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2001 Survey of Rhode Island Law: Cases: Judgments

Stephen P. Cooney
Roger Williams University School of Law

Camille A. McKenna
Roger Williams University School of Law

Judgments. *Allstate Insurance Co.v. Lombardi*, 773 A.2d 864 (R.I. 2001). A party may not obtain relief from a judgment confirming an arbitration award petition in an independent action if the party's own unexcused negligence led to the entry of judgment, even if there was an otherwise meritorious defense to the confirmation petition.

FACTS AND TRAVEL

Peter Lombardi (Lombardi or appellant) was injured as a result of a two-car accident.[1] He was a passenger in one of the vehicles and sued the driver of the other vehicle for negligence.[2] That driver's insurance company went into receivership while Lombardi's lawsuit was pending.[3] Allstate insured the vehicle that Lombardi was riding in for underinsured and uninsured motorist (UIM) coverage.[4] Lombardi requested UIM coverage from Allstate, but after unsuccessful negotiations he demanded arbitration of his claim, pursuant to the Allstate insurance policy.[5]

Prior to the arbitration hearing, Allstate offered Lombardi the policy's limits, $25,000.[6] Lombardi rejected the offer.[7] He sought prejudgment interest, in addition to and in excess of the policy limit.[8] On August 5, 1992, an arbitrator awarded Lombardi $40,000, plus $29,000 in interest.[9] Following the arbitrator's ruling, Allstate tendered Lombardi a check for $25,000; on its face, clear wording indicated that the check was a final settlement for all claims resulting from the accident for the UIM coverage.[10]

Nevertheless, in November of 1992, Lombardi petitioned the superior court for a confirmation of the arbitrator's award.[11] Lombardi had already negotiated the check given in final settlement of the claim.[12] In January of 1993, that confirmation hearing was

1. Allstate Ins. Co. v. Lombardi, 773 A.2d 864, 866 (R.I. 2001). The accident occurred on May 30, 1986. *Id.* at 866.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

held.[13] The court entered an order confirming the order in February, 1993.[14] Allstate was not represented at the hearing, though Allstate's arbitration attorney had been notified.[15] An amended order was entered in July 1993, indicating credit for the $25,000 Allstate had previously paid.[16] The initial confirmation order, the amended order and the judgment indicating the terms were all served on Allstate's arbitration attorney.[17]

More court action followed. In March 1994, an execution of the judgment was issued at Lombardi's request.[18] In November of that year, Lombardi filed a debt-on-judgment complaint for approximately $46,000 after Allstate refused to give more than the $25,000 already tendered.[19] In December 1994, Lombardi requested an entry of default because Allstate had failed to answer.[20] In January 1995, before the judgment was entered, an attorney entered his appearance for Allstate and Allstate answered.[21] On appeal, Allstate suggested both that the confirmation petition inaction was a result of multiple firms handling different aspects of the claim, and that the illness and 1998 death of Allstate's arbitration attorney constituted excusable neglect for not opposing the confirmation petition.[22]

In March 1995, Allstate filed an independent action in which they sought relief from both the arbitration award confirmation and the debt-on-judgment default.[23] Allstate made several assertions in its complaint that the judgment was a nullity because money in the amount of the policy's limits was offered before the arbitration, Lombardi accepted a check for the policy's limits, Lombardi negotiated the check and the language on the check indicated that it was for the final settlement of the claim.[24] Allstate also contended that they had not been served with notice of the action,

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13. *Id.*
14. *Id.* at 867
15. *Id.* at 866-67. The record indicates a copy of the cover letter to the clerk of the court was served upon Allstate's attorney. *Id.*
16. *Id.* at 867.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*

and that, in any event, Lombardi could still recover additional damages as a result of the pending litigation with the driver of the other vehicle.[25]

The confirmation action, the debt-on-judgment action and the relief from judgment action were consolidated into the Allstate action, and the matter was brought before the Rhode Island Supreme Court.[26] Lombardi filed motions for summary judgment on the debt-on-judgment action and Allstate's relief action.[27] At the hearing on the motions for summary judgment, Allstate admitted "that it had received notice of the confirmation proceeding, that the confirmation petition had 'got lost somewhere' during the interim . . . and that it had made 'a glaring error' by not responding to the petition or opposing the confirmation of the award."[28]

Allstate did not argue at the trial level that its attorney's illness and death constituted a reason for vacating the judgment.[29] No evidence was introduced by Allstate to substantiate the claim that the illness and death had an effect upon any of the actions.[30] Allstate did not make a showing of excusable neglect or the absence of negligence on its part.[31] Instead, Allstate argued that the decision was void as a result of the Rhode Island Supreme Court's decision in *Allstate Insurance Co. v. Pogorilich*,[32] which was rendered while the arbitration proceedings were ongoing.[33] Allstate's attorney admitted that the award was never contested because of "'inadvertence of prior counsel'" and "'remiss lawyering'" as well as because of the assumption that the appellant would not seek confirmation of an award with, in light of the *Pogorilich* decision, "'no legal relevance.'"[34]

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25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 867-68.

29. *Id.* at 868. Apparently, there was a verbal indication to the trial court that Allstate's arbitration attorney died in 1998, but that was years after the arbitration award and confirmation action had concluded. *Id.*

30. *Id.* An unsigned affidavit of the arbitration attorney that was allegedly prepared in 1995 made no mention of any kind of illness or incapacity. *Id.*

31. *Id.*

32. 605 A.2d 1318 (R.I. 1992).

33. *See Lombardi*, 773 A.2d at 865, 868.

34. *Id.*

The trial court denied Lombardi's summary judgment motions.[35] The judge on the motion calendar ruled that the *Pogorilich* decision rendered the arbitration award void because that case established that Lombardi could only recover the limits of the UIM policy from Allstate ($25,000), an amount concededly paid.[36] Further, she noted that that decision was issued prior to the arbitration award.[37]

Following that reasoning, Allstate moved for summary judgment on all of the actions; the same motion judge granted the motions and ruled the award void because it was contrary to the holding in *Pogorilich*.[38] Final judgment entered in the consolidated cases in favor of Allstate.[39]

On appeal, Lombardi's position was that Allstate was negligent in not raising the *Pogorilich* issue at either the arbitration or confirmation proceeding.[40] Allstate had decided not to defend itself and it should not have been allowed to obtain relief after the fact when it had negligently failed to raise those arguments "at the proper time."[41] For those reasons, Lombardi contended, the judge erred in voiding the judgment.[42]

That position was refuted by Allstate. Allstate argued that the judgment was, in fact, a nullity because the policy's limits was offered and accepted in final settlement of the UIM claims.[43] Summary judgment was appropriate because of the settlement and the availability of recourse against the driver of the other vehicle for other damages.[44] Allstate continued with its argument that it lacked notice of the confirmation proceeding.[45]

It was conceded by both parties that there were no material facts to dispute and that the motion judge's sole task was to deter-

35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 869.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*

mine if Allstate was entitled to summary judgment as a matter of law.[46]

ANALYSIS AND HOLDING

Pursuant to Rule 60(b) of the Rhode Island Superior Court Rules of Civil Procedure, a party may seek relief from a judgment by filing an independent action.[47] Specifically, Rule 60(b)(4) allows relief from a judgment that is void.[48] An erroneous judgment does not necessarily make the judgment void.[49] Errors of law are not grounds to vacate a judgment as void, except when the court has no jurisdiction or the actions are "a plain usurpation of power constituting a violation of due process."[50] Fraud and collusion are also reasons that judgments may be void or voided.[51] A default judgment is void if no notice is given to the opposing party.[52] An erroneous judgment may only be attacked directly, which makes it different from a void judgment, which may be attacked via an independent action.[53]

"[R]egardless of whether the Superior Court erred on the merits when it entered a judgment that confirmed the arbitrators' award of prejudgment interest in excess of the Allstate's policy's limits, Allstate may not obtain relief from such a judgment merely because the . . . [c]ourt may have committed a legal error."[54] The methods to challenge that alleged error were by opposing the confirmation petition or directly appealing the award at the confirmation proceedings, but despite notice, Allstate negligently failed to take advantage of those avenues for relief.[55] The court held that the trial justice erred in ruling that her earlier judgment was void

46. *Id.* (citing Superior Boiler Works, Inc. v. R.J. Sanders, Inc. 711 A.2d 628, 631-32 (R.I. 1998)).

47. *Id.* (citing Raymond v. Koszela, 473 A.2d 281, 285 (R.I. 1984)).

48. *Id.*

49. *Id.* (citing Jackson v. Medical Coaches, 734 A.2d 502, 506 (R.I. 1999) (per curiam) (quoting 11 Charles A. Wright et al., *Federal Practice and Procedure* § 2862, at 326 (2d Ed. 1995)); Hoult v. Hoult, 57 F.3d 1, 6 (1st Cir. 1995)).

50. *Id.* (quoting *Hoult*, 57 F.3d at 6).

51. *Id.* (quoting Medeiros v. Hilton Homes, Inc., 408 A.2d 598, 601 n.2 (R.I. 1979)).

52. *Id.* (citing *Medeiros*, 408 A.2d at 601 n.2).

53. *Id.* (citing Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 649 (1st Cir. 1972)).

54. *Id.* at 869-70.

55. *Id.* at 870.

because the arbitration award contained prejudgment interest.[56] Even if she had not ruled it void and the judge had been in error by confirming the award, that type of error would not make the judgment void via a Rule 60 motion or independent action.[57]

Lombardi also complied with the applicable statute concerning the entry of an order confirming such an award.[58] Lombardi complied by serving a cover letter and confirmation petition, as well as serving notice of the hearing, on Allstate's arbitration attorney.[59]

There was no evidence in the record to suggest excusable neglect or a lack of actual notice.[60] Statements of counsel on appeal are not evidence and not part of the record, thus statements on appeal in support of the excusable neglect and notice arguments could not be entertained.[61] The record did not indicate that Allstate's attorney was ill, or when he became ill, nor did Allstate argue to the lower court that the death or illness of the attorney constituted excusable neglect.[62] There was nothing in the record to suggest that the attorney was suffering from terminal cancer at the time of the confirmation petition, nor was there anything in the record to suggest any evidence to believe the claim had been settled.[63] Allstate "relied solely on the vague, conclusory, unsworn, and unsupported statements of its counsel on appeal to plaster over all the cracks, crevices, and gaping holes in the porous eviden-

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56. *Id.* At this point, the court paused to clarify the misconception that Allstate had concerning its prior holding in *Pogorilich*:

> Contrary to Allstate's contention, this Court's ruling in [*Pogorilich*] does not stand for the proposition that an that an arbitration award cannot include prejudgment interest in excess of the limits of an insured's uninsured motorist (UIM) coverage. Rather, all that *Pogorilich* held was that when arbitrators have been asked to decide the amount that the injured parties are to recover *from the tortfeasor*, the uninsured motorist carrier for the injured parties cannot be required to pay more than the policy limits of the coverage. But when the arbitrators have been asked to determine the amount . . . to recover *from the UIM insurer*, then the arbitrators can award prejudgment interest in excess of the policy limits.

Id. at 870 n.2 (citations omitted) (italics in original). Thus, by relying on the *Pogorilich* decision, the motion justice was herself committing error. *Id.*

57. *Id.*

58. *Id.* (citing R.I. Gen. Laws § 10-3-11 (1956)).

59. *Id.*

60. *Id.*

61. *Id.* at 871 (citing Wood v. Ford, 525 A.2d 901, 903 (R.I. 1987); State v. Brown, 258 A.2d 273, 275 (R.I. 1969)).

62. *Id.*

63. *Id.*

tiary foundation for its independent relief-from-judgment petition it slapped together for the Superior Court."[64] The review of a summary judgment award considers the issues that were properly presented to the lower court and a party may not raise new issues on appeal to secure a reversal.[65] Allstate's attorney submitted no sworn factual rebuttal and that neglect was imputed to Allstate.[66]

The court noted that it was important that Allstate was on notice for the award confirmation, because there may have been merit to Allstate's claim that the receipt and negotiation by Lombardi of the check indicating final settlement was, in law and fact, final settlement of the claim.[67] Rhode Island accepts the widely accepted common law rule that, when there is a dispute about the amount of debt owed, the creditor's taking of a check for less than the amount claimed extinguishes the debt.[68]

Allstate's awareness and subsequent negligence by failing to act was fatal to its independent action in equity seeking relief from the earlier judgment.[69] The traditionally required elements that a party seeking relief from judgment in an independent equity action must show are (1) a judgment that because of equity or good conscience should not be enforced, (2) a good defense to the claim, (3) some fraud, accident, or mistake that prevented giving the defense, (4) the absence of an adequate remedy at law and (5) "'the absence of fault or negligence on the part of the defendant.'"[70] Equitable relief is traditionally limited to those who come before the court with "clean hands."[71] Allstate admitted to its own negligence by not opposing the confirmation petition, admitted its 'glaring error' by not responding to the petition and failed to show any evidence in the record that could create excusable neglect on its part.[72]

Allstate could not satisfy the required elements for bringing an independent action in equity and the judge erred in vacating

64. *Id.* at 871-72

65. *Id.* at 871 (citing Ludwig v. Kowal, 419 A.2d 297, 302 (R.I. 1980)).

66. *Id.* (citing *Ludwig*, 419 A.2d at 303-04).

67. *Id.* at 872.

68. *Id.* at 872 n.4 (citing 1 Henry J. Bailey & Richard V. Hagedorn, *Brady on Bank Checks: The Law of Bank Checks* § 4.12 at 4-40 to 4-41 (rev. ed. 1997)).

69. *Id.* at 872-73.

70. *Id.* at 873 (citing Clark v. Dubuc, 486 A.2d 603, 605 n.3 (R.I. 1985) (quoting Paul v. Fortier, 366 A.2d 550, 552 (R.I. 1976))).

71. *Id.* (citing Opie v. Clancy, 60 A. 635, 638 (R.I. 1905); Carteret Sav. & Loan Ass'n v. Jackson, 812 F.2d 36, 39 (1st Cir. 1987)).

72. *Id.*

the original judgment. The lower court's summary judgment in favor of Allstate was vacated and the case was remanded so that all judgments in the consolidated cases would be entered in favor of Lombardi.[73]

In dissent, Justice Bourcier would have allowed a challenge to the judgment, even if the judgment was not void.[74] Rule 60(b)(5) would have been an appropriate way to get relief from the judgment.[75] Relief from a judgment pursuant to that rule "is appropriate where the limit of a policy has already been paid in final settlement of the underlying claim."[76] In this case, there was no dispute that Lombardi accepted a check that expressly released Allstate from further liability beyond the policy's limits.[77]

Further, Allstate adequately rebutted any alleged negligence because "it explained that its arbitration attorney . . . died after the arbitration hearing . . . concluded and that, as a result, it never received actual notice of the confirmation proceedings and the various orders . . . Lombardi . . . sent to the deceased attorney's office in time for Allstate to object . . . or . . . to oppose . . . or to appeal . . . ."[78] The dissent noted that the motion judge decided correctly, but for the wrong reason; suggesting that the reasoning should have focused on "that it was 'no longer equitable that the judgment should have prospective application.'"[79] Because the Rhode Island Supreme Court may affirm a decision on different grounds from that of the trial judge and Allstate was entitled to relief, Allstate was entitled to summary judgment in its action in equity.[80] It was inappropriate to deny relief "simply because the motion hearing justice gave the wrong reason for doing so."[81]

CONCLUSION

In *Allstate Insurance Co. v. Lombardi*, the Rhode Island Supreme Court held that relief is not available, via an independent action, to an insurer merely because the lower court judge may

73. *Id.*
74. *Id.* at 876 (Bourcier, J., dissenting).
75. *Id.* at 877.
76. *Id.* (citing Vaughan v. Mut. Ins. Co., 702 A.2d 198, 206 (D.C. 1997).
77. *Id.*
78. *Id.*
79. *Id.* (quoting R.I. R. Civ. P. 60(b)(5)).
80. *Id.*
81. *Id.*

have committed legal error; a judgment is not void solely because it may be erroneous. Because the insurer was on notice of a hearing on the confirmation of an arbitration award that included prejudgment interest and no evidence establishing excusable neglect was in the record, the creditor was entitled to the full arbitration award, despite the negotiation of a check for the policy's limits. In doing so, the court clarified its earlier decision in *Pogorilich*. Further, an independent action in equity may not be entertained when the party seeking relief does not come to the court with "clean hands."

Stephen P. Cooney

Judgments. *Webster v. Perrotta,* 774 A.2d 68 (R.I. 2001). Entry of a default judgment constitutes a concession of all well pleaded allegations of liability, however, it is not considered an admission of damages. Also, a police officer's salary, wages and benefits awarded pursuant to statute cease when he or she is no longer an active member of the police force. Furthermore, prejudgment interest is only awarded to police officers when the town is acting in an enterprise or proprietary manner.

FACTS AND TRAVEL

The plaintiffs are former officers of the Johnston Police Department who sought wages and benefits from the date of their respective retirements.[1] Each plaintiff voluntarily retired from the force because of illness or injury suffered or contracted in the line of duty.[2] At the time of their retirement, there was a valid and enforceable provision in their union contract stating that all members of the police department who are injured or contract illness in the line of duty are statutorily entitled to benefits.[3] This statute is often referred to as the Injured on Duty provision.[4] However after retirement, the plaintiffs received pension payments that were less

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1. Webster v. Perrota, 774 A.2d 68, 71 (R.I. 2001).
2. *Id.*
3. *Id.*
4. *Id.* The Injured on Duty provision provides, in pertinent part:
Whenever any police officer. . . of any city, town, fire district, or the state of Rhode Island is wholly or partially incapacitated by reason of injuries received or sickness contracted in the performance of his or her duties, the respective city, town, or fire district, or state of Rhode Island by which the police officer. . . is employed, shall, during the period of the incapacity, pay the police officer. . . the salary or wage and benefits to which the police officer. . .would be entitled had he or she not been incapacitated, and shall pay the medical, surgical, dental, optical, or other attendance, or treatment, nurses, and hospital services, medicines, crutches, and apparatus for the necessary period, except that if any city, town, fire district, or the state of Rhode Island provides the police officer. . . with insurance coverage for the related treatment, services, or equipment, then the city, town, fire district, or the state of Rhode Island is only obligated to pay the difference between the maximum amount allowable under the insurance coverage and the actual cost of the treatment, service, or equipment. In addition, the cities, towns, fire districts, or the state of Rhode Island shall pay all similar expenses incurred by a member who has been placed on a disability pension and suffers a recurrence of the injury or illness that dictated his or her disability retirement.
R.I. Gen. Law § 45-19-1 (2001).

than 100 percent of the salary, wages and benefits that they would have received had they not retired.[5]

In 1997, the plaintiffs sued the town for recovery claiming that they were entitled to 100 percent of the salary, wages and benefits that they would have received had they not retired.[6] A fourth plaintiff claimed that he was owed the same amount of compensation; however his claim was based on a collective bargaining agreement.[7] During the litigation the town failed to comply with discovery orders and the superior court issued a default judgment in all four cases pursuant to Rule 37 of the Superior Court Rules of Civil Procedure.[8] The default judgments were deemed final, and they mandated the town to immediately pay 100 percent of the salary and benefits that each plaintiff would have received as an officer of the Johnston police department.[9] Each judgment was also scheduled for a proof of claim hearing to determine the amount of money that the town owed the plaintiffs.[10] Incidentally neither the complaints nor the final judgments included a claim or finding that these plaintiffs, from the time of their voluntary retirements, remained active members of the police department.[11]

Shortly after their entry, the town sought to vacate these final judgments pursuant to Rule 60(b)(1) of the Superior Court Rules of Civil Procedure for mistake, inadvertence, surprise, or excusable neglect.[12] The superior court denied these motions.[13] At the consolidated oral-proof-of-claim hearing the town made a second motion for the judgments to be vacated or modified in order to comport with the provisions of § 45-19-1 and the pronouncements of the supreme court.[14] The town sought relief from the judgments pursuant to Rule 60(b)(4), (5) and (6).[15] The hearing justice found

5. *Webster*, 774 A.2d at 72.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 73.
13. *Id.*
14. *Id.*
15. *Id.* Rule 60(b) states in part that:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons (1) mistake, inadvertence, surprise, or excus-

that the defendants failed to satisfy the burden imposed on them by Rule 60(b)(1)-(6).[16] Furthermore the justice stated that law of the case precluded him from "second guessing" other justices of the superior court with respect to legal determinations made by them.[17] When dealing with the proof of claim issues, he rejected the town's argument that attacked the language in the judgments, in that they suggested that the computation of damages required a thorough and detailed analysis of the scope and purposes behind section 45-19-1 and the pronouncements of the supreme court.[18] The hearing judge was persuaded that the language of the final judgments was controlling.[19] He held that the provisions with respect to the calculation of damages agreed upon in a previous stipulation was controlling.[20] Finally, the hearing judge denied plaintiffs' request for prejudgment interest, finding that the town was clearly acting in a governmental capacity as opposed to a proprietary one.[21] Both parties appealed.[22]

The defendants alleged that the judgments were void, arguing that the judgments should have been vacated and modified because they exceeded the scope of section 45-19-1 and are applied to individuals who are no longer active members of the department, contrary to the previous pronouncements of the supreme court and the legislature.[23] The town also argued that its motions to vacate

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able neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

R.I. Superior Ct. R. Civ. P. 60 (b).

16. *Webster*, 772 A.2d at 73.
17. *Id.*
18. *Id.* at 73-74.
19. *Id.* at 74.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*

or modify the judgments should have been granted because the judgments were based on an incorrect conclusion of law and an erroneous interpretation of *Chester v. aRusso*.[24] Finally, the defendants urged the court to revisit the holding in *Chester* and clarify whether that case is applicable to voluntary retirement.[25] Alternatively the town argued that the hearing justice erred by failing to conclude that § 45-19-1 and the previous pronouncements of the supreme court controlled the proper measure of damages at the hearing on oral proof of claim.[26] On cross-appeal, the plaintiffs argued that the denial of prejudgment interest was error because the plaintiffs' action against the town was one in contract.[27]

ANALYSIS AND HOLDING

The supreme court held that although labeled final, the judgments entered upon the default of the defendant were merely conclusive in that they established the liability of the defendants as it related to the allegation in the complaints.[28] The court states that all language purporting to set forth the measure of damages was null and void.[29] The court also noted that it is well established in the jurisdiction that a default judgment does not concede the amount of damages, nor may this type of judgment include the measure of damages.[30] A party's default is deemed to constitute a concession of all well-pleaded allegations of liability, however a default judgment is not considered an admission of damages.[31] Therefore, although the plaintiffs are relieved of the burden of establishing liability in this case, they nonetheless bear the burden of establishing the damages they are entitled to recover.[32] Furthermore the court held that the litigation was not terminated be-

24. *Id.* Chester v. aRusso, 667 A.2d 519 (R.I. 1995) (holding that when there exists a valid and enforceable collective-bargaining agreement whose terms provide greater disability benefits than is afforded by special legislation, the collective bargaining agreement trumps the special legislation).

25. *Webster*, 774 A.2d at 74.

26. *Id.*

27. *Id.*

28. *Id.* at 75.

29. *Id.*

30. *Id.* at 75.

31. *Id.* at 77. (citing Greyhound Exhibitgroup Inc. v. E.L.U.L. Reality Corp., 973 F.2d 155, 158 (2d Cir. 1992)).

32. *Id.*

cause the case was ordered to a hearing on the plaintiffs' oral proof of claim.[33]

Examining the complaints, the court held that three of the plaintiffs' complaints alleged that the named plaintiff contracted illness or injury in performance of his duties.[34] Additionally under section 45-19-1 the plaintiff was entitled to salary, wages and benefits that he would have been entitled had he not been incapacitated, and that the defendants have refused to make payments required by law.[35] A second count alleged that at the time the plaintiff ceased working as a full time officer a collective bargaining agreement was in place, which entitled him to receive benefits pursuant to section 45-19-1.[36] Finally, a third count alleged that the defendants' failure to recognize the previous decision of the superior court amounted to bad faith. The court held that this allegation amounted to a conclusion at law and had no relevance in a default judgment, thus was a nullity.[37]

Plaintiff Ferrante filed the fourth complaint and the court held that this complaint was completely devoid of any allegations that would support relief in this case and had no relevance to section 45-19-1, thus the judgment for this plaintiff was null and void.[38] This complaint made no mention of section 45-19-1 or that the plaintiff was on Injury on Duty status, but only stated that the town failed to afford plaintiff benefits of a disability retirement.[39] Finally, the court concluded that the trial justice erred in failing to examine the pleadings to determine whether the plaintiffs were legally entitled to recover the relief awarded in this case.[40] The court also held that pursuant to the supreme court's examination, the plaintiffs were not entitled to relief awarded in the judgments.[41]

Regarding the motions to vacate, the court held that according to the language in the complaints, plaintiffs Webster, Riccitelli and Bolton were entitled to compensation governed by section 45-19-1

33. *Id.* at 75.
34. *Id.* at 77-78.
35. *Id.* at 78.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 79.
41. *Id.*

and previous pronouncements of the supreme court.[42] However, the court held that an officer who is no longer a member of the police department is not entitled to the benefits provided by section 45-19-1 or the collective bargaining agreement.[43] Regarding the *Chester* decision, the court held that this case had no bearing on the plaintiffs' entitlement to damages, and any contrary holding is overruled.[44] *Chester* stated that collective bargaining agreements could take precedent over an act of legislature when it provides greater disability benefits.[45] The court held that *Chester* was a case of statutory construction, and never addressed the applicability damages granted to retired officers' pursuant section 45-19-1.[46]

Regarding prejudgment interest, the court held that prejudgment interest would only be awarded against a municipality on a breach of contract claim where the municipality acts in a proprietary or enterprise capacity.[47] Here the court held that the defendants were acting in a governmental manner thus cannot be awarded the interest.[48] Furthermore, because no plaintiff has alleged that he was a current member of the collective bargaining agreement unit, they were unable to pursue a claim through the grievance process.[49]

In Justice Flanders' dissent, he argued that Rule 37 of the Superior Court Rules of Civil Procedure should be interpreted broadly to permit the court to enter a final judgment for a defendant's discovery violation.[50] Furthermore this justice stated that Rule 37 can and often does award damages and other relief to the non-defaulting party pursuant to the well-pleaded allegations of the complaint.[51] On this same subject, the dissent stated that because this was a final judgment, the defendants should not have been able to assert the voluntary-retirement defense because the

42. *Id.*
43. *Id.* at 79-81.
44. *Id.* at 82.
45. *Id.* (citing Chester v. aRusso, 667 A.2d 519 (R.I. 1995)).
46. *Id.*
47. *Id.* at 82.
48. *Id.*
49. *Id.*
50. *Id.* at 83-84 (Flanders, J., dissenting).
51. *Id.* at 83.

entire theory of default centered on the notion that the defaulting party has forfeited liability.[52]

The dissent also asserted that *Chester* specifically dealt with a retired police officer who was no longer employed by the town, however, the *Chester* court still awarded him benefits under section 45-19-1.[53] Furthermore, Justice Flanders stated that under *Chester*, there is no indication that contemporaneous employment is a precondition of recovery under section 45-19-1.[54]

Regarding the pre-judgment interest, the dissent argued that breaching employment contracts with police officers and/or their union is not an exercise of police power, and in turn not a government function.[55] Justice Flanders argued that the appropriate inquiry is whether the activity at issue is one that a private person or corporation would most likely undertake.[56] In this case the dissent held that employment contracts do fall into this category.[57]

CONCLUSION

The court held that plaintiffs Webster, Bolton and Riccitelli, who claimed compensation pursuant to the provisions of section 45-19-1, are entitled to receive compensation from the town for all periods during which they were actively employed and were entitled to a paycheck. Each plaintiff was owed 100% of the salary and benefits he was receiving up to the date of voluntary retirement, and these cases were remanded for a new determination of damages. The judgment for the plaintiff Ferrante who made no claim under section 45-19-1 was vacated in its entirety and remanded for trial. Finally the plaintiffs were denied their prejudgment interest because the defendants were acting in a governmental capacity.

Camille A. McKenna

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52. *Id.* at 84-85. (citing Calise v. Hidden Valley Condo. Ass'n., 773 A.2d 834, 839 (R.I. 2001)).

53. *Id.* at 86.

54. *Id.* at 87.

55. *Id.* at 87.

56. *Id.* (citing Housing Auth. of Providence v. Oropeza, 713 A.2d 1262, 1263 (R.I. 1998) (quoting DeLong v. Prudential Prop. & Cas. Ins. Co., 583 A.2d 75, 76 (R.I. 1990))).

57. *Id.*