**COMMONWEALTH OF MASSACHUSETTS**
**APPEALS COURT**

**2019-P-0107**

**KATHERINE DRAKE,**
**Appellant**

**v.**

**TOWN OF LEICESTER,**
**Appellee**

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**ON APPEAL FROM AN ORDER OF**
**THE WORCESTER SUPERIOR COURT**

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# BRIEF FOR THE APPELLANT

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**March 4, 2019**

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## ISSUES PRESENTED

Whether the lower court erred by allowing Appellee's ("Town") motion to dismiss Appellant's ("Drake") complaint.

## STATEMENT OF THE CASE

On March 26, 2018, Drake filed a civil complaint against Town seeking compensation for injuries and damages arising from a slip and fall accident on January 19, 2016 from the accumulation of snow and ice at Town's high school. (R/2, 19-29).[1] Drake's complaint alleged her written notice to Town pursuant to G.L. c. 258, § 4 and G.L. c. 84, §§ 18-21 by her correspondence dated January 19, 2018. (R/20, 22-27).

Town moved to dismiss Drake's complaint pursuant to Mass. R. Civ. P. 12(b)(6) for reasons that Drake failed to timely make presentment pursuant to G.L. c. 258, § 4.

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[1] Citations to Appellant's Record Appendix are as (R/__).

(R/10). A hearing was conducted on Town's motion on August 14, 2018 and an order allowing Town's motion entered on September 27, 2018. (R/3, 47). A judgment dismissing Drake's complaint issued on October 2, 2018; (R/3-4, R/42); and Drake file a notice of appeal on October 15, 2018 (R/4, 48-49). Drake's appeal was entered on January 22, 2019 and her civil docketing statement was filed on February 4, 2019. (R/50-53).

## STATEMENT OF FACTS

According to the facts alleged in Drake's complaint, on January 19, 2016, Drake slipped and fell at the Leicester High School. (R/20). Town operates the school and also maintains the property on which the school is located. (R/19). Drake was lawfully present at the school while it was in session as she was there to pick up her grandson. (R/19). While attempting to enter the school, Drake slipped on an accumulation of snow and ice and

sustained physical injuries—including a fractured knee and wrist. (R/20). Drake's fall and resulting injuries were caused by Town's failure to maintain the school's property in a reasonable and safe manner. (R/20).

By correspondence dated January 19, 2018, Drake provided notice to Town of her personal injuries and damages pursuant to G.L. c. 258, § 4 and G.L. c. 84, §§ 18-21. (R/20, 22-27). Town's offices were closed on January 19, 2018, and Town received Drake's notice on January 22, 2018. (R/20, 28-29). By letter, dated February 7, 2018, Town denied liability for Drake's personal injuries and damages and Drake filed her civil complaint with the Worcester Superior Court on March 26, 2018. (R/2, 20).

## ARGUMENT

**THE LOWER COURT ERRED BY ENTERING AN ORDER DISMISSING THE COMPLAINT BECAUSE THE ALLEGATIONS CONTAINED THEREIN DEMONSTRATE DRAKE PROVIDED TIMELY NOTICE FOR HER CAUSE OF ACTION UNDER THE MASSACHUSETTS TORT CLAIMS ACT**

### A. Standard of Review For Appeal of Allowed Motion to Dismiss Complaint and Standard for Determining Motion to Dismiss Complaint

The standard for appellate review of the allowance of a motion to dismiss is de novo. Harhen v. Brown, 431 Mass. 838, 845 (2000). When determining a motion to dismiss a complaint for failure to state claim, allegations within Drake's complaint are accepted as true, and reasonable inferences drawn therefrom are taken in Drake's favor. Curtis v. Chamber, 458 Mass. 674, 676 (2011), citing Warner-Lambert Co. v. Execuquest Corp., 427 Mass. 46, 47 (1998).

Dismissal of Drake's complaint under Mass.R.Civ.P. 12(b)(6) is only appropriate if "it appears beyond doubt that [Drake] can prove no set of facts in support of [her] claim which would entitle [her] to relief." Nader v. Citron, 372 Mass. 96, 98 (1977), quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see Iannacchino v. Ford Motor Co., 451 Mass. 623,

636 (2008). In arriving at such a determination, the motion judge must confine inquiry to the four corners of the complaint and take as true all allegations within the complaint, drawing all permissible inferences in the Drake's favor. See Parker v. Chief Justice for Admn. & Mgmt. of the Trial Ct., 67 Mass. App. Ct. 174, 176 (2006); see also Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007)(to survive a motion to dismiss under rule 12(b)(6), only "plausible entitlement to relief is needed); Gibbs Ford, Inc. v. United Truck Leasing Corp., 399 Mass. 8, 13 (1987)(doubting whether particular claim is provable is not proper basis to dismiss complaint under Mass.R.Civ.P. 12(b)(6)). Exhibits attached to a complaint may also be considered when determining a motion to dismiss. Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000), quoting 5A Wright & Miller, Federal Practice and Procedure § 1357, at 299 (1990). Under certain circumstances, a court

may also consider "documents the authenticity of which are not disputed by the parties" and "documents sufficiently referred to in the complaint." Curran v. Cousins, 509 F.3d 36, 44 (1st Cir.2007).

**B. Presentment Pursuant to G.L. c. 258, § 4 Was Adequate**

Prior to filing a civil negligence action against a public employer for damages, a claimant must "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. . . ." G.L. c. 258, § 4. Town did not dispute Drake's presentment directed to the proper executive officer; it limited its motion to dismiss Drake's complaint to the issue of timeliness. (R/10, 12-16).

Drake's cause of action arose on January 19, 2016, the date of her fall. Therefore, presentment of her claims must have been "within two years after [January 19, 2018]." G.L. c. 258, § 4. See Gavin v. Tewksbury State Hospital, 83 Mass. App. Ct. 139, 143 (2013), further review granted, 468 Mass. 123 (2014)("parties do not dispute that Gavin's death on August 11, 2008, triggered commencement of the two-year presentment period, and that proper presentment must have occurred by August 11, 2010"); Pruner v. Clerk of Superior Court, 382 Mass. 309 (1981)("assuming the cause of action arose on October 7, 1977, plaintiff had until October 7, 1979, to comply with the requirements of G. L. c. 258, Section 4"). Town contends that Drake's presentment must have been "received" by January 19, 2018,[2] notwithstanding the legislature's decision against defining

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[2] R/14-15.

"presentment" as such and notwithstanding the lack of any supporting appellate authority.

There are two "equally important" purposes of the Massachusetts Tort Claims Act: "to allow plaintiffs with valid causes of action to recover in negligence against governmental entities . . . [and] to preserve the stability and effectiveness of government by providing a mechanism which will result in payment of only those claims against governmental entities which are valid, in amounts which are reasonable and not inflated." Gavin v. Tewksbury State Hospital, 468 Mass. 123, 131 (2014), quoting Vasys v. Metropolitan Dist. Comm'n, 387 Mass. 51, 57 (1982). The Supreme Judicial Court recently reviewed the purpose and legislative intent of the Act when called upon to decide the meaning of a "claimant" and deemed "it significant that, in the [A]ct, the Legislature did not choose to define 'claimant' in the restricted manner suggested by the Commonwealth despite including a section that

contains very specific definitions of many of the act's significant, frequently used terms." Gavin v. Tewksbury State Hospital, 468 Mass. at 128-135; see, G. L. c. 258, § 1. "The absence of a statutory definition is relevant because interpreting 'claimant' in its ordinary sense still gives full effect to all provisions of the act." Gavin v. Tewksbury State Hospital, 468 Mass. at 130, citing Bankers Life & Cas. Co. v. Commissioner of Ins., 427 Mass. 136, 140 (1998)(statute must be construed to give effect to all provisions). Because a liberal interpretation of the "presentment requirement best achieves balance among act's purposes; Vasys v. Metropolitan Dist. Comm'n, supra, a 'claimant' under the Act included an 'estate.'" Gavin v. Tewksbury State Hospital, 468 Mass. at 132.

While Town contends that strict compliance with Act's presentment requirement mandates dismissal of Drake's complaint, the requirements of presentment have not been

strictly construed when analyzing the timeliness of presentment. See Weaver v. Commonwealth, 387 Mass. 43, 44-47 (1982)(strict compliance with presentment requirement of the Act held only for cases in which notice was sent to wrong party); Bellanti v. Boston Pub. Health Comm'n, 70 Mass. App. Ct. 401, 408 (2007)(same). Unlike the Federal Tort Claims Act,[3] under which "a claim shall be deemed to have been presented when a Federal agency receives from a claimant . . . written notification of an incident", the Massachusetts legislature chose to omit a definition of "presented" in G.L. c. 258, § 1. See also 38 C.F.R. § 14.604(a) and (b)(an individual filing a claim against United States based upon the negligence of an employee of the Department of Veterans Affairs acting within the scope of his or her employment, must first "present" the

[3] 28 U.S.C. § 2401(b)(prior to filing a tort action against the United States, the claim must first be presented to the applicable

claim, and such a claim is "deemed to have been presented when the Department of Veterans Affairs receives" from a claimant" written notification of the incident)(emphasis added).

A statute is interpreted according to the intent of the Legislature, which is taken from the statute's words, "construed by the ordinary and approved usage of the language" and "considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished". Ciani v. MacGrath, 481 Mass. 174, 178 (2019), citing Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (2006); G. L. c. 4, § 6, Third. Massachusetts courts do "not adopt a literal construction of a statute if the consequences of doing so are 'absurd or unreasonable,' such that it could not be what the Legislature intended." Ciani v. MacGrath, 481 Mass. at 178,

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federal agency within two years after the claim accrues).

quoting Sharris v. Commonwealth, 480 Mass. 586, 594 (2018), Attorney Gen. v. School Comm. of Essex, 387 Mass. 326, 336 (1982). If statutory language is inconclusive for its interpretation, then an analysis may rely upon extrinsic sources, including the legislative history and other statutes. Ciani v. MacGrath, 481 Mass. at 178. See Ortiz v. Hampden Cnty., 16 Mass. App. Ct. 138, 139 (1983)(reliance placed upon interpretations of Federal Tort Claims Act and Alaska caselaw to interpret Massachusetts statute). When seeking the intent of the Legislature, the goal is to reach a conclusion "consonant with sound reason and common sense. Ciani v. MacGrath, 481 Mass. at 178, quoting Commonwealth v. Curran, 478 Mass. 630, 633-634 (2018).

In support of its contention, Town relies upon the 1995 superior court case of Fredette v. Respite House of Fitchburg, 3 Mass. L. Rptr. 664 (Mass. Super. Ct. 1995)("Fredette"), which denied a motion for summary judgment based on

an issue of fact as to when presentment letters were received. In Fredette, the "'trigger date' for the two-year presentment window commencement [was], at the earliest, on September 27, 1987" and several presentment letters, dated September 26, 1987, were sent that were received either on September 27, 1987 or September 28 1987. While Fredette contained issue of fact as to when the presentment letter was received, it did not hold that presentment is complete upon receipt.

But Fredette also recognized that the analytical approach to "fixing the time of accrual of actions under G.L. c. 258 is the same as that employed with respect to ascertainment of the commencement of the running of a statute of limitations under G.L. c. 260. According to, G.L. c. 260, § 2A, "long standing Massachusetts precedent" excludes the date of accrual from the calculation of the limitations period. Poy v. Boutselis, 352 F.3d 479, 484 (1st Cir. 2003); Opinion of the

Justices, 291 Mass. 572, 574 (1935)("computation of time from a date, event or act excludes the day form which the time begins to run"); Pierce v. Tiernan, 280 Mass. 180, 181-182 (1932)(last day of statute of limitations period is anniversary of date cause of action accrued). Under an analytic approach under G.L. c. 260, Drake needed only to file her claim on January 19, 2018, rather than having the Town served with her claim on January 19, 2018.

Even if Drake had mailed her presentment letter several days prior to January 19, 2018, Town's contention implies that unless it actually received it on or before January 19, 2018, Drake's presentment would have been defective under G. L. c. 258, § 4. Adoption of this contention would lead to inconsistent, "absurd or unreasonable" results because delays associated with mailings would have to be construed against the injured party when seeking to provide notice under G. L. c. 258, §

4. See Boswell v. Zephyr Lines, Inc., 414 Mass. 241, 247 (1993)("we must attempt to construe [a statute] in harmony with other related statutes and rules so as to give rise to a consistent body of law"). The lower court opted to rely upon a dictionary definition of "presentment" in dismissing Drake's complaint instead of comparing the Act with its federal counterpart and the express use of "receives" when defining what is meant by "presentment." Additionally, the lower court's analysis didn't take into consideration that Town's offices were closed on January 19, 2018. Therefore, there could have been no receipt of Drake's presentment letter on January 19, 2018 even if Drake hand-delivering her notice of her claim herself, or used a sheriff or constable on that date, or even if Drake's mailed her presentment letter several days in advance of January 19, 2018. If Town had no employees available to receive and investigate Drake's claim on January 19, 2018, it is difficult to understand how receipt

of Drake's presentment letter mailed within two years after her claim accrued would somehow undermine the stability and effectiveness of the Town of Leicester.

In addition to Fredette, Town cites several cases in support of the "strict construction" applied to the presentment rule in G. L. c. 258, § 4. Each case, however, differs from the facts of this case: the mailing of a presentment letter pursuant to G. L. c. 258, § 4 within two years from the date of injury. See, e.g. Coren-Hall v. Massachusetts Bay Transp. Authy., 91 Mass. App. Ct. 77, 79 (2017)(summary judgment should have been granted in favor of defendant where presentment was not made to "executive officer" and actual notice exception could not save this error); Tivnan v. Registrar of Motor Vehicles, 50 Mass. App. Ct. 96, 103 (2000)(plaintiff's claim barred because of failure to make presentment prior to filing suit), citing Spring v. Geriatric Authy. Of Holyoke, 394

Mass. 274, 283-286 (1985)(same); Johnson v. Trustees of Health and Hospitals of City of Boston, 23 Mass. App. Ct. 933, 933-935 (1986)(presentment delivered well past the "within two years" period required by G. L. c. 258, § 4); Weaver v. Commonwealth, 387 Mass. 43, 44-45 (1982)(notice delivered three months after cause of action arose barred claim under the Act because of failure to present claim within two years after date cause of action arose).

Coren-Hall v. Massachusetts Bay Transp. Authy., supra, merely reinforces the recognized principle that strict compliance with the presentment requirement of the Act has been limited to cases in which notice was sent to wrong party. See Weaver v. Commonwealth, supra; Bellanti v. Boston Pub. Health Comm'n, 70 Mass. App. Ct. 401, 408 (2007)(same). As set forth herein, so long as Drake mailed her presentment letter on or before January 19, 2018, she satisfied the requirements of G. L. c. 258, §

4. Because she did so, there was no basis to dismiss Drake's complaint upon grounds for failure to comply with G.L. c. 258, § 4 and Town's motion to dismiss Drake's complaint should have been denied.

## CONCLUSION

For the foregoing reasons, this Honorable Court should enter an Order reversing the lower court's order dismissing Appellant's complaint.

March 4, 2019

Respectfully Submitted,

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# ADDENDUM

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**DUE TO THE PENDING WINTER STORM, THE HOUSE OF REPRESENTATIVES AND SENATE WILL OPEN ON A TWO-HOUR DELAY ON MONDAY, MARCH 4, 2019. OFFICES WILL OPEN AT 11AM.**

**Part III** COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

**Title IV** CERTAIN WRITS AND PROCEEDINGS IN SPECIAL CASES

**Chapter 258** CLAIMS AND INDEMNITY PROCEDURE FOR THE COMMONWEALTH, ITS MUNICIPALITIES, COUNTIES AND DISTRICTS AND THE OFFICERS AND EMPLOYEES THEREOF

**Section 1** DEFINITIONS

Section 1. As used in this chapter the following words shall have the following meanings:?

"Acting within the scope of his office or employment", acting in the performance of any lawfully ordered military duty, in the case of an officer or soldier of the military forces of the commonwealth.

"Executive officer of a public employer", the secretary of an executive office of the commonwealth, or in the case of an agency not within the executive office, the attorney general; the adjutant general of the military forces of the commonwealth; the county commissioners of a county; the mayor of a city, or as designated by the charter of the city; the selectmen of a town or as designated by the charter of the town; and the board, directors, or committee of a district in the case of the public employers of a district, in the case of the Massachusetts Bay Transportation Authority, its general manager and rail and transit administrator, and, in the case of any other public employer, the nominal chief executive officer or board.

"Public attorney", the attorney who shall defend all civil actions brought against a public employer pursuant to this chapter. In the case of the commonwealth he shall be the attorney general; in the case of any county he shall be the district attorney as designated in sections twelve and thirteen of chapter twelve; in the case of a city or town he shall be the city solicitor or town counsel, or, if the town has no such counsel, an attorney employed for the purpose by the selectmen; in the case of a district he shall be an attorney legally employed by the district for that purpose; and, in the case of the Massachusetts Bay Transportation Authority, the attorney shall be the general counsel. A public attorney may also be an attorney furnished by an insurer obligated under the terms of a policy of insurance to defend the public employer against claims brought pursuant thereto.

"Public employee", elected or appointed, officers or employees of any public employer, whether serving full or part-time, temporary or permanent, compensated or uncompensated, and officers or soldiers of the military forces of the commonwealth. For purposes of this chapter, the term "public employee" shall include an approved or licensed foster caregiver with respect to claims against such caregiver by a child in the temporary custody and care of such caregiver or an adult in the care of such caregiver for injury or death caused by the conduct of such caregiver; provided, however, that such conduct was not intentional, or wanton and willful, or grossly negligent. For this purpose, a caregiver of adults means a member of a foster family, or any other individual, who is under contract with an adult foster care provider as defined and certified by the division of medical assistance.

"Public employer", the commonwealth and any county, city, town, educational collaborative, or district, including the Massachusetts Department of Transportation, the Massachusetts Bay Transportation Authority, any duly constituted regional transit authority and the Massachusetts Turnpike Authority and any public health district or joint district or regional health district or regional health board established pursuant to the provisions of section twenty-seven A or twenty-seven B of chapter one hundred and eleven, and any department, office, commission, committee, council, board, division, bureau, institution, agency or authority thereof including a local water and sewer commission including a municipal gas or electric plant, a municipal lighting plant or

cooperative which operates a telecommunications system pursuant to section 47E of chapter 164, department, board and commission, which exercises direction and control over the public employee, but not a private contractor with any such public employer, the Massachusetts Port Authority, or any other independent body politic and corporate. With respect to public employees of a school committee of a city or town, the public employer for the purposes of this chapter shall be deemed to be said respective city or town.

"Serious bodily injury", bodily injury which results in a permanent disfigurement, or loss or impairment of a bodily function, limb or organ, or death.

**DUE TO THE PENDING WINTER STORM, THE HOUSE OF REPRESENTATIVES AND SENATE WILL OPEN ON A TWO-HOUR DELAY ON MONDAY, MARCH 4, 2019. OFFICES WILL OPEN AT 11AM.**

**Part III** COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

**Title IV** CERTAIN WRITS AND PROCEEDINGS IN SPECIAL CASES

**Chapter 258** CLAIMS AND INDEMNITY PROCEDURE FOR THE COMMONWEALTH, ITS MUNICIPALITIES, COUNTIES AND DISTRICTS AND THE OFFICERS AND EMPLOYEES THEREOF

**Section 4** INSTITUTING CLAIMS; FINAL DENIAL; LIMITATION OF ACTIONS

Section 4. 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 4C1/2 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 4C1/2 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.

# 28 CFR § 14.2 - Administrative claim; when presented.

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## § 14.2 Administrative claim; when presented.

**(a)** For purposes of the provisions of 28 U.S.C. 2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident; and the title or legal capacity of the person signing, and is accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

**(b)**

**(1)** A claim shall be presented to the Federal agency whose activities gave rise to the claim. When a claim is presented to any other Federal agency, that agency shall transfer it forthwith to the appropriate agency, if the proper agency can be identified from the claim, and advise the claimant of the transfer. If transfer is not feasible the claim shall be returned to the claimant. The fact of transfer shall not, in itself, preclude further transfer, return of the claim to the claimant or other appropriate disposition of the claim. A claim shall be presented as required by 28 U.S.C. 2401(b) as of the date it is received by the appropriate agency.

**(2)** When more than one Federal agency is or may be involved in the events giving rise to the claim, an agency with which the claim is filed shall contact all other affected agencies in order to designate the single agency which will thereafter investigate and decide the merits of the claim. In the event that an agreed upon designation cannot be made by the affected agencies, the Department of Justice shall be consulted and will thereafter designate an agency to investigate and decide the merits of the claim. Once a determination has been made, the designated agency shall notify

the claimant that all future correspondence concerning the claim shall be directed to that Federal agency. All involved Federal agencies may agree either to conduct their own administrative reviews and to coordinate the results or to have the investigations conducted by the designated Federal agency, but, in either event, the designated Federal agency will be responsible for the final determination of the claim.

**(3)** A claimant presenting a claim arising from an incident to more than one agency should identify each agency to which the claim is submitted at the time each claim is presented. Where a claim arising from an incident is presented to more than one Federal agency without any indication that more than one agency is involved, and any one of the concerned Federal agencies takes final action on that claim, the final action thus taken is conclusive on the claims presented to the other agencies in regard to the time required for filing suit set forth in 28 U.S.C. 2401(b). However, if a second involved Federal agency subsequently desires to take further action with a view towards settling the claim the second Federal agency may treat the matter as a request for reconsideration of the final denial under 28 CFR 14.9(b), unless suit has been filed in the interim, and so advise the claimant.

**(4)** If, after an agency final denial, the claimant files a claim arising out of the same incident with a different Federal agency, the new submission of the claim will not toll the requirement of 28 U.S.C. 2401(b) that suit must be filed within six months of the final denial by the first agency, unless the second agency specifically and explicitly treats the second submission as a request for reconsideration under 28 CFR 14.9(b) and so advises the claimant.

**(c)** A claim presented in compliance with paragraph (a) of this section may be amended by the claimant at any time prior to final agency action or prior to the exercise of the claimant's option under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or his duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the agency shall have six months in which to make a final disposition of the claim as amended and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until six months after the filing of an amendment.

[Order No. 870-79, 45 FR 2650, Jan. 14, 1980, as amended by Order No. 960-81, 46 FR 52355, Oct. 27, 1981; Order No. 1179-87, 52 FR 7411, Mar. 11, 1987]

# 38 CFR § 14.604 - Filing a claim.

- CFR

prev | next

## § 14.604 Filing a claim.

**(a)** Each person who inquires as to the procedure for filing a claim against the United States, predicated on a negligent or wrongful act or omission of an employee of the Department of Veterans Affairs acting within the scope of his or her employment, will be furnished a copy of SF 95, Claim for Damage, Injury, or Death. The claimant will be advised to submit the executed claim directly to the Regional Counsel having jurisdiction of the area wherein the occurrence complained of took place. He or she will also be advised to submit the information prescribed by 28 CFR 14.4 to the extent applicable. If a claim is presented to the Department of Veterans Affairs which involves the actions of employees or officers of other agencies, it will be forwarded to the Department of Veterans AffairsGeneral Counsel, for appropriate action in accord with 28 CFR 14.2.

**(b)** A claim shall be deemed to have been presented when the Department of Veterans Affairs receives from a claimant, his or her duly authorized agent or legal representative, an executed SF 95, or other written notification of an incident, together with a claim for money damages, in a sum certain, for damage to or loss of property or personal injury or death: *Provided, however,* That before compromising or settling any claim, an executed SF 95 shall be obtained from the claimant.

**(c)** A claim presented in compliance with paragraphs (a) and (b) of this section may be amended by the claimant at any time prior to final Department of Veterans Affairs action or prior to the exercise of the claimant's option under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or his or her duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the Department of Veterans Affairs shall have 6 months in which to make a final disposition of the claim as amended and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until 6 months after the filing of the amendment.

(Authority: 28 U.S.C. 1346(b)(1), 2401(b), 2671-2680; 38 U.S.C. 512, 515; 28 CFR part 14, appendix to part 14)

# 28 U.S. Code § 2401. Time for commencing action against United States

U.S. Code Notes Table of Popular Names

**(a)** Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

**(b)** A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

(June 25, 1948, ch. 646, 62 Stat. 971; Apr. 25, 1949, ch. 92, § 1, 63 Stat. 62; Pub. L. 86–238, § 1(3), Sept. 8, 1959, 73 Stat. 472; Pub. L. 89–506, § 7, July 18, 1966, 80 Stat. 307; Pub. L. 95–563, § 14(b), Nov. 1, 1978, 92 Stat. 2389; Pub. L. 111–350, § 5(g)(8), Jan. 4, 2011, 124 Stat. 3848.)

3 Mass.L.Rptr. 664
Superior Court of Massachusetts.

Sheila FREDETTE [1]

v.

RESPITE HOUSE OF FITCHBURG et al. [2]

No. 903105.

May 30, 1995.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT COMMONWEALTH OF MASSACHUSETTS' MOTION FOR SUMMARY JUDGMENT

TOOMEY, Judge.

## INTRODUCTION

*1 The plaintiff, Sheila Fredette, as next friend of her son David Fredette, brought this suit after David was allegedly raped by a roommate while staying at the Respite House of Fitchburg ("Respite House"). The matter is before the court on the defendant Commonwealth of Massachusetts' motion for summary judgment. For reasons stated *infra,* the motion is allowed in part and denied in part.

## BACKGROUND

David Fredette was a twenty-one year old mentally retarded man who was allegedly raped by Frank Eldridge during the late evening and early morning hours of September 25-26, 1987. David and Eldridge were roommates at the Respite House, where both men were staying temporarily. Eldridge had a knife and pornographic magazines in the room with him during the attack. Eldridge eventually pleaded guilty to indecent assault and battery upon David and was sentenced to serve one year in the Massachusetts House of Corrections.

The Respite House was operated by the Worcester Area Association for Retarded Citizens, Inc., which had a contract with the Commonwealth's Department of Mental Retardation ("DMR") to provide residential respite services to mentally retarded people. According to its regulations, the Respite House could only accept guests who were not at risk to harm themselves or others. David had stayed at the Respite House many times over a number of years.

Roger Kane, an employee of the Herbert Lipton Community Mental Health Center ("the Lipton Center"), a private nonprofit agency, was Eldridge's social worker and had provided therapy to him. Michael Mudd was an employee of the DMR assigned to the Lipton Center, and was Kane's supervisor. Mudd was primarily responsible for referring Eldridge to the Respite House on September 24, 1987.

During the weeks prior to his admission at the Respite House, Eldridge was angry and suicidal. On September 14 and September 17, applications were filed, pursuant to G.L.c. 123, § 12, seeking the temporary hospitalization of Eldridge. On September 14, 1987, physicians at Burbank Hospital noted that he had suicidal ideation with a plan, was carrying a large knife, was suffering from increasing depression and impaired judgment, and was unpredictable with a history of angry outbursts. On September 15, Eldridge attempted to commit suicide by using a sharp knife. Kane's notes from September 17 indicate that Eldridge was restless and angry, that he appeared at risk for being explosive, and that he appeared volatile. Kane's notes from September 18 recite that a number of agencies in which Eldridge was involved, including the Department of Social Services and the Department of Mental Health, had previously met to discuss his case and had recommended long-term inpatient psychiatric treatment. Kane's September 24 notes indicate that Eldridge was upset, explosive, and depressed, and that he threatened to commit suicide. They conclude that Eldridge "is losing control and very agitated."

Karen Reynolds, the director of Respite House, testified at a deposition that, prior to accepting the referral, she was not aware of the DSS and DMR recommendation or of Eldridge's recent deterioration. Had she been informed of those facts, she would probably not have accepted Eldridge to Respite House.

*2 David told his mother, Sheila Fredette, about the rape at his first opportunity when she picked him up on September 27, 1987. Sheila, her husband, and David returned to the Respite House and confronted the staff.

An internal investigation by the DMR followed, resulting in an initial determination that David had fabricated the rape. The Fredettes felt that this conclusion reflected an attempt by the DMR to cover up the incident. Sheila testified at a deposition that, "David knew what was in that report. He knew that they said it did not occur. And that made him very angry. That made him very upset that they didn't believe him." Sheila testified that David had said many times, "They don't believe me."

The Fredettes' former attorney had repeated correspondence with the Commissioner of the Department of Mental Retardation regarding the rape and the investigation that followed. The Fredette's current attorney sent formal presentment letters, pursuant to G.L.c. 258, § 4, to the Attorney General and the Secretary of the Executive Office of Human Services. The presentment letters were dated September 26, 1989. They gave a detailed version of the facts, repeated herein, and stated in part, "The Respite admitted Frank Eldridge at the recommendation of Dr. Roger Kane of the Development Services Unit of the Lipton Mental Health Center ... [Eldridge told the police that] Roger Kane assisted him in the placement at the Respite."

David has a cognitive level, at best, of that of an elementary school child. David's psychologist has indicated that this disability does not allow David to realize that negligence or wrongdoing by the Department of Mental Retardation may have caused him to suffer harm.

In their Second Amended Complaint, the Fredettes allege that the Commonwealth inflicted emotional distress on David through its improper, *post*-incident investigation; that the investigation was negligent; that the Commonwealth negligently failed to ensure that Respite House, *pre*-incident, followed appropriate admissions procedures and supervision of guests; and that the Commonwealth, as Michael Mudd's employer, is liable for Mudd's allegedly reckless or negligent referral of Eldridge to Respite House. The Commonwealth has responded with this motion for summary judgment.

## DISCUSSION

Summary judgment shall be granted where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Cassesso v. Commissioner of Correction,* 390 Mass. 419, 422 (1983); *Community National Bank v. Dawes,* 369 Mass. 550, 553 (1976); Mass.R.Civ.P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the moving party is entitled to judgment as a matter of law. *Pederson v. Time. Inc.*, 404 Mass. 14, 16-17 (1989). Where the party moving for summary judgment does not have the burden of proof at trial, this burden may be met by either submitting affirmative evidence that negates an essential element of the opponent's case or "by demonstrating that proof of that element is unlikely to be forthcoming at trial." *Flesner v. Technical Communication Corp.*, 410 Mass. 805, 809 (1991). *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts establishing the existence of a material fact in order to defeat the motion. *Pederson, supra* at 17.

1. Negligent Investigation

***3** The Fredettes allege that "Public employees of the defendant Commonwealth of Massachusetts ... negligently or recklessly failed to provide a proper or accurate investigation of the above described incident, as was its duty ..."

An investigator's duty runs to the person or entity on whose behalf the investigation is conducted, not to the person being investigated. *O'Connell v. Bank of Boston,* 37 Mass.App.Ct. 416, 419 (1994). Thus, a slipshod or incomplete investigation, without more, is a disservice to the one who commissioned the investigation, not to its subject. *Id.* In this instance, the DMR, not the Fredettes, commissioned the investigation of the rape. The Fredettes therefore do not have standing to bring a claim for negligent investigation, and summary judgment must be granted to the Commonwealth on this Count.

2. Infliction of Emotional Distress

The Fredettes, complaint also alleges that employees of the Commonwealth intentionally[3] or negligently made false accusations as to the conduct and veracity of David, which accusations they knew or should have known would cause and, in fact, did cause David to suffer severe emotional distress and physical harm. The complaint asserts that those accusations constituted extreme and

outrageous conduct, utterly intolerable in a civilized world, and were, therefore, actionable.

The Commonwealth correctly responds that the Fredettes cannot sustain a claim for negligent infliction of emotional distress because they have not offered proof that David suffered physical harm, demonstrative of emotional distress, as a result of the false accusations. *Payton v. Abbott Labs,* 386 Mass. 540, 556 (1982). The Commonwealth is entitled to summary judgment upon plaintiffs' negligent infliction theory of liability.

The Fredettes have, however, offered enough evidence to go forward on a claim of intentional infliction of emotional distress. One who, without privilege to do so and through extreme and outrageous conduct, intentionally causes severe emotional distress to another is subject to liability for intentional infliction of emotional distress. *Agis v. Howard Johnson Co.,* 371 Mass. 140, 142 (1976). To prevail, the Fredettes must demonstrate that employees of the Commonwealth either intended that David suffer emotional distress or knew or should have known that emotional distress was the likely result of their conduct; that the conduct was extreme and outrageous, beyond all possible bounds of decency, and was utterly intolerable in a civilized community; that the employees' actions were the cause of David's distress; and that David's emotional distress was severe and of a nature that no reasonable person could be expected to endure it. *Id.* at 144-45. On the facts asserted at bar, a jury could find that Commonwealth employees should have known that a retarded man would suffer severe emotional distress as a result of being told people in his support system thought he lied about being raped; that the assertion that David lied, under the circumstances, was extreme and outrageous conduct; and that David suffered severe emotional distress as a result. Therefore, summary judgment is denied, insofar as plaintiffs seek recovery for intentional infliction of emotional distress.

3. Liability of Commonwealth for Actions of Respite House

*4 The Fredettes assert that the Commonwealth, through its public employees, is liable for the Respite House staff's failure to ensure appropriate standards and procedures for the admission, monitoring, and supervision of its guests. G.L.c. 258, § 2 allows suits against the Commonwealth as a public employer for the negligent or wrongful acts or omissions of its employees. However, the Commonwealth is not a public employer of its private contractors, G.L.c. 258, § 1, and, consequently, is not liable for the acts or omissions of such contractors. Since the Respite House was such a private contractor, its staff members are not public employees for whose torts the Commonwealth may be answerable. Therefore, summary judgment must be granted to the Commonwealth on this claim.

4. Liability of Commonwealth for Acts and Omissions of Mudd

Finally, the Fredettes allege in their complaint that Mudd, a public employee, recklessly or negligently referred and persuaded Respite House to admit Eldridge and recklessly or negligently failed to inform the Respite House staff of Eldridge's dangerous propensities.

The Commonwealth offers two arguments that summary judgment should be granted in its favor on the claims which advance those allegations. First, the Commonwealth maintains that the Fredettes failed to comply with the presentment requirements of the Massachusetts Torts Claims Act, G.L.c. 258 ("the M.T.C.A."). Second, the Commonwealth contends that it is immune from liability because Mudd's alleged acts or omissions come under the discretionary function exception to liability under the M.T.C.A. Neither argument possesses merit.

A. The Presentment Issues

G.L.c. 258, § 4 requires that a claim under the M.T.C.A. be presented to an appropriate executive officer of the Commonwealth within two years of the date the cause of action arose. The Commonwealth now asserts both that the presentment letters given to it by the Fredettes did not include allegations of wrongful acts by Mudd and that the letters were not timely. The Commonwealth argues that, for either reason, the Court should dismiss the claims.

The M.T.C.A. does not mandate the contents of a presentment letter or otherwise specify the inclusions necessary for it to be legally effective. The purpose of presentment is "to ensure that the responsible public official receives notice of the claim so that the official can investigate to determine whether or not a claim is valid, preclude payment of inflated or nonmeritorious claims, settle valid claims expeditiously, and take steps to ensure that similar claims will not be brought in

the future." *Tambolleo v. Town of West Boylston,* 34 Mass.App.Ct. 526, 532 (1993). Presentment requirements should not become a fetish. *Carifio v. Watertown,* 27 Mass.App.Ct. 571, 574-75, 576 (1989) (where the date of an allegedly tortious incident was inadvertently left off a presentment letter, the presentment is still valid because the Commonwealth could discover this date by means of a simple telephone call or letter inquiry).

*5 In the instant case, the presentment letter mistakenly stated that Kane was responsible for the allegedly tortious referral of Eldridge to Respite House. In fact, Mudd made the referral. The misstatement may be significant because, although Mudd is an employee of the Commonwealth, Kane is not. The Commonwealth is not liable for torts committed by Kane, and, accordingly, the presentment letter did not, in a literal sense, provide the Commonwealth notice that it was potentially liable for the negligent referral.

Such a view, however, reads the presentment requirements too narrowly. The Commonwealth, in the course of even minimal investigation, would surely have discovered its potential liability. If the Commonwealth had taken the simple step of inquiring as to whether or not Kane was one of its employees, it would have learned that his supervisor, Mudd, was a Commonwealth employee, and that the Commonwealth was, through that employment relationship, potentially liable for the referral. Further, if the Commonwealth had investigated, even in the most cursory manner, the events leading up to the assault, it would have undoubtedly learned from Respite House employees that its employee, Mudd, made the referral. Finally, if the Commonwealth had investigated the allegations, in the same presentment letter, of torts connected with the DMR's internal investigation of the rape, it would have discovered that Mudd made the referral.

The circumstances at bar are analogous to the inadvertent and harmless omission in *Carifio.* As in *Carifio,* the instant presentment letter stated facts sufficient to put the Commonwealth on reasonable notice as to its potential liability for the referral. The presentment *sub judice* met the purpose stated in *Tambolleo* of noticing public officials with respect to possible claims against the Commonwealth and provides no reason to relieve the Commonwealth of the consequences of its inattention. The Commonwealth is, consequently, not entitled to summary judgment on grounds that the contents of the presentment were not sufficiently focused.

The Commonwealth also asserts that the claims for negligent referral are barred because the presentment letters were not timely. The M.T.C.A. requires that the claims be presented "within two years after the date upon which the cause of action arose." G.L.c. 258, § 2. However, the analytical approach to be employed in fixing the time of accrual of actions under G.L.c. 258 is the same as that employed with respect to the ascertainment of the commencement of the running of a statute of limitations under G.L.c. 260. *Dinsky v. Framingham,* 386 Mass. 801, 803 (1982). The approved analysis includes the "discovery" rule, under which a cause of action for an inherently unknowable wrong does not accrue until the injured person knows, or in the exercise of reasonable diligence should know, of the facts giving rise to the cause of action. *Id.* A statute of limitations under G.L.c. 260, and, *a priori,* the M.T.C.A., is tolled by "any mental condition which precludes the plaintiff's understanding the nature or effects of his acts and thus prevents him from comprehending his legal rights."[4] *McGuinness v. Cotter,* 412 Mass. 617, 625 & f.n. 9 (1992).

*6 The rape occurred during the early morning hours of September 25-26, 1987. In the circumstances of David's disability and his inability to understand, even now, that the actions by the Commonwealth caused him to suffer harm, the law tolling the presentment requirement compels the conclusion that the trigger date for the two-year presentment window commenced, at the earliest, on September 27, 1987 when David first revealed the assault to one able to comprehend and give voice to his interests. Cf. G.L.c. 260, § 7.

The Fredettes sent to the Commonwealth three identical presentment letters, each dated September 26, 1989. The Commonwealth submitted evidence in the form of affidavits from its records-keepers that it did not receive the letters until September 28, September 29, and October 2, 1989, respectively. The Fredettes have produced return postal receipts showing delivery dates of September 27. They have also referred to the Commonwealth's exhibit copy of one of the presentment letters it received, which has a stamp on it reading "CORRESPONDENCE OFFICE 89 SEP 28 AM 2:46." The Fredettes correctly point out that a jury could infer that the Commonwealth actually received the letter on September 27, 1989, prior

to the close of the post office, but that its mailroom did not open the letter until the early morning hours of September 28. The Fredettes have produced enough evidence, in the discovery record, to send the issue of the date the Commonwealth received the presentment letters to a jury. There being a genuine issue of material fact as to the date of receipt, the Commonwealth's motion for summary judgment, based on its assertion of an untimely presentment, must be rejected.

B. The Discretionary Function Issue

Finally, the Commonwealth argues that it is immune from liability for Mudd's allegedly negligent referral because Mudd's action was a discretionary function under G.L.c. 258, § 10(b). That statute protects the government from liability 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 employee, acting within the scope of his office or employment, whether or not the discretion involved is abused." *Id.*

In deciding whether there is governmental immunity under this section, the court is to employ a two-step analysis. The first step is to determine whether the government employee had any discretion at all as to what course of conduct to follow. *Harry Stoller & Co. v. Lowell,* 412 Mass. 139, 141 (1992). If discretion was permitted the employee, the second step involves a determination as to whether the discretion was of a sort for which § 10(b) provides immunity. *Id.*

The Supreme Judicial Court, in *Whitney v. Worcester,* 373 Mass. 208 (1977), addressed the second *Harry Stoller* question.[5] *Whitney* observed that immunity applies to "those functions which rest on the exercise of judgment and discretion and represent planning and policymaking," and does not apply to "those functions which involve the implementation and execution of such governmental policy or planning." *Id.* at 217. Thus, the government is immune from negligence suits based upon the planning of sewers, but may be liable for negligence in their construction and maintenance. *Id.* In examining whether liability attaches to particular governmental acts or omissions, the following questions may be asked:

> *7 Was the injury-producing conduct an integral part of governmental policy-making or planning? Might the imposition of tort liability jeopardize the quality and efficiency of the governmental process? Could a judge or jury review the conduct in question without usurping the power and responsibility of the legislative or executive branches? Is there an alternate action for damages? ... Other relevant considerations are the reasonable expectations of the injured person with respect to his relationship to the governmental entity in question, the nature of the duty running from the government to the governed in the particular case, and the nature of the injury.
>
> *Id.* at 219-20. Application of the Whitney analytic method to the alleged conduct of the government employee at bar suggests the conclusion that his conduct was implementative, and not creative, in nature.

The Supreme Judicial Court has held that where a government employee, whose duties include placing Department of Mental Health clients in short-term housing, fails to warn a private rooming-house operator that a client he referred has a history of destruction of property, violence, and fire setting, the Commonwealth is liable when the client subsequently sets fire to the rooming house. *Onofrio v. Department of Mental Health,* 408 Mass. 605 (1990). The Court stated, "It is clear ... that the conduct [the trial judge] found to have been negligent was not the exercise of choice regarding public policy and planning but, instead, was the negligent carrying out of previously established policies or plans." *Id.* at 611. Similarly, the Commonwealth is not immune from liability where a parole officer fails adequately to warn a trailer park manager that a parolee, whom the trailer park has hired as a maintenance man, has dangerous propensities and the parolee subsequently rapes a trailer park resident. *Bonnie W. v. Commonwealth,* 419 Mass. 122 (1994). Both *Onofrio* and *Bonnie W.* are precedent for the proposition that, in the case at bar, the Commonwealth may find in § 10b no safe harbor from liability.

The Commonwealth disputes the conclusion that immunity is not available to it, noting that DMR regulations require that its clients receive the "opportunity to live and receive services in the least restrictive and most normal setting possible." 104 Code Mass.Regs. 20.04(4). The Commonwealth argues that the determination of the appropriate level of services for an individual client is made by trained professional staff through the exercise of clinical judgment, that the staff's exercise of its discretion gives shape to the regulatory policy, and that

the Commonwealth is, therefore, immune from liability for negligent exercise, by the staff, of discretion. The rationale stated in *Onofrio* and *Bonnie W.*, however, eviscerates the Commonwealth's argument. While the Commonwealth is immune from liability for creating the policy stated in the regulations, it is not immune from liability for employees who negligently carry out this policy by making inappropriate referrals. The reach of § 10b is not as comprehensive as the Commonwealth suggests.

*8 Because the Fredettes have produced evidence showing that they made proper presentment, and because the Commonwealth is not immune from liability for Mudd's allegedly negligent referral, there remain genuine issues of material fact to be resolved at trial.

## ORDER [6]

For the foregoing reasons, it is ORDERED that the Commonwealth's motion for summary judgment be ALLOWED as to the claims for negligent infliction of emotional distress, negligent investigation, and the alleged negligence of Respite House. It is further ORDERED that the Commonwealth's motion for summary judgment be DENIED as to the claim for intentional infliction of emotional distress and the claims arising out of the alleged negligence of its employee Michael Mudd.

### All Citations

Not Reported in N.E.2d, 3 Mass.L.Rptr. 664, 1995 WL 809520

Footnotes

1 As next friend of David Fredette.

2 Karen Reynolds, Diane Martin, Roger Kane, Frank Eldridge, and the Commonwealth of Massachusetts.

3 Although the complaint is drafted in terms of recklessness, the plaintiff defines that concept by employing the traditional elements of intentional conduct. The court will treat plaintiff's allegations as one accusing defendant's employees of an intentional tort.

4 This statement interprets G.L.c. 260, § 7, which states that if a plaintiff "... is incapacitated by reason of mental illness when a right to bring an action first accrues, the action may be commenced within the time hereinbefore limited [by statutes of limitation] after the disability is removed."

5 Although the *Whitney* opinion was written prior to the passage of G.L.c. 258, later opinions relied on its analysis. See e.g., *Horta v. Sullivan*, 418 Mass. 615, 620 (1994); *Harry Stoller & Co. v. Lowell, supra* at 142. Thus, *Whitney* may be viewed as precedent for the purposes of the instant assessment of G.L.c. 258.

6 Because plaintiffs' complaint has not been crafted in the traditional "count" fashion, this Order will define the relief it grants in terms of the theories of alleged liability gleaned from the complaint.

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**COMMONWEALTH OF MASSACHUSETTS**
**APPEALS COURT**

**NO. 2019-P-0107**

**KATHERINE DRAKE**
**Appellant**
**v.**
**TOWN OF LEICESTER**
**Appellee**

**CERTIFICATE OF SERVICE FOR FILING AND SERVING OF APPELLANT'S BRIEF**

I, Tom G. Vukmirovits, counsel for the Appellant, certify under the pains and penalties of perjury that I e-filed a true copy of the Appellant's brief and appendix on this date, with the Office of the Clerk, Office of the Clerk, Massachusetts Appeals Court, John Adams Courthouse, One Pemberton Square, Suite 1200, Boston, MA 02108-1724, and that I further served two (2) true copies of the Appellant's brief and appendix on this date, by first-class mail, or its equivalent, postage-prepaid, to the following interest party:

Gerard T. Donnelly, Esq.
Melina McTigue Garland, Esq.
Hassett & Donnelly, PC
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March 4, 2019

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**COMMONWEALTH OF MASSACHUSETTS**
**APPEALS COURT**

**NO. 2019-P-0107**

**KATHERINE DRAKE**
**Appellant**
**v.**
**TOWN OF LEICESTER**
**Appellee**

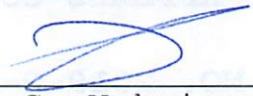
## CERTIFICATE OF COMPLIANCE FOR FILING AND SERVING OF APPELLANT'S BRIEF AND APPENDIX

I, Tom G. Vukmirovits, counsel for the Appellant, certify under the pains and penalties of perjury that this brief complies with the rules of court that pertain to the filing of briefs, including Mass. R. A. P. 16(a)(13)(addendum), Mas. R. A. P. 16(e)(references to the record), Mass. R. A. P. 18(appendix to the briefs), M. R. A. P. 20 (form and lengths of briefs, appendices, and other documents), and M. R. A. P. 21 (redaction).

I, Tom G. Vukmirovits, counsel for the Appellant, certify under the pains and penalties of perjury that compliance with the applicable length limit of M. R. A. P. 20 was ascertained by using Courier New size 14 monospaced font, and containing 2,601 non-excluded words, using Microsoft Word version 97-2003.

March 4, 2019

For: KATHERINE DRAKE
By: Her Attorney,



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COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

2019-P-0107

KATHERINE DRAKE,
Appellant

v.

TOWN OF LEICESTER,
Appellee

---

ON APPEAL FROM AN ORDER OF
THE WORCESTER SUPERIOR COURT

---

# BRIEF FOR THE APPELLANT

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