COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2015-P-0905

HARVARD CLIMATE JUSTICE COALITION, ET. AL.,

Plaintiffs/Appellants

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE, ET. AL.,

Defendants/Appellees

On Appeal from a Judgment of the Suffolk County Superior Court

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BRIEF FOR DEFENDANTS/APPELLEES PRESIDENT AND FELLOWS OF HARVARD COLLEGE AND HARVARD MANAGEMENT COMPANY, INC.

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STATEMENT OF ISSUES

I. Did the Superior Court properly dismiss a complaint filed by seven Harvard students and their student organization, which demanded that the court substitute the students' views of how to manage Harvard's endowment for that of Harvard's fiduciaries, because the students and their organization lack standing and their Complaint fails to state a claim?

II. Did the Superior Court properly dismiss a tort claim of the students' own invention—"Intentional Investment in Abnormally Dangerous Activities"—which they claim to bring on behalf of "Future Generations," because it failed to state a claim upon which relief may be granted?

STATEMENT OF THE CASE

Harvard adopts Plaintiffs' Statement of the Case.

STATEMENT OF FACTS

Plaintiffs identify themselves as both an unincorporated organization with a "mission to educate the Harvard community on the facts of climate change" and seven currently-enrolled Harvard students, each claiming an interest in promoting efforts to address climate change and in the "University's current and long-

term reputational and physical health."[1] They assert that they are acting on behalf of themselves and for "Future Generations," meaning "individuals not yet born or too young to assert their rights." Record Appendix ("App."), 5-6, 11-13.

The students seek injunctive relief as follows: (1) an order requiring Harvard's immediate withdrawal of direct holdings in fossil fuel companies; and (2) an order requiring Harvard to take "immediate steps to begin withdrawing indirect holdings" and to withdraw from all indirect holdings "within a reasonable period of time." App. 15. The students also seek a declaratory judgment that, through investments in fossil fuel companies, Harvard has breached obligations contained in its Charter, has violated its duties as a public charity under M.G.L. c. 180, § 4, and has violated c. 180A by mismanaging charitable funds. Id. Finally, the students allege that Harvard "intentionally invest[ed] in abnormally dangerous activities," conduct they assert should be found to violate a new tort they urge the court to create. App. 10-15.

[1] For ease of reference, this brief often refers to the individuals and their unincorporated association as, collectively, "the students."

As referenced in the Complaint, demands for Harvard to divest from fossil fuel companies also have been made outside this Court and directly to Harvard's senior leadership and governing board. After due consideration, Harvard has concluded that divestment is inappropriate for many reasons, including because the endowment should not be instrumentalized for purposes unrelated to its core purpose and because the institution's mission—"to carry out the best possible programs of education and research"—is best served when the endowment is used to support and advance these aims. See Letter of Harvard President Drew Faust to the Harvard community (April 7, 2014), Docket #SUCV2014-03620, Complaint, Ex. J.

As the students themselves noted in their Complaint, Harvard has taken significant steps outside of the endowment to address climate change in ways consistent with its mission. Most importantly, Harvard has supported research and scholarship by faculty and students on the scientific, legal, economic, political, and public health aspects of climate change—the kind of work that is fundamentally at the heart of a university's enterprise. Id. Beyond that, and as noted in President Faust's April 7, 2014 letter, Harvard has

reduced greenhouse gas emissions university-wide, has become a signatory to two organizations, United Nations-supported Principles for Responsible Investment and the Carbon Disclosure Project's climate change program, and is raising money for research through the Climate Change Solutions Fund. Id. at Exs. J, Y.

The students, unsatisfied with these and other steps Harvard has taken, ask the Court to order Harvard to consider factors outside prudent endowment management and instead to divest for its symbolic and political impact. They ask the Court to force Harvard to adopt their views in place of the considered judgments of its own leadership and fiduciaries. The students contend that the investments at issue constitute a breach of Harvard's "fiduciary and charitable duties as a public charity" because they "contribute to climate change" and conflict both with general language in Harvard's Charter extolling "the advancement and education of youth," and with general statements made by President Faust that Harvard "has a special obligation and accountability to the future, to the long view needed to anticipate and alter the trajectory and impact of climate change." App. 10-11. The students further allege that Harvard's investment in fossil

fuel companies supports the actions and influence of these companies, thereby impeding the mission of the students' unincorporated organization and "contribut[ing] to the diminishment" of the individual students' educations in unspecified ways. App. 12-13. Finally, the students assert that Harvard knows or should know with substantial certainty that its investments support fossil fuel companies' business activities, which the students allege are abnormally dangerous because they contribute to climate change. App. 14. For the reasons set forth below, the Superior Court's order granting Harvard's Motion to Dismiss should be affirmed.

SUMMARY OF THE ARGUMENT

The Superior Court properly dismissed Count I of the students' Complaint, alleging that Harvard mismanaged charitable assets, because the students lack standing to raise issues in court about Harvard's investment of charitable funds. Under well-settled Massachusetts law, the Attorney General has exclusive authority to bring suit challenging a charitable corporation's management of its assets. The students simply do not possess the kind of special legal interest that would place this case within any of the ex-

tremely narrow exceptions to that general rule. See infra pp. 7-17.

The Superior Court's dismissal of the students' claims was correct for a second, independent reason: Harvard has not engaged in any wrongful conduct by investing in direct and indirect holdings in fossil fuel companies. Such investments are legal and well within the zone of discretion afforded to managers of charitable assets. For either or both reasons, Count I of the students' Complaint fails to state a claim upon which relief could be granted. See infra pp. 17-21.

The students incorrectly argue on appeal that the Superior Court failed to accept the Complaint's factual allegations as true in deciding the motion to dismiss. To the contrary, it accepted those assertions but dismissed the claims nonetheless because, even accepting those facts, the Complaint establishes no right to relief. The Court also appropriately found that the students' claim that they would suffer harm from Harvard's fossil fuel investments was too speculative to warrant relief. See infra pp. 21-25.

The Court also correctly dismissed Count II of the Complaint. In that count, the students—purporting to bring suit on behalf of "Future Generations"—

claimed that Harvard had engaged in a new tort: "Intentional Investment in Abnormally Dangerous Activities." The Court correctly dismissed Count II for two independent reasons. First, the students cannot lawfully bring suit on behalf of "Future Generations." Second, no court has ever recognized the imaginary tort the students have invented, and there is no good reason for it to be recognized in Massachusetts. See infra pp. 25-36.

ARGUMENT

I. The Superior Court Correctly Concluded Plaintiffs Lack Standing.

A. The Attorney General has Exclusive Authority to Challenge a Charitable Organization's Management Except in Extraordinary Circumstances

As the Superior Court recognized, only the Attorney General has standing to "enforce the due application of funds given or appropriated to public charities within the commonwealth." M.G.L. c. 12 § 8. "The duty of taking action to protect public charitable trusts and to enforce proper application of their funds rests solely upon the Attorney General as the representative of the public interest. This is so both at common law and under G.L. (Ter.Ed.) c. 12, § 8." Ames v. Attorney General, 332 Mass. 246, 250 (1955);

see also Weaver v. Wood, 425 Mass. 270, 275 (1997) ("When a trust is charitable, and is created not to benefit one or more individuals but is devoted to purposes that are beneficial to a broader community, the Legislature has determined that the Attorney General is responsible for ensuring that its charitable funds are used in accordance with the donor's wishes.").

Indeed, the Supreme Judicial Court has held that the Attorney General's exclusive responsibility extends even further. In general, the Attorney General alone has "standing to bring an action to protect the public interest in the efficient and lawful operation of a charitable corporation, or to correct any abuse or error in the administration of that corporation." Estate of Moulton v. Puopolo, 467 Mass. 478, 493 (2014).

The students concede, as they must, that the Attorney General's authority in this area is exclusive but for a narrow exception when "the plaintiff asserts interests in such organizations which are distinct from those of the general public." App. 29. Because the students have no such interest, they have no standing to pursue this case.

B. The Students Have Failed to Allege a "Special Interest" Sufficient to Provide Standing to Litigate Their Claims

The students do not possess any of the limited special interests sufficient to give them standing under Supreme Judicial Court precedent; moreover, courts historically have rejected similar claims brought by students to challenge their school's governance.

Contrary to the students' allegations, they do not enjoy any benefits from Harvard that are distinct from those enjoyed by other students, and indeed, many of the benefits they identify are shared with the general public. In the very rare instances when Massachusetts courts have recognized a private plaintiff's standing to make claims against a public charity, they have required the plaintiff to assert "an individual interest in the charitable organization distinct from that of the general public." Maffei v. Roman Catholic Archbishop of Boston, 449 Mass. 235, 245 (2007). Here, the students have failed to assert any such "special interests;" to the contrary, they fundamentally rely on their student status alone, which courts consistently have found insufficient to confer standing.

The only "individual interests" the Supreme Judicial Court has recognized as sufficient to confer standing are reversionary and other legal interests in property and the enforcement of individual membership rights under an organization's bylaws. See, e.g., Maffei, 449 Mass. at 245 (2007) (plaintiffs' claims were "personal, specific, and exist[ed] apart from any broader community interest in keeping [the church] open" because one plaintiff had a reversionary interest in the property and another had lost substantial personal funds due to defendant's negligent misrepresentation); Trustees of Dartmouth College v. Quincy, 331 Mass. 219, 225 (1954)(petitioner had a special interest in maintenance of a fund because petitioner would be entitled to the fund on occurrence of a contingency stated in the will); Lopez v. Medford Community Center, Inc., 384 Mass. 163, 169 (1981)(plaintiffs had standing only to litigate their claim that they were unlawfully denied membership in violation of the bylaws).

Here, the students do not and could not assert personal interests of the kind Massachusetts courts require to confer standing on individuals who seek to play the role ordinarily reserved exclusively for the

Attorney General. They do not have a reversionary interest in any property, like the plaintiffs in Maffei, 449 Mass. at 245, or the plaintiffs in Trustees of Dartmouth College, 331 Mass. at 225. Nor do they claim that Harvard has violated rights they possess to participate in Harvard's governance—a claim that would at least resemble the interest the Supreme Judicial Court recognized in Lopez, 384 Mass. at 169. These cases present the *only* arguable exceptions Massachusetts courts have made to the general rule that the Attorney General, as the sole representative of the public interest, has exclusive authority to hold charitable organizations accountable for the management of charitable funds.

Here, the students' assertions that they have personal and specific interests that exist apart from the broader community amount to nothing more than "legal conclusions cast in the form of factual allegations." As such, the court need not accept them as true in analyzing the motion to dismiss. See Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000). Perhaps recognizing that their student status alone does not constitute a special interest sufficient to confer standing, the students attempt to obfuscate by alleg-

ing that standing should be granted based on their student status coupled with their purported injuries from Harvard's investment in fossil fuels. But simply alleging that the supposed harms they suffer are unique to them does not make it so. Even taken as true, all of the alleged harms the students list also would affect other students and the general public: a chilling effect on academic freedom, diminished future enjoyment of the Harvard campus as a result of sea level rise, and detriment to the quality of education resulting from fossil fuel companies' dissemination of scientific falsehoods. Appellants' Brief ("Appellants' Br.") 18.

Indeed, the students' brief ultimately acknowledges that their standing argument rests on their "special interests as students." Appellants' Br. 19. But courts firmly have rejected the notion that student status is sufficient to establish standing to challenge an educational institution's governance. As the Supreme Court recognized nearly two centuries ago in Trustees of Dartmouth College v. Woodward, students had no vested rights in their college's governance and therefore no standing to sue under its charter. The Court held that the Dartmouth corporation itself was a

"trustee" for its students, which would "exercise… assert… and protect…" their aggregate potential interests. 17 U.S. (4 Wheat.) 518, 641-43 (1819).

Subsequent courts, citing Dartmouth College, similarly have held that students lack standing to sue over corporate governance and other matters of institutional policy.[2] See, e.g., Russell v. Yale University, 737 A.2d 941, 946 & n.6 (Conn. App. 1999); Miller v. Alderhold, 184 S.E.2d 172, 174-75 (Ga. 1971). Notably, the Russell court denied standing to a group of Yale Divinity School students who challenged a vote by the Yale Corporation to reorganize their school, including demolishing large portions of its campus-a far less attenuated "special interest" than that asserted here, and yet still insufficient to establish standing. The Supreme Judicial Court also has rejected

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[2] The students argue that they do not seek to "challenge how Harvard invests its endowment" and that their alleged personal rights are narrower than the Superior Court's characterization of them as challenging Harvard's charitable activity. See Appellants' Br. 20-21. This is simply incorrect. A large, modern investment portfolio like Harvard's is the result of a set of interrelated judgments about risks and opportunities across potential investments in various sectors (equities, bonds, natural resources, etc.). If students were able to compel divestment from specific industries, those judgments would risk fundamentally altering Harvard's overall investment approach and impinging on a core fiduciary responsibility.

student standing in litigation involving the composition of a school's faculty. In Harvard Law School Coalition for Civil Rights v. President & Fellows of Harvard College, the Court held that law students lacked standing to sue Harvard for failure to hire a racially diverse law school faculty, clarifying that the students were "no more than incidental beneficiaries of [the faculty] contracts." 413 Mass. 66, 71 (1992). If Harvard students do not have standing to challenge the composition of the faculty from whom they will learn, they certainly do not have standing based on the attenuated interests articulated in this case.

Indeed, the students here cite no case conferring standing on litigants in circumstances analogous to theirs. The students rely heavily on the Supreme Judicial Court's holding in Jessie v. Boynton, 372 Mass. 293 (1977), but that reliance is wholly misplaced. In Jessie, the plaintiffs were dues-paying employee "members" of a hospital, the bylaws of which gave all members the right to vote on matters relating to hospital governance, like a corporation's shareholders. Id. at 294. They alleged that other members of the hospital fraudulently adopted "new corporate by-laws

which provided, for the first time, that employees of the hospital . . . constitute[d] a separate class of members ineligible to vote." Id. The Supreme Judicial Court held that the disenfranchised employee members had standing to challenge the allegedly fraudulent adoption of the new bylaws that took away their voting rights. Id. at 304-05.

The distinction between Jessie and this case is plain: the Jessie plaintiffs had a pre-existing right to vote that the defendants fraudulently eliminated. Here, the students do not allege, and could not allege, that Harvard interfered with any contractual right they possess to participate in Harvard's affairs. In Jessie, as in Lopez, 384 Mass. at 169, the plaintiffs properly looked to the courts to vindicate their rights under a charitable organization's bylaws to participate in the organization's governance. Here, the students have no such right.

Instead, their claims are more closely analogous to those made in Corrigan v. Roman Catholic Archbishop of Boston, where the Appeals Court affirmed dismissal of a complaint brought by parishioners, both individually and on behalf of other parishioners, for injunctive and declaratory relief related to the defendant's

management of property in a charitable trust. 2008 Mass. App. Unpub. LEXIS 332, at *1 (Mass. App. Ct. Sept. 19, 2008). The court held that the parishioners lacked standing because they failed to allege any personal interest in real or personal property conditionally donated to the church and did not claim to be "a successor in interest to any legal or beneficial interest in the items of property." Id. at *7.

Moreover, even in cases where the court has found a special or personal interest, it has limited standing to the claims of injury to that interest. In Lopez, the plaintiffs made claims of corporate mismanagement in addition to claiming they had been denied their right to membership. 384 Mass. at 165. The Court allowed them to litigate only the claim relating to membership but found they "had no standing to prosecute their claims of corporate mismanagement." Id. at 169.

Unlike the plaintiffs in Jessie, whose injury and personal right both arose from the denial of their membership vote, the students have no personal right in and no injury arising from the investment of Harvard's endowment. Instead they make the circular argument that they have a "distinct interest in Harvard's

fossil fuel investment" because of Harvard's Charter and the alleged personal effects of fossil fuel investment on their educations. Appellants' Br. 22. These allegations themselves make clear that the students contest Harvard's governance as a general matter; they do not and cannot point to a discrete personal right-like a membership vote-of the kind that the Supreme Judicial Court has recognized.

II. The Students' Complaint Must Be Dismissed Because They Have Failed to Allege Any Wrongful Conduct and Permitting Their Claim Would Violate Public Policy.

While the Superior Court's reasons for dismissing the Complaint are legally sound and sufficient, the court's decision can be upheld on other grounds as well. Lieberman v. Powers, 70 Mass. App. Ct. 238, 242 n. 6 (App. Ct. 2007)("a party who prevailed in the trial court may defend a judgment on any ground asserted in that court"). Most importantly, as Harvard argued below, the students have failed to allege that Harvard engaged in any wrongful conduct by making investments in fossil fuel industries.

Massachusetts statutes and case law afford the managers of charities broad discretion to decide how to invest their funds. An institution like Harvard may

"invest in any kind of property or type of investment." M.G.L. c. 180A, § 2(e)(4). The law imposes few limits on the investment decisions of charitable organizations, requiring only that funds are managed and invested "in good faith and with the care that an ordinarily prudent person in a like position would exercise under similar circumstances." M.G.L. c. 180A, § 2(b).

The students do not—and could not—allege that investments in fossil fuel businesses are unlawful.[3] Rather, they want Harvard to divest based on their own personal, moral and political views, seeking to substitute these views for the lawful determinations about what is in Harvard's best interest made by those

[3] They do not allege that Harvard has misappropriated funds or that its investment decision makers have engaged in a self-interested transaction—two circumstances in which the Attorney General and the courts may intervene in a charitable organization's decisions about investments. Assurance of Discontinuance, In the Matter of the National Graduate School of Quality Management, Inc., C.A. No. 12-1874-D (Mass. Att'y Gen. Apr. 22, 2014), http://www.mass.gov/ago/docs/press/2014/ngs-aod.pdf (Attorney General alleged board members breached their fiduciary duty by misappropriating the organization's funds to make personal purchases of luxury items); see also Findings and Recommendations, Suffolk University (Mass. Att'y Gen. Jul. 9, 2009), http://www.mass.gov/ago/docs/nonprofit/findings-and-recommendations/suffolk-university-070909.pdf (Attorney General investigated transactions with a contractor in which a university trustee held an interest).

charged with managing its endowment. Absent any allegations of fraud, self-dealing, or other such misconduct, even the Attorney General lacks this authority. Finding that the students lack standing does not, as they assert, allow Harvard to "enjoy special protection from the law." Appellants' Br. 28. Massachusetts statutes and case law recognize the "necessity of protecting public charities from being called upon to answer to proceedings instituted by individuals, with or without just cause, who have no private interests distinct from those of the public." Dillaway v. Burton, 256 Mass. 568, 575 (1926).

The students attempt a sleight of hand, arguing that they are not asking the Court to impose their views on Harvard's entire investment strategy, but only on that portion invested, directly or indirectly in fossil fuels. But this is plainly incorrect: attempting to force Harvard to divest from one component of the University's larger investment strategy necessarily interferes with Harvard's overall investment scheme. In the ordinary course of managing their finances, universities no doubt will make investments in companies engaged in activities that are unpopular with some students, parents, faculty, staff or alumni.

But that alone cannot drive a university's investment strategy; nor can a university be required by a court of law to accommodate the views of one or another of the many interest groups in its community. Institutions of higher education are diverse; students, faculty, staff and alumni may have very strongly held and conflicting views on a range of political and social issues. Indeed, the Supreme Judicial Court previously has recognized that it is Harvard's responsibility—not the court's—to balance multiple factors when managing assets in its trust. Attorney General v. President & Fellows of Harvard College, 350 Mass. 125, 139 (1966) ("Resolution of possibly divergent interests is inherent in the holding and management by a single institution of a number of public trusts for independent, related or overlapping purposes."). Universities, like other charitable organizations, are rightly cautious about using their endowments to make political statements, as the students demand here, and courts appropriately have declined to second-guess these institutions' considered judgments.[4]

[4] As the Superior Court noted here, "Plaintiffs have brought their advocacy, fervent and articulate and admirable as it is, to a forum that cannot grant the

As members of Harvard's academic community, the students are free to press their views through advocacy and persuasion on campus. But their attempt to have the Court intervene in Harvard's investment decisions has the potential for far-reaching and problematic consequences. To allow such a claim to proceed would be contrary to public policy and Massachusetts law, which protects charitable organizations' discretion in determining how to manage their funds.

III. The Superior Court Correctly Applied the Standard of Review in Dismissing Plaintiffs' Complaint.

A. The Superior Court Did Not Base Its Order Dismissing the Complaint on an Improper Rejection of the Students' Factual Allegations.

Misreading its decision, the students wrongly cast the Superior Court as a "climate change denier" and suggest that it incorrectly rejected their factual allegations about climate change. The students focus on the Court's characterization of their views on climate change as "beliefs," noting the Court's statement that "other students believe just as fervently in other causes." See Appellants' Br. 6-7.

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relief they seek." App. 41 (internal citations omitted).

But in keeping with the standard of review applicable to a motion to dismiss, the Court *did* accept the students' allegations about climate change. It merely noted that other students may believe, with passion equal to theirs, that the university should accommodate their own issues of concern. The Superior Court's common sense recognition that other Harvard students may prioritize issues differently does not mean the Court rejected the factual allegations about climate change set forth in the Complaint. It means only that the Court acknowledged the reality that other students likely have equally strong views about other social problems and would, if the law permitted, urge the courts to order Harvard to divest from different classes of assets. The Court's statement about the students' "beliefs" simply made the point that allowing them to direct Harvard's investment strategy would open the gates to litigation over myriad other issues supported by different members of the Harvard community. One can accept the students' factual allegations about climate change—as the Court appropriately did here, given the posture of the case—without finding they are entitled to legal relief.

B. The Superior Court Correctly Concluded that the Students' Claims Were Too Speculative to Warrant Relief.

The Court also correctly found that the students' claim that they would suffer harm from Harvard's fossil fuel investments was too speculative to warrant relief. To survive a motion to dismiss under Mass. R. Civ. P. 12(b)(6), a complaint "requires more than labels and conclusions . . . [w]hat is required at the pleading stage are factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008) (citations omitted). The complaint must "possess enough heft to 'sho[w] that the pleader is entitled to relief.'" Id. (citations omitted). See also Schaer, 432 Mass. at 477-78 (2000) (plaintiffs are not entitled "to rest on 'subjective characterizations' or conclusory descriptions of a 'general scenario which could be dominated by unpleaded facts.'") (citing Judge v. Lowell, 160 F.3d 67, 77 (1st Cir. 1998), quoting Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 53 (1st Cir. 1990)).

Here, the Superior Court correctly rejected as speculative the students' claims that Harvard's investment in fossil fuel companies caused the diminish-

ment of their educations: "[t]he allegations of this Complaint, as they attempt to connect Harvard's fossil fuel investments with the 'diminishment' of Plaintiffs' educations and a chilling of academic freedom are simply too speculative." App. 36.

The trial court properly recognized that the Complaint fails to account for breaks in the chain of causation between Harvard's investments and the harms allegedly caused by those investments. As the court noted, even if it directed Harvard to divest, "fossil fuel companies would still exist, would still have every motive to spread the alleged scientific falsehoods, and would certainly have the resources to continue to do so." Id.

The Court also correctly found that the Complaint itself demonstrated that "Harvard's investment in fossil fuel companies has not chilled academic debate on the topic of climate change; indeed, one of the putative Plaintiffs is a campus organization whose function is to 'educate the Harvard community about the facts of climate change and advocate for environmental and climate justice.'" Id. at 36-37. This point highlights the internal contradictions of the students' position, and what is ultimately the profoundly

limited view that animates their Complaint. The students essentially argue that they have an educational right to have everyone agree with their view on how best to combat climate change and that anything short of that diminishes their education. But a fundamental premise of higher education is to expose students to ideas and viewpoints different from their own, including some with which they may disagree. For a court to find that students have an educational right to compel their institution to adopt their views on a particular topic would undermine a core educational principle and would lead to the chilling of academic freedom and the vibrancy of intellectual discourse on campus.

IV. The Students' Claim for "Intentional Investment in Abnormally Dangerous Activities" Is Not Legally Cognizable.

The Superior Court properly dismissed the students' request—purportedly made on behalf of "Future Generations"—for an order directing Harvard to divest its fossil fuel investments as a remedy for Harvard's alleged commission of a previously unrecognized tort they name "Intentional Investment in Abnormally Dangerous Activities."

The students' claim based on this alleged new tort suffers from two basic defects. First, they fail

to explain why they—seven Harvard students and their student association—should be viewed as appropriate parties to make claims on behalf of "Future Generations" or, for that matter, why "Future Generations" would have standing to contradict Harvard's judgments about how to invest its endowment. Second, no court has ever recognized the tort of "Intentional Investment in Abnormally Dangerous Activities," and there is no good reason for Massachusetts to be the first.

A. The Superior Properly Rejected the Students' Assertion That They Represent Future Generations.

The students do not purport to seek relief on their own behalf but, instead, on behalf of "Future Generations," defined as "individuals not yet born or too young to assert their rights." App. 5, 14. But the students fail to explain why *they* should be granted this authority. As the Superior Court correctly noted, the students did not move, pursuant to G.L. c. 215, §56A for an appointment to "'represent a child's basic welfare rights as a guardian ad litem.'" Id. at 40. Even if they had, as the trial court also found, the students' "unilateral assertion of the interests of every not-yet-born or young person on earth is a far cry from representing the interests of a single child

as guardian ad litem after convincing a court that such representation is necessary and that the proposed guardian is an appropriate person to provide it." Id. The Superior Court was correct to fear the consequences of "granting Plaintiffs a roving commission to litigate on behalf of Future Generations." Id.

Moreover, the students fail to explain why "Future Generations"—any more than the students themselves—should be permitted to ask the Court to instruct Harvard how to manage its endowments. The claim asserted on behalf of Future Generations seeks injunctive relief, not damages. It is, in effect, a transparent attempt to end-run the longstanding principle, described in detail above, granting the Attorney General the exclusive authority to challenge a charitable organization's management of its assets. See supra at I.A.

The students' failure to articulate a reason why they should be permitted to represent Future Generations, or why Future Generations should be permitted to control Harvard's investment decisions, provides a firm basis for this Court to affirm the Superior Court's decision to dismiss the claim based on "Intentional Investment in Abnormally Dangerous Activities."

B. The Court Should Not Recognize the New Tort the Students Propose.

The Court correctly dismissed Count II of the Complaint for a second, equally compelling reason: no court has ever recognized the tort of "Intentional Investment in Abnormally Dangerous Activities" and there is no basis for Massachusetts to do so.

"Courts are hesitant...to create a new cause of action, only doing so when there is no other way to vindicate such public policy."[5] Bergeson v. Franchi, 783 F. Supp. 713, 717 (D. Mass. 1992)(quoting, Melley v. Gillette Corp., 19 Mass. App. Ct. 511, 512 (1985), aff'd, 397 Mass. 1004 (1986))(internal quotations omitted); see also 74 Am. Jur. 2d Torts §4 (a "state court treads cautiously when deciding whether to recognize a new tort... While the law must adjust to meet society's changing needs, courts must balance that

[5] Here, there is no basis for the students to contend that requiring divestment in companies with fossil fuel is consistent with public policy. The Commonwealth of Massachusetts itself invests its pension funds in such companies and has resisted divestment efforts. *See, e.g.*, Pensions and Investments, "Massachusetts Bill would force MassPRIM to divest fossil fuel investments (Sept. 12, 2013), available at , http://www.pionline.com/article/20130912/ONLINE/130919932/massachusetts-bill-would-force-massprim-to-divest-fossil-fuel-investments. Even if Massachusetts itself decided to divest, it has never adopted a policy requiring charitable organizations to select or avoid particular investments.

adjustment against boundless claims in an already crowded judicial system").

In considering claims to recognize new torts, Massachusetts courts consider carefully the policy implications and practical consequences of recognizing tort liability where none existed before. In Remy v. MacDonald, 440 Mass. 675 (2004), for example, the Supreme Judicial Court rejected a request to recognize a new tort: a cause of action by a child "against her mother for personal injuries incurred before birth because of the mother's negligence." Id. The Court concluded, among other things, that recognizing the new tort would inject courts into areas where they lacked the expertise to make sound decisions. See also Payton v. Abbott Labs, 386 Mass. 540, 555 (1982)(rejecting request to extend tort liability to claims alleging negligent infliction of emotional distress where no physical harm is manifest; requiring proof of physical harm "will serve to limit frivolous suits and those in which only bad manners or mere hurt feelings are involved . . .").

Here, as the Superior Court found, the students' claim has no limiting principle. While the students assert that investments in fossil fuels promote abnor-

mally dangerous activities, and divestment thus is necessary to avoid harm, other students, faculty, staff or alumni could assert that engagement with fossil fuel companies is a better way to effect change and investment is not, therefore, abnormally dangerous. Other students, faculty, staff or alumni could claim that investments in companies that manufacture unhealthy food, or in countries whose policies particular plaintiffs may believe violate human rights, constitute abnormally dangerous activities. See Docket #SUCV2014-03620, Complaint, Ex. N (describing 2002 effort at Harvard to divest in Israel).[6]

In short, the students' novel tort claim arises from what they believe is the mismanagement of a charitable organization, and they invented it precisely to side-step existing Massachusetts law, which already addresses the governance of charities. In proposing a

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[6] In considering a proposed tort, Massachusetts courts also carefully canvas the law in other jurisdictions to see if any have provided persuasive reasons to recognize it. See, e.g. Remy, 440 Mass. at 679 (declining to recognize new tort); Payton, 386 Mass. at 546 (same); George v. Jordan Marsh Co., 359 Mass. 244, 251 (1971)(recognizing new tort of intentional infliction of emotional distress in part because "there have been many persuasive decisions thereon in other jurisdictions.") But no other jurisdiction has considered, much less recognized, the novel tort the students propose, adding credence to the Superior Court's decision to reject it here.

new tort, the students are attempting to avoid the application of established Massachusetts law, which holds uniformly that, absent narrowly defined special interests not present in this case, it is the sole province of the Attorney General to challenge a charitable organization's management. See supra at I.A.

Allowing a remedy against Harvard based solely on its status as an investor in fossil fuel companies also would run counter to black letter law insulating stockholders from liability for the actions of the companies in which they invest. See Scott v. NG US 1, Inc., 450 Mass. 760, 766 (2008) ("[I]t is hornbook law that the exercise of the control which stock ownership gives to the stockholders . . . will not create liability beyond the assets of the subsidiary.")(quoting U.S. v. Bestfoods 524 U.S. 51, 61-62 (1998); see also Hanson v. Bradley, 298 Mass. 371, 379-80 (1937) (holding that corporations are "an entity separate from the stockholders" so that stockholders may invest without risk to "their uninvested assets and their personal responsibility"). If the students have been harmed by fossil fuel companies' "abnormally dangerous activities," their claims properly should be asserted

against those companies directly, not against those who invest in them. Id.[7]

Moreover, the students' proposed tort theory lacks the conventional tort elements. First, the students cannot show that Harvard owes them or Future Generations a duty to invest, or not to invest, in particular industries. Massachusetts law has conferred the exclusive jurisdiction in such matters to the Attorney General. See supra at I.A. Without a duty, there can be no breach of a duty.[8]

Second, although they posit many theories of tort liability—intentional, negligent, or reckless—the students cannot show the essential element of causation and concede as much in their brief. While they allege that Harvard's investments are tortious because

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[7] The students attempt to distinguish consumers of fossil fuels from investors in companies that produce fossil fuels, arguing that it is the "production rather than consumption of fossil fuel products that is abnormally dangerous." Appellants' Br. 36, n. 7. But they fail to appreciate that investing in the fossil fuel industry is also a step removed from production.

[8] The students attempt to paper over this problem by asserting that Harvard, like "every person" has a "duty to exercise reasonable care to avoid physical harm to others," and that this general "duty of care" to Future Generations is sufficient to support their novel tort theory. Even if that were true, however, "that duty applies only where the risk of [physical] harm is foreseeable," as the students themselves recognize. Appellants' Br. 38.

of the "certainty and severity of the harms" they cause (Appellants' Br. 34), most of these alleged harms relate to climate change itself-the students are asking the Court to leap down the causal chain and attribute the harms of climate change directly to Harvard's investment.[9] Such a leap is entirely speculative and too attenuated to survive a motion to dismiss.

The students try to minimize their inability to allege harm arising directly from Harvard's investments in fossil fuels by arguing that these investments, when combined with the tortious actions of others, cause climate change to reach a "tipping point" and that "relaxed standards of causation" are called for in complex environmental cases. Appellants' Br. 41, 43. Both arguments must fail.

Not only is there no legal support for the students' "tipping point" theory, but it is also fatally flawed, as they recognize in a footnote: "virtually anyone whose contribution to global greenhouse gas

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[9] The students acknowledge that there are "several intermediate steps in the causal chain linking [Harvard's] conduct to Future Generations' injuries," Appellants' Br. 42, n. 13, thereby contradicting their own assertion that Harvard has knowledge of a "causal relationship" between investment and alleged climate change harms. Appellants' Br. 38.

emissions is non-negligible might be held liable." Appellants' Br. 43, n. 16. The students argue that this problem is solved by the other elements in their novel tort: investment in wrongful activity and knowledge of the harms caused by such investment. But once one assumes, as they do, that fossil fuel production is a "wrongful activity," then their new tort would encompass anyone who purchases a product that relies on fossil fuel. In other words, all purchasers of cars, conventional or electric, or heating and cooling systems, potentially would be liable-an absurd result.

The two Supreme Court cases cited by the students, Massachusetts v. EPA 549 U.S. 497 (2007) and American Electric Power Company v. Connecticut, 131 S.Ct. 2527 (2011), do not support their assertion that this Court should relax causation standards for their invented tort claim. Appellants' Br. 41, n. 12.

Massachusetts v. EPA concerned the EPA's failure to regulate emission of greenhouse gases. The Supreme Court granted standing to groups of states, local governments, and private organizations that sought to challenge the EPA's action, but only because it found that the EPA had a duty, created by Congress, to take

action, and that at least one petitioner, notably "a sovereign State and not… a private individual," actually was injured as a result of the EPA's inaction. See id. at 517, 521-24. In American Electric Power Company, the Court summarily affirmed the lower court's exercise of jurisdiction without analyzing causation and ultimately found the plaintiffs' claims were displaced by federal law and federal agency action. 131 S.Ct. 2527, 2535-37 (2011).

Tellingly, the students appear to concede that they cannot show causation, but attempt to goad the Court into overlooking this critical gap: "even if our allegations could not demonstrate causation… denying our claim on this basis would be a failure of judicial imagination." They then suggest, without citation, that "[t]here is nothing essential about causation in tort law." Appellants' Br. 44. To the contrary, all torts require that damages *arise from* the breach of a duty. See Ankiewicz v. Kinder, 408 Mass. 792, 795 (1990) ("All torts share the elements of duty, breach of that duty and damages arising from that breach."); Swift v. United States, 866 F.2d 507, 508 (1st Cir. 1989) (applying Massachusetts law) ("[T]he essential elements of a common law tort action: duty, breach,

causation (actual and proximate), and damages."). In sum, as the students cannot show a duty or a breach of that duty, much less causation, their proposed new tort is not legally cognizable.

CONCLUSION

For the reasons stated above, the judgment of the trial court should be affirmed.

Respectfully submitted,
President and Fellows of Harvard College and Harvard Management Company, Inc.

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Dated: November 4, 2015

CERTIFICATION UNDER MASS. R. APP. P. 16

I, Jennifer A. Kirby, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R.A.P. 16(a)(6); Mass. R.A.P. 16(b); Mass. R.A.P. 16(e); Mass. R.A.P. 16(f); Mass. R.A.P. 16(h); Mass. R.A.P. 18; and Mass. R.A.P. 20(a).

Jennifer A. Kirby, Esq.

ADDENDUM

Index

ALM GL ch. 12, § 8

Current through Act 118 excluding 107, 108, and 112 of the 2015 Legislative Session

Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT [Chapters 1 - 182] > TITLE II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH [Chapters 6 - 28A] > Chapter 12 Department of the Attorney General and the District Attorneys

§ 8. Attorney General to Enforce Due Application of Charity Funds.

The attorney general shall enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof.

History

1847, 263 ; 1849, 186, § 8 ; GS 1860, 14, § 20; PS 1882, 17, § 6; RL 1902, 7, § 6; GL 1932, 12, § 8; 1979, 716.

ALM GL ch. 180A, § 2

Current through Act 118 excluding 107, 108, and 112 of the 2015 Legislative Session

Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT [Chapters 1 - 182] > TITLE XXII CORPORATIONS [Chapters 155 - 182] > Chapter 180A Uniform Prudent Management of Institutional Funds

§ 2. Standard of Conduct in Managing and Investing Institutional Fund.

(a) Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(b) In addition to complying with the duty of loyalty imposed by law other than this chapter, each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care that an ordinarily prudent person in a like position would exercise under similar circumstances.

(c) In managing and investing an institutional fund, an institution:

(1) may incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution and the skills available to the institution;

(2) except as otherwise provided by a gift instrument, shall allocate those costs on a reasonable basis to each institutional fund prior to any appropriation; and

(3) shall make a reasonable effort to verify facts relevant to the management and investment of the fund.

(d) An institution may pool 2 or more institutional funds for purposes of management and investment.

(e)

(1) Except as otherwise provided by a gift instrument, the rules set forth in this subsection shall apply.

(2) In managing and investing an institutional fund, the following factors, if relevant, shall be considered:

(i) general economic conditions;

(ii) the possible effect of inflation or deflation;

(iii) the expected tax consequences, if any, of investment decisions or strategies;

(iv) the role that each investment or course of action plays within the overall investment portfolio of the fund;

(v) the expected total return from income and the appreciation of investments;

(vi) other resources of the institution;

(vii) the needs of the institution and the fund to make distributions and to preserve capital; and

(viii) an asset's special relationship or special value, if any, to the charitable purposes of the institution.

(3) Management and investment decisions about an individual asset shall not be made in isolation but shall be made in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fund and to the institution.

(4) Except as provided by any other general or special law, an institution may invest in any kind of property or type of investment consistent with this section.

(5) An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund will be better served without diversification.

(6) Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to rebalance a portfolio in order to bring the institutional fund

into compliance with the purposes, terms and distribution requirements of the institution as necessary to meet other circumstances of the institution and the requirements of this chapter.

(7) A person who has special skills or expertise or who is selected in reliance upon the person's representation that the person posesses special skills or expertise shall have a duty to use those skills or that expertise in managing and investing institutional funds.

History

HISTORY:

1975, 886 ; 2009, 29, § 1.