24-P-309 Appeals Court

CITATION INSURANCE COMPANY[1] vs. CITY OF CHICOPEE.

No. 24-P-309.

Hampden. December 9, 2024. – April 9, 2025.

Present: Henry, Desmond, & Englander, JJ.

Governmental Immunity. Municipal Corporations, Governmental immunity, Liability for tort. Negligence, Municipality, Governmental immunity. Massachusetts Tort Claims Act. Practice, Civil, Summary judgment.

Civil action commenced in the Superior Court Department on July 2, 2021.

The case was heard by Tracy E. Duncan, J., on a motion for summary judgment.

Mark J. Albano for the defendant.
Diana D. O'Hara for the plaintiff.

ENGLANDER, J. On February 25, 2019, a tree fell on the home of Mary Hebert in the city of Chicopee (city), causing substantial damage. The tree had been located on the city's property, in the tree belt in front of Hebert's home. Hebert's

[1] As subrogee of Mary F. Hebert.

subrogee, Citation Insurance Company (plaintiff or Citation), paid Hebert's insurance claim, and brought this negligence action against the city. The city sought summary judgment on two grounds relevant to this appeal: (1) that the plaintiff had failed to make proper presentment as required by G. L. c. 258, § 4, of the Massachusetts Tort Claims Act (MTCA), G. L. c. 258; and (2) that the city was immune from tort liability under the MTCA, based upon the so-called "discretionary function" exception, G. L. c. 258, § 10 (b) (§ 10 [b]).

A Superior Court judge denied summary judgment, and the city appeals, properly invoking the doctrine of present execution. See Shapiro v. Worcester, 464 Mass. 261, 265 (2013) (municipality may immediately appeal from order denying motion for summary judgment based upon exception to liability under MTCA). The city argues that its decision whether to remove a tree is a discretionary function, and thus that it is immune from suit pursuant to § 10 (b). The city cites in particular to a city ordinance, § 257-8, which provides that "[t]he discretion and sound judgment of the Tree Warden alone determines whether a tree shall be removed." City of Chicopee Ordinance § 257-8 (1998) (§ 257-8). The applicability of the § 10 (b) exception is a question of law, however, which turns on whether the public act at issue involves "policy making or planning"; § 10 (b)'s application is not determined by whether the public body itself

chooses to define its actions as "discretionary." See Harry Stoller & Co. v. Lowell, 412 Mass. 139, 141 (1992) (Stoller). And here, the tree warden's alleged failure to remove an unhealthy tree does not qualify as "policy making or planning" under the case law. We affirm.

Background. The tree in question fell on Hebert's home during a windstorm on February 25, 2019. It caused over $40,000 in damages, which Citation paid pursuant to Hebert's homeowner's policy. The tree had been located on city property, and it was subject to the jurisdiction of the city tree warden. Relevant here, the predecessor owner of Hebert's property had sent a certified letter to the city, in 2013, notifying the city of the owner's belief that the tree was in poor condition and posed a danger to the home.

Hebert, on March 1, 2019, sent a letter to the mayor of Chicopee, notifying the city that the tree fell on her property, causing damage, and further stating that "the damage could have been prevented by the exercise of reasonable care had the [c]ity acted diligently to remedy or guard against this unsafe condition." The plaintiff Citation filed this lawsuit in July of 2021. The complaint alleged negligence in the maintenance of the tree. Prior to filing, Citation, on June 20, 2019 and again on October 15, 2019, also sent letters to the mayor of Chicopee, notifying the city of the damages sustained from the tree.

In due course the city filed a motion for summary judgment, which a Superior Court judge denied. This interlocutory appeal followed.

Discussion. The MTCA establishes that public employers generally are liable for the negligent acts of public employees, "in the same manner and to the same extent as a private individual under like circumstances." G. L. c. 258, § 2. There are several statutory exceptions to MTCA liability, however, and here we deal with § 10 (b), which exempts "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function."

The meaning and scope of this discretionary function exception has been addressed many times in our courts. The principles are well established, although the cases do not always trace a straight line on their facts. The case law establishes a two-step analysis, under which the second "more difficult" step requires a court to determine whether the government conduct that forms the basis for the plaintiff's claim involves "policy making or planning." Stoller, 412 Mass. at 141. As the Supreme Judicial Court explained in Stoller:

> "The second and far more difficult step is to determine whether the discretion that the actor had is that kind of discretion for which § 10 (b) provides immunity from liability. Almost all conduct involves some discretion, if only concerning minor details. If allegedly tortious conduct were to be immunized from causing liability simply because there was some element of discretion in that

> conduct, the discretionary function exception would go a long way toward restoring the governmental immunity that G. L. c. 258 was designed to eliminate. . . . [H]owever, the discretionary function exception, both under our [MTCA] and under the Federal Tort Claims Act, is far narrower, providing immunity only for discretionary conduct that involves policy making or planning. Because of the limitation of the exception to conduct that is policy making or planning, the words 'discretionary function' are somewhat misleading as a name of the concept." (Citation omitted.)

Id.

In short, the discretionary function exception does not apply to all government conduct that involves discretion, but rather to a "narrow[]" subset of such conduct. Stoller, 412 Mass at 141. The question whether the exception applies has been treated as a question of law, in light of the particular facts of the case and the plaintiff's articulated theory of liability. See Alter v. Newton, 35 Mass. App. Ct. 142, 147-148 (1993). In past cases, the discretionary function exception twice has been held not to apply to theories of negligent maintenance of a public parking lot, see Greenwood v. Easton, 444 Mass. 467, 472-473 (2005); Doherty v. Belmont, 396 Mass. 271, 276 (1985), as well as to a theory of negligent medical treatment in a hospital emergency room, see Kelley v. Rossi, 395 Mass. 659, 664-665 & n.6 (1985).

We think it clear, given the case law and the standards there articulated, that the exclusion does not apply to the

plaintiff's claim here.[2] The decision whether to remove the potentially hazardous tree at issue did not involve "policy making or planning" -- at least, as those terms are used in the case law. The decision to place the tree where it was perhaps constituted planning, as might the decision to establish and fund the position of a tree warden to curate the trees. Those decisions involve determinations allocating government resources and assigning government responsibility. Imposing liability based upon those decisions might involve "usurping the power and responsibility of either the legislative or executive branch of government." Stoller, 412 Mass. at 142. See Barnett v. Lynn, 433 Mass. 662, 665 (2001). But that is not this case. Here the city owns the tree, and the tree threatened a neighbor's property. The city has established a tree warden to maintain its trees. The law of negligence establishes a basic duty to exercise reasonable care to avoid harming the property of others. See Remy v. MacDonald, 440 Mass. 675, 677 (2004).

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[2] There is no merit to the city's claim that the plaintiff failed to make a proper presentment under G. L. c. 258, § 4. The plaintiff's letter of March 1, 2019, was sent to a proper city official, the mayor; it identified the date of injury, the nature of what occurred, and the nature of the claim -- failure to exercise reasonable care. Nothing more was required. See G. L. c. 258, § 4; Murray v. Hudson, 472 Mass. 376, 384 (2015) (presentment adequate if "it sets forth sufficient facts from which public officials reasonably can discern the legal basis of the claim, and determine whether it states a claim for which damages may be recovered under the [MTCA]").

Incurring that basic duty as the tree warden (or imposing it upon him) involved no "policy making or planning" -- it merely required the proper exercise of a defined function. See Greenwood, 444 Mass. at 473.

This case thus falls comfortably in line with prior cases that have held, on their particular facts, that the exception does not apply. Thus, in Greenwood, the plaintiff sued the town for negligence, after her daughter was hit and injured by a telephone pole that the town was using as a barrier in its parking lot. Greenwood, 444 Mass. at 467-468. The plaintiff's theory was that the town had negligently maintained the parking lot by not securing the telephone poles properly. Id. at 472. The court held that while the town's decision to use telephone poles as parking barriers was a discretionary function, the installation of the poles was not. Id. at 473. Similarly, in Kelley, the plaintiff sued an emergency room doctor for negligent treatment; in a footnote, the court rejected the argument that the doctor was engaged in a discretionary function, as "[t]he doctor was governed by the standard of accepted medical practice, an ascertainable guide to proper conduct." Kelley, 395 Mass. at 660, 665 n.6. Here as well, in maintaining the city's trees, the tree warden did not have the discretion to disregard the duty of reasonable care to the city's neighbors.

The one wrinkle in this case, which the city presses upon us, is that here the city ordinance governing the tree warden stated that the warden's "discretion and sound judgment" would "alone determine[] whether a tree shall be removed." § 257-8. But whatever this ordinance may mean as to the allocation of responsibility within the city, it should be evident from the above discussion that the ordinance does not determine the legal question of the application of § 10 (b). In applying the discretionary function exception, the cases reach a conclusion, independently, whether the acts at issue constitute the kind of "policy making or planning" that the Legislature intended to exempt. In addressing that question, various government ordinances, bylaws, policy directives, job descriptions and the like may well be relevant, but the public employer cannot render such government directives conclusive as to the application of § 10 (b) merely by describing particular functions as involving "discretion." Indeed, a contrary ruling would lead to an obvious means for government employers to avoid the intent and import of MTCA liability.[3]

[3] The city also argues that it was entitled to summary judgment because Citation had not put forth any admissible evidence of negligence. This issue is not collateral but rather goes to the merits of the plaintiff's claim, and is not properly before us under the doctrine of present execution. See Shapiro, 464 Mass. at 265. We note, however, that there is an affidavit in the record from the prior owner that avers that in 2013 she

The order denying the motion for summary judgment is affirmed.

So ordered.

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sent a certified letter to the city notifying it of her concerns with the tree and its condition.