PIERCE, DAVIS & PERRITANO, LLP
FALL 2011 NEWSLETTER
DEVELOPMENTS IN MUNICIPAL LAW

Contract Extension Held Unenforceable Due to Open Meeting Law Violation: Johnson v. Sandwich School Committee, BACV2010-00663 (Mass.Super.Ct., March 9, 2011)

In a decision roundly endorsing the purposes behind the Open Meeting Law, Judge Raymond Veary, Jr., recently dismissed a Complaint brought by the former Superintendent of the Sandwich Public Schools seeking to enforce a vote taken during an unlawful meeting of the Sandwich School Committee. On April 30, 2010, the Sandwich School Committee voted 4-2 to extend the Superintendent's contract for an additional two years, to June 30, 2013. But after the Town Clerk sent a letter to the District Attorney of the Cape & Islands District questioning the validity of the vote, the DA concluded that the April 30th meeting was not adequately posted and, therefore, violated the Open Meeting Law. (Prior to July 1, 2010, the District Attorney was responsible for enforcing Open Meeting Law compliance by municipal bodies. M.G.L. c. 39, § 23B. Under the "new" Open Meeting Law, M.G.L. c. 30A, §§ 18-25, enforcement with respect to all governmental bodies (state and local) is vested in the Attorney General. M.G.L. c. 30A, § 23(a)).

Although the School Committee had met on April 28, 2010, then suspended its meeting for the purpose of re-convening two nights later, the April 30th meeting, stated the DA, still required

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posting at forty-eight (48) hours in advance. Because this was not done, any business undertaken at the April 30th meeting – including the vote to extend the Superintendent's contract – was a "nullity." Thus, the DA ordered: "The meeting should be re-posted and reheard pursuant to the provisions of the Open Meeting Law."

And that's exactly what the Sandwich School Committee did. On May 26, 2010, the School Committee accepted the DA's decision and, three weeks later, at a lawfully-posted meeting, voted again on the Superintendent's contract extension. Only this time, due to an intervening election held one week after the April 30th vote, the outcome of the vote was different; the motion to extend was defeated 4-3. Preferring the first outcome over the second, the Superintendent sued the School Committee to enforce her two-year contract extension. Arguing the prior vote could *only* be invalidated by an action filed in Superior Court within 21 days of the alleged violation (M.G.L. c. 39, § 23B), the Superintendent insisted that the failure to timely pursue a judicial remedy effectively insulated the April 30th vote from any subsequent change or challenge.

On behalf of the School Committee, PD&P moved to dismiss the Superintendent's Complaint under Rule 12(b)(6). Rejecting the notion that judicial invalidation served as the *exclusive* remedy for enforcement of the Open Meeting Law, the School Committee insisted the DA's declaration of its April 30th vote as a "nullity" had teeth. The School Committee was not free to disregard a decision issued by the officer expressly appointed to enforce the statute. Moreover, case law has long supported and, indeed, courts have encouraged governmental bodies to voluntarily cure known Open Meeting Law violations, just as the Sandwich School Committee did here.

Judge Veary agreed with the DA that a "do over" was entirely appropriate. "The requirement [to post a meeting at least 48 hours in advance] is hardly an idle one. It assures that members of the public will have a consistent, reliable and authoritative means of learning the times and places of meetings which they have an interest in attending." Any plea that substitute notice was somehow adequate – *e.g.*, notice on a high school bulletin board, an article in the local paper – landed on deaf ears. Moreover, such substitutes still fell short of the minimum 48-hour notice requirement. As for the Superintendent's argument that the first vote should stand because no timely action was taken to judicially invalidate it, the Court recognized such a remedy was indeed available. However, the statute expressly provided that the judicial remedy was "not exclusive." "In this instance, the School Committee chose another such available remedy by taking up the subject matter again at a subsequent meeting."

Although Judge Veary was interpreting the "old" Open Meeting Law, his views on the importance of its statutory protections should be a lesson to all governmental bodies. Despite the Superintendent's stance that the violation was *de minimis* and, therefore, should be forgiven, Judge Veary clearly disagreed, calling the April 30th meeting "fatally flawed." The Superintendent's final attempt to salvage the second vote by accusing her opponents on the School Committee of personal animus met with equal success. The School Committee members "lawfully voted their preference." In a pithy conclusion, Judge Veary reminded all parties: "Democracy is not a tort."

Stay tuned; the Superintendent appealed the judgment of dismissal to the Appeals Court. Johnson v. Sandwich School Committee, App. Ct., No. 2011-P-0858. No date has yet been scheduled for oral argument.

Case Comments

The "Public Concern" Test Limits First Amendment Petition Clause Claims By Public Employees: Borough of Duryea, Pa. v. Guarnieri, 564 U.S. __ (2011).

Recently, the United States Supreme Court handed down a decision in Borough of Duryea, Pa. v. Guarnieri, holding that a public employee who claims government employer retaliation in violation of the First Amendment's Petition Clause must demonstrate that his petition raises a matter of *public concern* and is *not* just a *private* grievance. The plaintiff, a former police chief, alleged retaliation because he had both filed a grievance and brought a Section 1983 civil rights action against his employer, the defendant municipality. A jury initially awarded compensatory damages to the plaintiff and the Third Circuit affirmed, holding that the Petition Clause may be used in public employee retaliation cases even if the grievance or lawsuit giving rise to the alleged retaliation involves matters of private concern.

The First Amendment, as applied to the states through the Fourteenth Amendment, secures from state action an individual's rights to "freedom of speech" and to "petition the government for a redress of grievances." In 1983, the Supreme Court ruled that not all speech by public employees is constitutionally protected; when a public employee speaks out on matters of personal interest, he may nonetheless be subjected to an adverse employment action. In short, retaliation for such speech is not unconstitutional. Connick v. Myers, 461 U.S. 138, 147 (1983). In Guarnieri, the Supreme Court placed the same restriction on the Petition Clause.

In an opinion written by Justice Kennedy, the Supreme Court reversed the Third Circuit. The Supreme Court assumed that grievances and lawsuits are both generally protected by the Petition Clause, but emphasized that its decision relates only to Petition Clause claims made by *public employees against government employers*. It then went on to rule that, in the public employment setting, the Petition Clause is no broader in scope than the Free Speech Clause which has long included a public concern component. Like speech, the Supreme Court argued, petitions for redress of grievances can interfere with the efficient and effective operation of government; indeed, lawsuits are often more disruptive to the workplace than speech since they call for a government response. Further, judicial second-guessing and intervention impose significant costs on government employers. Where a petition, such as a grievance, raises only a matter of private concern, the public employee is not acting as a citizen but, rather, complaining to government as his *employer*, not the *sovereign*. A public employee should accordingly not be protected by the Petition Clause any more than a public employee raising an issue of private concern is protected by the Free Speech Clause under Connick v. Myers.

The Supreme Court maintained that its view of the Petition Clause derives considerable support from the historical record since, in the past, many petitions for government redress addressed matters of public concern. Thus, the Petition Clause should continue to afford considerable protection from retaliation, even if petitioners on matters of private concern only do not share in such protection.

The Court then vacated and remanded the decision for further proceedings, since the public concern issue had not been addressed below.

As a practical matter, the Supreme Court in Guarnieri brought public employee Petition Clause claims in line with both public employee Free Speech Clause claims and public employee Equal Protection Clause claims, which the Supreme Court addressed in Engquist v. Oregon Dept. of Agriculture, 553 U.S. 591 (2008). In all three situations, the Supreme Court pruned back the applicable constitutional right in a way that reflects the Court's weighty concerns with efficient government and the costs of judicial intervention.

State Agency Not Immune from All Municipal Regulations: Town of Boxford v. Massachusetts Highway Dept., 458 Mass. 596 (2010).

In a case pitting municipal regulations against the immunities and authority of the State and its agencies, the Supreme Judicial Court recently took up the Commonwealth's interlocutory appeal in Town of Boxford v. Massachusetts Highway Dept. The Commonwealth, on behalf of the Massachusetts Highway Department, filed its appeal after the Essex Superior Court denied the Commonwealth's motion to dismiss the Town's complaint for injunctive relief. In affirming, in part, the denial of the Commonwealth's motion by the Superior Court, the SJC upheld the ability of local municipalities to enforce regulations against the State in certain circumstances.

The controversy between the Town and the Commonwealth stemmed from the Massachusetts Highway Department's (a Commonwealth agency) maintenance of a salt storage facility on Town property. Claiming the facility – which Mass. Highway used to facilitate snow removal – had contaminated the local drinking water supply, the Town filed a four-Count complaint. In Count I, the Town claimed a violation of M.G.L. c. 111, § 122, alleging the salt shed constituted a public health nuisance. It thereby sought a preliminary injunction pursuant to M.G.L. c. 111, § 130, ordering the Commonwealth to cease salt shed operations and abate the environmental damage caused. In Count II, the Town alleged that Mass. Highway was presently causing or about to cause substantial harm to the environment and accordingly sought the same injunctive relief as in Count I. In Count III, the Town sought an order that the Commonwealth must comply with Town regulations (adopted pursuant to M.G.L. c. 111, § 31) and apply for permits from the Town prior to installing wells to replace those contaminated by the salt shed. Finally, in Count IV, the Town sought mandamus relief under M.G.L. c. 249, § 5, requiring the Department of Environmental Protection to institute an enforcement action against the Commonwealth for violation of M.G.L. c. 85, § 7A, which prohibits causing "damage to the environment."

The SJC considered, and ultimately (like the Superior Court) rejected, the Commonwealth's first argument for dismissal, namely that it enjoyed sovereign immunity with regard to Counts I and III. Although sovereign immunity applies to money judgments and, in general, to other interference by the courts, the SJC ruled that "a legislatively created entity, including a State agency, is subject to local

regulations to the extent that those regulations 'do not interfere with its ability to fulfill its essential governmental purposes and have only a negligible effect on its operations.'" The Court further noted that under M.G.L. c. 111, § 31, pursuant to which the Town promulgated its regulations regarding the installation of private wells, "the power to enforce local health and environmental laws is integral to the power to regulate." Given the factual nature of the inquiry as to whether such enforcement has a "merely negligible effect" on Mass. Highways' ability to fulfill its essential functions, the SJC agreed that the Superior Court had properly denied the motion to dismiss on these grounds and remanded Counts I and III for further proceedings.

With respect to Count II (to enjoin further harm to the environment), the Court analyzed the language of M.G.L. c. 111, § 122, which the Town argued authorized its Board of Health to issue an order requiring the Commonwealth, as a property owner, to abate the nuisance it had created on its property. Holding that dismissal of this Count was properly denied, the Court stated that, while the last sentence of Chapter 111, Section 122 provides for a fine, to which the Commonwealth cannot be subjected, "it does not follow that the highway department is also exempt from an order of injunctive relief . . .," noting parenthetically that to hold otherwise would, in essence, be a ruling that the Commonwealth enjoyed sovereign immunity from the nuisance claim as well.

The SJC entered its only ruling in support of the Commonwealth on Count IV, the Town's request for mandamus. Characterizing the duties of the DEP under M.G.L. c. 85, § 7A as discretionary, the Court pointed to the language of the statute which states the agency "*may* issue [general] regulations," and "*may*, by specific order … regulate the place where [road salts] may be used." Because mandamus relief is not appropriate to order the performance of discretionary (rather than ministerial) acts, the SJC affirmed the Superior Court's dismissal of the request for mandamus relief.

Municipalities should take heart from the Boxford decision. While the Commonwealth enjoys considerable protection for its activities, such protection is not absolute. Particularly where health and environmental issues are concerned, the Commonwealth, as any property owner, can be called to answer for its transgressions.

Supreme Court Strengthens Municipal Immunity For Prosecutorial Violations: Connick v. Thompson, 563 U.S. __ (2011).

In Connick v. Thompson, the United States Supreme Court held that local government liability for failure to train cannot be based on a single incident, even in the face of an otherwise persuasive claim of deliberate indifference, because the need for such training is "obvious." Instead, plaintiff must show a pattern of similar constitutional violations.

The Section 1983 plaintiff, John Thompson, was convicted of murder and spent fourteen years on death row for a crime he did not commit because prosecutors failed to turn over to his defense counsel a lab report from a prior case in which Thompson was convicted of attempted aggravated armed robbery. According to the lab report, the perpetrator of the attempted armed robbery had type B blood, while the plaintiff had type O blood. Because of that conviction, plaintiff declined to take the stand in his own defense at the murder trial. The jury found him guilty of murder. Years later, when the lab report was discovered, plaintiff's attempted armed robbery conviction was vacated. Another three years after that, plaintiff's murder conviction was overturned. At his retrial for murder, plaintiff testified in his own defense. This time, he was found not guilty.

Thompson sued the District Attorney's office for damages under Section 1983, asserting that the failure to properly train criminal prosecutors of their duty to disclose evidence under Brady v. Maryland, 373 U.S. 83 (1963), and that his rights to due process were violated by the prosecutor's failure to provide the exculpatory lab report to his defense counsel. A civil jury awarded him $14 million, a verdict upheld by the district court on post-trial motions. The verdict and judgment were based on two grounds. First, Connick, the District Attorney, was a policymaker who was deliberately indifferent to an obvious need to train prosecutors regarding their obligations under Brady. Second, the lack of Brady training was the "moving force" behind plaintiff's constitutional injury.

The Supreme Court reversed the judgment below, holding that a single Brady violation is not sufficient to ground a Section 1983 action based on failure to train. The Court noted that a Section 1983 claim based on a failure to train ordinarily requires a plaintiff to show a pattern of civil rights violations. In reaching its decision, the Court distinguished a hypothetical posed by Justice O'Connor in Canton v. Harris, 489 U. S. 378 (1989), where she wrote that a city's failure to train officers regarding the use of deadly force, after equipping its police force with guns, would permit an inference of the city's deliberate indifference to the constitutional rights of its citizens. Here, the Court noted, (1) prosecutors were already trained in the law in law school, in CLE courses, and on the job; (2) the Brady line of cases has a number of gray areas; and (3) prosecutors are ethically bound to know their obligations under Brady. As a result, the Supreme Court held that, unlike the Canton hypothetical, recurring constitutional violations are not the "obvious consequence" of a failure to provide prosecutors with formal training about how to follow Brady.

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The Court concluded: "To prove deliberate indifference, Thompson needed to show that Connick was on notice that, absent additional specified training, it was 'highly predictable' that the prosecutors in his office would be confounded by those [Brady] gray areas and make incorrect Brady decisions as a result. In fact, Thompson had to show that it was so predictable that failing to train the prosecutors amounted to conscious disregard for defendants' Brady rights." And Thompson did not do so.

While Connick involved the training of prosecutors, the Supreme Court's reasoning makes it abundantly clear that plaintiffs, in all failure to train cases, will have to show a pattern of prior constitutional violations in order to demonstrate deliberate indifference. Without such a showing, they cannot recover against the government under Section 1983.

Curator's B & B Business in Historic State Park Destroys Real Estate Tax Exemption: Willowdale LLC v. Board of Assessors of Topsfield, 78 Mass. App. Ct. 767 (2011).

Bradley Palmer State Park is a 721-acre reservation and estate set among the rhododendrons, white pines and meadows of Hamilton and Topsfield, nestled between Willowdale State Forest and the Ipswich River Wildlife Sanctuary. The park's namesake was a turn-of-the century Boston lawyer who represented the likes of the United Fruit Company, State Street Trust, the Gillette Safety Razor Company and President Woodrow Wilson. Over the years, Mr. Palmer acquired a great deal of real estate in the Essex County area, including the mansion in Topsfield that today bears his name. Willowdale LLC could have used a lawyer like Mr. Palmer before opening a bed and breakfast at the Palmer Mansion in 1999.

Willowdale opened the B & B after leasing the historic Palmer Mansion (and six surrounding acres) from the Massachusetts Department of Environmental Management (now the Department of Conservation and Recreation) as part of an historic curatorship legislative program developed to preserve unused, historic properties through public-private partnerships. Under the 50-year lease, Willowdale was responsible for the payment of all real estate taxes, if and when assessed. The lease also charged Willowdale with the responsibility of maintaining and preserving the property, but allowed it to deduct any monies spent on upkeep and maintenance from the rent payments.

Upon the completion of renovations, Willowdale began operating a for-profit conference center and B & B – uses expressly contemplated and permitted under the terms of the lease – out of Palmer Mansion. Although Willowdale conducted free public tours of the interior of the mansion and held free community events on occasion, the interior of the mansion was otherwise accessible only to paying customers.

The Topsfield Board of Assessors assessed Willowdale with real estate taxes for the 2007 and 2008 tax years. Willowdale paid the taxes, but applied to the Board for an abatement, claiming entitlement to a tax exemption for the leased property on the grounds that operation of its business was "reasonably necessary to the public purpose of … a park, which is available to the use of the general public." M.G.L. c. 59, § 2B. Willowdale theorized that income from the business was necessary

to maintain and use the historic structure. The Board of Assessors rejected Willowdale's "reasonably necessary" argument and denied the abatement. The Board also held that the leased portion of the property (6 of 721 acres) was not itself a "park" and, thus, did not qualify for an exemption under any circumstances. Noting the lofty burden of proof facing a taxpayer claiming an exemption, the State's Appellate Tax Board affirmed. Willowdale then sought relief in the Appeals Court.

In affirming the Appellate Tax Board's decision, the Appeals Court noted that entitlement to a tax exemption must be clear and unmistakable. For two reasons, no such entitlement was recognizable here. First, the public's use of the remainder of the State Park was in no way contingent upon or affected by the presence of Willowdale's operations at the mansion. Second, the interior of the leased portion of the property was primarily available only to paying customers of Willowdale's for-profit business, effectively removing such portion from the definition of a "park" within the meaning of M.G.L. c. 59, § 2B. As the Appeals Court wrote: "Willowdale confuses what is reasonably necessary to the maintenance and use of the mansion as a historic property with what is reasonably necessary to the public purpose of a park available to the use of the general public."

The decision stands as a helpful tool to those seeking to enjoy the otherwise favorable terms of long-term leases offered by the Commonwealth, as well as to the communities where such historic properties are located.

PD&P Decisions & Jury Verdicts

Town Held Immune From Private Nuisance Claim Under the Massachusetts Tort Claims Act: Glasman v. Town of Sharon, NOCV2009-1050 (Mass. Super. Ct., July 22, 2011).

PD&P successfully argued a Motion for Summary Judgment in a significant nuisance case. The litigation stemmed from a roadwork reconstruction project completed on North Main Street (a/k/a Route 27) in Sharon abutting plaintiffs' property. Plaintiffs alleged that, as a result of the project, their property suffered water intrusion and their driveway slope was dramatically increased. Plaintiffs' damage claim was heightened by the fact that they have a minor child whose wheelchair access to the property was negatively impacted by the project. Plaintiffs' Complaint, which sounded in private nuisance, was filed in 2007, prior to the decision in Morrissey v. New England Deaconess Assoc., 450 Mass. 580 (2010). There, the Supreme Judicial Court reversed numerous Appeals Court decisions and ruled that private nuisance claims against municipalities are subject to the provisions of the Massachusetts Tort Claims Act ("MTCA"), M.G.L. c. 258, §§ 1, *et seq.* The SJC also ruled that its decision was to be applied retroactively. Plaintiffs did not make timely statutory presentment of their private nuisance claim either to the Town or to the co-defendant, Massachusetts Highway Department.

In its Motion for Summary Judgment, the Town argued that plaintiffs' private nuisance claim should be dismissed for failure to make written presentment within two years. M.G.L. c. 258, § 4. Alternatively, the Town invoked its immunity from claims based on negligent design under the "discretionary function" exception of the MTCA. M.G.L. c. 258, § 10(b).

The Superior Court granted the Town's Motion for Summary Judgment on the second ground only. Noting that the manner in which the project was designed and built involved issues of policy-making and planning protected by the "discretionary function" exception, the Court held the Town immune from liability for private nuisance under Section 10(b) of the MTCA. The Court declined to rule, however, on the Town's presentment argument, leaving undecided the issue of whether the retroactivity of Morrissey applies to all provisions of the MTCA or merely to the substantive immunity protections. This dichotomy was highlighted in the recent case of Shapiro v. City of Worcester, WOCV2008-00771, where the Worcester Superior Court (D. Curran, J.), refused to apply the presentment requirement retroactively on the grounds of "fairness." The City appealed his decision under the doctrine of present execution. The Appeals Court will likely hear argument on the issue later this fall. Shapiro v. City of Worcester, App. Ct. No. 2011-P-0488.

Recreational Use Statute Applies To Student Injured While Attending After-School Program: Kahler v. Town of Middleboro, 80 Mass. App. Ct. 1101 (2011).

On August 2, 2011, the Appeals Court affirmed the Plymouth Superior Court's allowance of the Town of Middleboro's Motion for Summary Judgment and the denial of the plaintiff's Motion for Summary Judgment, in a case defended by PD&P, Kahler v. Town of Middleboro. The five-year-old plaintiff was allegedly injured on the premises of a public school in Middleboro at the conclusion of a daily afterschool program run by the local YMCA. While playing on a grassy area adjacent to the parking lot of the school in view of her mother, who had come to pick her up for the day and was conversing with YMCA staff, the plaintiff climbed on the concrete base of a light pole and allegedly caught her pant leg on a vertically-protruding bolt, causing her to fall and sustain injury.

The Appeals Court considered and affirmed plaintiff's appeal of the Superior Court's decision, finding that the so-called Recreational Use Statute, M.G.L. c. 21, § 17C(a), applied to bar plaintiff's claims. The Court noted it was undisputed that Middleboro owned and operated the school and the particular area where plaintiff was injured, and held that, although plaintiff argued that the area around the light pole was not designated as a play area for school children, the Town had established that the premises were open for public recreational use free of charge. Although plaintiff paid a fee to the YMCA for participation in the program, the Appeals Court noted that the YMCA, in turn, paid no fee to Middleboro for use of the school. Furthermore, at the time of her injury, the plaintiff was engaged in play with other children and this, in the view of the Appeals Court, constituted an "objectively recreational activity."

In its decision, the Appeals Court also rejected plaintiff's argument that, pursuant to the ruling in Alter v. City of Newton, 35 Mass. App. Ct. 142 (1993), she was owed a "higher duty of care" as a student on school grounds for educational purposes. This "higher duty," she claimed, effectively precluded application of the Recreational Use Statute. The Court distinguished the ruling in Alter from the instant case, noting that the plaintiff was not injured on the premises of her own school but rather an adjacent school, she was not participating in an activity approved of or sponsored by the school, and the school (and, by extension, Middleboro) had no supervisory or other role in the YMCA program that she attended. The Court concluded there "was no inherent link between her presence on town property and her status as a student that would implicate the 'special relationship of the school to its

students' … and [thereby] trigger the heightened duty of care. For the purposes of the statute, Kahler was thus situated as a member of the general public," and the Recreational Use Statute, therefore, applied.

In Alter, the Appeals Court carved out an exception to the class of plaintiffs against whom the Recreational Use Statute may be applied. Kahler serves as a useful tool for municipalities in that it narrows the Alter exception and thereby expands the scope of the statutory defense. Now, when a student suffers an injury on school grounds, it will be appropriate for a Court to examine the relationship between that student and the particular school involved before deciding whether the duty owed was one of reasonable care, or to refrain from willful, wanton or reckless conduct. The student's right of recovery will often depend upon the nature of that relationship.

Charging Fee at Transfer Station Precludes Application of the Recreational Use Statute, While Not Paying the Fee Makes Injured Plaintiff a Trespasser: Gill v. Town of Winchester, MICV2009-01625 (Mass.Super.Ct., Oct. 29, 2010)

PD&P recently obtained summary judgment for the Town of Winchester in the case of Gill v. Winchester. Gill claimed injury as a result of the Town's negligence after slipping and falling on a piece of Plexiglas, while unloading her recyclables at the Town's Transfer Station on March 4, 2008. Although the Town charged an annual fee for use of the station, Gill, who had always paid the fee in past years, had "forgotten" to pay the fee for 2008. Discovery revealed that the Town took several measures to enforce the fee requirement, such as a by-law imposing fines, lockable gates, a permit check point, random police details, surveillance cameras and conspicuous signage. It was undisputed that there was no police detail and no one manning the check point at the time of plaintiff's fall.

The Town moved for summary judgment, arguing that plaintiff's negligence claims were unavailable under two alternative theories: 1) the Recreational Use Statute (M.G.L. c. 21, § 17C) barred the claims because recycling is an environmental, conservational and/or ecological pursuit and plaintiff had not paid a fee to use the Transfer Station; and 2) plaintiff's permission to use the Transfer Station was conditioned upon payment of a fee and, because she had not paid the fee, she was a trespasser. Under either theory, plaintiff was not owed a duty of reasonable care; rather, the Town's only duty was to refrain from engaging in willful, wanton or reckless conduct. With respect to its Recreational Use argument, the Town contended that the focus must be on whether the injured party actually *paid a fee* to use the property. Alternatively, a plaintiff must be equitably estopped from arguing that she enjoys a greater duty of care after side-stepping the requisite fee. Plaintiff countered that the Recreational Use Statute did not apply because the Town *charged* a fee. Actual payment, she insisted, was not the determinative factor. In opposition to the Town's second argument that a non-paying user is entitled to no more protection than a trespasser, plaintiff demurred, claiming the Town passively acquiesced to her use of the property without a permit by not manning the check point or providing a police detail.

The Superior Court rejected the Town's defense under the Recreational Use Statute, holding that application of the statute depends on whether the landowner *charges a fee* for the use of its property, not whether the fee is actually paid. The Court agreed with the Town, however, that the undisputed facts rendered the plaintiff a trespasser. Plaintiff's "passive acquiescence" argument failed, reasoned the Court, because the Town took considerable measures to deter illegal dumping and because plaintiff did not claim an objectively reasonable belief that she could use the Transfer Station without a permit. Her testimony was that she knew she needed a permit, but simply forgot to obtain one.

We disagree with the Superior Court that application of the Recreational Use Statute turns on the "charge" of a fee rather than the "payment." This construction effectively increases the duty of care owed to a person who side-steps a lawful entrance fee in order to use the landowner's property for recreational, environmental, conservation, etc. purposes. The Court's endorsement of the trespass argument, however, provides an alternative layer of protection for landowners under such circumstances. And, in the end, the legal effect may well be the same.

Defense Verdict: Powers v. Town of Duxbury, PLCV2006-01037 (Mass.Super.Ct., Feb. 17, 2011)

PD&P Attorney Seth Barnett recently obtained a defense verdict in an action that arose from a motor vehicle accident between plaintiff's vehicle and a Town of Duxbury police cruiser. While responding to an emergency, the police officer operated his cruiser, with his lights and siren activated, at speeds in excess of the speed limit. The plaintiff, who failed to yield as required under M.G.L. c. 89, § 7, made a left-hand turn into the path of the oncoming cruiser, thereby causing the accident. The Plymouth County jury found no negligence on the part of the police officer. Accordingly, the Court entered judgment in favor of the Town.

PD&P Speaking Engagements

On October 4, 2011, PD&P's John Davis will be a featured speaker at the National Business Institute's program entitled **Student Privacy: The Top Hot Button Legal Issues**. Attorney Davis's presentation will focus primarily on the legal issues surrounding student searches. The seminar is being held at the Newton Marriott. For more information please visit National Business Institute's website at www.nbi-sems.com or contact our office at (617)-350-0950.