COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Docket No. SJC-10984

EDWARD MARCUS

PLAINTIFF/APPELLEE

v.

CITY OF NEWTON, ET AL.

DEFENDANTS/APPELLANTS

BRIEF OF AMICUS CURIAE CITY SOLICITORS AND TOWN COUNSEL ASSOCIATION ON APPEAL FROM THE MIDDLESEX SUPERIOR COURT

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STATEMENT OF THE ISSUE

Whether a municipality is immune under the recreational use statute, G. L. ch. 21, §17C, where the plaintiff was injured while participating in an activity on municipal land; where the organization running the activity in which the plaintiff was participating had paid money to the municipality in conjunction with the use of the land; and where the plaintiff had paid a fee to the organization to participate but had not himself paid any money directly to the municipality.

STATEMENT OF INTEREST OF AMICUS CURIAE

The City Solicitors and Town Counsel Association (the "Association") is the oldest and largest bar association dedicated to the practice of municipal law in the Commonwealth. The members of the Association are attorneys and their assistants who represent municipal governments as city solicitor, town counsel, town attorney, or corporation counsel. Members of the Association also include attorneys who represent or advise cities, towns, and other governmental agencies

in other capacities. The Association's mission is to promote better local government through the advancement of municipal law.

Cities and towns across the Commonwealth of Massachusetts are under budgetary assault. Proposition 2 ½ restricts local ability to raise revenue through the property tax and has led to long-term structural deficiencies in municipal budgets, while the current economic downturn is constricting the few remaining local revenue-generators, sharply curtailing state aid, and decimating the value of pension-fund investment portfolios. At the same time, communities' health-care and education costs continue to rise dramatically. Against this backdrop, the Superior Court removed a statutory protection from liability which the Legislature has provided to municipalities.

If the Recreational Use Statute is interpreted to permit recovery for negligence as in this case, then every municipality could be subject to damages. Such havoc is not what the Legislature intended.

STATEMENT OF FACTS

The Association adopts the statement of facts set forth in the brief of the City of Newton.

STATEMENT OF PROCEEDINGS

The Association adopts the statement of proceedings set forth in the brief of the City of Newton.

ARGUMENT

The Plaintiff Did Not Pay A "Charge or Fee" To Use McGrath Field As Such Terms Were Intended By the Legislature.

Application of the so-called Recreational Use Statute [hereinafter the "Statute"] to the case now before the Court depends on whether the plaintiff, Edward Marcus (hereinafter the "plaintiff"), paid a "charge or fee" to the defendant, City of Newton (hereinafter the "City"), to use McGrath Field to play softball. The undisputed facts, as set forth in the summary judgment record below, establish that the plaintiff did *not* pay a "charge or fee" to the City to use the field for recreational purposes as the terms "charge or fee" were intended by the Legislature. The duty of care owed by the City to the plaintiff is,

therefore, controlled by the Statute. The trial court should have granted summary judgment in favor of the City.

The reasons favoring application of the Statute are twofold. First, it is undisputed that the plaintiff paid the sum of $80.00 to a third party, *i.e.*, the Coed Jewish Sports League (hereinafter the "League"), which payment entitled him to play on a League team, obtain a team jersey, compete for a trophy, and attend an awards banquet. (A. 105-08). This sum was not paid to the City, nor was it paid in exchange for, or in consideration of, plaintiff's use of the softball field. When money is paid, the Appeals Court has held, "the issue is whether the plaintiff paid a fee *to the owner* of the facility *in exchange for her use of the premises*…." (Emphasis supplied). Whooley v. Commonwealth, 57 Mass. App. Ct. 909, 910 (2003). In other words, the plaintiff's payment and his right to "use such land for recreational" purposes are inseparable. Whether a third party also paid a fee is immaterial. Id.; Seich v. Town of Canton, 426 Mass. 84, 86 (1997). Here, the

City did not impose a charge or fee upon Mr. Marcus; the plaintiff was free to use McGrath Field for recreational purposes, like any other member of the public, regardless of whether he paid $80.00 to the League. (A. 34). The fact that the plaintiff did not pay a "charge or fee" to the City to use McGrath Field is dispositive of his negligence claim.

Second, it is further undisputed that the League paid the City $1,200.00 to reserve the McGrath Field for eight, two-hour time blocks from June through August 2007. (A. 33-34, 44). The City applied the funds received from the League to partially defray $12,105.85 in costs associated with the administration and maintenance of the Field. (A. 33-34, 44). Whether the League's $1,200.00 payment to the City included some (or all) of the $80.00 collected from the plaintiff is immaterial since the League's payment did not constitute a "charge or fee" for "use" of McGrath Field within the meaning of the Statute.

The words "charge or fee" are not defined in the Statute, other than to exclude contributions or other voluntary payments. In adopting the Statute, the

Legislature meant to encourage landowners to open their land to use by the public for recreational purposes. Ali v. City of Boston, 441 Mass. 233, 235-37 & n.4 (2004). By divesting from the protection of the Statute any landowner who imposes a charge or fee for such use, the Legislature made plain that those who stand to profit or benefit by opening their land shall remain exposed to liability for negligence. DiMella v. Gray Lines of Boston, Inc., 836 F.2d 718, 721 (1st Cir. 1988) ("[w]hile the statutory intent is to encourage free dedication of recreational facilities, it is not to diminish liability for engagements for profit.")[1] A landowner who financially benefits by inviting the public to its property requires no extra incentive to make his land available for recreational purposes and, as a matter of public policy, is undeserving of statutory protection.

Although no state court has affirmatively held that the charge or fee imposed must confer a benefit

[1] See also Collins v. Martella, 17 F.3d 1, 5 (1st Cir. 1994) (interpreting "fee" and "charge" under similar New Hampshire statute to mean payments that confer a "benefit" on the owner and barring a negligence claim by a condominium resident injured while diving into a common area lake despite payment of a condominium fee used to defray common area maintenance costs.)

on the landowner for the exception to immunity to apply, there is precedent for the notion that payments collected for the purpose of defraying maintenance costs do not constitute "charges or fees" within the meaning of the Statute. Dunn v. City of Boston, 75 Mass. App. Ct. 556, 561-62, rev. den., 445 Mass. 1107 (2009) (payment made to City for purpose of defraying maintenance and security costs associated with use of City Hall Plaza for day-long religious gathering held not a "charge or fee," but more accurately a "reimbursement.") See also, Seich, supra, 426 Mass. at 86 (registration fee used, in part, to pay custodians to open school gymnasium for weekend games and practices held not a "charge or fee.")

The reasoning of Dunn and Seich is consistent with the Legislature's intent to withhold statutory protection only from those who profit or otherwise benefit by opening their land for public use. To interpret the terms "charge or fee" so broadly as to include monies paid to help defray custodial costs or to maintain the status quo would be tantamount to asking landowners to shoulder the burden of such costs

themselves. That is a burden few landowners are likely to bear, regardless of their philanthropy. Moreover, such an interpretation would serve to discourage landowners from opening their property to the public for recreational (or educational, environmental, religious, charitable, etc.) purposes, an effect directly opposite to what the Legislature intended. This Court should interpret the terms "charge or fee" to include only those payments that confer a benefit upon the landowner.

It is undisputed that the League's payment of $1,200.00 conferred no benefit upon the City but was applied to defray a small portion of the administrative and maintenance costs associated with the ongoing use of McGrath Field. Thus, whether any part of the plaintiff's $80.00 payment to the League was included within the League's payment is immaterial. In answer to the question posed by the Court, a municipality, here the City of Newton, is entitled to immunity under G.L. c. 21, § 17C, in the circumstances described.

CONCLUSION

Upon the authorities cited, the trial court's denial of the City's motion for summary judgment below should be reversed

RESPECTFULLY SUBMITTED,

CITY SOLICITORS AND
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