18-P-1568 Appeals Court

RHEA R.[1] & others[2] vs. DEPARTMENT OF CHILDREN AND FAMILIES.

No. 18-P-1568.

Middlesex. September 12, 2019. - January 16, 2020.

Present: Green, C.J., Milkey, & Wendlandt, JJ.

Adoption, Foster parents. Massachusetts Tort Claims Act. Governmental Immunity. Negligence, Governmental immunity.

Civil action commenced in the Superior Court Department on July 27, 2016.

The case was heard by John T. Lu, J., on a motion for judgment on the pleadings.

Gregory A. Hession for the plaintiffs.
Gregory Schmidt, Special Assistant Attorney General, for the defendant.

GREEN, C.J. After the Department of Children and Families (department or DCF) placed a foster child in the plaintiffs'

[1] A pseudonym.

[2] Ralph R., and Ramona R., a minor, by her parents and next friends, Rhea R. and Ralph R. The parties' names are pseudonyms.

home, the foster child sexually assaulted the family's young daughter. Under the written foster care agreement between the department and the plaintiff parents, the department had agreed to provide them with sufficient information about any child proposed for placement to enable them "knowledgeably [to] determine whether or not to accept the child." As the parents later discovered, however, the department was aware at the time it placed the child in the plaintiffs' home that the child had a history as both a victim and a perpetrator of sexual abuse, but did not disclose that information to the parents before placing him in their home. The plaintiffs filed a complaint against the department, claiming negligence and breach of contract. At issue on appeal is a judgment of the Superior Court dismissing the plaintiffs' complaint on the ground that their claims are barred by sovereign immunity, G. L. c. 258, § 10 (j) (§ 10 [j]). We reverse.

Background. The case comes before us on the plaintiffs' appeal from a judgment of dismissal, entered on the department's motion for judgment on the pleadings. We accordingly summarize the facts alleged in the plaintiffs' complaint, which we (like the motion judge) take as true for purposes of our evaluation of the department's claim of immunity. See Minaya v. Massachusetts Credit Union Share Ins. Corp., 392 Mass. 904, 905 (1984).

The plaintiffs are two parents and their minor daughter. The parents have taken in hundreds of foster children under contract with the department since 1999. The written foster care agreement between the parents and the department, which is signed by both parents and (on behalf of the department) by the parents' department family resource worker, sets out in considerable detail the parents' and the department's respective responsibilities, imposing twenty specific obligations on the department and thirty-three specific obligations on the parents. Among the provisions of the agreement (and among the specific obligations undertaken by the department) is the following:

> "THE DEPARTMENT . . . AGREES TO:
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> 1. provide the family with sufficient information about a child who is in [the department's] care or custody, prior to placement, so that she or he can knowledgeably determine whether or not to accept the child, and to provide the foster/pre-adoptive family with sufficient information on an ongoing basis about the child who is in [the department's] care or custody to enable the foster/pre-adoptive family to provide adequate care to that child and to meet the individual needs of that child."[3]

In May 2013, the department telephoned the mother to ask if it could place a twelve year old boy, to whom we shall refer as Frank, in her home for a few days. The only information about Frank furnished to the mother was that his grandmother had

[3] That provision tracks the language of regulations promulgated by the department in 110 Code Mass. Regs. § 7.112(1) (2009).

passed away and his aunt did not have legal custody. At the time of the department's request, the parents were not taking any new foster child placements and had notified their foster care supervisor of that decision. After a second request by the department (based on its expressed desire to avoid requiring Frank to change schools before the end of the school year), the mother "reluctantly" agreed to accept the placement, but stated to both Frank's caseworker and the parents' foster care supervisor that they would not keep him for the summer.

Prior to Frank's placement in the parents' home, the mother requested additional information about him from Frank's caseworker but did not receive any, despite the department's awareness that Frank had a history of sexual abuse.[4] Had the parents known the information that was known to the department regarding Frank's history of sexual abuse, they would not have agreed to the foster placement.

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[4] Medical records subsequently obtained by the parents from a hospital included an entry that stated:

> "[Frank] is a 12-year old boy who came to live with the [plaintiff parents] in May 2013. According to Karen Wilson, DCF supervisor, [Frank] and his twin sister both disclosed that they were sexually abused by their step grandfather and went through the SAIN interview a few months ago. [Frank's] twin sister disclosed to her foster mother that [Frank] would try to come into her bed, try to touch her and kiss her."

Following Frank's placement in their home, the parents twice requested the department to end the placement due to behavioral problems, but the department took no action. In fact, the placement continued through the summer, and as fall approached Frank's caseworker enrolled him in the public school in the town in which the plaintiffs resided, without telling the parents (who learned of the enrollment only when the school called to verify Frank's enrollment).

On September 2, 2013, as the family awaited the arrival of guests for their daughter's fifth birthday party, the daughter disclosed to her father that Frank had sexually assaulted her.

Discussion. The motion judge concluded that the plaintiffs' claims for negligence and breach of contract are barred by the Massachusetts Tort Claims Act, G. L. c. 258 (MTCA), and specifically by § 10 (j) thereof.[5] Our review of a motion for judgment on the pleadings is de novo, based on our review of the allegations of the complaint. Kraft Power Corp. v. Merrill, 464 Mass. 145, 147 (2013). "The effect of a motion for judgment on the pleadings is 'to challenge the legal

[5] General Laws c. 258, § 10 (j), provides that a "public employer" (as defined in § 1 of that chapter, and which includes the department) is immune from "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 [its employees]."

sufficiency of the complaint.' Burlington v. District Attorney for the N. Dist., 381 Mass. 717, 717-718 (1980). . . . [Therefore,] '[f]or purposes of the court's consideration of the [rule 12 (c)] motion, all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false.' 5 C.A. Wright & A.R. Miller, Federal Practice and Procedure § 1368, at 691 (1969)." Minaya, 392 Mass. at 905.

Section 10 (j) was enacted among a series of amendments to the MTCA in 1993, in response to the announced intention of the Supreme Judicial Court, in Jean W. v. Commonwealth, 414 Mass. 496, 499 (1993), to abrogate the "public duty rule."[6] As indicated by the language quoted in note 5, supra, § 10 (j) bars any claim based upon a public employer's act or failure to act to prevent harm resulting from a condition or situation, including the wrongful act of a third party, unless the condition or situation was "originally caused" by the public

[6] As explained in Jean W., 414 Mass. 500-501, "[t]he public duty rule, broadly stated, is a judicially-created doctrine that protects governmental units from liability unless an injured person seeking recovery can show that the duty breached was a duty owed to the individual himself, and not merely to the public at large" (footnote omitted).

employer.[7] Cormier v. Lynn, 479 Mass. 35, 40 (2018), quoting Brum v. Dartmouth, 428 Mass. 684, 692, 695 (1999). The exclusion of liability is, however, subject to the saving provision of § 10 (j) (1), in circumstances where the claim is "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."

To fall within the saving provision of § 10 (j) (1), an "explicit" assurance must be "a spoken or written assurance, not one implied from the conduct of the parties or the situation," and to be "specific" "the terms of the assurance must be definite, fixed, and free from ambiguity." Lawrence v. Cambridge, 422 Mass. 406, 410 (1996). Several cases have considered the contours of the saving provision, and guide our evaluation of the plaintiffs' claims in the present case.

In Lawrence, the plaintiff (who managed a retail liquor store) had been robbed at gunpoint after closing the store. Id.

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[7] Though the plaintiffs assert on appeal that the department was the original cause of the harm forming the basis for their claims, they did not make that argument in the Superior Court; accordingly, it is waived. See Springfield v. Civil Serv. Comm'n, 469 Mass. 370, 382 (2014); Albert v. Municipal Court of Boston, 388 Mass. 491, 493-494 (1983).

at 407. His assailant was apprehended, and the plaintiff agreed to testify before a grand jury weighing charges against the assailant. Id. In agreeing to testify, the plaintiff relied on a promise by the Cambridge Police to "protect [the plaintiff] when [he] closed the store at night." Id. A police officer thereafter was stationed at the liquor store around closing time for the next three nights. Id. However, on the fourth night (the night before the plaintiff was due to testify before the grand jury), no police officer was present when the plaintiff was shot in the face after leaving the store. Id. The police did not tell the plaintiff that it would stop providing protection before the occasion on which the plaintiff was shot. See id. Though the court recognized some uncertainty regarding the duration of the assurance, it concluded that (at least for purposes of summary judgment) it should be taken as true that the promise of protection extended for so long as his assailant and his companions posed a threat to the plaintiff. See id. at 411-412. Accordingly, the court concluded that the assurance of police protection fell within the saving provision of § 10 (j) (1). See id.

By contrast, in Barnes v. Metropolitan Hous. Assistance Program, 425 Mass. 79, 80-81 (1997), claims arising from lead paint poisoning were barred notwithstanding obligations imposed in a written rent subsidy contract between a local public

housing authority and the plaintiffs' landlord to inspect the premises prior to occupancy, to assure that the premises were "decent, safe, and sanitary."[8] Though the court recognized that the plaintiff tenants were intended third-party beneficiaries of the subsidy contract, it held that the claims were barred by § 10 (j) because the assurances made in the contracts were not "made to the direct victim or a member of [her] family." Id. at 87. Similarly, in Campbell v. Boston Hous. Auth., 443 Mass. 574, 576, 583-584 (2005), the court concluded that § 10 (j) would bar the plaintiff tenant's claim as an intended third-party beneficiary of an essentially identical obligation under a rent subsidy contract between a housing authority and her landlord.[9,10]

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[8] The court also held that the plaintiffs' "understanding" that the unit had passed a safety inspection was the "sort of assurance 'implied from the conduct of the parties or the situation,' that we have held does not meet the requirements of the statute." Barnes, 425 Mass. at 87, quoting Lawrence, 422 Mass. at 410.

[9] The court nonetheless allowed the contractual claim to proceed, because it arose before the enactment of § 10 (j) and the application of § 10 (j) to bar the claim would violate the contract clause of the United States Constitution. See Campbell, 443 Mass. at 581.

[10] As in Barnes, 425 Mass. at 87, the court also expressed its view that certain general verbal statements made by housing authority inspectors were not the sort of "explicit and specific" assurances required to fall within the saving provision of § 10 (j) (1). Campbell, 443 Mass. at 585-586.

We consider Sullivan v. Chief Justice for Admin. & Mgt. of the Trial Court, 448 Mass. 15 (2006), to be particularly instructive on the question. In that case, following the discovery of large quantities of asbestos in a court house, the defendant released an action plan that provided (among other things) that all employees working in the building would be notified in advance of all work activities for asbestos removal. See id. at 19-20. However, work took place on several occasions without prior notice to the employees. Id. at 20. The court held that the defendant's assurances were sufficiently definitive, specific, and free of ambiguity to satisfy the requirements of § 10 (j) (1). Id. at 32-33. Though the assurance of notice prior to work activities did not itself provide a promise of safety to building employees, it assured them that they would receive information necessary to allow them to take steps to ensure their safety from exposure to asbestos during performance of the work.

In the present case, the foster care agreement between the department and the parents contained an explicit and specific assurance that the department would provide the parents with sufficient information about a foster child proposed for placement in their home to allow them "knowledgeably [to] determine whether or not to accept the child." That assurance, made to the parents, is unambiguous; though the assurance does

not describe the precise contours of the information the department would furnish, its general expression is understandable in light of the variable nature of the kind of information that might relate to a particular child (and a prospective foster parent's evaluation of whether to accept that child), and the character of the information is adequately described by reference to its purpose. If the plaintiffs' allegations are proven, the department violated its contractual commitment by failing to provide the parents with information known to it, and plainly material to the parents' evaluation of whether to accept placement of the foster child in their home. Moreover, based on the allegations in the complaint the injuries to the parents' daughter resulted at least in part from the parents' reliance on the department's assurances. We conclude that the plaintiffs' claims fall within the saving provision of § 10 (j) (1), and thus are not barred by § 10 (j).[11] The

[11] In its brief, the department suggests that the contractual assurance cannot give rise to liability because it merely restates obligations already imposed on the department by its own regulations. See note 3, supra. While it is true that "a private cause of action cannot be inferred solely from an agency regulation," Frawley v. Police Comm'r of Cambridge, 473 Mass. 716, 722 (2016), quoting Loffredo v. Center for Addictive Behaviors, 426 Mass. 541, 546 (1998), the existence of a regulation does not operate to negate a similarly-worded requirement expressly set forth as a promise in a written contract between a government entity and another specific party. Similarly, an obligation imposed on the department by regulation, even if designed for the benefit of the general public, is not for that reason inadequately "explicit and

judgment dismissing the plaintiffs' complaint is reversed, and the case is remanded to the Superior Court for further proceedings.

So ordered.

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specific" to satisfy § 10 (j) (1) when undertaken for the benefit of a specific counterparty in a written contract with the department.