

APPEALS COURT

CARLOS ANDRADE & others [1] vs. CITY OF SOMERVILLE

Docket: 16-P-1407
Dates: September 13, 2017 - October 30, 2017
Present: Massing, Kinder, & Ditkoff, JJ.
County: Middlesex
Massachusetts Tort Claims Act.
Firearms. License. Governmental Immunity. Municipal Corporations, Governmental
Keywords: immunity. Negligence, Governmental immunity. Police, Negligence. Practice, Civil, Motion to dismiss.

Civil action commenced in the Superior Court Department on November 9, 2015.

A motion to dismiss was heard by Maureen B. Hogan, J.

David P. Shapiro, Assistant City Solicitor, for the defendant.

Keith J. Nicholson for the plaintiffs.

MASSING, J. This appeal concerns the scope of § 10(e) of the Massachusetts Tort Claims Act, G. L. c. 258, which exempts public employers from liability in tort with respect to "any claim based upon the issuance, denial, suspension or revocation or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization." G. L. c. 258, § 10(e), inserted by St. 1993, c. 495, § 57.

Plaintiff Carlos Andrade was grievously and permanently injured when Santano Dessin shot him in the neck, shattering Andrade's spine and leaving him paralyzed from the neck down. The plaintiffs allege that the gun Dessin used to shoot Andrade had been wrongly returned to Dessin by defendant city of Somerville (city) and the Somerville police department (department) after the department had previously confiscated it in the course of revoking Dessin's license to carry firearms. We conclude that the city's conduct was "based upon" licensing activity described in § 10(e) and that the city is accordingly exempt from suit.

Background. Because this appeal comes to us on interlocutory review of the denial of the city's motion to dismiss, [2] we accept the facts as alleged in the plaintiffs' complaint. See Kent

v. Commonwealth, 437 Mass. 312, 317 (2002); Greenleaf Arms Realty Trust I, LLC v. New Boston Fund, Inc., 81 Mass. App. Ct. 282, 288 (2012). In January, 2010, the department notified Dessin that his license to carry had been revoked because of a disqualifying adjudication of delinquency that appeared on his juvenile record. The department took possession of three firearms belonging to Dessin. [3] Dessin appealed the department's decision, and a Superior Court judge determined that Dessin was permitted to possess firearms. Following the judge's ruling, although the department was awaiting a decision of the Massachusetts Executive Office of Public Safety and Security (EOPSS) regarding whether it could issue Dessin a new license to carry, the department returned the three firearms to him in August, 2011. The EOPSS subsequently notified the department that Dessin was disqualified based on his juvenile record, and at a hearing held on January 3, 2012, a Superior Court judge agreed.

At that hearing, the department "acknowledged that the firearms should not have been returned to . . . Dessin and that they would need to be surrendered to the police department." Indeed, the department "informed the . . . Superior Court that they would re-acquire and secure the firearm[s] from . . . Dessin." However, "[a]t no[] time after January 3, 2012[,] did the [department] recover any of the firearms from . . . Dessin nor did they take steps to make sure that they were no longer being stored at [Dessin's residence] in Somerville . . . until the shooting." Ten months later, Dessin shot Andrade with one of the firearms that the department failed to recover.

The plaintiffs filed a multi-count complaint in the Superior Court against the city, alleging claims of gross negligence as well as negligent supervision and training both in violation of G. L. c. 258, § 2, and loss of consortium. [4] The city filed a motion to dismiss the three counts against it based solely on § 10(e). A judge of the Superior Court denied the motion, and the city initiated this appeal.

Discussion. 1. Role of local police in firearms licensing. Municipal police departments oversee the licensing process for the sale and possession of firearms [5] in Massachusetts. With respect to firearms, the "[l]icensing authority" is defined as "the chief of police or the board or officer having control of the police in a city or town, or persons authorized by them." G. L. c. 140, § 121, as appearing in St. 1998, c. 180, § 8. [6] The local police department is responsible for the issuance of firearms licenses to persons who reside or have a place of business within its jurisdiction. See G. L. c. 140, § 129B(1), as appearing in St. 1998, c. 180, § 29 (directing "[a]ny person residing or having a place of business within the jurisdiction of the licensing authority" to submit application for firearm identification card to the licensing authority); G. L. c. 140, § 131(d), as appearing in St. 1998, c. 180, § 41 (directing "[a]ny person residing or having a place of business within the jurisdiction of the licensing authority" to submit application for a license to carry firearms to licensing authority or colonel of State police).

The police chief must deny an application for a firearms identification card or license to carry if the applicant is subject to any of several statutory disqualifications, including having been convicted of, or adjudicated a youthful offender or delinquent by reason of, any felony or various misdemeanor crimes. See G. L. c. 140, § 129B(1)(i)-(ix); G. L. c. 140, § 131(d)(i)-(vii); Chardin v. Police Commr. of Boston, 465 Mass. 314, 316-317 (2013) (Chardin). [7] To determine whether the applicant is disqualified by reason of a criminal record, the local police department

forwards the applicant's fingerprints to the State police. See G. L. c. 140, § 129B(2); G. L. c. 140, § 131(e). The licensing authority may also make inquiries with the Massachusetts department of criminal justice information services. See *ibid.* [8]

If a person's license to possess or carry a firearm is revoked, suspended, or denied, the person is responsible for surrendering "all firearms, rifles, shotguns and machine guns and ammunition" in the person's possession to the licensing authority. G. L. c. 140, § 129D, as appearing in St. 1986, c. 481, § 1 ("Upon revocation, suspension or denial of an application for a firearm identification card . . . the person . . . shall without delay deliver or surrender, to the licensing authority where he resides, all firearms, rifles, shotguns and machine guns and ammunition which he then possesses unless an appeal is pending"). See G. L. c. 140, § 131(f), inserted by St. 1998, c. 180, § 41 ("Upon revocation or suspension [of a license to carry], the licensing authority shall take possession of such license and the person whose license is so revoked or suspended shall take all actions required under the provision of section 129D"). The licensing authority is then responsible for properly storing and disposing of the weapons. See G. L. c. 140, § 129D.

2. Application of § 10(e). The plaintiffs contend that § 10(e) does not apply because their injuries were not caused by any licensing decision made by the department. Rather, they allege that the department acted with "gross negligence in returning a firearm to a person deemed irresponsible and then failing to retrieve it." The plaintiffs read § 10(e) too narrowly.

"The language of § 10(e) is plain and unambiguous, and it 'cuts a broad swath, exempting from recovery "any claim" in a variety of named circumstances.'" *Morrissey v. New England Deaconess Assn. -- Abundant Life Communities, Inc.*, 458 Mass. 580, 592-593 (2010) (*Morrissey*), quoting from *Smith v. Registrar of Motor Vehicles*, 66 Mass. App. Ct. 31, 32 (2006) (*Smith*). The language encompasses not only claims resulting directly from a licensing decision, [9] but also claims "rooted in" the licensing process. *Smith*, *supra* at 33. "If the gravamen of a plaintiff's complaint can be traced back to any one or more of the types of events or activities delineated in § 10(e), then the action is barred." *Ibid.* Thus, in *Smith*, we held that injury alleged to be caused by the Registry of Motor Vehicles (RMV) in issuing an erroneous report that the plaintiff's motor vehicle registration had been revoked -- the report was posted on the RMV database and a police officer relied on it to arrest the plaintiff -- was so closely related to the licensing process that § 10(e) applied. *Id.* at 31-33.

Similarly in this case, while the plaintiffs' injuries were not caused directly by the issuance or revocation of a firearms license, they are "based upon" the department's decision to revoke Dessin's license. G. L. c. 258, § 10(e). This licensing decision gave rise to the department's responsibilities with respect to Dessin's firearms. A local police department's duties to receive, store, and dispose of weapons when a person's firearms license is revoked or denied "are central to the functions that are immunized from liability by § 10(e). Given the broad language of the statute, they cannot be parsed from the remainder of the process." *Smith*, *supra* at 33. Because the plaintiffs' complaint is "rooted in" the department's licensing function, the motion to dismiss under § 10(e) should have been allowed. *Ibid.*

Conclusion. The order denying the city's motion to dismiss is reversed.

So ordered.

footnotes

[1] Juana Sola Andrade; and Mario Andrade and Julie Andrade, by their parents and next friends, Carlos Andrade and Juana Sola Andrade.

[2] See *Kent v. Commonwealth*, 437 Mass. 312, 317 (2002) (holding "that the denial of a claim of immunity is appealable by a public employer, on an interlocutory basis, as a matter of right"); *Moore v. Billerica*, 83 Mass. App. Ct. 729, 729-730 n.2 (2013).

[3] The complaint does not specifically allege how or when the department obtained Dessin's firearms, but the plaintiffs repeatedly allege that the department "returned" them to him.

[4] The complaint also alleged claims of assault and battery, negligence, intentional infliction of emotional distress, and loss of consortium against Dessin and his parents.

[5] We refer to "firearms" in the general sense rather than in reference to its precise statutory definition. See G. L. c. 140, § 121 (defining "firearm" as having a barrel length of less than sixteen inches and "weapon" to mean a firearm, shotgun, or rifle).

[6] We refer to the versions of the firearms licensing statutes in effect in 2012. Although the statutes underwent a major revision in 2014, see St. 2014, c. 284, the responsibilities of the local police chiefs remained essentially the same.

[7] In addition, the police chief may deny an application for a license to carry based on a determination that the applicant is not a "suitable person." *Chardin*, supra at 316, quoting from G. L. c. 140, § 131(d). See generally *Chief of Police of Worcester v. Holden*, 470 Mass. 845 (2015) (rejecting constitutional challenges to "suitable person" standard). The current procedure for denying a firearm identification card on the basis of unsuitability was not in place in 2012. See G. L. c. 140, § 129B(1½), inserted by St. 2014, c. 284, § 30.

[8] Both the State police and the Massachusetts department of criminal justice information services are agencies within EOPSS. See G. L. c. 6A, § 18.

[9] See, e.g., *Morrissey*, supra at 593 ("Here, because the actions that allegedly caused the private nuisance occurred as a result of the Commonwealth's issuance of a work permit to [the defendant corporation], [the plaintiff's] claim against the Commonwealth is barred by the express language of § 10[e]").