STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: July 31, 2013]

ROBERT VENTURINI	:	
	:	
v.	:	
	:	**C.A. No. PC 2004-6588**
PETER J. COSTELLO, individually and as agent of the City of Providence, and JAMES J. LOMBARDI, III, in his capacity as Treasurer of the CITY OF PROVIDENCE	:	

DECISION

TAFT-CARTER, J. Before the Court is a post-trial Motion to Amend the Judgment filed by Defendants Peter J. Costello (Costello), in his individual capacity and as an agent of the City of Providence, and James J. Lombardi, III, in his capacity as the Treasurer of the City of Providence (the City) (collectively, the Defendants). The ultimate issue that the Court must decide is whether the City can cloak Costello with sovereign immunity pursuant to a state law mandating indemnification. On March 29, 2013, a jury returned a verdict in favor of Plaintiff Robert Venturini (the Plaintiff), who had alleged that Costello was negligent while operating a car owned by the City of Providence, on December 11, 2001, causing him injury. On April 1, 2013, judgment entered in the Plaintiff's favor in the amount of $661,983.10. The Defendants seek to remove all damages in excess of $100,000 and to strike the award of prejudgment interest.

I

Facts and Travel

On December 11, 2001, Costello, a member of the Providence Police Department, was involved in a motor vehicle accident with the Plaintiff while operating a police vehicle in the course of his employment. The Plaintiff sued Costello both individually and in his capacity as an

agent of the City, claiming negligence. A four-day jury trial began on March 25, 2013. On March 29, 2013, the jury returned a verdict on behalf of the Plaintiff, finding that Costello had negligently collided with the rear end of his vehicle while he was stopped to make a left-hand turn. The jury's verdict awarded the Plaintiff $66,622.51 in damages for medical expenses and $225,000 in damages for pain and suffering, for a total of $291,622.51 in damages. On April 1, 2013, judgment entered in the Plaintiff's favor in the amount of $661,983.10. In addition to the jury's award for damages, the amount included prejudgment interest in the amount of $370,360.59, calculated at twelve percent (12%) per annum as set forth in G.L. 1956 § 9-21-10.

In their instant motion, the Defendants argue that Costello's "exposure to liability falls under the umbrella of the City's sovereign immunity." Therefore, the Defendants contend, the judgment must be amended to strike the award of prejudgment interest and remove all damages in excess of $100,000.

II

Standard of Review

Rule 59(e) of the Rhode Island Superior Court Rules of Civil Procedure states that "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Our Supreme Court has held that after a nonjury trial in a civil matter, a trial justice may only grant a Rule 59(e) motion to amend the judgment if he or she finds "'a manifest error of law in the judgment entered or if there was newly discovered evidence [. . .] unavailable at the original trial and sufficiently important to warrant a new trial.'" Bogosian v. Bederman, 823 A.2d 1117, 1119 (R.I. 2003) (quoting Am. Fed'n of Teachers Local 2012 v. Rhode Island Bd. of Regents for Educ., 477 A.2d 104, 105-06 (R.I. 1984)). Although the judgment entered in this case followed a trial by jury, the relevant facts are not in dispute, and the Defendants' instant

motion raises a pure question of law. A manifest error of law in a judgment is "one that is apparent, blatant, conspicuous, clearly evident, and easily discernible from a reading of the judgment document itself." Am. Fed'n of Teachers, 477 A.2d at 106. Accordingly, when a "judgment document entered after the trial [does] not contain a manifest error of law, the trial justice need not . . . consider[] the Rule 59(e) motion." Bogosian, 823 A.2d at 1119.

III

Analysis

A

The City's Immunity

The Defendants argue that the City is unquestionably immune from prejudgment interest and damages in excess of $100,000 pursuant to Rhode Island's statutory and common law. The Plaintiff argues that the City is not immune from prejudgment interest or damages in excess of $100,000 because, at the time of the accident, Costello was engaged in an activity that a private person or entity would be likely to carry out.

Under the doctrine of sovereign immunity, "'[a] sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.'" Pellegrino v. Rhode Island Ethics Comm'n, 788 A.2d 1119, 1123 (R.I. 2002) (quoting Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) (Holmes, J.)). Our Supreme Court has held that "[w]hen a statute purporting to waive any aspect of the state's sovereign immunity is examined, the language of the statute must be closely parsed and strictly construed." Reagan Const. Corp. v. Mayer, 712 A.2d 372, 373 (R.I. 1998). Rhode Island's Governmental Tort Liability Act, G.L. 1956 § 9-31-1, et seq., "waive[d] a major portion of the state's common-law sovereign immunity, subject to the express limitations contained in

the statute as well as implied limitations imposed by [the Supreme Court]." Laird v. Chrysler Corp., 460 A.2d 425, 427 (R.I. 1983). Section 9-31-3, therein, states:

> "In any tort action against any city or town or any fire district, any damages recovered therein shall not exceed the sum of one hundred thousand dollars ($100,000); provided however, that in all instances in which the city or town or fire district was engaged in a proprietary function in the commission of the tort, the limitation of damages set forth in this section shall not apply."

It is clear from the plain language of the statute as well as Supreme Court precedent that this statutory provision represents a "limited waiver" of sovereign immunity, under which Rhode Island cities and towns may be held liable for up to $100,000 in damages. See Pridemore v. Napolitano, 689 A.2d 1053, 1056 (R.I. 1997); Andrade v. State, 448 A.2d 1293, 1295 (R.I. 1982) (stressing that the limited waiver of immunity applies strictly to "any damages recovered" in actions against cities and towns) (hereinafter, Andrade I). A statute waiving sovereign immunity must be "strictly construed," and any right of recovery against a town or municipality "must be expressly mentioned." Matarese v. Dunham, 689 A.2d 1057, 1058 (R.I. 1997) (citing Andrade I and barring the addition of interest to the judgment against the city). Thus, states and municipalities are generally exempt from prejudgment interest. See id. "The exemption from prejudgment interest for municipalities derive[s] from the residual sovereign immunity that survived the limited waiver of such immunity established by the Governmental Tort Liability Act, G.L. 1956 §§ 9-31-2 and 9-31-3[.]" Pridemore, 689 A.2d 1053. Therefore, it is generally true that a city or municipality is immune from prejudgment interest and damages in excess of $100,000.

In this case, the Plaintiff contends that the City should not enjoy immunity from prejudgment interest or damages in excess of $100,000. The Plaintiff argues that Costello was engaged in an activity that "a private person or entity would be likely to carry out," and

therefore, that the City is not entitled to any immunity from liability for Costello's actions. The Defendants contend that the Plaintiff's position requires a mischaracterization of the law and of the nature of Costello's underlying activity at the time of the accident.

Section 9-31-3 states that "the limitation of damages . . . shall not apply" if the "city or town . . . was engaged in a proprietary function in the commission of the tort." In addition, our Supreme Court has stated that "[b]ecause it appears that the Legislature did not intend to limit recovery in cases where the state is performing a proprietary function," prejudgment interest may be awarded in cases where the government is performing a proprietary function. Lepore v. Rhode Island Pub. Transit Auth., 524 A.2d 574, 575 (R.I. 1987). Notwithstanding, the "distinction between proprietary and governmental functions no longer is either controlling or of significant assistance in determining the liability of a municipality" under the Governmental Tort Liability Act. O'Brien v. State, 555 A.2d 334, 338 (R.I. 1989). Instead, in determining the extent to which a municipality may be liable under § 9-31-3, the Court must make an analysis that is "functional rather than abstract." Id. Under such an inquiry, if an underlying activity is one "that a private person or corporation would be likely to carry out," liability may attach to a municipality. Id.

The Plaintiff argues that because operation of a motor vehicle is "an activity that is common to the majority of Americans," the City should not be entitled to any immunity for Costello's negligence in this case. The Plaintiff's argument relies principally on Catone v. Medberry, 555 A.2d 328, 334 (R.I. 1989), a case discussing the so-called "public duty doctrine,"[1] which found that a government employee operating a car within the scope of his or

[1] The "public duty doctrine" is an exception to the traditional application of governmental immunity under which "private plaintiffs must show that the governmental body or its agent breached a special duty of care owed to them in their individual capacities." Catone, 555 A.2d at

her duties was "an activity normally undertaken by private individuals in the course of their everyday lives." In spite of this finding, the contention that the City should not be entitled to any limitation on liability at all in this case is directly controverted by Catone itself. "When the government acts in the same manner as a private individual, the only difference between the State of Rhode Island and other tort defendants is the [monetary] limitation on liability contained in § 9-31-2." Id. (adding that the cap on damages "will ensure that the state is not crippled by excessive judgments"). The Catone Court therefore presumed that any cap on a municipality's liability for damages under the Governmental Tort Liability Act would apply, even when the government employee's underlying abstract activity is one that a private person would be likely to carry out. Id.

Moreover, Rhode Island Supreme Court precedent directly supports the proposition that the § 9-31-3 limitation on a municipality's potential for liability applies to motor vehicle accidents involving negligent government employees. For example, in Matarese, 689 A.2d at 1058, the Supreme Court expressly found that a city employee who was liable for a motor vehicle accident while driving a city-owned car on duty was not engaged in a "proprietary" activity for purposes of the Governmental Tort Liability Act. In contrast, the employee was engaged in a "governmental function" and, therefore, "the claim against the city was covered by the limitations contained in § 9-31-3." Id. Similarly, the Court found that the addition of prejudgment interest was barred from the judgment against the city. Id. Additionally, in Pridemore, 689 A.2d at 1056, the Supreme Court approved the trial court's exclusion of prejudgment interest against the City of Providence where the plaintiff was injured by a

330. In Catone, the Rhode Island Supreme Court abrogated this doctrine in the context of motor vehicle accidents involving negligent government employees, stating that "[t]here is no need to establish the existence of a special relationship in these circumstances simply because of the sovereign status of the state." Id. at 334.

Providence police officer who was driving a city-owned vehicle on his way to work; Andrade v. Perry, 863 A.2d 1272, 1275-76 (R.I. 2004) (hereinafter, Andrade II.). Here, Costello, as agent of the Providence Police Department, had permission to drive the City car to Pawtucket for the purpose of conducting background checks.

As a result, the Court finds that pursuant to Rhode Island's statutory and common law, the City is immune from prejudgment interest and damages in excess of $100,000 in this case. The fact that Costello was driving a motor vehicle in the ordinary course of his job duties does not mean that the Defendant was engaged in a "proprietary" activity so as to expose the City to unlimited liability for Costello's negligence pursuant to § 9-31-3. See Catone, 555 A.2d at 334; Matarese, 689 A.2d at 1058; Pridemore, 689 A.2d at 1056.

B

Costello's Immunity

Costello has been sued in his individual capacity. "Official capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" Kentucky v. Graham, 473 U.S. 159, 165 (1985) (quoting Monell v. New York City Dep't of Social Services, 436 U.S. 658, 690 n.55 (1978)). In contrast, "[p]ersonal capacity suits seek to impose individual liability upon a government official for actions he takes under color of state law." Id. The Defendants argue that because the City is statutorily required to indemnify Costello, Costello's liability falls under the protection of the City's limited waiver of sovereign immunity. As a result, the Defendants argue that Costello cannot be liable for prejudgment interest or damages greater than $100,000 and that the judgment must be amended. The Plaintiff argues that, regardless of the City's statutory duty to indemnify, neither the City's immunity

from prejudgment interest, nor the statutory cap on damages under § 9-31-3, applies to Costello in his individual capacity.

This issue requires the Court to examine the relation of § 9-31-3 and G.L. 1956 § 45-15-16, which requires a municipality to indemnify its public employees.[2] The Defendants' argument that § 45-15-16 brings Costello's liability under the umbrella of the City's sovereign immunity is premised in part on an amendment to § 45-15-16, and also in dicta from the Rhode Island Supreme Court in Andrade II. The relevant change in statutory language occurred on

[2] Section 45-15-16, in relevant part, provides as follows:

> "All town or city councils or any fire district shall, by ordinance or otherwise, indemnify any and all police officers, firefighters, elected or appointed fire district officials, public employees, fire district employees, officials, members of boards, agencies and commissions appointed by town councils or any fire district or by any other person exercising appointing authority delegated to them by the town council; whether or not the police officers, firefighters, elected or appointed fire district officials, employees, officials, or members are paid, from all loss, cost, expense, and damage, including legal fees and court costs, if any, arising out of any claim, action, compromise, settlement, or judgment by reason of any intentional tort or by reason of any alleged error or misstatement or action or omission, or neglect or violation of the rights of any person under any federal or state law, including misfeasance, malfeasance, or nonfeasance or any act, omission, or neglect contrary to any federal or state law which imposes personal liability on any police officers, firefighters, elected or appointed fire district official, employee, official, or member, if the elected or appointed fire district official, employee, official, or member, at the time of the intentional tort or act, omission or neglect, was acting within the scope of his or her official duties or employment. The municipality or any fire district may decline to indemnify any elected or appointed fire district official, employee, official, or member for any misstatement, error, act, omission, or neglect if it resulted from willful, wanton, or malicious conduct on the part of the police officers, firefighters, elected or appointed fire district official, employee, official, or member. The indemnity shall be provided by the city or town council or any fire district on a case by case basis or by ordinance of general application." (Emphasis added.)

November 13, 2009, when P.L. 2009, ch. 361, § 1, substituted the word "shall" for the word "may." Prior to the amendment, § 45-15-16 stated that "All town or city councils or any fire district may, by ordinance or otherwise, indemnify any and all police officers [. . .]." The Defendants argue that under the amendment to § 45-15-16, "[w]hat was previously an option to voluntarily indemnify employees became a compulsory indemnification duty[.]" In Andrade II, 863 A.2d at 1277, our Supreme Court found that, prior to the amendment to § 45-15-16, there was no "compulsory indemnification duty on the municipality sufficient to bring the tortfeasor's liability under the umbrella of either the Governmental Tort Liability Act or prejudgment interest immunity." As a result, the Defendants argue that § 45-15-16, as amended, does bring Costello's liability as an individual under the umbrella of the Governmental Tort Liability Act and prejudgment interest immunity. In contrast, the Plaintiff argues that the amendment to § 45-15-16 has not worked a change in the law so as to limit Costello's liability as an individual capacity defendant.

There is considerable precedent supporting the proposition that negligent government employees, acting in the scope of their employment, may be personally liable for damages. See Feeney v. Napolitano, 825 A.2d 1, 6 (R.I. 2003) ("[T]here is no limitation on damages in an individual capacity suit."); see also Pridemore, 689 A.2d at 1056; Anthony F. Cottone, Clarifying Individual Capacity Liability and Other Doctrinal Confusion Surrounding Government Tort Claims in Rhode Island: The Basic Questions Attorneys Should Ask, 54-Apr. R.I. Bar J. 5 (2006). In Pridemore, the Supreme Court cited one of its previously unpublished orders approvingly, noting that the trial justice in the unpublished case had "erred in applying the [§ 9-31-3] recovery limit to the liability of the individual police officer because the individual's liability for his own tortious action was not controlled by the limit of liability of the

municipality." Id. (holding that the same result must also obtain in the case at issue, which also concerned an on-duty police officer involved in a car accident). In addition, the Court held that "the exemption for prejudgment interest for municipalities . . . does not extend to government employees who are liable in tort." Id. Moreover, in Gelsomino v. Mendonca, 723 A.2d 300, 303 (R.I. 1999), the Supreme Court held that in a negligence action against an on-duty police officer involved in a motor vehicle accident, "any award granted against the police officer . . . must be enlarged by prejudgment interest since the police officer is not entitled to the residual effect of sovereign immunity recognized . . . in [Andrade I]."

The Defendants argue that Andrade II absolves Costello of the liabilities imposed in this case. However, the Andrade II court, relying on the above precedents, came to the determination that public employees do not "share immunity from prejudgment interest when found liable for tortious conduct in the performance of their duties." 863 A.2d at 1274-76. The Andrade II court revisited the issue of a public employee's entitlement to the municipality's immunity from prejudgment interest when found liable in tort in the performance of their duties. Id. at 1276-77 ("In summary, there is no public policy argument that would justify our abandonment of the principles set out in Pridemore and Gelsomino."). The defendant in Andrade II advanced a public policy argument. Id. He argued that the limitations of the Governmental Tort Liability Act in § 9-31-3 were implicated in personal capacity suits against government employees because the preamendment version of § 45-15-16 commonly caused municipalities to voluntarily indemnify public employees. Id. at 1276-77. In confronting this argument, the Supreme Court emphasized that under § 45-15-16, as it was written at the time, municipalities were not "mandated to pay judgments rendered against their employees," and that "the statute neither provide[d] an employee with the right to indemnification nor order[ed] indemnification to take

place." Id. The Court also stated that "[w]hen an individual is found to be negligent, his own liability does not disappear simply by virtue of his status as a state or municipal employee." Id. at 1276.

Section 45-15-16 as currently written does appear to "order indemnification to take place." It would be entirely speculative for this Court to conclude, based solely on the Defendants' interpretation of the policy argument presented in Andrade II, that the change of a single word in § 45-15-16 completely overhauls clear Supreme Court precedent and thereby entitles Costello to benefit from the relative immunities enjoyed by municipalities pursuant to § 9-31-3. The § 9-31-3 cap on a municipality's liability does not apply to individual tortfeasors; nor does it apply "when the state voluntarily indemnifies its employees." Id. at 1277. Notwithstanding the Defendants' argument that § 45-15-16 worked a key change by transforming a municipality's "voluntary" choice to indemnify into a "mandatory" obligation, other courts have found that a state statute mandating indemnification under strongly similar circumstances nevertheless constitutes a "voluntary" choice on behalf of the state. See Duckworth v. Franzen, 780 F.2d 645, 650-51 (7th Cir. 1985) (Posner, J.) (finding that a state law mandating indemnification of state employees sued in their individual capacities will not convert an individual capacity suit into a suit against the state) (abrogated on other grounds as noted in Haley v. Gross, 86 F.3d 630 (7th Cir. 2006)).[3] If § 45-15-16 represents a voluntary choice by the Legislature to make indemnification of municipal employees mandatory, then the statute provides no justification for breaking with Rhode Island Supreme Court precedent and holding that a municipal employee may be protected in his or her individual capacity by a city's

[3] The Seventh Circuit reasoned that "it would be absurd if all a state had to do to put its employees beyond the reach of section 1983 and thereby make the statute ineffectual . . . was to promise to indemnify state employees for any damages awarded in such a suit." Duckworth, 780 F.2d at 651.

immunity from prejudgment interest or its $100,000 limitation on liability for damages, pursuant to § 9-31-3. In addition, the statute as written supports the voluntary aspect because it states that "[t]he indemnity shall be provided by the city or town council . . . on a case by case basis." Sec. 45-15-16. This language suggests there may be discretion.

Moreover, this Court's reasoning is consistent with the overwhelming majority of federal precedent on the analogous issue of a state's immunity from suit in federal courts under the Eleventh Amendment. Enunciating a standard for sovereign immunity applicable to states called into federal court, the United States Supreme Court has stated: "It is well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment . . . . When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individuals are nominal defendants." Edelman v. Jordan, 415 U.S. 651, 663 (1974). The Court continued: "Thus, the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." Id. Arguably, a state is the "real, substantial party in interest" when a statute requires the state to indemnify state employees for personal liability that arises during the performance of their duties. Nevertheless, the Supreme Court later noted that it had "not decided which arrangements between a State and a nominal defendant are sufficient to establish that the State is the real party in interest for Eleventh Amendment purposes." Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 317 n.10 (1990). Moreover, "[i]t may be that a simple indemnification clause, without more, does not trigger the doctrine [of sovereign immunity]." Id. The Court reasoned that "[l]ower courts have uniformly held that States may not cloak their officers with a personal Eleventh Amendment defense, by promising, by statute,

to indemnify them for damages awards imposed on them for actions taken in the course of their employment." Id. (citing Blaylock v. Schwinden, 862 F.2d 1352, 1354 n.1 (9th Cir. 1988); Duckworth, 780 F.2d at 650-51; and Wilson v. Beebe, 770 F.2d 578, 588 (6th Cir. 1985)).

Similarly, this Court finds that Costello is not entitled to benefit from the relative immunities enjoyed by municipalities pursuant to § 9-31-3 solely because § 45-15-16 appears to require indemnification by the City. For the foregoing reasons, insofar as the judgment in this case applies to Costello in his individual capacity, it was not "manifest error of law" to award prejudgment interest and damages in excess of $100,000. See Am. Fed'n of Teachers, 477 A.2d at 106. It is undisputed that Costello was sued in his individual capacity. Rhode Island Supreme Court precedent does not permit extension of the City's sovereign immunity, in terms of damages or awards of prejudgment interest, to Costello in that capacity. See Andrade II, 863 A.2d at 1277; Feeney v. Napolitano, 825 A.2d at 6; Gelsomino, 723 A.2d at 303; Pridemore, 689 A.2d at 1056.

C

Other Arguments

The Plaintiff raised other arguments in support of his objection to the Defendants' Motion to Amend the Judgment. The Plaintiff claimed that the City had voluntarily chosen to indemnify Costello at the outset of this litigation pursuant to a collective bargaining agreement. The Plaintiff has also contended that § 45-15-16, as amended in 2009, should not be applied "retroactively" in this case. The Plaintiff claims that "indemnification" within the meaning of § 45-15-16 occurred "[w]hen this lawsuit was commenced," whereas the Defendants contend that indemnification occurs "at the time judgment enters."

Because there was no manifest error in the judgment, the Court need not address these issues. Whether or not the City voluntarily chose to indemnify Costello pursuant to a collective bargaining agreement goes beyond the scope of Defendants' Motion to Amend the Judgment and it is not appropriate to consider that argument in the present context. See Pierce v. Shapiro, KC-1990-0355, 1990 WL 10000380, at *1 (R.I. Super. Ct. May 18, 1990) (declining to discuss arguments outside the scope of a motion). In addition, the "retroactivity" issue does not affect the outcome of this case because the Court has found that the amendment to § 45-15-16 does not alter Costello's liability in his personal capacity. Therefore, the Court need not determine when "indemnification" occurs within the meaning of § 45-15-16.

IV

Conclusion

The Defendants' Motion to Amend the Judgment is denied. Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Robert Venturini v. Peter J. Costello, et al.
CASE NO:	PC 04-6588
COURT:	Providence County Superior Court
DATE DECISION FILED:	July 31, 2013
JUSTICE/MAGISTRATE:	Taft-Carter, J.
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