STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. SUPERIOR COURT

[FILED: August 22, 2019]

ALBERT A. FAELLA ANDREA DIMAIO in her capacity as the duly appointed administratrix of the Estate of John DiMaio	:	
vs.	:	**C.A. No. PB-2010-0311**
TOWN OF JOHNSTON and JOSEPH CHIODO in his capacity as Finance Director for the Town of Johnston	:	

ALAN ROSS	:	
vs.	:	**C.A. No. PB-2010-0060**
TOWN OF JOHNSTON and ING LIFE INSURANCE, ANNUITY COMPANY AND CITIGROUP GLOBAL MARKET, INC.[1]	:	

DECISION

SILVERSTEIN, J. (Ret.) Before the Court for decision following a nonjury trial are the consolidated matters of Albert A. Faella (Faella), Andrea DiMaio, in her capacity as the duly appointed administratrix of the Estate of John DiMaio, and Alan Ross (Ross) (collectively, with Faella and Andrea DiMaio, Plaintiffs). Faella and Andrea DiMaio bring this action against the Town of Johnston (Defendant Johnston or the Town) and Joseph Chiodo, in his capacity as Finance Director for the Town of Johnston. Ross brings his complaint against Defendant Johnston.

[1] On January 13, 2011, the Court received a transfer of the funds at issue from ING Life Insurance and Annuity Company (ING), along with Citigroup Global Market, Inc. (Citigroup) into the Registry of the Court. Thereafter, ING and Citigroup were released as defendants in this action.

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Plaintiffs seek declaratory judgment regarding the ownership of funds that had been deposited in certain accounts organized under Internal Revenue Code (I.R.C. or the Code) § 457 (the § 457 Accounts or the Accounts).[2] The § 457 Accounts bear the names of Ross, Faella, and John DiMaio (DiMaio), former Johnston police officers and members of the International Brotherhood of Police Officers (IBPO) who retired due to injuries sustained in the line of duty. Upon their retirement, the Town placed Ross, Faella, and DiMaio on disability pension benefits pursuant to collective bargaining agreements (CBAs) between the IBPO and the Town—either the 2001-2004 or the 2005-2008 CBA, depending upon their date of retirement. However, the Town refused to remit funds in the § 457 Accounts to Ross, Faella, and DiMaio, arguing that these Accounts are merely funding mechanisms for the pensions set forth under applicable CBAs. Jurisdiction is pursuant to G.L. 1956 §§ 9-30-1, *et seq.* and G.L. 1956 § 8-2-14.

I

Facts and Travel

On January 6, 2010, Ross filed a Complaint against the Town, ING, and Citigroup, while Faella and DiMaio filed a Complaint on January 15, 2010 against Joseph Chiodo in his capacity as Finance Director for the Town, ING, and Citigroup.[3] In their Complaints, Ross, Faella, and DiMaio sought distributions from certain § 457 Accounts to which they contributed during their employment with the Town. The Town responded that the Accounts were a funding mechanism for defined benefit plans governed by applicable CBAs rather than deferred compensation accounts. According to the Town, it had met—and continued to meet—its obligation to Ross, Faella, and DiMaio through its payment of their disability pension benefits.

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[2] These funds are currently held in the Registry of the Court.

[3] On September 30, 2010, upon Ross's Oral Motion to Consolidate, these two cases were consolidated.

On December 5, 2011, the Court denied Defendant Johnston's Cross-Motion for Summary Judgment and granted the Plaintiffs' Motion for Summary Judgment, determining that a "1993 Contract" (discussed in Section B, *supra*) governing the police deferred compensation plan is binding upon Defendant Johnston, and not preempted by the defined benefit plans in the CBAs. *Ross v. Town of Johnston*, Nos. PB 10-0060, PB 10-0311, 2011 WL 6131032 (R.I. Super. Dec. 5, 2011). Under this reasoning, Ross, Faella, and DiMaio were entitled to distributions from the § 457 Accounts. *Id.* at *10. The decision was based, in part, on the doctrine of equitable estoppel. *Id.* at *5.

Defendant Johnston appealed the decision to the Supreme Court. On March 30, 2015, the Supreme Court vacated the judgment and remanded the case, finding that factual issues precluded summary judgment for Plaintiffs on the grounds of equitable estoppel. *Faella v. Chiodo*, 111 A.3d 351, 357-58 (R.I. 2015). A non-jury trial ensued. Following the trial and upon the request of the Court, Defendants submitted a Memorandum of Law in Support of their Renewed Rule 52(c) Motion for Judgment on Partial Findings Pursuant to the Rhode Island Superior Court Rules of Civil Procedure,[4] and Plaintiffs submitted their Post Trial Memorandum of Law in lieu of closing arguments. The Court's findings of fact follow. *See* Super. R. Civ. P. 52(a) ("[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon").

[4] In October 2018, Defendants moved for judgment on partial findings pursuant to Super. R. Civ. P. 52(c). The Court deferred ruling on the motion until the close of all evidence. *See* Trial Tr. (Tr.) 557-58, Oct. 20, 2017 (Vol. 6).

A

The ING Accounts

On April 26, 1984, Defendant Johnston entered into an agreement with ING entitled Town of Johnston Deferred Compensation Plan (the Deferred Compensation Agreement). Trial Ex. 1. This contract resulted in the establishment of a system of employee accounts under I.R.C. § 457, Deferred Compensation Plans of State and Local Governments and Tax-exempt Organizations. *See id.* at 80 ("Type of plan and section of the Internal Revenue Code (if any) under which plan is to qualify: 457"). Plan participants (Participants) were comprised of members of the Town's police force, and the plan allowed Participants to set aside 6% of their salary while the Town agreed to contribute a 12% match. Contributions from both Participants and the Town were held by ING in Accounts bearing the name and social security number of each Participant.

Ross, Faella, and DiMaio voluntarily enrolled in these Accounts shortly after the commencement of their employment with the Town. Ross testified that he believed his Account to be a savings plan and that the funds would be remitted to him upon his retirement. Tr. 294-96, Oct. 17, 2017 (Vol. 4). Ross and Faella each testified that although they understood that they would receive the money in the § 457 Accounts after the conclusion of their service to the Town, they did not know how they would receive this money, be it in a lump sum or in portions. *Id.* at 329-30.

At times relevant to this matter, the Town paid its invoices—including pension payment obligations—out of a general fund comprised of taxes and various fees. Tr. 43-44, July 11, 2017 (Vol. 2). However, Participant contributions to the § 457 Accounts were held by ING, separately from the Town's general fund. Vol. 6 Tr. 515. These funds were organized into two accounts: VB1965 and VB1966. Participant contributions of 6% of their salaries were held in VB1965,

while the Town's 12% match was held in VB1966. Officers received quarterly statements from ING, which displayed their names and social security numbers. The funds were further organized into a "fixed account," which offered a guaranteed rate of return of 4%, as well as subaccounts that were invested in the stock market as a whole. All the Town's contributions were held in the fixed account. Participants had the opportunity to designate their 6% contributions among different accounts and received personal identification numbers (PINs) through ING that allowed them to access the Accounts to do so. This structure was unique to the Town's police force; for instance, the Town provided a pension to its firemen, the funds for which were pooled into a single account. *See* Tr. 213, July 12, 2017 (Vol. 3).

Although the Accounts were set up in the employees' names and the employees selected the investment vehicles for the funds held therein, the Town was owner of all § 457 Accounts. This structure was required pursuant to I.R.C., under which § 457 deferred compensation accounts are owned by the employer until some triggering event, such as the employee's retirement or termination of his or her employment. Ross testified that he understood this structure when he signed the paperwork to enroll in the program.

On November 3, 2010, after a hearing upon ING's Motion for Leave to Interplead Funds, ING was ordered to pay all funds in the names of Ross, Faella, and DiMaio into the Registry of the Court (the Registry) to be held pending the adjudication of entitlement to the funds. On January 13, 2011, the Court recorded a Receipt of the following checks from ING:

No. 0014011203, $102,400.73, Albert Faella, VB1965;
No. 0014011204, $176,106.94, Albert Faella, VB1966;
No. 0014011205, $92,424.09, John DiMaio, VB1965;
No. 0014011206, $169,768.15, John DiMaio, VB1966;
No. 0014010614, $97,278.07, Alan Ross, VB1965;
No. 0014010615, $187,502.74, Alan Ross, VB1966.

ING and Citigroup were dismissed thereafter. The funds at issue remain in the Registry pending a decision in this action.

B

The 1993 Document

At trial, Faella presented a document entitled Town of Johnston Police Department Pension Plan (the 1993 Document) as evidence. However, Faella's copy was missing its first page, and a diligent search by Johnston Town Clerk Vincent P. Baccari, Jr. failed to yield the complete, original document. Vol. 3 Tr. 233. Moreover, witnesses including Faella, who signed the document in 1993, were unable to sufficiently testify to its authenticity. The 1993 Document was initially admitted *de bene* after the Town sought to exclude it during pretrial hearings on motions *in limine*, but the Court ultimately deemed it inadmissible after Plaintiffs were unable to authenticate the document. Therefore, the 1993 Document shall not be considered in the decision herein.

C

The Collective Bargaining Agreements

At all times relevant to this action, the Town was a party to CBAs with the IBPO, which were renegotiated approximately every three years. Pursuant thereto, the Town had an obligation to provide a pension to its police force. The CBAs set forth the parameters of this pension plan including the formula used to calculate pension benefits, as well as the benefits offered for early retirement. Notably, the Early Retirement section of relevant CBAs included the same 6% and 12% contribution language as that contained in the Deferred Compensation Agreement. At trial, the parties stipulated that there was no mention in the CBAs of 6% and 12% payments from the officers or the Town, except in the Early Retirement section of the relevant CBA. *See* Tr. 616,

Nov. 29, 2017 (Vol. 7). Disability pension benefits are also set forth in the CBAs from the time period relevant to this action; such payments are calculated as two-thirds of the full pension an officer would have received but for retirement due to a disability.

Following the Town's adoption of the Deferred Compensation Agreement, the Town officials expressed concerns that the § 457 Accounts could create an additional retirement benefit for police officers beyond their pensions. According to Defendant Johnston's Finance Director Dennis Quaranta (Quaranta), who oversaw pension payments from 1992 through 1995, the Town made these payments from its general fund and there was no designated pension fund that he could remember. Vol. 2 Tr. 44. When the Town entered into the Deferred Compensation Agreement, Quaranta reasoned that these Accounts would create a double retirement benefit for the police officers. *Id.* at 72-73. When he notified Mayor aRusso of this possibility, Mayor aRusso responded that the Town "[had] it covered." Tr. 97.

Ultimately, the Town made changes to the structure of the retirement benefits it offered its police officers, such that officers would not have the ability to establish additional savings accounts beyond the Town's pension plan. However, these changes went into effect after Ross, Faella, and DiMaio retired from service to the Town.

II

Standard of Review

When considering a non-jury trial pursuant to Super. R. Civ. P. 39(b), this Court is subject to Super. R. Civ. P. 52(c), which provides:

> "If . . . a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a

> judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule."

"[T]he trial justice weighs 'the credibility of witnesses and determines the weight of the evidence presented by plaintiff'" when ruling on a motion pursuant to Super. R. Civ. P. 52(c). *Broadley v. State*, 939 A.2d 1016, 1020 (R.I. 2008) (quoting *Pillar Property Management, L.L.C. v. Caste's, Inc.*, 714 A.2d 619, 620 (R.I. 1998)). Moreover, "when deciding a motion for judgment as a matter of law in a nonjury trial, unlike a jury trial, the trial justice need not view the evidence in the light most favorable to the nonmoving party." *Id.* (citing *Estate of Meller v. Adolf Meller Co.*, 554 A.2d 648, 651 (R.I. 1989)). Upon a defendant's motion for judgment following the close of a plaintiff's evidence, "'the trial justice may either determine the case on the record as it exists at the time the defendant files his motion or defer his [or her] judgment until both parties have completed their presentations of evidence.'" *Shove Insurance, Inc. v. Tenreiro*, 667 A.2d 532, 534 (R.I. 1995) (considering Rule 41(b)(2), the predecessor to Rule 52(c)) (quoting *J. K. Social Club v. J. K. Realty Corp.*, 448 A.2d 130, 133 (R.I. 1982)). "The rule is discretionary and allows the trial justice to defer his or her judgment until all the evidence is presented." *Id.*

The justice in a nonjury trial acts as the trier of both fact and law. *Hood v. Hawkins*, 478 A.2d 181, 184 (R.I. 1984). This role involves the consideration of evidence, the determination of the credibility of the witnesses, and the eventual drawing of proper inferences, all of which need not be done in the light most favorable to the plaintiff. *Id.* at 184-85. Indeed, "[t]he task of determining the credibility of witnesses is peculiarly the function of the trial justice when sitting without a jury." *Parella v. Montalbano*, 899 A.2d 1226, 1239 (R.I. 2006). "It is also the province of the trial justice to draw inferences from the testimony of witnesses." *Id.* (quoting *Walton v. Baird*, 433 A.2d 963, 964 (R.I. 1981)). These "findings of fact by a trial justice sitting without a jury are entitled to great weight and will not be disturbed on appeal absent a record showing that

the trial justice overlooked or misconceived material evidence or was otherwise clearly wrong." *Donnelly v. Cowsill*, 716 A.2d 742, 747 (R.I. 1998) (citing *Thomas v. Ross*, 477 A.2d 950, 953 (R.I. 1984)).

III

Analysis

Although Defendants moved midtrial for judgment on partial findings pursuant to Super. R. Civ. P. 52(c), the Court reserved judgment until the conclusion of all evidence in order to decide this case on the merits. Super. R. Civ. P. 52(c) ("the court may enter judgment as a matter of law against that party with respect to a claim or defense . . . or the court may decline to render any judgment until the close of all the evidence"). Following the non-jury trial, Plaintiffs and Defendants submitted their closing arguments in post-trial memoranda, each party arguing that the limited evidence presented at trial precluded declaratory judgment in favor of the opposing party.

Plaintiffs submit that I.R.C. § 457 is applicable to the herein analysis and decision and narrow their requested relief in the Amended Complaints solely to declaratory judgment. Specifically, Faella and DiMaio withdraw Counts III, IV, V, and VI of their Amended Complaint, leaving only Counts I and II, which consist of requests for declaratory judgment regarding the § 457 Accounts in Faella's and DiMaio's favor, respectively.[5] Also, Ross withdraws Counts I and

[5] Counts III and IV of Faella and DiMaio's Amended Complaint request relief with respect to the 1993 Contract, which was deemed inadmissible evidence. Counts V and VI request mandatory injunctions requiring Defendants to remit the funds originally held in the § 457 Accounts to Plaintiffs; however, as these funds are now held in the Registry, Plaintiffs maintain these Counts are rendered moot.

II of his Amended Complaint, leaving only a request for injunctive relief with respect to the § 457 Accounts bearing his name and social security number.[6]

Additionally, Plaintiffs argue that evidence presented at trial demonstrates that the Town's reliance on G.L. 1956 §§ 45-65-1 *et seq.*, Pathway to Retirement Security for Locally Administered Pension Funds Act), to show entitlement to funds in the Accounts, is irrelevant and misplaced. In the alternative, Plaintiffs argue—in the event that the Town attempts to nullify the § 457 Accounts using the argument that the Town never ratified the contracts—that the Town Council's approval of annual budgets consistent with the terms' obligation demonstrates sufficient consent and knowledge to bind the Town in a contractual agreement. Finally, should the Court find that the § 457 Contracts are null and void, Plaintiffs seek an award solely of their 6% contributions to the § 457 Accounts, without the Town's 12% contribution.

In their post-trial memorandum of law, Defendants renew their Rule 52(c) Motion for Judgment on Partial Findings. Defendants argue that Plaintiffs submitted insufficient evidence at trial to support their claims in the Amended Complaints; namely, Plaintiffs' failure to present a complete version of the 1993 Document and the Court's rejection of Plaintiffs' proposed expert testimony,[7] coupled with the Court's sole acceptance of Defendants' expert witness.[8] Given this purported insufficiency of the evidence, Defendants maintain that an award of declaratory and injunctive relief under an equitable theory would be clearly erroneous. Lastly, Defendants argue

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[6] Ross's Amended Complaint, which he submitted individually, has analogous Counts to those of the Amended Complaint of Faella and DiMaio, including a request for a mandatory injunction and relief pursuant to the 1993 Contract.

[7] Plaintiffs sought to have John Robert Keegan qualified as an expert, but the request was denied based on a finding that Keegan's knowledge regarding municipal plans was insufficient to aid the trier of fact. Vol. 3 Tr. 267-81.

[8] Defendants' witness Philip J. Fogli was qualified as an expert on issues covered in the case, including § 457. Tr. 685, Nov. 30, 2017 (Vol. 8).

that Plaintiffs improperly rely on § 457 of the I.R.C., given that it is a federal statute and Plaintiffs failed to submit the statute into evidence or request the Court take judicial notice thereof.

A

Judicial Notice

As a threshold matter, it is important to address the applicability of § 457 to this action. Defendants maintain that Plaintiffs' reliance upon § 457 of the Code is improper because the Court did not take judicial notice of this federal statute at trial, nor did Plaintiffs introduce the statute as an exhibit. Therefore, Defendants argue that § 457 may not be considered in the analysis or decision.

It is well-settled that a court need not formally take judicial notice of state or federal law at trial but should consider such law, be it statutory or case law, when rendering a decision. *See* 31A C.J.S. *Evidence* § 27 (June 2019 Update) (explaining that "[a] public statute of the forum state or of the United States need not be pleaded, and it may and must be judicially noticed regardless of whether it was called to the attention of the court by counsel"); *see also Lucero v. R.K. Wong*, No. C 10-1339 SI (pr.), 2011 WL 5834963, at *5 (N.D. Cal. Nov. 21, 2011) (stating that it is not necessary for parties to move for judicial notice of state and federal cases as legal precedent because "the court routinely considers such legal authorities in doing its legal analysis without a party requesting that they be judicially noticed"). Indeed,

> "[a]ll courts of the United States take judicial notice of the United States Constitution and its amendments, and of the public statutes enacted by Congress. Likewise, from motives of necessity, as well as of public policy, all courts of a state judicially recognize the state constitution as well as the state's public statutes." 31A C.J.S. *Evidence* § 27.

Although not required to do so explicitly at trial, state courts must take judicial notice of the United States Constitution and federal statutes. *See, e.g., Laurence v. Corwin*, 75 A.D.2d 840 (N.Y. App.

Div. 1980) ("it is not important that Securities Act was not expressly pleaded, 'for judicial notice of the Acts of Congress must be taken by state courts'") (quoting *Dowski v. Merritt-Chapman & Scott Corp.*, 65 N.Y.S.2d 890 (N.Y. 1946), *aff'd*, 271 A.D. 874, 66 N.Y.S.2d 635 (N.Y. App. Div. 1946); *State v. Pleva*, 496 A.2d 375, 382 (N.J. Super. Ct. App. Div. 1985) ("it is well-established that federal laws and constitutional provisions are binding on the state courts and are subject to their judicial notice"); *Ingram v. Knippers*, 72 P.3d 17, 24 n.4 (Okla. 2003) (state courts are bound "to follow the United States Constitution as the supreme law of the land").

Moreover, Rule 201 of the Rhode Island Rules of Evidence governs judicial notice, and explicitly limits the scope of the rule to "adjudicative facts." R.I. R. Evid. 201. The Advisory Committee's Notes to Federal Rules of Evidence 201 further clarify that "Rule 201 applies only to facts: the rule leaves questions of noticing law untouched." "The facts must be adjudicative, as opposed to legislative; that is, the facts must pertain to the litigated event, not to the laws or policies behind the laws that relate to the event." *See* Advisory Committee's Notes (1) and (2) to Fed. R. Evid. 201. Although Rule 44.1 of the Rhode Island Rules of Civil Procedure requires parties to give reasonable notice when they intend to raise an issue of foreign law, this rule only pertains to the law of a foreign country. Super. R. Civ. P. 44.1. Nevertheless, Defendants' expert Fogli gave testimony regarding I.R.C. § 457 at trial, thereby providing reasonable notice of those issues pertaining to § 457. Tr. 744, Jan. 10, 2018 (Vol. 9).

Therefore, Defendants' argument that § 457 may not be considered in the within decision because judicial notice of such law was not taken at trial is of no moment. Explicit judicial notice, at trial, of federal statutes or case law is not required under the Rhode Island Rules of Evidence. *See* R.I. R. Evid. 201(a) (applying rules of judicial notice only to adjudicative facts). Furthermore, all state courts of the United States take judicial notice of the United States Constitution and the

federal laws originating therefrom. 31A C.J.S. *Evidence* § 27 (June 2019 Update). Accordingly, the Court shall consider I.R.C. § 457, and other relevant federal law, in the analysis herein.

B

Deferred Compensation and I.R.C. § 457

Having determined that it may consider § 457 of the Code, the Court turns to Defendants' argument that Plaintiffs have failed to introduce sufficient evidence to demonstrate that Plaintiffs have a property right to the § 457 Accounts. Specifically, Plaintiffs take issue with the Town's contention that

> "although the contracts before the [C]ourt represent [§] 457[ ]plans, the intent in opening these . . . accounts was not to follow the mandate of IRS code [§] 457 (which is the genesis and source of these accounts) but was intended by the Town to fund the [P]laintiffs' defined pensions plans arising out of the CBA's [sic]." Pls.' Post Trial Mem. 13.

Plaintiffs argue that there is no competent evidence to support Defendants' position. Plaintiffs further reference the I.R.C. rules governing § 457 deferred compensation in support of a finding in their favor.

Plaintiffs present proposed findings of fact based on the evidence presented at trial in support of their assertion that the Accounts are property of Plaintiffs under § 457. First, Plaintiffs submit that it is undisputed that the Deferred Compensation Agreement established a deferred compensation plan pursuant to I.R.C. § 457. Plaintiffs additionally note that the 6% contributions into the Accounts were segregated into subaccounts, assigned to each officer under his respective social security number and that the officers had unfettered discretion to invest their contributions in any manner they saw fit, consistent with ING's investment menu. Plaintiffs therefore argue that the Accounts constitute deferred compensation, rather than a funding mechanism for a defined benefit plan.

Furthermore, Plaintiffs maintain that the deposition of Christina Menard (Menard)—a client relations manager for ING who was deposed on March 30, 2011, pursuant to Super. R. Civ. P. 30, on behalf of Faella and DiMaio—supports a finding in their favor. Menard was well versed in ING products, had worked within the public-sector including with the Town, and testified that she was familiar with "defined contribution plans," of which § 457 constitute one such type. Considering her experience and expertise, the Plaintiffs rely upon her testimony including the statement that "the contracts between the Town of Johnston and ING Life Insurance and Annuity Company . . . set up different deferred compensation plans." Menard Dep. 23:18-21. Ultimately, Plaintiffs argue that this testimony negates the Town's defense that while the Accounts represent § 457 plans, the intent in opening such plans was not to follow the mandate of the IRS code but rather was to fund Plaintiffs' defined pension plans arising out of the CBAs.

In response, Defendants assert that the insufficiency of evidence precludes a finding in Plaintiffs' favor. First, Defendants note that the 1993 Document was deemed inadmissible as a full exhibit. Tr. 416-17, Oct. 18, 2017 (Vol. 5). Moreover, Defendants submit that its witness Fogli was the only witness approved as an expert. According to Defendants, Fogli's testimony—specifically his testimony that the § 457 Accounts were owned by the Town at all times relevant to this matter, consistent with the Code requirement that the employer own the account until distribution to employee (see discussion on page 16 *infra*)—supports a finding in Defendant Johnston's favor. Defendants additionally note Fogli's testimony that he reviewed the CBAs for relevant years (including the CBA for the years 2001-2004 and the CBA for 2005-2008) and the benefits provided therein included a defined benefit pension for normal retirement, early retirement, and a disability retirement. Fogli opined that there was no indication in the relevant CBAs that Plaintiffs would receive a pension in addition to a deferred compensation plan. Finally,

Defendants dispute Plaintiffs' reliance upon I.R.C. § 457, arguing that nothing in the forms could have reasonably given Plaintiffs an expectation of receiving their contributions to the § 457 Accounts after the conclusion of their service to the Town.

In general, *compensation* can be defined as "[r]emuneration and other benefits received in return for services rendered; esp., salary or wages." Black's Law Dictionary (11th ed. 2019). It "consists of wages and benefits in return for services [and] [i]t is payment for work[; i]f the work contracted for is not done, there is no obligation to pay." *Id.* Conversely, employees who are aggrieved by failure to receive their wages can seek legal recourse. *See generally* G.L. 1956 § 28-14-19.2(a) (providing a civil right of action to recover unpaid wages or benefits).

At issue in this matter is the compensation of Ross, Faella, and DiMaio from the Town. Specifically, the parties are in dispute over the 6% of each of these officers' salaries that the officers voluntarily deferred when they began serving in the police force, as well as the 12% match promised by the Town in return for employees foregoing such compensation in the short term. Accordingly, Ross, Faella, and DiMaio had an expectation of receiving this money upon their retirement from employment with the Town.

The term "compensation" is broad, encompassing numerous benefits. *See* Pension Plan Guide (CCH) P 26464 (C.C.H.), 2015 WL 8928626, ¶ 26,464 *Squeeze on Qualified Plans Often Makes Nonqualified Arrangements Primary Source of Retirement Benefits* (2019). One such benefit is *deferred compensation*, which can be described as "[p]ayment for work performed[] to be paid in the future or when some future event occurs" or "[a]n employee's earnings that are taxed when received or distributed rather than when earned." Black's Law Dictionary (11th ed. 2019). The term "'deferred' refers to the fact that income is typically deferred for a specified number of years or until termination of employment." Pension Plan Guide, 2015 WL 8928626. Under a

deferred compensation plan, an employee may defer the receipt of their earnings until retirement or the termination of their employment, thereby deferring their taxation on such earnings until the employee is in a lower tax bracket. *See generally In re IT Group, Inc.*, 448 F.3d 661, 664 (3d Cir. 2006) (citing David J. Cartano, *Taxation of Compensation & Benefits* § 20.01, at 709 (2004)).

The 6% contributions from Ross, Faella, and DiMaio at issue constitute deferred compensation. The officers performed work for the Town and voluntarily gave up a portion of their salaries to save for retirement and in order to benefit from the favorable tax consequences of such a decision. S*ee Register v. PNC Financial Services Group, Inc.*, 477 F.3d 56, 61-62 (3d Cir. 2007) (explaining that, in the case of a defined contribution plan, "[t]he employee bears the investment risks and the employer does not guarantee a retirement benefit to the employee" but rather the employee is entitled to whatever assets are held in that employee's account). Moreover, Ross, Faella, and DiMaio forewent this present pay to benefit from the Town's offer to match 6% of their salaries by placing 12% in an Account bearing each Plaintiffs' names and social security numbers.

Deferred compensation is categorized as qualified or nonqualified. "The basic concept of nonqualified deferred compensation is that amounts are paid in the future for services rendered today." Thomas A. Jorgensen, *Nonqualified Compensation-Deferred* Concepts, C923 ALI-ABA 1177, 1179(I)(A)(1)(a) (1994). "'Nonqualified' means that the plan does not meet all of the tax qualification requirements of Code Sec. 401(a)." Pension Plan Guide, 2015 WL 8928626. "Generally, the amounts payable to the employee under a nonqualified deferred compensation plan are unfunded promises of the employer to pay the deferred compensation at the future date specified in the plan." C923 ALI-ABA 1177, 1179(I)(A)(1)(c).[9] Section 457 of the I.R.C. defines

[9] "A plan is unfunded when:

and sets forth the parameters for one such nonqualified deferred compensation plan. *Id.* at 1200(C)(1). "With enactment of IRC section 457 in 1978, the Congress specifically authorized a tax-deferred, nonqualified, and unfunded compensation plan to enable employees of state and local government to provide themselves with additional retirement income." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-96-38, *PUBLIC PENSIONS: SECTION 457 PLANS POSED GREATER RISK THAN OTHER SUPPLEMENTAL PLANS* (GAO/HEHS-96-38) CH. 4 (1996). Congress subsequently made the more commonly used 401(k) unavailable to state and local government employees, finding the plans duplicative with respect to the benefits they offer. *Id.*

Essentially, "457 plan participants voluntarily forego current income in order to provide for themselves in their retirement years." *Id.* Details of the plan are set forth in the I.R.C., including, *inter alia*, the year of inclusion of the compensation in gross income, parameters of eligible plans and distribution requirements. I.R.C. § 457(a), (b), (d). Notably, § 457(e)(11)(A), (B) enumerates plans that are excluded from § 457 and shall not be treated as providing deferred compensation. These include "bona fide vacation leave, sick leave, compensatory time, severance pay, *disability pay*, or death benefit plan." Sec. 457(e)(11)(A)(i) (emphasis added). The I.R.C. additionally requires that ownership of property held in such a plan remain with the employer until the time of distribution, in keeping with underlying tax principles that require taxation when the

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> [t]he employer promises to pay the employee the deferred compensation at a specified time, but does not set aside the funds in an escrow, trust fund, or otherwise. The assets used to pay the deferred compensation are the general assets of the employer and are subject to the claims of the employer's creditors." *In re New Century Holdings, Inc.*, 387 B.R. 95, 109 (Bankr. D. Del. 2008) (citing David J. Cartano, *Taxation of Compensation & Benefits* § 20.02[A], at 721.

taxpayer receives—or realizes the benefit of—the compensation. Most significantly, § 457 does not allow anyone other than the Participant and his or her beneficiaries to receive funds from a § 457 plan. *See* § 457(d)-(g).

The plan at issue is a § 457 deferred compensation plan. It was organized as such, listed as a § 457 plan on all relevant paperwork submitted and accepted as exhibits at trial, and was managed according to the IRS rules governing such plans at all times relevant to this action. Accordingly, the plan at issue is governed by I.R.C. § 457 and constitutes deferred compensation for Ross, Faella, and DiMaio's service to the Town. The Town's argument—that these former officers' payments for the disabling injuries they suffered while serving the Town replace Ross, Faella, and DiMaio's deferred 6% of their salaries and the 12% matches bearing their names and social security numbers—fails. Further, the Town's proposal to appropriate these Accounts to fund police officer pension plans, generally, is not in compliance with federal law.

Regrettably for the Plaintiffs, experts have recognized § 457 plans to be inherently more risky than other modes of deferred compensation. GAO/HEHS-96-38 CH. 4. In general, "because 457 plans are nonqualified, unfunded deferred plans that require that the amounts deferred may not be set aside for the exclusive benefit of the employee but must remain the property of the employer." *Id.* Furthermore, "nonqualified plan participants are often at risk of losing part or all of their benefits under the plan because the employer's promise to pay is generally unsecured." Pension Plan Guide, 2015 WL 8928626, at 1.

Two circumstances pose particular risks to § 457 Participants: (1) when an employer becomes insolvent or becomes a debtor in a bankruptcy proceeding, and (2) when an employer has a "change of heart" with regard to the plan. With respect to bankruptcy, money intended to pay employees' § 457 plans in the future will be subject to claims of the employers' general creditors,

and the employee/plan participant will simply become an unsecured creditor. GAO/HEHS-96-38, at 1. Less commonly, "[a] change of heart can occur when an employee covered by an unfunded deferred compensation arrangement falls out of favor with those in control of the company." Pension Plan Guide, 2015 WL 8928626, at 3. Similarly, "[§] 457 plan participants risk losses because sponsoring governments may view deferred monies as available for public use." GAO/HEHS-96-38, at 1. The legislature has attempted to protect § 457 participants from these risks through the imposition of a requirement that money set aside for § 457 plans be put in trust to protect employees; however, this procedure does not protect participants from the bankruptcy risk, as the trust will still allow employer creditors to reach the funds. *See* Pension Plan Guide, 2015 WL 8928626, at 4 (explaining that "[t]his type of trust protects the employee against a change of heart because the funds cannot revert to the employer under any circumstances[; h]owever, the employee is not protected against the possibility that the employer will suffer a severe financial hardship, in which case the employee would . . . be a mere unsecured creditor"). In either situation, employees have "legal recourse, [but] this is small consolation to those seeking security as they near retirement." *Id.* at 3.

Although Defendant Johnston threatens that a finding in Plaintiffs' favor would result in its bankruptcy, the Town currently is not involved in bankruptcy proceedings. Rather, Defendant Johnston has had a change of heart with respect to the § 457 Accounts. Despite its insistence that it did not intend the § 457 Accounts as deferred compensation, the Town organized the Accounts under federal law governing deferred compensation and the plans must be treated as such. *See, e.g., Beary v. ING Life Insurance & Annuity Co.*, 520 F. Supp. 2d 356, 365 n.6 (D. Conn. 2007) (noting that certain § 457 accounts in issue were "required to be utilized for the exclusive benefit of [p]articipants and their beneficiaries in accordance with Section 457(g) of the Internal Revenue

Code," in the context of a breach of fiduciary claim). Since entering into the Deferred Compensation Agreement in 1984, the Town has deemed that money set aside from Plaintiffs' salaries would better serve the Town if it were put towards a public use: to be placed in a general fund to pay the Town's pension obligations. However, the I.R.C. and the Deferred Compensation Agreement require that the Town pay the police officers the compensation they earned through their service to the Town. *See* I.R.C. § 457(g) (requiring that "[g]overnmental plans [organized under this statute] must maintain set-asides for *exclusive benefit of participants*") (emphasis added).

Moreover, the Town's argument that the § 457 Accounts are property of the Town because plan documents identify the Town as the owner is misplaced. Indeed, § 457 requires that funds in accounts organized under this section of the Code remain "solely the property and rights of the employer," but only "*until made available to the participant or other beneficiary.*" § 457(b)(6)(C) (Emphasis added.) This structure prevents Participants from having continued control over deferred compensation "in order to maintain tax-deferred status of the funds," and has no bearing upon the ultimate property rights in such accounts. GAO/HEHS-96-38 CH. 0:3; *see generally* Melissa K. Burnett-Testa, Esq., A Practical Guide to Estate Planning in Rhode Island § 9.2.5, *Nonqualified Deferred Compensation Plans* (MCLE) (1st ed. 2012 with 2017 Supplement) ("[t]o achieve . . . income tax deferral, the plan must be structured to avoid triggering income recognition").

The question remains as to whether the § 457 Contracts are rendered moot due to the fact that they were not ratified by the Town. Plaintiffs dispute this proposition, arguing that the Town has demonstrated a pattern of failure to formally ratify agreements, generally, as well as an acquiescence to the § 457 Contracts, specifically. Indeed, a review of the record indicates that the

Town failed to ratify fourteen out of the eighteen CBAs relevant to this action. However, the Town Council approved Defendant Johnston's budgets in all years relevant to this matter, particularly the budgets that allocated the Town's 12% contribution to be deposited into the § 457 Accounts. The Town Council also approved budgets designating money from the general fund to pay the defined benefit pension payments of retired officers, rather than arranging to pay these pension obligations through the § 457 Accounts. *See generally*, 73 Am. Jur. 2d *Statute of Frauds* § 452 (Aug. 2019 Update) (explaining that a party's part performance of an agreement estops that party from later disputing the existence of a valid contract). For these reasons, the suggestion that the § 457 Contracts are invalid because they were not ratified in accordance with the Town Charter is without merit.

C

Public Policy Considerations

The parties submitted additional memoranda shortly before the close of the trial. Therein, Plaintiffs and Defendants, at the Court's request, addressed a colloquy in which the Court presented the following hypothetical to defense counsel:

> "Assume arguendo that the [P]laintiffs' legal position is correct and that [the § 457 Accounts] are separate, they're not part of the pension, separate deal that was going to make them millionaires, but the Town has treated it in the fashion that it has. . . . So if the Court were to find that the money really was theirs back when they should have gotten it but, in fact, because of the way it's been handled it's going to bankrupt the Town, to use your term, do they then have to sacrifice to the Town if they were right in the first instance"? (Vol. 8 Tr. 713).

In their responsive memorandum, Plaintiffs argue that § 45-65-1, the Pathway to Retirement Security for Locally Administered Pension Funds Act, neither requires nor permits the Town to appropriate funds in Plaintiffs' § 457 Accounts, as § 45-65-1 is not relevant to this action.

Citing the Takings Clauses of the United States and Rhode Island Constitutions, both of which mandate that the government may not take a person's property without just compensation, Plaintiffs argue that § 45-65-1 does not circumvent these Constitutions to impose "super-powers" upon the Town to take their property.

Plaintiffs further submit that the Town should not be permitted to introduce evidence concerning the financial status of its police pension plan or be allowed to call an expert witness to render an opinion in accordance therewith. More importantly, Plaintiffs argue that the Town's alleged financial deficiencies should have no legal bearing upon the property rights in the § 457 Accounts. While the Town hopes to demonstrate that it will be rendered insolvent—thereby supporting a finding under §§ 45-65-1 *et seq.* that "public policy" entitles it to the § 457 Accounts—Plaintiffs argue that §§ 45-65-1 *et seq.* does not require or permit the Town to take Plaintiffs' deferred compensation funds, in light of the Takings Clauses discussed *supra.* Moreover, § 45-65-1 was enacted in 2011—well after Ross, Faella, and DiMaio retired (all retired no later than 2008) and after Plaintiffs brought this litigation seeking funds presently on deposit in the Court's Registry—therefore, Plaintiffs argue the statute is inapplicable to this analysis. Finally, Plaintiffs assert that the Town's arguments related to the mandatory injunction counts are misplaced, maintaining that Plaintiffs seek only declaratory judgment.

In their response, Defendants reiterate the argument that there is insufficient evidence to support Plaintiffs' claims to distributions from the § 457 Accounts. Defendants argue that state and federal due process protections are only triggered after a property right as been established and that Plaintiffs have failed to establish such a right. It is Defendant Johnston's position that Plaintiffs are entitled only to the disability pensions, and given that the Town has paid these pensions, Defendants argue that Plaintiffs cannot claim a deprivation that would invoke the due

process clauses of the United States or Rhode Island Constitutions. Defendants do not directly address the question of whether an award of the § 457 Accounts to the Town is proper in the event that Plaintiffs have a legitimate property right to funds therein.

It is well-settled that a party's financial status is generally not admissible evidence. *Travelers Insurance Co. v. Hindle*, 748 A.2d 256, 259-60 (R.I. 2000). Specifically, "'federal discovery rules and similar state rules do not permit the discovery of facts concerning a defendant's financial status or ability to satisfy a judgment, since such matters are not relevant to the trial issues and cannot lead to the discovery of admissible evidence[.]'" *Id.* at 259 (quoting 23 Am. Jur.2d *Depositions and Discovery* § 37 (Aug. 2019 Update)). Likewise, the introduction of evidence of "'[o]ne's ability to satisfy a judgment ordinarily is not evidence that is material to any matter.'" *Traveler's Insurance Co.*, 748 A.2d at 260 (quoting *Great American Insurance Co. v. Murray*, 437 S.W.2d 264, 266 (Tex. 1969)); *see also State v. Reid*, 213 S.W.3d 792, 814 (Tenn. 2006) (holding that evidence of a defendant's poverty generally holds little probative value). Courts have routinely found that a party's financial status is irrelevant and unduly prejudicial. *See, e.g., Scheibel v. Groeteka*, 538 N.E.2d 1236, 1251 (Ill. App. Ct. 1989) (evidence of a party's financial status can be "so harmful and prejudicial as to have resulted in the return of an improper verdict").

Defendants seek to introduce evidence of the Town's financial status in order to demonstrate its inability to pay a future judgment in this action. However, here at issue is which party has property rights to the § 457 Accounts. Plaintiffs seek a declaratory judgment that the Accounts constitute deferred compensation, whereas the Town argues they are funding for the Town's defined benefit pension plans. Thus, evidence of the Town's inability to pay a judgment in this matter is irrelevant to this action. *See Travelers Insurance Co.*, 748 A.2d at 259 (explaining

that the Supreme Court has always recognized the "prejudicial nature of requiring a defendant to reveal his or her financial worth").

D

Declaratory Judgment Under §§ 9-30-1 *et seq.*

"The decision to grant or to deny declaratory relief under the Uniform Declaratory Judgments Act is purely discretionary." *Sullivan v. Chafee*, 703 A.2d 748, 751 (R.I. 1997) (citing *Woonsocket Teachers' Guild Local Union 951, AFT v. Woonsocket School Committee*, 694 A.2d 727, 729 (R.I. 1997)). Specifically, the Uniform Declaratory Judgments Act states that "[t]he [S]uperior . . . [C]ourt upon petition, following such procedure as the court by general or special rules may prescribe, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Sec. 9-30-1. Should the Superior Court exercise "its discretion to issue such a judgment, [the] decision should remain untouched on appeal unless the court improperly exercised its discretion or otherwise abused its authority." *Sullivan*, 703 A.2d at 751.

Under Rhode Island law, "courts may withhold injunctive relief after balancing the equities or, put another way, considering the relative hardships to the parties." *Rose Nulman Park Found. ex rel. Nulman v. Four Twenty Corp.*, 93 A.3d 25, 30 (R.I. 2014). Indeed, the request for a mandatory injunction is an action in equity, and the Court may consider interests of third parties and the public in granting or denying such a request. *Id.* at 32 (citing the Restatement (Second) of *Torts* § 942 (1979) (June 2019 Update). A declaratory judgment proceeding is likewise equitable in nature. *Arena v. City of Providence*, 919 A.2d 379, 396 (R.I. 2007) (applying the doctrine of laches, given that "proceedings for declaratory relief have a great deal in common with equitable

proceedings"); *Northern Trust Co. v. Zoning Board of Review of Town of Westerly*, 899 A.2d 517, 520 n.6 (R.I. 2006).

In the Amended Complaints, Plaintiffs brought counts seeking both declaratory judgment and mandatory injunctions. However, based on rulings at trial including the finding that the 1993 Document was inadmissible and the Order for funds in the § 457 Accounts held originally by ING be placed in the Registry, Plaintiffs ask, in their Post Trial Memorandum of Law, to withdraw all counts except those seeking declaratory judgment.

Pursuant to Super. R. Civ. P. 15(a), a party may amend its pleading with the court's approval, which "shall be freely given when justice so requires." Moreover, "[w]ithdrawing a claim from within a complaint is properly seen as an amendment of the complaint." *Bailey v. Walsh*, 61 F. App'x 120 (5th Cir. 2003) (citing *Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298, 302 n.2 (5th Cir. 1978)). Here, Plaintiffs' claims—including their requests for declaratory relief with respect to the 1993 Document and mandatory injunctions to facilitate Defendants' remittance of the funds in dispute—are rendered moot due to the rulings at trial that the 1993 Document is inadmissible and the Order for ING to transfer funds in the § 457 Accounts into the Registry. The sole remaining question is the proper ownership of the disputed funds; therefore, justice requires the Court to allow Plaintiffs to withdraw all other counts. *See* Super. R. Civ. P. 15(a). Accordingly, this Decision shall address only Plaintiffs' request for declaratory judgment.

Evidence presented by both parties at trial supports a finding that the Accounts at issue are governed by § 457 of the I.R.C. Specifically, the evidence shows that Plaintiffs voluntarily contributed their salaries to the Accounts, that they received statements in their names which included their social security numbers, that the Town segregated these funds in the Accounts at ING apart from other pension funds such as the firemen's pension, that Plaintiffs had discretion

regarding how money in the Accounts was invested, and that plan documents were identified as § 457 deferred compensation. *See generally Register*, 477 F.3d at 61 (distinguishing defined contribution plans and defined benefit plans and stating that with a defined contribution plan "[t]he employee is entitled 'to whatever assets are dedicated to his individual account'") (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999)). Overall, Plaintiffs demonstrated that they have a legitimate property right in these Accounts. Accordingly, the § 457 Accounts are Plaintiffs' property and Plaintiffs are therefore entitled to the funds therein.

Moreover, equitable considerations weigh in favor of Plaintiffs. *See Tucker Estates Charlestown, LLC v. Town of Charlestown*, 964 A.2d 1138, 1140 (R.I. 2009) (stating that it is "well settled that the Superior Court has broad discretion to grant or deny declaratory relief under the [Uniform Declaratory Judgments Act])." At trial, Defendant Johnston argued that Rhode Island's Pathway to Retirement Security for Locally Administered Pension Funds Act enabled it to appropriate the property of Plaintiffs for the public good. Vol. 8 Tr. 714-15; §§ 45-65-1 *et seq.*[10] However, Defendant Johnston failed to provide legal support for the proposition that a court may take an individual's property without just compensation. R.I. CONST. art. I, § 16 ("[p]rivate property shall not be taken for public uses, without just compensation"); *see also McCullough v. State*, 490 A.2d 967, 969 (R.I. 1985) (rejecting similar arguments such as "'the floodgates of litigation will be opened' or 'the financial integrity of the fund will be impaired,'" and stating that instead, "[s]uch comments should be directed to the legislature," in the context of an emotional distress claim made under the Criminal Injuries Compensation Act). As the Accounts at issue are Plaintiffs' property, Defendants' arguments regarding equity are unpersuasive.

[10] At trial, counsel for Defendant Johnston referred to §§ 45-65-1 *et seq.* as "Retirement Security Act for Locally Administered Pension Funds." The title of this statute has since been changed to "Pathway to Retirement Security for Locally Administered Pension Funds Act."

E

Remedies

Having determined that the Accounts are deferred compensation of Ross, Faella, and DiMaio and are properly governed by federal law, the Court turns to the issue of appropriate remedies. In their Amended Complaints, Plaintiffs seek their 6% contributions to the Accounts; the Town's 12% match; interest on all the § 457 Accounts, including the 6% employee contributions and the 12% employer contributions; and attorneys' fees.

1

Employee Contributions to the § 457 Accounts

Plaintiffs ask to be awarded the Accounts holding the 6% contributions from Ross, Faella, and DiMaio's salaries to which they contributed during their service to the Town. Specifically, Faella seeks $102,400.73 from account VB1965, deposited into the Registry under Check No. 0014011203; Ross seeks $97,278.07 from account VB1965, deposited into the Registry under Check No. 0014010614; and Andrea DiMaio seeks $92,424.09 from account VB1965, deposited into the Registry under Check No. 0014011205. Having determined that these funds constitute deferred compensation of Ross, Faella, and DiMaio, properly governed by and organized under the I.R.C., the Court awards each Plaintiff the specific amount allocated to him or her as aforesaid.

2

Employer Contributions to the §457 Accounts

Plaintiffs seek funds from the Accounts holding the 12% of Ross, Faella, and DiMaio's salaries that the Town matched pursuant to the Deferred Compensation Agreement. Faella asks the Court to award him $176,106.94 from account VB 1966, deposited into the Registry under Check No. 0014011204; Ross seeks $187,502.74 from account VB 1966, deposited into the

Registry under Check No. 0014010615; and Andrea DiMaio seeks $169,768.15 from account VB 1966, deposited into the Registry under Check No. 0014011206. After determining that the 12% match from the Town is additionally governed by IRC § 457, the Court finds the 12% employer contributions to be deferred compensation for Plaintiffs' exclusive benefit. § 457(g). Therefore, the Court awards Plaintiffs these Accounts.

3

Interest and Attorneys' Fees

In addition to the subject funds held in the Registry, Plaintiffs seek interest and attorneys' fees. Pursuant to Rhode Island statute, "[i]n any civil action in which a verdict is rendered . . . for pecuniary damages, there shall be added . . . interest at the rate of twelve percent (12%) per annum thereon from the date the cause of action accrued" which shall continue to accrue post-judgment at the same rate. *See* Sec. 9-21-10(2). However, the Supreme Court has held that declaratory judgments do not constitute pecuniary damages and are therefore not eligible for statutory interest. *See Fravala v. City of Cranston ex rel. Baron*, 996 A.2d 696, 708 (R.I. 2010) ("this determination of benefits, by way of a declaratory judgment, was not an award of damages[; the plaintiff] therefore is not entitled to prejudgment interest under § 9-21-10(a)") (in the context of a widow's claim for municipal pension benefits). Here, the Court has rendered a declaratory judgment rather than an award of pecuniary damages. Therefore, Plaintiffs are not entitled to interest on the § 457 Accounts, including those Accounts holding their 6% contribution and the 12% contribution from the Town.

With respect to attorneys' fees, Plaintiffs' request for relief is denied. While the Uniform Declaratory Judgments Act allows the Court to "make such award of costs as may seem equitable and just," Rhode Island courts "adhere[] to the 'American rule' that litigants generally are

responsible for their own attorneys' fees and costs." Sec. 9-30-10; *Downey v. Carcieri*, 996 A.2d 1144, 1153 (R.I. 2010) (affirming the trial court's award of attorneys' fees pursuant to the plaintiff's claims under the Access to Public Records Act (APRA) notwithstanding the plaintiff's additional count for declaratory relief, but noting that the "action was, in essence, centered on the quest for disclosure of public records [and] . . . APRA encourages meritorious claims under the statute by providing the incentive of an award of attorneys' fees for a prevailing party"). Moreover, the Supreme Court has "never once held that 'costs' under § 9-30-10 include attorneys' fees." *Arnold v. Arnold*, 187 A.3d 299, 316 n.10 (R.I. 2018). Therefore, the Court declines to extend § 9-30-10 beyond the Supreme Court's interpretation, despite its finding that Plaintiffs are entitled to the § 457 Accounts.

IV

Conclusion

For the reasons stated herein, all Accounts bearing the names and social security numbers of Ross, Faella, and DiMaio that are currently held in the Registry are property of Plaintiffs. Specifically, these Accounts—including those holding 6% of Ross, Faella, and DiMaio's salaries, along with those holding the Town's 12% match—are governed by § 457 and constitute deferred compensation under federal law. Therefore, the Court shall remit all aforementioned funds to Plaintiffs. Plaintiffs are not entitled to interest under § 9-21-10, as the decision herein is made pursuant to §§ 9-30-1 *et seq.*, and such judgments are not subject to statutory interest. Finally, Plaintiffs' request for attorneys' fees is denied.

Prevailing counsel shall present an appropriate order consistent herewith which shall be settled after due notice to counsel of record.

RHODE ISLAND SUPERIOR COURT

Decision Cover Sheet

TITLE OF CASE:	Albert A. Faella, et al and Alan Ross v. Town of Johnston
CASE NO:	PB-2010-0311; PB-2010-0060
COURT:	Providence County Superior Court
DATE DECISION FILED:	August 22, 2019
JUSTICE/MAGISTRATE:	Silverstein, J. (Ret.)
ATTORNEYS:	
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For Defendant:	SEE ATTACHED LIST

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