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1995 Supreme Court of Rhode Island Survey: Torts

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Torts. *Boston Inv. Property #1 State v. E.W. Burman, Inc.*, 658 A.2d 515 (R.I. 1995). In the absence of privity of contract, a subsequent purchaser of commercial property is not entitled to recover economic damages as a result of the alleged negligence of a third-party general contractor.

Where there is privity of contract, a purchaser of real estate may maintain a cause of action against a negligent general contractor for breach of contract as well as breach of express and implied warranties of reasonable workmanship and habitability.[1] However, in *Boston Inv. Property #1 State v. E.W. Burman, Inc.*,[2] the Rhode Island Supreme Court held that a general contractor can not be held liable for his alleged negligent construction of a commercial property which caused economic damages to a subsequent purchaser, in the absence of foreseeable harm to such purchaser.

FACTS AND TRAVEL

In November of 1985, plaintiff Boston Investment Property #1 State (Boston Investment) purchased a newly constructed six-story commercial office building from Capital Hill Development (Capital), not subject to any express warranties concerning the condition of the property.[3] Shortly after the transaction, Boston Investment alleged that the windows leaked when it rained and that erosion problems were present in the parking lot.[4] Boston Investment filed suit against Capital in the United States District Court for the District of Rhode Island alleging breach of contract, as well as breach of express and implied warranties.[5]

Subsequently, Capital Hill filed a third-party complaint against the general contractor for the building, E.W. Burman, Inc. (Burman), alleging negligence in construction.[6] Boston Investment then moved to amend its complaint in order to add a claim of

1. *See generally* Boghossian v. Ferland Corp., 600 A.2d 288 (R.I. 1991); Lee v. Morin, 469 A.2d 358 (R.I. 1983); Padula v. J.J. Deb-Cin Homes, Inc., 111 R.I. 29, 298 A.2d 529 (R.I. 1973).
2. 658 A.2d 515 (R.I. 1995).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 516.

negligence directly against Burman.[7] After the district court granted Boston Investment's motion to amend, Burman objected and moved to certify the question presented in this matter to the Rhode Island Supreme Court.[8] The certified question was whether a subsequent purchaser of commercial property in Rhode Island is entitled to recover economic damages alleged to have been proximately caused by the negligence of the general contractor, in the absence of privity of contract with that general contractor.[9]

BACKGROUND

Previously, in *Forte Bros., Inc. v. Nat'l Amusements, Inc.*, the Rhode Island Supreme Court addressed the issue of whether a third-party plaintiff, who may foreseeably be injured or may suffer an economic loss proximately caused by the negligent performance of a contractual duty, has a cause of action in negligence in the absence of privity.[10] The court held that a general contractor could maintain a negligence claim for purely economic loss against an architect, even in the absence of privity of contract.[11] The court in *Forte* determined that the absence of privity can be overcome when there has been "direct and reasonable reliance by the contractor on the contractual performance" of an architect who knows, or should know, of that reliance.[12]

ANALYSIS AND HOLDING

Notwithstanding *Forte.*, the Rhode Island Supreme Court answered the certified question in the present case in the negative. The court held that in the absence of privity of contract with the general contractor, a subsequent purchaser of commercial property in Rhode Island is not entitled to recover economic damages allegedly caused by the negligence of the general contractor.[13] This is true even though the purchaser was the first purchaser of the property from the developer, and took title less than one year after

7. *Id.*
8. *Id.*
9. *Id.* at 515.
10. 525 A.2d 1301 (R.I. 1987).
11. *Id.* at 1303.
12. *Id.*(citations omitted).
13. *Boston Investment*, 658 A.2d at 518.

completion of the building.[14] The court reasoned that Boston Investment, as a future buyer, was neither known to nor identifiable to defendant contractor. Their individual relationships with the original owner were wholly independent of each other. There was no foreseeable harm to a subsequent owner based on alleged negligence on the part of the builder, particularly because the original owner might well have corrected any problems or absorbed any losses long before any sale.[15]

The court distinguished *Forte* from the instant case, in that in *Forte* "the plaintiff contractor and the defendant architect were collaborators on the same project, with each dependent on the other to complete the project."[16] This was deemed distinguishable from the situation in *Boston Investment* where each party had an independent contract and was not a collaborator with the owners of the property.[17]

CONCLUSION

A subsequent purchaser of commercial property in Rhode Island cannot maintain a claim of negligence seeking economic damages against the general contractor for the property, in the absence of privity of contract. However, given that the parties to the transaction were sophisticated commercial entities able to protect themselves from economic loss, the court's holding suggests that the applicability of the decision may be limited to commercial entities engaged in a real estate transaction.[18]

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14. *Id.* at 516.

15. *Id.* at 517.

16. *Id.* at 516.

17. *Id.* at 516-17.

18. *Id.* at 517-18 (citing Hydro-Mfg., Inc. v. Kayser-Roth Corp., 640 A.2d 950 (R.I. 1994) (discussing the risk allocation framework for commercial real estate, and stating that a sophisticated buyer has the option to inspect the property and to inquire into possible defects prior to purchase)).

Torts. *Ferreira v. Strack*, 652 A.2d 965 (R.I. 1995). A social-host is not under a duty of care to protect third parties from an intoxicated driver leaving a party, where the driver had neither been invited to attend the party nor was he offered or served alcohol.

The Supreme Court of Rhode Island confronted the question of whether a social-host had a duty of care to pedestrians who were injured when struck by a drunk driver. Because the driver had neither been invited to the party nor acquainted with the host, the court refused to create such a duty.

FACTS AND TRAVEL

Upon crossing a street in a crosswalk, two victims were struck by a vehicle driven by William Strack (Strack) who was indisputably intoxicated.[1] Throughout the night of the incident Strack had consumed significant amounts of alcohol at various locations before attending a party being held at the defendants' home.[2] Upon arrival at the defendants' home without any written or oral invitation, Strack continued to consume alcohol which he had brought with him to the party.[3] At no time during the party, or on any previous occasion, did the defendants have any contact with Strack.[4] Strack left the party briefly, only to return for a second time.[5] On this occasion, although not offered anything to drink, Strack helped himself to a beer from the refrigerator.[6] After leaving the defendants' house for the second time, Strack traveled to another drinking establishment where he continued to consume alcohol.[7] Following his departure from that establishment, Strack struck two pedestrians.[8]

The pedestrian victims (Plaintiffs) brought an action in superior court alleging that the defendant social-hosts were negligent in breaching a duty of care to the general public by not preventing Strack, their guest, from driving.[9] The defendants filed a motion

1. Ferreira v. Strack, 652 A.2d 965, 966 (R.I. 1995).
2. *Id.* at 966-67.
3. *Id.* at 966.
4. *Id.*
5. *Id.* at 967.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

for summary judgment, which was granted by the trial court.[10] Plaintiffs appealed the granting of this motion.[11] The issue on appeal was one of first impression in Rhode Island: "whether there exists a duty of care owed by a defendant social-host to an innocent third party who suffers injuries as a result of the negligent operation of a motor vehicle by an adult guest if the negligence is caused by the guest's intoxication."[12]

BACKGROUND

Rhode Island law holds that "negligence is the breach of a duty, the existence of which is a question of law."[13] The issue of "[w]hether there exists a duty of care running from the defendant to the plaintiff is, therefore, a question for the court and not for the jury."[14] Furthermore, in *Banks v. Bowen's Landing Corp.*, the court stated that where no duty exists the trier of fact is presented with nothing to consider and a motion for summary judgment must be granted.[15]

The Supreme Court of Rhode Island has "never adopted the principle that a social-host owes a duty to a third person injured by an intoxicated person who has obtained intoxicating liquor" at the social-host's home.[16] Rather, the court has indicated on several occasions that the creation of new causes of action, such as the one claimed by the plaintiffs, must be left to the state legislature.[17]

In determining whether a social-host should be held liable to a third party, the majority of jurisdictions have adhered to the common-law rule of social-host immunity.[18] In order to justify the adherence to this rule, these courts employ one of three different rationales: traditional principles of common law, issues of social policy, and deference to the legislature.[19] Of the majority jurisdic-

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10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* (quoting Barratt v. Burlingham, 492 A.2d 1219, 1222 (R.I. 1985)).
14. *Id.* (quoting Banks v. Bowen's Landing Corp., 522 A.2d 1222, 1224 (R.I. 1987)).
15. *Id.*
16. *Id.* at 968.
17. *Id. See also* Kalian v. People Acting through Community Effort, Inc., 408 A.2d 608, 609 (R.I. 1979); Castellucci v. Castellucci, 188 A.2d 467, 469 (R.I. 1963); Levasseur v. Knights of Columbus, 188 A.2d 469, 471 (R.I. 1963).
18. *Ferreira,* 652 A.2d at 968. *See* cases cited *infra* note 20.
19. *Id.*

tions, several indicate a reluctance to impose social-host liability based on negligence principles alone.[20] In only two jurisdictions, New Jersey and Massachusetts, have the courts imposed liability upon a social-host for negligent service of alcohol to a guest.[21]

COURT'S ANALYSIS AND HOLDING

The Rhode Island Supreme Court affirmed the trial court's granting of the defendants' summary judgment motion and held that the trial justice correctly determined that no genuine issue of material fact existed.[22] The facts of the case at bar were not sufficiently adequate to form a basis for the imposition of a duty of care on the defendants.[23] The defendants neither met, invited, personally knew, nor were aware of the intoxicated individual's presence

20. *Id.* (citing Faulk v. Suzuki Motor Co., Ltd., 851 P.2d 332 (Haw. Ct. App. 1993) (finding that a social-host had no tort-law duty to protect third persons from intoxicated guests who attended the host's party and drove in a negligent manner, causing injury); Ribbens v. Jawahir, 438 N.W.2d 252 (Mich. Ct. App. 1988) (ruling that social-host liability does not extend to social host who served alcohol to an adult who subsequently injured a third person as a result of his intoxication); Sites v. Cloonan, 477 A.2d 547 (Pa. Super. Ct. 1984) (finding that a noncommercial organization cannot be held liable for injuries arising from its service of alcohol at a social event); Garren v. Cummings & McCrady, Inc., 345 S.E.2d 508 (S.C. Ct. App. 1986) (finding that no duty under common law or statute will be imposed upon a social host; any action taken should be the result of legislative initiative, not judicial interpretation); Graff v. Beard, 858 S.W.2d 918 (Tex. 1993) (declining to find common-law social-host liability and refusing to judicially create a cause of action that the legislature had specifically rejected), *rev'g*, Beard v. Graff, 801 S.W.2d 158 (Tex. Ct. App. 1990); Hansen v. Friend, 797 P.2d 521 (Wash. Ct. App. 1990) (emphasizing deference to the legislature); Overbaugh v. McCutcheon, 396 S.E.2d 153 (W. Va. 1990) (refusing in the absence of legislation, to impose social-host liability against an employer who served liquor at a Christmas party; in making the decision, the court took notice of the fact that most jurisdictions do not impose such common-law liability absent statutory law); Langle v. Kurkul, 510 A.2d 1301 (Vt. 1986) (holding that a social host owes no duty to an intoxicated adult guest)).

21. *Ferreira*, 652 A.2d at 968-69 (citing Kelly v. Gwinnell, 476 A.2d 1219, 1228 (N.J. 1984) (imposing liability on a social-host who serves alcoholic beverages to an adult guest but limited the liability to situations where the host "directly serves the guest and continues to do so even after the guest is visibly intoxicated."); McGuiggan v. New England Telephone & Telegraph Co., 496 N.E.2d 141, 146 (Mass. 1986) (limiting the imposition of liability to situations where the host had knowledge that the guest was drunk and permitted the guest to continue drinking). In deciding whether a host exercised ordinary prudence a relevant consideration is whether the host "knew or reasonably should have known that the intoxicated guest might presently operate a motor vehicle." *Id.* *See also* Ulwick v. DeChristopher, 582 N.E.2d 954 (Mass. 1991).

22. *Ferreira*, 652 A.2d at 969.

23. *Id.*

at their house. In addition, Strack not only brought his own alcohol on his first visit, but during the course of his two visits he was never served nor offered alcohol by anyone, including the defendants.[24] Moreover, the court considered it debatable as to whether Strack could even be considered a guest.[25] The court explained that because the facts were undisputed that Strack had not received an invitation, implied or express, the legal status of Strack was deemed "more akin to that of a trespasser."[26] In such instances, the court explained that it would defer to the legislature to set out any possible duties or responsibilities on social-hosts where "[t]he imposition of liability upon social hosts for the torts of guests has such serious implications. . . ."[27]

CONCLUSION

A social-host is not under a duty of care to protect third parties from a drunken driver where the driver had neither been invited to attend the party, nor was offered or served alcohol. Presently, only Massachusetts and New Jersey courts have held that such a duty of care may exist under certain circumstances.[28] In this case of first impression, however, the Rhode Island Supreme Court joined the majority of states by holding that it is the province of the legislature, and not the court, to create such a duty.

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24. *Id.* at 970.
25. *Id.* at 969.
26. *Id.*
27. *Id.* at 968.
28. *See supra* note 21.

Torts. *Jolicoeur Furniture Co., Inc. v. Baldelli*, 653 A.2d 740 (R.I. 1995). The mayor and planning director for a city are considered third parties in relation to a contract between the city and a purchaser of land, and may be held liable for tortious interference with that contract.

Where a claim of tortious interference with a contract is brought against an agent or employee of one of the parties to the contract, the question arises whether the agent or employee can be considered an entity separate and distinct from the contracting party and subject to liability for interference, or whether he is part of the contracting party. In *Jolicoeur Furniture Co., Inc. v. Baldelli*,[1] the Rhode Island Supreme Court held that both the mayor and planning director for the City of Woonsocket were parties separate from the city itself, therefore subject to liability for tortiously interfering with a contract between the city and a purchaser of land.[2] However, because there was no violation of the buyer's constitutional rights under 42 U.S.C. section 1983, awards of punitive damages and attorneys' fees could not be sustained.[3]

FACTS AND TRAVEL

The owners of Jolicoeur Furniture (Jolicoeur) learned that the State of Rhode Island intended to acquire the site of their present store in order to accommodate construction of the Bernon Street Bridge in Woonsocket, Rhode Island.[4] Jolicoeur thereafter contacted the Woonsocket Department of Planning and Development ("Department of Planning" or "Department") for help in finding a suitable site to relocate their business.[5] The Department of Planning recommended three contiguous lots, of which the city owned two, and recommended to the City Council that they sell the two lots to Jolicoeur subject to the Department's approval of certain aesthetic features of the building.[6]

1. 653 A.2d 740 (R.I. 1995), *cert. denied*, 116 S.Ct. 417 (1995).
2. *Id.* at 752-53.
3. *Id.* at 755.
4. *Id.* at 743.
5. *Id.*
6. *Id.*

Pursuant to Woonsocket City Council ordinance, the lots were auctioned, with Jolicoeur tendering the highest bid.[7] The bid was accepted by the city treasurer subject to approval of the plans by the Department of Planning.[8] The city council thereafter passed an ordinance authorizing the city treasurer to sell Jolicoeur the land, subject to receipt of the purchase price as well as the approval of the Department.[9] The ordinance did not specify any requirements for the Department's approval, nor did it set any deadlines for approval.[10]

Approximately one month later, the Rhode Island Department of Environmental Management (DEM) informed the mayor of Woonsocket that the subject land was subject to a State of Rhode Island Heritage Bond Grant.[11] The DEM further informed the Department of Planning that if the sale of land to Jolicoeur occurred, the grant would be withdrawn and Woonsocket would lose funding for other projects as well.[12] In light of this development, the Department recommended that the city withdraw from its transaction with Jolicoeur, and the mayor similarly recommended that the city return Jolicoeur's deposit.[13]

On June 1, 1987, the city council passed an amendment to the ordinance which required Jolicoeur to submit acceptable building designs to the Department of Planning within 60 days.[14] Although having met on several occasions with members of the Department, Jolicoeur's designs were not found to be acceptable by the deadline.[15] Although the mayor took the position that Jolicoeur's right to buy the land had expired, the city council again amended the ordinance to extend the deadline for submission of acceptable plans.[16] This ordinance was vetoed by the mayor, who explained that he felt that the city was no longer under an obligation to deal with Jolicoeur.[17]

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7. *Id.* at 743-44.
8. *Id.* at 744.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 744-45.
13. *Id.* at 745.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 746.

Jolicoeur filed suit against the City of Woonsocket, the planning director of the Department of Planning and the mayor.[18] Jolicoeur alleged that the city had breached its contract, that the director of planning and the mayor had tortiously interfered with Jolicoeur's contract with the city and that all defendants had violated Jolicoeur's constitutional rights as well as 42 U.S.C. section 1983.[19] The superior court held that the city had breached its contract with Jolicoeur, and ordered specific performance.[20] A jury determined that both the mayor and the director of planning had tortiously interfered with the contract between Jolicoeur and the city, and also that all defendants had " 'violated plaintiff's rights under the Federal Civil Rights Act; or [had violated] . . . plaintiffs' constitutional rights.' "[21] Based on the constitutional violations, Jolicoeur was awarded punitive damages as well as attorneys' fees.[22]

The defendants appealed to the Rhode Island Supreme Court claiming, first, that the mayor and planning director of a city cannot be held liable for tortious interference with a contract in which the city is a party, because as city officials they are considered part of the city.[23] Further, the defendants asserted that there was no violation of Jolicoeur's constitutional rights.[24]

BACKGROUND

A claim of tortious interference with a contractual relationship consists of the following four elements: 1) the existence of a contract; 2) the alleged wrongdoer's knowledge of the contract; 3) his intentional interference with that contract; and 4) damages resulting therefrom.[25] While the Rhode Island Supreme Court had not previously considered whether city officials could be held liable for interfering with city contracts, the court was faced with a roughly

18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 746-47 (quoting special interrogatory from the jury).
22. *Id.* at 747.
23. *Id.*
24. *Id.*
25. Smith Dev. Corp. v. Bilow Enter., Inc., 112 R.I. 203, 211, 308 A.2d 477, 482 (1973); DiBiasio v. Brown & Sharpe Mfg. Co., 525 A.2d 489, 493 (R.I. 1987).

analogous situation in the case of *Roy v. Woonsocket Instit. for Sav.*[26]

In *Roy*, a dismissed employee brought a claim of tortious interference with a contractual relationship against his former supervisor. The court held that the claim could not stand because of a lack of "legal malice"on the part of the supervisor in firing the employee.[27] Legal malice does not spring from "spite or ill will," but is "an intent to do harm without justification."[28] Since the employee in *Roy* had not shown that his termination was the result of his supervisor's unjustified intention to cause harm, the claim for intentional interference failed.[29]

ANALYSIS AND HOLDING

The court first determined that the four elements of intentional interference with contractual relationship were present. The contract between Jolicoeur and the city was valid and binding.[30] Evidence at trial established that both the mayor and the planning director were aware of the contract.[31] Intentional interference of the contract was shown by the mayor's veto of the city council's ordinance to extend Jolicoeur's deadline for submitting plans, and by the planning director's refusal to consider such plans.[32] Finally, the court accepted the jury's determination that Jolicoeur suffered damages in amount of $340,000, plus interest.[33]

The court next determined that the defendants had shown the requisite "legal malice" in their interference with the contract.[34] "Although the defendants here may have had good motives be-

26. *Jolicoeur*, 653 A.2d at 753 (discussing Roy v. Woosocket Inst. for Sav., 525 A.2d 915, 916-17 (R.I. 1987)).

27. *Roy*, 525 A.2d at 919.

28. *Id.* (quoting Mesolella v. City of Providence, 508 A.2d 661, 669-70 (R.I. 1986). *See also* Childress v. Abeles, 84 S.E.2d 176, 182 (N.C. 1954) ("Indeed, actual malice and freedom from liability for this tort may coexist. If the outsider has a sufficient lawful reason for inducing the breach of contract, he is exempt from liability for so doing, no matter how malicious in actuality his conduct may be.").

29. *Roy*, 525 A.2d at 919. *See also* Varner v. Bryan, 440 S.E.2d 295, 298-99 (N.C. App. 1994) (dismissed Town Manager's claim of intentional interference with contractual relations against members of City Council fails because of failure to prove that dismissal was result of legal malice).

30. *Jolicoeur*, 653 A.2d at 752.

31. *Id.*

32. *Id.*

33. *Id.* at 747.

34. *Id.*

cause of the potential loss of state funds to the city, they were not legally justified in their attempt to obstruct the successful completion of the contract between the city and [Jolicoeur]."[35] "Because their actions were not justified and constituted legal malice toward plaintiffs, their conditional privilege to act as agents of the city was destroyed."[36] Consequently, the court held that the trial justice had properly denied the defendant's motion for a directed verdict on the intentional interference claim.[37]

Regarding Jolicoeur's claims of violations of the United States Constitution and 42 U.S.C. section 1983, the court held that the defendants' actions did not rise to a level of constitutional deprivation.[38] In the court's opinion, there was no need to go into a lengthy analysis of Section 1983 because plaintiff had not been "deprived of a right 'secured by the Constitution and laws' of the United States."[39] "The plaintiffs have alleged that defendants had taken their property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution."[40] However, the court held that because "defendants are liable to plaintiffs under state common law, the procedural requirements of the Due Process Clause are [ ] satisfied."[41] Moreover, the plaintiff was not denied his substantive Due Process rights. Substantive Due Process is violated by state actions which are " 'arbitrary and capricious' or that run counter to 'ordered liberty' or that are 'shocking or violative of universal standards of decency' or even 'too close to the rack and the screw'."[42] In the present case, defendants' behavior did not rise to such levels.[43] Since there were no Constitutional violations, there could be no violation of 42 U.S.C. section 1983. For that reason, the court held that the award of punitive damages and attorneys fees could not stand.[44]

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35. *Id.*
36. *Id.* (citing Lorenz v. Dreske, 214 N.W.2d 753, 760 (Wis. 1974)).
37. *Id.*
38. *Id.* at 749-50.
39. *Id.* (citing Martinez v. California, 444 U.S. 277 284, *reh'g denied*, 445 U.S. 920 (1980); Baker v. McCollan, 443 U.S. 137, 140 (1979)).
40. *Id.* at 750.
41. *Id.* at n.1.
42. *Id.* at 751 (quoting Amsden v. Moran, 904 F.2d 748, 753-54 (1st Cir. 1990)).
43. *Id.*
44. *Id.*

CONCLUSION

City officials may be held liable for intentional interference with a contractual relationship between a third party and the city, provided that the city official has acted with legal malice. However, in the instant case, such interference did not amount to a denial of a third party's right to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution.

Alan H. Wasserman

Torts. *Mallette v. Children's Friend and Service*, 661 A.2d 67 (R.I. 1995).[1] The common law tort of negligent misrepresentation is extended into the context of adoption.

Rhode Island does not have a statute that requires adoption agencies to disclose relevant information to potential adopting parents. However, this does not preclude the finding of a duty on the part of the agency to give background information regarding the child to be adopted in a non-negligent manner once the agency has volunteered some information. In *Mallette v. Children's Friend and Service*, the Rhode Island Supreme Court declined to create the tort of wrongful adoption, and instead elected to extend the tort of negligent misrepresentation to the adoption context.[2]

FACTS AND TRAVEL

In 1981, the plaintiffs Thomas Mallette, Jr. and Deborah Mallette (Mallettes) sought to adopt a child through the defendant agency, Children's Friend and Service (CFS).[3] CFS contacted the Mallettes with information concerning the child, Christopher, age one.[4] Prior to the adoption, the Mallettes were told by CFS that Christopher's biological mother had been diagnosed with learning disabilities which were the result of a childhood head trauma.[5] Christopher was adopted by the Mallettes later that year.[6] In actuality, Christopher's biological mother had been diagnosed with macrocephaly,[7] pseudoepicanthal folds,[8] a high arched palate,[9] tachycardia,[10] small clinodactyly of the fifth fingers,[11] tremors of

1. The Rhode Island Supreme Court issued an opinion on a collateral issue to this case in Mallette v. Children's Friend and Serv., 661 A.2d 74 (R.I. 1995). In that case, the court held that Rhode Island General Laws § 42-72-8 does not contain a testimonial privilege which would prohibit the Department of Children, Youth and Families (DCYF) from responding to a *subpoena duces tecum* seeking the health and family history of the adopted child. *Id.*

2. 661 A.2d 67 (R.I. 1995).

3. *Id.* at 68.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* (A congenital or acquired condition in which the head is abnormally enlarged).

8. *Id.* (Abnormalities of, and around, the eyes).

9. *Id.* (Deformities of the bones and structure of the mouth).

10. *Id.* (Abnormal, rapid heart rhythm).

11. *Id.* (Permanent deflection, or moving to one side, of the little fingers).

the hands, and poor coordination.[12] Currently, Christopher is mentally retarded and severely behaviorally disturbed.[13]

In 1991, the Mallettes instituted suit against CFS claiming great mental anguish and emotional distress as the result of the negligent misrepresentations of CFS.[14] The Mallettes contended that CFS negligently omitted material information concerning Christopher's medical and family history.[15] Specifically, it was alleged that Christopher's biological mother's medical problems were known by CFS prior to the adoption.[16] The Mallettes further claimed that they had incurred enormous expenses for Christopher's medical treatment and psychiatric care.[17] CFS filed a motion to dismiss, which was denied by the trial court.[18] CFS then petitioned the Rhode Island Supreme Court for a writ of *certiorari*.[19]

BACKGROUND

American courts began only recently to recognize causes of action for "wrongful adoption."[20] However, there is still considerable confusion in the area because the term "wrongful adoption" has been used to describe several distinct common law actions.[21] Confusion has become so prevalent that many jurisdictions have discarded the idea of a "wrongful adoption" tort in favor of extending

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12. *Id.*

13. *Id.*

14. *Id.* Prior to this decision, the Mallettes filed a second claim on March 17, 1994 for intentional misrepresentation. Because this claim was filed after the petition for certiorari, both parties agreed that it was not before the Supreme Court at this time.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 69 (citing Burr v. Board of County Comm'rs of Stark County, 491 N.E.2d 1101 (Ohio 1986) (recognizing a claim for intentional misrepresentation in the adoption context)).

21. These include negligent misrepresentation, intentional misrepresentation, fraud and intentional infliction of emotional distress. *See, e.g.*, Juman v. Louise Wise Servs., 620 N.Y.S.2d 371 (1995). *See generally*, Note, *When Love Is Not Enough: Toward a Unified Wrongful Adoption Tort,* 105 Harv. L. Rev. 1761, (1992).

the application of negligent misrepresentation to the adoption context.[22] For Rhode Island, this was a case of first impression.

ANALYSIS AND HOLDING

The Rhode Island Supreme Court reviewed the Mallette's claims and concluded that, although many causes of action were suggested, the fundamental claim was grounded in the tort of negligent misrepresentation.[23] The narrow issue that the court addressed was whether Rhode Island should extend this tort to the adoption context.[24] CFS contended that negligence theories were inapplicable because the agency owed no duty of care to the Mallettes. In addition, CFS argued that Rhode Island public policy precluded the extension of the tort of negligent misrepresentation to the adoption context.[25] The court disagreed.[26]

In its analysis, the court first considered whether CFS owed a duty of care to the Mallettes as prospective parents.[27] Whether such a duty exists is a legal question for the court's determination.[28] To make this determination, the court must consider all relevant factors, including the relationship of the parties, the scope and burden of the obligation, and public policy.[29] The Rhode Island Supreme Court found that CFS did owe a duty of care to the Mallettes even though Rhode Island law does not require that an adoption agency disclose all relevant information about the child.[30] The court considered opinions from other jurisdictions which had found a duty to disclose accurate information, and determined that the duty in these cases did not stem from state statutes but rather

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22. *See, e.g.*, Gibbs v. Ernst, 647 A.2d 882, 886 (Pa. 1994).

23. *Mallette*, 661 A.2d at 69. The elements that must be established in order to prove negligent misrepresentation are: "(1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance upon the misrepresentation." *Id.* (quoting *Gibbs*, 647 A.2d at 890).

24. *Mallette*, 661 A.2d at 70.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id. See* Ferreira v. Strack, 636 A.2d 682 (R.I. 1994).

29. *Mallette*, 661 A.2d at 70. *See* Kenney Mfg. Co. v. Starkwhether & Shepley, Inc., 643 A.2d 203, 206 (R.I. 1994).

30. *Mallette*, 661 A.2d at 70.

from the adoption agencies' voluntary dissemination of health information concerning the child to the potential adoptive parents.[31] In the instant case, when CFS began to volunteer information concerning Christopher's family health and genetic background the agency assumed the necessary duty.[32] The court held that in order to avoid liability an adoption agency must refrain from making representations or, if it does make them, it must do so in a non-negligent manner.[33]

The court next considered whether this decision might give adoption agencies incentive to remain silent when they had relevant, but unfavorable, information.[34] Prospective adoptive parents are at the mercy of agencies to disclose the health and genetic history of the children for whom they will become financially and emotionally responsible.[35] Although the Rhode Island General Assembly has chosen to remain silent regarding the need for adoption agencies to disclose health information,[36] the court explained that full disclosure of available, nonidentifying information is the ideal.[37] By extending the tort of negligent misrepresentation to the adoption context the court stated that adoptive parents would at least be alerted by an agency which chooses to remain silent rather than give the true information.[38]

CONCLUSION

The Rhode Island Supreme Court held that the tort of negligent misrepresentation extends to the adoption process. The fact that no statute requires adoption agencies to disclose relevant information to the prospective adoptive parents does not preclude a court from finding a duty on the part of the agency to give accurate

31. *Id. See, e.g.*, M.H. v. Caritas Family Serv., 488 N.W.2d 282, 288 (Minn. 1992); Meracle v. Children's Serv. Soc'y of Wisconsin, 437 N.W.2d 532, 537 (Wis. 1989).

32. *Mallette*, 661 A.2d at 71.

33. *Id.* at 73.

34. *Id.*

35. *Id.*

36. *Id. See* Paula K. Bebenese, *In the Best Interests of the Child and Adoptive Parents: The Need for Disclosure*, 78 Iowa L. Rev. 397, 404 n. 65 (1993) (noting that Rhode Island, Nevada and Alaska are the only three states which do not require adoption agencies to collect or disclose information on the adoptee's medical or social background).

37. *Mallette*, 661 A.2d at 73.

38. *Id.*

background material pertinent to the child. Although the agency may avoid this liability by remaining silent, this silence will hopefully alert prospective parents to carefully examine their decision to adopt a particular child.

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