SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH OF MASSACHUSETTS

CASE NO. SJC-12606

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RICHARD MEYER,
Appellant-Plaintiff

v.

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

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

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# REPLY BRIEF FOR APPELLANT-PLAINTIFF RICHARD MEYER

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September 2018

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES



### STATUTES AND RULES

## 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).

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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.

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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.