COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

2018-P-1308

JANICE MAGLIACANE, on behalf of herself and all others similarly situated,

APPELLANT/PLAINTIFF

vs.

CITY OF GARDNER,

APPELLEE/DEFENDANT

On Appeal from Judgment of the Superior Court

BRIEF OF THE APPELLANT

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STATEMENT OF THE ISSUES

Appellant Janice Magliacane ("Magliacane") presents the following issues for review on appeal:

I. Whether the Superior Court erred in finding on a motion to dismiss that Magliacane's cause of action against the City of Gardner arose by September 2015 at the latest?

II. Whether the Superior Court erred in finding that Magliacane did not effectuate timely presentment of her claims against the City of Gardner pursuant to G.L. c. 258, § 4?

III. Whether the Superior Court erred in failing to consider the detailed allegations in the Complaint relating to fraudulent concealment by the City?

IV. Whether the Superior Court erred in failing to consider the continuing wrong doctrine with regard to the timeliness of Magliacane's presentment?

V. Whether the Massachusetts Tort Claims Act applied to the City of Gardner with respect to the conduct at issue, and if so, whether the City was immune from liability in this action under G.L. c. 258, §§ 10(b), 10(j)?

VI.

STATEMENT OF THE CASE

On December 13, 2017, Magliacane filed this putative class action against the City of Gardner (the "City" or "Gardner"), and its private water system operators, AECOM Technical Services, Inc. (formerly Earth Tech, Inc.) ("AECOM") and SUEZ Water Environmental Services, Inc. (formerly United Water Environmental Services, Inc.) ("SUEZ") (collectively the "Defendants"), asserting claims relating to the Defendants' failure to implement their corrosion control plan, which had been approved multiple times by the Massachusetts Department of Environmental Protection ("MADEP"). A.012-040.[1] On April 10, 2018, the City filed its motion to dismiss the complaint and for entry of separate and final judgment under Mass. R. Civ. P. 54(b), and AECOM and Seuz moved to dismiss the complaint and to strike the class allegations. A.006-007.

On June 5, 2018, the court held a hearing on the Defendants' motions to dismiss. A.008. On June 27, 2018, the court issued its decision (the "Memo &

[1] Cites to the Record Appendix are referenced herein as "A.___".

Order"), A.190-203,[2] granting the City's motion to dismiss by finding that Magliacane's cause of action against the City arose in September 2015, and concluding that she did not make timely presentment under the Massachusetts Torts Claim Act ("MTCA"), G.L. c. 258, § 4. The court then entered a separate and final judgment with respect to the City. A.204. Magliacane timely filed her Notice of Appeal on July 19, 2018. A.009; A.205.[3]

STATEMENT OF FACTS

Magliacane is a resident and homeowner in the City of Gardner. She brought this action on behalf of herself and other similarly situated Gardner residents, property owners and business who have had to replace heating coils, hot water heaters, furnaces and/or boilers due to coil corrosion (the "Class"). A.012 at ¶1.

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[2] The trial court's Memo & Order is also included in the attached Addendum. *See* Add.003.

[3] The court subsequently allowed AECOM's motion to dismiss on statute of limitations grounds, but sustained all but the breach of warranty claims against Suez and struck the class allegations on the pleadings. A.009. A single justice of this Court denied interlocutory review of the order striking the class allegation. A.010. The trial court's order on those issues will be the subject of a separate appeal following entry of final judgment below.

The City, and its private water system operators, AECOM and SUEZ, sell and supply water to Gardner residents, property owners and businesses. A.012-013 at ¶2. The Complaint alleges that Defendants have long known that the water they sell and supply was corrosive to copper plumbing and that this harm could have been avoided if Defendants had implemented their copper corrosion plan, which had been approved by the MADEP, to add orthophosphate to the water supply as a corrosion inhibitor. A.013 at ¶4. The Complaint further alleges that these actions and inactions of Defendants caused copper heating coils of Magliacane and the Class to corrode and fail prematurely. The Complaint alleges that the City's actions were negligent, grossly negligent and created, permitted or maintained a nuisance. A.013 at ¶5.

The City owns water treatment plants at Crystal Lake and Snake Pond in Gardner, Massachusetts and sells and supplies water for monetary gain to Gardner residents, property owners and businesses, who pay for the water based on usage. A.015 at ¶¶14-15.

In 1998, the City entered into a contract with AECOM, for the operation and maintenance of the City's water distribution system, which effectively

privatized water system operations. In 2008, SUEZ assumed the responsibilities under that contract. Under the contract, AECOM and SUEZ guaranteed that the City's water system would be operated and maintained consistent with good industry practices, promised to perform their work in conformity with the highest standard of care expected of those engaged in comparable work and agreed to use all reasonable means to insure the safety, integrity and quality of the City's water. A.015-016 at ¶¶16-19.

Defendants have known for years that the water that they sell and supply to Gardner residents, property owners and businesses was corrosive. A.017 at ¶23. When the City and AECOM constructed water treatment plants at Crystal Lake and Snake Pond in the late 1990s, they incorporated the addition of orthophosphate into the design of the facilities as a corrosion inhibitor. The City and AECOM sought and received approval from the MADEP to add orthophosphate as a corrosion inhibitor but out of neglect sold and supplied the water without doing so. A.018-019 at ¶¶27-31.

In the early to mid-2000s, copper heating coils in Gardner began to fail prematurely due to corrosion.

By 2012, the City had received reports of more than 400 coil failures from more than 250 City residents. A.019 at ¶¶32-33, 35.

In 2011, the City consulted with the U.S. Environmental Protection Agency ("EPA") about the copper coil failures. The EPA did not find any problem with the coils, but told the City that the alkalinity of the water was "very low and that is never good for pitting corrosion." The EPA recommended that the City increase the pH of the water. A.019 at ¶34.

In 2012, the City and SUEZ retained Microvision Laboratories ("Microvision") to examine heating coils and water samples. Microvision ruled out coil quality/imperfection and believed that the use of chloramines to disinfect the water may have contributed to the corrosive water conditions. A.019-020 at ¶36. Microvision recommended that:

> Additional steps might be taken in order to minimize the risk of aggressive corrosion. Depending on the application environment, the addition of a phosphate corrosion inhibitor might increase the longevity of the piping. Since copper is generally self oxidizing, it is often not directly attacked, but in this case, it does appear that the oxide layer is being removed. Additional phosphate based protective material layers may inhibit this process further, adding longevity to the system.

A.020 at ¶37; *see also id.* at ¶38.

Accordingly, the City recommended that SUEZ add "corrosion inhibitors" and increase "alkalinity" to protect the plumbing. A.020-021 at ¶39. In a July 2012 memorandum, the City Engineer wrote:

> I believe we need to direct [SUEZ] to adjust the water chemistry of finished water leaving Crystal Lake…. Original studies in advance of the current water treatment facility construction called for the addition 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.
>
> …***I believe it is incumbent upon us as the supplier to improve water chemistry to make the water more protective of the copper pipe within the boiler heating environment.*** This may be accomplished by adding phosphate corrosion inhibitors or increasing alkalinity and pH.

A.020-021 at ¶39 (emphasis added).

Despite this determination, the City did not cause SUEZ to implement its plan to add orthophosphate as a corrosion inhibitor, which had been previously approved by the MADEP. A.021 at ¶40.

Additional complaints mounted, and in 2015 the City and SUEZ retained Corrosion Testing Laboratories ("CTL"), to conduct further testing on the copper coil failures. CTL concluded that "leaks in the provided coils were caused by localized pinholes that formed at

the inside surface of the coil (exposed to potable drinking water)" and that "the attack that created the pinholes was likely caused by the water quality issues related to soft water low alkalinity, and/or low dissolved inorganic carbon." CTL further stated that chloramines used in the water treatment plants have been "associated with changing the alkalinity and dissolved inorganic carbonate levels in water." A.021-022 at ¶¶42, 43.

In June 2016, the City and SUEZ once again sought MADEP approval to add orthophosphate at its water treatment facilities as a corrosion inhibitor. As noted in the proposal, the City had previously been permitted to add orthophosphate by the MADEP. In January 2017, the City and SUEZ submitted a final plan "to proceed with the addition of orthophosphate" to the treatment facilities. The MADEP approved the City's and SUEZ's request in August, 2017. A.022-023 at ¶¶46-48. On August 30, 2017, the City announced that it would add orthophosphates to the water supply, which the City stated "will make the situation go away." It stated that the use of orthophosphate was safe and the standard for dealing with copper corrosion. A.023 at ¶49. This is the course of action

that Defendants had long ago concluded was necessary but failed to implement out of neglect.

Despite the City's longstanding understanding that the water was corrosive, and that the coil corrosion could have been prevented by adding orthophosphate, the City continually and publicly denied that the coil corrosion was in any way related to the water, falsely stating "we have the water tested and it is not showing anything." A.025 at ¶58; *see also* A.025-027 at ¶¶56-64. Gardner continued to deny responsibility through 2016, stating "we are not doing anything wrong." A.026 at ¶62. Initially, Gardner blamed the coil corrosion on the coil manufacturers and the materials used in manufacturing the coils, even though it knew (but did not disclose) that the EPA and Microvision had ruled out the coils as the cause. The City then attributed the coil corrosion to the "natural" properties of the water, even though CTL found that use of chloramines contributed to the corrosive water conditions. The City's misrepresentations were made with the intent to deceive Gardner residents, property owners and businesses, in order to conceal the negligence of the City and its water system operators. A.025-027 at

¶¶56-64.

The City and SUEZ still have not added orthophosphates to the water supply, even though the MADEP approved their request in August 2017; thus, the City's negligence, gross negligence and nuisance are continuing. A.024 at ¶51.

SUMMARY OF THE ARGUMENT

The City moved to dismiss the claims against it, arguing (i) that Magliacane did not timely and adequately present her claims pursuant to Section 4 of the MTCA, G.L. c. 258, § 4, (ii) that her presentment letter did not adequately present her nuisance claim and could not present claims on behalf of the Class, and (iii) that it is immune from liability under sections 10(b) and 10(j) of the MTCA, G.L. c. 258, §§ 10(b), 10(j). The Superior Court only reached the first issue of whether Magliacane's presentment was timely. The Superior Court erred in granting the City's motion to dismiss for the following reasons:

First, the MTCA does not apply to the claims against the City because it was acting in a commercial capacity for monetary gain when it sold and supplied water to Magliacane and the Class. *Infra* at 19-21.

Second, the Superior Court erred in making factual findings and ruling at the pleading stage that Magliacane's cause of action had accrued by September 2015. The Superior Court further erred in not considering the allegations relating to fraudulent concealment by the City and the application of the continuing wrong doctrine. The Complaint contains detailed allegations to plausibly establish that Magliacane timely and adequately presented the claims for herself and the Class as required by G.L. c. 258, § 4. She presented her claims to the City within the two years after she knew or reasonably should have known that she was injured by the City's tortious conduct. The presentment period also was tolled by the City's fraudulent concealment of its tortious conduct, and by its continuing and ongoing tortious conduct. *Infra* at 22-32.

Finally, although the Superior Court did not reach the issues below, Magliacane properly presented her nuisance claim and all claims on behalf of the Class. *Infra* at 33-40. In addition, the City is not immune from liability under G.L. c. 258, §§ 10(b), 10(j) because the City and the water system operators acting on the City's behalf materially contributed to

the conditions that caused the coil failures, and because Magliacane does not challenge the City's planning or policymaking, but challenges the City's failure to implement its own corrosion control plan. *Infra* at 40-51.

ARGUMENT

On appeal, the Court "reviews orders on motions to dismiss *de novo*." *Revere v. Mass. Gaming Comm'n*, 476 Mass. 591, 595 (2017), citing *Shapiro v. Worcester*, 464 Mass. 261, 266 (2013). In doing so, the court accepts as true the facts alleged in the complaint and draws all reasonable inferences in the plaintiff's favor. *Revere*, 476 Mass. at 595, citing *Burbank Apartments Tenant Ass'n v. Kargman*, 474 Mass. 107, 116 (2016).

I. The Massachusetts Tort Claims Act Does Not Apply to Suits Against the Government Acting in a Proprietary or Commercial Capacity.

The trial court's dismissal of Magliacane's claims was premised on the conclusion that she failed to present her claims in the time and manner required by G.L. c. 258, § 4. As an initial matter, the court's decision was error because the MTCA does not apply to suits against a municipality acting in a proprietary

or commercial capacity such as with respect to the sale of water. *Mattoon v. Pittsfield*, 1996 WL 34393584 (Mass. Super. Ct. Jan. 17, 1996) (Spina, J.).

"[I]n 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." *Harvard Furniture Co. v. Cambridge*, 320 Mass. 227, 229 (1946); *see also Gans Tire Sales Co. v. Chelsea*, 16 Mass. App. Ct. 947, 948 (1983) ("So far as it undertakes to sell water for private consumption the city engages in commercial venture, functions as any other business corporation, and is liable for the negligence of its employees."); *Bayview Improvement Corp. v. Vincent*, 1998 Mass. Super. LEXIS 477, *19 (Sept. 4, 1998) ("In supplying water at a price, a municipality is not performing a governmental function, but rather is engaging in trade"). "Historically, a city which undertook to supply water to its inhabitants was deemed to engage in a commercial activity which did not enjoy the protection of sovereign immunity." *Mattoon*, 1996 WL 34393584, at 5.

Because "plaintiffs' common law counts have been historically recognized as not susceptible to any

defense of sovereign immunity," the court in *Mattoon* concluded that the MTCA "does not apply to the plaintiffs' common law claims…in tort for injuries." Thus, "[n]o plaintiff was required to make any presentment to the City under Ch. 258, Sec. 4; and the City may not avail itself of the defense of a discretionary function under Ch. 258, Sec. 10(b)." *Mattoon*, 1996 WL 34393584, at 6.

The same reasoning applies here. Gardner is in the 'business of selling, supplying and distributing water to the residents, property owners and businesses of the City" and "[i]n connection with the sale and distribution of water… [is] engaged in commercial activity for monetary gain and profit." A.014-015 at ¶13. The City's "residents, property owners and businesses … pay for the water based on usage as determined by water meters installed at their properties." A.015 at ¶15. Because Gardner was a commercial actor when selling and supplying water, the MTCA does not apply to Magliacane's claims.

The trial court erred in rejecting the rationale in *Matoon* and concluding that the MTCA applied to the City's conduct. A.201-202.

II. Magliacane Timely Presented Her Claims Within Two Years After Her Claims Arose.

If the MTCA were to apply here, Magliacane had to present her claims "within two years after the date upon which the cause of action arose." G.L. c 258, § 4. The Superior Court erred in finding that Magliacane's cause of action arose in September 2015 and concluding that she did not make timely presentment of her claims under the MTCA. This finding by the court was error for three reasons. First, Magliacane's claims did not arise until she knew or should have known that she was harmed by the City's negligence. Second, in light of the City's fraudulent concealment, Magliacane's claims did not arise until she discovered her claims against the City. Finally, the period was tolled because of the City's continuing negligence. Because Magliacane did not know, and could not have reasonably known, that she was harmed by the City's negligence more than two years prior to presentment, A.031 at ¶84, her claims were timely.

As discussed below, the trial court erred by making factual determinations regarding when Magliacane knew or should have known that she was harmed by the City and for not considering the

detailed allegations of fraudulent concealment and application of the continuing wrong doctrine.

A. Magliacane's Claims Did Not Arise Until She Knew or Reasonably Should Have Known That Her Coils Were Damaged by the City's Negligence.

Magliacane presented her claims to the City, individually and on behalf of the Class, on October 12, 2017. A.024 at ¶54; A.091-096. Chapter 258, § 4, requires that a claim under the MTCA be "presented ... in writing ... within two years after the date upon which the cause of action arose." The so-called "discovery rule" applies in determining when a cause of action arises for presentment purposes. *Darius v. Boston*, 433 Mass. 274, 275 n. 3 (2001); *Heck v. Commonwealth*, 397 Mass. 336, 340 (1986) ("We see no reason why the rules applied to the accrual of a cause of action asserted under G. L. c. 258 should be different from the general rules we apply to the accrual of actions under G. L. c. 260. The 'discovery rule' thus applies … and governs the interpretation of the phrase 'within two years after the date upon which the cause of action arose' in §4 of the act'"); *Dinsky v. Framingham*, 386 Mass. 801, 803 (1982) ("nothing in the Act which shows a legislative intent that

different accrual rules apply" under G.L. c. 258 and c. 260).

Under the discovery rule, Magliacane had until two years after she knew or should have known that she was harmed by the City's conduct to present her claim. *Heck*, 397 Mass. at 340 ("cause of action accrues when the plaintiff learns or reasonably should have learned that he or she has been harmed by a defendant's conduct").

In its Memo & Order, the court concluded that Plaintiff's cause of action accrued in September 2015 because that was when the City issued a press release stating that the copper corrosion was "potentially determined to be due to the natural state of the water itself and not due to any additives", even though the City's mayor denied the City had any culpability and stated that its consultant CTL had attributed the issue not to anything the City had done. A.195; A.025-026 at ¶¶60-61.

From that statement in the press release, the court then concluded that Magliacane "either knew or should have known by September 2015 that the City's alleged conduct, in part, caused the harm underlying her claims." A.200. But nothing in the press release

even suggested that the City's conduct was a potential cause of Plaintiff's harm. A.025-026 at ¶60. In fact, the Complaint makes clear that the September 2015 press release actually blamed the corrosion on the natural state of the water "and not due to any additive" notwithstanding the fact that CTL had informed Suez and the City that the chloramine treatments they had added to the water supply had "contributed to the corrosive water conditions." A.025-026 at ¶60. In fact, the press release and the allegations surrounding it in the Complaint make clear that nothing was disclosed at the time to suggest the City's actions and inactions were a cause of the corrosion problem. A.025-026 at ¶¶56-63. The Complaint details that the particular press release by the City was false and failed to disclose that CTL had determined that the City and Suez's use of chloramine treatments had altered the alkalinity and dissolved inorganic carbon levels in the City's water, which contributed to the corrosive water conditions. A.025-026 at ¶60.

Thus, the court did not accept all the allegations in the Complaint as true for purposes of the motion to dismiss as it was required to do.

Rather, the court made findings of fact that were contrary to the allegations in the Complaint. Indeed, the court recognized in its Memo & Order that, as alleged in the Complaint, as late as March 3, 2016, "the City continued to deny publicly that it was responsible for the coil corrosion." A.200-201. And yet, the court made a factual determination that Magliacane must have known that the City had caused her injury in September 2015. This was error.

The law is clear that Magliacane's cause of action did not arise in September 2015 but only when she knew or should have known that the coil failures were caused by the City's conduct. *See Player v. Framingham*, 2014 Mass. Super. LEXIS 85, *7-9 (Aug. 26, 2014) (although plaintiff knew of his injuries while a tenant, claim did not arise until he learned there was toxic mold in the building owned by town which caused his injuries). Indeed, the Complaint alleges that while the City knew that it would have to change the water chemistry to fix the corrosion problem, A.018-022 at ¶¶30, 34, 37-39, 41, 43, 45(b), it denied that the corrosion had anything to do with the water quality or that any of its actions or inactions contributed to the coil corrosion. A.025 at ¶56. It

was not until August 30, 2017, that Gardner announced that the City and SUEZ would be adding orthophosphate to the water to fix the problem. A.023 at ¶¶48-49. Thus, as specifically alleged in the Complaint (A.031 at ¶84):

> Plaintiff and the members of the Class did not know that the negligence and gross negligence of the City, and could not have reasonably have known that the negligence and gross negligence of the City, caused them harm more than three years prior to the commencement of this action or more than two years prior to the presentment of the claim under G.L. c. §258, §4.

Moreover, an issue concerning what the plaintiff knew or should have known is a factual question that is appropriate for the trier of fact." *Koe v. Mercer*, 450 Mass. 97, 101 (2007); *Santos v. Commonwealth*, 2002 Mass. Super. LEXIS 419, *3 n.2 (Aug. 15, 2002) (rejecting untimely presentment argument that "requires me to consider matters beyond the four corners of the Complaint (so as to determine when the plaintiff knew or should have known that she had a claim against the Commonwealth)"). When the issue of timeliness is raised on a motion to dismiss, the complaint must "clearly reveal that the action was commenced beyond the time constraints of the statute of limitations." *Clayman v. McLaughlin*, 2017 Mass.

Super. LEXIS 146, *15 (Aug. 14, 2017), quoting *Epstein v. Seigel*, 396 Mass. 278, 279 (1985).

The Complaint alleges that Magliacane did not know and reasonably could not have known that the coil failures were caused by the City's tortious acts more than two years prior to presenting her claims. *See Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 333 (D. Mass. 2013) (although plaintiff was "aware that some injuries occurred" outside the limitations period her claim was not time-barred because "Defendant has not adequately shown that Plaintiff had adequate notice … that Defendant contributed to these harms"); *Riley v. Presnell*, 409 Mass. 239, 244-51 (1991) (even though plaintiff knew of ailments outside of limitations period, there was a genuine dispute as to when the plaintiff knew or should have known that he may have been harmed by the defendant's wrongful conduct). Thus, the trial court erred when it made these factual determinations to reach its conclusion that Magliacane knew or should have known of her claims by September 2015.

B. Magliacane's Claims Did Not Arise Until She Actually Discovered the City's Wrongdoing Because the City Fraudulently Concealed Its Misconduct.

Under G.L. c. 260, § 12, "[i]f 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." Section 12 codified the long-standing common law rule that "positive acts done with the intention to deceive" the injured party from knowing of her cause of action constitutes fraudulent concealment and tolls the accrual of a cause of action until it is discovered. *Maloney v. Brackett*, 275 Mass. 479, 484 (1931). In *Howe v. Palmer*, 80 Mass. App. Ct. 736, 743 (2011), the Appeals Court recognized that fraudulent concealment may toll statute of limitations under similar accrual provisions in the Federal Tort Claims Act ("FTCA"); *see also Rakes v. U.S.*, 442 F.3d 7, 24-25 (1st Cir. 2006) (fraudulent concealment tolls presentment period under FTCA).

The Complaint alleges in detail how the City took active steps to conceal that its conduct contributed to the coil corrosion. A.025-027 at ¶¶56-64. The City

falsely claimed that "we have the water tested and it is not showing anything," ¶58, and stated "we are not doing anything wrong." A.026 at ¶62. Initially, the City blamed the coil manufacturers, even though the EPA and Microvision had had ruled out coil defects as the culprit. A.025 at ¶57. The City then blamed the corrosion on natural properties of the water, even though CTL attributed the corrosion to water quality issues, including the addition of chloramines to the water supply. A.025-026 at ¶¶60-62. These positive acts by the City "were made with the intent to deceive the residents, property owners and businesses in Gardner in order to conceal the City's negligence and the negligence of its water systems operators ...to avoid litigation." A.026 at ¶63.

The trial court also erred by summarily dismissing Magliacane's fraudulent concealment allegations and concluding that, despite the City's concealment, that Magliacane "knew of the harm and should have known that the City's conduct contributed to that harm." A.201. The court reached this conclusion by finding that Magliacane "knew (or should have known)" by September 2015 that "her copper water heating coils failed prematurely and that the City's

water was a potential cause." A.201. But the court did not explain how, even if those facts were true, that Magliacane knew or should have known that the City's actions/inactions were the cause of the harm. In light of Magliacane's well pleaded allegations of fraudulent concealment, she plausibly alleged that her claims did not arise until she actually discovered the City's wrongdoing.

C. The City's Continuing Tortious Conduct Tolled the Presentment Period.

Magliacane's claims against Gardner also were separately tolled because Gardner's tortious conduct is continuing. "Where the tortious conduct is a continuing event, the two-year presentment requirement is tolled." *Doe v. Blandford*, 402 Mass. 831, 839 (1988); *see also Colonial Color Corp. v. Mass. Highway Dep't*, 1999 Mass. Super. LEXIS 366, *8 (July 12, 1999) (denying a motion to dismiss because plaintiff contends the "negligence is a continuing event, which continues to this day, and that the two-year presentment period has yet to expire because of the tolling").

The Complaint alleges that on August 30, 2017, the City announced that it would add orthophosphates

to the water supply to "make the situation go away." A.023 at ¶49. Notwithstanding that belated announcement, the Complaint alleges that Gardner still has not added orthophosphates to the water and the violations are continuing. A.024 at ¶51. Thus, the tortious conduct, not just the injury, is continuing. *Borghese v. Senior*, 2009 Mass. Super. LEXIS 125, *4 (May 6, 2009) ("[T]he continuing tort doctrine requires that the tortious conduct continue up though some time within the limitations period and that there be 'continual unlawful acts'"). Accordingly, Magliacane has plausibly alleged that the two-year presentment period had not yet expired because the negligence is continuing. The lower court erred in failing to consider these detailed allegations and Magliacane's arguments regarding the continuing wrong doctrine.

III. The Other Arguments Raised by the City, Which Were Not Considered by the Superior Court, Do Not Support Dismissal

Because the Superior Court dismissed Magliacane's claims against the City based on the issue of timely presentment of her claims under the MTCA, the court did not reach the other issues raised by the City in

its motion to dismiss. However, because this Court may consider any grounds apparent on the record below in addressing an appeal, *see, e.g., Gabbidon v. King*, 414 Mass. 685, 686 (1993), Magliacane addresses the other issues raised by the City below. These additional arguments for dismissal likewise are without merit.

A. Magliacane's Presentment Letter Properly Presented Her Nuisance Claim And All Claims On Behalf of the Class.

1. Magliacane's Nuisance Claim Is Based on the Same Factual Basis Described in the Presentment Letter and Is Properly Included in the Complaint.

The City argued below that Magliacane's nuisance claim was never presented and, therefore, must be dismissed. A.050-051. This argument has no merit.

In interpreting the presentment requirement in G.L. c. 258, § 4, courts have attempted to strike an "appropriate balance... between the public interest in fairness to injured persons and in promoting effective government." *Rodriguez v. Cambridge Hous. Auth.*, 59 Mass. App. Ct. 127, 135 (2003). In striking that balance, courts have held that the presentment letter cannot be "so obscure that educated public officials ... find themselves baffled or misled with respect to [whether] . . . a claim' is being asserted 'which

constitutes a proper subject for suit.'" *Martin v. Commonwealth*, 53 Mass. App. Ct. 526, 529 (2002), quoting *Gilmore v. Commonwealth*, 417 Mass. 718, 723 (1994).

When a presentment letter is not "so deficient or obscure, our courts have found them adequate despite some imprecision." *Rodriguez*, 59 Mass. App. Ct. at 135. Accordingly, alternative legal theories need not be presented in the notice as long as the "proper authority was placed on notice of the circumstances surrounding the alleged injury" and "all theories of liability argued by the plaintiff were based on the same facts." *McAllister v. Boston Hous. Auth.*, 429 Mass. 300, 305 n.7 (1999) (rejecting argument that implied warranty of habitability claim was "barred" because "plaintiff only filed notice of the negligence claim"); *Martin*, 53 Mass. App. Ct. at 531 (presentment letter adequate even though it did not mention mother's loss of consortium claim); *Murray v. Hudson*, 472 Mass. 376, 385 (2015) (presentment letter provided town with adequate notice, even though it "did not characterize the specific theory of negligence"); *Sterling v. Commonwealth*, 2000 Mass. Super. LEXIS 642, *6 (Aug. 1, 2000) ("not necessary that the plaintiff

even identify all of its claims, so long as defendant is sufficiently apprized of the circumstances surrounding the alleged injury").

In her presentment letter, Magliacane explained how Gardner acted negligently when it failed to implement its MADEP approved plan to add orthophosphates to the water supply to prevent corrosion and described how she and the members of the Class were injured by the resulting coil corrosion. A.091-096. The factual basis for the negligence claim is identical to the factual basis for the nuisance claim. Gardner needed no additional factual information to investigate the merits of this alternative legal theory and, thus, Magliacane's nuisance claim was properly presented.

2. Magliacane's Letter Properly Presented All Claims on Behalf of the Class.

The presentment provision of G.L. c. 258, § 4 is designed to alert the appropriate government official to the factual basis for the claim and afford that official "an adequate opportunity to investigate the circumstances surrounding [the] claim." *Weaver v. Commonwealth*, 387 Mass. 43, 47 (1982). The City, nevertheless, argued below that Magliacane, as the

"claimant" could not make presentment on behalf of the Class. A.051-052. This argument similarly lacks merit.

In *Estate of Gavin v. Tewksbury State Hosp.*, 468 Mass. 123 (2014), the SJC rejected a "restricted" interpretation of "claimant," which is not defined by the statute, and held that the usual and accepted meaning of "claimant" is simply "[o]ne who asserts a right or demand." *Id.* at 129-130. The SJC further explained that at its core, the presentment requirement is about giving the government "the opportunity to investigate and settle claims and to prevent future claims through notice to executive officers." *Id.* It concluded that presentment by an estate on behalf of the decedent's children, "did not prevent or inhibit the Commonwealth from accomplishing any of these tasks." *Id.* at 132. The same is true in this case.

Here, Magliacane's presentment letter (A.091-096) informed the City that she was presenting claims for herself "and a 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." A.091. Magliacane presented her class

claims to the City in extensive detail. The letter provides a clear factual basis for the claims and an explanation of injuries suffered by Magliacane and the Class who had to replace and purchase heating coils, boilers and hot water heaters due to coil corrosion. A.092-096. Her presentment enabled the City's officials to investigate the factual basis for the legal claims and understand the scope of the class-wide claims. Indeed, Gardner provided a very detailed response to Magliacane's letter, and denied that "its conduct or actions were in any way negligent," stating that "nothing the City did or failed to do caused or contributed to the reported heating coil failures." A.131-132.

Although no Massachusetts court has addressed the question, states with similar tort claims acts that serve similar objectives to the MTCA, G.L. c. 258, § 4, have found that detailed presentments by named plaintiffs on behalf of a class are sufficient to alert public officials to the basis for the claims and adequately present the claims of the entire class. *See Galicki v. New Jersey*, 2016 U.S. Dist. LEXIS 126076, *71 (D.N.J. Sept. 15, 2016) ("The Court … finds that the Notice of Claim here—filed on behalf of 'any and

all Plaintiffs who have yet to be identified and fit within the potential representative class'—is legally sufficient to support tort claims against New Jersey" under N.J.S.A. § 59:8-4); *Budden v. Board of Sch. Comm'rs*, 698 N.E.2d 1157, 1162 (Ind. 1998) ("there is nothing in the [Indiana Tort Claims Act] to suggest that 'the claim' cannot be a class action or that unknown class members must be identified by name" to satisfy Ind. Code Ann. § 34-13-3-8"); *San Jose v. Superior Court*, 12 Cal. 3d 447, 457 (Cal. 1974) ("We conclude that 'claimant,' as used in [Cal. Gov. Code § 910], must be equated with the class itself and therefore reject the suggested the necessity for filing an individual claim for each member of the purported class"); *Andrew S. Arena, Inc. v. Superior Court*, 163 Ariz. 423, 426 (1990) ("claim against a public entity may be presented as a class claim" under former A.R.S. § 12-821, which was subsequently superseded by statute); *Houghton v. Dep't of Health*, 125 P.3d 860, 867 (Utah 2005) ("claim providing notice of a possible class action lawsuit satisfies the requirements of [Utah Code Ann. § 63G-7-401] if it is filed by a class representative on behalf of potential class members").

In addition, in the analogous c. 93A context, demand letters by representative plaintiffs on behalf of a class are sufficient for statutory purposes when they reasonably describe the injuries in "sufficient detail to permit [the defendant] reasonably to ascertain its exposure." *Simas v. House of Cabinets, Inc.*, 53 Mass. App. Ct. 131, 140 (2001). However, like presentment letters under the MTCA, c. 93A demand letters do not have to identify the specific amount of the economic injury. *Richards v. Arteva Specialties S.A.R.L.*, 66 Mass. App. Ct. 726, 734 (2006). Thus, "Massachusetts courts ... have determined that in a putative class action, the demand letter need only be sent by a class representative on behalf of herself and the entire class, as long as the letter sufficiently describes the claimant's injuries." *Bosque v. Wells Fargo Bank, N.A.*, 762 F. Supp. 2d 342, 354 (D. Mass. 2011); *see also Richards*, 66 Mass. App. Ct. at 733-34 (c. 93A demand letter which identified claimant and class she proposed to represent was sufficient). Magliacane's MTCA presentment letter fulfills the same role: it reasonably described her injury and defined the Class sufficiently for Gardner to be able to "reasonably ascertain its exposure."

There is no requirement that each class member make separate presentment. Because the City had an adequate opportunity to investigate the circumstances surrounding the Class claims, the presentment letter submitted by Magliacane on behalf of the Class is adequate.

B. The City Is Not Immune From Liability Under G.L. c. 258, § 10.

1. The City Is Not Entitled to Immunity Under G.L. c. 258, § 10(j) Because It Materially Contributed to the Harmful Condition.

The City argued below that it is immune under G.L. c. 258, § 10(j), A.052-055, which provides:

> any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, **which is not originally caused by the public employer or any other person acting on behalf of the public employer.**

(emphasis added). "In order for a public employer's affirmative act to be the 'original cause' of a 'condition or situation' ... [such] act must have materially contributed to creating [a] specific 'condition or situation' that resulted in the harm." *Harrison v. Mattapoisett*, 78 Mass. App. Ct. 367, 371 (2010); *Kent v. Commonwealth*, 437 Mass. 312, 319

(2002)). Gardner concedes that § 10(j) would not apply if its actions materially contributed to the coil corrosion problem at issue. A.054.

The Complaint alleges that Gardner, and the water system operators acting on its behalf, materially contributed to the coil failures by selling finished water which it knew was corrosive. *See, e.g.*, A.012 at ¶¶4; A.014-015 at ¶¶13-14; A.017 at ¶23. By the 1990s, the City learned that it needed to add orthophosphate to the City's water treatment system in order to inhibit corrosion of the distribution system plumbing. A.017-018 at ¶¶25-26. Thus, when the City constructed its water treatment plants, it incorporated the addition of orthophosphate into their design, and sought and obtained approval from the MADEP to add orthophosphate to the water supply. A.018 at ¶¶27-29. Despite obtaining these approvals, the City sold and distributed corrosive water without adding orthophosphates. A.014-015, 019 at ¶¶13, 31.

The Complaint further alleges the use of chloramines at the City's water treatment plants contributed to the corrosive water conditions. A 2015 report prepared by CTL stated that the plants' use of chloramines has been "associated with changing the

alkalinity and dissolved inorganic carbonate levels in water," which contributed to the corrosive water conditions. A.021-022 at ¶43; *see also* A.019-020 at ¶¶36, 38 (identifying chloramines as suspected culprit). Thus, Gardner's contention that Magliacane alleges no affirmative acts on the part of the City or anyone acting on the City's behalf ignores the express allegations in the Complaint.

The decision in *Shapiro v. Worcester*, 464 Mass. 261 (2013) is right on point. In *Shapiro*, property owners sued the city relating to the discharge of sewer effluent onto their properties. The Metropolitan District Commission ("MDC") issued a report that "forecasted that, without the necessary improvements, sanitary sewer backups could occur in residential properties, such as the plaintiffs', during severe weather conditions." *Id.* at 263-64. Worcester and the MDC then entered into a contract whereby the city allowed MDC to use the city's sewer system in exchange for MDC designing, constructing and inspecting improvements recommended in MDC's report on the sewer system. But the improvements were not made. *Id.* In ruling that § 10(j) did not provide Worcester with immunity, the SJC held:

> Here, the action of the city permitting MDC effluent to flow into the city's sewer system materially contributed to its overloading and exposed homeowners to a known risk. Having created this condition, the city "was bound, as any other person would be, to act reasonably." In failing to take steps to ensure that the MDC made the necessary improvements, and allowing the MDC effluent to flow into the city's sewer system without requiring their completion, the city did not act reasonably, and may be liable for negligence.

Shapiro, 464 Mass. at 272-73; *see also LaFeche v. Sturbridge*, 2006 Mass. Super. LEXIS 182, *7-8 (March 20, 2006) (allegation that town failed to properly construct, maintain and repair gate alleges negligence attributable to town action which is not immune under § 10(j)).

As in *Shapiro*, Gardner took affirmative action that caused harm to Magliacane and the Class. It sold and distributed water to them, knowing that the water was not being properly treated for corrosion, and allowed the use of chloramine treatments in its water plants, which contributed to the corrosive conditions. Because Gardner "originally caused" the condition or situation, it cannot claim immunity for those actions or for its subsequent failure to remedy the problem.

The public duty rule codified in § 10(j) "applies only to situations … in which a plaintiff has been

directly harmed by the conduct of a third person and only indirectly by a public employee's dereliction of a duty." *Onofrio v. Dep't of Mental Health*, 408 Mass. 605, 609-10 (1990) (holding that there was no immunity where state employees took action exposing plaintiff to harm); *Ku v. Framingham*, 62 Mass. App. Ct. 271, 275 (2004) (§ 10(j) applies where person was harmed by a third party as opposed to person acting "on behalf of the public employer").

Gardner's reliance below on *Brum v. Dartmouth*, 428 Mass. 684 (1999) is therefore misplaced. In *Brum*, the court held that the town was entitled to immunity stemming from a student's stabbing death at the hands of third party assailants because the assailants were the cause of the victim's death and not because the town failed to provide better security. *Id.* at 696. There, the school officials had not materially contributed to the victim's death; school officials simply did not take any action to prevent it. *Id.*

Gardner concedes that the purpose of § 10(j) is to immunize the government for failing to prevent harm caused by the wrongful act of a third party. A.052. Indeed, each case cited by Gardner in the trial court dealt with claims that the government failed to

prevent a third party from inflicting harm. A.052-053. This stands in stark contrast to this case where there is no third party involvement. Magliacane has alleged facts showing the conduct of Gardner and its water system operators materially contributed to the coil failures, thereby making § 10(j) inapplicable.

2. The City Is Not Entitled to Immunity Pursuant to G.L. c. 258, § 10(b) Because It Was Not Engaged in a Discretionary Function.

Gardner's alternative argument that it is immune under G.L. c. 258, § 10(b) because it was engaged in a discretionary function, A.055-058, also misses the mark. Chapter 258, § 10(b) provides that a governmental actor may be entitled to immunity 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.

Section 10(b) provides immunity only for "discretionary conduct that involves policy making or planning." *Harry Stoller & Co. v. Lowell*, 412 Mass. 139, 141 (1992). "Discretionary acts are not those which involve 'the carrying out of previously

established policies or plans.'" *Dobos v. Driscoll*, 404 Mass. 634, 651 (1989).

> [T]he dividing line should be between those functions that "rest on the exercise of judgment and discretion and represent planning and policymaking [for which there would be immunity] and those functions which involve the implementation and execution of such governmental policy or planning [for which there would be no immunity]."

Shapiro, 464 Mass. at 270, quoting *Whitney v. Worcester*, 373 Mass. 208, 217 (1977); *Gennari v. Reading Pub. Sch.*, 77 Mass. App. Ct. 762, 766 (2010) ("relevant distinction is between policy making, on the one hand, and the discretionary decisions that inhere in effecting that policy, on the other."); *Lobster Pot of Lowell v. Lowell*, 333 Mass. 31, 33 (1955) (city is not responsible for damages arising from inadequacy in the planning of its sewer system but is responsible for damages as a result of negligence in the construction, maintenance or operation of its system of sewers).

As an initial matter, the courts have held that the "discretionary function" analysis under § 10(b) is a fact specific inquiry and therefore is generally not appropriate for resolution on a motion to dismiss. *See Ryan v. Malden*, 2017 Mass. App. Unpub. LEXIS 732, *5-6

(July 19, 2017) ("Whether a particular decision falls within the discretionary function exception depends largely on the facts specific to each case."); *Gremo v. Worcester*, 2012 Mass. App. Unpub. LEXIS 117, *18 n.15 (2012) ("assessment of the immunity issues … bound up in [facts]"). Indeed, in its brief below, Gardner relied exclusively upon cases decided at summary judgment or at trial in arguing that § 10(b) should apply. A.057-058. It would be premature to resolve this issue at the pleading stage prior to discovery.

However, even if this Court chose to address the issue now, Gardner's argument still fails. The *Shapiro* decision again is instructive. The Superior Court judge in *Shapiro* had framed the issue as "'whether the cause of the sewage backup was a failure in planning or a failure in implementing a plan.'" 464 Mass. at 270. "Based on the fact that the city established a plan 'whereby it would allow MDC to increase flow in the City's sewers in exchange for the MDC improving the sewer system [but that] the city failed to totally and properly implement that plan,'" the trial court concluded that the action was not barred by § 10(b). *Id.* at 270-71. The SJC found "the judge's analysis

persuasive." *Id.* at 271.

The SJC held that while "the events beginning with the joint study through the decision to upgrade the system are properly characterized as 'planning and policymaking,'. . . the moment the city entered into a contractual arrangement allowing the MDC's sewerage to flow into the system in exchange for constructing the necessary improvements by a date certain, the city was charged not with planning or policymaking, but with ensuring the policy implementation by the MDC of its chosen course of action." *Id.* In other words, the failure to carry out an existing plan of action does not constitute planning or policymaking. As a result, section 10(b) did not apply and Worcester was not immune from suit. *Id.*; *Onofrio*, 408 Mass. at 611 (no immunity where defendant was "negligent carrying out of previously established policies or plans"); *see also Doherty v. Belmont*, 396 Mass. 271, 276 (1985) (failure to maintain parking lot in reasonably safe condition does not rise to level of planning decision); *Fantasia v. Worcester*, 2011 Mass. Super. LEXIS 385, *5-6 (Jan. 26, 2011) (failure to maintain sewage system to prevent blockages was not discretionary planning decision).

Magliacane alleges that Gardner knew the water was corrosive, and adopted a plan to add orthophosphate to the water system, constructed water treatment plants that incorporated the addition of orthophosphate, and obtained approval from the MADEP to add orthophosphate. A.017-018 at ¶¶25-29. Those planning and design decisions are not being challenged. Rather, Magliacane claims Gardner (along with SUEZ and AECOM) negligently failed to execute that plan. *See, e.g.,* A.013 at ¶4; A.017 at ¶24; A.019 at ¶31; A.020-023 at ¶¶37-50. These actions and inactions were not ones of policy or planning. Rather, the allegations are that Magliacane and the Class suffered harm from Gardner's failure to carrying out its corrosion control plan. As such, Gardner's conduct falls outside the discretionary function exception in § 10(b).

Gardner's reliance below on *Fortenbacher v. Commonwealth*, 72 Mass. App. Ct. 82 (2008) is misplaced. *Fortenbacher* recognized that immunity only applied for "discretionary conduct that involves policy making or planning…as opposed to conduct that consists of the carrying out of previously established policies or plan." *Id.* at 87. That court found on the

summary judgment record that there was no previously established plan, standards or "off-the-shelf solution" for the design and construction of a guardrail extension on a bridge. *Id.* at 88-89.

Here, by contrast, Gardner adopted a corrosion control plan using orthophosphate, A.018 at ¶29, and it was Gardner's negligence in executing that plan that is at issue. Furthermore, unlike in *Fortenbacher*, there was a readily available "off-the-shelf solution," the addition of orthophosphate which the City has admitted is "the standard for addressing corrosion." A.023 at ¶49. Thus, contrary to the City's argument, there were "fixed or readily-ascertainable standards to fall back on." A.056.

The other cases that the City relied upon below (A.056-058) likewise challenged policy decisions, rather than policy implementation. Indeed, in *Greenwood v. Easton*, 444 Mass. 467 (2005), the SJC held that claims relating to the town's "execution of [its] established policy" did not qualify for immunity under § 10(b). 444 Mass. at 472-73. The *Greenwood* court distinguished between the town's decision to put telephone poles in a parking lot for safety reasons as being rooted in policy, and the town's failure to

properly secure the poles it had installed as not a discretionary function. *Id.*

Where, as here, Magliacane challenges the City's negligent failure to implement its corrosion control plan, Gardner's conduct is not entitled to immunity under G.L. c. 258, § 10(b).

CONCLUSION

For the foregoing reasons, the Superior Court erred in dismissing Magliacane's claims against the City of Gardner, and the Superior Court's decision should be reversed.

January 25, 2019 By her attorneys,

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Certificate of Service

Pursuant to Mass. R. App. P. 13(d), I hereby certify under penalty of perjury that a true copy of the foregoing Brief of the Appellant and the accompanying Record Appendix was served upon counsel of record for Defendants by e-mail on January 25, 2019:

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CERTIFICATE OF COMPLIANCE

I hereby certify under penalty of perjury that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to: Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices, and other papers).

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ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 17-2005

JANICE MAGLIACANE, individually and on behalf of others similarly situated

vs.

CITY OF GARDNER & others[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT CITY OF GARDNER'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT UNDER RULE 12(b)(6) AND FOR ENTRY OF SEPARATE AND FINAL JUDGMENT UNDER RULE 54(b)

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INTRODUCTION

The plaintiff, Janice Magliacane ("Magliacane"), individually and on behalf of others similarly situated, alleges that the defendants, the City of Gardner (the "City"), Suez Water Environmental Services, Inc. ("Suez"), and AECOM Technical Services, Inc. ("AECOM") (collectively, the "Defendants"), improperly treated and distributed water to her home, causing corrosion to the copper coils in her water heater. The matter is presently before this court on the City's motion to dismiss Magliacane's complaint pursuant to Mass. R. Civ. P. 12(b)(6), and for entry of separate and final judgment pursuant to Mass. R. Civ. P. 54(b). For the reasons set forth below, the City's motion to dismiss Magliacane's complaint and for entry of separate and final judgment is **ALLOWED**.

[1] Suez Water Environmental Services, Inc. (formerly known as United Water Environmental Services, Inc.) and AECOM Technical Services, Inc. (formerly known as Earth Tech, Inc.

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BACKGROUND

For purposes of evaluating a motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6), the court must accept as true all of the factual allegations contained in the complaint.

Magliacane is a resident and homeowner in the City. Residents of the City pay for the water based on usage, as determined by water meters installed at their properties. In 1998, the City entered into a contract with Earth Tech, Inc., a predecessor entity of AECOM, regarding distribution of the City's water and operation of two water treatment plants, the Crystal Lake Water Treatment Plant and the Snake Pond Water Treatment Plant (the "Contract").[2] The Contract privatized the City's water maintenance and distribution operation.

Under the Contract, AECOM was required to maintain and operate the City's water systems in accordance with Good Industry Practices, which included:

> those methods, techniques, standards and practices which at the time they are employed and in light of the circumstances known or reasonably believed to exist at such time, are generally recognized and accepted as good and prudent practices in the construction, operation or maintenance, as the case may be, for the municipal water and/or wastewater industry, as the case may be, in the northeast region of the United States and are consistent with the same degree or skill and care ordinarily exercised by members of the respective trade or profession.

AECOM agreed to "use all reasonable means and methods to insure the safety, integrity and quality of the City's water." The Contract further required that the work performed thereunder "conform to the highest professional standard of care and practice customarily expected of those engaged in performing comparable work . . . ." The City was responsible for the "billing and collection functions for the Contract Systems" and the "preparation of municipal lien

[2] For purposes of clarity and consistency, this decision will not distinguish Earth Tech from AECOM.

certificates."[3] Residents of the City were regarded as the "customers" of the water distribution service provided for under the Contract.

In 2008, Suez acquired the Contract from AECOM and assumed all obligations owed thereunder. Suez has operated the City's water facilities and distribution system from 2008 to the present.

The Defendants knew for years that the water they sold and distributed to the residents of the City was corrosive and damaged the heating coils, water heaters, furnaces, and boilers owned by the residents. In a report from June of 1994 (the "1994 Report"), City consultants, Tighe & Bond, stated that "the corrosive nature of the source water was causing leaching of lead and copper from building plumbing." The 1994 Report concluded that "increasing the pH of the water entering the distribution system would reduce lead and copper solubility," recommending the City "add a non-zinc based orthophosphate to serve as a film former within the distribution system and inhibit corrosion of the distribution system piping and plumbing." In a letter from January of 1998, the same consultants recommended that the City's water treatment facility at Snake Pond implement "corrosion control using caustic soda and poly/orthophosphate blend."

When the City constructed its two water treatment plants, it and AECOM incorporated the addition of orthophosphate into the design as a corrosion inhibitor. The City and AECOM sought approval from the Massachusetts Department of Environmental Protection (the "DEP") for such addition. The DEP subsequently approved the addition of orthophosphate as a corrosion inhibitor for both water treatment facilities.[4] In August of 2002, AECOM sent a letter to the

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[3] "Contract Systems" is defined in the Contract as "those portions of the City's infrastructure as of the Commencement Date consisting of the water distribution system and wastewater collection system (jointly referred to as the Contract Systems)."

[4] In a letter from March of 1998, the DEP approved the City's request, including post-treatment of finished water that incorporated "corrosion control with orthophosphoric acid." By letter in January of 1999, the DEP approved the second facility, noting that "[c]orrosion control is proposed to include treatment of this groundwater source with the addition of sodium hydroxide for pH adjustment and phosphate addition as a corrosion inhibitor."

DEP stating that "we do not believe our corrosion control program has been optimized" and that it would "further optimize lead and copper control with orthophosphate treatment." Despite these decisions and approvals, the Defendants failed to add orthophosphate to inhibit corrosion.

Starting "in the early to mid 2000s," copper heating coils in residents' hot water heating systems began to fail prematurely, "with many residents experiencing multiple failures." By 2009 or 2010, the City had received numerous complaints regarding such premature failures, so it commenced an investigation into the issue. In 2011, the City's engineer contacted an official with the United States Environmental Protection Agency (the "EPA") to conduct tests on, among other things the copper water heating coils. The EPA official found no issue with the coils themselves. Instead, he advised the City that the "alkalinity [in the water] is very low and that is never good for pitting corrosion" and that he "would consider increasing it a bit." The City shared this information with Suez, but neither entity acted on the recommendation to increase the alkalinity in the water.

By 2012, the City had received reports of more than 400 coil failures from more than 250 residents, with many of them experiencing multiple failures. In 2012, the City retained Microvision Laboratories ("Microvision") to examine water coil samples that were submitted for corrosion and failure analysis. Microvision excluded coil quality as a cause of the issue. It surmised that the switch from chlorine to chloramine to disinfect the water may have contributed to the coil corrosion. In its June 15, 2012 report (the "Microvision Report"), Microvision advised the City as follows:

> Additional steps might be taken in order to minimize the risk of aggressive corrosion. Depending on the application environment, the addition of a phosphate corrosion inhibitor might increase the longevity of the piping . . . Additional phosphate based protective material layers may inhibit this process further, adding longevity to the system.

In a memorandum dated June 26, 2012, the City Engineer summarized Microvision's findings, and noted some of the potential causes it identified. Based on the Microvision Report, the City engineer recommended that the City and Suez should consider "corrosion inhibitors" and increasing the alkalinity. In a memorandum dated July 31, 2012, the City engineer wrote the following:

> After a careful review of the report prepared by [Microvision] concerning the failure of copper heating coils in Gardner, I believe we need to direct [Suez] to adjust the water chemistry of finished water leaving Crystal Lake . . . Original studies in advance of the current water treatment facility construction called for the addition [*sic*] 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.
>
> I believe it is incumbent upon us as the supplier to improve water chemistry to make the water more protective of the copper pipe within the boiler heating environment. This may be accomplished by adding phosphate corrosion inhibitors or increasing alkalinity and pH. I suggest that [Suez] be instructed to consult with their water chemistry experts and recommend to the City adjustments to water chemistry that will enhance the protection of copper.

Again, despite these recommendations, the Defendants failed take any action to improve the water chemistry by adding phosphate corrosion inhibitor or by increasing the alkalinity and pH.

Magliacane had three copper heating coils fail. She replaced two copper heating coils as the result of such failures. After the third copper coil failed, she installed a hot water heater to replace her tankless hot water system to avoid additional costs of replacing another copper coil.[5]

As the City continued receiving complaints, in 2015 the City and Suez retained Corrosion Testing Laboratories ("CTL") to test further the copper coil failures. CTL issued a report dated September 8, 2015, concluding that "leaks in the provided coils were caused by localized pinholes that formed at the inside surface of the coil (exposed to potable drinking water)." That report also concluded that "the attack that created the pinholes was likely caused by the water

[5] At the hearing before this court on June 5, 2018, Magliacane's counsel represented that the three separate failures occurred in 2012, 2014, and 2015, respectively.

quality issues related to soft water low alkalinity, and/or low dissolved inorganic carbon." CTL further opined that Suez's use of chloramine treatment had been "associated with changing the alkalinity and dissolved inorganic carbonate levels in water."

Until September of 2015, the City denied that the coil corrosion was caused by, or related to, the chemistry of its water. Prior to September of 2015, the City publicly blamed the issue on the manufacturers of the coils and the materials they used. The City did so even though it knew that in 2011 the EPA founding nothing wrong with the coils, that in 2012 Microvision ruled out the coils as the cause, and that the residents of neighboring towns who used the same copper heating coils did not experience similar failures. At a May 17, 2013 meeting of the Public Service Committee of the City Council, in response to questioning about coil corrosion, the City's engineer stated, "we have the water tested and it is not showing anything." The Defendants never disclosed the consultant opinions from the late 1990s or Microvision's recommendations from 2012.

In September of 2015, the City issued a press release concerning the CTL study, acknowledging that "the soft water (low alkalinity) and a low level of Dissolved Inorganic Carbons" contributed to the copper coil failures. The same press release by the City stated 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." Following the press release, the City's mayor denied that it had any culpability for the coil corrosion because CTL's report attributed the issue to the natural state of the surface water. Around the same time, the City directed Suez to perform a Desk Top Corrosion Study to review its strategy for corrosion control, which they had not done for years.

According to the minutes of a meeting of the Public Service Committee of the City Council on March 3, 2016, the City continued to deny publicly that it was responsible for the coil corrosion. At that meeting, the City's engineer stated, "we are not doing anything wrong." He further reported that the Massachusetts Interlocal Insurance Association, the City's insurance carrier, reviewed and denied any claims associated with the coil corrosion "because City has soft water, which is a natural occurrence."

In June of 2016, the City and Suez sought approval from the DEP to add orthophosphate as a corrosion inhibitor at both water treatment facilities. On November 4, 2016, DEP representatives met with the City and Suez to discuss the coil corrosion issues. On January 18, 2017, the City and Suez submitted a final plan "to proceed with the addition of orthophosphate at the Crystal Lake and Snake Pond Water Treatment Facilities" in the City's water system. The DEP approved their request on August 8, 2017. On August 30, 2017, the City announced that it would add orthophosphates, which its engineer stated "will make the situation go away." The City and Suez, however, have yet to implement the orthophosphate additives.

On October 12, 2017, counsel representing Magliacane sent a demand letter to the Defendants. The City responded by letter dated December 4, 2017, denying all responsibility and liability for Magliacane's claimed injuries. Suez responded in like fashion by letter dated December 8, 2017. AECOM never responded to Magliacane's demand letter.

DISCUSSION

Magliacane's complaint contains three claims against the City: negligence, gross negligence, and nuisance.[6] In support of its motion to dismiss, the City advances three general arguments: Magliacane failed to make proper presentment under G. L. c. 258, § 4; the City is

[6] The complaint includes both negligence and gross negligence claims under the heading, "Count I." The nuisance claim is designated in the complaint as "Count III."

immune from liability under G. L. c. 258, § 10(j), on the ground that it did not originally cause the condition of which Magliacane complains; and the City is immune under G. L. c. 258, § 10(b), on the ground that Magliacane's claims are based upon a discretionary function. Regarding its presentment argument, the City asserts: (i) that Magliacane failed to make presentment within two years of the date on which her cause of action arose; (ii) that she failed to present the nuisance claim because she did not explicitly identify it in her October 12, 2017 letter; and (iii) that Magliacane's presentment cannot constitute presentment by any purported similarly situated class members.[7]

In her opposition, Magliacane counters the City's untimely presentment argument first by asserting that G. L. c. 258 has no application to the dispute at issue. Next, Magliacane contends that she made proper and timely presentment upon the City by virtue of the October 12, 2017 letter. She maintains that her presentment was timely, arguing that she suffered an "inherently unknowable" harm and that the City fraudulently concealed her cause of action.

I. Standard of Review

A motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6) is allowed upon a showing that the claimant has "failed to state a claim upon which relief can be granted." Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000). In evaluating a motion to dismiss under this rule, the allegations set forth in the complaint are taken as true, and any reasonable inferences that may be drawn therefrom are made in the claimant's favor. Warner-Lambert Co. v. Execuquest Corp., 427 Mass. 46, 47 (1998). Though the factual allegations are taken as true, legal conclusions disguised as factual allegations are not accepted. Schaer, 432 Mass. at 477-478. Rather, the claimant must set forth factual allegations that plausibly suggest a right to relief beyond mere

[7] For the reasons outlined below, this court need not reach the second and third arguments.

speculation which may be supported by only "labels and conclusions." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1964-1966 (2007).

II. G. L. c. 258

The Massachusetts Tort Claims Act ("MTCA") provides: "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 . . . ." G. L. c. 258, § 2. "The remedies provided under c. 258 are exclusive of any common law remedy." Spring v. Geriatric Auth. of Holyoke, 394 Mass. 274, 283-284 (1985). The statute prescribes that a "civil action shall not be instituted against a public employer . . . unless the claimant shall have first presented his claim in writing . . . within two years after the date upon which the cause of action arose . . . ." G. L. c. 258, § 4. The requirement that a claimant make presentment in accordance with the statutory provisions is to be "applied strictly." Krasnow v. Allen, 29 Mass. App. Ct. 562, 566 (1990) (citations omitted). The purpose for such strict application "is a recognition of the need for public bodies to make prompt investigations in the interest of disproving fraudulent claims and settling meritorious ones out of court, and the desirability of enabling them to take preventative steps to avoid future claims." Id. at 567. It is for these reasons that the "strict presentment requirement is a statutory prerequisite for recovery" under the MTCA. Shapiro v. Worcester, 464 Mass. 261, 267 (2013).

In determining when a cause of action arose for presentment purposes, the court employs the familiar principles applicable to statute of limitations questions. Dinsky v. Framingham, 386 Mass. 801, 803 (1982) ("We see no reason why the rules applied to the accrual of a cause of

action under G. L. c. 258 should be different from the general rules we apply to the accrual of actions under G. L. c. 260."). A cause of action accrues on the occurrence of an event that puts the plaintiff on notice of the claim. White v. Peabody Constr. Co., 386 Mass. 121, 129-130 (1982). "The 'notice' required is not notice of every fact which must eventually be proved in support of the claim." Id. at 130. Under the discovery rule, there are three circumstances in which a statute of limitations may be tolled: "where a misrepresentation concerns a fact that was 'inherently unknowable' to the injured party, where a wrongdoer breached some duty of disclosure, or where a wrongdoer concealed the existence of a cause of action through some affirmative act done with the intent to deceive." Patsos v. First Albany Corp., 433 Mass. 323, 328 (2001).

For an "inherently unknowable" cause of action, the discovery rule provides that the action accrues on the date on which the plaintiff discovers, or reasonably should discover, that he or she has been harmed, and that the defendant's conduct caused such harm.[8] Harrington v. Costello, 467 Mass. 720, 725-727 (2014); Bowen v. Eli Lilly & Co., 408 Mass. 204, 205-206 (1990). In some circumstances, reasonable notice that a particular act of another person may have caused the harm "creates a duty of inquiry and starts the running of the statute of limitations" where the defendant's identity is reasonably ascertainable to the injured party. Bowen, 408 Mass. at 210-211 (concluding statute of limitations ran where plaintiff was under duty of inquiry to discover "readily available" identity of defendant product manufacturer); White, 386 Mass. at 130 (concluding statute of limitations ran where defendant's identity was a matter of public record).

[8] "The 'inherently unknowable' standard is no different from and is used interchangeably with the 'knew or should have known' standard." Sheila S. v. Commonwealth, 57 Mass. App. Ct. 423, 426 n.8 (2003) (citations omitted).

III. Analysis

This court concludes that Magliacane's cause of action against the City arose by September of 2015 at the latest, and, therefore, that she failed to effectuate timely presentment of her claims against the City as required under G. L. c. 258, § 4. White, 386 Mass. at 129-130. Magliacane presented her claims to the City through counsel by letter dated October 12, 2017. Accordingly, to satisfy the strict presentment obligation, her cause of action must not have arisen prior to October 12, 2015. For the reasons explained below, even when making every reasonable inference from the well-pleaded factual allegations in her favor, this court concludes that Magliacane either knew or should have known by September of 2015 that the City's alleged conduct, in part, caused the harm underlying her claims. Bowen, 408 Mass. at 205-206; White, 386 Mass. at 129-130.

Magliacane alleges with great specificity many dates or, at minimum, general timeframes throughout her one-hundred and thirty-two-paragraph complaint. Her allegations are noticeably vague, however, with regard to the three distinct points in time at which her copper heating coils failed, requiring her to undertake three separate replacements to remedy the recurring issue. Indeed, Magliacane fails to allege even in the most general terms the timeframe in which she allegedly suffered the first, second, and third issues with her water heating system, and its copper heating coils in particular. From this perspective, it is not reasonable to infer from Magliacane's allegations that she did not know of *some* issue repeatedly affecting her copper heating coils by the time the City ultimately made its public announcement in September of 2015. In that announcement, the City identified that the corrosion issue was generally due to the condition of its water—whether naturally or unnaturally occurring. Consequently, even giving every indulgence in favor of Magliacane at this stage, this court concludes that her cause of action

against the City arose, by the latest point, in September of 2015. Bowen, 408 Mass. at 205-206; White, 386 Mass. at 129-130.

That the City continued to disclaim liability after the September 2015 acknowledgment did not obviate Magliacane's duty of inquiry, nor did it neutralize the facts of which she had notice. Even at the most basic level, Magliacane knew (or should have known) of two crucial facts giving rise to a reasonable duty of inquiry under the circumstances: that her copper water heating coils failed prematurely and that the City's water was a potential cause. Bowen, 408 Mass. at 210. Stated differently, she knew of the harm and should have known that the City's conduct contributed to that harm. Harrington, 467 Mass. at 725-727. Again, the notice required to start the clock on her claims "is *not* notice of every fact which must eventually be proved in support of the claim." White, 386 Mass. at 130 (emphasis added). Whatever protection the discovery rule afforded her up until then was extinguished in September of 2015. Harrington, 467 Mass. at 725-727. By that time, even accepting her own version of the events, she had copper coils fail multiple times and she learned that the corrosion issue was, to some extent, attributable to the condition of the City's water.

Magliacane contends that G. L. c. 258 "does not apply to suits against a municipality acting in a proprietary or commercial capacity such as with respect to the sale of water." It is true, as Magliacane notes, that "in undertaking to supply water at a price, a municipality is not performing a governmental function but is engaging in trade . . . ." Harvard Furniture Co. v. Cambridge, 320 Mass. 227, 229 (1946) (citations omitted); see Gans Tire Sales Co. v. Chelsea, 16 Mass. App. Ct. 947, 948 (1983) ("So far as [a municipality] undertakes to sell water for private consumption the city engages in commercial venture"). That maxim, however, does not mean that c. 258 has no application to Magliacane's claims against the City. Magliacane cites

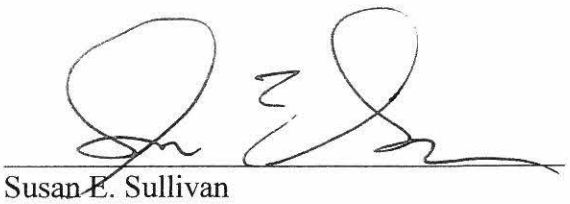
Mattoon v. Pittsfield, 1996 WL 34393584 (Mass. Super. Ct. Jan. 17, 1996) (Spina, J.), in support of her argument.[9] That decision, however, is not binding authority, and this court declines to follow its rationale in this case. Magliacane does not provide, and this court is not aware of, any binding authority in Massachusetts establishing that c. 258 has no application to circumstances in which a municipality sells water to its residents. The scope of c. 258, including any recognized exemptions thereto, is already well defined in the statutory scheme. See G. L. c. 258, § 10. Magliacane's claims against the City plainly involve "the negligent or wrongful act or omission of [a] public employee," which fits squarely within the confines of the MTCA. G. L. c. 258, § 2.

It is for these reasons that this court concludes Magliacane's cause of action against the City arose in September of 2015. As she did not make presentment until October 12, 2017, under the strict application required in such cases, her claims against the City are now time barred. Accordingly, the City's motion to dismiss must be allowed as to Counts I and III in the complaint. Iannacchino, 451 Mass. at 636.

[9] On appeal, the Appeals Court did not reach the issue of whether the municipality was immune from liability under c. 258. Mattoon v. Pittsfield, 56 Mass. App. Ct. 124, 142 (2002).

ORDER

For the reasons stated above, this court hereby **ORDERS** that the City of Gardner's Motion to Dismiss Plaintiff's Complaint Under Rule 12(b)(6) and for Entry of Separate and Final Judgment Under Rule 54(b) be **ALLOWED**.



Susan E. Sullivan
Justice of the Superior Court

Dated: June , 2018

FINAL JUDGMENT (Pursuant to MASS. R. CIV. P. 54 (b))	Trial Court of Massachusetts The Superior Court
DOCKET NUMBER 1785CV02005	Dennis P. McManus, Clerk of Courts
CASE NAME Janice Magliacane, Individually and on behalf of others similarly situated vs. City of Gardner et al	COURT NAME & ADDRESS Worcester County Superior Court 225 Main Street Worcester, MA 01608

JUDGMENT FOR THE FOLLOWING DEFENDANT(S)

City of Gardner

JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S)

Janice Magliacane, Individually and on behalf of others similarly situated

This action came on before the Court, Hon. Susan E Sullivan, presiding, and upon above named defendant(s) Motion for Entry of Separate and Final Judgment pursuant to Mass. R. Civ. P. 54(b), and the Court having found and determined that there is no just reason for delay in the entry of final judgment and therefore allowed said motion, and upon consideration thereof,

It is **ORDERED AND ADJUDGED**:

That the complaint of the plaintiff(s) named above be and hereby is **DISMISSED** against the defendant(s) named above, with statutory costs.

DATE JUDGMENT ENTERED	CLERK OF COURTS/ ASST. CLERK
06/21/2018	X

Date/Time Printed: 06-21-2018 15:17:43

SCV078: 10/2016

Entered and Copies Mailed 6/27/18

ALM GL ch. 258, § 4

Current through Act 321 of the 2018 Legislative Session.

Annotated Laws of Massachusetts > PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES (Chs. 211 - 262) > TITLE IV CERTAIN WRITS AND PROCEEDINGS IN SPECIAL CASES (Chs. 246 - 258E) > TITLE IV CERTAIN WRITS AND PROCEEDINGS IN SPECIAL CASES (Chs. 246 — 258E) > Chapter 258 Claims and Indemnity Procedure for the Commonwealth, its Municipalities, Counties and Districts and the Officers and Employees Thereof (§§ 1 — 14)

§ 4. Prerequisites to Civil Action — Written Notice; Denial of Claim; Limitation of Actions.

A civil action shall not be instituted against a public employer on a claim for damages under this chapter 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, and such claim shall have been finally denied by such executive officer in writing and sent by certified or registered mail, or as otherwise provided by this section; provided, however, that a civil action against a public employer which relates to the sexual abuse of a minor, as provided in section 4C of chapter 260, shall be governed by section 4C½ of said chapter 260 and shall not require presentment of such claim pursuant to this section. The failure of the executive officer to deny such claim in writing within six months after the date upon which it is presented, or the failure to reach final arbitration, settlement or compromise of such claim according to the provisions of section five, shall be deemed a final denial of such claim. No civil action shall be brought more than three years after the date upon which such cause of action accrued; provided, however, that an action which relates to the sexual abuse of a minor, as defined in said section 4C of said chapter 260, shall be governed by said section 4C½ of said chapter 260. Disposition of any claim by the executive officer of a public employer shall not be competent evidence of liability or amount of damages.

Notwithstanding the provisions of the preceding paragraph, in the case of a city or town, presentment of a claim pursuant to this section shall be deemed sufficient if presented to any of the following: mayor, city manager, town manager, corporation counsel, city solicitor, town counsel, city clerk, town clerk, chairman of the board of selectmen, or executive secretary of the board of selectmen; provided, however, that in the case of the commonwealth, or any department, office, commission, committee, council, board, division, bureau, institution, agency or authority thereof, presentment of a claim pursuant to this section shall be deemed sufficient if presented to the attorney general.

The provisions of this section shall not apply to such claims as may be asserted by third–party complaint, cross claim, or counter–claim, or to small claims brought against housing authorities pursuant to sections twenty–one to twenty–five, inclusive, of chapter two hundred and eighteen; provided however, that no small claim shall be brought against a housing authority more than three years after the date upon which the cause of action arose.

History

1978, 512, § 15; 1987, 343, § 2; 1988, 217; 1989, 161; 2014, 145, §§ 1, 2.

ALM GL ch. 258, § 10

Current through Act 321 of the 2018 Legislative Session.

Annotated Laws of Massachusetts > PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES (Chs. 211 - 262) > TITLE IV CERTAIN WRITS AND PROCEEDINGS IN SPECIAL CASES (Chs. 246 - 258E) > TITLE IV CERTAIN WRITS AND PROCEEDINGS IN SPECIAL CASES (Chs. 246 — 258E) > Chapter 258 Claims and Indemnity Procedure for the Commonwealth, its Municipalities, Counties and Districts and the Officers and Employees Thereof (§§ 1 — 14)

§ 10. Applicability of §§ 1-8; Certain Actions Excepted.

The provisions of sections one to eight, inclusive, shall not apply to:—

(a) any claim based upon an act or omission of a public employee when such employee is exercising due care in the execution of any statute or any regulation of a public employer, or any municipal ordinance or by–law, whether or not such statute, regulation, ordinance or by–law is valid;

(b) 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;

(c) any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with advantageous relations or interference with contractual relations;

(d) any claim arising in respect of the assessment or collection of any tax, or the lawful detention of any goods or merchandise by any law enforcement officer;

(e) any claim based upon the issuance, denial, suspension or revocation or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization;

(f) any claim based upon the failure to inspect, or an inadequate or negligent inspection, of any property, real or personal, to determine whether the property complies with or violates any law, regulation, ordinance or code, or contains a hazard to health or safety, except as otherwise provided in clause (1) of subparagraph (j).

(g) any claim based upon the failure to establish a fire department or a particular fire protection service, or if fire protection service is provided, for failure to prevent, suppress or contain a fire, or for any acts or omissions in the suppression or containment of a fire, but not including claims based upon the negligent operation of motor vehicles or as otherwise provided in clause (1) of subparagraph (j).

(h) any claim based upon the failure to establish a police department or a particular police protection service, or if police protection is provided, for failure to provide adequate police protection, prevent the commission of crimes, investigate, detect or solve crimes, identify or apprehend criminals or suspects, arrest or detain suspects, or enforce any law, but not including claims based upon the negligent operation of motor vehicles, negligent protection, supervision or care of persons in custody, or as otherwise provided in clause (1) of subparagraph (j).

(i) an claim based upon the release, parole, furlough or escape of any person, including but not limited to a prisoner, inmate, detainee, juvenile, patient or client, from the custody of a public employee or employer or their agents, unless gross negligence is shown in allowing such release, parole, furlough or escape.

(j) any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer. This exclusion shall not apply to:

(1) any claim based upon explicit and specific assurances of safety or assistance, beyond general representations that investigation or assistance will be or has been undertaken, made to the direct victim or a member of his family or household by a public employee, provided that the injury resulted in part from reliance on those assurances. A permit, certificate or report of findings of an investigation or inspection shall not constitute such assurances of safety or assistance; and

(2) any claim based upon the intervention of a public employee which causes injury to the victim or places the victim in a worse position than he was in before the intervention; and

(3) any claim based on negligent maintenance of public property;

(4) any claim by or on behalf of a patient for negligent medical or other therapeutic treatment received by the patient from a public employee.

Nothing in this section shall be construed to modify or repeal the applicability of any existing statute that limits, controls or affects the liability of public employers or entities.

History

1978, 512, § 15; 1993, 495, § 57.

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ALM GL ch. 260, § 12

Current through Act 321 of the 2018 Legislative Session.

Annotated Laws of Massachusetts > PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES (Chs. 211 - 262) > TITLE V STATUTES OF FRAUDS AND LIMITATIONS (Chs. 259 - 260) > TITLE V STATUTES OF FRAUDS AND LIMITATIONS (Chs. 259 — 260) > Chapter 260 Limitation of Actions (§§ 1 — 36)

§ 12. Tolling or Suspension — Fraudulent Concealment.

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.

History

RS 1836, 120, § 12; GS 1860, 155, § 12; PS 1882, 197, § 14; RL 1902, 202, § 11.

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