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1996 Survey of Rhode Island Law: Cases: Constitutional Law

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Constitutional Law. *Giroux v. Purington Building Systems, Inc.*, 670 A.2d 1227 (R.I. 1996). Rhode Island General Laws section 27-7-2.4, which entitles a complaint to be filed directly against the liability insurer of an alleged tort-feasor who has filed for bankruptcy, is not preempted by federal bankruptcy law, and is not unconstitutional where substitution does not harm other creditors.

By virtue of the bankruptcy clause of the United States Constitution, Congress is empowered to enact a national bankruptcy law.[1] In *International Shoe v. Pinkus*,[2] the United States Supreme Court held that federal bankruptcy law preempts any state law that interferes with the bankruptcy laws or creates additional regulations.[3] In *Giroux v. Purington Building Systems, Inc.*,[4] the Rhode Island Supreme Court was confronted with a constitutional challenge to Rhode Island General Laws section 27-7-2.4.[5] Concluding that section 27-7-2.4 is not preempted by federal law, the Rhode Island Supreme Court held that the goals of the federal bankruptcy laws are not frustrated by the substitution of the insurer when there is but one claimant against the policy.[6]

FACTS AND TRAVEL

Richard Giroux was employed by Gustafson Steel Erectors, Inc., a subcontractor for Purington Building Systems, Inc.[7] Giroux alleged that he sustained severe injuries while working in this capacity, when he was struck by a prefabricated roof decking that caused him to fall from a structure he was building.[8] The building and its components, including the roof decking, were manufactured by Inland Buildings, Inc.[9]

Giroux filed a complaint on September 13, 1990, against both Purington and Inland, in which he alleged that Purington was neg-

1. U.S. Const. art. I, § 8, cl. 4. The bankruptcy clause states that "Congress shall have [the] [p]ower . . . [t]o establish . . . uniform [l]aws on the subject of [b]ankruptcies throughout the United States."

2. 278 U.S. 261 (1929).

3. Giroux v. Purington Bldg. Sys., Inc., 670 A.2d 1227, 1230 (R.I. 1996) (citing *International Shoe*, 278 U.S. 261).

4. 670 A.2d 1227 (R.I. 1996).

5. *Id.* at 1229.

6. *Giroux*, 670 A.2d at 1231.

7. *Id.* at 1228.

8. *Id.*

9. *Id.*

ligent in failing to maintain a safe job site and that Inland was negligent in designing, manufacturing and selling the building.[10] On December 11, 1990, Purington filed a third party complaint against Gustafson.[11] Purington alleged that Gustafson had previously agreed to indemnify Purington for all claims arising from, and incident to, Gustafson's job site performance.[12] In addition, in April 1992, Purington filed a cross-claim against Inland.[13]

On September 10, 1992, Inland applied for and received protection under Chapter Eleven of the United States Bankruptcy Code.[14] Inland conceded that it had a liability insurance policy through Aetna Casualty and Surety Co., Inc.[15] In August 1993, Giroux filed a motion pursuant to Rhode Island General Laws section 27-7-2.4[16] to substitute the insurance carrier, Aetna, for Inland, as defendant.[17] In response, the superior court granted Giroux's motion and rejected Inland's contention that relief from the automatic stay[18] was a condition precedent to the superior court's having jurisdiction to substitute Aetna as defendant.[19]

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10. *Id.*

11. *Id.* The court dismissed Giroux's complaint against Purington as a result of a dismissal stipulation entered into by Giroux and Purington on December 21, 1993. *Id.* at 1228. The court also dismissed Purington's third party complaint against Gustafson. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* (citing 11 U.S.C. §§ 1101-46).

15. *Id.*

16. R.I. Gen. Laws § 27-7-2.4 (1995) states that:

> [a]ny person, having a claim because of damages of any kind caused by the tort of any other person, may file a complaint directly against the liability insurer of the alleged tort-feasor seeking compensation by way of a judgment for money damages whenever the alleged tort-feasor files for bankruptcy, involving a reorganization for the benefit of creditors or a wage earner plan, provided that the complaining party shall not recover an amount in excess of the insurance coverage available for the tort complained of.

Id.

17. *Giroux*, 670 A.2d at 1228.

18. 11 U.S.C. § 362 (1988). 11 U.S.C. § 362(a)(1) states that:

> a [bankruptcy] petition filed . . . operates as a stay . . . of the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under [Title 11], or to recover a claim against the debtor that arose before the commencement of the case under [Title 11].

Id.

19. *Giroux*, 670 A.2d at 1228.

Seeking a review of the superior court's substitution order, Aetna and Inland filed, and were granted, a writ of certiorari on June 30, 1994.[20] On July 26, 1994, Giroux filed a motion in the United States Bankruptcy Court for the Eastern District of Wisconsin, to modify the automatic stay to allow Giroux to pursue his suit against Aetna.[21] In response, the bankruptcy court ordered a modification of the stay so the Rhode Island courts could determine against whom the action should proceed.[22]

In their petition for certiorari, Inland and Aetna claimed that substitution was unnecessary because Giroux was allowed to proceed in his claim directly against Inland as a result of the bankruptcy court's order granting relief from the automatic stay.[23] Aetna and Inland also argued that substitution was permissive and discretionary under section 27-7-2.4, and that the superior court erred by not using its discretion to protect Aetna from the prejudice created by being substituted as defendant.[24] Lastly, Inland and Aetna argued that section 27-7-2.4 was unconstitutional and preempted by federal law in that it impeded the bankruptcy court's ability to protect the assets of the debtor.[25] Conversely, Giroux contended that section 27-7-2.4 did not require a determination that substitution was necessary or reasonable given the clear and unambiguous language of the statute.[26]

BACKGROUND

Empowered by the language of the United States Constitution,[27] Congress enacted a national bankruptcy law that preempts any state law by virtue of the Supremacy Clause.[28] Any state law that interferes with the bankruptcy laws or creates additional reg-

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20. *Id.*

21. *Id.* Inland applied for and received protection under Chapter 11 of the United States Bankruptcy Code by the United States Bankruptcy Court for the Eastern District of Wisconsin. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 1228-29.

25. *Id.* at 1229.

26. *Id.*

27. *See supra* note 1 and accompanying text.

28. U.S. Const. art. VI, § 2. The Supremacy Clause states that the "Constitution, and the [l]aws . . . made in [p]ursuance thereof . . . shall be the supreme [l]aw of the land." *See* Texaco, Inc. v. Liberty Nat'l Bank & Trust Co., 464 F.2d 389, 392 (10th Cir. 1972).

ulations has been held to be preempted by federal bankruptcy law.[29] In Rhode Island, it has been firmly established that the federal bankruptcy laws preempt the state laws of insolvency and the rights of debtors.[30]

Prior to *Giroux*, Rhode Island courts had never addressed whether a liability policy of insurance is an asset of the debtor within the control of the bankruptcy court.[31] However, the issue has been addressed in other jurisdictions.[32] In *Tringali v. Hathaway Machinery Co.*,[33] the plaintiff was injured working on a fishing boat while using a winch.[34] Tringali brought suit against the manufacturer of the winch, and was awarded one million dollars in damages.[35] As a result, the manufacturer filed for Chapter Eleven protection under the Bankruptcy Code.[36] In response, Tringali requested that the "automatic stay" be lifted to allow him to pursue a state court proceeding to recover the proceeds from the manufacturer's liability policy.[37] The district court granted Tringali's request and the manufacturer appealed.[38]

In reversing the lifting of the "automatic stay," the First Circuit rejected Tringali's argument that they were not subject to the automatic stay since the proceeds of the liability insurance policy were not property of the estate under 11 U.S.C. § 541(a)(1).[39] The court held that the language of section 541(a)(1) was sufficiently broad to encompass an interest in a liability policy.[40] The court expressed concern that a contrary holding could "start a race to the

29. *Giroux*, 670 A.2d at 1230 (citing International Shoe v. Pinkus, 278 U.S. 261 (1929)).

30. *Id.* (citing *In re* the Matter of Reynolds, 8 R.I. 485 (1867)).

31. *Id.*

32. *Id.*

33. 796 F.2d 553 (1st Cir. 1986).

34. *Id.* at 556.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 560. 11 U.S.C. § 541(a)(1) states that "the commencement of a case under [Title 11]... creates an estate. Such an estate is comprised of... all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (1982 & Supp.1984).

40. *Tringali*, 796 F.2d at 560; *see, e.g.*, A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1001-02 (4th Cir. 1986); *In re* Davis, 730 F.2d 176, 184 (5th Cir. 1984); *In re* Forty-Eight Insulators, Inc., 54 B.R. 905, 907-09 (Bankr. N.D. Ill. 1985).

courthouse whenever a policy is too small to satisfy several potential plaintiffs."[41]

ANALYSIS AND HOLDING

Prior to addressing whether substitution was permissive and judicially discretionary, the court analyzed the language of Rhode Island General Laws section 27-7-2.4 and held that the language was clear and unambiguous.[42] As such, the court stated that an injured party is entitled to substitute the tort-feasor's liability insurer as defendant upon the filing of bankruptcy by the tort-feasor.[43] In addition, the court found that section 27-7-2.4 does not expressly call for any other condition to be satisfied for the substitution of the insurer as defendant.[44] Accordingly, the court rejected Aetna's and Inland's assertions that conditions such as judicial discretion, and obtaining a modification of an automatic stay were necessary conditions for substitution.[45] In view of the aforementioned, the court concluded that the mere filing of bankruptcy by Inland, and nothing more, entitled Giroux to substitute Aetna for Inland under section 27-7-2.4.[46]

In spite of the urging of Aetna and Inland, the court rejected the assertion that substitution of Aetna was unnecessary since Giroux could pursue his claim against Inland.[47] The bankruptcy court's order simply allowed the State to interpret and apply its statutes, and to determine against whom the suit was to proceed.[48] Otherwise stated, the Rhode Island Supreme Court interpreted the order as indicative of the intent of the bankruptcy court, viz., to modify the automatic stay so that a determination could be made

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41. *Tringali*, 796 F.2d at 560.

42. Giroux v. Purington Bldg. Sys., Inc., 670 A.2d 1227, 1229 (R.I. 1996). Although the meaning of Rhode Island General Laws section 27-7-2.4 had never been addressed per se, a similar direct-action statute was previously analyzed in *Markham v. Allstate Insurance Co.*, 352 A.2d 651 (R.I. 1976). In *Markham*, the court held that the expressed meaning of a statute will be presumed as the intention of the legislature where the language of the statute is clear and unambiguous, and expresses a plain and sensible meaning. *Id.*

43. *Giroux*, 670 A.2d at 1229.

44. *Id.*

45. *Id.* at 1229-30.

46. *Id.*

47. *Id.* at 1230.

48. *Id.*

by the superior court as to Giroux's substitution motion.[49] The bankruptcy court's intent was not to re-expose Inland to the judgment of the superior court.[50] Consequently, Giroux's direct action against Aetna was not foreclosed by the modification, since the automatic stay was operative and had not been modified with regard to Inland.[51]

Lastly, the Rhode Island Supreme Court rejected Aetna's and Inland's assertion that section 27-7-2.4 was preempted by federal law because it hindered the protection of the bankrupt's assets by exposing the liability insurer to claims that preceded the bankruptcy filing.[52] This presented an issue of first impression for the court: whether a policy of liability insurance is an asset of the debtor for bankruptcy protection purposes.[53]

In deciding this issue, the court distinguished the instant action from *Tringali* and *A.H. Robins Co. v. Piccinin*,[54] both of which had held that the debtor's liability policies were assets and entitled to bankruptcy protection.[55] Unlike the liability policy in the instant action, the policies involved in *A.H. Robins* and *Tringali* were subject to claims of multiple parties.[56] In the instant case, Giroux was the only claimant against Inland's liability policy with Aetna and there was no evidence to the contrary.[57] The court reasoned that Inland's other creditors could not be harmed in light of the fact that they were not entitled to the insurance proceeds.[58] Therefore, the court concluded that by substituting the liability insurer as the defendant, where there is only one claimant of a liability insurance policy, the harm alluded to in *Tringali* and *A.H. Robins* does not result.[59]

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49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. 788 F.2d 994 (4th Cir. 1986).

55. *Giroux*, 670 A.2d at 1231 (citing Tringali v. Hathaway Mach. Co., 796 F.2d 553 (1st Cir. 1986); *A.H. Robins*, 788 F.2d 994).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.; see, e.g.*, Aaron v. Bankers & Shippers Ins. Co., 475 So. 2d 379 (La. Ct. App. 1985) (holding that a court may refuse an action in the event that the bankrupt's assets are threatened).

CONCLUSION

Although an issue of first impression, the question of whether a policy of liability insurance is an asset of a debtor was effortlessly resolved by the Rhode Island Supreme Court, given the reliability of the case law from other jurisdictions. As a consequence of *Giroux*, Rhode Island now follows the majority of jurisdictions and holds that a policy of liability insurance is an asset of the debtor within the scope of the bankruptcy court. However, such assets may be reached in cases such as *Giroux* where there is only one claimant under the policy.

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Constitutional Law. *Hometown Properties, Inc. v. Fleming*, 680 A.2d 56 (R.I. 1996). Anti-SLAPP statute found constitutional both under United States and Rhode Island Constitutions and applicable against allegations of tortious conduct.

The First Amendment to the United States Constitution guarantees "the right of the people . . . to petition the government for a redress of grievances."[1] The Strategic Litigation Against Public Participation (anti-SLAPP)[2] Act was enacted by the Rhode Island General Assembly to protect individuals who exercise this First Amendment right from lawsuits.[3] In *Hometown Properties v. Fleming, Inc.*,[4] the Rhode Island Supreme Court found that the anti-SLAPP statute was constitutional, holding that persons exercising their free speech rights fall within the protection of the statute for all claims including those of alleged tortious conduct.[5]

FACTS AND TRAVEL

The Rhode Island Department of Environmental Management (DEM) held meetings with a group of North Kingstown, Rhode Island residents regarding a local landfill.[6] Following these meetings, the defendant, Nancy Hsu Fleming (Fleming), wrote a letter to the DEM alleging that a landfill operated by the plaintiff, Hometown Properties, Inc. (Hometown), should be closed and cleaned of hazardous waste and contaminated groundwater.[7] Hometown filed a complaint in the Rhode Island Superior Court

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1. U.S. Const. amend. I.

2. *See* George W. Pring & Penelope Canan, *SLAPPs: An Overview of the Practice*, C935 ALI-ABA 1 (1994). Professors Pring and Canan developed the term "SLAPP" to describe the occurrence of a suit initiated to punish activists for petitioning the government.

3. Rhode Island General Laws section 9-33-1 states that "[f]ull participation by persons and organizations and robust discussion of issues of public concern . . . are essential to the democratic process." R.I. Gen. Laws § 9-33-1 (1995).

4. 680 A.2d 56 (R.I. 1996).

5. *Id.* at 64.

6. *Id.* at 58. The meetings were held around November 21, 1991, and February 17, 1992. *Id.*

7. *Id.* The letter, which also commented on proposed new rules and regulations for groundwater quality proposed by the DEM, stated that "[t]here are clear statements by the EPA and other experts that the Landfill contains hazardous waste, that the Landfill continues to contaminate offsite groundwater . . . . The Town expert has documented a three-year history of groundwater contamination." *Id.* The letter was copied to various state and federal officials. *Id.*

after Fleming refused to issue a retraction.[8] The complaint sought compensatory and punitive damages for defamation and tortious interference.[9] Fleming filed a motion to dismiss in the superior court claiming an "absolute constitutional privilege against tort liability" from her statements made in the letter to DEM.[10] The motion was denied.[11]

Fleming filed a second motion to dismiss based on the Rhode Island anti-SLAPP statute.[12] The motion was passed on by the motion judge, and Fleming subsequently filed a third motion to dismiss which was accompanied by a memorandum in support of her position.[13] The superior court denied Fleming's motion, stating that the defendant did not fall within the class of defendants defined in the statute, and held that the statute does not provide absolute immunity for libel.[14] Fleming appealed contending that the "Noerr-Pennington doctrine" should be applied in interpreting the anti-SLAPP statute.[15] Hometown argued that the anti-SLAPP act was unconstitutional.[16]

BACKGROUND

The General Assembly enacted the anti-SLAPP statute to protect valid governmental petitioning as a response to "a disturbing increase in lawsuits brought primarily to chill the valid exercise . . . of freedom of speech and petition for the redress of griev-

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8. *Id.* at 59. The complaint was filed December 2, 1992. *Id.*

9. *Id.*

10. *Id.* The Rhode Island Attorney General filed an amicus curiae brief on behalf of Fleming. *Id.*

11. *Id.*

12. *Id.* The Rhode Island General Assembly enacted the anti-SLAPP statute. R.I. Gen. Laws § 9-33-1 (1993). All actions that had "not been fully adjudicated" by the date of the act were included retroactively, and a party to such action was allowed to file a "special motion to dismiss a claim" within 60 days of enactment. *Id.*

13. *Hometown*, 682 A.2d at 59. The memorandum included reports and government documents that supported Fleming's contention that her disputed statements were made in response to public comments that were sought by the DEM regarding proposed landfill rules. *Id.*

14. *Id.* The motion judge presumed the anti-SLAPP statute was constitutional. *Id.*

15. *Id.* See *infra* note 18 for an explanation of the Noerr-Pennington doctrine.

16. *Id.* at 60. Hometown challenged the statute on "equal protection, right to a trial by jury, due process, retroactive application, separation of powers, denial of access to state courts, and bill of attainder" issues. *Id.*

ances."[17] The First Amendment right to petition was clearly articulated by the United States Supreme Court through its formulation of the Noerr-Pennington doctrine.[18] The Rhode Island Supreme Court articulated the doctrine to mean that if the defendant looked to the outcome of the government process to resolve the dispute, then the petitioning was legitimate.[19] The supreme court adopted the Noerr-Pennington doctrine,[20] and concluded that constitutional considerations take precedence over common law tort doctrines.[21]

The original enactment of the Rhode Island anti-SLAPP statute in 1993 provided that the moving party should be granted a "special motion to dismiss" if the claim involved free speech and the "moving party did not engage in a course of tortious conduct."[22] This provision was amended in its entirety in 1995, articulating the "conditional immunity afforded to non-sham petitioning activity under Noerr-Pennington."[23] The amendment defined a "sham activity" as one that is both objectively baseless in that "no reasonable person . . . could realistically expect success in procuring such government action," and "subjectively baseless in the sense that it is actually an attempt to use the governmental process for its own direct effect."[24]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court found the anti-SLAPP statute constitutional based upon the principle that the court may adopt an interpretation of the language that avoids a finding of

17. *Id.* at 61 (quoting R.I. Gen. Laws § 9-33-1 (1993)).

18. *Id.* at 60; *see* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United States Mine Workers v. Pennington, 381 U.S. 657 (1965). These cases, originally brought in the context of antitrust law, held that, when the alleged anti-competitive activity involved a legitimate, i.e., not a "sham," petition of the government, the activity would not violate antitrust laws.

19. *Hometown*, 680 A.2d at 60.

20. *Id.* at 60-61; *see* Cove Road Dev. v. West Cranston Indus. Park Assoc., 674 A.2d 1234, 1236 (R.I. 1996); Pound Hill Corp., Inc. v. Perl, 668 A.2d 1260, 1263 (R.I. 1996).

21. *Hometown*, 680 A.2d at 60 (citing *Cove Road*, 674 A.2d at 1239).

22. *Id.* at 61 (quoting R.I. Gen. Laws § 9-33-2(a) (1995)).

23. *Id.* (citing R.I. Gen. Laws § 9-33-2(a)). The amended provision grants conditional immunity from civil claims, counterclaims and cross-claims that are directed at free speech. *Id.*

24. R.I. Gen. Laws § 9-33-2(a)(1)-(2) (1995).

unconstitutionality.[25] The statute was held to be consistent with the Noerr-Pennington doctrine, which is based upon the First Amendment right to petition the government for redress of grievances.[26] The anti-SLAPP statute was also construed as being consistent with the General Assembly's intent to "secure the vital role of open discourse on matters of public importance."[27]

Hometown claimed that an action for defamation would fall outside the immunity of the statute.[28] The original anti-SLAPP act enacted in 1993 did not contain the Noerr-Pennington sham doctrine, and the 1995 amendment[29] to the anti-SLAPP statute was not applied retroactively.[30] The superior court judge agreed with Hometown that the Noerr-Pennington doctrine was not applicable, and could not "rule as a matter of law that [Fleming] did not engage in tortious conduct."[31] The court found that Fleming did not fall "within the class of defendants defined in 9-33-2(a)."[32] The Rhode Island Supreme Court held that the trial judge erred in regarding the Noerr-Pennington doctrine inapplicable to the anti-SLAPP statute.[33]

The supreme court held that the 1995 amendment was intended only to clarify the original provisions, and it specifically found that the "term 'tortious conduct' in the 1993 act is synonymous with the term 'sham petitioning' in the 1995 amendment."[34] An allegation that a party has engaged in tortious conduct was never intended by the legislature as an exception to the anti-SLAPP statute.[35] The court concluded by stating "[t]he anti-SLAPP statute and our holding today are consistent with the independence and individualism that led this state's earliest settlers 'to

25. Advisory Opinion to the Governor (DEPCO), 593 A.2d 943, 946 (R.I. 1991) (holding that the court must be convinced beyond a reasonable doubt that the act is contrary to a constitutional provision, and if more than one interpretation is available, then the court will avoid unconstitutionality).

26. *Hometown*, 680 A.2d at 60-62.

27. *Id.* at 62.

28. *Id.*

29. *Id.* The 1995 amendment to the anti-SLAPP statute applied to a provision that was nearly identical to the Noerr-Pennington doctrine. *See supra* note 18.

30. *Hometown*, 682 A.2d at 62.

31. *Id.* at 63.

32. *Id.* See *supra* notes 22-23 and accompanying text for the requirements of the statute.

33. *Hometown*, 682 A.2d at 63.

34. *Id.*

35. *Id.* at 64.

create a free community of seekers after the Truth and a haven for those persecuted elsewhere for their conscientious beliefs.'"[36]

CONCLUSION

The court's holding in *Hometown* allows activists broad immunity from civil suit as long as the activity is related to involvement with public forums.[37] The intent of the statute is to protect the valid exercise of free speech.[38] This immunity may be too broad, especially where the equitable rights of legitimate plaintiffs are not protected from grossly tortious conduct of activists or extremists.

In order to find a balance between the rights of legitimate plaintiffs and public participants, the application of the Noerr-Pennington doctrine should be modified to give equal weight to both the objective and the subjective test in defining what constitutes a "sham." This doctrine, which has been applied to the Rhode Island anti-SLAPP statute, deems that free speech is a sham only if both the objective and subjective tests are met. It does not consider the weight of each test. A highly abusive activist can be granted immunity under the test as long as there is any objective basis of legitimacy in the exercise of his or her rights.

There is a dramatic need to encourage citizen involvement in any representative democracy. The anti-SLAPP statute helps to preserve this objective by protecting participation without the chill of an abusive lawsuit. The courts and the legislature should consider balancing the Noerr-Pennington doctrine to protect legitimate plaintiffs adequately from potential abuses of this immunity.

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36. *Id.* (quoting William G. McLoughlin, Rhode Island, A History 10 (1978)).
37. *Id.*
38. *Id.* The United States Supreme Court has established limits on some types of speech such as obscenity, Roth v. United States, 354 U.S. 476 (1957), and fighting words, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The anti-SLAPP statute and the Rhode Island Supreme Court's holding in *Hometown* does not establish any such limitations on acceptable speech that may be protected by the immunity of the statute.