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## Parents of boy who drowned can sue seller of pool over installation

By Eric T. Berkman  
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Parents of a 4-year-old boy who drowned in his grandmother's swimming pool could bring a negligence claim against the company that sold the pool even though another company installed it, the Rhode Island Supreme Court has ruled.

A Superior Court judge had granted summary judgment for defendant NAMCO, the pool vendor. Specifically, the judge found insufficient facts to allege that Lot-2 Enterprises, the pool installer that the boy's grandmother picked from a list provided by the defendant, had actual or apparent authority to act as NAMCO's agent.

But the Supreme Court reversed, pointing to testimony that Lot-2 was on a list of installers provided by NAMCO; that the NAMCO employee who provided the list indicated that it contained subcontractors who knew how to install NAMCO pools; and that



The suit alleges negligent installation of an above-ground swimming pool and safety ladder.

NAMCO personnel randomly inspect pools installed by Lot-2 on a periodic basis.

"After considering these facts in the light most favorable to plaintiffs, we are of the opinion that an issue of

fact exists as to whether Lot-2 acted as NAMCO's agent, or whether [the grandmother] reasonably believed that Lot-2 was NAMCO's agent," Chief Justice Paul A. Suttell wrote for the

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## Ineffective assistance claim fails

'Strickland' standard not met, judge finds

By Barry Bridges  
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A Superior Court judge has denied a petitioner's application for post-conviction relief, concluding that his trial attorney did not render constitutionally ineffective assistance in his assault trial by not calling certain medical personnel or an expert witness to the stand to testify about the victim's injuries.

The petitioner, Kevin Storey, was convicted by a jury in 2012 of assault with a dangerous weapon and simple assault and battery following an altercation with his wife, Danielle Saleeba.

In his challenge of those convictions, Judge Susan E. McGuirl determined that the trial attorney's alleged shortcomings in mounting Storey's defense were reasonable strategic decisions. Even if, for the sake of argument, her legal performance was deemed deficient, the petitioner did not demonstrate a reasonable probability that

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The full text of the ruling in *Storey v. State* can be found at [rilawyersweekly.com](http://rilawyersweekly.com).

### IMPORTANT OPINIONS OF THE WEEK

#### Immunity | Bank Secrecy Act

A suit against a defendant financial institution that reported the plaintiffs' suspicious activity to the federal government was barred by the immunity provision in the Bank Secrecy Act, the 1st U.S. Circuit Court of Appeals holds. **page 4**

#### Search and seizure | Uploaded images

A child pornography defendant had no reasonable expectation of privacy in images he uploaded to a digital album on an image-hosting website, the 1st U.S. Circuit Court of Appeals concludes. **page 7**

#### Bankruptcy | Eligibility

The dismissal of a pension trust's Chapter 11 petition should be upheld, as the debtor could not qualify as a "business trust" eligible to file a bankruptcy petition, the Bankruptcy Appellate Panel decides. **page 10**

## Denial of municipal pension not 'arbitrary and capricious'

By Barry Bridges  
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A town's pension administrator did not act in an arbitrary and capricious manner in denying benefits to a 22-year part-time municipal employee, according to a ruling issued by the Rhode Island Supreme Court.

Central to the question of whether the town of Coventry wrongfully denied those benefits to plaintiff Richard P. Sullivan was the fact that, pursuant to the pension plan's terms, the administrator — in this case the Town Council — enjoyed "complete control of the administration of the plan" and "complete discretion to construe or

interpret" its provisions.

Writing for the court, Justice Gilbert V. Indeglia said the administrator acted rationally in exercising that control.

"While the plaintiff set forth strong arguments in support of his contention that he was entitled to benefits under the plan, we cannot say that the plan administrator's decision denying the ... benefits was unreasonable, irrational, or not made in good faith," Indeglia wrote.

Rather, he continued, the denial was a reasonable outcome and was sufficiently supported by testimony and other evidence adduced at a hearing.

The Supreme Court also agreed with a

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RAGOSTA  
Applauds ruling



#### CELEBRATING EXCELLENCE

Lawyers Weekly's first Excellence in the Law event drew a big crowd of honorees and well-wishers on April 9. See pages 8-9

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"It wasn't just a job for them."

# Denial of pension not 'arbitrary and capricious'

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Superior Court judge that the lower court lacked jurisdiction to entertain the plaintiff's claim, as the administrator's operation in a quasi-judicial capacity dictated a certain appellate route.

"We have clearly explained that 'the proper procedure to gain review of a quasi-judicial action of a town council, except where a right of appeal is specifically provided by statute, is by a writ of certiorari to this court,'" Indeglia wrote.

The 20-page decision is *Sullivan v. Coventry Municipal Employees' Retirement Plan, et al.*, Lawyers Weekly No. 60-023-19. The full text of the ruling can be found at [rilawyersweekly.com](http://rilawyersweekly.com).

## Actions validated

Vincent F. Ragosta Jr. of Providence, counsel for the municipal defendants, said on a practical level the outcome helps to "sustain the town of Coventry's underfunded and distressed pension plan" from a class of employees it was not intended to benefit.

From a legal perspective, he said, the holding lends clarity to the avenue of appellate review of quasi-judicial determinations of municipal pension disputes.

But according to Ragosta, the ruling's value lies mainly in its ratification of the applicable standard of review to be applied.

"The takeaway for attorneys who represent pension plan administrators is that the Supreme Court has bolstered and reinforced its adherence to the arbitrary and capricious standard that is used with respect to pension plans governed by federal law," he said. "The Supreme Court showed not only a great deal of fidelity to state and

federal precedent, but also validated what the Town Council had done."

In that sense, he said, the holding affirms the methodology used by the administrator in the case in approaching the question of Sullivan's eligibility.

Ragosta said the court was meticulous in parsing the administrator's written decision and saw that a great deal of effort had been expended in conducting a "thoughtful" fact-finding hearing.

"The Supreme Court's assiduous analysis of each contention of Sullivan in his quest for a pension validated the sound and interpretive rulings of the plan administrator in determining that he was ineligible," Ragosta added. "Process matters with pension benefits and eligibility questions."

The plan's provisions conferring complete control to the administrator were critical to the outcome, Ragosta said.

"In light of its terms, one would be hard pressed to say the administrator/Town Council exceeded its authority," he said. "The plaintiff seemingly ignored the plain language giving the council the power to determine who is an

**CASE:** *Sullivan v. Coventry Municipal Employees' Retirement Plan, et al.*, Lawyers Weekly No. 60-023-19

**COURT:** Rhode Island Supreme Court

**ISSUE:** Was the vote of a town pension administrator to deny a former part-time employee's request for benefits arbitrary and capricious?

**DECISION:** No

The full text of the ruling in *Sullivan v. Coventry Municipal Employees' Retirement Plan, et al.* can be found at [rilawyersweekly.com](http://rilawyersweekly.com).

administrative employee."

Ragosta stressed that the outcome had nothing to do with the quality of services that Sullivan rendered as a public servant, but had everything to do with the fact that he was a part-time employee.

"All of his stints of public service for the town were political appointments of a part-time nature, and in the history of the town no one in that sort of role was ever understood to be an administrative employee who qualified for a pension," he said.

Robert D. Goldberg of Pawtucket represented plaintiff Sullivan. Goldberg did not respond to a request for comment prior to press time.

## Part-time positions

From February 1986 through December 2008, Sullivan held a variety of part-time positions with the town of Coventry, including probate judge, assistant solicitor and town moderator.

After his 22-year employment with the town ended, Sullivan submitted a request for a pension. When the plan administrator — comprised of members of the Town Council — did not respond, Sullivan filed a complaint in Superior Court against the Coventry Municipal Employees' Retirement Plan. Through amended complaints, he later added as defendants the town's finance director and members of the council in their capacity as administrator.

Sullivan claimed breach of contract, for which he sought specific performance and damages. He also asked for a declaration of the parties' rights, status and obligations under the plan.

The municipal defendants' first motion to dismiss for lack of subject-matter jurisdiction was denied. Although the judge noted the review of a quasi-judicial hearing and action by a town council is properly made by way of a petition for writ of certiorari to the Supreme Court, he said Sullivan was entitled to due process and it was not clear whether he had received a hearing on his application. The case was remanded to the Town Council, with the Superior Court retaining jurisdiction.

The plan administrator thereupon convened a hearing, and after considering the documentary evidence and testimony presented, as well as examining the terms of the plan, its members voted unanimously to deny the request for benefits.

At that point, Sullivan petitioned the Supreme Court for a common law writ of certiorari to review his unsuccessful outcome, but his request was denied "without prejudice ... to the petitioner's right to prosecute his Superior Court action against the respondents." As the denial was not an adjudication on the merits, the Supreme Court at the time was not addressing the question of the lower court's jurisdiction.

The parties thus returned to Superior

Court, where Judge Bennett R. Gallo first determined that the court lacked subject matter jurisdiction over Sullivan's claims, reasoning that the proper recourse would be in the Supreme Court.

However, Gallo said that even if he could exercise jurisdiction, the municipal defendants were entitled to summary judgment because the plan administrator's position was not arbitrary and capricious.

## Decision supported by evidence

On Sullivan's appeal, the Supreme Court affirmed the lower court's dismissal of the action based on lack of jurisdiction. The justices were not persuaded by Sullivan's assertion that his claim should have been reviewed under the lower court's general equitable or declaratory judgment jurisdiction.

"[P]laintiff endeavors to classify his case as an action in equity, which he argues would allow him to shield his claim from dismissal for lack of subject-matter jurisdiction," Indeglia wrote. "We disagree with plaintiff's characterization of his claims and with his assertion that [the state statutes he relies on] provide the Superior Court with subject-matter jurisdiction."

In the end, Indeglia said, the action was essentially an appeal of the plan administrator's decision. And since that denial of benefits resulted from a quasi-judicial function, its review required a petition for writ of certiorari to the Supreme Court.

The court then reinstated and granted Sullivan's original petition for a writ and proceeded to review the plan administrator's actions.

And in the court's view, the denial was consistent with the administrator's broad grant of power and did not run afoul of the arbitrary and capricious standard.

In so holding, the court examined the administrator's written decision to navigate the bases of its decision.

It pointed to many factors supporting the denial of benefits. For instance, the administrator indicated that it had relied on "historical context" in determining that the plaintiff's part-time positions were never understood to qualify for a town pension.

Further, the position of probate judge required a limited number of work days per month; the assistant solicitor position had no minimum-hour requirements; and Sullivan could maintain a private law practice while performing those duties.

The administrator also weighed testimony from the town manager, who stated that no assistant town solicitor or municipal court judge had ever participated in the plan, as well as Sullivan's own testimony that he did not make contributions because he "had no idea there was a pension involved."

The administrator described the "negative implications" that would result to the underfunded system if non-contributing employees were allowed to participate.

Considering the evidence used by the administrator in reaching its decision, the Supreme Court was unable to point to any action that could be considered arbitrary and capricious, and affirmed the denial of benefits.

"Use of the arbitrary and capricious standard means that reviewing courts will uphold ... decisions interpreting the plan as long as the administrative interpreters have acted within their authority [to make determinations that are] rational, logical, and supported by substantial evidence," Indeglia wrote.

Justices Francis X. Flaherty and Maureen McKenna Goldberg did not participate in the ruling. **RW**

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