Prevailing Parties

The parents of a student should be awarded counsel fees and costs as prevailing parties in a special education dispute with a public school system, as the fact that they were represented by an out-of-state attorney does not disqualify them from recovering fees, determines a U.S. District Court judge ..... page 11.

Zoning

Telecommunications Tower

A plaintiff corporation should be awarded summary judgment on a count alleging that the defendant Cumberland zoning board's decision to deny the plaintiff permission to erect a 170-foot telecommunications tower violated the Telecommunications Act of 1996, as the board's decision would effectively prohibit the provision of personal wireless service in portions of Cumberland and the surrounding area, a U.S. magistrate judge concludes ..... page 11.

Contract

Indemnification - Injured Employee Of Subcontractor

A general contractor, which was found not negligent in a civil suit filed by the injured employee of a subcontractor, is entitled to recover its defense costs from the subcontractor, as the subcontractor breached its duty to defend arising out of the indemnification clause of its agreement with the general contractor, rules a Superior Court judge..... page 13.

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INSIDE

lected workers' compensation from his employer, ThermoCor Kimmins.

Kimmins was hired by the general contractor, Kiewit Construction Co., pursuant to a $1.3 million subcontract agreement to perform demolition work on a contract

counts of negligence.

Subsequently, Kiewit filed a third-party complaint against Kimmins and Reliable National Insurance Co. seeking to enforce Section 11 entitled "INDEMNIFICATION,"

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ident or the majority owner of the corporation] could effectively bar an otherwise responsible officer from paying these funds in accordance with the law."

The nine-page decision is *Lubetzky v. Unit-*

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Lawyer Wins Bid For Prejudgment Interest

Cap Did Not Apply To Municipal Employee Who Was Sued Individually

Personal-injury and commercial litigation attorney Richard C. Tallo recently prevailed in a case in which the Rhode Island Supreme Court clarified the position that municipal employees being sued in their individual capacities do not enjoy the protections afforded by statutory law that the municipality itself enjoys, and that they are subject to prejudgment interest on awards entered against them. In a recent interview with Lawyers Weekly's Tony Wright, the plaintiffs' lawyer discusses the case, *Andrade, et al. v. Perry, et al.*, and the implications of the court's decision.

ESQ.

* * *

Q. *What were the facts of the case?*

A. This was a case where my client, a copier repair man, was traveling through an intersection in the Town of South Kingstown when a patrolman, [David B.] Perry, who was in uniform and on patrol, struck my client broadside. He had rotator cuff and shoulder injuries, generally. He was out of work for a couple of months.

Q. *Were there any attempts to settle the matter?*

A. We tried to make several attempts to settle the case unsuccessfully. When we finally went to trial, I brought the action against the police officer as well as the Town of South Kingstown. We tried it for four days in front of [Superior Court Judge Francis J.] Darigan [Jr.], and judgment was entered for my client on March 13, 2003.

RICHARD C. TALLO

Providence

Born: Dec. 21, 1946, Providence

Education: Suffolk University Law School, 1973; Rhode Island College, 1969

Bar admission: 1973

Professional experience: Tallo and Pearlman (2001-present); solo practitioner (1973-2001)

Professional affiliations: Rhode Island Bar Association, Rhode Island Trial Lawyers Association, Trial Lawyers for Public Justice, Justinian Law Society, National Italian American Bar Association

Q. *Was the judgment against both defendants?*

A. Yes, but my request for [prejudgment] interest was only against the individual officer because General Law 9-31-3, known as the Rhode Island Governmental Tort Liability Act, which applies to municipalities, essentially says that statutory damages against municipalities are capped at $100,000. In addition to that it says that no matter what the judgment is — $25,000, $50,000, or in our case $75,000 — there is no prejudgment interest.

Q. *And was your motion allowed as to prejudgment interest against the officer?*

A. Initially Judge Darigan denied my motion. But then I filed a motion for new trial, sent a memo and reargued [my position]. He then granted my motion for costs and interest against Officer Perry only.

Q. *What, in your opinion, changed Darigan's mind?*

A. He did some research and he agreed with me. My position was that for municipal employees who are sued individually or who are sued separate and apart from the municipality and who are demonstratively negligent on their own, the municipal immunity or cap does not apply. The first time he denied [the mo-

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Lawyer Wins Bid Involving Prejudgment Interest

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tion] his belief was that because the police officer was in the course of duty, the municipal immunity would cover him. But upon additional research and reflection, he agreed that it did not.

Q. *What's the rationale behind General Law 9-31-3?*

A. The rationale is to protect the municipality from excessive damages and interest. Different jurisdictions take different views on that. Some states have given up their immunity entirely. Our state has capped it at $100,000.

Q. *The attorney for the municipality and for the officer filed an appeal, which was heard and decided by the Supreme Court. What issues specifically did the court address?*

A. The only issues were [whether] the cap applied to individual municipal employees who commit negligence during the course of their employment, and do [attorneys] have to specifically state they're suing an individual "in their individual capacity." Do you have to use the magic or formulaic words saying, "I sue the Town of South Kingstown and John Jones individually." That is the most important part of this case.

Q. *And how did the court answer those questions?*

A. The court reiterated that municipal employees are not covered by 9-31-3, but more importantly, the court clarified once and for all that when you sue a municipal employee you do not have to use the words "in his individual capacity." You can say, "I sue the Town of South Kingstown and John Jones." So what the court said was that when you sue an individual employee in his capacity as a town employee, he enjoys the cap. But if you don't say "in his capacity as a town official," then he does not enjoy that cap. The reason why it's so important is that the attorney who is filing these kinds of complaints — and they're filed every day — is not trapped by the failure to use the magic language. As long as you don't say "in his official capacity," you can just say "John Jones." You can just say "Mary Smith." It will be assumed that you are suing a person in an individual capacity unless you say otherwise. It really clarifies the issue of pleading when you're dealing with a municipality, where you're attempting to hold the municipality liable by and through the actions of an employee.

Q. *Switching gears, as an experienced commercial litigator and PI attorney, what do you consider the toughest cases to handle?*

A. The slip-and-fall cases are very very difficult because of the general admonition against people in that they should look where they're walking. There's also the difficulty of notice. In order to prevail, the owner of the property or the person responsible for maintaining it has to have notice [of the hazardous condition].

> **"The court clarified once and for all that ... when you sue an individual employee in his capacity as a town employee, he enjoys the cap. But if you don't say 'in his capacity as a town official,' he does not enjoy that cap. The reason why it's so important is that the attorney who is filing these kinds of complaints — and they're filed every day — is not trapped by the failure to use the magic language."**
>
> **— Richard C. Tallo, plaintiffs' lawyer in *Andrade, et al. v. Perry, et al.***

Q. *What do you enjoy most about your practice?*

A. I like the challenges of the different types of cases. In all respects we try to do our best to see that plaintiffs are adequately compensated if they're truly deserving and not at fault.

Q. *What do you think of the massive efforts underfoot at tort reform?*

A. I think the tort reform efforts are misguided. I don't think they're aimed at the correct culprits. The plaintiffs' bar is not the culprit. We're the ones who are maintaining the traditions of the law. We're seeing that products are safe, that people are driving their automobiles and keeping their properties in safe and reasonable conditions. We're the ones that weed out doctors who do not practice in a safe and reasonable manner. Plaintiffs' attorneys are actually doing a service to the public.

Q. *Should there be any caps at all on awards?*

A. No, I don't think there should be any caps because for hundreds of years there were no caps. I think juries are responsible and reasonable enough to put a value on what a person's injuries are. You only hear about these extraordinary cases, but 95 percent of cases are very reasonable and jurors are very reasonable. They can evaluate, based on the testimony they hear, what are reasonable damages. I don't think that any juror is going to overpay for injuries they feel are not valued at that amount. RILW

Questions or comments may be directed to the writer at twright@lawyersweekly.com.