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Rhode Island Interest: Rhode Island Civil Procedure - Some Problems

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INTRODUCTION

"Law must be stable and yet it cannot stand still."[1] That is true of civil procedure. Substantial change in that field came to Rhode Island in 1966. After a history of division of civil actions between law and equity and general adherence to the English system brought to these shores with colonization, in 1966 Rhode Island adopted the Superior Court Rules of Civil Procedure (the Rules) modeled upon the Federal Rules of Civil Procedure (the Federal Rules).[2] Amendments to the Rules in Rhode Island were infrequent between 1966 and 1995, a period in which the 1966 rules were regularly applied and interpreted by the Supreme Court of Rhode Island.[3]

During this period numerous sets of amendments to the Federal Rules were adopted, widening the gap between the two sets of rules.[4] There also arose perceptions that problems with the Rules needed attention. This attention came in the early 1990s through a process of review under the leadership of the Superior Court

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1. ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923).

2. The Superior Court Rules of Civil Procedure were promulgated on June 9, 1965, and effective on January 10, 1966. *See* 1 ROBERT BRYDON KENT, RHODE ISLAND PRACTICE: RULES OF CIVIL PROCEDURE WITH COMMENTARIES § 1.2 (1969).

3. Rule 4 was amended in 1972, Rule 49 in 1973, Rule 23 in 1991, and Rule 30 in 1992.

4. Federal Rule amendments appeared seven times between 1966 and 1993. *See* FED. CIV. JUD. P. & R., 24-35 (West 2003).

Bench Bar Committee. This review eventually culminated in a substantial revision of the Rules in 1995.

The ensuing eight years have witnessed, perhaps inevitably, the appearance of some problems in the system, some occasioned by flaws in the Rules as drafted and adopted, some, in the view of this observer, by unfortunate decisions of the Rhode Island Supreme Court in its application and interpretation of the Rules. Having served as reporter to the original project from 1962 to 1966 and to the committee (termed "the working group"), which prepared and recommended the 1995 revision, I here propose a brief critique both of the Rules and court decisions concerning them.

Before going into detail, it seems desirable to remind briefly of the history of the rule-making process in Rhode Island. The 1966 Rules were promulgated by the justices of the superior court pursuant to section 8–6–2 of the General Laws of Rhode Island. This enabling act departed from the Federal Rules Enabling Act and most state enabling legislation which conferred rule-making power on the supreme courts of the respective governments.[5] The Rhode Island Enabling Act, in its broadest form, was adopted in 1940.[6] It conferred the power on the justices of the superior court, and the 1966 reform was the product of that court. In 1969 an amendment to section 8–6–2 made the Rules thereafter adopted by the trial courts subject to approval of the supreme court.[7] Primary responsibilities, however, would remain with the trial courts.

II. TEXTUAL PROBLEMS WITH THE RULES

1. *Failure to Obtain Timely Service of Process; Consequences.*

Prior to 1995 Rhode Island case law established the consequences of a plaintiff's failure to obtain service of process. The leading case was *Caprio v. Fanning and Dooley Construction Co.*[8] Rule 4(b) then stated: "The plaintiff's attorney shall deliver to the

5. At the time the Superior Court Rules were adopted, Delaware was the only other state conferring broad rule-making power upon its trial courts. KENT, *supra* note 2, § 1.2.

6. 1940 R.I. Pub. Laws ch. 943, § 1.

7. 1969 R.I. Pub. Laws ch. 239, § 2.

8. 243 A.2d 738 (R.I. 1968).

person who is to make service the original summons upon which to make the return of service and a copy of the summons and complaint for service upon the defendant . . . ."[9] Rule 4 did not prescribe a specific time limit upon compliance. In *Caprio* the plaintiff, on the last day of the two year period provided by the statute of limitations, filed a complaint with the court against two defendants.[10] Nearly thirteen months later plaintiff issued a summons against each defendant; service was made nearly fourteen months after the filing of the complaint.[11] The defendants moved to dismiss for the plaintiff's failure to exhibit due diligence in the prosecution of her action.[12] Consequently, the superior court dismissed the actions for want of prosecution.[13] The supreme court affirmed, but for different reasons. That court held that the obligation of the plaintiff to deliver process for service under Rule 4(b) implicitly required that this be done within a reasonable time.[14] Failure to meet this requirement exposed the plaintiff to a discretionary dismissal pursuant to Rule 41(b)(2) for "failure of the plaintiff to comply with the rules."[15] Although not discussed in *Caprio*, Rule 41(b)(3) provides: "[u]nless the court in its order of dismissal otherwise specifies, a dismissal under this subdivision (b) . . . operates as an adjudication upon the merits."[16]

In 1995 the scene changed. Based on Federal Rule 4(m), itself added by amendments in 1983 and 1993, Rhode Island adopted Rule 4(l). Our Rule 4(l) effects two major changes. First, the standard of "reasonable time" is replaced by a specific period of 120 days. Unless the offending plaintiff can show good cause for failure to serve within that period, "the action shall be dismissed as to that defendant *without prejudice* . . . ."[17]

Now to the remaining problem: surely a new action based on the same claim would not be barred by the doctrine of res judicata, given the "without prejudice" character of the judgment of dismissal. But what of the statute of limitations? Section 9–1–22 of

9. *Id.* at 740.
10. *Id.* at 739.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 740.
15. *Id.* at 740-41.
16. *Id.*
17. R.I. SUPER. CT. R. CIV. P. 4(l) (emphasis added).

the General Laws of Rhode Island, a so-called "savings statute," provides as follows:

> [i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or if he or she dies and the claim survives, his or her executor or administrator, may commence a new action upon the same claim within one year after the termination.[18]

A judgment dismissing an action for failure to effect timely service of process is not a "judgment on the merits," but is it a dismissal "for neglect to prosecute the action"? That exception to the statute was added in a 1965 amendment to section 9–1–22.[19] It is difficult not to interpret "neglect to prosecute" as including failure to observe the 120 day requirement of Rule 4(l). The only Rhode Island case I can find which comes close to the point is *Caprio v. Fanning and Dooley Construction Co.*, discussed above. Recall that the superior court dismissed the case "for want of prosecution." The supreme court treated its disposition of the case "on other grounds." The court made no reference to section 9–1–22. The question thus remained open. Again, should a dismissal under Rule 4(l), added in 1995, for failure to obtain service of process within 120 days following filing of the complaint, be treated as a dismissal "for neglect to prosecute the action" within the meaning of the savings statute? I believe it should and the subsequent action, even if brought within one year following dismissal of the first action, should be subject to the applicable statute of limitations. But on January 9, 2004, the Supreme Court of Rhode Island decided otherwise.[20]

The case of *Furtado v. LaFerriere* involved an extreme violation of Rule 4(1).[21] A personal injury action was filed "on the eve of the expiration of the three-year statute of limitations."[22] For nearly three years thereafter the plaintiff failed to obtain service

18. R.I. GEN. LAWS § 9–1–22 (2003).
19. R.I. GEN. LAWS § 9–1–22 (2003), amended by 1965 R.I. Pub. Laws ch. 55, § 6.
20. *See* Furtado v. LaFerriere, 839 A.2d 533 (R.I. 2004).
21. *Id.*
22. *Id* at 534.

of process upon the defendant, notwithstanding the defendant's apparent amenability.[23] The action was dismissed by the superior court without prejudice pursuant to Rule 4(1).[24] The plaintiff, within one year after the dismissal, commenced a new action on the same claim and promptly effected service of process.[25] The defendant sought and obtained from the superior court a summary judgment on the ground of expiration of the statute of limitations.[26] The supreme court, on appeal, reversed the judgment, holding, per curiam, that the claim was preserved by the "savings statute," the above quoted section 9–1–22.[27] The court rejected defendant's argument that the unexcused failure to comply with Rule 4(1) constituted "neglect to prosecute," a textual exception to the savings statute.[28]

The per curiam opinion involved two propositions. First, the court equated the "neglect to prosecute" under section 9–1–22 with "lack of prosecution" under Rule 41(b)(1).[29] The latter provides for dismissal where the lack of prosecution involves an action "pending for more than five years."[30] Despite the differing language – "neglect to" in the statute, "lack of" in the rule – the court considered them "functionally equivalent,"[31] and restricted application of neglect of prosecution" in the statute to the five year reference to "lack of prosecution" in the rule.[32] Justice Flanders's persuasive dissent rejected this restricted reading of "neglect to prosecute" and found such neglect in this long and unexcused failure to comply with Rule 4(1).[33]

The other rationale in the per curiam opinion is that to hold the violation of Rule 4(1), even in the circumstances of this case, a "neglect to prosecute," negating application of the savings statute, would undercut the "without prejudice" character of the dismissal

23. *Id.*
24. *Id.*
25. *Id.* at 535.
26. *Id.*
27. *Id.* at 538.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at n.3.
33. *Id.* at 539-46.

for violation of Rule 4(1).[34] In the words of the court, "[b]y denying plaintiff the protection of the savings statute, the motion justice in the second case effectively reassessed the ruling in the first case and determined that dismissal should have been with prejudice."[35] The present writer respectfully disagrees. The designation of a dismissal as "without prejudice" surely eliminates any res judicata impact of the judgment. But as Justice Flanders cogently observed, dismissal without prejudice "does not inoculate the claim against a future dismissal on statute-of-limitations grounds . . . ."[36]

This observer believes that remedial action is indicated on two fronts. The per curiam opinion states that "we hesitate to deprive the plaintiff of [a] day in court, until the General Assembly amends § 9–1–22."[37]

The failure without "good cause" to obtain service within 120 days can leave the plaintiff's second action subject to the statute of limitations by adding to the exceptions to the savings statute "failure to obtain timely service of process."

Rule 4(1) itself needs attention. Adopted in 1995, it tracks the 1983 provision in Federal Rule 4(m). In 1993, the federal rule was amended to accord the trial court broader discretion not to dismiss for failure to obtain timely service even without good cause.[38] The advisory committee note suggests relief may be appropriate because the statute of limitations would bar a refiled action. It is desirable that such discretion be exercised at the time dismissal of the first action is sought, not through a rigid application of the savings statute. An amendment to Superior Court Rule 4(1) to follow the lead of the 1993 amendment of Federal Rule 4(m) seems desirable.

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34. *Id.* at 537.
35. *Id.* at 538-39.
36. *Id.* at 545.
37. *Id.* at 539.
38. Although serving as reporter to the 1995 Rhode Island rules project, the author is at a loss to explain now why the 1993 version of Federal Rule 4(m) was not the model used.

2. *The Demand for Judgment (Rule 8(a)(2)) in Actions for Personal Injury, Property Damage or Wrongful Death and the Limit on Relief in Default Cases: Rule 54(c)).*

Section 9–1–30(a) of the General Laws of Rhode Island provides:

> [n]o complaint or pleading in an action of contract or tort for personal injury, injury to property, or wrongful death shall contain an ad damnum or monetary amount claimed against any defendant or defendants; provided, however, that in any action brought before the superior court, the complaint shall state that the monetary amount claimed is sufficient to establish the jurisdiction of the superior court.[39]

A 1995 amendment to Rule 8(a)(2) tracks this statute. While providing that generally a claim for relief shall contain "a demand for judgment for the relief the pleader seeks," it goes on to provide: "[i]n an action for personal injury, injury to property, or wrongful death, the pleading shall not state the amount claimed, but only that the amount is sufficient to establish the jurisdiction of the court."[40] Form 9 in the Appendix of Forms, dealing with "complaint for negligence," furnishes the model: "[w]herefore plaintiff demands judgment against defendant in an amount sufficient to invoke the jurisdiction of the court."[41]

A problem arises when the defendant defaults. Rule 54(c), entitled *Demand for Judgment,* provides: "A judgment by default shall not be different in kind from or *exceed in amount* that prayed for in the demand for judgment."[42] Rule 55(b)(2) provides for entry of a judgment by default by the court, not by the clerk, when the amount claimed is not certain.[43] A defaulting defendant who has appeared is entitled to a written notice of a hearing to determine the amount of damages.[44] Prudence, if not the text of the rule, would seem to require such notice even to a defendant who is defaulted for want of any appearance. Assume that such a defendant

39. R.I. GEN. LAWS § 9–1–30(a) (1997).
40. R.I. SUPER. CT. R. CIV. P. 8(a)(2).
41. *Id.* Form 9(2) (2003).
42. *Id.* 54(c) (emphasis added).
43. R.I. SUPER. CT. R. CIV. P. 55(b)(2).
44. *Id.* 55(b)(2).

persists in not appearing. Given Rule 54(c), may the court, after notice and an opportunity to be heard, render judgment in excess of $5,000, the minimum provided by section 8–2–14 for invoking the jurisdiction of the superior court in an action at law? The answer must be yes, but there is a problem with Rule 54(c): its provision that a judgment by default shall not exceed the amount prayed for, in this instance an amount "sufficient to invoke the jurisdiction of the court."

Of course, the judicial function includes not only the application and interpretation of Rules, but also includes filling in the blanks. The process is strained when a sensible solution involves a stark departure from the language of a rule. Therefore, amendment of Rule 54(c) seems in order.

3. *Enlargement of Time: Rule 6(b) and Rule 50(b).*

Rule 6(b) authorizes the court to enlarge periods of time provided by the rules, even after expiration of a time period.[45] Rule 6(b) qualifies this authority by stating that "it may not extend the time for taking any action under Rules 52(b), 59(b), (d), and (e) and 60(b) . . . ."[46] These exceptions follow the model of Federal Rule 6(b), except that the Federal Rule also prohibits enlargement of the ten day period for action under Rule 50(b), renewing a motion for judgment as a matter of law following a verdict.[47] This reference to Rule 50(b) is not in the Rhode Island version of Rule 6(b).[48] This omission occurred in the original Rhode Island Rule because the text of that Rule rendered the exception inapplicable.[49] With Rule 50(b) amended in 1995, Rule 6(b) should refer to it.

The 1995 departure from the Federal Rule was inadvertent. It is anomalous to say that the court may not extend the ten day period for moving for a new trial (Rule 59(b)) and yet to permit enlargement of the ten day period for renewal of a motion for judgment as a matter of law. Admittedly, the matter is not earth shaking. I can find no case in which the superior court has

45. R.I. SUPER. CT. R. CIV. P. 6(b).
46. *Id.*
47. FED. R. CIV. P. 6(b).
48. R.I. SUPER. CT. R. CIV. P. 6(b).
49. As originally written, Rule 50(b) did not provide for renewed motion for a directed verdict.

enlarged the time for a renewed motion under Rule 50(b), but would urge that, when the rules are next amended, Rule 6(b) should include a motion under Rule 50(b) on the list of motions for which the time may not be enlarged.

III. INTERPRETATION AND APPLICATION OF THE RULES: SOME CRITICISMS

As noted earlier, from 1940 to 1969 the superior court's exercise of its rule making power was not subject to supreme court approval.[50] Since 1969 it has been subject to that approval.[51] During both periods, however, the ultimate authority upon the application and interpretation of court rules lies in the supreme court. The cases are legion. What follows is a critique of a few such supreme court decisions.

1. *Motion for new trial after jury verdict on ground of error of law occurring at the trial: requiring the motion as a condition for appeal.*

Until 1995 Rhode Island law did not recognize error of law occurring at trial as a ground for granting a new trial motion in a case tried to a jury. Unique to Rhode Island, this dated back at least to the Court and Practice Act of 1905.[52] Such errors could be corrected only through appellate review in the supreme court after timely objection in the trial court.[53] Even the new Rules in 1966 did not alter this.[54]

Change came in 1995 when "error of law occurring at the trial" was added to the grounds on which the trial court could order a new trial under Rule 59(a). *Amica Insurance Company v. Tashjian* was an early application of the amended rule.[55] The court quite properly reviewed the denial of a new trial motion on the ground of claimed error in instructing the jury.[56] The instructions were upheld, but the court ordered a new trial for an error

50. *See supra* Introduction.
51. *Id.*
52. R.I. GEN. ASSEM., The COURT AND PRACTICE ACT (1905).
53. Bernat v. DeGasparre, 129 A.2d 545 (1957).
54. *See* KENT, *supra* note 2, § 59.6, at 443-44.
55. 703 A.2d 93 (1997).
56. *Id.* at 94.

not assigned in the motion for a new trial.[57] After the jury had retired, it requested the judge to have some testimony read back.[58] The judge dealt with this request in the absence of counsel for the parties.[59] The supreme court upheld the appellant's claim that this was error necessitating a new trial.[60] The court then addressed the consequences of appellant's failure to include this ground in his motion for a new trial. It stated that "errors of law not first presented to the trial justice in a jury tried case in a motion for a new trial will not be permitted to be later raised in this Court for the first time on appeal."[61] In the instant case the court excused the oversight because the issue arose only four months after the 1995 change for the first time included error of law occurring at the trial as a ground for a motion for a new trial.[62]

There is ambiguity here. If an appellant does not object to a ruling at the time it is made, the Court's exclusion of the matter on appeal appears warranted.[63] But the Court's dictum is broader and appears to require a motion for a new trial raising the alleged error, even if there had been an objection to the trial court's action at the time it was taken.[64]

Federal practice is clear. If objection was noted at the time the alleged error was made, it may be renewed in a motion for a new trial, but it need not be as a precondition to appeal.[65] This is sounder than the approach in *Amica*. If counsel believes there is no chance of persuading the trial judge of having committed error, there should be no barrier to appellate review without a motion for a new trial.

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57. *Id.* at 97.
58. *Id.*
59. *Id.* at 95.
60. *Id.*
61. *Id.*
62. *Id.*
63. In *Amica* contemporaneous objection was not possible because the action was taken in the absence of counsel. 703 A.2d at 96-97; R.I. SUPER. CT. R. CIV. P. 46.
64. *Amica Mut. Ins. Co.*, 703 A.2d at 97.
65. 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 2818 (2d ed. 2004) and cases cited; 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 59.55 (3d ed. 2004) and cases cited.

2. *New Trials in Non-Jury Cases: Grounds; Tolling the Time for Appeal from Judgment.*

As discussed above, the granting of new trials in jury cases now encompasses errors of law occurring at the trial as well as the other traditional grounds for granting new trials in such actions, thus bringing Rhode Island law into harmony with that of other states. In non-jury cases, whether classifiable as at law or in equity, the picture is more complex.

Rule 59(a) provides that a new trial may be granted, "in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of this state."[66] Thus, the old equity standard for granting rehearings governs in all non-jury actions, whether legal or equitable in character. Much turns on what circumstances the modern supreme court finds its predecessors treated as grounds for a rehearing in equity in the years prior to the 1966 procedural merger of law and equity in Rhode Island.

The key case is *Colvin v. Goldenberg* decided in 1971. [67] The action was one seeking damages for personal injury and tried without a jury. The trial judge found for the plaintiff and awarded damages. The defendant's motion for a new trial was denied and the defendant appealed. The precise grounds for the motion, other than newly discovered evidence, were unclear. "At most the defendant's motion amounted to a rehash of the evidence adduced at the trial."[68] The court found no adequate new evidence presented and affirmed the judgment.[69] The significance of the case lies in the court's discussion of the place of the new trial motion in a non-jury case. The scholarly opinion of Justice Kelleher discussed the equity precedents in detail, noting that cases generously treating grounds for rehearing arose prior to transfer of equity trial jurisdiction from the supreme court to the superior court in 1905.[70]

The matter was put succinctly in *Shepard v. Taylor* in 1887.[71]

The case of *Hodges v. Soren Co.*, decided in 1853, has al-

66. R.I. SUPER. CT. R. CIV. P. 59(a).
67. 273 A.2d 663 (1971).
68. *Id.* at 669.
69. *Id.*
70. *Id.* at 667-69.
71. 16 R.I. 166 (1887).

> ways since then been regarded as settling the practice in this state in regard to the rehearing of suits in equity on petition. The court then decided that a rehearing would be granted, upon petition, by the court in its discretion, if it thought the case ought to be reheard, even when the error alleged was simply error of law, and the court added that the discretion should be exercised liberally in favor of a rehearing.[72]

Colvin treated these precedents as inapposite because of the shift of trial jurisdiction to the superior court in 1905. It then turned to federal precedents in applying Federal Rule of Civil Procedure 59(a), and concluded therefrom that the trial judge in a non-jury case "may grant a new trial only if he finds a manifest error of law in the judgment previously entered or if he is satisfied that the newly discovered evidence was not available at the first trial and is of sufficient importance to warrant a new trial."[73]

In applying *Colvin* the supreme court has emphasized its rigidity by elaborating the rule to require allegation of "a manifest error of law on the face of the record without further examination of matters of fact or evidence . . . ."[74] The strict view of *Colvin* sharply diverges from modern federal practice. Moore's Federal Practice observes that "[a] new trial may be granted in a non-jury action if a new trial might be obtained under similar circumstances in a jury action."[75] There is a recognition that in a non-jury case the motion "should be based on a manifest mistake of fact or error of law; the court should find substantial reasons for setting aside judgment."[76] Wright, Miller & Kane, Federal Practice and Procedure, observes "the concept of a new trial under Rule 59 is broad enough to include a rehearing of any matter decided by the court without a jury."[77] It goes on to caution that "a motion for a new trial in a non-jury case or a petition for rehearing should be based upon a manifest error of law or mistake of fact, and judgment should not be set aside except for substantial reasons."[78]

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72. *Id.* (citation omitted).
73. *Colvin*, 273 A.2d at 669.
74. Tillson v. Feingold, 490 A.2d 64, 66 (R.I. 1985).
75. MOORE, *supra* note 65, ¶ 59.13[3][a].
76. *Id.*
77. WRIGHT, *supra* note 65, § 2804, at 51.
78. *Id.*

It seems clear that the term "manifest error" in the federal sense involves clear error, but the court is not restricted to the "face of the record" as emphasized in Rhode Island.[79]

Suppose the following: During the course of the trial the judge makes a ruling on the admissibility of evidence which is arguably very wrong and which infects the judgment. If the case were tried to a jury, the error of law occurring at the trial is now a ground for a motion for a new trial. I find no compulsion in the rules for a different approach if the case is tried without a jury, whether in its nature it is legal or equitable. The motion for a new trial is a useful device. There is nothing in classical equity practice which calls for a narrow view of that device in a non-jury case.

The narrow view of grounds for a new trial in non-jury cases has a collateral consequence of significance. The lawyer who moves for a new trial on grounds not recognized by the supreme court runs the risk of forfeiting the right to appeal to correct the alleged error. Rule 4 of the Supreme Court Rules of Appellate Procedure provides that a notice of appeal must be filed with the clerk of the trial court within twenty days of the date of the judgment.[80] That rule goes on to provide that the time for filing an appeal is terminated by a timely motion in the superior court made under a number of superior court rules, including a motion for a new trial under Rule 59.[81] The full time for appeal from the judgment commences to run again from the order ruling on the motion.[82]

In the case of *Tillson v. Feingold*, a breach of contract action was tried by the superior court without a jury. [83] The court rendered judgment for the plaintiff in the amount of $8,207.[84] The defendant moved for a new trial "purportedly" pursuant to Rule 59(a)(2). The grounds were that the court's findings of fact and conclusions of law were "clearly erroneous."[85] The motion was de-

79. Although both MOORE and WRIGHT, MILLER & KANE state that new trials for a non-jury trial should be based on an error of law, mistake of fact, or new evidence, they start by emphasizing that trial courts have broad discretion in granting a new trial.

80. RI SUP. CT. R. APP. P. 4(a).

81. *Id.* 4(a)(4).

82. *Id.* 4(a).

83. 490 A.2d 64 (R.I. 1985).

84. *Id.* at 65.

85. *Id.* at 66.

nied.[86] An appeal was denied on the ground that the motion for a new trial was a "nullity" for failure to assert either of the grounds recognized in *Colvin*.[87] Because the case was of first impression, the supreme court considered the substantive grounds of appeal and found them without merit.[88] The significance of the case lies in the following:

> We do caution members of the bar that in the future the filing of a motion for a new trial in a non-jury case that does not conform to the requirements of *Colvin*, *supra*, will be regarded as a nullity and such a motion will not extend the time for the filing of a notice of appeal.[89]

The lesson is clear; unless one relies on newly discovered evidence, a motion for a new trial in a non-jury case must allege manifest error. But one could be wrong in claiming that a clearly erroneous ruling is "manifest on the face of the record." "[T]o toll the running of the time for filing a notice of appeal, one must not only comply with the timeliness provision but one must also set forth the proper grounds for a new trial, which grounds are to be found in Rule 59 of the Superior Court Rules of Civil Procedure."[90]

Certainly, a good faith attempt to set forth a valid ground for a new trial should be a condition to tolling the time for appeal. If such good faith is present, the motion should not be treated as a nullity because the grounds asserted do not meet the unduly strict test of *Colvin*.

3. *The Renewed Motion for Judgment as a Matter of Law – Its Relationship to Appellate Review.*

In a case tried by jury, suppose the defendant moves for judgment as a matter of law at the close of all the evidence. The trial judge denies the motion and submits the case to the jury. Verdict and judgment are for the plaintiff. Though clearly authorized to do so by Rule 50(b), the defendant fails to renew the motion for judgment as a matter of law. Rather, defendant appeals from the judgment, assigning as error the denial of the motion for

86. *Id.*
87. *Id.* at 67.
88. *Id.* at 66.
89. *Id.* at 67.
90. Town of Glocester v. Lucy Corp., 422 A.2d 918, 919 (1980).

judgment made at the close of the evidence. May the defendant do this? The answer in federal court is no,[91] in Rhode Island it is yes under *Skaling v. Aetna Insurance Co.*[92]

The Supreme Court of Rhode Island recognized that:

> [t]he corresponding federal rule has long been interpreted to require renewal of the motion after judgment is entered in order to preserve an issue for appeal. After careful consideration, we have concluded that we shall not apply this interpretation to the Rhode Island rule. Instead we hold that if a motion for judgment as a matter of law was made at the close of all the evidence, the motion is sufficiently preserved for review by this Court.[93]

In a host of cases, the Rhode Island Supreme Court has followed federal precedents in interpreting parallel provisions of the Superior Court Rules of Civil Procedure, especially where the language is identical to the federal rule.[94] As to why the departure here "after careful consideration," the opinion in *Skaling* does not opine.[95]

One may draw guidance from the history of Rule 50(b). In 1960, the superior court adopted what was then Rule 46(a) of the Rules of Practice of that court. It read:

> (a) Reservation of Decision on Motion. Whenever a motion for a directed verdict is made at the close of all the evidence, the Court may reserve decision on said motion subject to a later determination and if decision is reserved the Court shall submit the action to the jury. When the jury is discharged the Court shall forthwith enter a decision on the motion reserved whether or not the jury returned a verdict.[96]

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91. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 218 (1947).

92. 742 A.2d 282 (R.I. 1999).

93. *Id.* at 287 (citing Cone v. W. Va. Pulp & Paper Co., 330 U.S. 212 (1947)).

94. *E.g.*, Plushner v. Mills, 429 A.2d 444 (R.I. 1981) (Rule 4(d)(1)); Hall v. The Ins. Co. of N. Am., 727 A.2d 667 (R.I. 1997) (Rule 15); Kelvey v. Coughlin, 625 A.2d 775 (R.I. 1993) (Rule 30(c)).

95. *See generally Skaling*, 742 A.2d at 282.

96. R.I. SUPER CT. R. P. 46(a) (amended 1960).

In 1966, this rule was preserved as Rule 50(b). Its aim was to enable the trial judge to defer a ruling on a motion for a directed verdict until after the jury had rendered a verdict. If the judge were disposed to grant the motion, deferral operated to place in the record a jury verdict. In the event a reserved motion for a directed verdict was granted after verdict for the plaintiff, reversal by the supreme court did not lead to a new trial. Rather the verdict was there as the basis for a final judgment in the case.

The 1995 amendment recast Rule 50(b) in the image of the Federal Rule. "Judgment as a Matter of Law" was substituted for "Directed Verdict" as a matter of nomenclature.[97] The new rule preserved the trial judge's option to postpone the ruling on a motion challenging the legal sufficiency of the evidence until after the verdict is received, either by denying the motion or simply not granting it.[98] The moving party renews the motion for judgment as a matter of law and the court rules thereon.[99] The change brings the Rule into closer harmony with federal practice, a salutary by-product of the Rules ever since the use of the Federal Rules model in 1966.[100] To equate the practices here, however, requires more than adoption of the language of the Federal Rule. It requires adherence to at least clear interpretation and application of the Federal Rule by the federal courts. In this instance it would mean requiring the renewal of the motion as a condition of appellate review of the action denying the motion when initially made at the close of the evidence. The advisory committee, which recommended the 1995 amendment to Rule 50(b), recognized this. Its note, appended to the new rule, stressed the change in Rhode Island practice. That committee note reads in part: "[R]enewal of the motion after verdict is essential if the defendant desires appellate review of the judge's failure to render judgment as a matter of law at the close of all the evidence."[101] The *Skaling* decision renders that note inaccurate for Rhode Island, however correct as a statement of federal practice under an identically worded rule.

The loss perceived here is in the flexibility of the trial judge in handling motions for judgment as a matter of law. If the ruling

97. *See* R.I. SUPER. CT. R. CIV. P. 50 committee note.
98. *See* R.I. SUPER. CT. R. CIV. P. 50(b).
99. *Id.*
100. The Rhode Island Supreme Court comments often on this similarity.
101. R.I. SUP. CT. R. CIV. P. 50(b) (amended 1995) committee note.

presents difficulties, the judge may well want to delay decision until after a verdict is returned. The judge may well deny the motion, virtually pro forma, knowing that upon renewal of the motion after verdict time and effort in deciding will be invested in a context of importance. Ironically, that flexibility existed under the prior superior court rule.[102] It also exists under the federal approach to the amended rule.[103] It is dubious, however, under *Skaling*, for the trial judge cannot be certain that the defendant will renew the motion, rather than accept the supreme court's invitation to appeal from the judgment, assigning as error the pre-verdict denial of the motion. This in effect requires the trial judge to decide the issue with care before submitting a case to the jury, rather than usefully postponing that decision until after the jury has returned, with or without a verdict.

4. *Discovery of Tax Returns; Limits Imposed by the Rules Enabling Act.*

With the adoption of the 1966 Superior Court Rules of Civil Procedure came a focus on the scope of pre-trial discovery. Superior Court Justice Frank Licht, presiding over the motion calendar in the period following adoption of the Rules, became the foremost applier of the discovery rules. In a thoughtful piece, Judge Licht reviewed the discovery rules and discussed particular problems thereunder.[104] He indicated that only a clear showing of need warranted disclosure of tax returns and added that in many cases production of a W–2 Form would suffice.[105]

Judge Licht wrote his piece in 1966. Legislation followed in 1975, when section 8–6–2 of the General Laws of Rhode Island, the Rules Enabling Act, was amended to include the following:

> each respective court shall not in said rules of procedure require a party to produce either by discovery, motion to produce or interrogatory an income tax return, W–2 statement, or copies thereof.[106]

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102. *See* KENT, *supra* note 2, § 50.3, at 371, 372.
103. *See* FED R. CIV. P. 50(b).
104. Frank Licht, *Observations on Some Aspects of the Discovery Provisions of the New Rules*, 3 R.I. BAR J. 1, 6-7 (1966).
105. *Id.*
106. 1975 R. I. Pub. Laws ch. 222, §. 1.

In *DeBiasio v. Gervais Electronics Corporation* plaintiff, pursuant to an employment contract, sought a bonus based on twenty percent of defendant's net profits.[107] To determine the amount of such profits, plaintiff requested copies of defendant's income tax returns for the years in question and moved to compel production.[108] The superior court ordered production.[109] On review by writ of certiorari, the supreme court affirmed, rejecting defendant's contention that the statute represented a "clear declaration that income tax returns are not discoverable."[110]

The court recognized that the Enabling Act makes clear that "no court can promulgate a rule of practice which requires a party to produce tax returns."[111] Nevertheless, the court, over dissent, upheld the order.[112] The opinion stated: "We do not believe, however, that the statute speaks to the individual judge who, in an appropriate factual context, decides that justice would be best served by requiring a party to produce his income tax returns."[113] As the dissent pointed out, there is nothing in the statute to prevent a trial judge from ordering production of tax returns for trial by way of a subpoena.[114] Discovery, however, is another matter. Authority to order production in that context rests squarely on Rules 26 and 34, which in turn are grounded in section 8–6–2. [115]

The clear legislative purpose is to prevent orders, pursuant to court rule, to produce tax returns in the context of discovery.[116] Inherent power to do so is indeed hard to find. From 1966, authority for the Superior Court Rules of Civil Procedure has been understood to stem from the Enabling Act.[117] This case flouts that understanding.

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107. 459 A.2d 941 (R.I. 1983).
108. *Id.* at 942.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 943.
113. *Id.*
114. *Id.* at 944.
115. R.I. SUPER. CT. R. CIV. P. 26(b)(1), 34 (b)(1) (2003).
116. *See* R.I. GEN. LAWS § 8–6–2 (1999); *DeBiasio*, 459 A.2d at 942.
117. *See* KENT, *supra* note 2, § 1.2.

5. *Motion to Vacate Judgment Under Rule 60(b): Limits*

The case of *Jackson v. Medical Coaches* is instructive not only for its treatment of the 1995 amendment adding Rule 4(l), but also because it involves important holdings on Rule 60(b) and its limitations.[118]

Jackson commenced an action against two defendants, alleging products liability, negligence, strict liability and breach of warranty causing personal injury.[119] The defendants moved to dismiss the action for failure to effectuate service of process until more than four months after commencement of the action, an unreasonable delay in doing so.[120] The trial judge dismissed the action as to both defendants with prejudice.[121] It is apparent that all involved were unaware that the 1995 adoption of Rule 4(l) provided for dismissal *without prejudice* when, in the absence of good cause, process is not served within 120 days after commencement of the action.[122]

In 1997 plaintiff filed a second action, idntical to the first, against the same defendants.[123] Defendants moved for summary judgment on the ground of res judicata and the statute of limitations.[124] While granting that motion the judge stayed entry of judgment to accord plaintiff an opportunity to move for vacation of the earlier judgment.[125] The plaintiff so moved.[126] The judge vacated the judgment and entered a new one, dismissing the first action *without prejudice*.[127] Review in the supreme court evoked a substantial treatment of the judge's authority to do so.

The Court discussed several provisions of Rule 60(b) and found none of them applicable.[128] The ground of mistake, pursuant to Rule 60(b)(1), does not apply to erroneous rulings of law by the judge.[129] An erroneous judgment is not "void" within the meaning

118. 734 A.2d 502 (R.I. 1999).
119. *Id.* at 503.
120. *Id.*
121. *Id.*
122. *See id.*; R.I. SUPER. CT. R. CIV. P. 4(l).
123. *Jackson*, 734 A.2d at 503.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 503-04.
128. *Id.* at 505-06.
129. *Id.* at 507.

of Rule 60(b)(4).[130] As for Rule 60(b)(6), "any other reason justifying relief from the operation of the judgment," the court repeated an earlier admonition that the provision "is not intended as a catchall."[131] The court quoted the present writer as stating "that the circumstances must be extraordinary to justify relief."[132]

Mild disagreement here rests upon a belief that the circumstances were "extraordinary." This was the first occasion on which the court held, and correctly so, that Rule 4(l) dictates dismissal without prejudice for failure to serve within 120 days, thus overruling earlier precedents calling for dismissal with prejudice for unreasonable delay in obtaining service of process.[133]

At the time of the first *Jackson* suit, Rule 4(l) was, at most, a few months old. It had not been interpreted or applied by the supreme court. The court has been generous in granting substantive review notwithstanding counsel's procedural missteps in following brand new requirements.[134] Circumstances in this case warranted a determination that there were "extraordinary circumstances" justifying vacation of the judgment under Rule 60(b)(6).[135]

6. *Rule 15(c) and Relation Back of Amendments Changing Plaintiffs*

In *Balletta v. McHale* the Supreme Court of Rhode Island held that an amendment to add a spouse's claim of loss of consortium to a personal injury action does not relate back to the filing of the original claim for statute of limitations purposes.[136] The per curiam opinion holds that Superior Court Rule 15(c), relative to relation back of amendments "changing the party," applies to a party "against whom a claim is asserted."[137] Addition of a party *asserting* a claim is not within the language of this provision.[138] How-

130. *Id.* at 506.
131. *Id.* at 505 n.3.
132. *Id.* at 505 (quoting Bendix Corp. v. Norberg, 404 A.2d 505, 506 (R.I. 1979)).
133. *Id.*
134. *See, e.g.*, Amica Mutual Ins. Co. v. Tashjian, 703 A.2d 93, 97 (R.I. 1997).
135. *Jackson,* 734 A.2d at 505 (quoting *Bendix Corp.*, 404 A.2d at 506 (quoting KENT, *supra* note 2, § 60.8, at 456)).
136. Balletta v. McHale, 823 A.2d 292, 295 (R.I. 2003).
137. *Id.* at 294.
138. *Id.*

ever, there is substantial support for holding that the change of plaintiffs is consistent with Rule 15(c) as a whole. The first sentence of which reads: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."[139] The next sentence, relating to change of party "against whom a claim is asserted,"[140] is based on a 1966 amendment to Federal Rule 15(c) adopted to cure a problem regarding change of defendants and relation back.[141] The advisory committee note reads in part, "The relation back of amendments changing plaintiffs is not expressly treated in Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs."[142]

The reporter's note to Superior Court Rule 15(c) makes the same point.[143] The departure in *Balletta* can be cured by amendment of Superior Court Rule 15(c) to make specific reference to amendments changing claimants.

7. *Waiver of Time for Appeal*

Previously discussed for its impact on Rule 4(l) and Rhode Island General Law section 9–1–22, the recent case of *Furtado v. LaFerriere*[144] also involved a troublesome application of Superior Court Rule 58 and its relation to the time of appeal. Rule 4(a) of the Rhode Island Supreme Court Rules of Appellate Procedure provides for filing a notice of appeal with the clerk of the trial court "within twenty (20) days of the date of the entry of the judgment . . . ."[145] The entry of judgment in the superior court is governed by Rule 58 and its requirement that "[e]very judgment

139. R.I. SUPER. CT. R. CIV. P. 15(c).
140. *Id.*
141. *Id.* 15(c) reporter's note.
142. FED. R. CIV. P. 15(c) advisory committee note.
143. R.I. SUPER. CT. R. CIV. P. 15(c) reporter's note. *See also* 1 KENT, *supra* note 2, § 15.6 at 154.
144. 839 A.2d 533 (R.I. 2004).
145. R.I. SUP. CT. R. APP. P. 4(a).

shall be set forth on a separate document."[146] *Furtado* poses the problem. The motion justice ordered summary judgment on August 9, 2001.[147] The order for summary judgment was entered on September 5, 2001, but no judgment was then entered.[148] Only when the defendant later moved for entry of judgment was a final judgment entered on June 27, 2002.[149] On July 10, 2002 the plaintiff filed the notice of appeal.[150] When did the appeal period begin to run, from September 5, 2001, the date of entry of the order, or from June 27, 2002, the date of entry of judgment on a separate paper? The Supreme Court of Rhode Island held in its per curiam opinion that the appeal time ran only from June 27, 2002.[151] The court recognized that under a 2002 amendment to the parallel Federal Rule 58, the judgment is entered when set forth on a separate document or "when 150 days have run from the entry in the civil docket."[152] The Rhode Island per curiam accurately points out that such language does not appear in Superior Court Rule 58.[153]

Justice Flanders also dissented on this issue.[154] He pointed out that the 2002 amendment to Federal Rule 58 represented a codification of an earlier approach by the First Circuit establishing "a clear rule that waiver of the right to judgment entered on a separate document will be inferred [when] a party fails to act [to cause the entry of a judgment on a separate document] within three months of the court's final order in a case."[155] Application of that proposition in *Furtado* would have led to dismissal of the appeal as untimely. The court made clear its adherence to the mandatory requirement of a separate document with no waiver "unless and until Rule 58 is amended."[156] Such amendment appears desirable.

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146. R.I. SUPER. CT. R. CIV. P. 58(a).
147. *Furtado*, 839 A.2d at 535.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 536.
152. *Id.*
153. *Id.*
154. *Id.* at 539-43.
155. *Id.* at 540.
156. *Id.* at 536-37.

8. *Appeals from Interlocutory Orders: "The* McAuslan *Doctrine"*

The basic rule of appealability in Rhode Island is set forth in section 9–24–1 of the Rhode Island General Laws, which authorizes an appeal to the supreme court for a final judgment, decree or order of the superior court.[157]

Appeals from a limited number of interlocutory orders and judgments are appealable pursuant to section 9–24–7.[158] These are the granting or continuing of an injunction (including a preliminary injunction),[159] the appointment of a receiver, an order for the sale of property or an order granting a new trial after trial by jury.[160]

An additional occasion for appeal from a non-final order is of judicial creation, the so-called "McAuslan Doctrine." The case was *McAuslan v. McAuslan*.[161] As the Rhode Island Supreme Court said:

> Besides those provided for in the statute, other instances may present themselves of decrees, in a strict sense interlocutory, which by reason of their possible injurious consequences require an immediate review, and must be held for this reason to have such elements of finality as to permit an immediate appeal.[162]

This case has been cited to and its doctrine applied many times.[163]

Inevitably, the question arose as to whether failure to take an appeal from an order appealable under the McAuslan doctrine precluded appellate review of such order after final judgment. The

157. R.I. GEN. LAWS § 9–24–1 (1997).
158. *Id.* § 9–24–7.
159. *See* Paramount Office Supply Co. v. D.A. MacIsaac, Inc., 524 A.2d 1099, 1101 n.1 (R.I. 1987) ("We note that the grant of a preliminary injunction is appealable, . . . however, the denial of a preliminary injunction is not." (citation omitted)).
160. R.I. GEN. LAWS § 9–24–7 (1997).
161. 83 A. 837 (R.I. 1912). *See also* Sheer Asset Mgmt. Partners v. Lauro Thin Films, Inc., 731 A.2d 708, 710 (R.I. 1999) (affirming the continuing validity of the *McAuslan* doctrine).
162. *McAuslan*, 83 A. at 841.
163. *See* KENT, *supra* note 2, § 73.4.

court answered the question clearly in *Acme Finishing Co. v. Greenville Finishing Co.*[164]:

> As this exceptional right or privilege to take an immediate appeal in order to prevent irreparable injury, rather than because of the strict finality of the decree, is allowed to the party aggrieved for his benefit and to prevent injustice, such party may elect to make his appeal forthwith, or to take the appeal in the regular course, and *a failure to take such an immediate appeal does not deprive him of his right to an appeal from the decree to which objection is made at the termination of the proceedings in the superior court.*[165]

A cloud on this sound determination appeared in *Jolicoeur Furniture Company v. Baldelli.*[166] In a complex case involving an alleged contract of a city to sell land, the plaintiff relied upon a number of theories, some legal, some equitable.[167] Both parties initially demanded trial by jury.[168] When the plaintiff moved for separate trials on different issues, the trial court ordered separate trials and that issues of both liability and specific performance be tried by the court without a jury.[169] Without further objection the court proceeded to do so.[170] Following an adverse judgment, the defendants claimed denial of their constitutional right to a jury trial.[171] The supreme court held that the claim of jury trial had been waived and, inter alia, that the defendants' failure to appeal from the order for a separate trial to the court alone precluded raising that issue on appeal from the final judgment.[172]

There was probably ample reason for finding the waiver, but the one ground relied upon was unfortunate. The court, without citing *McAuslan*, stated that:

> The . . . order of the Superior Court terminated the rights of both parties to a jury trial on the issues of liability and

164. 111 A. 721 (R.I. 1920).
165. *Id.* at 722 (emphasis added).
166. 653 A.2d 740 (R.I. 1995).
167. *Id.* at 746.
168. *Id.* at 747.
169. *Id.* at 746.
170. *Id.*
171. *Id.* at 747.
172. *Id.* at 748.

> specific performance. Because a timely appeal was necessary in order to prevent the "imminent and irreparable harm" of being deprived a jury trial on the issues, the order had the requisite element of finality. Yet defendants failed to satisfy the "all-important condition precedent" of filing an appeal within the twenty days of entry of the order.[173]

This ignores the salutary decision in *Acme* that the immediate appeal pursuant to *McAuslan* is an option of the appellant who may choose to await the final judgment before seeking review of the offending order.[174]

The result of *Jolicoeur* is to motivate careful counsel to appeal immediately from orders even possibly meeting the *McAuslan* standard of irreparable harm, lest failure to do so constitute loss of any appellate review. As the court stated in *Acme*, "[t]o compel a litigant in such cases to elect at his peril whether an immediate appeal should be taken would probably result in the taking of appeals in all doubtful cases in order to protect the right to an ultimate appeal, thereby causing delay and unnecessary expense."[175] One may hope that when faced with this issue again the court will recognize that its approach in *Jolicoeur* represents an unfortunate departure from the sound rule articulated in *Acme*.

In sum, the foregoing represents three contexts in which problems of procedure have arisen: flaws in the text of the rules curable by amendments or statutory changes, unfortunate Rhode Island Supreme Court interpretations, and judicially fashioned doctrine which can be altered through persuasion of the court itself.

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173. *Jolicoeur Furniture Co.*, 653 A.2d at 748.

174. *See* Acme Finishing Co. v. Greenville Finishing Co., 111 A. 721, 722 (R.I. 1920).

175. *Id.*