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## Polanco v. Lombardi, 231 A.3d 139 (R.I. 2020)

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**Civil Procedure.** *Polanco v. Lombardi*, 231 A.3d 139 (R.I. 2020). The discovery rule is only available in certain categories of negligence claims and does not extend more broadly to general negligence claims. A plaintiff injured as a result of a police officer’s failure to produce a police report—particularly one that may have contained information exculpating the plaintiff in a subsequent criminal case—first sustains its injury when that plaintiff is arraigned. *Heck v. Humphrey* and the exoneration rule do not extend to state law negligence claims. Under section 9-1-20 of the Rhode Island General Laws, failure to produce a police report is not an affirmative misrepresentation capable of tolling the applicable statute of limitations. Equitable tolling is not appropriate where a plaintiff could have discovered their injury by exercising reasonably diligent efforts or in the absence of extraordinary circumstances that prevented the plaintiff from discovering their injury within the statutory period.

#### FACTS AND TRAVEL

On August 13, 2005, Fernando Fernandez was assaulted with a pool cue at the Mi Sueño club in Providence, Rhode Island.<sup>1</sup> Officer Michael Camardo of the Providence Police Department responded to the incident, but after conducting an initial investigation at the scene, he determined that the assault complaint was unfounded and did not file a police report of the incident.<sup>2</sup> Importantly, Officer Camardo took this course of action notwithstanding the statements of two alleged witnesses—Luz Morales and Leksandro Collazo—both of whom Dionisio Polanco (the principal plaintiff) said were interviewed by Officer Camardo at the time of the incident.<sup>3</sup>

Separately, the Providence Police Department responded to a call from Mr. Fernandez’s family and friends from the hospital

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1. *Polanco v. Lombardi*, 231 A.3d 139, 142 (R.I. 2020).
  2. *Id.*
  3. *Id.*

where Mr. Fernandez was receiving treatment for his injuries.<sup>4</sup> There, the owner of Mi Sueño, Jesus Titin, identified Mr. Polanco as the assailant.<sup>5</sup> It was not until two years later, in 2007, that Mr. Polanco was arrested for the felony assault of Mr. Fernandez.<sup>6</sup>

At Mr. Polanco's 2008 bench trial, Mr. Titin testified—contrary to his prior statement—that Mr. Polanco was not the individual who struck Mr. Fernandez.<sup>7</sup> Notably, Mr. Titin also testified that Officer Camardo “messed up” when he failed to file a police report of the incident.<sup>8</sup> However, a Mi Sueño employee, who worked on the night of the 2005 assault, testified that Mr. Polanco was indeed the true assailant.<sup>9</sup> On July 30, 2008, the court found Mr. Polanco guilty.<sup>10</sup> He was later sentenced to ten years' imprisonment, with four years to serve and the remainder of the sentence suspended.<sup>11</sup>

Two years later, during the Summer of 2010, Ms. Morales—one of the witnesses of the 2005 assault—returned to Rhode Island from Puerto Rico and learned of Mr. Polanco's conviction.<sup>12</sup> Shortly thereafter, Ms. Morales and Mr. Collazo—the other witness who spoke with Officer Camardo at the scene of the assault—executed affidavits stating that they had witnessed the assault, that Mr. Polanco was not the true assailant, and that they had both provided statements—including a physical description of the assailant—to a police officer at the scene.<sup>13</sup> In light of these affidavits, Mr. Polanco filed a motion for—and was subsequently granted—a new trial in September 2010.<sup>14</sup> Although Mr. Polanco was released from detention, he was remanded to the custody of United States Immigration and Customs Enforcement (ICE).<sup>15</sup> The State of Rhode Island ultimately dismissed the charges against Mr. Polanco

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4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 142–43.

12. *Id.* at 143.

13. *Id.*

14. *Id.*

15. *Id.*

stemming from the 2005 assault, and he was released from ICE custody.<sup>16</sup>

Mr. Polanco and the other plaintiff in the suit (his wife) filed the complaint that gave rise to the instant case in April 2012.<sup>17</sup> The plaintiffs alleged one count of negligence against Officer Camardo based upon his failure to file a police report of the 2005 assault of Mr. Fernandez—a report which plaintiffs believed would have included the eyewitness statements of Ms. Morales and Mr. Collazo.<sup>18</sup> At bottom, plaintiffs claimed that Officer Camardo's failure to file a police report resulted in the nondisclosure of potentially exculpatory information that Mr. Polanco could have used to develop a better defense in his criminal case.<sup>19</sup> The plaintiffs also alleged a single negligence count against the City of Providence under a theory of *respondeat superior*.<sup>20</sup> The plaintiffs alleged damages, included compensation for Mr. Polanco's thirty-two month incarceration, his remand to ICE custody for deportation, his loss of earning capacity, his extreme pain and suffering, and the deprivation of the society and companionship of his wife and children.<sup>21</sup>

The defendants filed a motion for summary judgment, arguing that the plaintiffs' suit was barred by the applicable three-year statute of limitations.<sup>22</sup> In response, the plaintiffs argued that the discovery rule should be applied in the case to delay the time at which the statutory clock would begin running to the time when Ms. Morales and Mr. Collazo executed their affidavits in August of 2010, as Mr. Polanco's discovery of their identities prior to August 2010 would have been impossible.<sup>23</sup> As a failsafe, the plaintiffs also argued that the court should equitably toll the statute of limitations

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16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

given the circumstances of Mr. Polanco's case.<sup>24</sup> The defendants' motion was heard in February 2018.<sup>25</sup>

The hearing justice granted the motion for summary judgment, finding that the applicable statute of limitations began to run on July 30, 2008—when Mr. Polanco began to serve his sentence for the assault conviction—as Mr. Polanco “knew he had suffered an injury when he was denied his liberty.”<sup>26</sup> As this date preceded the plaintiffs' April 2012 suit by more than three years, the plaintiffs' suit was time barred.<sup>27</sup> Next, the hearing justice determined that tolling of the statute of limitations pursuant to section 9-1-20 of the Rhode Island General Laws was unavailable to the plaintiffs, as Officer Camardo's alleged negligent failure to submit a police report did not amount to the type of affirmative misrepresentation of material fact required for tolling to apply under section 9-1-20.<sup>28</sup> Lastly, the hearing justice concluded that the discovery rule applies only in limited categories of cases, and that the general negligence case against the defendants “d[id] not fall into any of those categories.”<sup>29</sup> The court entered final judgment in favor of the defendants on all counts in April of 2018, and the plaintiffs timely appealed.<sup>30</sup>

#### ANALYSIS AND HOLDING

The Rhode Island Supreme Court began *de novo* review of the grant of summary judgment by determining the threshold issue of when exactly Mr. Polanco incurred his injury.<sup>31</sup> In a slight departure from the court below, the Court held that Mr. Polanco incurred his injury not when he began to serve his sentence in 2008, but instead when he was initially arraigned and bound over for trial for the assault charge in October 5, 2007.<sup>32</sup> Importantly, this determination resulted in the statutory clock beginning to run even

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24. *Id.*

25. *Id.*

26. *Id.* at 144.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 145.

earlier, thus placing the plaintiffs' 2012 claims even further outside the statute of limitations in the absence of some applicable law that might stop that clock from running.<sup>33</sup>

The plaintiffs brought four different legal arguments for tolling the applicable statute of limitations. The plaintiffs first argued that the statute should be tolled by the discovery rule, which, when available, prevents the statutory clock from beginning "to run until the plaintiff discovers, or with reasonable diligence should have discovered, the wrongful conduct."<sup>34</sup> However, according to the Court, the plaintiffs' general negligence claim did not fall within any of the limited categories of claims eligible for the discovery rule.<sup>35</sup> Importantly, the Court noted that even if the discovery rule did apply, it would not have saved the plaintiffs' case here because the latest point at which the plaintiffs could have reasonably discovered their injuries was at the time of Mr. Polanco's conviction in 2008—a point that would still fall outside the applicable statute of limitations.<sup>36</sup> The Court also highlighted the fact that Officer Camardo's failure to submit a police report was revealed at Mr. Polanco's trial, and posited that such a revelation "should have put plaintiffs on notice that a further investigation as to what may have been in that report was required."<sup>37</sup> Further, the Court noted that the party seeking to apply the discovery rule has the burden to show they exercised reasonable diligence to discover the injury, and the plaintiffs here failed to meet that burden.<sup>38</sup>

Next, the plaintiffs argued that the exoneration rule laid out in the United States Supreme Court Case *Heck v. Humphrey*<sup>39</sup> prevented Mr. Polanco from bringing forth his claim from his 2008 conviction through when his conviction was vacated in 2010, thereby tolling the applicable statute of limitations until 2010 and making their collective claims timely.<sup>40</sup> In response, the

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33. *Id.*

34. *Id.* at 146 (quoting *Mills v. Toselli*, 819 A.2d 202, 205 (R.I. 2003)).

35. *Id.* at 147.

36. *Id.*

37. *Id.* at 147–48.

38. *Id.* at 148.

39. *Heck v. Humphrey*, 512 U.S. 477 (1994).

40. *Polanco*, 231 A.3d at 149–50. The plaintiffs specifically claimed that "Mr. Polanco needed to obtain post-conviction relief before suing because his civil action attacked his conviction." *Id.* at 149.

defendants argued that the exoneration rule applies only where a plaintiff's underlying claims challenge the validity of their criminal conviction under 42 U.S.C. § 1983, and that the plaintiffs here brought no such claim in their complaint.<sup>41</sup> Here, the Court agreed with the defendants, and refused to extend the holding in *Heck* to state law negligence claims.<sup>42</sup> As such, the Court held that *Heck* and the exoneration rule did not apply to delay the accrual of the plaintiffs' injuries to a date within the applicable statute of limitations.<sup>43</sup>

Third, the plaintiffs argued that Officer Camardo's failure to compile and submit a police report amounted to fraudulent concealment under section 9-1-20 of the Rhode Island General Laws and that the statute of limitations should have been tolled accordingly until the plaintiffs discovered Officer Camardo's concealment.<sup>44</sup> In support of this argument, the plaintiffs relied on a statement that the detective assigned to the 2005 assault case made during a deposition, which seemed to suggest that Officer Camardo falsely told the detective that nobody reported an assault to him on the night in question.<sup>45</sup> However, the Court held that the failure to file a police report amounted to "mere silence or inaction on the part of the defendant" and that such a failure does not qualify as an actual misrepresentation for the purposes of section 9-1-20.<sup>46</sup> In addition, in reviewing the deposition transcripts, the Court held that the detective's testimony surrounding his conversation with Officer Camardo "simply [did] not rise to the level of an actual misrepresentation."<sup>47</sup> Thus, the Court concluded that

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41. *Id.* at 150. The *Heck* rule specifically states that, "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid . . . a §1983 plaintiff must prove that the conviction or sentence has been [exonerated]." *See Heck*, 512 U.S. at 486–87.

42. *Polanco*, 231 A.3d at 152.

43. *Id.* at 153.

44. *Id.*

45. *Id.* (quoting *Boudreau v. Automatic Temperature Controls, Inc.*, 212 A.3d 594, 601–02 (R.I. 2019)).

46. *Id.* at 153–54 (quoting *Boudreau*, 212 A.3d at 601–02).

47. *Id.* at 154–55.

section 9-1-20 did not apply to toll the applicable statute of limitations.<sup>48</sup>

Lastly, the plaintiffs argued that the “unusual” nature of Mr. Polanco’s conviction and resulting claims presented a case ripe for equitable tolling of the statute of limitations to 2010, the point at which the new witnesses came forward.<sup>49</sup> In response, the defendants argued that the statute of limitations should not be equitably tolled in this case, as the plaintiffs failed to undertake any reasonably diligent efforts to investigate their claims between Mr. Polanco’s conviction and the time at which the new witnesses came forward, noting that Mr. Polanco became aware of Officer Camardo’s failure to submit a police report at his trial in 2008.<sup>50</sup> Once again, the Court agreed with the defendants, noting that a clear prerequisite to the equitable tolling of the statute of limitations is “either a plaintiff who was not able to discover his or her injury despite diligent efforts or extraordinary circumstances that prevented a plaintiff from complying with the deadline despite using reasonable diligence.”<sup>51</sup> Noting that the plaintiffs failed to interview Officer Camardo “prior to or during the trial,” the Court found that the plaintiffs did not exercise reasonably diligent efforts to investigate their claims, rendering equitable tolling unavailable in their case.<sup>52</sup>

At bottom, the plaintiffs’ claims accrued at the time of Mr. Polanco’s arraignment on October 5, 2007, and “were not tolled by the discovery rule, the holding in *Heck*, the exoneration rule, § 9-1-20, or the doctrine of equitable tolling.”<sup>53</sup> As a result, the plaintiffs’ 2012 suit was filed after the three-year statute of limitations expired and was therefore time barred.<sup>54</sup>

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48. *Id.* at 155.

49. *Id.*

50. *Id.*

51. *Id.* at 155–56.

52. *Id.* at 156.

53. *Id.*

54. *Id.* However, the Court’s opinion in this case was not unanimous. In a thoughtful dissent, Justice Flaherty found Mr. Polanco’s case to be “extraordinary,” and argued that equitable tolling should have applied to bring Mr. Polanco’s claim within the applicable statute of limitations “[i]f equity is to mean anything at all.” *See id.* at 159 (Flaherty, J., dissenting). To Justice Flaherty, the majority’s suggestion that Mr. Polanco would be capable of exercising reasonable diligence in the investigation of his claim—while behind bars



## COMMENTARY

Despite the difficulty of the instant case, and the disappointing result for the plaintiffs, the Rhode Island Supreme Court held fast to its prior decisions that establish when statutes of limitations can appropriately be tolled in general negligence claims. As a general rule, only certain categories of tort claims are eligible for tolling under the discovery rule, including medical malpractice claims, drug product liability claims, and actions involving improvements to real property.<sup>55</sup> To extend the discovery rule's applicability to all negligence claims thus represented a step too far to the Court. Moreover, even if the discovery rule were extended to the plaintiffs' claims, the claims would still fall outside of the applicable statute of limitations.<sup>56</sup> Interestingly, the Court also found that Mr. Polanco's injuries accrued at his arraignment in October of 2007, the point at which "his incarceration and its attendant harms began to befall him" as a result of Officer Camardo's alleged negligence.<sup>57</sup> Thus, whether he was first made aware of his injury at his arraignment or at his subsequent bench trial in 2008 was ultimately immaterial, as the plaintiffs' filing of their suit in 2012 placed either date, and the points between them, outside the statute of limitations.

Further, the plaintiffs' attempt to invoke *Heck* and the exoneration rule were somewhat of a stretch, as the plaintiffs' claims surrounded the alleged negligence of Officer Camardo and did not challenge the legitimacy of Mr. Polanco's conviction under 42 U.S.C. § 1983.<sup>58</sup> Additionally, the failure to file a police report—an unfortunate omission on Officer Camardo's part—is not the type of affirmative misrepresentation required to allow section 9-1-20 of the Rhode Island General Laws to kick in and toll the applicable three-year statute of limitations.<sup>59</sup> Here again, the latest point at which Mr. Polanco could have discovered Officer Camardo's failure to submit a police report was arguably at his own trial in 2008.

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on the basis of faulty eyewitness testimony—was, "in and of itself, unreasonable." *See id.* at 158–59.

55. *Id.* at 146–47 (majority opinion).

56. *Id.* at 147.

57. *Id.* at 145.

58. *Id.* at 152.

59. *Id.* at 154.

Thus, even if Officer Camardo's omission was sufficient to trigger section 9-1-20, the plaintiffs' claims would have likely still failed.

However, when it comes to the equitable tolling argument, Justice Flaherty's dissent should not fall on deaf ears. Unlike the majority opinion, which quickly dismisses any suggestion that Mr. Polanco exercised reasonably diligent efforts to investigate the veracity of his claims, Justice Flaherty's dissent reminds the Court that Mr. Polanco's ability to exercise such efforts was considerably limited as a result of his incarceration.<sup>60</sup> Justice Flaherty also calls attention to the fact that Mr. Polanco's wrongful conviction stemmed from faulty eyewitness testimony and reiterates the original hearing justice's opinion that neither Mr. Polanco nor his defense team could have discovered the existence of the two exculpatory witnesses until they came forward in 2010.<sup>61</sup> To Justice Flaherty, Mr. Polanco's knowledge that Officer Camardo failed to file a police report could not itself "lead to a conclusion that . . . unidentified witnesses [existed]."<sup>62</sup> Therefore, in light of the totality of Mr. Polanco's extraordinary circumstances, Justice Flaherty argued that equitable tolling of the applicable statute of limitations was appropriate in the instant case.<sup>63</sup> His well-reasoned argument is certainly noteworthy for future plaintiffs suffering similar injuries.

#### CONCLUSION

The Rhode Island Supreme Court declined to extend the discovery rule to general negligence claims and instead held fast to the limits it placed upon that doctrine in its earlier jurisprudence. The Court also held that neither *Heck* nor the exoneration rule apply to state law negligence claims and are limited in their application to claims challenging the legitimacy of criminal convictions brought forth pursuant to 42 U.S.C. § 1983. Further, the Court held that the failure of a police officer to file a police report does not amount to the type of affirmative misrepresentation needed for section 9-1-20 of the Rhode Island General Laws to toll the applicable statute of limitations in a general negligence claim.

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60. *See id.* at 159 (Flaherty, J., dissenting).

61. *See id.* at 157–59.

62. *Id.* at 159.

63. *Id.*

Lastly, the Court reaffirmed that equitable tolling of applicable statutes of limitations is not available to plaintiffs who fail to exercise reasonable diligence to investigate the veracity of their claims or whose circumstances do not prevent the exercise of such efforts.

Edward A. Gencarelli, Jr.