

DAR:18445

SJC10672

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
SUFFOLK, SS. APPEALS NO. 2009-P-2249

SJC NO. _____

JOHN N. MORRISSEY, TRUSTEE, JNM 2006 TRUST

Appellee/Plaintiff,

v.

NEW ENGLAND DEACONESS ASSOCIATION -- ABUNDANT LIFE
COMMUNITIES, INC.,

Defendant,

COMMONWEALTH OF MASSACHUSETTS EXECUTIVE OFFICE OF
TRANSPORTATION AND PUBLIC WORKS,

Appellant/Defendant,

and

DELPHI CONSTRUCTION, INC.

Defendant/Third-Party Plaintiff,

v.

MAROIS BROS., INC.

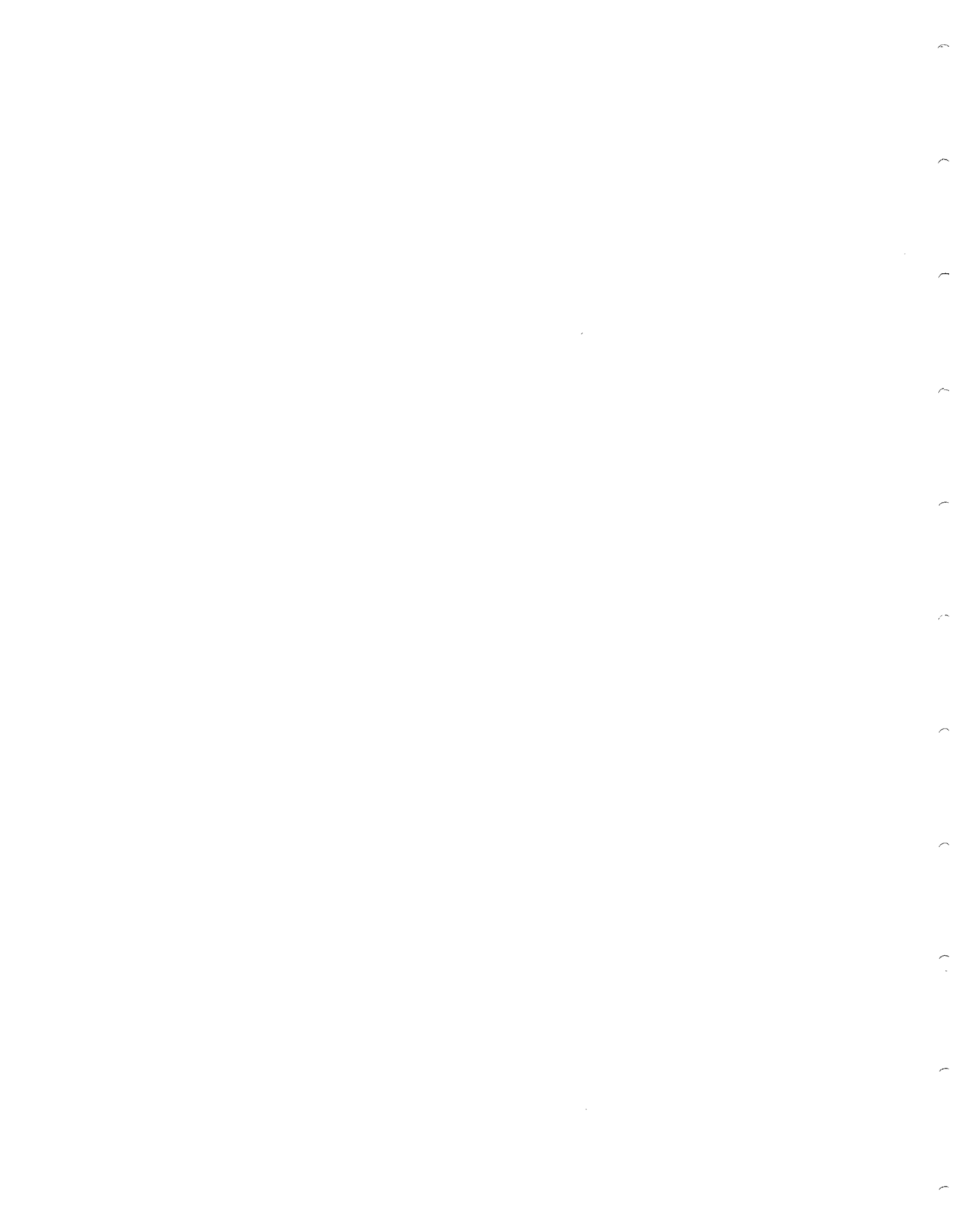
Third-Party Defendant.

ON APPEAL FROM A DECISION OF THE SUPERIOR
COURT DEPARTMENT OF THE TRIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

APPELLANT COMMONWEALTH OF MASSACHUSETTS'
APPLICATION FOR DIRECT APPELLATE REVIEW

Howard R. Meshnick, #547290
Assistant Attorney General
Government Bureau/Trial Division
One Ashburton Place, Room 1813
Boston, MA 02108
(617) 963-2569

Ronaldo Rauseo-Ricupero, #670014
Special Assistant Attorney General
NIXON PEABODY LLP
100 Summer Street
Boston, MA 02110
(617) 345-1000



REQUEST FOR DIRECT APPELLATE REVIEW

Pursuant to Mass. R. A. P. 11(a), the Commonwealth of Massachusetts Department of Transportation¹ ("Commonwealth"), appellant, respectfully requests that this Court grant direct appellate review of the judgment of the Middlesex Superior Court. This appeal presents an important question concerning whether the tort of private nuisance is subject to the Massachusetts Tort Claims Act ("MTCA"), and consequently, whether, in this case, the private nuisance claim against the Commonwealth is barred by G. L. c. 258, §§ 10(b) and (e). Section 10(b) of the MTCA bars tort claims against public employers based upon the exercise of, or failure to exercise, "a discretionary function or duty." Section 10(e) bars tort claims based upon the issuance of, or failure to issue, "any permit, license, certificate, approval, order or similar authorization."

¹ The Amended Complaint names the appellant as the Commonwealth of Massachusetts, Executive Office of Transportation and Public Works. Pursuant to a statutory reorganization effective November 1, 2009. See 2009 Mass. Acts c. 25 ("An Act Modernizing the Transportation Systems of the Commonwealth of Massachusetts"), that agency became the Commonwealth of Massachusetts Department of Transportation.

In Count III of the Amended Complaint, appellee John N. Morrissey, as sole trustee of the JNM 2006 Trust, ("Morrissey") sought monetary damages for the tort of private nuisance. Morrissey alleged, in part, that the Commonwealth engaged in "construction activities" on a state highway, Route 2, causing Morrissey's adjacent property to suffer increased "noise, dust, and vibration from the construction work."² Amended Complaint, ¶ 47. The Trial Court, relying upon *Murphy v. Chatham*, 41 Mass. App. Ct. 821 (1996), and *Asiala v. Fitchburg*, 24 Mass. App. Ct. 13 (1987), denied the Commonwealth's Motion to Dismiss the private nuisance claim, holding that the tort of private nuisance was not subject to the MTCA. Consequently, the Court ruled that the retention of sovereign immunity in G. L. c. 258, § 10(b) and (e) did not apply to Morrissey's private nuisance count.³

² Because this appeal arises from a motion to dismiss, the Commonwealth accepts, as true, the allegations in the Amended Complaint as for purposes of this appeal only even though no Commonwealth employee actually participated in any of the alleged construction activities.

³ The Amended Complaint also included the tort claims against the Commonwealth for trespass and loss of lateral support, and an inverse condemnation claim. The Commonwealth moved to dismiss for lack of subject matter jurisdiction, arguing that the private nuisance, trespass, and lateral support claims were

Direct appellate review is warranted to determine whether the holdings of *Murphy* and *Asiala* are inconsistent with the express language of the MTCA that makes it an exclusive remedy for tort claims against the Commonwealth and other public employers. G. L. c. 258, § 2. The Trial Court, and the Appeals Court in *Murphy* and *Asiala*, erroneously failed to consider that -- as is made clear in the MTCA's construction clause (St. 1978, c. 512, § 18, as amended by St. 1979 c. 1, §12(2)) -- the MTCA effectively repealed all pre-existing common law and statutory waivers of immunity inconsistent with the MTCA to create a new, comprehensive, and exclusive remedy for all tort claims against public employers.

Additionally, the MTCA was enacted in response to *Morash & Sons, Inc. v. Commonwealth*, 363 Mass. 612 (1973), and *Whitney v. Worcester*, 373 Mass. 208 (1977), in which this Court urged the Legislature to enact a comprehensive Tort Claims Act to supersede

barred by the immunities of MTCA, specifically G.L. c. 258, §§ 10(b) and (e). Pursuant to that motion, the Trial Court dismissed the tort counts for trespass and loss of lateral support based upon the immunities of G. L. c. 258, §§ 10(b), (e) and (j). The Court also effectively dismissed the inverse condemnation claim ruling that the Commonwealth "did not involve itself in . . . taking any portion of the Trust Property." [Dkt. No. 66].

all the prior, piecemeal judicial and statutory waivers of immunity. In so responding, the Legislature intended to address, not exclude, the only claim asserted in *Morash*, private nuisance.

Moreover, the *Murphy* and *Asiala* decisions have allowed plaintiffs to elevate form over substance and avoid the requirements and limitations of the MTCA by recasting negligence claims as private nuisance claims for the same injuries. See, e.g., *Color Colonial Corp. v. Mass. Highway Dept.* 1999 WL 791956 (Mass. Super. 1999) (Gants, J.).

The issue of whether the tort of private nuisance is subject to the MTCA arises frequently in litigation against the Commonwealth. A resolution of this important question by this Court is in the public interest of the Commonwealth, other public employers, and the taxpayers.

STATEMENT OF PRIOR PROCEEDINGS

On December 17, 2007, Morrissey filed a verified complaint in Middlesex Superior Court against its abutter, New England Deaconess Association - Abundant Life Communities, Inc., Delphi Construction Co., and the Commonwealth. Morrissey alleged, in part, that

the defendants' construction activities on the state highway (Route 2) and an off-ramp resulted in injuries to Morrissey's adjacent property at 23 Cambridge Turnpike in Lincoln, Massachusetts. [Dkt No. 1]. The complaint was amended on April 17, 2008 to add a Chapter 93A count against the private co-defendants. [Dkt No. 26].

In July 2009, the Commonwealth moved to dismiss for lack of subject matter jurisdiction, on the ground that Morrissey's tort claims against the Commonwealth were barred by the MTCA.

On October 8, 2009, the Trial Court (Gershengorn, J.) issued its Memorandum of Decision and Order ("Decision"), allowing the dismissal as to the loss of lateral support and trespass claims based upon the immunities of G.L. c. 258, §§ 10(b), (e) and (j), but denying the motion to dismiss as to private nuisance claim. [Dkt. No. 66]. The Trial Court, relying upon *Murphy* and *Asiala*, held that the tort of private nuisance was not subject to the MTCA because municipalities and the Commonwealth had been subject to private nuisance before the enactment of the MTCA and, therefore, the immunity provisions of Chapter 258 did not apply to the private nuisance claims.

On October 21, 2009, the Commonwealth filed a Notice of Appeal of the Trial Court's denial of its Motion to Dismiss the private nuisance claim that had been based on immunity grounds. The Commonwealth was entitled to appeal immediately as of right under the doctrine of present execution. *Kent v. Commonwealth*, 437 Mass. 312, 316-17 (2002). [Dkt. No. 70].

STATEMENT OF THE FACTS

John N. Morrissey is sole trustee of the JNM 2006 Trust, which owns 23 Cambridge Turnpike, on Route 2 in Lincoln, Massachusetts ("the Property"). New England Deaconess Association - Abundant Life Communities, Inc. ("NEDA") is an abutting landowner that is engaged in the development of the senior living community "The Groves" on its property. Construction of The Groves necessitated construction of an acceleration lane in the Commonwealth's Route 2 abutting Morrissey's parcel. Pursuant to an application by NEDA, the Commonwealth, through its agency the Massachusetts Highway Department, reviewed and granted Permit # 4-2007-0311 for construction of the acceleration lane on the Commonwealth's right-of-way. Morrissey alleged that the construction activities of all defendants,

including the Commonwealth, resulted in a loss of lateral support and a trespass onto his land. Morrissey also alleged that the construction activities within the state highway layout resulted in increased noise, dust, and vibration to his property resulting in a private nuisance.

ISSUE PRESENTED

Whether the tort of private nuisance is subject to the Massachusetts Tort Claims Act ("MTCA"), and consequently, whether in this case, the private nuisance claim against the Commonwealth is barred by the immunities of G. L. c. 258, §§ 10(b) and (e).

ARGUMENT ON LEGAL ISSUES

I. **DIRECT APPELLATE REVIEW SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION CONCERNING WHETHER THE TORT OF PRIVATE NUISANCE IS SUBJECT TO THE MTCA.**

The Trial Court denied the Commonwealth's Motion to Dismiss the private nuisance claim that had been based upon the immunities G.L. c. 258, §§ 10(b) and (e), relying instead upon the precedent set forth in *Asiala* and *Murphy* which held that the tort of private nuisance is not subject to the MTCA. *Murphy supra*, 41

Mass. App. Ct. at 824-826; *Asiala supra*, 24 Mass. App. Ct. at 17-18. It is in the public interest for this Court to consider whether those decisions should be reversed.

A. The Appeals Court In *Murphy* And *Asiala* Did Not Consider That The MTCA Repealed All Preexisting Statutory And Common Law Waivers Of Sovereign Immunity Inconsistent With The MTCA For The Purpose Of Creating A Comprehensive And Exclusive Remedy For All Tort Claims Against Public Employers.

In *Murphy* and *Asiala*, the Appeals Court held that municipal immunity for private nuisance had been judicially abrogated prior to the enactment of MTCA and, therefore, that the MTCA did not apply to claims for private nuisance. *Murphy supra*, 41 Mass. App. Ct. at 824-826; *Asiala supra*, 24 Mass. App. Ct. 17-18. Those decisions relied upon the Appeals Court's determination that there was nothing in the MTCA evidencing a legislative intent to materially alter the existing common law judicial waiver of immunity for private nuisance. *Murphy*, 41 Mass. App. Ct. at 825-26 quoting *Asiala*, 24 Mass. App. Ct. at 18. This determination was incorrect. The *Murphy* and *Asiala* decisions failed to consider that the MTCA's construction clause, St. 1978, c. 512, § 18, which is

not codified in G.L. c. 258, et seq., made clear that the MTCA effectively repealed (with the exception of the road defect statutes⁴), all preexisting statutory and common law waivers of sovereign immunity inconsistent with the new MTCA.

The overall purpose of MTCA was to create a "comprehensive and uniform regime of tort liability for public employers." *Lafayette Place Associates v. Boston Redevelopment Auth.*, 427 Mass. 509, 534 (1998). The Legislature accomplished this by the enactment of the construction clause specifying that the MTCA would supersede all prior waivers or abrogations of immunities of public employers, and replace them with a new, comprehensive statutory scheme which provided a limited waiver of immunity with respect to some torts, but retained, or reinstated, immunity with respect to others. The Legislature provided in the construction clause instructions on how to construe the MTCA:

The provisions of this act shall be construed liberally for the accomplishment of the purpose thereof but shall not be construed to supersede or repeal section eighteen of chapter eighty-one and sections fifteen to twenty-five inclusive of chapter

⁴ The construction clause, also known as the "savings clause," expressly preserved the state, municipal and Metropolitan District Commission road defect statutes. St. 1978, c. 512, §18; St. 1983, c. 392.

eighty-four of the General Laws. **Any other provision of law inconsistent with this chapter shall not apply.**

St. 1978, c. 512, § 18 (emphasis added).

In 1979, the Legislature amended this construction clause to clarify that "[n]othing contained in this chapter [MTCA] shall be construed as limiting or restricting any liability with respect to claims **not** arising in tort to which the commonwealth may have been subject prior to the effective date of this chapter. . . ." St. 1979, c. 1, § 2 (emphasis added).

In *Fearon v. Commonwealth*, 394 Mass. 50 (1985), this Court held that the comprehensive nature of the MTCA, as specified in its construction clause, necessarily means that the Act applies even to causes of action previously recognized at common law.

We add that we are not inclined to perpetuate the suggestion in the *Weaver* case that the two-year presentment requirement might be tolled if the claim against the public employer had a common law origin... Nor does G. L. c. 258, § 4 which provides the exclusive remedy for tort claims against public employers, preserve by its terms a distinction between claims that were actionable before the enactment of the Tort Claims Act and those that were not. Unless exempted from the requirements of G.L. c. 258, § 18 by statute (see St. 1978, c. 512, § 18) we believe all actions based upon such

claims should be subject to the presentment requirement as stated in § 4.

Id. at 52-53. See also, *Morris v. Massachusetts*

Maritime Academy, 409 Mass. 179, 186 (1991)

(legislature commanded within construction clause that MTCA be construed liberally and consistent with that obligation, this Court determined that common law and statutory admiralty claims are subject to the MTCA even though such tort claims are not specifically mentioned within Chapter 258).

The Superior Court's determination that the private nuisance claim against the Commonwealth was not subject to the MTCA is inconsistent with the express provisions of the MTCA mandating its exclusivity as a tort remedy against the Commonwealth (and other public employers) as the Legislature made clear by the codification of both G.L. c. 258, § 2, and the MTCA's construction clause. *Fearon*, 394 Mass. at 52-53.

B. The Enactment Of The MTCA Was In Direct Response To This Court's Request In *Morash* For Legislature To Pass A New Comprehensive Tort Statute That Would Supersede The Existing Piecemeal Judicial Waivers Of Immunity And Logically Include, Not Exclude, The Only Tort Claim In *Morash* -- Private Nuisance.

In 1973, this Court judicially abrogated, for the first time, the Commonwealth's sovereign immunity for private nuisance, putting the Commonwealth's waiver of sovereign immunity on the same footing as the pre-existing judicial waiver of immunity for private nuisance that had been applied to cities and towns. *Morash*, 363 Mass at 619. In doing so, however, this Court noted:

Further discussion is also indicated because we have in this case carved out a new exception to the immunity doctrine despite our appreciation as shown below that the exceptions created by the courts are based upon doubtful legal reasoning.

Id. at 619-20. This Court criticized the myriad of judicial waivers of the immunity of public employers to date noting that they reflected partial and piecemeal adjustments by the Courts which if applied in all cases would bring about unjust results. *Id.* at 620-23. This Court further noted that a "legislative approach is preferable" stating:

Clearly, there should be limits to governmental liability and exceptions to the rule of liability based upon considerations of justice and public policy. We believe the legislature should be afforded an opportunity to do this by a comprehensive statute....

Id. at 623.

The Legislature responded to *Morash*, and to this Court's subsequent decision in *Whitney v. Worcester*, 373 Mass. 208 (1977), by enacting the MTCA. See *Irwin v. Commissioner of Dept. of Youth Services*, 388 Mass. 810, 817 (1983) ("[w]e think the conclusion is unmistakable that the Legislature, in enacting Tort Claims Act, was responding to ... *Morash* ..."). Since the enactment of the MTCA was a direct response to *Morash*, it is illogical that the MTCA was intended not to apply to the one claim at issue in *Morash* -- private nuisance.

Allowance of this application for direct appellate review will give this Court an opportunity to clarify that the MTCA, through its construction clause, modified all pre-existing judicial waivers of municipal and sovereign immunity inconsistent with the Act, including private nuisance.

C. The *Asiala* Decision Has Caused Anomalous Results Permitting Plaintiffs To Avoid The Requirements And Limitations Of The MTCA By Alternatively Pleading Negligence Claims As Private Nuisance Claims.

The MTCA was intended to be an exclusive and comprehensive remedy for tort claims against public employers." *Lafayette Place Assocs. v. Boston Redevelopment Auth.*, 427 Mass. 509, 534 (1998);

Fearon, 394 Mass. at 53. The Legislature specified in the MTCA that:

The remedies provided by this chapter shall be **exclusive of any other civil action or proceeding** by reason of the **same subject matter** against the public employer or, the public employee.... Final judgment in an action brought against a public employer under this chapter shall constitute a complete bar to any action by a party to such judgment against such public employer or public employee by reason of the same subject matter.

G.L. c. 258, § 2 (emphasis added).

Nonetheless, the *Asiala* decision, and the cases which have followed its reasoning,⁵ have allowed plaintiffs to file complaints alleging both negligence and private nuisance claims for the same injury, leading to illogical results. For example, in *Color Colonial Corp. v. Mass. Highway Dept.* 1999 WL 791956 (Mass. Super. 1999) (Gants, J.) the Trial Court was compelled to apply this illogical result to a claim noting:

This Court recognizes that following this precedent means a triumph of form over substance: the nuisance claim that as a matter of law requires a showing of negligence falls outside the MTCA, but the negligence claim itself falls within the

⁵ *Murphy supra* at 825-826; *Tarzia v. Hingham*, 35 Mass. App. Ct. 506, 509-10 (1993); *Schliessner v. Provincetown*, 27 Mass. App. Ct 392, 395 n. 3 (1989).

MTCA. Yet, this is what *Asiala* dictates and this Court must abide by its holding.

1999 WL 791956, 2 (Gants, J.).

Nothing in the MTCA reflects any legislative intent to treat a tort claim for private nuisance against the Commonwealth or other public employers any differently than a negligence claim based on the same facts. "It is difficult if not impossible to describe nuisance without reliance on the concepts . . . [of] negligence." *Tarzia v. Town of Hingham*, 35 Mass. App. Ct. 506, 507 n. 3 (1993) quoting *Nolan & Sartorio, Tort Law* § 446 at 190 (2d ed. 1983). Allowing plaintiffs to bring complaints with concurrent negligence and private nuisance for the same injury, but exempting the private nuisance claim from the requirements and limitations of the MTCA, thwarts the clear legislative intent that the MTCA serve as the exclusive and comprehensive remedy for all tort claims against public employers. See *Lemasurier v. Town of Pepperell*, 10 Mass. App. Ct. 96, 98 (1980) (where action for flooding damages, pled as both negligence and private nuisance, occurred before effective date of MTCA, court notes in dicta that all claims would have been subject to the MTCA had the cause of action

arisen after the MTCA's effective date). This issue is a substantial matter of great public interest that should be resolved by this Court.

**STATEMENT OF REASONS WHY DIRECT
APPELLATE REVIEW IS APPROPRIATE**

This case presents a question of substantial public interest concerning whether the tort of private nuisance is subject to the MTCA, and consequently, whether in this case, the private nuisance claim against the Commonwealth is barred by the immunities of G.L. c. 258, §§ 10(b) and (e). For the foregoing reasons, the Commonwealth respectfully requests that this application for direct appeal review be *granted*.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TRANSPORTATION, as
successor to

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF TRANSPORTATION
AND PUBLIC WORKS,

By its attorneys,

MARTHA COAKLEY
ATTORNEY GENERAL

Howard R. Meshnick (REK)

Howard R. Meshnick, BBO #547290
Assistant Attorney General
Government Bureau/Trial Division
One Ashburton Place, Room 1813
Boston, MA 02108
(617) 963-2569

Ronaldo Rauseo-Ricupero

Ronaldo Rauseo-Ricupero,
BBO #670014
Special Assistant Attorney General
NIXON PEABODY LLP
100 Summer Street
Boston, MA 02110
(617) 345-1000

PROOF OF SERVICE

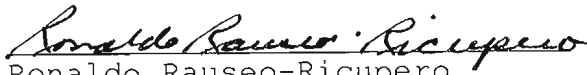
The undersigned hereby states under the penalties of perjury that on January 11, 2010 he caused a copy of the foregoing document to be served by first class mail addressed to:

John N. Morrissey, Esq.
JNM 2006 Trust
16 White Road
Wayland, MA 01778

Gregg A. Rubenstein, Esq.
NIXON PEABODY LLP
100 Summer Street
Boston, MA 02110

Richard E. Cavanaugh, Esq.
GALLAGHER & CAVANAUGH, LLP
Boott Cotton Mills
100 Foot of John Street
Lowell, MA 01852

William P. Rose, Esq.
TUCKER, HEIFETZ & SALTZMAN, LLP
100 Franklin Street
Boston, MA 02110


Ronaldo Rauseo-Ricupero

ADDENDUM

TABLE OF CONTENTS

1. Certified Copy of Trial Court Docket Add. 1

2. Memorandum of Decision and Order on Commonwealth of
Massachusetts' Motion to Dismiss for Lack of Subject
Matter Jurisdiction Add. 12

Commonwealth of Massachusetts
MIDDLESEX SUPERIOR COURT
Case Summary
Civil Docket

MICV2007-04867

sey, Trustee of JNM 2006 Trust v New England Deaconess Association- Abundant Life Communities,

File Date	12/17/2007	Status	Active Partial Appeal (aparap)
Status Date	12/08/2009	Session	C - Civil C CtRm 610 (Woburn)
Origin	1 - Complaint	Case Type	C01 - Land taking/ eminent domain
Track	F - Fast track	Lead Case	
		Jury Trial	Yes

DEADLINES

	Service	Answer	Rule12/19/20	Rule 15	Discovery	Rule 56	Final PTC	Judgment
Served By			04/15/2008	04/15/2008	04/02/2009	05/02/2009		
Filed By	03/16/2008	04/15/2008	05/15/2008	05/15/2008		06/01/2009		10/07/2009
Heard By			06/14/2008	06/14/2008			08/01/2009	

PARTIES

<p>Plaintiff John N. Morrissey, Trustee of JNM 2006 Trust Active 12/17/2007</p>	<p>Private Counsel 664579 John N. Morrissey 16 White Road Wayland, MA 01778 Phone: 508-358-2027 Fax: 508-358-2027 Withdrawn 04/08/2008</p> <p>Private Counsel 114740 John S Davagian II Davagian & Associates 365 Boston Post Road Suite 200 Sudbury, MA 01776 Phone: 978-443-3773 Fax: 978-443-7773 Withdrawn 04/08/2008</p> <p>Private Counsel 664579 John N. Morrissey 16 White Road Wayland, MA 01778 Phone: 508-358-2027 Fax: 508-358-2027 Active 04/14/2008 Notify</p> <p>Private Counsel 665618 Michael Fedenyszen 83 Perkins St. #1 Phone: 617-645-5381 Active 10/28/2009</p>
--	---

MICV2007-04867

sey, Trustee of JNM 2006 Trust v New England Deaconess Association- Abundant Life Communities,

Defendant

New England Deaconess Association- Abundant Life Communities, In
80 Deaconess Road
Concord, MA 01742
Served: 12/19/2007
Active 05/07/2009

Private Counsel 550538

Robert L Kirby Jr
Pierce & Mandell
11 Beacon Street
Suite 800
Boston, MA 02108
Phone: 617-720-2444
Fax: 617-720-3693
Withdrawn 02/02/2009

Private Counsel 670014

Ronaldo Rauseo-Ricupero
Nixon Peabody
100 Summer Street
Boston, MA 02110
Phone: 617-345-1000
Fax: 617-345-1300
Active 05/02/2008 Notify

Private Counsel 549016

Gordon M Jones III
Nixon Peabody
100 Summer Street
Boston, MA 02110
Phone: 617-345-1000
Fax: 617-345-1300
Withdrawn 06/30/2009

Private Counsel 639680

Gregg A Rubenstein
Nixon Peabody
100 Summer Street
Boston, MA 02110
Phone: 617-345-1000
Fax: 866-369-4747
Active 06/30/2009 Notify

Defendant

Delphi Construction, Inc.
130 Overland Road
Waltham, MA 02451
Served: 12/18/2007
Answered: 01/09/2008
Answered 01/09/2008

Private Counsel 563347

Robert B Foster
Rackemann Sawyer & Brewster
160 Federal Street
Boston, MA 02110-1700
Phone: 617-951-1138
Fax: 617-542-7437
Withdrawn 02/05/2008

Commonwealth of Massachusetts
MIDDLESEX SUPERIOR COURT
Case Summary
Civil Docket

MICV2007-04867

sey, Trustee of JNM 2006 Trust v New England Deaconess Association- Abundant Life Communities,

Defendant
Commonwealth of Massachusetts' Executive
Office of
10 Park Plaza
Suite 3170
Boston, MA 02116
Transportation and Public Works
Served: 12/19/2007
Answered: 04/29/2008
Answered 04/29/2008

Plaintiff/3rd party
Delphi Construction, Inc.
Active 01/09/2008

Private Counsel 557539
Richard E Cavanaugh
Gallagher & Cavanaugh LLP
100 Foot of John Street
Boott Cotton Mills
Lowell, MA 01852
Phone: 978-452-0522
Fax: 978-452-0482
Active 01/10/2008 Notify

Private Counsel 183400
Michael W Gallagher
Gallagher & Cavanaugh LLP
Boott Cotton Mills
100 Foot of John Street
Lowell, MA 01852
Phone: 978-452-0522
Fax: 978-452-0482
Active 01/10/2008

Private Counsel 547290
Howard R Meshnick
Mass Atty General's Office
Government Bureau/Trial Division
One Ashburton Place Room 1813
Boston, MA 02108-1598
Phone: 617-727-2200
Fax: 617-727-3076
Withdrawn 12/08/2009

*** See Attorney Information Above ***

Private Counsel 640017
Ronaldo Rauseo Ricupero
Nixon Peabody
100 Summer St.
Boston, MA 02110
Phone: 617-345-1000
Fax: 617-345-1000
Active 10/17/2008

Commonwealth of Massachusetts
MIDDLESEX SUPERIOR COURT
Case Summary
Civil Docket

MICV2007-04867

sey, Trustee of JNM 2006 Trust v New England Deaconess Association- Abundant Life Communities,

Defendant/3rd party

Marois Bros, Inc.
115 Blackstone River Road
Worcester, MA 01607
Answered: 02/21/2008
Answered 02/21/2008

Private Counsel 557000

William P Rose
Tucker Heifetz & Saltzman
100 Franklin Street
Suite 801
Boston, MA 02110
Phone: 617-557-9696
Fax: 617-227-9191
Active 02/25/2008 Notify

*** See Attorney Information Above ***

Defendant/crossclaim

New England Deaconess Association
Abundant Lufe Communities Inc
Active 05/07/2009

Private Counsel 639680

Gregg A Rubenstein
Nixon Peabody
100 Summer Street
Boston, MA 02110
Phone: 617-345-1000
Fax: 866-369-4747
Active 07/29/2009 Notify

Defendant/crossclaim

Delphia Construction Inc
Answered: 06/15/2009
Answered 06/15/2009

Private Counsel 557539

Richard E Cavanaugh
Gallagher & Cavanaugh LLP
100 Foot of John Street
Boot Cotton Mills
Lowell, MA 01852
Phone: 978-452-0522
Fax: 978-452-0482
Active 06/15/2009 Notify

ENTRIES

Date	Paper	Text
12/17/2007	1.0	Complaint & civil action cover sheet filed
12/17/2007		Origin 1, Type C01, Track F.
12/17/2007	2.0	Affidavit of Plaintiff John N. Morrissey, Esquire in support of Temporary Restraining Order
12/17/2007	3.0	Plaintiff John N. Morrissey, Trustee of JNM 2006 Trust's ex parte MOTION for temporary restraining order After review, denied Ex-Parte the within matter is set down for hearing with notice on December 20, 2007 at 9:00 AM in Courtroom 11A (Gershengom, J.) copy given in hand
12/17/2007	4.0	Summons and order of notice issued; returnable 12/20/2007 at 9:00 am in Courtroom 11A
12/20/2007		Atty Robert B Foster's notice of appearance for Delphi Construction, Inc.(Filed in Court this day)
12/20/2007		Atty Robert L Kirby Jr's notice of appearance for New England Deaconess Association- Abundant Life Communities, Inc. (Filed in Court thsi day)
12/20/2007	4.1	SERVICE RETURNED (order of notice): Delphi Construction, Inc., 12/18/07, in hand, 130 Overland Road, Waltham, MA 02451. Returned into Court 12/20/07.

MICV2007-04867

sey, Trustee of JNM 2006 Trust v New England Deaconess Association- Abundant Life Communities,

Date	Paper	Text
12/20/2007		SERVICE RETURNED (order of notice): Commonwealth of Massachusetts' Executive Office of Trans & Public Works, 12/19/07, in hand, 10 Park Plaza, Suite 3170, Boston, MA 02115. Returned into Court.
12/20/2007		SERVICE RETURNED (order of notice): New England Deaconess Association- Abundant Life Communities, In, 12/19/07, in hand, 80 Deaconess Road, Concord, MA 01724. Returned into Court.
12/27/2007	5.0	AGREED ORDER: The plaintiff, John Morrissey as Trustee, and defendants New England Deaconess Association ("NEDA") and Delphi Construction, Inc. ("Delphi"), hereby agree to the entry of the following Order: 1. Until further Order of the Court, NEDA and Delphi shall cease construction on that portion of the roadway on Route 2 eastbound in Lincoln, Massachusetts, which bounds on the property of the plaintiff. Notwithstanding the foregoing, NEDA and Delphi may attend to any public safety consideration that may rise. 2. Delphi shall remove from plaintiff's property the temporary fence that Delphi previously erected on plaintiff's property. Delphi shall provide plaintiff with 24 hour advance notice before removing said fence. Plaintiff shall not interfere with Delphi's removal of the fence. 3. Plaintiff has advised the Court that plaintiff does not want the defendants to remove any riprap that was placed on plaintiff's property in connection with the construction project that is at issue in this action. Accordingly, until further Order of the Court, defendants shall not remove any such riprap from plaintiff's property. SO ORDERED. (Gershengorn, J.). Certified Copies mailed 12/27/07.
01/09/2008		Attorney John N. Morrissey for John N. Morrissey, Trustee of JNM 2006 Trust, Notice of change of address and telephone number (Filed in Court this day)
01/09/2008	6.0	SERVICE RETURNED (order of notice): Commonwealth of Massachusetts' Executive Office of Transportation & Public Works, 12/19/07 in hand at 10 Park Plaza, Suite 3170 Boston, MA. Filed in Court
01/09/2008	7.0	Affidavit of John N. Morrissey, Esq. Certifying Service upon Attorney General, Cert Mail, receipt attached. Filed in Court.
01/09/2008	8.0	Affidavit of Plaintiff John N. Morrissey, Esq. in Support of Temporary Restraining Order. Filed in Court
01/09/2008	9.0	ANSWER: Delphi Construction, Inc.(Defendant) to Plaintiff's Verified Complaint & Jury Demand. Filed in Court
01/09/2008		Atty John S Davagian II's notice of appearance for John N. Morrissey, Trustee of JNM 2006 Trust. Filed in Court
01/09/2008		Atty Richard E Cavanaugh's notice of appearance for Delphi Construction, Inc. Filed in Court
01/09/2008		Atty Michael W Gallagher's notice of appearance for Delphi Construction, Inc.
01/09/2008	10.0	Complaint of 3d-party Plf Delphi Construction, Inc. v Marois Bros, Inc. along with filing fee in the amt of \$275.00 including security fee rec'd. Filed in Court

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Morrissey, Trustee of JNM 2006 Trust v New England Deaconess Association- Abundant Life Communities,

Date	Paper	Text
01/31/2008	11.0	Attorney, Robert L Kirby Jr's MOTION to withdraw as counsel of record for Delphi Construction, Inc., Affidavit of Robert B. Foster
02/08/2008	12.0	SERVICE RETURNED (3rd pty summons): Marois Bros, Inc., service made on 2/8/2008 (in hand)
02/21/2008	14.0	ANSWER by Marois Bros, Inc. to COMPLAINT (claim of trial by jury reqstd)
04/03/2008	44.0	Plaintiff John N. Morrissey, Trustee of JNM 2006 Trust's MOTION Under MASS.R.CIV.P. 59(e) For Reconsideration of Court's Order Precluding Plaintiff From Prosecuting HIS claim Pro Se And Testifying At Trial; Plaintiff's Memorandum of Law in support of His MOTION Under MASS.R.CIV.P. 59(e) For Reconsideration of Court's Order Precluding Plaintiff From Prosecuting HIS claim Pro Se And Testifying At Trial; Affidavit of plaintiff in support of HIS MOTION Under MASS.R.CIV.P. 59(e) For Reconsideration of Court's Order Precluding Plaintiff From Prosecuting HIS claim Pro Se And Testifying At Trial; Defendant New England Deaconess Association - Bundant Life Communities, Inc's Opposition to Plaintiff's Motion For Reconsideration; Affidavit of Gregg A. Rubenstein in opposition to Plaintiff's Motion For Reconsideration; Superior Court rule 9A Affidavit of compliance
04/07/2008		MOTION (P#15) After review and without opposition, motion allowed. (Leila Kern, Justice). Notices mailed 4/7/2008
04/07/2008	16.0	Amended complaint of John N. Morrissey, Trustee of JNM 2006 Trust (Filed in Court this day)
04/16/2008	17.0	ORDER OF DISMISSAL re: New England Deaconess Association- Abundant Life Communities, In (w/o prejudice; service not complete by 1-88 deadline). Copies mailed.
04/16/2008		Case status changed to 'Needs review for answers' at service deadline review
04/17/2008	18.0	Default re: Commonwealth of Massachusetts' Executive Office of (no answer by 1-88 deadline); Pltf directed to move for appropriate judgement by 05/17/2008. Copies mailed.
04/17/2008		Case status changed to 'Needs discovery' at answer deadline review
04/22/2008	19.0	ORDER vacating default of April 17, 2007 (Leila R. Kern, Justice)
04/29/2008	20.0	ANSWER (amended complaint): Commonwealth of Massachusetts' Executive Office of
05/02/2008	21.0	ANSWER (amended complaint): New England Deaconess Association- Abundant Life Communities, In
05/02/2008		Jury demand on all issues filed by New England Deaconess Association- Abundant Life Communities, In
08/01/2008	22.0	Joint motion for amended tracking order, filed in court and ALLOWED. Trial date to be set at the Summary Judgment hearing (Gershengorn, J.) notices mailed 08/01/2008
08/04/2008	23.0	Joint MOTION to amend tracking deadlines.
04/27/2009	24.0	Defendant New England Deaconess Association Abundant Life Communities, Inc.'s MOTION To Amend Its Answer To Plaintiff's Amended Verified Complaint and Jury Demand To Assert Cross-Claims; Memo In

Commonwealth of Massachusetts
MIDDLESEX SUPERIOR COURT
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MICV2007-04867

sey, Trustee of JNM 2006 Trust v New England Deaconess Association- Abundant Life Communities,

Date	Paper	Text
	24.0	Support; and Certificate Of Compliance.
04/29/2009	25.0	Defendant New England Deaconess Association Abundant Life Communities, Inc. Amended Answer to Plaintiff's Amended Verified Complaint and Jury Demand with Cross-Claims filed in Court
04/30/2009		After review and without opposition, Motion (P#24) ALLOWED. Christine M. McEvoy, Justice) Dated 4-29-09 and Notices mailed 4/30/2009
05/08/2009	26.0	Amended ANSWER: New England Deaconess Association- Abundant Life Communities, Inand jury demand
05/08/2009		CROSSCLAIM of New England Deaconess Association- Abundant Life Communities, in v Delphi Construction, Inc. and jury demand
06/15/2009	27.0	ANSWER: Delphia Construction Inc(Defendant/crossclaim) of New England Deaconess Association Abundant Life Communities Inc and jury demand
06/15/2009		Amended third party complaint of Delphi Construction, Inc.and jury demand
07/08/2009	28.0	ANSWER (to Amended Third-Party Complaint): Marois Bros, Inc. (Jury demand)
07/20/2009	29.0	ANSWER (Amended complaint): Delphi Construction, Inc. and Jury Demand
07/27/2009	30.0	Joint MOTION to Rescheduled Pre-Trial Conference
07/28/2009	31.0	FAXED Joint Motion to Reschedule Pre-Trial Conference. Allowed (Gershengorn, J.) copies mailed 7-29-09
07/29/2009		(P#30) ALLOWED.(Wendie I. Gershengorn, Justice) Dated 7-28-09 and Notices mailed 7/29/2009
07/29/2009	32.0	Defendant New England Deaconess Association- Abundant Life Communities, Incorporated's MOTION to strike Insufficient Expert Designation and Sup. Cr. Rule 9C Certification; Plff's opposition to deft's motion; Affidavit in support of plff's opposition to deft's motion.
07/29/2009	33.0	Defendant Commonwealth of Massachusetts' Executive Office of Transportation and Public Works's MOTION to Dismiss for Lack of Subject Matter Jurisdiction; Deft's Memorandum in support of; Plff's Memorandum in opposition to deft's motion.
07/29/2009	34.0	Court received Letter correspondence to Clerk DeGuglielmo from Ronaldo Rauseo-Ricupero. RE: Leave to submit a reply brief on behalf of the New England Deaconess Association.
07/29/2009	35.0	Court received Letter correspondence to Clerk DeGuglielmo from Ronaldo Rauseo-Ricupero. RE: Leave to submit a reply brief on behalf of the Commonwealth of Massachusetts.
08/03/2009		Motion (P#34) ALLOWED Dated: July 29, 2009 (Wendie I. Gershengorn, Justice) Notices mailed 8/3/2009
08/03/2009		Motion (P#35) ALLOWED Dated: July 29, 2009 (Wendie I. Gershengorn, Justice) Notices mailed 8/3/2009
08/24/2009	36.0	Deft New England Deaconess Association- Abundant Life Communities, Inc's reply to plff's opposition to motion to Strike Insufficient Expert Designation.
08/24/2009	37.0	Deft Commonwealth of Massachusetts' reply to plff's opposition to Commonwealth's motion to dismiss for lack of subject matter

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sey, Trustee of JNM 2006 Trust v New England Deaconess Association- Abundant Life Communities,

Date	Paper	Text
	37.0	jurisdiction.
08/26/2009	38.0	Plaintiff's Emergency MOTION To Strike Defendant Commonwealth Of Massachusetts Reply To Plaintiff's Opposition To Commonwealth's Motion To Dismiss For Lack Of Subject Matter Jurisdiction
08/26/2009	39.0	Plaintiff's Emergency MOTION To Strike Defendant New England Deaconess Association-Abundant Life Communities,Inc.'s Reply To Plaintiff's Opposition To Motion To Strike Insufficient Expert Designation
08/28/2009	40.0	Defendant Commonwealth Of Massachusetts' Opposition to Plaintiff's Emergency MOTION To Strike Defendant Commonwealth reply to plaintiff's opposition to Commonwealth's Motion To Dismiss For Lack of Subject Matter Jurisdiction (RE#38)
08/28/2009	41.0	Defendant New England Deaconess Association- Abundant Life Communities, Inc's opposition to Plaintiff's Emergency MOTION To Strike Defendant New England Deaconess Association-Abundant Life Communities,Inc.'s Reply To Plaintiff's Opposition To Motion To Strike Insufficient Expert Designation (RE#39)
09/08/2009	42.0	Joint Pre-trial Memorandum filed
09/10/2009		JOINT PRE-TRIAL MEMORANDUM(COPY-P#42) Morrissey to have counsel file an appearance on his behalf or not testify. That decision to be made in writing within 30 days. Defendant may file a S.J. motion on 93A claims. Hearing on November 10, 2009 at 2pm. March 15 trial. (Wendie I. Gershengorn, Justice). Notices mailed 9/29/2009
09/10/2009		Motion (P#32) This Court finds plaintiff's expert designations are inadequate- therefore defendants may depose plaintiff's expert appraiser by November 13, 2009. Plaintiff to make expert available within the time frame or plaintiff's expert is stricken. Defense may depose plaintiff's other 2 expert and may name their rebuttal experts within 70 days. (Wendie I. Gershengorn, Justice). Notices mailed 9/29/2009
09/10/2009		Motion (P#33) The Court gives notice that it will treat this motion as one for S.J. Plaintiff to respond within 30 days as to what action the Commonwealth took other than issuing a license that supports plaintiff's causes of action. (Wendie I. Gershengorn, Justice). Notices mailed 9/29/2009
10/13/2009	43.0	Plaintiff John N. Morrissey, Trustee of JNM 2006 Trust's MOTION for reconsideration of Court Order dated , (P#)
10/14/2009	44.0	MEMORANDUM OF DECISION AND ORDER ON DEFENDANT COMMONWEALTH OF MASSACHUSETTS' MOTION DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION: Which See (8) pages ORDER: For the following reasons, the Commonwealth of Massachusetts Executive Office of Transportation and Public Works' Motion to Dismiss is DENIED as to the private nuisance claim (Count III) and ALLOWED as to the interference with rights to lateral support claim (Count I) and trespass to land claim (Count II). Dated: October 8, 2009 (Gershengorn, Justice). Copies mailed

Commonwealth of Massachusetts
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MICV2007-04867

sey, Trustee of JNM 2006 Trust v New England Deaconess Association- Abundant Life Communities,

Date	Paper	Text
10/14/2009	45.0	Plaintiff John N. Morrissey, Trustee of JNM 2006 Trust's assented to MOTION to stay this court's order precluding plaintiff from prosecuting his claim pro se and testifying at trial.
10/20/2009	46.0	Court received letter form Attorney John N. Morrissey dated October 9, 2009 requesting leave to submit a reply memorandum
10/20/2009		Letter (FAXED COPY) (P#46) Allowed reply to be filed within 15 days. (Gershengorn, Justice).(Dated October 19, 2009) Notices mailed 10/20/2009
10/22/2009	47.0	Defendant Commonwealth of Massachusetts' Executive Office of's notice of appeal from the order entered on October 14, 2009 (Gershengorn, J.) denying its motion to dismiss for lack of subject matter jurisdiction.
10/23/2009		Notice of filing of appeal sent to all counsel of record.
10/28/2009	49.0	Court received; Reply to Defendant New England Deaconess-Abundant Life Communities, Inc.'s Opposition To Plaintiff's Motion For Reconsideration (Re#43)
10/29/2009	50.0	Defendant Commonwealth of Massachusetts MRAP 9(c)(2) statement that it has not ordered and does not intend to order the transcript or any portion thereof of the lower court proceedings.
11/06/2009	51.0	Defendant New England Deaconess Association- Abundant Life Communities, Inc's MOTION for Partial Summary Judgment, pursuant to Mass.R.Civ.P. 56, as to John N. Morrissey, Trustee of JNM 2006 Trust; Memorandum of Law in support of; Affidavit of Ronaldo Rauseo-Ricupero with exhibits; Plaintiff's Memorandum of Law in opposition to deft's Motion for Partial Summary Judgment; Affidavit of John N. Morrissey, Esq. in support of plff's opposition to deft's motion; Supplemental Affidavit of Ronaldo Rouseo-Ricupero, Esq.; Deft's and Pliff's Consolidated Statement of Material Facts and Responses thereto in connection with motion for Partial Summary Judgment.
11/06/2009		Joint Appendix of Exhibits filed
11/18/2009	52.0	Plaintiff John N. Morrissey, Trustee of JNM 2006 Trust's MOTION for reconsideration and to allow Plaintiff to Prosecute his claim Pro Se and Testify at Trial
11/18/2009		Motion (P#52) (which see 3 pages) (Wendie Gershengorn, Justice) Dated: November 16, 2009. Notices mailed 11/19/2009
12/03/2009		Notice sent to clerk of Appeals Court that record is assembled
12/03/2009	53.0	Record assembled; notice (9d) to clerk of Appeals Court with 2 certified copies of docket entries; notice mailed
12/03/2009		Hearing on (P#51) New England Deaconess Association- Abundant Life Communities, Inc.'s motion for partial summary judgment. held, matter taken under advisement. (Leila R. Kern, Justice)
12/03/2009	54.0	Defendant New England Deaconess Association- Abundant Life Communities, In's MOTION for leave to file Motion for Partial Summary Judgment; Plaintiff's Memorandum in opposition to deft's motion.
12/04/2009		Notice of service of Motion To Stay Trial Pending Interlocutory Appeal
12/08/2009		(P#51) ALLOWED as to G.L.c. 93A claim. (see p.2 of motion) Dated

Commonwealth of Massachusetts
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sey, Trustee of JNM 2006 Trust v New England Deaconess Association- Abundant Life Communities,

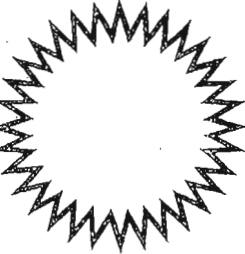
Date	Paper	Text
		October 13, 2009 The scope of "trade or commerce," as that term appears in G.L.c. 93A, encompasses "services...offered generally by a person for sale to the public in a business transaction." Szalla v. Locke, 421 Mass.448, 452 (1995). There was no business transaction between Morrissey and any of the defendants, and the claims at issue did not arise from any services offered for sale to the general public. Accordingly, the injuries alleged did not occur in trade or commerce, and the Motion for Partial Summary Judgment as to the Count for a violation of G.L.c. 93A is ALLOWED. (Leila R. Kern, Justice) Dated 12-7-09 and Notices mailed 12/8/2009
12/08/2009		(P#54) ALLOWED (Leila R. Kern, Justice) Dated 12-7-09 and Notices mailed 12/8/2009
12/14/2009	55.0	Defendant Commonwealth of Massachusetts' Executive Office of's MOTION to stay Trial pending Resolution of Interlocutory Appeal of Order on Motion to Dismiss for Lack of Subject Matter Jurisdiction; Affidavit of Compliance with Rule 9A
12/16/2009	56.0	Plaintiff John N. Morrissey, Trustee of JNM 2006 Trust's MOTION to require Discovering Party to pay reasonable Expert Fees and Sup. Crt. Rule 9C Certificate; Memorandum of Law in support of plff's motion; Affidavit of John N. Morrissey, Esq., in support of plff's motion; Defendant New England Deaconess Association-Abundant Life Communities, Inc's opposition to plff's motion; Sup. Crt. Rule 9A Affidavit of Compliance.
12/17/2009		Appeal entered in Appeals Court on 12/14/2009 docket #A.C.2009-P-2249.
12/18/2009		Motion (P#56) DENIED, based upon Gershengorn, J.'s Order allowing depositions of Plaintiff's experts because "this Court finds Plaintiff's expert to designations inadequate" it would be iniquitable to now require any defendant to pay for such depositions (Leila R. Kern, Justice) Dated: December 17, 2009. Notices mailed 12/18/2009
12/21/2009		Motion (P#55) ALLOWED Dated: December 16, 2009 (Leila R. Kern, Justice) Notices mailed 12/21/2009
12/21/2009	57.0	Court received letter from John N. Morrissey to The honorable Leila Kern: RE: Request leave to submit a reply memorandum. ALLOWED. (Kern, J.) Dated: December 16, 2009
01/04/2010	58.0	Plaintiff John N. Morrissey, Trustee of JNM 2006 Trust's MOTION under Mass. R. Civ.P.59(e) for Reconsideration of Court's Allowance of Defendant New England Deaconess Association-Abundant Life Communities, Inc's Motion for Partial Summary Judgment; Plff's Memorandum of Law in support of its motion; Defendant New England Deaconess Association-Abundant Life Communities, Inc's opposition to plff's motion for Reconsideration of Partial Summary Judgment Dismissing 93A Claim and Cross-Motion for Sanctions; Rule 9A Affidavit of Compliance.

Commonwealth of Massachusetts
MIDDLESEX SUPERIOR COURT
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MICV2007-04867
sey, Trustee of JNM 2006 Trust v New England Deaconess Association- Abundant Life Communities,

MIDDLESEX, SS. *Commonwealth of Massachusetts*
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

In testimony that the foregoing is a true copy on file
and of record made by photographic process, I hereunto
set my hand and affix the seal of said Superior Court
this Fifth day of January, 2010.


Ellen M. DiPace
Deputy Assistant Clerk

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
MICV 2007-4867

JOHN MORRISSEY, as trustee ¹

vs.

NEW ENGLAND DEACONESS ASSOCIATION -
ABUNDANT LIFE COMMUNITIES, INC. & others ²;
MAROIS BROS, INC., third-party defendant

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT
COMMONWEALTH OF MASSACHUSETTS' MOTION TO
DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

The plaintiff, John Morrissey (“Morrissey”), commenced this action against the Commonwealth of Massachusetts Executive Office of Transportation and Public Works (the “Commonwealth”), New England Deaconess Association – Abundant Life Communities, Inc. (“Deaconess”), and Delphi Construction, Inc. as a result of their alleged involvement in the alteration of a state highway that resulted in property injuries. This action is before the court on the Commonwealth’s Motion to Dismiss Morrissey’s Amended Verified Complaint (the “Complaint”). The Commonwealth argues that the court lacks subject matter jurisdiction over the Complaint’s claims of interference with rights to lateral support (Count I), trespass to land (Count II), and private nuisance (Count III). For the following reasons, the Commonwealth’s motion is **DENIED** as to the private nuisance claim and **ALLOWED** as to the interference with rights to lateral support and trespass to land claims.

¹ Of the JNM 2006 Trust

² Commonwealth of Massachusetts, Executive Office of Transportation and Public Works; Delphi Construction, Inc.

BACKGROUND

The plaintiff's Complaint alleged the following facts: Morrissey is the sole trustee of the JNM 2006 Trust, which owns the residential property located at 23 Cambridge Turnpike in Lincoln, Massachusetts (the "Trust Property"). Cambridge Turnpike is a state highway that is also identified as Route 2 ("Route 2"). The Property abuts both Route 2 and a parcel of land owned by Deaconess, on which Deaconess is constructing a senior living community project (the "Project"). Vehicles entering and exiting the Project's construction site currently use a paved roadway that connects the Project with Route 2.

The construction of the Project required Deaconess to obtain a permit from the Commonwealth that allowed Deaconess to alter Route 2 by constructing acceleration and deceleration lanes on the state highway. Once the Project opens for business, vehicular traffic would use these lanes when exiting and entering the Project via the paved roadway. Deaconess hired Delphi Construction to perform these alterations to Route 2.

Morrissey asserts that this alteration work resulted in injuries to the Trust Property. He specifically contends that the work undermined the lateral support of the portion of the Trust Property adjacent to Route 2, resulted in the defendants trespassing on the Trust Property, and caused a private nuisance on the Trust Property on the basis of the work increasing noise, dust, and vibration levels and interfering with one's ability to access the Trust Property.

DISCUSSION

The Commonwealth has moved pursuant to Mass. R. Civ. P. 12(b)(1) to dismiss Morrissey's claims that the Commonwealth interfered with his rights to lateral support (Count I), trespassed onto his land (Count II), and caused a private nuisance (Count III). A motion brought

pursuant to Mass. R. Civ. P. 12(b)(1) challenges the court's jurisdiction over the subject matter of the complaint. When this type of motion is unsupported by affidavits, the challenge is solely based on the allegations contained in the complaint, taken as true for the purposes of resolving the motion. Callahan v. First Congregational Church of Haverhill, 441 Mass. 699, 709 (2004). The party asserting jurisdiction bears the burden of setting forth jurisdictional facts. Miller v. Miller, 448 Mass. 320, 325 (2007).

The Commonwealth filed no affidavits in support of its motion, but challenges the court's jurisdiction based on Morrissey's allegations. Specifically, the Commonwealth contends that G. L. c. 258, the Massachusetts Tort Claims Act, ("Chapter 258" or the "Act") bars the court from having jurisdiction over the subject matter of the Complaint as it pertains to the Commonwealth. Taking as true Morrissey's allegations that the Commonwealth issued a permit to Deaconess that allowed Deaconess to perform alteration work to Route 2, Morrissey's claim that the Commonwealth caused a private nuisance is not barred by the Act. His claims that the Commonwealth interfered with his rights to lateral support and trespassed onto the Trust Property, however, cannot survive.

Chapter 258, § 1, et. seq., functions as a limited waiver of sovereign immunity in certain tort actions that are brought against the Commonwealth, municipalities, and other governmental subdivisions. See Murphy v. Chatham, 41 Mass. App. Ct. 821, 824 (1996). According to Chapter 258, § 2, "[p]ublic employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances" G. L. c. 258, § 2. While the Act may

provide a remedy for persons injured by the negligent or wrongful acts of governmental entities, “it does so by abrogating sovereign immunity only within a narrow statutory framework.”

Sharon v. Newton, 437 Mass. 99, 111 (2002).

Specifically, Chapter 258, § 10 delineates certain claims where the Commonwealth has not waived sovereign immunity. These claims include “(b) any claim based upon the exercise or performance . . . [of] a discretionary function or duty on the part of public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused,” “(e) any claim based upon the issuance . . . [of] any permit, license, certificate, approval, order or similar authorization,” and “(j) any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation . . . which is not originally caused by the public employer.” G. L. c. 258, § 10. This section concludes with a provision that “[n]othing in this section shall be construed to modify or repeal the applicability of any existing statute that limits, controls or affects the liability of public employers or entities.”

Id.

1. Private Nuisance

For the purposes of this motion, Morrissey has demonstrated that the court has jurisdiction over its private nuisance claim against the Commonwealth. “A private nuisance is actionable when a property owner creates, permits, or maintains a condition or activity on his property that causes a substantial and unreasonable interference with the use and enjoyment of the property of another.” Asiala v. Fitchburg, 24 Mass. App. Ct. 13, 17 (1987). The allegations in Morrissey’s Complaint, taken as true for the purposes of this motion, contend that the Commonwealth issued a permit to Deaconess to perform alteration work on Route 2, a state

highway owned by the Commonwealth, and that this work interfered with the use and enjoyment of the Trust Property based the work increasing noise, dust, and vibration levels and interfering with one's ability to access the Trust Property.

The Commonwealth argues that Chapter 258, § 10 precludes liability of this private nuisance claim where it only issued the license allowing the alteration work. Chapter 258, however, does not apply to private nuisance actions brought against a governmental entity. Murphy v. Chatham, 41 Mass. App. Ct. 821, 825-826 (1996). See also Fortier v. Essex, 52 Mass. App. Ct. 263, 268 n.8 (2001). While Chapter 258 removed the defense of sovereign immunity in certain tort actions, “such remedy was not needed in regard to private nuisance actions. Decades before the enactment of the Act, it was well established that a municipality was not immune from liability if it created or maintained a private nuisance on its land which caused injury to the real property of another.” Murphy, 41 Mass. App. Ct. at 824-825, quoting Asjala, 24 Mass. App. Ct. at 17. See also Morash & Sons, Inc. v. Commonwealth, 363 Mass. 612, 616 (1973) (“Where a municipality is the owner of or in control of real estate and creates or permits a private nuisance to the real property of another, it is liable in a common law action just as a natural person would be.”). Accordingly, the court will not dismiss Morrissey’s private nuisance claim for lack of subject matter jurisdiction.

2. Interference with Rights to Lateral Support and Trespass to Land

Morrissey has failed meet his burden of showing that the court has jurisdiction over the remaining claims of interference with rights to lateral support and trespass to land against the Commonwealth. While acknowledging that the Commonwealth has retained immunity with respect to certain claims, Morrissey relies on a provision in § 10 of Chapter 258 that states,

“[n]othing in this section shall be construed to modify or repeal the applicability of any existing statute that limits, controls or affects the liability of public employers or entities.” In his Complaint, however, Morrissey does not assert any statutory claims against the Commonwealth. His remaining claims of interference with his rights to lateral support and trespass to land relate only to the Commonwealth on the basis of its decision to issue a permit allowing Deaconess to perform the alteration work. The Commonwealth has not waived immunity to claims based on a discretionary decision, an issuance of a permit, or an alleged failure to prevent or diminish harmful consequences that it did not originally cause. See G. L. c. 258, § 10(b), (e), (j). Consequently, the court does not have subject matter jurisdiction over these common-law claims.

In his Opposition to the Commonwealth’s Motion to Dismiss, Morrissey contends that the court has jurisdiction over these claims pursuant to G. L. c. 81, § 7. This section, entitled “Acquisition of Land Outside Limits of Existing Highway,” initially provides that “[i]f it is necessary to acquire land for the purposes of a state highway outside the limits of an existing public way, the [state highway] department may take the same by eminent domain on behalf of the commonwealth under chapter seventy-nine.” The section continues to state, “[w]hen injury has been caused to the real estate of any person by the laying out or alteration of a state highway, he may recover compensation therefor from the commonwealth under chapter seventy-nine.” *Id.* See also Malone v. Commonwealth, 378 Mass. 74, 77 (1979). General Laws c. 79, entitled “Eminent Domain,” provides that “[i]n determining the damages to a parcel of land injured when no part of it has been taken, regard shall be had only to such injury as is special and peculiar to such parcel.” G. L. c. 79, § 12. See also Paul’s Lobster, Inc. v. Commonwealth, 53 Mass. App. Ct. 227, 233 (2001).

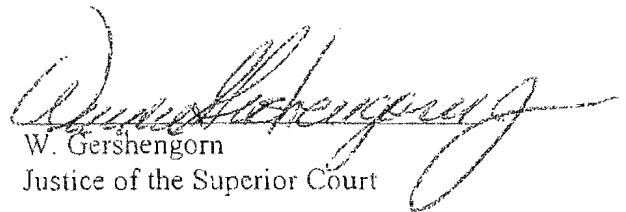
This statutory imposition of liability for injuries to property not taken by the Commonwealth that were caused by the alteration of a state highway relies on the implication that the Commonwealth had a role in performing the work. See Paul's Lobster, Inc., 53 Mass. App. Ct. at 233 (attesting that the parties did not dispute that the state highway department "controlled" a state highway alteration project when referring to G. L. c. 81, § 7). See also G. L. c. 81, § 7; G. L. c. § 79 (primarily addressing remedies where the Commonwealth takes property under its eminent domain powers). In the present case, the Commonwealth did not involve itself in the alteration of Route 2 by either controlling the work allegedly performed by Deaconess or Delphi Construction, Inc. or taking any portion of the Trust Property. Instead, the Commonwealth's only role in the alteration of Route 2 was its decision to issue a permit to Deaconess that allowed this work to be performed. As both of Morrissey's remaining claims against the Commonwealth for interference with his rights to lateral support and trespass to land are based on this discretionary decision, these claims are barred by the waiver of sovereign immunity exceptions listed in G. L. c. 258, § 10(b), (e), or (j).

Morrissey's additional argument that G. L. c. 81, § 21 provides the court with subject matter jurisdiction over these remaining claims is unavailing. This statute requires entities performing maintenance and repair work on a state highway to acquire a permit from the Commonwealth's highway department and perform the work "under its supervision and to its satisfaction." G. L. c. 81, § 21. This provision only gives the Commonwealth the right to oversee the work, and does not create a private right of action based on the failure of the Commonwealth to fulfill its supervisory role. "The rules of construction governing statutory waivers of sovereign immunity are stringent, . . . [and] [c]onsent to suit must be expressed by the

terms of a statute, or appear by necessary implication from them.” Ware v. Commonwealth, 409 Mass. 89, 91 (1991) (internal citations and quotations omitted). Accordingly, the court lacks subject matter jurisdiction over Morrissey’s claims of interference with rights to lateral support and trespass to land as they pertain to the Commonwealth.

ORDER

For the following reasons, the Commonwealth of Massachusetts Executive Office of Transportation and Public Works’ Motion to Dismiss is **DENIED** as to the private nuisance claim (Count III) and **ALLOWED** as to the interference with rights to lateral support claim (Count I) and trespass to land claim (Count II).


W. Gershengorn
Justice of the Superior Court

DATED: October 8, 2009