Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

NO. SJC-11395

ESSEX COUNTY

WILLIAM SHEEHAN,
PLAINTIFF-APPELLEE,

v.

DAVID B. WEAVER AND JEAN C. WEAVER,
DEFENDANTS-APPELLANTS.

ON APPEAL FROM A JUDGMENT OF THE NORTHEAST HOUSING COURT

BRIEF FOR THE *AMICUS CURIAE*
MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION

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STATEMENT OF THE INTEREST OF THE *AMICUS CURIAE*

The Massachusetts Defense Lawyers Association ("MDLA"), *amicus curiae*, is a voluntary, non-profit, statewide professional association of trial lawyers who defend corporations, individuals and insurance companies in civil lawsuits. Members of the MDLA do not include attorneys who, for the most part, represent claimants in personal injury litigation. The purpose of the MDLA is to improve the administration of justice, legal education and professional standards, and to promote collegiality and civility among all members of the bar.

To promote its objectives, MDLA participates as *amicus curiae* in cases raising issues of importance to its members, their clients and the judicial system. The MDLA believes that this is such a case and that its perspective can assist the Court in resolving the important issues raised by this appeal. The MDLA urges the Court to uphold its earlier decision in *McAllister*, which limits the application of G.L. c. 143, § 51 to incidents in which a building code violation results in injury to a person fleeing a fire. The MDLA also urges the Court to conclude that the structure at issue was not a "building" within the

meaning of G.L. c. 143, § 51. The Housing Court's decision under review improperly supplants the common law of negligence with strict liability whenever there is a building code violation and improperly expands the scope and reach of § 51 to a "mom and pop" rental property to which it was never intended to apply.

STATEMENT OF THE ISSUES

I. Whether the Housing Court trial judge committed an error of law in ruling that the defendants were strictly liable under G.L. c. 143, § 51 for alleged building code violations where the plaintiff was not injured while fleeing a fire?

II. Whether the Housing Court trial judge committed an error of law in ruling that the property at which the incident occurred was subject to the provisions of G.L. c. 143, § 51 where that statute only applies to "place[s] of assembly, theatre[s], special hall[s], public hall[s], factor[ies], workshop[s], manufacturing establishment[s] or building[s]"?

STATEMENT OF THE CASE

The MDLA, as *amicus curiae*, adopts the defendants-appellants' statement of the case regarding the prior proceedings and the factual background.

ARGUMENT

The Housing Court trial judge incorrectly interpreted and applied G.L. c. 143, § 51. In finding that G.L. c. 143, § 51 applied, the Housing Court trial judge simply ignored existing and controlling precedent, which limits liability under the statute to incidents in which a violation of the State Building Code results in an injury to someone fleeing a fire. Additionally, the Housing Court trial judge erred in concluding that the Rantoul Structure was a "building" within the meaning of G.L. c. 143, § 51. The Housing Court judge failed to apply the doctrine of *ejusdem generis* to construction of the term "building" as required by the Supreme Judicial Court. Here, the small scale, "mom and pop" rental operation at the subject property is simply not analogous to the specifically listed structures to which § 51 applies ("place of assembly, theatre, special hall, public

hall, factory, workshop, manufacturing establishment").

I. G.L. c. 143, § 51 Must Be Read With Reference to the Well Established Case Law Limiting Its Application to Persons Using Stairways and Egresses To Escape from a Fire.

In *McAllister v. Boston Hous. Auth.*, 429 Mass. 300, 304 n.5 (1999), the Supreme Judicial Court ruled that G.L. c. 143, § 51[1] only applied to persons using stairways and egresses to escape from a fire. The plaintiff, Geraldine McAllister, slipped and fell on ice on the exterior stairs of the Boston Housing Authority ("BHA") property where she resided. *Id.* at 301. She asserted claims for negligence, breach of the implied warranty of habitability, breach of the covenant of quiet enjoyment and violation of the lease against the BHA. *Id.* At trial, McAllister requested a jury instruction under G.L. c. 143, § 51, as

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[1] G.L. c. 143, § 51 provides, in pertinent part:

> The owner, lessee, mortgagee in possession or occupant, being the party in control, of a place of assembly, theatre, special hall, public hall, factory, workshop, manufacturing establishment or building shall comply with the provisions of this chapter and the state building code relative thereto, and such person shall be liable to any person injured for all damages caused by a violation of any of said provisions.

amended, which the trial judge refused to give. *Id.* at 304 n.5. The Supreme Judicial Court held that the trial judge did not err in refusing to give that jury instruction because G.L. c. 143, § 51 only applied to situations involving people fleeing from a fire.[2] *Id.* As the *McAllister* court concluded:

> The plaintiff also argues that the judge erred by not reading a proposed jury instruction stating that the defendant "shall be liable . . . [for] a violation of the State Building Code," citing G.L. c. 143, § 51. There was no error. "[N]one of the benefits of G.L. c. 143, [§ 51] is 'available to persons using stairways and egresses for purposes other than escape from danger from fire.'" *Festa v. Piemonte*, 349 Mass. 761, 761, 207 N.E.2d 535 (1965).

Id.

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[2] The Housing Court incorrectly viewed the holding in *McAllister* on the scope of G.L. c. 143, § 51 as "dictum." The Latin term *obiter dictum* translates to "something said in passing" and is defined as "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)." Black's Law Dictionary (7th ed. 1999) at 1100. The *McAllister* court specifically addressed why the trial judge had not erred in refusing to give the plaintiff's requested jury instruction for strict liability based upon a violation of the State Building Code. *Id.* In so ruling, the *McAllister* court noted that "the plaintiff argues that the instructions failed to convey that a violation of the code is sufficient, in and of itself, to warrant a finding of liability." *Id.* at 304 n.6. Accordingly, the *McAllister* court's analysis of G.L. c. 143, § 51 was plainly necessary for its determination that the plaintiff was not entitled to a new trial.

In *Fox v. The Little People's School, Inc.*, 54 Mass. App. Ct. 578, 582 (2002), *further app. rev. den.* 437 Mass. 1106 (2002), the Appeals Court followed *McAllister*, finding that the "appropriate circumstances" for recovery under G.L. c. 143, § 51 are those in which a violation of the State Building Code results in an injury to someone fleeing a fire. While it noted the changes made to the statute by the 1972 legislation, which created a comprehensive State Building Code, the *Fox* court recognized that the Supreme Judicial Court in *McAllister* "imported into the new § 51 the fire safety concerns the old statute embodied." *Id.* at 581. Therefore, the *Fox* court concluded that, after *McAllister*, "the pedigree of c. 143, § 51" limited "its facially broad language." *Id.* at 582. Significantly, this Court denied the plaintiff-appellant's petition for further appellate review of the Appeals Court's decision in *Fox*. 437 Mass. 1106 (2002). Had the Supreme Judicial Court viewed the *Fox* decision and its interpretation of *McAllister* as contrary to "the public interest or the interests of justice," it could have granted further appellate review. Mass. R. App. P. 27.1(a). However,

the Supreme Judicial Court declined to do so. 437 Mass. 1106 (2002).

More than 14 years have transpired since *McAllister* and more than 11 years have transpired since *Fox*. However, the Legislature has not amended G.L. c. 143, § 51 during either the more than 14-year period since *McAllister* or the more than 11-year period since *Fox*. The Legislature's silence suggests its tacit approval of those decisions limiting the application of G.L. c. 143, § 51 to instances in which a person is injured fleeing a fire.

The Legislature's prolonged silence after *McAllister* and *Fox* contrasts starkly with the Legislature's swift reaction to *St. Germaine v. Pendergast*, 411 Mass. 615, 619 (1992) ("*St. Germaine I*"), which held that G.L. c. 143, § 51 did not apply to a single family home under construction. *See St. Germaine v. Pendergast*, 416 Mass. 698, 701 (1993) ("*St. Germaine II*"). As the Supreme Judicial Court noted in *St. Germaine II*:

> In a *clear response* to our decision [in *St. Germaine I*], the Legislature enacted St. 1992, c. 66, inserting two sentences into G.L. c. 143, § 51, one of which provides that "any person who obtains a permit pursuant to the state building code to

> erect, construct, or demolish a building or structure shall be liable to any worker or other person for all injuries and damages that result from a failure to provide a safe workplace, or caused by a violation of the state building code or other codes, by-laws, rules and regulations applicable to the construction site."

Id. (Emphasis added.) Similarly, after *St. Germaine II*, the Legislature promptly acted to amend G.L. c. 143, § 51 to delete the two sentences it had added in response to *St. Germaine I*. *See* St. 1993, c. 495, § 35. (AD 00018). By comparison with its actions after *St. Germaine I* and *St. Germaine II*, the Legislature's silence after *McAllister* and *Fox* is deafening.

The *McAllister* court's holding that G.L. c. 143, § 51 only applies to incidents where a violation of the State Building Code results in an injury to someone fleeing a fire comports with established rules of statutory construction. In construing a statute, this Court "presume[s] that the Legislature is aware of the prior state of the law as explicated by the decisions of [the Supreme Judicial Court]" and "do[es] not readily assume that [the Legislature] intends to overrule [the Supreme Judicial Court's] decisions sub silentio." *Commonwealth v. Maloney*, 447 Mass. 577,

589 (2006). Furthermore, "[s]tatutes are to be construed in light of the preexisting common and statutory law with reference to the mischief probably intended to be remedied." *EMC Corp. v. Commissioner of Revenue*, 433 Mass. 568, 571 (2001), *quoting Ferullo's Case*, 331 Mass. 635, 637 (1954). "It is not to be lightly supposed that radical changes in the law were intended where not plainly expressed." *Id.* Additionally, the Court "will not adopt a literal construction of a statute if the consequences of such construction are absurd or unreasonable." *North Shore Realty Trust v. Commonwealth*, 434 Mass. 109, 112 (2001). Rather, the Court assumes the Legislature intended to act reasonably. *Id.*

Here, neither the statutory language nor the legislative history for the 1972 amendment to G.L. c. 143, § 51 show that the Legislature intended to overrule *Festa* and to radically expand the scope of strict liability under § 51 to cover every building code violation. A legislative intent to overrule *Festa* should not be presumed *sub silentio*. Similarly, since it was not "plainly expressed" by the Legislature, it should not be presumed that the scope of strict liability under G.L. c. 143, § 51 ballooned

from building code violations that resulted in injury to a person fleeing a fire to any building code violation whatsoever. Given the absence of any legislative history evincing such a sea change in the law, the *McAllister* court properly "imported" into the amended § 51 the fire safety concerns of its predecessor. *See Fox*, 54 Mass. App. Ct. at 581.

Finally, the Housing Court's broad reading of G.L. c. 143, § 51 is unreasonable because it supplants the common law of negligence with statutory strict liability whenever there is a building code violation, leading to absurd and costly results. As a general rule, violations of a statute or regulation do not constitute negligence *per se*; rather, they are only some evidence of negligence. *St. Germaine I*, 411 Mass. at 614. The Housing Court's overly broad interpretation of G.L. c. 143, § 51 would turn this well-established rule on its head, and would expose the persons or entities subject to § 51 to greatly expanded civil liability. To the extent the statute creates strict liability in tort, it deviates from the common law establishing negligence as the standard for liability of a property owner. The Housing Court's expansion of the scope of G.L. c. 143, § 51 is in

derogation of the common law; therefore, the rule that "an existing common law remedy is not to be taken away by statute unless by direct enactment or necessary implication" applies. *Cavadi v. DeYeso*, 458 Mass. 615, 628-629 (2011). *See Suffolk Constr. Co. v. Division of Capital Asset Mgt.*, 449 Mass. 444, 454 (2007), *quoting Riley v. Davison Constr. Co.*, 381 Mass. 432, 438 (1980)("We consider the statute in light of the common law . . . and we do not construe a statute 'as effecting a material change in or a repeal to the common law unless the intent to do so is clearly expressed'"). Furthermore, since the statute, as interpreted by the Housing Court, is in derogation of the common law, it must be strictly construed. *Phillips v. Pembroke Real Estate, Inc.*, 443 Mass. 110, 119 n.12 (2004). Here, there was no clear expression by the Legislature of an intent to supplant the law of negligence with strict liability for every building code violation.

II. The Housing Court Trial Judge Erred in Ruling That the Rantoul Structure Was Subject to G.L. c. 143, § 51 Because It Is Not a "Place of Assembly, Theatre, Special Hall, Public Hall, Factory, Workshop, Manufacturing Establishment or Building" Within the Meaning of the Statute.

The types of structures covered by G.L. c. 143, § 51 are clearly delimited. The statute only applies to "place[s] of assembly, theatre[s], special hall[s], public hall[s], factor[ies], workshop[s], manufacturing establishment[s] or building[s]." G.L. c. 143, § 51. Here, the Rantoul Structure was plainly not a "place of assembly," a "theatre," a "special hall," a "public hall," a "factory," a "workshop" or a "manufacturing establishment." Therefore, G.L. c. 143, § 51 would only apply to the Rantoul Structure if it was a "building" within the meaning of the statute.

In construing the language of G.L. c. 143, § 51, the Supreme Judicial Court has applied the doctrine of *ejusdem generis*. *Banushi v. Dorfman*, 438 Mass. 242, 244 (2002). Under that doctrine, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those enumerated by the preceding specific words." *Id.*,

quoting 2A N.J. Singer, Sutherland Statutory Construction § 47.17, at 273-274 (6th ed. rev. 2000). The final word, "building" in the pertinent language of G.L. c. 143, § 51 is a general word; therefore, the *Banushi* court construed it under the doctrine of *ejusdem generis*. *Id.* As the *Banushi* court determined:

> Pursuant to the doctrine of ejusdem generis, *we construe the general word "building" to refer to structures similar in nature to those described by the preceding specific words, i.e., places of public or commercial use, places of assembly or places of work.* "'Building' [in the statute] must be read to refer to structures used for purposes like those of the other structures listed."

Id., *quoting Commonwealth v. Eakin*, 427 Mass. 590, 592 (1998) (emphasis added).

In fact, the *Banushi* court "observe[d] that the Legislature simply may have intended the word 'building' as a synonym for a 'manufacturing establishment.'" *Id.* at 244 n.5. The Supreme Judicial Court made that observation because there was "no comma in that portion of the definition that contains the phrase 'manufacturing establishment or building.'" *Id.* The *Banushi* court further noted that a legislative "intent" that the word "building" was synonymous with "manufacturing establishment" was

consistent with its decision holding that an owner-occupied two-family house in which the other unit was rented was not a "building" within the meaning of G.L. c. 143, § 51. *Id.*

The *Banushi* court found that the broad definition of "building" in G.L. c. 143, § 1 – "a combination of any materials, whether portable or fixed, having a roof, to form a structure for the shelter of persons, animals or property" – did not change its analysis. *Id.* at 245. Applying that broad definition to § 51 "would render the remaining words in the listing superfluous." *Id.* *Eakin*, 427 Mass. at 592 ("The Legislature could not have intended the word 'building' in § 51, which appears in a series with other, more specific words . . . to mean any and every structure. If it had, the word 'building' alone would have been sufficient. 'Building' must be read to refer to structures used for purposes like those of the other structures listed."). Statutes are not read so as to render any of their terms meaningless or superfluous. *Id.*

In a footnote in *Banushi*, discussed above, the Supreme Judicial Court suggested that § 51 might not apply to *any* residential property if "building" is

viewed simply as a synonym for "manufacturing establishment."[3] *Id.* at 244 n.5. The Supreme Judicial Court has held in *Eakin,* 427 Mass. at 592, that § 51 did not apply to a single family house, and has held in *Banushi*, 438 Mass. at 244, that § 51 did not apply to an owner-occupied two-family house in which the other unit was rented. The *Banushi* court found that § 51 did not apply to the small scale residential property at issue for the following reasons:

[3] The *McAllister* court did not specifically address the issue of whether the housing project at issue was a "building," nor was it necessary for the Court to do so given its holding that § 51 only applied to situations where people were fleeing a fire. 429 Mass. at 304 n.5. In *Santos v. Bettencourt*, 40 Mass. App. Ct. 90, 92-94 (1996), the Appeals Court held that G.L. c. 143, § 51 did not apply to a single family house. In *Osorno v. Simone*, 56 Mass. App. Ct. 612, 617-620 (2002), *further app. rev. den.* 438 Mass. 1108 (2003), the Appeals Court held that § 51 did not apply to a 13-unit condominium in which 3 units were rented. In *Hristoforidis v. Fisher*, 17 Mass. L. Rptr. 574, 574-575, 2004 Mass. Super. LEXIS 159 (Mass. Super. Ct. April 9, 2004), Superior Court Justice Francis Fecteau held that § 51 did not apply to a three-family residence even though it was not owner-occupied. In *Commonwealth v. Duda*, 33 Mass. App. Ct. 922, 923 (1992), the Appeals Court held that § 51 applied to a watchmen's cottage at a commercial marina. However, the holding in *Duda* has been "discredited" by the Supreme Judicial Court because it incorrectly relied upon the broad definition of "building" in G.L. c. 143, § 1 and it incorrectly implied that a single family house would be a "building" under § 51 as well. *Banushi*, 438 Mass. at 245 n.6.

> An owner-occupied two-family home in which the owner rents one unit to a tenant is not a "building" within the terms of the statute. *Although the owner may derive some minimal income from the rental, it is not the type of commercial, public use, assembly, or workplace structure contemplated by the statute. "The large number of owners* of [these types of homes] in the Commonwealth *should not be exposed to expanded civil liability deriving from the regulatory provisions of chapter 143 except by express and clear legislation evidencing that intention*."

438 Mass. at 244, *quoting Santos*, 40 Mass. App. Ct. at 94. Superior Court Justice Fecteau extended this rationale to three-family residences in *Hristoforidis*, 17 Mass. L. Rptr. at 574-575. As Justice Fecteau reasoned:

> [T]he Supreme Judicial Court has stated . . . that "'building' must be read to refer to structures used for purposes like those of the other structures listed [in § 51]." *This is not the case with respect to three-family residences, even if the owner does not reside therein. A three-family residence is not used for purposes like those of other structures listed in Section 51. To include a 3-family residence within the scope of this statute is inconsistent with the plain meaning of the words of the statute that lists the categories of buildings to which it expressly applies.*

Id. (Emphasis added.)

The specific words used in § 51 ("place of assembly, theatre, special hall, public hall, factory, workshop, manufacturing establishment") give no hint

that the Legislature intended it to apply to residential properties. Had the statute been intended to encompass all residential properties it should have been done with express and clear intent so that residential property owners would be on notice of their potential expanded civil liability. *See Banushi*, 438 Mass. at 244. Unlike its earlier versions, the statute does not refer to apartments, boarding houses, lodging houses or tenements. Therefore, the *Banushi* court's suggestion that "building" is a synonym for "manufacturing establishment" makes perfect sense. *See id.* at 244 n.5.

Even if the Court were to find that the general word "building" in § 51 included certain types of residential structures, notwithstanding its footnote in *Banushi*, only those residential structures that were places of public or commercial use, places of assembly or places of work would fall within its parameters. *Id.* at 244.

Here, the Rantoul Structure is plainly not a "building" within the meaning of G.L. c. 143, § 51. The Rantoul Structure afforded housing to three individuals. The exterior stairway, porch and

railing, which were the source of Sheehan's claim, did not service the first floor chiropractor's office. Neither the chiropractor nor his patients used the subject stairway and porch. The scale of the "commercial" use of the chiropractor's first floor office was relatively modest. There was no significant retail component, for example, a restaurant, supermarket, pharmacy or department store that invites large numbers of the general public to it. *See Osorno*, 56 Mass. App. Ct. at 619 ("Use of the structures described in § 51, by contrast, involves invitation of a significant number of the public to come on the premises for relatively short durations of time, although perhaps on a repeated basis"). Moreover, Sheehan's injury was completely unrelated to the chiropractor's use of the first floor office.

The small scale rental operation of the Rantoul Structure stands in stark contrast with the specifically listed structures to which § 51 applies – "place of assembly, theatre, special hall, public hall, factory, workshop, manufacturing establishment." The specifically enumerated structures in § 51 are commercial places that experience significant foot traffic from the general public, places of public

assembly or places that are fully dedicated to the commercial manufacturing and production of goods. *See id.* ("Each of the building categories described in the statute . . . have an intrinsic public or commercial character; they are places where the public may come together in numbers for brief, intermittent use"); *Banushi*, 438 Mass. at 244 ("[W]e construe the general word 'building' to refer to structures similar in nature to those described by the preceding specific words, i.e., places of public or commercial use, places of assembly or places of work"). Furthermore, the overall "commercial" character of the Rantoul Structure is not appreciably different from the owner-occupied, two-family house in *Banushi* or the three-family residence in *Hristoforidis,* which were not "building[s]" within the meaning of G.L. c. 143, § 51. Thus, the Rantoul Structure is not a "building" within the meaning of the statute. The Housing Court's overly broad construction of the term "building" exposes a vast class of small property owners to strict liability under a statute that was clearly not intended to apply to them. Therefore, it should be rejected by this Court.

CONCLUSION

For the reasons set forth above, the *amicus curiae*, MDLA, respectfully requests that the Housing Court's order denying the defendants-appellants' motion for judgment notwithstanding the verdict with respect to the claim based upon G.L. c. 143, § 51 be reversed, and judgment entered for the defendants-appellants on that claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO MASS. R. A. P. 16(k)

I, John F. Brosnan, counsel for the Massachusetts Defense Lawyers Association ("MDLA"), *amicus curiae*, hereby certify, in accordance with Mass. R. App. P. 16(k), that the brief of the MDLA complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(a)(6); Mass. R. App. P. 16(e); Mass. R. App. P. 16(f); Mass. R. App. P. 16(h); Mass. R. App. P. 18 and Mass. R. App. P. 20.

/s/ John F. Brosnan

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CERTIFICATE OF SERVICE

I hereby certify that I have served two (2) true copies of this *amicus* brief on counsel of record:

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