

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1134

CHERRYLYN SIMMONS

vs.

MASSACHUSETTS MARITIME ACADEMY & another.<sup>1</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Cherrylyn Simmons, appeals from a Superior Court judgment dismissing her complaint asserting tort and contract claims against the Massachusetts Maritime Academy and the Commonwealth (collectively, MMA). A motion judge ruled that the tort claim had not been properly presented in accordance with the Massachusetts Tort Claims Act, G. L. c. 258, § 4, and that the contract claim was in substance a tort claim and therefore must likewise be dismissed for improper presentment. We are constrained to affirm.

Background. On March 10, 2017, Simmons, through counsel, sent a letter addressed to "Christina Aquilana, Office of the President, Massachusetts Maritime Academy," listing Simmons as

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<sup>1</sup> Commonwealth of Massachusetts.

the client and September 24, 2016, as the "D/accident," presumably meaning "date of accident." This first letter advised that counsel represented Simmons "for personal injuries she sustained on the above-mentioned date when she fell boarding a sponsored event on the campus on a boat ride." The letter asked that it be forwarded to MMA's insurance carrier.

On May 3, 2017, counsel for MMA replied by letter to Simmons's counsel, acknowledging "receipt of [the] March 10, 2017 claim presentment under M. G. L. c. 258." The letter stated that MMA's counsel had started to investigate the claim, but had "not discovered anything suggesting liability on the part of [MMA]," and thus requested additional details about the incident in question. The letter concluded, "[p]lease send to [counsel's] attention any future communication to [MMA] in this matter."

On August 23, 2017, Simmons's counsel replied to MMA's counsel by a letter that included details of the alleged negligence by MMA employees, the resulting injuries to Simmons, and the medical expenses she had incurred. This second letter demanded \$35,000 in settlement of the claim.

No settlement materialized, and so Simmons filed suit, initially in District Court and later in Superior Court. See G. L. c. 258, § 3 ("The superior court shall have jurisdiction of all civil actions brought against a public employer").

Simmons's complaint asserted essentially identical tort claims against MMA and the Commonwealth and a contract claim against MMA. The contract claim alleged that Simmons, "having anticipated paying adequate consideration as a business invitee, imposes a contract of responsibility on [MMA] to maintain the property in a sufficient manner as to imply safety for its intended business invitee guests and properly training its employees in assisting its invitees." The complaint alleged that MMA had breached that contract, causing Simmons to suffer injuries and incur medical expenses.

MMA moved to dismiss the complaint for failure to comply with the presentment requirements of G. L. c. 258, § 4. The judge allowed the motion, ruling that (1) Simmons's first letter contained insufficient detail to constitute proper presentment of her tort claim, (2) Simmons's second letter was not addressed or sent to MMA's president and thus did not cure the defects in the first letter, and (3) Simmons could not escape c. 258's presentment requirement by recasting her tort claim as a contract claim. This appeal followed.

Discussion. The Massachusetts Tort Claims Act provides in pertinent part that "[a] civil action shall not be instituted against a public employer on a claim for damages under this chapter unless the claimant shall have first presented his claim in writing to the executive officer of such public employer

within two years after the date upon which the cause of action arose."<sup>2</sup> G. L. c. 258, § 4. "An oft-recited proposition is that presentment must be made 'in strict compliance with the statute.'" Martin v. Commonwealth, 53 Mass. App. Ct. 526, 528 (2002), quoting Weaver v. Commonwealth, 387 Mass. 43, 47 (1982). See Drake v. Leicester, 484 Mass. 198, 201 (2020); Coren-Hall vs. Massachusetts Bay Transp. Auth., 91 Mass. App. Ct. 77, 80 (2017). The statute thus requires that "presentment [be] made to the proper executive officer . . . in a timely fashion." Martin, supra at 529. "As a general rule, a party must present its claim directly to the executive officer of the public employer." Garcia v. Essex County Sheriff's Dep't, 65 Mass. App. Ct. 104, 107 (2005). "The purpose of this rule is to provide notice to the highest ranking official with the ability to fully investigate, arbitrate, compromise or settle such claim, in order to ensure that the interests of the Commonwealth are protected" (quotation and citations omitted). Id.

1. The first letter. Here, Simmons's first letter was not addressed to MMA's executive officer -- whom the parties appear to agree was MMA's president -- but instead to a person with

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<sup>2</sup> The statute also deems presentment sufficient if made to certain other officials, including, in the case of State entities such as MMA, the Attorney General. See G. L. c. 258, § 4, second par. That provision is not implicated here.

some unidentified role within the president's office.<sup>3</sup> This was insufficient to constitute presentment "directly to the executive officer." Garcia, 65 Mass. App. Ct. at 107.

"[A]lthough presentment occurs upon delivery to the office of the proper executive officer, the presentment letter must still be addressed to the proper executive officer." Drake, 484 Mass. at 200 n.4. See Lopez v. Lynn Hous. Auth., 440 Mass. 1029, 1030 (2003) (suggesting that presentment letter "addressed generically to 'Lynn Housing Authority,'" rather than to its executive officer, was defective).

Moreover, the content of Simmons's first letter was deficient. A presentment letter must "set[] forth sufficient facts from which public officials reasonably can discern the legal basis of the claim, and determine whether it states a claim for which damages may be recovered under the act." Murray v. Hudson, 472 Mass. 376, 384 (2015). Simmons's first letter included no allegation of any negligence by any public employee, let alone enough factual detail to allow any determination

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<sup>3</sup> "Executive officer of a public employer" is defined in pertinent part as "the secretary of an executive office of the commonwealth, or in the case of an agency not within the executive office, the attorney general; the adjutant general of the military forces of the commonwealth; . . . and, in the case of any other public employer, the nominal chief executive officer or board." G. L. c. 258, § 1.

whether Simmons's claim was one for which damages could be recovered under c. 258.

2. The second letter. We assume without deciding that Simmons's second letter cured the first letter's content deficiency by including enough facts to satisfy the Murray standard. But the second letter did not cure the first letter's addressing deficiency. The second letter was not addressed to MMA's executive officer, as required by c. 258, but instead was addressed to MMA's counsel.<sup>4</sup>

Nor do the two letters taken together constitute adequate presentment to MMA's executive officer. We recognize that MMA's counsel responded to the first letter by requesting that "any future communication to [MMA] in this matter" be directed to MMA's counsel. Had the first letter been properly addressed to MMA's executive officer, then Simmons might well have been justified in treating the response to the first letter as the executive officer's authorization to provide further information

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<sup>4</sup> Simmons errs in arguing that sending the second letter directly to the executive officer would have violated Mass. R. Prof. C. 4.2, as appearing in 471 Mass. 1440 (2015). That rule provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Id. Here, communication with a public employer's executive officer in order to present a tort claim is authorized by G. L. c. 258, § 4.

to MMA's counsel, instead of to the executive officer himself. However, because the first letter was not sent "directly to the executive officer," Garcia, 65 Mass. App. Ct. at 107, the response to the first letter cannot be taken as the executive officer's authorization to do anything. See id. at 108 (rejecting "agency argument that the attorney who responded to the claim did so in a representative capacity sufficient to demonstrate notice to" executive officer). The letters taken together do not provide the requisite assurance that there was "notice to the highest ranking official with the ability to fully investigate, arbitrate, compromise or settle such claim, in order to ensure that the interests of the Commonwealth are protected" (quotation and citations omitted).<sup>5</sup> Id. at 107. Therefore, we must turn to whether one or more of the exceptions to the presentment requirement applies.

3. Actual notice. We are unpersuaded by Simmons's argument that the MMA's executive officer had actual notice of

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<sup>5</sup> Garcia recognized that if a public employer's attorney responded to a purported presentment by directly acknowledging that the attorney represented the executive officer and that the executive officer "had direct notice of th[e] claim," and by instructing that further communications be sent to someone other than the executive officer, such further communications could count as communications to the executive officer through his or her representative. Id. at 109, citing Carifio v. Watertown, 27 Mass. App. Ct. 571, 575 (1989). Here, MMA counsel's response to Simmons's first letter stated that MMA counsel represented MMA, but it did not indicate that MMA's executive officer had any direct or other notice of Simmons's claim.

the claim. It is settled that strict compliance with the presentment requirement may be excused "if the plaintiff can show that . . . the designated executive officer had actual notice of the written claim." Bellantini v. Boston Pub. Health Comm'n., 70 Mass. App. Ct. 401, 407 (2007). But "the actual notice exception is narrow." Id. "[N]otice to the executive officer will not be inferred or imputed from the fact that others with responsibility for investigation and settlement of the dispute received the plaintiff's presentment letter and were in contact with the plaintiff." Id. at 408. See Coren-Hall, 91 Mass. App. Ct. at 79. "Constructive notice of the claim is insufficient" (citation omitted). Garcia, 65 Mass. App. Ct. at 108.

Here, nothing in the record indicates that MMA's executive officer had actual notice of Simmons's claim. Contrast Lopez, 440 Mass. at 1030 (despite improperly addressed presentment letter, actual notice exception applied where executive officer personally "acknowledged not only that he had actual notice of Lopez's claim, but also that the claim had been investigated, evaluated, and eventually denied").

4. The "lulling" exception. We are likewise unpersuaded by Simmons's argument that MMA "lull[ed] [her] into believing that presentment [was] not an issue" and therefore "should be equitably estopped from contesting the sufficiency of

presentment." Garcia, 65 Mass. App. Ct. at 111. To trigger this exception to the presentment requirement, "the defendant must affirmatively indicate that the presentment requirement has been met or is waived." Id. Moreover, the lulling exception has been applied only where the defendant made such an indication during the course of litigation, rather than before litigation was instituted. See Holahan v. Medford, 394 Mass. 186, 190-191 (1985) (explaining that exception reflects principle that "a litigant cannot assume inconsistent and contradictory positions" [citation omitted]).

Here, Simmons did not raise her lulling argument to the motion judge, and thus the argument is waived. See Albert v. Municipal Ct. of Boston, 388 Mass. 491, 493-494 (1983). Were we to reach the argument, we would reject it. Simmons points to nothing in the record whereby MMA affirmatively indicated that the presentment requirement had been met or was waived. Although MMA's counsel's letter referred to Simmons's first letter as a "claim presentment under M. G. L. c. 258," it in no way indicated that the first letter satisfied the statutory presentment requirement; rather, it sought further information. Moreover, MMA's counsel's letter was sent before, rather than during, litigation.

5. The contract claim. Simmons finally argues that her contract claim was not subject to c. 258's presentment

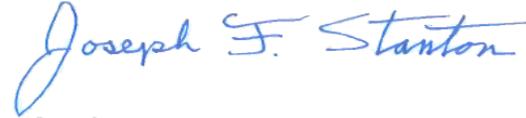
requirement and therefore should not have been dismissed. But "a plaintiff may not avoid the requirements and limitations of the Massachusetts Tort Claims Act by designating what is essentially a personal injury claim as a contract claim" (citation omitted). Ayala v. Boston Hous. Auth., 404 Mass. 689, 704 (1989). "[W]here . . . the 'essential nature of the plaintiff's claim is recovery for personal injuries founded on . . . negligence,' [her] action, whether it be denominated tort or contract, is governed by c. 258." Schenker v. Binns, 18 Mass. App. Ct. 404, 406 (1984), quoting Thomas v. Massachusetts Bay Transp. Auth., 389 Mass. 408, 410 (1983). "The policy against allowing form to prevail over substance is particularly strong in construing [G. L. c. 258] in view of the explicit provision in [G. L. c. 258,] § 2 making its remedies exclusive." Schenker, supra at 406. Simmons's contract claim was therefore correctly dismissed for defective presentment.

Conclusion. As the court has repeatedly recognized, dismissal based on defective presentment can be "a harsh result" if it "made no practical difference to the [public employer] that [the executive officer], himself, was not notified of the plaintiff's claim." Coren-Hall, 91 Mass. App. Ct. at 80, quoting Bellantì, 70 Mass. App. Ct. at 408. However, lack of prejudice has been held irrelevant. Coren-Hall, supra.

"Therefore, we are constrained to conclude" that Simmons's complaint was properly dismissed. Id. at 81.

Judgment affirmed.

By the Court (Neyman, Sacks & Lemire, JJ.<sup>6</sup>),



Clerk

Entered: May 6, 2021.

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<sup>6</sup> The panelists are listed in order of seniority.