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**Foreword from the Editors**  
**By Boston Bar Journal Board of Editors**

The Supreme Judicial Court issued a number of influential decisions in its most recent term. The Boston Bar Journal Board of Editors thought it would be fitting to release a special edition of the Journal dedicated to summarizing several of these cases. In addition to the articles that appear in this special edition, we encourage readers to look at our past articles featuring decisions from the 2015-2016 term: [\*Kace vs. Liang\*](#) and [\*Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner, LLP\*](#).

## **When Clients Clash: Abrano, Hot Potato and the Duty of Loyalty**

**By Paul Lannon and Jeffrey D. Woolf**

### **Case Focus**

Attorneys who advise closely-held corporations face recurring ethical challenges when conflicts develop among owners and managers of the business. The Supreme Judicial Court recently issued a unanimous decision, *Bryan Corp. v. Abrano*, 474 Mass. 504 (June 14, 2016), [http://scholar.google.com/scholar\\_case?case=10526802548823881243&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=10526802548823881243&hl=en&as_sdt=6&as_vis=1&oi=scholar) that provides much needed guidance to attorneys practicing in this area and that has broader implications for attorney-client relationships generally. The decision addresses, among other important ethical concerns, how to assess conflicts of interest and obtain informed consent, how to properly terminate a client relationship, to whom in a close corporation do attorneys owe a duty of loyalty, and under what circumstances, if any, are attorneys permitted to drop one client like a “hot potato” for another, presumably more lucrative, opportunity.

### Law Firm Disqualified

In *Abrano*, a law firm was advising certain officials of Bryan Corp., a closely held corporation, and representing the corporation in litigation against another company. The law firm did not have an agreement with the client limiting the scope of the engagement or addressing conflict or withdrawal situations. A dispute arose over the company’s compensation of its shareholders. The law firm advised one of the shareholders on the pay dispute, sent a demand letter to Bryan Corp. on behalf of a group of shareholders, and subsequently withdrew from its representation of Bryan Corp. in the pending litigation. The law firm terminated its representation of the company by sending a notice to a Bryan Corp. officer whom the law firm was representing in the pay dispute. When lawsuits erupted over the pay dispute, Bryan Corp. moved to disqualify its former law firm from representing adverse parties.

The SJC upheld the trial court’s order disqualifying the law firm. Notably, there was no finding of actual prejudice, nor were there any findings of fact supporting the order. The SJC’s holding rested on violations of both the common law duty of loyalty that attorneys owe clients and Massachusetts Rule of Professional Conduct 1.7, governing concurrent and successive representation of clients. The SJC reasoned that the compensation dispute with current shareholders created a potential conflict that made it improper for the corporation’s law firm to represent those individual shareholders as concurrent clients without first obtaining the company’s informed consent. By accepting the new representation without first obtaining such a waiver, the law firm breached its duty of loyalty to Bryan Corp. and violated the prohibition in Rule 1.7 against concurrent representation of clients whose interests are materially adverse. The decision also confirmed that disqualification can be a proper remedy for ethical violations even without a showing of actual prejudice.

The court also held that law firm’s termination of the client engagement was improper. Consent to terminate an engagement with an organizational must be given by an authorized representative of the organization who has no conflict of interest in the decision. Moreover, the development of the conflict between Bryan Corp. and certain shareholders did not, by itself, justify the firm’s withdrawal as counsel for the company in the pending but unrelated litigation.

The law firm argued that initially there was no adversity between the shareholders and the company and no showing of actual prejudice. The SJC rejected those arguments as overly narrow readings of Rule 1.7, which encompasses the duty to anticipate potential conflicts, and Rule 1.13, the comments to which instruct that when an organizational client's interests may be or become adverse to those of a constituent, the lawyer should advise the constituent of the conflict or potential conflict of interest and that the lawyer cannot then represent the constituent. The law firm had a duty to use "reasonable measures" to ascertain whether an actual conflict of interest was likely to occur, and, in this case, the law firm "should have known" that the interests of their concurrent clients were likely to become adverse in the near future, given the structure of the small board, the compensation dispute, and prior advice the law firm had given the shareholders about likely conflicts occurring if the board membership changed.

### Fulfilling the Duty of Loyalty

Abrano illuminates the breadth and depth of the duty of loyalty that Massachusetts attorneys owe their clients. To fulfill that duty, attorneys must maintain undivided loyalty to the client during the term of the engagement. The SJC explains that such undivided loyalty means taking no actions adverse to a current client and declining likely adverse representations without the client's informed consent. The duty of loyalty also obligates attorneys to complete their engagements, unless the client relationship is terminated with informed consent by an unconflicted representative.

### Anticipating Conflicts

Abrano clarifies that attorneys representing corporate clients cannot also represent individual shareholders without the corporate client's consent if it is reasonably foreseeable that a conflict will arise. Nor can attorneys accept the individual representation and then withdraw as corporate counsel when the conflict develops: "a firm may not undertake representation of a new client where the firm can reasonably anticipate that a conflict will develop with an existing client, and then choose between the two clients when the conflict materializes."

Abrano puts the burden on attorneys to assess the likelihood of a conflict when considering concurrent representation. Attorneys must undertake "reasonable measures" to anticipate conflicts and will be held to professional negligence standards in doing so. Precisely what measures are reasonable under different circumstances is unclear, and Abrano gives no further guidance beyond the facts specific to that case.

### Hot Potato Doctrine Not Adopted

The SJC expressly declined to decide whether to adopt the so-called Hot Potato doctrine, which limits a firm's ability to drop a client "like a hot potato" so that it may accept or continue representation of another client in a matter adverse to the first client. The SJC found that the duty of loyalty and professional rules were sufficiently broad to address the situation in Abrano, where the law firm started a new, potentially adverse engagement before terminating the existing client relationship. What is left unanswered is whether an attorney may terminate a client

relationship and shortly afterwards engage a new client adverse to the former client. Is the Hot Potato doctrine needed to regulate such situations where the matters are unrelated, or is Rule 1.9 sufficient?

### Engagement Letters

Abrano highlights the importance of carefully crafted engagement letters to avoid ethical as well as practical problems in the attorney-client relationship. An engagement letter should (i) identify who is the client, (ii) explain what will happen if a potential conflict arises among concurrent clients, including which client (if any) the attorney will continue to represent after the conflict arises, (iii) limit the scope of engagement; (iv) explain how the engagement may terminate before its completion, and (v) discuss business concerns, including representation of competitors or other adverse parties on unrelated matters. Done correctly, engagement letters should encourage ethical conduct, avoid misunderstandings, and simplify decision-making for attorneys and clients.

### Conclusion

The Abrano decision brings much needed guidance for attorneys representing closely-held businesses and for all attorneys facing questions about how to begin and end client relationships properly. Several questions remain unanswered, including whether the SJC might apply the Hot Potato doctrine to situations where attorneys end one client relationship for the purpose of engaging a new client adverse to the former client. For now, what is clear from Abrano is that Massachusetts attorneys must be mindful of and responsibly fulfill their duty of loyalty and professional conduct obligations when commencing and terminating client relationships.

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## **Verdrager v. Mintz, Levin: Expanding the Use of Indirect Evidence to Prove Pretext**

**By Damien DiGiovanni**

### **Case Focus**

In *Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, 474 Mass. 382 (2016), the Supreme Judicial Court (“SJC”) held, *inter alia*, that triable issues of fact existed as to whether a law firm’s legitimate, nondiscriminatory reasons for demoting and then terminating a female attorney were a pretext for gender discrimination. While the Court followed well-established precedent in applying the burden-shifting analysis to reach its conclusion, the evidence it relied upon ultimately may provide employee-plaintiffs who lack direct evidence of discrimination with expanding options to demonstrate pretext in order to survive summary judgment.

### ***Verdrager v. Mintz, Levin, et al.***

The plaintiff, Kamee Verdrager, was hired by Mintz, Levin, Cohn, Ferris, Glovsky, & Popeo, P.C., (“firm”) in June 2004. Less than a month into her employment, she alleged that a male member of the firm made several sexually-charged comments to her — which she reported to human resources, the managing director, and the attorney managing her group. The firm investigated her claims and found no evidence of gender-based discrimination. Subsequent to lodging her complaint, Verdrager received several mixed performance reviews.

After returning from maternity leave in November 2006, Verdrager received two negative reviews and, in February 2007, the senior attorneys in her group sought to terminate her employment. However, the firm’s chairman instead decided to demote Verdrager by “setting her back” two years in seniority — with a corresponding salary reduction — thereby allowing the firm additional time to determine her eligibility for membership. In response, Verdrager retained counsel and filed an internal complaint alleging that the decision was the result of gender discrimination. The firm’s investigation did not substantiate her claims.

Later that spring, and approximately six times thereafter while accessing the firm’s document management system (DeskSite), Verdrager searched for and discovered dozens of internal documents related to her case which she forwarded to her personal email account.

After receiving five positive evaluations from April to October 2007, Verdrager filed a Charge of Discrimination at the Massachusetts Commission Against Discrimination (“MCAD”) in December 2007, alleging that the step-back decision was discriminatory.

In November 2008, during a national economic slowdown, several associates, including Verdrager, were selected for layoff. While the firm offered to settle her MCAD claim if she accepted the layoff, Verdrager refused. Later that same day, she met with and showed a member of the firm one of the documents she accessed from DeskSite. The firm subsequently discovered Verdrager’s previous DeskSite searches and terminated her as a result. (The use of self-help is discussed in another article in this edition).

Verdrager filed a second charge at the MCAD alleging that the step-back decision and her termination were the result of gender discrimination and retaliation for her internal complaint

and previous MCAD complaint. After the case was filed in Superior Court, the defendants moved for summary judgment, which was granted. Verdrager petitioned for direct appellate review to the SJC.

### ***McDonnell Douglas Burden-Shifting Analysis***

To survive summary judgment, employee-plaintiffs must demonstrate that a “reasonable jury” could find: (1) that the plaintiff is a member of a protected class, (2) that the plaintiff suffered an adverse employment action (*e.g.*, demotion or termination), (3) discriminatory animus on the part of employer, and (4) causation. Like most discrimination cases, the Court focused on the last two elements.

As the Court explained, while employees are rarely equipped with direct evidence demonstrating discriminatory animus and causation, “they may survive a motion for summary judgment by producing ‘indirect or circumstantial evidence [of these elements] using the familiar three-stage, burden-shifting paradigm first set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792[] (1973)[.]’” *Verdrager*, 474 Mass. at 396 (citation omitted). Having found the first two stages were satisfied – *i.e.*, Verdrager demonstrated a *prima facie* case of discrimination (member of a protected class, performed her job at an acceptable level, suffered an adverse employment action), and defendants articulated a legitimate nondiscriminatory reason for her termination (mixed performance reviews, certain partners not willing to work with her, low utilization on a high billing rate, and her engaging in self-help), *id.* at 398 — the SJC turned its attention to the final stage, which requires that the plaintiff produce evidence that the employer’s justification for the adverse action was a pretext.

### **Lowered Burden of Production to Demonstrate Pretext?**

At the outset, the Court reiterated that Massachusetts is a “pretext-only jurisdiction,” holding that an employee can show that an employer’s nondiscriminatory reasons given for its actions were not the real reasons, “even if that evidence does not show directly that the true reasons were, in fact, discriminatory.” *Id.* at 397, citing *Bulwer v. Mount Auburn Hosp.*, 473 Mass. 672 (2016). While the Court looked at several “traditional” examples of indirect evidence (*e.g.*, similarly situated male employees being treated more favorably), the Court relied upon other indirect evidence in finding that the reasons given for the adverse job action may have been pretextual.

Significantly, the Court considered evidence from a 2005 report, which was completed by a consulting firm in the wake of an earlier discrimination suit, unrelated to the present case. The report found that “[m]any female [attorneys] ... believe it is more difficult for women than men at Mintz[,]” *id.* at 400-01, and that some of the members may be inherently biased against women. The Court held that this could be considered evidence of the employer’s “general practice and policies” concerning members of the protected class, and supported Verdrager’s contention that the firm’s proffered reasons for her termination were pretextual. *Id.* at 400 (quotations omitted). By relying on generalized complaints about the attitude of the firm towards women, the Court made it virtually impossible for the firm win on summary judgment, since there is no feasible way to deny a perceived bias without creating a disputed material fact.



The Court also found that “a reasonable jury could interpret a number of the [criticisms made by] the plaintiff’s evaluators and supervisors as reflecting stereotypical thinking...categorizing people on the basis of broad generalizations,” *id.*, at 399-400 (citations and quotations omitted), and that those statements, when considered with other evidence, “may lend support to the contention that the adverse employment action was made on an impermissible basis.” *Id.* at 400 (quotations omitted). For example, the Court held that comments related to Verdrager taking vacation and her not consistently being in the office “could be understood to reflect a stereotypical view of women as not committed to their work because of family responsibilities[.]” *id.* at 400, despite the comments themselves being completely gender-neutral.

While lower courts ultimately will decide how much weight to apply to perceived “stereotypical thinking” about protected classes, because those stereotypes are based upon subjective views historically held by others, this particular factor creates a type of pretext evidence that is likely to be more difficult for employers to rebut through summary judgment.

In sum, although the Court followed longstanding precedent in applying the *McDonnell Douglas* test, the specific factors it used to determine pretext arguably may lower the threshold for plaintiffs in meeting their burden moving forward.

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**of Anti-Discrimination Claims in Massachusetts**  
**By Ellen Messing and Martin Newhouse**  
**Case Focus**

In *Verdrager v. Mintz Levin, 474 Mass. 382 (2016)*, the Supreme Judicial Court answered a question of first impression under Massachusetts law: Do the anti-retaliation provisions of state anti-discrimination law protect an employee who accesses her employer's documents to support her employment discrimination claim? The SJC held that, under certain circumstances, such activity may be "protected," thereby precluding an employer from taking any adverse employment action based on that activity. The decision examined the interplay between "self-help discovery," or searches of employer materials outside the formal litigation discovery process, and the protections of the Commonwealth's chief anti-bias statute, G.L. c. 151B, which bars retaliation against plaintiffs who engage in "protected activity." G.L. c. 151B, §4(4). The SJC articulated the standards to be applied in determining whether employee acts of self-help discovery are protected, and specified limits on that protection.

Although this was a question of first impression in Massachusetts, in deciding that "self-help" discovery in a c. 151B case may be protected activity, the Court was not writing on a blank slate. Rather, its decision drew upon the sizeable case law on this issue that courts around the country have developed. Indeed, the multi-factor test for protected activity that the SJC has now adopted was expressly derived from a leading New Jersey case, *Quinlan v. Curtiss-Wright Corp., 8 A.3d 209, 204 N.J. 239 (2010)*. It is likely that Massachusetts courts will look to decisions from other jurisdictions in applying the new Massachusetts standards.

Consistently with the courts that have confronted this issue and its own jurisprudence on protected activity under c. 151B, *see, e.g.,* *Abramian v. President & Fellows of Harvard Coll., 432 Mass. 107, 121 (2000)*, the SJC in *Verdrager* held that self-help discovery "may in certain circumstances constitute protected activity under the statute, *but only if the employee's actions are reasonable in the totality of the circumstances.*" But the SJC placed an important limit on this holding, namely that only documents that would be subject to formal discovery may be subject to protected self-help discovery, although that can include privileged documents. Finally, the Court noted that the determination whether the self-help discovery at issue was reasonable is to be made as a matter of law by the court, not by the jury.

Whether an employee's self-help discovery was reasonable requires a fact-based determination. The SJC held that, "without limiting the considerations that additionally may be relevant in individual cases, the seven nuanced factors in *Quinlan* should be taken into account in any such analysis." The *Quinlan* factors as adopted by the SJC are: (1) "how the employee came to have possession of, or access to, the document;" (2) a balancing of the "'relevance' of the

seized documents to the employee's legal action against the disruption caused by the seizure 'to the employer's ordinary business;'" (3) "the strength of the employee's expressed reason for copying the document rather than, for example, simply describing it or identifying its existence to counsel so that it might be requested in discovery;" (4) what the employee did with the document, or who the employee showed it to; (5) "the nature and content of the particular document in order to weigh the strength of the employer's interest in keeping the document confidential;" (6) "whether there is a clearly identified company policy on privacy or confidentiality that the employee's disclosure has violated" and "whether the employer has routinely enforced that policy;" and (7) "the broad remedial purposes the Legislature has advanced through . . . G.L. 151B" and "the decision's effect on 'the balance of legitimate rights of both employers and employees.'" The SJC, again adopting the *Quinlan* approach, noted that this last factor is "a supplement' to the other factors, and plays a decisive role only in the 'close case' in which it would be appropriate for these broader considerations to 'tip the balance.'"

Of particular note for lawyers, the SJC held that self-help discovery protections apply equally to attorney-employees, such as the *Verdrager* plaintiff, and to documents that may be attorney-client privileged. The SJC focused on the importance of ensuring that attorney-employees have the same opportunity as other employees to show documents to their own lawyers in order to obtain legal advice.

*Verdrager* clearly is a victory for employees' rights in that it recognizes that employees who engage in self-help discovery in support of discrimination claims may be protected from adverse employment action. The decision, however, sounded several cautionary notes. First, the SJC limited its holding, and the application of the *Quinlan* factors, to claims under G.L. c. 151B, expressing no opinion on self-help discovery unrelated to such claims. Second, because the decision protects only self-help discovery found to be "reasonable in the totality of the circumstances," the SJC warned that employees who engage in self-help discovery "even under the best of circumstances . . . run a significant risk that the conduct in which they engage will not be found . . . [ultimately] to fall within the protections of the statute."

Finally, the SJC envisioned that, in deciding whether self-help discovery in a particular case was reasonable, a court will separately analyze each document or type of document accessed. As the SJC stated, "[t]he application of this test in particular cases may well result in determinations that certain acts of self-help discovery by the same employee are reasonable, while others are not." In such a case "the resolution of the claim of retaliation likely would entail a determination whether the employee's unreasonable and unprotected acts, standing alone, would have induced [the employer] to make the same [adverse employment] decision."

In sum, *Verdrager* now provides protection for reasonable acts of employee self-help discovery. Employers will need to proceed very cautiously before taking adverse action against employees who acquire internal documents, even confidential ones, in the course of pursuing discrimination claims. But discrimination plaintiffs, too, will need to consider carefully the factors articulated by the Court, and to judge carefully what acts of self-discovery will survive the future application of what we can now call the seven-factor *Verdrager* test.

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## SJC Rules State Must Set Annual Greenhouse Gas Emissions Reductions

By Dylan Sanders

### Case Focus

The state's responsibility to confront climate change is now the subject of Massachusetts case law. In a landmark decision interpreting the state's Global Warming Solutions Act ("GWSA"), *Kain v. Department of Environmental Protection*, 474 Mass. 278 (2016), the Supreme Judicial Court ruled that the Department of Environmental Protection ("DEP") must impose mandatory "volumetric limits" on multiple sources of greenhouse gas emissions – meaning limits on the actual amount of greenhouse gases emitted by those sources – and that those limits must decline on an annual basis. The decision could have far-reaching implications for how the state regulates emissions in many sectors of the economy, with the SJC warning that the "act makes plain that the Commonwealth must reduce emissions and, in doing so, may, in some instances, elevate environmental goals over other considerations." 474 Mass. at 292.

### Background

The GWSA was enacted in 2008, against the backdrop of what the SJC characterized as the "emerging consensus ... that climate change is attributable to increased emissions, ... [and] that national and international efforts to reduce those emissions are inadequate." 474 Mass. at 281. Among other provisions, the GWSA required DEP to maintain an inventory of greenhouse gas ("GHG") emissions in the state and to determine the statewide GHG emissions level as of 1990. The GWSA also required the state to adopt two types of declining GHG emission limits. One relates to total emissions from all sources, while the other relates to individual sources. First, the Executive Office of Energy and Environmental Affairs (the "Secretary") was required to adopt limits on the total amount of GHG emissions from all sources for 2020, 2030, 2040 and 2050, with the 2050 limit reducing overall GHG emissions in the Commonwealth by 80 percent from the 1990 level. Second, the GWSA required DEP to adopt *annual* declining limits on individual sources of GHG emissions, in addition to the end-of-decade limits, specifically by "establishing a desired level of declining annual aggregate emission limits for sources or categories of sources that emit greenhouse gas emissions." This latter provision, codified at chapter 21N, § 3(d), led to the controversy that was decided in *Kain*.

DEP agreed that the end-of-decade limits were legally binding caps for statewide GHG emissions. However, with regard to Section 3(d)'s "declining annual aggregate emission limits" for sources of GHG emissions, DEP took the position these were aspirational "targets," not binding caps, citing the statute's reference to "desired" levels. Alternatively, DEP contended that several existing regulatory programs fulfilled Section 3(d)'s requirements to limit sources of GHG emissions, and that the agency need not adopt new regulations to comply with the law.

When DEP failed to adopt any new regulations on sources of GHG emissions pursuant to Section 3(d), four teenagers, the Conservation Law Foundation, and the Mass Energy Consumers Alliance sued DEP to compel it to adopt binding caps on sources of GHG emissions that declined annually. (The teenagers, two from Boston and two from Wellesley, were among scores of youth who, concerned about the impact of climate change on their future, had unsuccessfully petitioned DEP to adopt new Section 3(d) rules in 2012.) On cross-motions for judgment on the pleadings, the Superior Court ruled in favor of DEP, on the grounds that the three regulatory

schemes cited by DEP fulfilled Section 3(d)'s requirements. After granting direct appellate review, the SJC reversed.

### **The SJC Decision**

At the outset, the SJC acknowledged that DEP has wide discretion in establishing the scope of its authority, but stated that deference to DEP's interpretation of Section 3(d) "would tend to undermine the [GWSA]'s central purpose of reducing emissions in the Commonwealth." *Id.* at 287.

The Court first rejected DEP's argument that Section 3(d) required only aspirational "targets" for limiting sources of GHG emissions, not binding caps. The Court observed that when the GWSA referred to "limits" elsewhere in the statute, DEP conceded that "limits" referred to binding caps. The Court refused to give the word "limit" a different meaning with regard to the annual limits on sources of emissions in Section 3(d). 474 Mass. at 288.

The Court also pointedly said that "a regulation, by definition, is not aspirational" and expressed doubt that the Legislature would require an agency to promulgate regulations that were merely aspirational. Finally, while DEP had stressed that the term "desired level" necessarily implied that "limits" on emissions were aspirational, the Court disagreed. The Court held that, in the context of the statute's goal of reducing emissions in the Commonwealth, the term "desired level" meant the level of emissions from a source or category of sources that would be "suitable" to achieve the statewide GHG emissions limits. 474 Mass. at 289.

The SJC next turned to the three regulatory schemes that DEP argued fulfilled Section 3(d)'s requirements to limit sources of GHG emissions, and held that none satisfied the statute's mandate. The first regulatory scheme limits the rate of leakage of a powerful greenhouse gas from certain electrical switch gear, with the intent of gradually reducing the leakage rate from the equipment. The Court held that this regulatory scheme did not satisfy Section 3(d) because it established only a declining *rate* of emissions from sources, not a cap on the actual volume of emissions, and the amount of leaked emissions therefore could *increase* simply by the installation of additional equipment in a facility or in the state as a whole. 474 Mass. at 295. As to the second regulatory scheme, the "low emission vehicle" ("LEV") program, which also "regulates through the imposition of rates, rather than actual caps on emissions," the SJC held it did not comply with Section 3(d)'s requirement that DEP promulgate declining volumetric emissions limits. 474 Mass. at 299. The LEV program regulates emissions based on the average emissions of each auto manufacturer's fleet of cars. Thus, like the regulations regarding switch gear emissions, although the average rate of emissions from a vehicle fleet may decline, the total number of vehicles on the road from a manufacturer's fleet may increase and thus the volume of emissions from those sources may increase as well. *Id.*

Here and elsewhere, DEP argued that it should be free to use a rate rate-based mechanism rather than a volume-based cap on emissions, because using a cap would potentially limit the actual number of emission sources. Disagreeing, the Court said the GWSA required that new or additional GHG sources must comply with a regulatory scheme that required the reduction of the actual volume of emissions. 474 Mass. at 295.

Finally, the SJC turned to the Regional Greenhouse Gas Initiative (“RGGI”), a regional cap and trade system for carbon dioxide emitted by power plants, pursuant to which the overall cap on emissions from plants in Massachusetts and eight other states is reduced by 2.5 percent each year. Although RGGI imposes an overall cap on carbon dioxide emissions that declines annually through 2020, the SJC held that it nevertheless did not fulfill Section 3(d)’s requirements. The Court observed that RGGI was established by a separate statute, and that the GWSA elsewhere created a separate process by which emission levels associated with the electric sector are set. *Id.* at 297. These factors, said the Court, indicated the Legislature did not intend for the RGGI program to be part of the Section 3(d) regulations. In addition, the Court noted that under RGGI, a Massachusetts power plant could purchase allowances from another state that would permit the Massachusetts plant to increase emissions. Accordingly, RGGI does not actually require carbon dioxide emissions from power plants located in the Commonwealth to decrease annually.

In ruling that none of the three programs proffered by DEP satisfies Section 3(d)’s requirements, the SJC acknowledged that these schemes may play important roles in achieving greenhouse gas reductions. But the SJC also repeatedly said that, because these regulatory schemes do not actually require annual decreases in the volume of GHG emissions, they simply do not require what Section 3(d) mandates.

### **Conclusion**

The full import of *Kain* remains to be seen. At a minimum, it requires DEP to establish annual declining volumetric limits for those sources, or categories of sources, of emissions in the GHG inventory, which will help the state achieve its 2020 and 2050 limits. Designing programs to achieve those limits is another matter. Moreover, the Section 3(d) regulations were supposed to take effect no later than January 1, 2013, and to sunset on December 31, 2020. The work at hand now concerns what can best be achieved in the time that remains.

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## ***Skawski v. Greenfield Investors Prop. Dev. LLC* Clarifies Which Courts Have Jurisdiction to Hear Appeals of Major Development Permits**

**By Gordon Orloff**

### **Case Focus**

In February 2016 the Supreme Judicial Court decided *Skawski v. Greenfield Investors Prop. Dev. LLC*, 473 Mass. 580 (2016), and concluded that, in establishing the permit session of the Land Court, “the Legislature intended that major development permit appeals should be adjudicated only in the permit session of the Land Court or in the Superior Court.” *Id.* at 581. Therefore, *Skawski* ruled that the Housing Court lacked jurisdiction over challenges to a special permit granted for a major developments. That decision was consistent with both the Appeals Court’s rescript decision in *Skawski*, 87 Mass. App. Ct. 903 (2015), and the Appeals Court’s earlier decision in *Buccaneer Dev., Inc. v. Zoning Bd. of Appeals of Lenox*, 87 Mass. App. Ct. 871 (2015).

G.L. c. 185, § 3A (“Section 3A”) gave rise to each of these cases. That statute, which was enacted in 2006, established the permit session of the Land Court and granted it “original jurisdiction, concurrently with the superior court department, over civil actions in whole or part . . . arising out of the appeal of any municipal, regional or state permit, order, certificate or approval, or the denial thereof, concerning the use or development of real property” and other similar projects with 25 or more dwelling units and/or involving the construction or alteration of 25,000 square feet or more of gross floor area (which *Skaswki* termed “major developments”). *Skawski* considered an abutter’s challenge to a special permit granted by the Greenfield Planning Board for construction of a retail development of approximately 135,000 square feet. As was then common in Hampden County, the appeal was filed in Housing Court.

The Chief Justice of the Trial Court denied a motion to transfer the case to the permit session of the Land Court. Later, the Chief Justice of the Housing Court failed to act on a request by the trial judge that the case be transferred administratively to the Superior Court Department and that she (the Housing Court trial judge) be cross-designated as a Superior Court judge.

Faced with a pending motion to dismiss for lack of subject matter jurisdiction, the Housing Court judge withdrew her request and denied the motion to transfer the case. She then reported her ruling to the Appeals Court. Following the Appeals Court’s reversal of the trial judge’s order, the SJC granted the plaintiff’s application for further appellate review.

The issue confronted by the SJC was how to square Section 3A, which established the permit session, with G.L. c. 40A, § 17 (“Section 17”), which “gave subject matter jurisdiction in all permit appeals to the Housing Court, along with the Land Court, Superior Court, and District Court, and G.L. c. 185C, § 20, [which] gave any party the power to transfer such an appeal to the Housing Court if it were not initially filed there.” *Skawski*, 473 Mass. at 585. Chief Justice Gants engaged in a lengthy analysis of the language, context and history of Section 3A to reach the conclusion that the Housing Court was without subject matter jurisdiction to hear the appeal.

*Skawski* first acknowledged that Section 3A did not expressly repeal Section 17. The SJC next turned to the legislative purpose of Section 3A to determine if it repealed Section 17 by clear implication. The SJC emphasized that Section 3A was but one section of St. 2006, c. 205 (the



“act”), “whose purpose is clear from its title, ‘An Act relative to streamlining and expediting the permitting process in the commonwealth,’ and its preamble—‘to forthwith expedite the permitting process in the commonwealth.’” *Skawski*, 473 Mass. at 587. “From the text of the act and its legislative history, it is plain that the Legislature sought to reduce the costs and delays of the permitting process required to conduct business and develop property.” *Id.* (citations omitted). The SJC also observed that the “comprehensive scope of the act further suggests that the Legislature intended to be equally comprehensive in declaring which court departments would have original jurisdiction to adjudicate major development permit appeals.” *Id.* at 588. In light of the legislative purpose, the SJC concluded that, “[b]y specifying that the Superior Court Department shared concurrent jurisdiction with the permit session of the Land Court, and not also specifying any other court department as having concurrent jurisdiction, the Legislature impliedly reflected its intent that these **major development permit appeals be adjudicated only by these two courts.**” *Id.* at 587-88 (emphasis added; citations omitted).

The SJC found further support for this conclusion in the fact that the “establishment of the permit session of the Land Court to hear major development permit appeals was an integral part of the act’s over-all plan to expedite the permitting process because § 3A establishes demanding time frames for the final disposition of such appeals in the permit session.” In addition, Section 3A “allows any party, with the approval of the Chief Justice of the Trial Court, to transfer the appeal to the permit session.... But, if the Housing Court continued to have jurisdiction over these cases, any party could invoke G.L. c. 185C, § 20, and ensure that the final disposition of the appeal would be decided, not by the permit session, but by the Housing Court.” *Id.* at 588-89. Finally, the SJC found that the legislative history further supported its decision. *Id.* at 589-591.

The SJC concluded that the clear implication of these amendments is that the Legislature intended that major development permit appeals be adjudicated in the permit session and, if they could not be, either because the Chief Justice of the Trial Court denied the motion to transfer the case to that session or because a party claimed a right to a jury trial, that they be adjudicated in the Superior Court Department .... In short, ... the clear implication of § 3A is that the Legislature wanted all major development permit appeals to be adjudicated either in the permit session of the Land Court or in the Superior Court and therefore limited jurisdiction over these cases to these courts.

*Id.* at 590-91 (footnote omitted).

Interestingly, the SJC did not order dismissal of the case for lack of subject matter jurisdiction. Rather, it remanded the case to Housing Court to give the parties the opportunity to apply to the Chief Justice of the Trial Court for a transfer to the permit session of the Land Court or to the Superior Court.

*Skawski* gives effect to the Legislature’s intent to expedite appeals concerning major projects through use of the newly established permit session of the Land Court, staffed by judges with an expertise in land use matters. Practitioners should take note that interdepartmental assignments of Housing Court judges to hear major development permit appeals are now impossible because the Housing Court is without jurisdiction over such appeals, notwithstanding the language of G.L. c. 40A, § 17 and G.L. c. 185C, § 20.

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## ***Commonwealth v. Moore*: SJC Weighs In on Postverdict Juror Contact under Mass. R. Prof. Cond. 3.5**

**By Neil Austin and Caroline Donovan**

### **Case Focus**

Attorneys can initiate post-verdict contact with jurors without court permission or supervision, in the wake of the Supreme Judicial Court's holding in *Commonwealth v. Moore*, 474 Mass. 541 (2016). Nearly one year after the revised Massachusetts Rules of Professional Conduct went into effect on July 1, 2015, the SJC confirmed that Rule 3.5(c) worked a change in practice, allowing attorneys to communicate with jurors without requesting permission from the trial judge. Still, in other important areas, some constraints on juror contact remain.

Before the recent revisions to the Rules of Professional Conduct, attorneys in Massachusetts could initiate contact with jurors only with the permission of the trial judge, and then only on some suggestion that the jury had improperly considered extraneous material. See *Commonwealth v. Fidler*, 377 Mass. 192 (1979). In 2013, the SJC asked the Standing Advisory Committee on the Rules of Professional Conduct to re-examine the Massachusetts rules in light of changes to the ABA's Model Rules. The committee considered two proposed versions of Rule 3.5(c), one that allowed post-discharge juror contact and the other that affirmed *Fidler*'s prohibition on juror contact without the permission and supervision of the court. By unanimous vote, the committee recommended the version liberalizing juror contact. Following a comment period and argument, the SJC adopted the rule. Effective July 1, 2015, attorneys in Massachusetts may contact jurors post-verdict subject to three exceptions: (1) if the communication was "prohibited by law or court order"; (2) if the juror made known his desire not to communicate with the attorney, either directly or indirectly; or, (3) if the communication involved "misrepresentation, coercion, duress or harassment."

New Rule 3.5(c) was soon tested. In mid-July 2015, appellate counsel to Dwayne Moore sought to communicate with the jurors who had convicted Moore of murder in 2012. On July 14, 2015, two weeks after the effective date of revised Rule 3.5(c) and while Moore's appeal was pending, defense counsel sent the Commonwealth the letter he planned to send the jurors. The proposed letter asked whether the jurors had been exposed to any extraneous information during the trial and deliberations, including information about the mass shooting at Sandy Hook Elementary School. Having received no response from the Commonwealth, defense counsel sent the letter to the jurors one week later. That same day, the Commonwealth's attorney e-mailed defense counsel, notifying him that the Commonwealth would file a motion to prohibit juror contact, which it viewed as still impermissible under the revised rule.

The trial judge heard argument on the Commonwealth's motion and reported five questions to the Appeals Court (which were then transferred to the SJC):

1. In revising Rule 3.5 of the Massachusetts Rules of Professional Conduct to permit attorney originated communications with discharged jurors, did the Supreme Judicial Court implicitly overrule the prohibition against attorney originated communications with jurors as set forth in *Commonwealth v. Fidler*, 377 Mass. 192, 203-204, 385 N.E.2d 513 (1979)?

2. In generally adopting the American Bar Association's Model Rule 3.5 containing the language 'prohibited by law,' did the Supreme Judicial Court intend *Commonwealth v. Fidler* to be continuing precedent?
3. If the answer to question two is 'no,' then what types of contact with discharged jurors by an attorney, if any, are 'prohibited by law' under Rule 3.5(c)(1)?
4. If the answer to question one is 'yes,' and the answer to question two is 'no,' does revised Rule 3.5 permit attorneys to communicate with jurors who were discharged prior to July 1, 2015?
5. If the answer to question four is 'yes,' in light of *Commonwealth v. Fidler*, are attorneys required to seek approval from the court prior to contacting jurors?

*Commonwealth v. Moore*, SUCR2011-10023 (July 27, 2015), slip op. at 13-14.

On the first question, the Court said that, in "adopting rule 3.5 (c), we effectively overruled our rule, first stated in *Fidler*, that prohibited attorney-initiated, postverdict contact of and communications with jurors free from court oversight." *Commonwealth v. Moore*, 474 Mass. 541, 547 (2016). Second, the Court held that *Fidler* continues as precedent to the extent that, like *Fidler*, Rule 3.5(c) prohibits inquiries into the jury's deliberations. More specifically, "prohibited contact and communication include those that violate common-law principles, such as inquiries into the substance of jury deliberations, and communications that violate statutory law, other court rules, or specific court orders." *Id.* at 549. Finally, the Court held that Rule 3.5(c) applies to attorneys seeking to contact jurors discharged before July 1, 2015, the rule's effective date, if the case was pending on appeal on July 1, 2015, or if the appeal period had not yet run. *Id.* at 551. If either of those conditions is met, no court permission is required to contact jurors discharged before July 1, 2015. *Id.*

Beyond simply answering the trial court's questions, the SJC sought to provide procedural guidelines to counsel. Most notably, the Court required that a lawyer provide opposing counsel with five business days' notice of the lawyer's intent to contact the jurors. That notice should specify the proposed manner of communication and the substance of the inquiry, including, "where applicable, a copy of any letter or other form of written communication the attorney intends to send." *Id.* at 551-552. The Court stated that the preferred method of juror contact is by written letter, which should include a statement that the juror may decline to respond to such communication. While the Court observed that opposing counsel may seek relief if the proposed communication appears improper, the Court sought to tamp down routine challenges to proposed communications, underscoring that "[o]ur mention of the availability of judicial intervention and relief is not intended to serve as an invitation to counsel to seek it as a matter of course." *Id.* at 552.

Thus, lawyers in Massachusetts may now contact jurors without the permission or supervision of the trial court, including jurors discharged prior to July 1, 2015, if the direct appeal was then pending or the appeals period had not yet run. But before doing so, counsel must first provide opposing counsel notice of their intent to contact the jurors, and opposing counsel has an opportunity to move the court for relief. When counsel does make contact, he or she cannot inquire about the substance of the jury's deliberations; that subject continues to be off-limits. *Moore* provided preliminary answers and guidance concerning the implementation of Rule 3.5(c). Whether there will be additional litigation surrounding lawyer-initiated postverdict

contact with jurors remains to be seen.

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## Special Immigrant Juvenile Status in Massachusetts

By Nancy Kelly

### Case Focus

In a recent decision, *Recinos v. Escobar*, the Supreme Judicial Court (“SJC”) addressed and resolved a discrepancy between state and federal law as to whether individuals between the ages of 18 and 21 fall within the jurisdiction of the Massachusetts courts. 473 Mass. 734 (2016). The federal immigration statute considers individuals under the age of 21 children, but Massachusetts ordinarily considers individuals over the age of 18 adults. The discrepancy is important in immigration cases when individuals between the ages of 18 and 21 apply for Special Immigrant Juvenile (“SIJ”) status before the U.S. Citizenship and Immigration Services of the Department of Homeland Security (“USCIS”).

The plaintiff *Recinos*, Liliana Recinos, is a 20-year-old unmarried Salvadoran who attempted to apply to USCIS for SIJ status. SIJ status is available as an avenue for juveniles who have suffered abuse, neglect or abandonment to apply for permanent resident status before USCIS or the Immigration Court. As a prerequisite to applying for SIJ status, an applicant must obtain findings from a state court with jurisdiction to make determinations about the custody and care of juveniles that: 1) the applicant is dependent on the juvenile court; 2) reunification with one or both parents is not viable due to abuse, neglect or abandonment; and 3) it is not in the applicant’s best interests to return to her country of origin. Armed with those findings, a juvenile, up to age 21, can file a petition with USCIS for classification as a SIJ. If that classification is granted, the applicant can apply for lawful permanent resident status in the United States.

Recinos sought equitable and declaratory relief from the Middlesex County Probate and Family Court, specifically requesting the findings that would allow her to apply to USCIS for SIJ status. Twenty years old at the time of filing, Recinos “chronicled a childhood riddled with instances of physical and emotional abuse by her father,” “her mother’s failure to protect her,” and “chronic gang violence in her neighborhood.” *Recinos* at 736. The judge dismissed her complaint for lack of jurisdiction because she was over 18 years of age. Recinos filed an appeal with the Appeals Court, seeking expedited processing. The SJC took the appeal on its own motion and expedited the case to preserve Recinos’ opportunity to apply for SIJ status before her 21<sup>st</sup> birthday.

Justice Spina, writing for the court, described SIJ as “a unique hybrid procedure that directs the collaboration of state and federal systems.” *Recinos* at 737 (quoting *H.S.P. v. J.K.*, 223 N.J. 196, 209 (2015), and *Matter of Marisol N.H.*, 115 A.D. 3d 185, 188 (N.Y. 2013)). The state courts, which have expertise in child welfare and abuse, are entrusted by Congress to perform a best-interest analysis and make factual determinations about child welfare necessary to SIJ eligibility, while the federal agency, USCIS, retains the final determination regarding eligibility for SIJ status. *Recinos* at 738.

The court concluded that, while in most circumstances the Probate and Family Court has jurisdiction over children only until age 18, the court’s equitable powers under the Massachusetts General Laws, chapter 215, section 6, are “broad and flexible, and extend to actions necessary to afford any relief in the best interests of a person under their jurisdiction.” *Recinos* at 741

(quoting *Matter of Moe*, 385 Mass. 555, 561 (1982)). Noting that “a fundamental maxim of general equity jurisprudence is that equity will not suffer a wrong to be without a remedy,” the court found that the Commonwealth has a policy of protecting children from wrongs that result “from the absence, inability, inadequacy or destructive behavior of parents,” which are the same wrongs that SIJ status is intended to remedy. *Recinos* at 741 (quoting Mass. Gen. Laws ch. 119, § 1).

The court compared the case to *Eccleston v. Bankosky*, 438 Mass. 428, 431-433 (2003), in which the SJC, noting that attaining the age of majority does not necessarily mean that one is self-sufficient, extended jurisdiction through equity to order continued support for a child after the age of 18 where she could not live with either parent because of abuse and had no means of support. Because the state legislative scheme provided for post-minority support for an unemancipated child who lived with one parent, the court closed the “unintended gap” by providing an order for support through its equitable powers. Similarly, the court in *Recinos* used its equitable powers to fill the gap between the state court’s statutory jurisdictional limits and the federal immigration statute.

Finally, the court addressed the question of dependency. Analyzing the language of the statute, the court reasoned that, because *Recinos* could not become self-sufficient without having her case adjudicated, and because court findings were a prerequisite to having her immigration case considered, she was dependent on the court to obtain self-sufficiency.

Justice Cordy issued a concurring opinion, stating that, he would have preferred a legislative solution. Justice Cordy supported the majority’s conclusion because of strong state policies aimed at protecting children from the effects of asylum and neglect and the gap between the ordinary jurisdiction of the state court and the federal benefit, but said that it would have been preferable for the Massachusetts State Legislature to have acted on legislation that would have explicitly expanded the jurisdiction of the Probate and Family Court to address claims like those presented by *Recinos*.

Legislation has been pending which would address this issue, creating a statutory avenue for 18 to 21-year-old youth to seek findings necessary to apply for SIJ status. *An Act Relative to Special Juveniles*, SB 740, 189th Gen. Ct. (Mass. 2016). On April 4, 2016, subsequent to the issuance of the initial order in this case, the bill was sent to study, likely delaying the adoption of any legislation on this matter for some time.

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## **Finding Easements Isn't Easy: The SJC Requires an Expansive Search of the Land Registration System**

**By Bruce Barnett**

### **Case Focus**

How far must one look to identify easements or other encumbrances on registered land in Massachusetts? The Land Registration Act suggests that all answers should lie within the lot's certificate of title: according to the statute, the holder of a certificate "takes free from all encumbrances except those noted on the certificate," M.G.L. c. 185, § 46, and the certificate "shall set forth ... all particular ... easements ... to which the land or the owner's estate is subject," *id.* § 47. But, the statute does not tell the whole story, and last fall in Hickey v. Pathways Association, Inc., 472 Mass. 735 (2015), the Supreme Judicial Court ("SJC" or "Court") confirmed just how far beyond one's own certificate the search must extend.

As with many Massachusetts easement disputes, Hickey is about access to the beach—Cape Cod Bay in Dennis, in this case. The Hickeys and their neighbors, the Paglias, sought confirmation that only they could use a twenty-foot wide way (the "Way") that runs between their water-front properties from Shore Drive to the beach. The owners and guests of numerous lots in-land from Shore Drive had been using the Way. Owners of at least 38 in-land lots (the "access-seekers") were parties to the action; as will be seen, the result has implications for many more lots in the area.

Before proceeding to the details of Hickey, it will be helpful to say a few words about registered land and the typical process for developing a registered-land subdivision. In Massachusetts, land registration is a lengthy, voluntary process of exhaustive title examination (and, potentially, judicial dispute resolution) that results in a guaranteed (and state-insured) confirmation of the owner's title to the land, which is set forth on a court-issued certificate of title. The "registration case" proceeds in the Land Court, and the tract is initially depicted as a single lot on a court-approved plan referred to as the case's "A Plan."

To make a subdivision, the owner creates lots by dividing the tract one sub-area at a time, with each sub-area becoming the subject of its own plan. These later plans, which show individual lots, are designated by sequential letters assigned in chronological order (first the "B Plan," then the "C Plan," etc.). When a lot is conveyed, the new owner receives a certificate of title that, at least according to the statute, states all encumbrances on the land.

The registration case in Hickey involved a 217-acre tract. The Paglias' and Hickeys' lots and the Way were eventually established by the case's D Plan and F Plan. The lots were expressly granted rights in the Way when they were created—the issue in Hickey was whether anyone else also had rights. There is no mention of any grant to others of rights in the Way in the Paglias' and Hickeys' certificates of title (or those of their predecessors). Under the statute, that would be the end of the story.

Nonetheless, the SJC held that all the access-seekers' lots enjoyed easements in the Way by applying (and, some would say, expanding) an exception to the statutory rule that it had created in 1994. See Jackson v. Knotts, 418 Mass. 704 (1994). Under that exception, an owner "might take [its] property subject to an easement at the time of purchase ... if there were facts described on [its] certificate of title which would prompt a reasonable purchaser to investigate further other



certificates of title, documents, or plans in the registration system.” Id. at 711. In Jackson and Hickey, an investigation was required because the lots were in subdivisions, as is very often the case for registered land. The question for investigation is “whether there were facts within the Land Court registration system available to [the owners], at the time of their purchases, which would lead them to discover that [their] property was subject to an encumbrance, even if that encumbrance was not listed on their certificates of title.” Id.

In Jackson, another beach case, the SJC created the exception only to find that it did not apply. The Court looked beyond the silent certificates of the purportedly burdened land to other documents in the registered-land system, as the exception requires, but found no indication in those other documents that the developer intended to convey rights over the disputed access way to anyone else. Id. at 712-13.

The Hickey Court’s application of the Jackson exception yielded the opposite conclusion. The SJC rejected the Hickeys and Paglias’ argument that the required examination was limited to tracing their chains of title back to the D and F Plans that created their lots and back through the deeds by which their lots were conveyed and the resulting title certificates. Those documents showed no grant of any interest in the Way to anyone else. The SJC, however, held that a reasonable search must include much more. Hickey, 472 Mass. at 757-59.

First, the search must go farther back in time and must include documents related to land wholly apart from the land on the D and F Plans. In particular, the Court looked to the B Plan, which earlier had subdivided land on the other side of the 217-acre registered tract. The B Plan created over 225 lots stretching five blocks in-land from the shore, with ways to the beach placed after every third waterfront lot. The B Plan was not referred to in the Paglias’ and Hickeys’ certificates. Nevertheless, it was included in the Court’s required reasonable search. From the B Plan, the SJC stated, the Paglias and Hickeys would have observed the pattern of development in another area of the subdivision and should have inferred that the developer intended a similar pattern in their area, even if there was no indication of other lots on the D and F Plans.

Next, the Court held that a reasonable search must move forward in time from the creation of the Paglia and Hickey lots and the Way (in 1936 and 1944). In doing so, the search must include the title certificates and plans of other lots in the subdivision, at least to the extent the documents were added to the system before the Paglias and Hickeys purchased their lots (in 1994 and 1999). In setting the geographic scope of the examination, the SJC built on its statement in Jackson that, for a lot of registered land bounded by a way, a prospective purchaser “would ‘be expected to examine the certificates of other lot owners in the subdivision to determine whether others might have an interest in the way.’” Hickey, 472 Mass. at 756 (quoting Jackson, 418 Mass. at 712).

Geography-wise, however, Jackson, was a relatively simple case—it involved primarily one subdivision plan covering a limited area and showing all relevant lots. In Hickey, none of the access-seekers’ lots appeared on the Paglias’ D Plan or the Hickeys’ F Plan—they were all created subsequently. The SJC brought them and their respective certificates of title into the search through a series of marginal references linking one plan to another and then to a third and through the fact that one later plan (itself showing over 75 lots) “includes open-ended ways leading into other land of [the developer],” which was ultimately subdivided into over 100 additional lots on yet another plan. Id. at 760. The Court concluded that the Paglias’ and

Hickeys' reasonable searches of documents in the registered-land system should include the separate certificate of title for at least each of the 175-plus lots appearing on those later plans.

Looking at that broad array of title documents, the Court found all the access-seekers were entitled to use the Way, though with slightly different reasoning for two separate groups. The title certificates of the first group granted rights in all the ways appearing on certain plans, and those plans included the disputed Way. The SJC affirmed the Land Court's conclusion that the first group thus had access rights that a proper search would have revealed. The owners in the second group appeared to be differently situated: their lots were granted rights in ways appearing on a particular plan (the M Plan), which, in the form presented to the Land Court, did not show the Way. Accordingly, the Land Court rejected their claim. In reversing, the SJC gave a further indication of how far a search under the Jackson exception must extend. The Court ruled that a purchaser could not rely on the version of a registered-land plan on file at the county registry, which is where title searches take place. Rather, the SJC took judicial notice of the original M Plan, on file with the land registration office at the Land Court in Boston, which shows a portion of the D and F Plans, including a portion of the Way and the Hickeys' and Paglias' lots. Looking at the original M Plan, the SJC concluded that the developers intended to treat the areas shown on the plans "as an interrelated whole" and to grant easements over the Way to all lots. Id. at 761-64.

In sum, Hickey shows that a prospective purchaser undertaking due diligence of registered land cannot rely on the statutory promise that "all encumbrances [will be] noted on the certificate [of title]." M.G.L. c. 185, § 46. Rather, the purchaser must be prepared for an extensive (and expensive) review of potentially hundreds certificates of title to other lots and dozens of plans (including original versions located only in Boston) to determine whether anyone else shares rights in the land.

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