Roger Williams University Law Review

Volume 8 | Issue 2 Article 11

Spring 2003

2002 Survey of Rhode Island Law: Cases: Civil Procedure

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Recommended Citation

Hughes, Amy; Stockwell, Joshua A.; Medina, Carolyn P.; and Mancini, Nicholas R. (2003) "2002 Survey of Rhode Island Law: Cases: Civil Procedure," *Roger Williams University Law Review*: Vol. 8: Iss. 2, Article 11.
Available at: http://docs.rwu.edu/rwu_LR/vol8/iss2/11

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Civil Procedure. *Bailey v. Algonquin Gas Transmission Co.*, 788 A.2d 478 (R.I. 2002). A party may not be relieved of a final judgment under rule 60(b)(6) for inexcusable neglect. Inexcusable neglect precludes relief under rule 60(b)(1), which allows relief only for "excusable neglect"; therefore, inexcusable neglect cannot constitute the "other grounds" required for relief under rule 60(b)(6).

FACTS AND TRAVEL

Plaintiffs filed suit alleging they suffered personal injuries while they were excavating a trench and laying a gas line while employed by Algonquin Gas Transmission Company.[1] Plaintiffs alleged defendant, Maguire Group, Architects, Engineers, Planners, Ltd. (Maguire), knew or should have known the soil and ground water that plaintiffs excavated was contaminated with toxic chemicals.[2] Maguire filed an answer denying the allegations.[3]

During pretrial discovery, plaintiffs requested production of several documents from Maguire, to which Maguire did not respond.[4] After Maguire failed to produce the documents requested, a motion and order compelling Maguire to produce the documents was issued, a conditional default order was also issued, default was entered, there was a hearing on damages, and, finally, a default judgment was entered in the amount of $458,533.69.[5] All of the court papers were properly served on Maguire's attorney, John Coffey, Jr. (Coffey); however, Coffey failed to respond to any requests.[6] Coffey cited his wine consumption, which eventually led to treatment for alcoholism, as the reason for his impaired judgment in handling the case.[7]

Following the execution on the judgment, Maguire engaged new counsel and filed a motion to vacate the judgment pursuant to rule 60(b)(1) and (6) of the Rhode Island Superior Court Rules of Civil Procedure.[8] The motion justice found that there was no

1. Bailey v. Algonquin Gas Transmission Co., 788 A.2d 478, 480 (R.I. 2002).
2. *Id.*
3. *Id.* at 479.
4. *Id.* at 480.
5. *Id.* at 479-80.
6. *Id.* at 480.
7. *Id.* at 481.
8. *Id.* at 480-81.

causal connection between Coffey's alcoholism and his failure to properly manage this case, citing the fact that Coffey had properly managed many other legal matters during the same time period.[9] The court concluded that Coffey's behavior was not excusable neglect under rule 60(b)(1), but rather it was unexplained or willful conduct.[10] The motion justice also denied relief under rule 60(b)(6) reasoning that relief under rule 60(b)(6) must be mutually exclusive from relief under rule 60(b)(1)-(5).[11] He held that because Coffey's inexcusable neglect disqualified Maguire from relief under rule 60(b)(1), it also disqualified Maguire from relief under rule 60(b)(6).[12] The trial court also found that there were no circumstances present that would result in a manifest injustice to the defendant arising out of the default judgment.[13]

Due to the aforementioned reasons, the motion was denied.[14] Maguire appealed to the Rhode Island Supreme Court, challenging only the motion justice's findings with respect to rule 60(b)(6).[15]

BACKGROUND

Rule 60(b) states the court may relieve a party of a final judgment or order for "(1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment."[16]

ANALYSIS AND HOLDING

The court held that the fundamental law of agency imputes the neglect of an attorney to his client; therefore, Coffey's failure to respond was imputed to Maguire.[17] The court held that this concept remains unchanged regardless of whether the legal misconduct constituted "gross" negligence.[18]

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9. *Id.* at 481.
10. *Id.*
11. *Id.*
12. *Id.* at 482.
13. *Id.*
14. *Id.* at 480.
15. *Id.* at 481.
16. R.I. SUPER. CT. R. CIV. P. 60.
17. *Bailey,* 788 A.2d at 485.
18. *Id.* The court addressed two exceptions as to when the law of agency does not impute the neglect of an attorney to his client: when the client attempts to

The supreme court responded to Maguire's challenge under rule 60(b)(6) by affirming the motion justice's decision using the same reasoning applied by the motion justice.[19] The court found that the motion justice did not abuse his discretion by finding Coffey's negligence was inexcusable.[20] Therefore, Maguire was precluded from relief under rule 60(b)(1), which provides relief only for "excusable neglect."[21] The supreme court further reasoned the same inexcusable neglect cannot be the "other grounds" required for relief under rule 60(b)(6), unless other extraordinary factors were also present, because rule 60(b)(6) was not intended as a catchall.[22] The court was unable to find other extraordinary factors to justify relief under rule 60(b)(6); therefore, it denied Maguire's motion to vacate the judgment.[23]

CONCLUSION

The law of agency imputes the neglect of an attorney to his client even if the misconduct of the attorney rises to the level of gross negligence. A party may not be relieved of a final judgment under rule 60(b)(6) for inexcusable neglect because the same inexcusable neglect that precludes relief under rule 60(b)(1) cannot constitute the "other grounds" required for relief under Rule 60(b)(6).

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sever the relationship with the attorney and when extraordinary circumstances exist. *Id.* at 483.

19. *Id.* at 482-83.

20. *Id.* at 482.

21. *Id.*

22. *Id.* at 483.

23. *Id.* at 483-84.

Civil Procedure. *Flynn v. Al-Amir*, 811 A.2d 1146 (R.I. 2002). The Rhode Island Supreme Court held that a motion to vacate a void judgment is not subject to the one-year deadline; service of process on the defendant's last known address at his mother's house was proper; and the exclusion of affidavits as inadmissible hearsay was proper.

FACTS AND TRAVEL

Kerri Ellen Flynn (Flynn) filed for divorce in November 1989 against Nicholas Al-Amir (Al-Amir), her alleged common-law husband.[1] Pursuant to Family Court Rules of Procedure for Domestic Relations, Flynn mailed the complaint to Al-Amir via certified mail to his last known address in Massachusetts.[2] Even though she knew he married a woman in California, Flynn believed Al-Amir still lived in Massachusetts because he still visited and called her.[3] Al-Amir's mother received the complaint and signed it on behalf of her son.[4] Al-Amir did not answer the complaint or appear in family court, and as a result final judgment was granted in July 1990.[5] The divorce decree granted Flynn child support for the minor child of the alleged common-law marriage.[6] Al-Amir did make some child support payments, but fell behind by thousands of dollars.[7]

In May 2000, almost ten years later, Al-Amir filed a motion to vacate the judgment on grounds of insufficient service of process.[8] The family court held a hearing, which neither Al-Amir nor his mother attended.[9] The court found that Al-Amir's contacts with the state were sufficient for the court to exercise personal jurisdiction over him and that he failed to prove the service of process was invalid.[10] In support of his motion, Al-Amir submitted affidavits from himself and his mother, where he attacked the factual grounds of his purported common-law marriage.[11] The family

1. Flynn v. Al-Amir, 811 A.2d 1146, 1148 (R.I. 2002).
2. *Id.* at 1149.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 1149-50.
11. *Id.*

court refused to allow Al-Amir's affidavits into evidence because they were hearsay.[12] The court also ruled that Al-Amir had not established that the one-year limitation for filing motions to vacate judgments was inapplicable in this case.[13] Al-Amir's motion to vacate was denied.[14]

Analysis and Holding

Turning first to the issue of whether the one-year limitations for filing the motion to vacate was applicable, the Rhode Island Supreme Court held that the one-year limitation was not applicable to motions to vacate where the judgment is void.[15] The supreme court reasoned that time is inconsequential when considering a void judgment because the judgment was never effective.[16] Furthermore, the court noted that it was the duty of the court to remove the cloud of a void judgment whenever it was brought to the court's attention regardless of the circumstances.[17] In this instance, by alleging, in his motion to vacate, that service of process was insufficient, Al-Amir gave the family court the basis to consider the motion, as the failure of service of process would void the judgment.[18]

Next, the supreme court considered whether the service of process was proper.[19] The court held that service of process by certified mail to Al-Amir's last known address in Massachusetts was proper.[20] Due process requires notice of the lawsuit be reasonably calculated to afford the parties an opportunity to present their objections.[21] Service by registered mail with return receipt meets this requirement because it normally guarantees the defendant, a relative, or close associate has received notice of the pending suit.[22] In this case, Flynn's actions of sending the summons and complaint to Al-Amir's last known address and his mother's receipt of

12. *Id.*
13. *Id.* at 1150.
14. *Id.* at 1149.
15. *Id.* at 1150-51 (citing Lamarche v. Lamarche, 348 A.2d 22, 23 (R.I. 1975)).
16. *Id.* at 1150 n.3 (citing *Lamarche*, 348 A.2d at 23).
17. *Id.* (citing *Lamarche*, 348 A.2d at 23).
18. *Id.* at 1150-51.
19. *Id.* at 1151.
20. *Id.*
21. *Id.*
22. *Id.* (citing Action Indus., Inc. v. Wiedeman, 346 A.2d 798, 804 (Pa. Super. Ct. 1975)).

it, met the minimum requirements that a defendant be afforded notice of the pending action.[23]

Last, the court considered whether the family court's refusal to consider Al-Amir's affidavits in deciding the motion to vacate, was proper.[24] The court held that the family court's decision to exclude the affidavits was not an abuse of discretion.[25] The family court's reasons for excluding the affidavit were that Flynn would be denied the right to cross-examine both Al-Amir and his mother and that the fact-finder would be denied the right to observe the demeanor of the witnesses.[26] Furthermore, Al-Amir implied in his motion to vacate that he would make himself and his mother available to testify if required to do so.[27] The Rhode Island Supreme Court noted the family court's rejection of the affidavits effectively called upon Al-Amir and his mother to testify at the hearing if they wanted to tell their side of the story.[28] The family court was entitled to doubt Al-Amir's affidavits because Al-Amir failed to make himself available for cross-examination even though his affidavit implied he would do so if required.[29] Therefore, the family court did not abuse its discretion in denying the motion to vacate.[30]

Conclusion

The Rhode Island Supreme Court held that a motion to vacate a void judgment is not subject to the one-year limitation, even ten years after final judgment. Service of process by registered mail on a close relative, such as defendant's mother at the defendant's last known address was proper. The family court's decision to exclude affidavits as hearsay was not an abuse of discretion where the defendant asserted he would make himself available to testify but did not appear at the hearing.

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23. *Id.* at 1152.
24. *Id.*
25. *Id.*
26. *Id.* (citing Andrews v. Masse, 341 A.2d 30, 31 (R.I. 1975)).
27. *Id.* at 1153.
28. *Id.*
29. *Id.*
30. *Id.*

Civil Procedure. *Johnson v. Newport County Chapter for Retarded Citizens*, 799 A.2d 289 (R.I. 2002). Where a plaintiff has failed to file suit in a timely manner due to mental incapacity, statutes of limitation are subject to equitable tolling if the plaintiff is shown to have been of unsound mind. Being of unsound mind is defined as "the inability to manage one's day-to-day affairs."

FACTS AND TRAVEL

Richard Johnson (Johnson), an employee of the Newport County Chapter for Retarded Citizens (Newport), alleged he was sexually harassed by his supervisor.[1] Despite conversations with his supervisor informing her that her comments and advances were unwelcome and requesting this behavior cease, the harassing behavior continued.[2] His request for assistance from management also had no effect.[3] As a result of the harassment, Johnson began to suffer severe distress and anxiety, depression, high blood pressure, and weight loss.[4] He was diagnosed with an anxiety disorder and advised by his physician to take a leave of absence.[5] In spite of advanced and aggressive mental health care, Johnson's condition deteriorated.[6] He experienced intense agoraphobia, panic attacks, and hair loss, and was diagnosed with post-traumatic stress disorder.[7]

On May 18, 1995, Johnson filed a claim of discrimination against Newport with the Rhode Island Commission for Human Rights and the Equal Employment Opportunity Commission.[8] The Commission subsequently issued a "Notice of Right to Sue" on May 17, 1997.[9] Though Johnson eventually filed the action against Newport, he did not do so within ninety days of the receipt of the Notice,[10] as required by section 28-5-24.1(b) of the Rhode Island General Laws.[11]

1. Johnson v. Newport County Chapter for Retarded Citizens, 799 A.2d 289 (R.I. 2002).
2. *Id.* at 290.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* (citing R.I. GEN LAWS § 28-5-24.1(b) (2000)).

Newport filed a motion for summary judgment for failure to institute the claim in a timely manner.[12] In opposing the motion, Johnson argued that the ninety-day provision should be tolled pursuant to the exception in section 9-1-19, for people of unsound mind.[13] Johnson submitted an affidavit from his treating psychiatrist stating that during those ninety days, Johnson had attempted suicide and suffered from extreme social phobias, blackouts, and difficulty with memory.[14] It was the psychiatrist's opinion that during this time, Johnson's judgment was impaired to the extent that he was unable to comprehend or exercise his right to undertake litigation in this, or any other, matter.[15]

The trial court held that section 9-1-19 was not available to Johnson because section 9-1-24 made it inapplicable to actions limited by special time provisions.[16] Holding that Johnson's causes of action under the Rhode Island Fair Employment Practices Act and the Rhode Island Civil Rights Act of 1990 were subject to the ninety-day time limits pursuant to section 28-5-24.1(b),[17] the trial court granted Newport's motion for summary judgment.[18]

ANALYSIS AND HOLDING

While upholding the trial court's determination that section 9-1-24 makes the tolling provisions of section 9-1-19 inapplicable in this case,[19] the Rhode Island Supreme Court recognized equitable tolling as an exception to the general statute of limitations.[20] The court quoted the United States Supreme Court in *Irwin v. Department of Veteran Affairs,*[21] which addressed equitable tolling and noted it was "applicable to lawsuits against private employers under Title VII."[22]

12. *Id.* at 290-91.
13. *Id.* at 291.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 292.
20. *Id.*
21. 498 U.S. 89 (1990).
22. *Johnson*, 799 A.2d at 292 (quoting *Irwin*, 498 U.S. at 95).

After citing other federal case law recognizing equitable tolling,[23] the Rhode Island Supreme Court rejected Newport's argument that these cases were not binding on the court because the states are not required to follow federal decisions involving procedural requirements in Title VII cases.[24] The court held that the availability of equitable tolling is outcome determinative and more substantive than procedural in nature.[25] Accordingly, the federal authority was found to be binding on the court.[26]

The court recognized equitable tolling as an available exception to the ninety-day provisions of section 28-5-24.1(b) for people of unsound mind,[27] defining unsound mind as the inability to manage one's day-to-day affairs.[28] This standard had been previously adopted by the court in defining the requirements of section 9-1-19,[29] the provision that Johnson had originally tried to use.[30] The court also stated that since exceptions to statutes of limitations are strictly construed, an inability to manage one's day-to-day affairs must be demonstrated by "objectively ascertainable actions or inaction."[31]

In remanding the case for a determination of whether Johnson met the standard for unsound mind, the court noted that the attribution of an impaired condition to the actions of a defendant was a factor relevant to the application of equitable principles, though not a requirement.[32]

CONCLUSION

In *Johnson v. Newport County Chapter for Retarded Citizens, Inc.*, the Rhode Island Supreme Court held that equitable tolling is an exception to the general statute of limitations based on principles of equity and fairness, which is available to litigants who are of unsound mind. The court defined the standard for unsound

23. *Id.* (citing Irwin v. Dep't of Veteran's Affairs, 498 U.S. 89, 95 (1990) (citing Zipes v. TransWorld Airlines, Inc., 455 U.S. 385, 394 (1982))).
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 293.
28. *Id.*
29. *Id.* (citing Roe v. Gelineau, 794 A.2d 476 (R.I. 2002)).
30. *Id.* at 291.
31. *Id.*
32. *Id.*

mind as the inability to manage one's day-to-day affairs, which must be demonstrated by evidence of objectively ascertainable action or inaction.

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Civil Procedure. *Mottola v. Cirello*, 789 A.2d 421 (R.I. 2002). A state employee whose vehicle struck another was properly dismissed from suit where the employee was acting within the scope of his employment and the claim did not arise out of fraud, misconduct, or actual malice by the employee. Also, the trial court may not order the attorney general to defend such suit until the employee makes a written request and the attorney general declines to engage independent counsel.

FACTS AND TRAVEL

While driving on June 18, 1997, Mark E. Cirello (employee), an employee of the State of Rhode Island, struck Rudolph Mottola (plaintiff) from the rear.[1] Mottola filed a complaint against the defendant on June 10, 1998, alleging negligence by both Cirello and the state via respondeat superior.[2] Prior to the collision, the state had entered into an insurance contract with Royal Sun & Alliance Insurance Company (Royal) that provided coverage for the state's vehicles, including the vehicle driven by Cirello.[3] As part of the coverage contract, the state was required to cooperate in the defense of any claims and allow the carrier discretion to both investigate and settle claims.[4]

After being served with the complaint, the attorney general forwarded the claim to Royal for defense and coverage, after which Royal retained the firm of Higgins, Cavanagh, & Cooney (Higgins) to answer and defend the suit.[5] Answering the complaint, Higgins moved, pursuant to section 9-31-12(b) of the Rhode Island General Laws,[6] to dismiss the claim against Cirello and substitute the state

1. Mottola v. Cirello, 789 A.2d 421, 422 (R.I. 2002).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 423; R.I. GEN. LAWS § 9-31-12 (1997) provides:

Indemnification—Reservation of obligation—Certification—(a) The state reserves the right to determine whether or not it will indemnify any employees defended pursuant to §§ 9-31-8 - 9-31-11, if a judgment is rendered against the employee (b) Upon certification by the court in which the tort action against a state employee is pending that (1) the defendant employee was acting within the scope of his or her office or employment when the claim arose, and (2) the claim does not arise out of actual fraud, willful misconduct, or actual malice by the employee, any civil action or proceeding commenced upon the claim under this statute shall be deemed

as the party defendant.[7] The trial court granted the motion, dismissing the claim against Cirello.[8] The trial court also declared sua sponte, that Mottola was no longer entitled to statutory interest on any potential judgment and that the statutory cap on damages pursuant to section 9-31-1 applied to any judgment plaintiff might recover.[9] Finally, the trial court ordered that the "Attorney General [shall] enter his appearance forthwith [and that] [c]ounsel for the defendant shall withdraw simultaneously."[10] The Rhode Island Supreme Court granted certiorari to review these interlocutory rulings.[11]

Analysis and Holding

First, reviewing Cirello's motions to dismiss the claim and substitute the state as the party defendant, the court found the statutory language of section 9-31-12(b) to be clear and unambiguous.[12] The court held that once the state stipulated that Cirello was acting within the scope of his employment and that the suit was not improperly motivated, the substitution of the state as party defendant was appropriate, and Cirello was properly removed from the case.[13]

Turning to the trial court's determination of counsel, the supreme court found that, although section 9-31-6 provided that in an action "against the [S]tate of Rhode Island, the attorney general, or any assistant attorney general authorized by him or her, shall represent the state in the action[,]" the statute did not preclude the state from entering into a contract that allowed an insurance carrier to provide a defense to claims made pursuant to the policy.[14] The court reasoned that although section 9-31-8 allows the attorney general to defend any action brought pursuant to the statute "upon a written request of an employee or former employee

> to be an action or proceeding brought against the state under the provisions of this title and all references thereto, and the state shall be substituted as the party defendant.

Id. (quoting R.I. GEN LAWS § 9-31-12 (1997)).

7. *Id.* at 422.
8. *Id.*
9. *Id.* at 423.
10. *Id.*
11. *Id.*
12. *Id.* at 423-24.
13. *Id.* at 424.
14. *Id.* at 424 (citing R.I. GEN. LAWS § 9-31-6 (1997)).

of the state," section 9-31-9 recognizes that it may not be in the best interests of the state for the attorney general to defend actions in certain situations.[15] Furthermore, the court found that where the attorney general concludes that it is not in the state's best interest to undertake a defense, section 9-31-11 requires the state to pay reasonable counsel fees and the attorney general to consult in advance with such counsel to discuss fee liability.[16] Accordingly, the court found that, pursuant to section 9-31-10, the attorney general shall "assume exclusive control over the representation of the employee or former state employee" only where there has been a written request from the employee, and only after the attorney general has declined to exercise his or her right to require the state to retain independent counsel.[17] The court added that both sections 28-39-13 and 28-42-41 of the Rhode Island General Laws authorize the attorney general to delegate work to private counsel in tort actions.[18]

Because there was no evidence that Cirello ever requested the attorney general to defend in the suit, and the attorney general had no obligation to undertake representation of the state until Cirello was dismissed from the action, the court found the order to be an abuse of discretion.[19] The court held that it was not the province of the superior court or the state's supreme court to dictate how the attorney general chooses to carry out his or her statutory functions.[20] Accordingly, the supreme court vacated both the trial court's order of appearance to the attorney general and the order directing defense counsel Higgins to withdraw.[21]

Lastly, the court found that although the applicability of the statutory cap on damages provided in section 9-31-2 and the availability of prejudgment interest in the context of the case were both captivating issues, they were not before the trial justice.[22] Thus, the trial court's issuance of such orders constituted an abuse of discretion.[23]

15. *Id.*
16. *Id.* at 425.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 425-26.
23. *Id.* at 426.

The Dissenting Opinion

Justice Flanders disagreed with the majority's decision to quash the portion of the superior court's order requiring the attorney general to enter his appearance on behalf of the state, and dissented from this portion of the opinion.[24] He argued that section 9-31-6 is clear in requiring the attorney general to represent the state in any suit brought against it under the Governmental Tort Liability Act.[25] Justice Flanders did note, however, that he found nothing in the law prohibiting the assistance of private counsel in representing the state, but argued that complete abdication of the attorney general's ultimate control and responsibility in such cases was plainly prohibited.[26]

CONCLUSION

The Rhode Island Supreme Court held: 1) a state employee whose vehicle struck another was properly dismissed from suit brought by the other driver for personal injuries where the state employee was acting within the scope of his employment and the claim did not arise out of actual fraud, willful misconduct, or actual malice by the state employee; 2) it was an abuse of the trial court's discretion to order the attorney general to defend a personal injury action resulting from a vehicular collision involving a state employee unless that employee had made a written request and the attorney general declined to engage independent counsel; and 3) it was an abuse of the trial court's discretion to order that the statutory prejudgment interest would not be available and that damages were capped in a motorist's suit against the state for injuries received when struck by state employee-driven vehicle.

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24. *Id.* (Flanders, J., concurring in part and dissenting in part).
25. *Id.* at 429.
26. *Id.*

Civil Procedure. *Norwest Mortgage, Inc. v. Masse*, 799 A.2d 259 (R.I. 2002). A secured creditor who never filed an answer or challenged the validity of a tax sale of real estate owned by a debtor after receiving notice of such sale is barred from doing so in a later proceeding to set aside the sale, even if the sale was in violation of the bankruptcy code's automatic stay provision. Additionally, an appeal by a secured creditor is timely despite failure to appeal from an order dismissing its complaint, given that the order directed that judgment "shall enter" for defendants and creditor filed notice of appeal six days after the final judgment was subsequently entered.

FACTS AND TRAVEL

Defendant Christopher Robbins (debtor) executed a note in favor of Norwest Mortgage, Inc. (Norwest) secured by a mortgage on property in Cranston (City).[1] Robbins later filed a petition for bankruptcy in the United States Bankruptcy Court, "triggering the automatic stay of legal proceedings against him."[2] While his petition was pending, the City sold Robbins's property at a tax sale to Karolye White (White), and the bankruptcy court granted Norwest relief from the automatic stay without foreclosing on the mortgage.[3] The bankruptcy court granted a discharge of debts and closed the proceeding on April 15, 1998.[4] Later, White filed a petition to foreclose a tax lien on the property, giving notice to Norwest, and on January 5, 1999, the superior court issued a final decree that all rights of redemption be foreclosed and barred.[5] White then transferred his interest to Kevin Masse and K.B. Riccio on January 12, 1999, and Norwest thereafter filed a complaint seeking to set aside the original tax sale on the grounds that it was void due to its consummation during the debtor's bankruptcy in violation of the automatic stay.[6]

On May 8, 2000, the superior court denied Norwest's motion for summary judgment, ruling that because Norwest was a non-

1. Norwest Mortgage, Inc. v. Masse, 799 A.2d 259, 260 (R.I. 2002).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

debtor third party, it had no standing to challenge the tax sale.[7] Following this decision, the court entered an order, providing in part, that "judgment shall enter in this matter for the Defendants, Kevin Masse, K.B. Riccio, Karolye White, and the City of Cranston . . . ."[8] After no final judgment entered upon this order, Norwest sought to do so, while the defendants objected on the grounds that the June 23 order constituted a final judgment in itself.[9] The trial justice subsequently determined that no judgment had been entered, and ordered the parties to submit to a final judgment, entered on November 15, 2000.[10]

Analysis and Holding

Defendant filed two notices of appeal on November 21, 2000: one was from the superior court's denial of its objection to the entry of final judgment and the other from the entry of the final judgment.[11] Norwest asserted that the June 23 order was "only an interlocutory order for which a separate judgment must enter before any appeal can be filed."[12] In response, defendants asserted that the June 23 order was a final judgment because "it was set forth on a separate document and it terminates all the litigation between the parties."[13] Because Norwest failed to file a notice of appeal until more than four months after the June 23 order, defendants argued that the appeal was untimely and should be summarily dismissed.[14] Additionally, defendants contended that because an appealable order was entered on June 23, 2000, there was no need for the later final judgment to enter, and therefore, Norwest's appeal was untimely.[15]

Addressing the propriety of the appeal, the Rhode Island Supreme Court agreed with Norwest, holding that the docket sheet, which indicated that judgment "shall enter" for defendants, did not properly constitute a final judgment.[16] Acknowledging that rule

7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 261.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*

58 of the Rhode Island Superior Court Rules of Civil Procedure "does not prescribe what elements are essential to a judgment," nor does it "demand any particular words or a peculiar formal act," the court determined that the June 23, 2000 order, directing the later entry of a final judgment, was, by its own terms, an interlocutory order.[17] Finding that no final judgment entered until November 15, 2000, the court held that Norwest's appeal was timely and properly before it.[18]

Norwest next argued that the initial tax sale of the property was void and in violation of the automatic stay provisions of 11 U.S.C. § 362(a), and that all proceedings flowing from the sale were void.[19] They further asserted that the motion justice should have vacated the final judgment in the foreclosure action and permitted Norwest to pay the taxes and redeem the property.[20] Norwest relied on the court's ruling in *Shackleton v. Coffee 'An Service, Inc.*[21] that a "tax sale held during bankruptcy is void,"[22] and also contended that, as holder of a valid mortgage interest in the property, it has standing to challenge the tax sale pursuant to *Soares v. Brockton Credit Union*.[23] Additionally, Norwest argued that § 362(h) grants standing to both creditors and debtors.[24]

Assuming that Norwest possessed standing to challenge the validity of the tax sale, the court first followed *Mennonite Board of Missions v. Adams*[25] in which the United States Supreme Court held that "since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale."[26] Accordingly, the court found that Norwest did receive notice of the sale and never filed an answer or challenge after receiving such notice.[27] The court then found that pursuant to section 44-9-31 of the Rhode Island General Laws, because Norwest never contested the tax title in response to the notices it received to do so, it was "forever barred" from so do-

17. *Id.* at 261-62 (citing Malinov v. Kiernan, 251 A.2d 530, 531 (R.I. 1969)).
18. *Id.* at 262.
19. *Id.*
20. *Id.*
21. 657 A.2d 544 (R.I. 1995).
22. *Norwest*, 799 A.2d at 262 (citing *Shackleton*, 657 A.2d at 544).
23. *Id.*; Soares v. Brockton Credit Union, 107 F.3d 969 (1st Cir. 1997).
24. *Norwest*, 799 A.2d at 262.
25. 462 U.S. 791 (1983).
26. *Norwest*, 799 A.2d at 262 (quoting *Mennonite*, 462 U.S. at 798).
27. *Id.* at 263.

ing in a later proceeding.[28] The court reasoned that Norwest's reliance on *Soares* was misplaced because in that case, it was a debtor, and not a creditor, who was challenging the violation of an automatic stay.[29] Norwest's citation to *Shackleton* was similarly misplaced because that case "did not involve a secured creditor who sought to challenge a tax sale after failing to comply with section 44-9-31."[30]

CONCLUSION

An appeal by a secured creditor is timely despite failure to appeal from an order directing that judgment "shall enter" for defendants, and creditor filed notice of appeal six days after the final judgment was later entered. Additionally, a secured creditor who never filed an answer or challenged the validity of a tax sale of real estate owned by a debtor after receiving notice of such sale is barred from doing so in a later proceeding to set aside the sale, even if the sale was in violation of the bankruptcy code's automatic stay provision.

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28. *Id.* Section 44-9-31 reads, in part, that when contesting the validity of a tax sale, "the person shall do so by answer filed in the proceeding on or before the return day or else be forever barred from contesting or raising the question in any other proceeding." R.I. GEN. LAWS § 44-9-31 (1999).

29. *Norwest,* 799 A.2d at 263.

30. *Id.*

Civil Procedure. *Roe v. Gelineau*, 794 A.2d 476 (R.I. 2002). For the first time the Rhode Island Supreme Court defined the term "unsound mind" outside the context of repressed recollections. A person has an unsound mind for purposes of tolling the statute of limitations when that person cannot "manage his or her day-to-day affairs." Also, a repressed memory must be completely concealed and then suddenly and completely dislodged in order for tolling to apply.

FACTS AND TRAVEL

Joseph Roe,[1] a twenty-three year old man, sued multiple defendants for physical, emotional, and sexual abuse he was allegedly subjected to while a ward of the State of Rhode Island at the Saint Aloysius Home.[2] The defendants moved for a motion to dismiss on the ground that Mr. Roe's action was time barred by the three-year statute of limitations on personal injury claims.[3] In response, Mr. Roe claimed his minority tolled the statute of limitations.[4] Further, Mr. Roe claimed that the memories of abuse had been so painful that for some time in the three years preceding the filing of his suit he was not able to cope with them and thus could not bring his suit.[5] This, he claimed, acted as an "unsound mind" disability within the meaning of section 9-1-19 of the Rhode Island General Laws and tolled the statute of limitations until he could file his suit.[6] The motion justice considered materials outside the pleadings and, therefore, his denial of Mr. Roe's claim operated as a summary judgment, holding Mr. Roe's claim of unsound mind failed to satisfy the strictures of section 9-1-19.[7] Mr. Roe appealed this judgment, arguing that his intermittent inability to cope with the memories of abuse should be sufficient to allow an unsound mind tolling of the statute of limitations.[8]

1. The court permitted the plaintiff to proceed anonymously as Joseph Roe. Roe v. Gelineau, 794 A.2d 476, 479 n.2 (R.I. 2002).
2. *Id.* at 479.
3. *Id.* at 480.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 480-81.
8. *Id.* at 480.

ANALYSIS AND HOLDING

After a brief discussion the Rhode Island Supreme Court held that Mr. Roe could not avail himself of tolling based on minority and went on to examine what a "repressed memory" should be.[9] The court decided that the vacillating nature of Mr. Roe's inability to cope with his memories took his disability outside of the definition of repressed memory.[10] Instead the court held that a repressed memory must be a memory that is completely concealed and then suddenly and completely dislodged from its hiding place.[11]

Next the court turned to the "unsound mind" tolling claim.[12] In deciding Joseph Roe's claim, the Rhode Island Supreme Court, for the first time outside the realm of repressed recollection, defined the term "unsound mind."[13] To reach its definition the court traced the history of the unsound mind doctrine.[14] Initially the court noted that the term had been used interchangeably with "legal incompetence" and had often been compared to the term "insanity."[15] These terms are, according to the court, meant to "denote a mental infirmity that vitiates legal capacity generally."[16] The court also stated that an unsound mind must disable a person to a "substantial degree" before that individual can claim to have a legal disability.[17] Seeking to craft a definition that was consonant with this history, the court held that a person has an unsound mind when he or she has an "inability to manage [his or her] day-to-day affairs."[18]

Finally the court applied its new definition of unsound mind to Mr. Roe's case.[19] The court agreed with the decision of the motion justice that Mr. Roe's adroitly slipping in and out of the criminal justice system, his passing a Social Security exam intended to test the mettle of his mental well-being, and his pursuance of the very

9. *Id.* at 482-84.
10. *Id.* at 484.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 485 n.7.
15. *Id.* (citing Kelly v. Marcantonio, 678 A.2d 873, 879 (R.I. 1996)).
16. *Id.* at 486 (citing Sosik v. Conlon, 164 A.2d 696, 698 (R.I. 1996)).
17. *Id.*
18. *Id.*
19. *Id.* at 487.

tort action at bar tended to show that the unsound mind provision should not apply.[20] Lastly, the court held that the evidence of Mr. Roe's "functional abilities" suggested that, regardless of his psychiatric problems, he had been oriented as to "time, place and person" within his adult life and as such was able to manage his day-to-day affairs.[21] With both the repressed memory and unsound mind claims failing, the court affirmed the motion justice's ruling and denied Joseph Roe relief.[22]

CONCLUSION

A person will not be found to be of an unsound mind if he or she can handle day-to-day affairs. Factors, which may be taken into consideration in this judgment, can range from evidence of passed mental exams to the ability to bring a lawsuit. In this case the court decided that Joseph Roe was able to meet his day-to-day requirements and as such he was of a sound mind, despite his having to deal with painful memories of sexual abuse. This being established, the statute of limitations could not be tolled and Mr. Roe's action was time-barred.

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20. *Id.* at 487-88.
21. *Id.*
22. *Id.*

Civil Procedure. *Sweet v. Pace Membership Warehouse, Inc.*, 795 A.2d 524 (R.I. 2002). A trial justice commits a clear abuse of discretion when he or she excludes videotaped evidence that directly contradicts a plaintiff's claim.

FACTS AND TRAVEL

On October 11, 1991, Ralph Sweet (Sweet) went to Pace Membership Warehouse, Inc., (Pace) to purchase supplies for a construction project.[1] While there, a forklift hit Sweet causing him to sustain numerous injuries.[2] In October 1994, Sweet filed suit against multiple defendants including Pace.[3] Pace conceded liability and the case proceeded to trial on the sole issue of damages.[4]

At trial, Sweet sought damages of $370,000 for pain and suffering, lost income, and medical expenses.[5] Sweet testified at trial that he was unable, because of the accident, to undertake numerous physical activities and that he presently suffered from neck and back pain.[6] Sweet also testified that he was unable to take on several profitable contracting jobs because of his injuries.[7] Sweet speculated that his lost income from these jobs was approximately $130,000.[8]

During the trial, Pace sought to introduce videotaped evidence of Sweet.[9] The videotape showed Sweet driving an all terrain vehicle over bumpy roads in the national forest located in Arizona.[10] Pace also sought to introduce a videotaped deposition of Sweet's stepdaughter.[11] This deposition disclosed that Sweet partook in strenuous physical family activities on several occasions after November 25, 1997.[12] The trial justice allowed the evidence to be introduced.[13]

1. Sweet v. Pace Membership Warehouse, Inc., 795 A.2d 524, 524 (R.I. 2002).
2. *Id.* at 526.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 527.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

Sweet subsequently amended his claim for damages to cover only the period from October 11, 1991 to November 25, 1997.[14] As a result, the trial justice then excluded all of the videotaped evidence because the evidence was not relevant to Sweet's time period for damages.[15] The trial justice also disallowed the use of the videotaped evidence for impeachment purposes.[16]

Pace then filed a motion for judgment as a matter of law on Sweet's claim for lost income.[17] The judge denied the motion because he did not want to take the case from the jury.[18] The jury awarded Sweet damages plus interest in an amount over $300,000.[19] Pace then renewed its motion for judgment as a matter of law on Sweet's claim for lost income and made a motion for a new trial.[20] After the trial justice denied these motions, Pace appealed.[21]

Analysis and Holding

The Exclusion of Evidence

The Rhode Island Supreme Court stated that the evidentiary rulings made by a trial justice will not be overturned absent a clear abuse of discretion.[22] The "abuse of discretion standard includes review to ensure that the discretion was not guided by erroneous legal conclusions."[23]

The court reviewed the standard for admitting relevant evidence and held that the trial justice's exclusion of the videotaped evidence constituted an abuse of discretion.[24] The court noted Sweet was claiming "severe and permanent injury" and the videotaped evidence would definitely go to show a lower probability that Sweet was actually permanently injured because of the accident.[25]

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14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* (citing Votolato v. Mevandi, 747 A.2d 455, 460 (R.I. 2000) (quoting Koon v. United States, 518 U.S. 81, 100 (1996))).
24. *Id.*
25. *Id.*

The court also noted that Sweet testified to the fact that he still, to the day of trial, was unable to undertake certain physical activities.[26] Because this testimony was in direct contradiction of what was on the videotapes, the court held that the videotapes should have been admitted for impeachment purposes.[27] Based on the evidentiary errors, the court ordered a new trial be held.[28]

The Claim for Lost Income

The supreme court also reversed the trial justice's decision denying Pace's motion for judgment as a matter of law on Sweet's claim for lost income.[29] The supreme court held that the basis of the award for lost income was too speculative.[30]

The court stated that lost income may only be awarded when the loss is established with "reasonable certainty."[31] In the case at bar, the only evidence offered to prove lost income was Sweet's testimony.[32] The court found this testimony to be based entirely upon speculation and conjecture.[33] Because the evidence with respect to the lost income was so speculative, the supreme court reversed the decision of the trial justice and remanded the case for a new trial.[34]

CONCLUSION

The Rhode Island Supreme Court held that the trial justice's refusal to admit the videotaped evidence of Sweet's physical activities constituted an abuse of discretion because Sweet was requesting damages for permanent injuries. The court also held that Sweet's testimony as to the amount of his lost income, without more, was too speculative to sustain a claim for lost income.

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26. *Id.* at 528.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 529.
31. *Id.* (quoting UST Corp. v. General Road Trucking Corp., 783 A.2d 931, 941 (R.I. 2001)).
32. *Id.*
33. *Id.*
34. *Id.* at 530.

Civil Procedure. *Wilkinson v. State Crime Laboratory Commission*, 788 A.2d 1129 (R.I. 2002). Supplying the court with a brief that does not include a meaningful discussion of the issues raised constitutes a waiver of those issues. Achieving "full status" under the merit system constitutes a protected property interest that cannot be deprived without due process and just compensation. The court is the sole determiner of whether a statement contains a defamatory meaning.

FACTS AND TRAVEL

Richard Wilkinson, a classified "full status"[1] state crime laboratory employee, sued the state crime laboratory commission and the director of the state's crime laboratory (crime lab) for wrongful discharge, contempt, and back pay with benefits.[2] Wilkinson also sued Louis Luzzi, the dean of the Pharmacy Department of University of Rhode Island (URI) and Dennis Hilliard, the director of the crime lab, for defamation.[3] On appeal, Wilkinson raised numerous arguments in his brief to the Rhode Island Supreme Court.[4] The court noted that Wilkinson raised twelve separate specifications of error on appeal and failed to discuss the majority of them in his brief.[5] They considered this deficiency to constitute a waiver of certain issues.[6]

The court, however, did address whether Wilkinson had a property interest in his employment protected by due process.[7] The court also analyzed whether certain 1994 amendments to the State Crime Laboratory Commission Act[8] (crime lab act) deprived Wilkinson of any property interest he may have possessed in his employment.[9]

In 1971, Wilkinson was employed as a criminalist for the State of Rhode Island at the Laboratories for Scientific Criminal Investi-

1. *See* R.I. GEN. LAWS § 36-4-59 (2002) (defining "full status" as tenure in state service).
2. Wilkinson v. State Crime Lab. Comm'n, 788 A.2d 1129, 1131 (R.I. 2002).
3. *Id.*
4. *Id.* at 1131 n.1.
5. *Id.*
6. *Id.*
7. *Id.* at 1131.
8. *See* R.I. GEN. LAWS § 12-1.2-6 (2002).
9. *Wilkinson*, 788 A.2d at 1132.

gation.[10] In July 1988, Wilkinson achieved "full status" under the state's merit system.[11] Becoming a "full status" employee provides tenure to state employees who have achieved twenty years of service credit.[12]

On January 8, 1992, Louis Luzzi, the dean of URI's Pharmacy Department and executive secretary to the State Crime Laboratory Commission, sent a letter to Wilkinson notifying him that he was fired for his alleged insubordination to Luzzi and to URI.[13] Wilkinson was later reinstated after the commission received an advisory opinion on the matter from the attorney general's office.[14] Wilkinson was not reinstated, however, to his former position of assistant director but to the lower position of criminalist.[15] Wilkinson, unhappy with his reinstatement, filed a lawsuit in superior court.[16]

Later in 1994, the general assembly amended the crime lab act[17] and changed all commission jobs at the crime lab to limited appointment positions of the board of governors for higher education.[18] The amendment made the commission jobs subject to the employment policies and practices as set by the board of governors for higher education and URI.[19] In 1996, the commission again terminated Wilkinson from his employment at the crime lab by refusing to reappoint him.[20] Wilkinson subsequently amended his complaint to challenge the termination.[21]

On a motion for summary judgment, the motion justice decided that the 1994 amendment to the crime lab act divested Wilkinson of his tenure and allowed him to be terminated without cause when his appointment expired.[22]

10. *Id.*
11. *Id.*
12. *Id.* at 1132 n.4.
13. *Id.* at 1133.
14. *Id.*
15. *Id.* at 1134.
16. *Id.*
17. R.I. GEN. LAWS § 12-1.2-6 (2002).
18. *Wilkinson*, 788 A.2d at 1134.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*

ANALYSIS AND HOLDING

The Failure to Brief

Addressing the issue of Wilkinson's failure to thoroughly brief all the issues he raised on appeal, the Rhode Island Supreme Court stated that simply listing an issue for appellate review, without devoting any portion of the brief to a meaningful discussion does not assist the court and constitutes a waiver of that issue.[23] The court supported its decision by citing *O'Rourke v. Industrial National Bank of Rhode Island,*[24] which held that a plaintiff's failure to present legal authorities and to argue an asserted error of the trial court in their legal brief constituted a waiver of that legal error.[25] In total, the court dismissed seven of the twelve assignments of error Wilkinson raised on appeal because he inadequately briefed the issues for the court.[26]

Due Process and the Effect of the 1994 Amendment

The supreme court did review the issue of whether Wilkinson possessed a protected property interest in his employment and whether an amendment to a statute, which conveyed that property interest, in any way affected that interest.[27] With respect to the issue of whether Wilkinson possessed a protected property interest in his employment, the court held that "full status" state employees do possess a protected property interest in their employment and are entitled to due process and just compensation protections against any attempted termination.[28] The court noted that the achievement of permanent classified status conveyed on Wilkinson is a right to continued employment.[29] This right represents a property interest protected by due process.[30] The court supported this decision by relying on two United States Supreme Court cases that held a state statute can confer a property right on government

23. *Id.* at 1131 n.1.
24. 478 A.2d 195, 198 n.4 (R.I. 1984).
25. *Wilkinson*, 788 A.2d at 1131 n.1.
26. *Id.*
27. *Id.* at 1135.
28. *Id.* at 1138.
29. *Id.*
30. *Id.*

employees.[31] Thus, the ultimate decision of the court was that because Wilkinson had a vested property right in his employment after twenty years of service his employment was protected by the Due Process Clause of the United States Constitution.[32]

With respect to the commission's contention that the 1994 amendment altered Wilkinson's "full status" classification, the supreme court held that Wilkinson's status was not affected by the 1994 amendment.[33] The court concluded that the legislature did not intend the amendment to have a retroactive application and thus had no effect on the status of those who attained "full status" employment under the Merit System Act at the time of the amendment.[34] The court stated that Wilkinson achieved this status in 1988 when he reached the twenty years of service mark and simultaneously obtained a protected property interest in his continued employment.[35] Therefore, due process required that before the state could divest him of his property interest just compensation was required.[36]

The Defamation Claims

The court also addressed the defamation claims Wilkinson brought against Luzzi and Hilliard.[37] The alleged defamatory statements were contained in a memoranda sent to Wilkinson by Luzzi.[38] Hilliard allegedly made statements that were similar to those in the memoranda to the commission.[39] The court reaffirmed its holding in *Swerdlick v. Koch*,[40] stating that a defamatory statement consists of words that are false and malicious, imputing conduct which injuriously affects a person's reputation, or that tend to degrade a person to the level of public hatred and contempt.[41] The court noted that it alone decides whether the

31. *Id.* (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972) (holding that property is not limited to technical forms, but encompasses a broader definition)).
32. *Id.*
33. *Id.* at 1140.
34. *Id.* at 1141 (citing Merit System Act R.I. GEN. LAWS § 36-4-59 (1988)).
35. *Id.*
36. *Id.* at 1142.
37. *Id.*
38. *Id.*
39. *Id.*
40. 721 A.2d 849, 859 (R.I. 1998).
41. *Wilkinson*, 788 A.2d at 1142.

statement contains a defamatory meaning.[42] The supreme court held that the statements were not defamatory as a matter of law because Luzzi and Hilliard manifested a good faith belief, based on the facts and circumstances, that their statements were substantially true.[43]

CONCLUSION

Wilkinson's failure to devote any portion of his brief to a meaningful discussion of certain issues he raised on appeal constituted a waiver of any assignment of error that may have existed in those issues. On the other issues raised, the supreme court held that an individual who attained his "full status" certification under the merit system prior to the 1994 amendment is entitled to due process and just compensation protections because that person's employment represents a protected property interest. In addition, the supreme court held that a defamatory statement consists of words that are false and malicious, imputing conduct which injuriously affects a person's reputation, or which tend to degrade someone into public hatred and contempt and that the court alone is to decide whether the statement has a defamatory meaning.

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42. *Id.*
43. *Id.* at 1143.