making, reconstruction or repair, and including all lands connected therewith by any particular drain.

Section 10. All the main drains and common sewers in said district constructed or reconstructed or purchased by said board shall be the property of said district, and shall be under the charge and control of said board, who shall have power and authority to regulate the use of the same, and to prescribe the mode in which the same shall be entered by private drains from lands which have been assessed for the expense of their construction, and, upon proper

compensation therefor, to allow the same to be used to drain lands not so assessed, and to prescribe the manner of such use, and also, upon proper compensation therefor, to allow the use of the same in such manner as they shall direct, for the purpose of draining the public and private streets and ways and highways in said district. And no person shall be allowed to enter or discharge into a main drain or common sewer any private drain connecting any land which has not been assessed for the expense of building or repairing such main drain or common sewer under this act, except by leave of said board, and on payment of such compensation as said board shall prescribe ; and all such private drains entering any main drain or common sewer shall be under the exclusive charge and control of said board, who shall have authority to make and execute orders concerning the same as though the same were constructed by said board under this act. The provisions of this section shall apply to and govern the use of all sewers and drains in said district, and to the compensation to be made for such use, whether the same have been heretofore or shall be hereafter constructed.

Section 11. Said district may authorize said board to purchase for said district any private sewer for such reasonable consideration as may be agreed upon by the owners of such sewer and said board.

Section 12. All assessments so made by said board shall constitute a lien on the real estate assessed, for two years from the time of assessment, and for one year after the final determination of any suit or proceeding in which the amount or validity of such assessment shall be drawn in question. Every assessment made by said board shall be recorded in books to be kept for that purpose, and a list thereof shall be committed by said board for collection to the person then authorized by law to collect taxes in said district. Said collector shall forthwith publish the same for three successive weeks in some newspaper published in said district; and shall, on or before the day of the last publication thereof, demand payment of the same of the owner or occupant of the land assessed, if known to him and within his precinct. If any such assessment shall not be paid within three months from the last publication of said

list, he shall levy the same, with incidental costs and expenses, by sale of the land, such sales to be conducted in like manner as sales of land for non-payment of taxes ; and in making such sales, and any sales for taxes assessed for said district, such collector, and said district and its officers, shall have all the powers and privileges conferred by the general laws of the Commonwealth upon collectors of taxes, and upon cities and towns and their officers, relating to sales of land for the non-payment of taxes. The collector shall pay over all moneys received by him under this act to the treasurer of said district in the same manner as moneys received by him from taxes assessed for said district by the assessors of Great Barrington.

Section 13. Every assessment made by said board which is invalid by reason of any error or irregularity in the assessment, and which has not been paid, or which has been recovered back, or which has been enforced b}r an invalid sale, may be re-assessed by the board of commissioners of sidewalks, common sewers and main drains, for the time being, to the just amount which and upon the estate upon which such assessment ought at first to have been assessed; and the assessments thus re-assessed shall be payable and shall be collected and enforced in the same manner as other assessments.

Section 14. Any person aggrieved by an assessment made by said board, may, at any time within three months from the last publication of the list of such assessment as provided in the preceding section, apply by petition to the superior court for the county of Berkshire ; and, after due notice to the said fire district, a trial shall be had at the bar of said court in the same manner in which other civil causes are there tried by the jury, and, if either party requests it, the jury shall view the place in question ; and such petition may be filed in term time or vacation ; and if filed in vacation the clerk may issue an order of notice thereon, returnable to the term of the court next to be held after thirty days therefrom : provided, that before filing said petition the petitioner shall give one month's notice in writing to said board of his intention so to apply, and shall therein particularly specify his objections

to the assessment, and to which specification he shall be confined in the hearing by the jury. If the jury shall not reduce the amount of the assessment complained of, the respondent shall recover costs against the petitioner, which costs shall be a lien upon the estate assessed, and be collected in the same manner as the assessment; but if the jury shall reduce the amount of the assessment the petitioner shall recover costs.

Section 15. Whenever land is taken by virtue of the provisions of section nine, the said board shall, within sixty days after any such taking, file in the registry of deeds of the southern district of the county of Berkshire, a description of any lands so taken, sufficiently accurate for identification, and statement of the purpose for which it is taken ; and the right to use all lands so taken for the purposes mentioned in said statement shall vest in "said tire district and its successors. Damages for land so taken shall be paid by said lire district; and any person aggrieved by the taking of his land under this act, and failing to agree with said board as to the amount of damages, may, upon a petition filed with the county commissioners of the county of Berkshire within one year from the filing of the description thereof in the registry of deeds, have his damages assessed and determined in the manner provided when land is taken for highways; and if either party is not satisfied with the award of damages by the county commissioners, and shall apply for a jury to revise the same, the tire district shall pay the damages awarded by the jury, and shall pay costs if the damages are increased by the jury, and shall recover costs if the damages are decreased ; but if the jury shall award the same damages as were awarded by the county commissioners, the party who applied for the jury shall pay costs to the other party.

Section 16. Penalties under the provisions of this act, and under any by-laws established in pursuance thereof, may be recovered by action of tort, brought by direction of said board, in the name of and for the use of said district, or on complaint or indictment, to the use of the Commonwealth : provided, that no such action, complaint or indictment, shall be maintained, unless brought within thirty days after

the right of action accrues, or the offence is committed. No inhabitant of the district shall be disqualified, by reason of his being such inhabitant, to act as judge, magistrate, juror or officer, in a suit brought for such penalty.

Section 17. The provisions of all general laws of the Commonwealth applicable to fire districts, and not inconsistent with this act, shall continue to apply to the fire district of the town of Great Barrington. Nothing herein contained shall be construed to interfere with the authority of surveyors of highways, or any authority which can be legally exercised over highways or roads in the proper discharge of their duties ; but the town of Great Barrington shall repair any injury done to sidewalks in said district by the officers of said town by reason of any raising, lowering, or other act done for the purpose of repairing a highway or townway; and whenever any crosswalk constructed by said board shall be torn up or injured by the officers of the town of Great Barrington in making, repairing, altering, raising or lowering any highway or townway, said town shall re-lay and repair such crosswalk in like order and condition as the same was in before it was so torn up or injured. The authority of the town of Great Barrington to construct sidewalks and main drains and common sewers within the limits of said district shall be suspended while this act is in force

Section 18. This act shall take effect whenever the same shall have been approved and adopted by a majority of the legal voters of said fire district present and voting at a meeting duly called for that purpose.

Approved June 14, 1886.

Bartholomew v. Charter Communications, Inc.
84 Mass. App. Ct. 1104 (2013) (Rule 1:28)

84 Mass.App.Ct. 1104

Unpublished Disposition

Appeals Court of Massachusetts.

Robert BARTHOLOMEW

v.

CHARTER COMMUNICATIONS, INC.

No. 12-P-1496.

July 23, 2013.

By the Court (GRASSO, HANLON & HINES, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Robert Bartholomew, appeals from a Superior Court summary judgment in favor of the defendant, Charter Communications, Inc. (Charter). His main contention is that his claims against Charter are controlled by principles of common law negligence, and not G.L. c. 84, because the defendant is a private, for-profit corporation, and is neither a municipality nor a "person" entitled to notice of injury under the statute.[1] We affirm.

[Note] 1 The provisions of G.L. c. 84 pertain to the maintenance and repair of public ways in the Commonwealth; specifically, § 15 provides for recovery by one injured "by reason of a defect or a want of repair" in or upon a public way. G.L. c. 84, § 15.

Background. The material facts are not in contention. In May, 2002, as part of Charter's construction of a conduit bank, a third-party company installed a manhole on Charter's behalf in the area of Belmont and Rodney Streets in Worcester. On July 24, 2007, Bartholomew sustained serious injuries when he was thrown from his motorcycle after his front wheel hit a sinkhole in the area of the manhole and flipped over.

At the time of the accident, Worcester city ordinance c. 12, § 22, was in effect.[2] On January 8, 2009, Bartholomew filed a complaint, alleging that Charter was "negligent in the creation and maintenance of the area of the street at issue and [was] further negligent in failing to warn of or properly barricade the dangerous and defective condition, i.e. the sinkhole"; this was the first notice of injury Bartholomew provided to Charter. At the close of discovery, Charter filed a motion for summary judgment, asserting that Bartholomew had failed to provide Charter with the prerequisite notice of injury necessary under G.L. c. 84, § 18.[3]

[Note] 2 Paragraph (b) of § 22 provides, among other things, that "[o]ne who owns, possesses or controls any structure, excavation or conduit [including manholes] in, under, over, or upon a public way, ... shall be deemed to have entered into the following agreements with the City [of Worcester]: ... (iii) to maintain the public way directly above or adjacent to said structure, excavation or conduit, as the case may be, in good repair and condition...."

[Note] 3 General Laws c. 84, § 18, as amended through St.1979, c. 163, § 1, provides that "[a] person so injured shall, within thirty days thereafter, give to the ... person by law obliged to keep said way in repair, notice of the name and place of residence of the person injured, and the time, place and cause of said injury or damage; and if the said ... person does not pay the amount thereof, he may recover the same in an action of tort if brought within three years after the date of such injury or damage."

After the motion hearing on January 19, 2012, the judge determined that Charter was a "person" under G.L. c. 84, and that it was "in fact ['by law obliged'] to maintain the public way directly above or adjacent to the conduit bank and manhole constructed in May of 2002" pursuant to the ordinance. From this, he concluded that "Charter was entitled to receive notice of said claim under G.L. c. 84, § 18[,] within thirty days of [Bartholomew's] injury. [Bartholomew] [h]aving not provided such notice, and such notice being a condition precedent to the maintenance of such an action, the claim must be dismissed as a matter of law." Bartholomew filed a timely notice of appeal.

Discussion. On appeal, Bartholomew argues that the case is controlled by principles of common law negligence, rather than G.L. c. 84, and that, even if c. 84 applies, its notice provision is limited to municipalities and quasi-corporations performing municipal functions. For this reason, in his view, c. 84 does not apply to Charter, a private corporation. In addition, Bartholomew contends that Charter has failed to show how it has been prejudiced by lack of notice, and that the Worcester ordinance is irrelevant to this case, and not properly before the court.

"In reviewing the grant of a motion for summary judgment, we conduct a de novo examination of the evidence in the summary judgment record, ... and view the evidence in the light most favorable to the part[y] opposing summary judgment...." LeBlanc v. Logan Hilton Joint Venture, 463 Mass. 316, 318 (2012). Here, it is undisputed that Bartholomew was injured by a defect on a public way in 2007 and that he did not provide Charter with notice of his injuries until the filing of his complaint in 2009.

In order to determine whether Bartholomew was required to notify Charter under G.L. c. 84, the first question is whether Charter is a "person" for the purposes of c. 84. "The word 'person' in the phrase of the statute, 'or person by law obliged to repair the same,' includes a corporation." Hurlburt v. Great Barrington, 300 Mass. 524, 526 (1938), quoting from G.L. c. 84, § 15. Charter is a Delaware corporation and therefore properly is considered a "person" under c. 84.

On the second issue, whether Charter was "by law obliged" to maintain the way, the materials before the motion judge indicate that both parties were in agreement, at least for purposes of summary judgment, that "Charter was an entity required by law to maintain the area of roadway where the pothole was located." This shared viewpoint infuses the arguments on appeal as well. In the circumstances, we shall assume the merit of the proposition, see Baird v. Massachusetts Bay Transp. Authy., 32 Mass.App.Ct. 495, 496-497 (1992); Employers' Liab. Assur. Corp., Ltd. v. Hoechst Celanese Corp., 43 Mass.App.Ct. 465, 472 n. 8 (1997), and we conclude that being "required by law to

maintain" satisfies the statutory concept of being "by law obliged to repair." See Baird, supra at 497-498.[4,5]

[Note] 4 We note that the language of the Worcester ordinance makes clear that, at the time of Bartholomew's accident, there was an agreement in place with the city of Worcester that Charter was to keep the subject area in good repair. The plaintiff's argument that the ordinance is not properly before the court fails because, as Charter points out, the ordinance was included, without objection, in the "Consolidated Statement of Material Facts to Which There is No Genuine Issue to be Tried" submitted for the purpose of summary judgment. In any event, the ordinance is not a necessary ingredient to our decision in light of the parties' mutual understanding that Charter is "required by law" to maintain the subject area.

[Note] 5 If Charter was "by law obliged to repair" the roadway, we are compelled to reject Bartholomew's argument that his claim of negligence sounds in tort, independently of G.L. c. 84. See Ram v.. Charlton, 409 Mass. 481, 489 (1991) (remedy under G.L. c. 84, § 15, is exclusive).

For these reasons, Bartholomew was required to meet the thirty-day notification condition precedent contained in the statute before "he may recover ... in an action of tort." G.L. c. 84, § 18. See Paddock v. Brookline, 347 Mass. 230, 231-232 (1964) (statutory notice is condition precedent to action and "an essential ingredient indispensable to the existence of the cause of action"); Ram v. Charlton, 409 Mass. 481, 489 (1991) (notice is condition precedent and statute supplies exclusive remedy).[6] The motion judge properly ruled that "Charter was entitled to receive notice of [the] claim under G.L. c. 84, § 18[,] within thirty days of [Bartholomew's] injury." Viewing the evidence in the light most favorable to Bartholomew, all material facts are established and it is clear that Charter is entitled to a judgment as a matter of law. See Nutt v. Florio, 75 Mass.App.Ct. 482, 485 (2009).

[Note] 6 Because notice is a condition precedent to the existence of the cause of action, the question whether Charter was prejudiced by the lack of notice is irrelevant.

Judgment affirmed.

All Citations

84 Mass.App.Ct. 1104, 990 N.E.2d 563 (Table)