Roger Williams University Law Review

Volume 10 | Issue 3 Article 7

Spring 2005

2004 Survey of Rhode Island Law: Cases and 2004 Public Laws of Note

Law Review Staff
Roger Williams University School of Law

2004 Survey of Rhode Island Law

CASES

LEGISLATION

Admiralty Law. *Doyle v. Huntress, Inc.*, 301 F. Supp. 2d 135 (D. R.I. 2004). The Commercial Fishing Industry Vessel Safety Act of 1988[1] provides protection for seamen leaving port on boats twenty tons or larger by requiring that the terms of the fishing voyage, including the method of compensation, be reduced to individual writings between the vessel owner and each fisherman prior to the vessel leaving port. These agreements must be signed by the owner of the vessel, must state the period of effectiveness of the agreement, and must include terms of wages or another compensatory scheme particular to the fishery being utilized. Engagements between seamen and vessels not complying with these statutory agreement guidelines are void, and seamen may leave the service of the vessel at any time and are entitled to recover default wages at the highest rate particular to the port from which the vessel was engaged.

FACTS AND TRAVEL

The two defendants, vessel owning corporations Huntress, Inc. and Relentless, Inc., employed the five plaintiff fishermen as crew at various times between 1993 and 2000 aboard the fishing vessels Persistence and Relentless.[2] These vessels both weighed greater than twenty gross tons, and were based in Davisville, Rhode Island.[3] The defendants routinely compensated crewmen with the "lay-share system," where the crewmen would engage in commercial fishing aboard the vessels and would return to port and sell the fish for profit.[4] After selling the fish, Defendants would deduct fishing expenses, and normally about sixty percent of the net profits would go to the vessel owner, while the remaining forty percent would be divided "among the crewmen in the form of 'shares.'"[5]

---

1. Commercial Fishing Industry Vessel Safety Act, 46 U.S.C. § 10601 (1988).
2. Doyle v. Huntress, Inc., 301 F. Supp. 2d 135, 137 (D. R.I. 2004).
3. *Id.* at 137.
4. *Id.*
5. *Id.* at 138.

The details of these shares are important to the case. After each fishing trip, the vessel's captain would apportion a share of the remaining net profits to the crewmen based on the crewman's performance on the voyage.[6] Because a crewman's share was not based upon bargaining or an agreement with the defendants or the vessel captains before leaving port,[7] vessel captains allocated shares based on their discretion only. Generally, more experienced fishermen were paid larger shares than less experienced fishermen.[8] After the captain made his calculations, the defendants would issue checks to crewmen accordingly.[9] Crewmen were neither informed of the final accounting of the trip, nor were they informed what percentage share they received as compared to the other fishermen on the same vessel.[10]

Normally, these "lay-share" agreements were oral only, and not reduced to writing.[11] Sometimes, crewmen would sign a "FISHING AGREEMENT" as required by federal law, but these agreements only referenced payment by saying that each "crewmember shall receive a share of the crew's net proceeds from the trip."[12] Other versions of the agreements would be signed by crewmembers prior to departure, and the amount of the crewman's payment share would purposely be left blank, to be determined after the trip.[13] None of the defendants' authorized agents ever personally signed these agreements.[14] The only other agreements normally signed by crewmen prior to departure were rosters designed to keep track of the crewmen on each vessel. The crewman's signature on these rosters was also an agreement to the "terms and conditions of the fishing agreement" for that particular vessel.[15]

Each of the five plaintiffs made numerous trips aboard the two vessels Persistence and Relentless over the seven-year pe-

---

6. *Id.*
7. *Id.*
8. *Id.* There was no formula followed by captains in deciding share size.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 138-39.
15. *Id.* at 139.

riod.[16] No one ever signed a pre-voyage agreement delineating the terms of compensation.[17]

Finally, in 2000, Plaintiffs' attorney realized that defendants paid crewmembers "differing amounts per trip for the same work, and that no written agreements were executed prior to embarkation" documenting each crewmember's wage or share.[18] Plaintiffs claimed they never realized they were paid different shares for the same employment aboard the two vessels.[19] Subsequently, the plaintiffs filed suit against the defendants for violations of the Commercial Fishing Industry Vessel Safety Act of 1988 ("the Act") that occurred from 1993-2000.[20]

Plaintiffs' sole claims are under sections 10601 and 11107 of the Act. The defendants raise the defenses of waiver and laches. Both parties filed cross-motions for summary judgment.

ANALYSIS AND HOLDING

The United States District Court for the District of Rhode Island granted Plaintiffs' motion for summary judgment because: (1) Defendants failed to comply with section 10601[21] which "requires a written contract between working fishermen and those in charge of the vessel" to be executed before leaving port;[22] and (2) Plaintiffs correctly asserted section 11107[23] as the unambiguous statutory remedy for violations of section 10601 against lay-share fishermen.[24] No dispute as to any of material fact existed regarding either of these issues, thus summary judgment was appropriate.[25] Meanwhile, the court denied the defendants' motion for summary judgment on the defense issues of waiver and laches because a genuine issue of material fact existed to be determined by the factfinder.[26]

---

16. *Id.*
17. *See id.* at 137-39.
18. *Id.* at 139-40.
19. *Id.* at 140.
20. *Id.*
21. Commercial Fishing Industry Vessel Safety Act, 46 U.S.C. § 10601 (1988).
22. *Doyle*, 301 F. Supp. 2d at 143.
23. 46 U.S.C. § 11107.
24. *Doyle*, 301 F. Supp. 2d at 146.
25. *Id.* at 141.
26. *Id.* at 149.

First, in determining that the defendants had failed to comply with section 10601,[27] the court looked to the plain statutory language of the provision to determine statutory construction.[28] The court concluded that section 10601 required owners and operators of fishing vessels greater than twenty tons to enter written agreements with each crewman, and to include the necessary parties, timing, and terms in the agreement.[29] The court declined to accept Defendants' argument that the Act does not preclude the traditional oral contracts used for hundreds of years in the fishing industry because section 10601 uses the mandatory term "shall," eliminating the defendants' argument.[30] Congress acted to change admiralty law to protect crewmen.[31] This interpretation of section 10601 fosters bargaining between fishermen and the captain regarding a fisherman's share of the profits, and protects fishermen from discrimination by the captain in determining shares.[32] Therefore, the oral agreements between the Defendants and Plaintiff fishermen between 1993 and 2000, as well as the generic "share" agreements and roster sheets lacking important compensation terms, all failed to satisfy the clear requirements of section 10601.[33] The agreements never even mentioned how the lay-share system worked.[34] Therefore, Plaintiffs' motion for summary judg-

---

27. 46 U.S.C. § 10601. The statute states, in relevant part:

> (a) Before proceeding on a voyage, the owner, charterer, or managing operator, or a representative thereof, including the master or individual in charge, of a fishing vessel, fish processing vessel, or fish tender vessel shall make a fishing agreement in writing with each seaman employed on board if the vessel is - (1) at least 20 gross tons as measured under section 14502 of this title, or an alternate tonnage measured under section 14302 of this title as prescribed by the Secretary under section 14104 of this title; and (2) on a voyage from a port in the United States.
>
> (b) The agreement shall – (1) state the period of effectiveness of the agreement; (2) include the terms of any wage, share, or other compensation arrangement peculiar to the fishery in which the vessel will be engaged during the period of the agreement; and (3) include other agreed terms.

Id.

28. *Doyle*, 301 F. Supp. 2d at 142.
29. *Id.*; *see supra* note 27.
30. *Id.* at 143.
31. *Id.* at 144.
32. *Id.*
33. *Id.*
34. *Id.* at 145.

ment on the issue of Defendants' violation of section 10601 was granted.

Second, Plaintiffs properly cited section 11107[35] as the proper statutory remedy for violations of section 10601.[36] Statutory construction of section 11107 plainly revealed that "an engagement of a seaman contrary to a law of the United States is void."[37] The court found it immaterial that section 11107 referred to "seamen" while Plaintiffs were "fishermen."[38] Section 11107 is "both a 'penalty' placed on vessel owners for lack of compliance with admiralty laws and as a 'statutory default to market wage' when a contract is contrary to law. . . ."[39] Defendants are free to continue to pay experienced crewmen more money, as long as such agreements are reduced to writing prior to leaving port.[40] Plaintiffs' motion for summary judgment on the issue of requiring Defendants to adhere to the statutory remedy of section 11107 for violations of section 10601 was granted.

Defendants cross-motioned for summary judgment on the issue of waiver as a defense; that "by accepting payment for their services, Plaintiffs waived their right" to contest payment by Defendants.[41] However, waiver only applies if the waiving party does so knowingly.[42] Here, because the undisputed facts failed to show that Plaintiffs knew about problems with Defendants' payment, summary judgment was inappropriate on the defense of waiver.[43]

Also, Defendants cross-motioned for summary judgment on

---

35. 46 U.S.C. § 11107 (1988):

> An engagement of a seaman contrary to a law of the United States is void. A seaman so engaged may leave the service of the vessel at any time and is entitled to recover the highest rate of wages at the port from which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement, whichever is higher.

Id.

36. *Doyle*, 301 F. Supp. 2d at 148-49.

37. *Id.* at 146 (quoting 46 U.S.C. § 11107.

38. *Id.* at 146.

39. *Id.* at 148 (quoting Harper v. United States Seafoods LP, 278 F.3d 971, 977 (9th Cir. 2002)).

40. *Id.* However, both this court as well as the Ninth Circuit refused to award aggrieved crewmen the highest possible rate paid to anyone on the ship (usually the captain), but allowed that crewman may be paid more than they would have had they not brought this lawsuit. *Id.*

41. *Id.* at 149.

42. *Id.*

43. *Id.*

the issue of laches, asserting that Plaintiffs' claim was barred in any regard because they unreasonably delayed bringing the suit, and the delay resulted in prejudice for the Defendants.[44] The Court applied a ten-year statute of limitations based on Rhode Island General Laws section 9-1-13(a) applicable to claims for unpaid statutory wages.[45] Because undisputed facts failed to show that Plaintiffs "delayed unreasonably in bringing suit," or that the delay prejudiced Defendants, summary judgment was inappropriate on the defense of laches.[46]

COMMENTARY

Doyle changes the practice of lay-share fishing agreements that existed among fishermen for "hundreds of years."[47] The court's application of sections 10601 and 11107 to the facts of *Doyle* is consistent with similar decisions in both the Ninth Circuit Court of Appeals as well as the Alaska Supreme Court, the only other courts to decide the issue.[48] The decision in *Doyle* allows commercial fishing vessel crewmen, of which there are many leaving from New England ports, to engage in pre-voyage bargaining with captains and boat owners about the value of their work on the vessel.[49] Less experienced crewmen aboard commercial fishing vessels are likely to be unfamiliar with the legal guidelines surrounding their compensation and are also more likely to feel powerless to bargain with vessel owners or captains for fear that they would simply be replaced by other crewmen. By requiring a pre-voyage agreement signed by all relevant parties, crewmen are provided protection from "arbitrary discrimination" by vessel captains in apportioning crewmen's shares.[50]

However, the holding in *Doyle* might not necessarily mean

---

44. *Id.*
45. *Id.*; *see* R.I. GEN. LAWS § 9-1-13(a) (Supp. 2004).
46. *Doyle*, 301 F. Supp. 2d at 150.
47. *Id.* at 143.
48. *Id.* at 146 (citing Flores v. Amercian Seafoods Co., 335 F.3d 904, 912 (9th Cir. 2003)); Harper v. U.S. Seafoods LP, 278 F.3d 971, 977 (9th Cir. 2002); TCW Special Credits v. Chloe Z Fishing Co., Inc., 129 F.3d 1330, 1333 (9th Cir. 1997); Seattle-First Nat'l Bank v. Conway, 98 F.3d 1195, 1198 (9th Cir. 1996); Bjornsson v. U.S. Dominator, Inc., 863 P.2d 235, 238-39 (Alaska 1993).
49. *See Doyle*, 301 F. Supp. 2d at 144.
50. *See id.*

that the lay-share system cannot be used by vessel owners. The court hinted that agreements might be sufficient under section 10601 if they included essential terms such as who determines the crewmen's shares, factors to be used by the decision-maker, the timing of such a decision or an overall policy of compensating experienced crewmen more generously.[51] This language may suggest that the general lay-share scheme could be retained, as long as the share-determining process is well explained in the pre-voyage agreements signed by both the crewmen and either the vessel owners or captain. Either way, the decision in *Doyle* will hold vessel owners and captains accountable for their compensation decisions.

CONCLUSION

The United States District Court for the District of Rhode Island held it insufficient for commercial fishing vessel owners and captains of vessels over twenty tons to leave port without specific, written agreements with each crewman on board for any particular trip. The previous oral lay-share agreement system did not comply with the requirements of the Commercial Fishing Industry Vessel Safety Act of 1988. However, the court stopped short of requiring that pre-voyage written agreements delineate the specific percentage shares of fish sale profits to be due each crewman upon return to port. Even without requiring a written agreement to specific percentage shares for each crewman, the court provided crewmen protection from arbitrary or discriminatory decisions of vessel captains in apportioning funds, and allowed crewmen to now make informed decisions when committing to work aboard commercial vessels.

Joseph Farside

51. *See id.* at 145.

Civil Procedure. *Foster-Glocester Regional School Committee v. Board of Review*, 854 A.2d 1008 (R.I. 2004). A judicially confirmed arbitration award is a final judgment for purposes of collateral estoppel.

FACTS AND TRAVEL

On December 14, 1999, Michael Bailey was terminated as a physical education teacher at Ponaganset High School for alleged inappropriate behavior with female students.[1] Bailey subsequently appealed his termination to arbitration.[2] On April 10, 2001, the arbitrator issued his decision, stating that there was "clear and convincing evidence that Bailey's actions were 'inappropriate for a teacher' and that the school committee had just cause to terminate his employment."[3] The Rhode Island Superior Court confirmed the arbitration award on October 12, 2001.[4]

During the arbitration proceedings, Bailey filed for unemployment benefits.[5] On February 27, 2001, the director of the Rhode Island Department of Labor and Training granted Bailey's request, finding that he had been "discharged under 'non-disqualifying circumstances.'"[6] After appealing the director's decision to a referee of the Board of Review (Board), the school committee appealed to the Board.[7] On April 25, 2001, the Board held a *de novo* hearing, which resulted in the Board sustaining the director's decision that Bailey had been terminated for non-disqualifying conduct.[8] The school committee then appealed to the district court, arguing, *inter alia*, that the doctrine of collateral estoppel should have precluded the Board from making any findings of fact because the same issue of fact had already been decided by

1. Foster-Glocester Reg'l Sch. Comm. v. Bd. of Review, 854 A.2d 1008, 1011 (R.I. 2004).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

the arbitrator.[9] The district court held that, "because the arbitration decision had not been confirmed at the time when the Board issued its decision" the doctrine of collateral estoppel was inapplicable.[10]

BACKGROUND

The doctrine of collateral estoppel provides that "an issue of ultimate fact that has been actually litigated and determined cannot be re-litigated between the same parties or their privies in future proceedings."[11] Generally, courts should apply the doctrine when the following three elements are satisfied: (1) the parties are the same or in privity with the parties of the previous proceeding; (2) a final judgment on the merits has been entered in the previous proceeding; and (3) the issue or issues in question are identical in both proceedings.[12]

ANALYSIS AND HOLDING

In this case, the superior court confirmed the arbitration award on October 12, 2001; however, the Board issued its decision on May 2, 2001.[13] Thus, the Rhode Island Supreme Court noted preliminarily that because the Board issued its decision "well before" the superior court's confirmation of the arbitration award,[14] the Board was not precluded from finding that Bailey's termination had been under non-disqualifying circumstances.[15] The court held, however, that the district court erred in its decision because all three elements of collateral estoppel had been satisfied by the time the case had reached the district court.[16]

1. *Same Parties*

The court held that the parties to the arbitration proceedings and the unemployment-compensation proceedings were the same parties. While the parties to the unemployment compensation

---

9. *See id.* at 1012.
10. *Id.*
11. *Id.* at 1014 (quoting George v. Fadiani 772 A.2d 1065, 1067 (R.I. 2001) (internal quotations omitted).
12. *Id.*
13. *Id.* at 1014.
14. *Id.*
15. *Id.*
16. *Id.*

hearing were the school committee and Bailey, the parties to the arbitration hearing were the school committee and Bailey's labor union;[17] however, the labor union had represented Bailey's interests at the arbitration hearings.[18] Additionally, the court reasoned, "an attorney represented Bailey as his personal counsel at the hearings. Thus, the arbitration provided Bailey ample opportunity in a judicial-type proceeding to challenge the school committee's evidence that supported his termination for alleged misconduct."[19]

2. *Final Judgment*

The court held the superior court's judgment confirming the arbitration award to be a final judgment. In *Graziano v. R. I. State Lottery Comm'n*,[20] the court gave res judicata effect to a federal district court judgment that became final after the First Circuit Court of Appeals affirmed it while an identical action was pending before the Rhode Island Supreme Court.[21] The *Graziano* Court held that "even though 'the defense of *res adjudicata* could not be raised in the Superior Court,' it was 'properly raised before this Court since the federal judgment became final while these issues were pending on appeal before us.'"[22]

Applying the holding in *Graziano* to the present case, the court held that because no party had appealed the superior court's judgment confirming the arbitration award, it had ripened into a final judgment for collateral estoppel purposes.[23] Therefore, just as the prior judgment in *Graziano* became final while that action was pending before the supreme court, the superior court's judgment in this case confirming the arbitration award became final while this action was pending before the district court.[24]

3. *Same Issue*

The court held that the issues determined by the Board and

17. *Id.* at 1015 n.3.
18. *Id.* at 1015.
19. *Id.*
20. 810 A.2d 215 (R.I. 2002).
21. *Foster-Glocester*, 854 A.2d at 1015.
22. *Id.* (quoting *Graziano*, 810 A.2d at 220-21).
23. *Id.* (citing Mulholland Constr. Co. v. Lee Pare & Assocs., Inc., 576 A.2d 1236, 1237 (R.I. 1990)).
24. *Id.*

the arbitrator were the same.[25] The arbitrator found by "clear and convincing evidence that [Bailey] did what the witnesses described . . . and that those actions were inappropriate for a teacher"[26] amounting to "proved misconduct."[27] Similarly, the Board, pursuant to Rhode Island General Laws section 28-44-18, had to determine whether Bailey's behavior amounted to "proved misconduct."[28] Because the Board had to determine what had already been determined by the arbitrator, the court held that the district court should have applied the doctrine of collateral estoppel and vacated the Board's findings on the identical issue of Bailey's conduct.[29]

COMMENTARY

Although the Restatement provides generally that "a valid and final award by arbitration has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court,"[30] an important caveat is provided in comment c: "Giving claim preclusive effect to an arbitration award does not necessarily imply that such an award should also be given issue preclusive effects."[31] The Restatement favors denying collateral estoppel effect to findings achieved through "very informal" arbitration proceedings;[32] however, "[w]hen arbitration affords opportunity for presentation of evidence and argument substantially similar in form and scope to judicial proceedings, the award should have the same effect on issues necessarily determined as a judgment has."[33]

An appropriate arbitration procedure favoring collateral estoppel might include: "formal statement of charges, presentation of evidence through oral examination as in court, assistance of counsel, and a formal deliberative process by the arbitrator."[34] In this case, the arbitrator was a lawyer who conducted the arbitra-

25. *Id.* at 1016.
26. *Id.*
27. *Id.*
28. *Id.* at 1016-17.
29. *Id.* at 1017.
30. RESTATEMENT (SECOND) OF JUDGMENTS § 84 (1982).
31. *Id.* § 84 cmt. c.
32. *Id.*
33. *Id.*
34. *Id.* § 84 cmt. c, illus. 4.

tion according to the rules of the American Arbitration Association;[35] Bailey's interests were represented by a lawyer from his labor union as well as his own personal counsel;[36] direct and cross-examination of witnesses was conducted;[37] and the arbitrator applied a clear standard of proof – clear and convincing evidence.[38] Given the formal nature of the arbitration proceedings, affording the arbitration award collateral estoppel effect was entirely consistent with the Restatement in that respect.

Additionally, the court's attributing collateral estoppel effect to the arbitration award, confirmed by the superior court while the unemployment-compensation proceeding was pending, is consistent with the Restatement: "If two actions which involve the same issue are pending between the same parties, it is the first final judgment rendered in one of those actions which becomes conclusive in the other action, regardless of which action was brought first."[39] Section 14 comment a clarifies that "[i]n order that a final judgment shall be given res judicata effect in a pending action, it is not required that the judgment shall have been rendered before that [pending] action was commenced."[40] Although the arbitration award became a final judgment after the unemployment-compensation proceedings had commenced and were pending, it was nevertheless appropriately given collateral estoppel effect over the latter action.

CONCLUSION

The district court should have applied the doctrine of collateral estoppel to the unemployment-compensation case pending before it because the earlier arbitration award, confirmed by the superior court, was a final judgment to which collateral estoppel effect should have been given.

Aaron R. Baker

35. *Foster-Glocester*, 854 A.2d at 1015.
36. *Id.*
37. *Id.*
38. *Id.* at 1016.
39. RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. l (1982).
40. *Id.* § 14 cmt. a.

Constitutional Law. *In re Advisory Opinion to the Governor (Casino)*, 856 A.2d 320 (R.I. 2004). At the request of Governor Donald L. Carcieri, the Rhode Island Supreme Court issued an advisory opinion regarding the constitutionality of the 2004 Casino Act and the related referendum question on building a gambling casino in West Warwick, Rhode Island. The court stated that the important constitutional and social questions raised by the governor's question represented sufficiently appropriate circumstances for the court to speak on the subject. After an examination of the Rhode Island constitutional requirement that all lotteries be operated by the state, the court concluded that the Casino Act was unconstitutional and that the General Assembly could not submit a referendum question regarding the casino to the state's voters.

FACTS AND TRAVEL

The Rhode Island Supreme Court delivered this advisory opinion in the midst of the controversy surrounding the proposed 2004 referendum question regarding the building of a casino in West Warwick. After both houses of the General Assembly passed a bill entitled The Rhode Island Gaming Control and Revenue Act (Casino Act),[1] Governor Carcieri vetoed the bill.[2] The Casino Act included a provision calling for the following statewide referendum: "Shall there be a casino in the Town of West Warwick *operated* by an Affiliate of Harrah's Entertainment in association with the Narragansett Indian Tribe?"[3] Governor Carcieri, concerned that both the referendum question violated the Rhode Island Constitution's ban on lotteries run by entities other than the state[4] *and* that the General Assembly would override his veto, submitted a request to the Rhode Island Supreme Court for its opinion on

1. R.I. GEN. LAWS § 41-9.1-1 (Supp. 2004).

2. *In re* Advisory Opinion to the Governor (Casino), 856 A.2d 320, 322-23 (R.I. 2004).

3. *Id.* at 323 (emphasis added).

4. R.I. CONST. art VI, § 15 ("All lotteries shall be prohibited in the state except lotteries operated by the state and except those previously permitted by the general assembly prior to the adoption of this section, and shall be subject to the prescription and regulation of the general assembly.").

the constitutionality of the Casino Act.[5]

As expected, the General Assembly overrode the veto.[6] Governor Carcieri and Attorney General Patrick Lynch subsequently filed briefs in opposition to the Casino Act, arguing that it was unconstitutional.[7] Both the Speaker of the Rhode Island House of Representatives and the Senate President filed briefs in support of the legislation.[8] Casino supporters Harrah's Entertainment, Inc. and the Narragansett Indian Tribe, as well as casino opponents Lincoln Park, Inc., Newport Grand Jai Alai, LLC, and The Greater Providence Chamber of Commerce filed *amicus curiae* briefs on opposing sides of the issue.[9]

ANALYSIS AND HOLDING

Before issuing this advisory opinion,[10] the supreme court described how an advisory opinion differs from a typical judicial decision. At the outset of its advisory opinion, the court reiterated its role as consultative and "somewhat like the juriconsults under the Roman law."[11] As a group of legal consultants rather than decision-makers, the court could not (and did not) exercise its "fact-finding power," thus making its opinion non-binding.[12]

Before examining the constitutionality of the Casino Act, the court first determined the appropriateness of saying anything at all.[13] The court cited the Rhode Island Constitution as a source of its authority for issuing advisory opinions, stating that "[t]he judges of the supreme court shall give their written opinion upon any question of law whenever requested by the governor or by either house of the general assembly."[14] It noted that prior cases stated that the court was not *obligated* to issue an advisory opinion unless the challenged statute was ready for implementation by

5. *In re Advisory Opinion(Casino)*, 856 A.2d at 323.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 323-24.
10. Chief Justice Williams, Justice Suttell and Justice Weisberger signed the advisory opinion, while Justices Goldberg, Flanders and Flaherty did not participate. *Id.* at 334.
11. *Id.* at 323 (quoting *Opinion to the Governor*, 174 A.2d 553, 554 (R.I. 1961)).
12. *Id.*
13. *Id.* at 324.
14. R.I. CONST. art 10, § 3.

the governor.[15] Such was not the case in this situation because the Casino Act could not go into effect until the voters approved the referendum question.[16] Nevertheless, the court stated that it had the discretion to issue an advisory opinion because the "propounded question raise[d] important constitutional or social questions."[17] Rather than wait until the voters approved or rejected the referendum, the court opined that it was preferable to act quickly before members of the public waste time, energy and money, familiarizing themselves with the casino issue and the referendum.[18] Rather than hold a false vote on a controversial issue, the court cited its "strong preference for resolving election issues before the voters have spoken" as a primary reason for issuing its opinion.[19] The circumstances raised sufficiently important constitutional and social questions and an advisory opinion was therefore appropriate. The court then turned to an analysis of the merits of Governor Carcieri's request.

First, the court determined that the casino proposed by the General Assembly represented a lottery operation.[20] Relying on previous decisions that defined the term "lottery" expansively,[21] the court found a well-settled definition of a lottery as a "scheme or a plan having three essential elements: consideration, chance, and prize."[22] The court applied the "dominant factor" doctrine to determine whether the element of chance is present in a particular "scheme or plan."[23] Under this doctrine, a scheme is defined as a lottery "when an element of chance dominates the distribution of prizes."[24] Thus, the games proposed by the casino proponents, such as roulette, craps, slot machines, poker and blackjack, were examples of lotteries because of the strong degree of randomness

15. *See In re Advisory Opinion*, 856 A.2d at 324 (citing *In re Advisory Opinion (Chief Justice)*, 507 A.2d 1316, 1318-19 (R.I. 1986)).
16. *Id.*
17. *Id.*
18. *Id.* at 325.
19. *Id.* at 327.
20. *Id.*
21. *Id.* (citing *Roberts v. Communications Investment Club of Woonsocket*, 431 A.2d 1206, 1211 (R.I. 1981)).
22. *Id.*
23. *Id.* at 328.
24. *Id.* (quoting *Roberts*, 431 A.2d at 1211).

or chance that characterizes those games.[25]

If the games in question are lotteries, then the Rhode Island Constitution is clear that they must be operated by the state.[26] The court found that the referendum question was contrary to the Rhode Island Constitution because of its inclusion of the language that the casino would be "operated by an Affiliate of Harrah's."[27] The court saw that the referendum question itself violated the Rhode Island Constitution on its face because "[a] clearer identification of the casino operator cannot be imagined."[28]

The court further opined that the General Assembly could not credibly argue that it was maintaining control over the casino and simply delegating a significant portion of the operational responsibility to other entities, namely Harrah's.[29] It rejected the General Assembly's argument that the state's Lottery Commission would actually be the casino operator.[30] The court examined the language of the Casino Act, which gave the Lottery Commission jurisdictional and supervisory powers, stating that "[t]he Commission shall have jurisdiction over and *shall supervise* all gaming operations governed by this chapter."[31] The court described these powers as regulatory, not operational, in nature and saw little overlap between the two.[32] It pointed out that the word "'control' indicates authority over the day-to-day functioning of an enterprise" and that such "operational control" was Harrah's: "Harrah's would make day-to-day decisions having to do with the functioning of the proposed casino while the Lottery Commission merely would enforce the applicable regulations."[33] By failing to maintain operational control over the proposed casino and actually stating in the referendum question that a private entity would have such control, the General Assembly ran afoul of the constitutional requirement that lotteries within the state be run by the state.[34]

---

25. *See id.*
26. *See* R.I. CONST. art 6, § 15.
27. *In re Advisory Opinion (Casino)*, 856 A.2d at 330.
28. *Id.*
29. *Id.*
30. *Id.*
31. Casino Act, § 41-9.1-5(a) (emphasis added).
32. *In re Advisory Opinion (Casino)*, 856 A.2d at 331.
33. *Id.* at 331-32.
34. *Id.* at 332. The court also noted that neither of the constitutional exceptions applied to the casino proposed in the Casino Act, despite Harrah's

Finally, the court stated that the existing constitutional mechanism for expanding gambling in the state could not trump the constitutional requirement that lotteries be state-run.[35]

Casino proponents cited the "restriction of gambling" provision of the Rhode Island Constitution, which requires voter approval of any expansion of gambling in the state, in an attempt to get around the requirement that all lotteries within the state be run by the state.[36] Casino proponents argued that the requirement that any expansion of gambling be submitted to the state's voters *trumped* the separate constitutional provision requiring that lotteries be state-run.[37] However, the court stated that the two constitutional provisions had to be read together. While one provision addressed *lotteries*, the other addressed *gambling* ventures: "Although all lotteries are a form of gambling, not all forms of gambling are lotteries."[38] To illustrate its point, the court pointed out that while lotteries are predominantly games of chance, the same is not true of all types of gambling.[39] For example, the state could expand gambling, after holding a statewide referendum, on sports such as horse racing, baseball or football and on games such as chess or checkers because those games "depend primarily on skill or judgment."[40] Lotteries, by contrast, are predominantly games of chance.[41] Thus, to expand gambling activities, the state only needs to hold a referendum on the subject.[42] To expand lotteries, the state needs to first hold a referendum and then maintain opera-

---

and the General Assembly's arguments to the contrary. *Id.* at 332-33.

35. *Id.* at 333.

36. *Id.*; The Rhode Island Constitution states:

> No act expanding the types of gambling which are permitted within the state or within any city or town therein or expanding the municipalities in which a particular form of gambling is authorized shall take effect until it has been approved by the majority of those electors voting in a statewide referendum and by the majority of those electors voting in a referendum in the municipality in which the proposed gambling would be allowed.

R.I. CONST. art XI, § 22

37. *In re Advisory Opinion (Casino),* 856 A.2d at 333.

38. *Id.*

39. *Id.*

40. *Id.* at 333-34.

41. *See supra* note 24 and accompanying text.

42. *In re Advisory Opinion (Casino),* 856 A.2d at 334.

tional control over those lotteries if the voters approve them.[43]

COMMENTARY

Some observers may view the Rhode Island Supreme Court's advisory opinion on the constitutionality of the Casino Act and the casino referendum question as a premature opinion that quashed Rhode Islanders' opportunity to vote in the November elections on this important issue. However, the court was simply averting what could have become a constitutional crisis if it allowed an unconstitutional referendum question to be put before the voters.

While the court should be wary to issue advisory opinions, certain situations warrant them. The court said so in this opinion, stating that its inaction would have simply postponed its inevitable decision on the constitutional merits of the Casino Act.[44] To force casino proponents and opponents to mobilize their constituencies and devote significant resources in an effort to win in November only to invalidate the entire enterprise a few months later does not further the goals of honest or efficient government. The Casino Act involved two strongly committed groups of voters and a clash between the legislative and executive branches. If the Rhode Island Constitution had not been implicated, a judicial opinion on the matter would have been certainly unnecessary and perhaps inappropriate. However, the Casino Act represented a clear violation of the Rhode Island Constitution's requirement that all lotteries be state-run. To ignore that provision after being asked by the governor to give an opinion on the matter would have been irresponsible by the court.

In addition, the constant lobbying on the part of casino proponents to erect a casino in Rhode Island has become a state pastime. Just over a decade ago in 1994, Rhode Island voters soundly rejected a referendum that would have allowed the Narragansett Indians to build a casino. The issue returned in 2004, with a mammoth advertising campaign by casino proponents and overwhelming support from the General Assembly for Harrah's plans to build a casino. Such strong legislative support seemed at odds with the much more closely divided views of the voters, whom

43. *Id.* at 333.
44. *Id.* at 325.

most polls showed were evenly split on the issue.[45] Had the governor and the supreme court not stepped in, casino supporters would have been successful in thwarting the state constitution.

CONCLUSION

The Casino Act and controversy over the casino referendum question represent the types of circumstances under which the Rhode Island Supreme Court is willing to issue an advisory opinion. Its decision represents the court's strong preference to resolve an election-year issue replete with important constitutional issues before Election Day, rather than waiting for a legal quagmire to ensue. Despite issuing a non-binding opinion, the court did clarify some constitutional issues regarding the future of a casino in Rhode Island. First, it clearly held that the General Assembly cannot abdicate its constitutional responsibility to operate any lotteries within the state. Any lottery within the state must also be run by the state. Second, the court sent a strong message that it will not allow the General Assembly to delegate that constitutional responsibility to the Lottery Commission or to any private entity. Finally, it made clear that any decision to build a casino in the state must clear the constitutional hurdle requiring that all lotteries be run by the state *as well as* the constitutional hurdle that any proposal to expand gambling operations in the state must be approved in a statewide referendum.

Matthew M. Mannix

45. Zachary R. Mider, *Battle for R.I. Casino Now Moves to Voters*, PROVIDENCE J., Aug. 1, 2004, at B-01.

Constitutional Law. *Leddy v. Narragansett Television*, 843 A.2d 481 (R.I. 2004). When a television broadcast utilizes express disclaimers that disclose the non-defamatory factual basis for an opinion, and also disclaim all defamatory connotations, a person may not prevail on a defamation claim against the television station. Moreover, when disclaimers are not used, broadcasts that contain vague and imprecise language not capable of defamatory meaning are not subject to an action for defamation. Finally, a news medium has not violated Rhode Island General Laws section 9-1-28 when it re-airs portions of previously televised non-defamatory broadcasts in order to promote or advertise itself.

FACTS AND TRAVEL

"As the television cameras roll, an investigative reporter, inquiring about an issue of potential public interest, thrusts a microphone into the startled, hapless face of some speed-walking employee, who is vainly attempting to short circuit the interview."[1] This case arises out of a set of facts consistent with that employee's lack of success. Gerald Leddy (Leddy), a Deputy Fire Marshall working for the State of Rhode Island as a fire inspector, was stopped by Channel 12 Eyewitness News reporter Vincent DeMentri, and interviewed for a three part investigative series about state employees who were concurrently the beneficiaries of municipal disability pensions.[2] Leddy was one of a number of people who had retired from the police or fire departments on a disability pension, and had subsequently received a job with the State of Rhode Island. As a result, they received two salaries: one from the State for full time work and another from a municipal disability pension.[3]

The interview consisted of two questions in which DeMentri asked Leddy (1) if he felt that he was "ripping off the system in

1. Leddy v. Narragansett Television, 843 A.2d 481, 483 (R.I. 2004) (opening line of the majority opinion by now-retired Justice Robert G. Flanders, Jr.)
2. *Leddy*, 843 A.2d at 483-84.
3. *Id.* at 484.

some way,"[4] and (2) if he felt that there were other tasks he could have performed at the Providence Fire Department that would have precluded his current status as a double salary earner.[5] Leddy responded that it was "possible" and then cut off further questioning, suggesting that DeMentri contact his attorney.[6] About six months later, Channel 12 aired a promotional spot about its investigative news team that included brief segments of previous interviews, including Leddy's, along with a voice over suggesting that people could avoid similar interviews as long as they did not "do anything wrong."[7]

Following the aforementioned broadcasts, Leddy sued Narragansett Television, Vincent DeMentri and others for defamation and violation of section 9-1-28.[8] After a number of years of discovery, the case came before the superior court on cross motions for summary judgment.[9] In an opinion issued from the bench, the trial judge denied Leddy's motion for summary judgment and granted that of Narragansett Television.[10] The trial judge made several determinations that later became the subject matter of Leddy's appeal to the Rhode Island Supreme Court.[11]

The court held that Leddy was a public official, and, as a result, was required to make a showing of actual malice in order to prevail on his defamation claim.[12] The basis for this holding was Leddy's position as a fire investigator and the legitimate public concern in the newscasts.[13] Regarding Leddy's position as a fire investigator, the court found that it (1) potentially affected the constitutionally protected liberty and property interests of various individuals, (2) that law enforcement officials relied on his reports to prosecute crimes such as arson, and (3) that his position was like that of police officers in terms of the nature of his powers and

4. *Id.* at 485.
5. *Id.* at 485, n.2.
6. *Id.*
7. *Id.* at 485.
8. *Id.*; Action for Unauthorized Use of Name, Portrait, Picture, R.I. GEN. LAWS § 9-1-28 (Supp. 2004).
9. *Id.*
10. *Id.* at 486.
11. *Id.*
12. *Id.*
13. *Id.* at 485-86.

his exposure to public scrutiny.[14]

The trial justice went on to find that Leddy had not met his burden of proving actual malice on the part of Channel 12, namely that defendants had actual knowledge of a falsehood or that they had disseminated information with reckless disregard for the truth.[15] The trial justice also found that the disclaimers that had been given at the beginning and at the end of the broadcast, making it clear that no accusations of illegality were being waged and the opportunity afforded plaintiff to tell his side of the story, weighed in favor of a finding of summary judgment for defendant.[16] Finally, the trial justice held that he could not verify the meaning of the words "wrong" and "ripping off" and was thus unable to render an opinion as to their intended connotations in the broadcast.[17]

The trial justice, likewise, found plaintiff's statutory claim to be without merit, and found the broadcast to have been privileged as a matter of law under the doctrine of incidental use.[18] Because the media has a constitutional right to disseminate information about public officials in matters of public concern, the broadcast did not violate the dictates of section 9-1-28.[19]

Plaintiff appealed the superior court decision on four separate grounds: (1) that he was not a public official when the interview was broadcasted, and so should not have had to prove actual malice; (2) that the broadcast of the interview and the promotional spot constituted actual malice; (3) that the terms "wrong" and "ripping off" were capable of defamatory meaning; and (4) that he should have prevailed under section 9-1-28.[20]

ANALYSIS AND HOLDING

A claim for defamation requires proof on four separate elements: (1) a false and defamatory statement, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) damages, unless

14. *Id.* at 485.
15. *Id.* at 486.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 486-91.

the statement is actionable irrespective of social harm.[21] The Rhode Island Supreme Court's opinion in this case focuses on the first element.

The court, after analyzing case law from other jurisdictions, decided to assume for the purposes of the opinion that plaintiff was not a public official. Citing the lack of case law on the subject of whether or not firefighters or fire investigators should receive public official status, and finding no answer in widely divergent case law from other jurisdictions, the court moved onto the substantive portion of its analysis.[22]

The court went on to decide, as a matter of law, that no defamatory statements were issued in the interview, or in the subsequent promotional spot.[23] The court reasoned that there had been an adequate disclaimer of the fact that the station was making no accusation as to illegality. Moreover, the reporter quite clearly had not questioned the veracity of Leddy's medical problems, and it was clear from the context that he was not suggesting that Leddy was "faking" his problems.[24] Lastly, to hold the interview defamatory, the court reasoned, would be to create a chilling effect on legitimate criticism of government policy, something that the United States Supreme Court had warned against in the landmark case of *New York Times Co v. Sullivan*.[25] Because, the court reasoned, the comments at issue were, at worst, the expression of a "derogatory opinion about a subject of legitimate public interest" the doctrine of fair comment provided legal immunity to the factually based statements of opinion.[26] The court went on to indicate that the disclaimers had also done away with any potential inferences of defamatory meaning that the broadcast might have contained.[27]

Because the subsequent promotional spot at issue had not

21. *Id.* at 488 (quoting Healey v. New England Newspapers, Inc., 555 A.2d 321, 324 (R.I. 1989)).

22. *Id.* at 486-87. This decision had the effect of giving Leddy the opportunity to prove his case under a less onerous standard, and also of sending the ultimate message that it would be difficult to prove a defamation claim against a newspaper under any standard.

23. *Id.* at 487.

24. *Id.* at 487-88.

25. *Id.* at 488; New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

26. *Leddy*, 843 A.2d at 488.

27. *Id.* at 489.

carried express disclaimers as had the initial interview, the court utilized slightly different reasoning in coming to the conclusion that the spot had not carried defamatory meaning. The court held that the word "wrong" was just too imprecise to carry a defamatory meaning, as a matter of law, because there was no way to prove it true or false, precluding a finding of defamation.[28]

Finally, the court agreed with the trial justice as to his finding that Narragansett Television had not violated section 9-1-28 by exploiting the plaintiff by using his picture without permission.[29] The court agreed with a number of other courts which had ruled that free speech considerations protect brief rebroadcasts of previously televised investigative reports utilized to promote a new medium from invasion or wrongful use claims as long as the original broadcast was not defamatory.[30]

COMMENTARY

Although it is not a focal point of the opinion, *Leddy v. Narragansett Television* marks the first time that the Rhode Island Supreme Court has engaged in statutory construction of section 9-1-28. Before *Leddy*, the only authoritative construction of section 9-1-28 was found in the United States District Court for the District of Rhode Island's decision, *Mendonsa v. Time, Inc.*[31] *Leddy* marks the first time that the Rhode Island Supreme Court has referenced *Mendonsa*, and with little fanfare, largely adopting its interpretation.[32] *Leddy* does, however, add an important aspect to *Mendonsa's* longstanding interpretation of the statute.

Mendonsa went through a painstaking historical analysis of what was, at that time, a fairly new statutory provision.[33] The district court decided in that opinion that the initial publication of the famous "kissing sailor" photograph taken on "V-J Day" in 1945 was not actionable under section 9-1-28 because of the newsworthy value that it carried.[34] Subsequent reprints of that photograph, however, culminating in an offer to sell copies for $1600 a

28. *Id.*
29. *Id.* 490.
30. *Id.*
31. 678 F. Supp. 967 (D. R.I. 1988).
32. *Leddy*, 843 A.2d at 490.
33. *Mendonsa*, 678 F. Supp at 968-73.
34. *Id.* at 972.

piece, did not carry the same newsworthy value and made up a set of facts precluding a finding for defendants on a motion to dismiss for failure to state a claim under which relief could be granted.[35]

Leddy marks the first time that the Rhode Island Supreme Court has analyzed a set of facts similar to those facing the district court in *Mendonsa*. In response, the *Leddy* Court has adopted a narrower construction of section 9-1-28 than the district court, holding that subsequent rebroadcasts of initially newsworthy, non-defamatory material are protected by the First Amendment.[36] Notably, and appropriately, the court takes as persuasive a number of precedents from New York.[37] This is appropriate because the statute was initially modeled after a New York Civil Rights Law which codified the birth of a new statutory right to privacy in that jurisdiction.[38]

By holding that the brief rebroadcast at issue in *Leddy* was protected by the First Amendment as newsworthy, and as a "logical extension of the clearly protected editorial use of the content of the publication,"[39] the Rhode Island Supreme Court has skillfully navigated a difficult line between the First Amendment and the right to privacy in Rhode Island.

CONCLUSION

The court upheld in this case the right of a television station to broadcast information of public concern as long as the underlying facts were true and defamatory connotations were properly disclaimed. Moreover, the court held that words that were too vague or imprecise to be proven true or false were incapable of carrying defamatory meanings and could not be the subject of a successful claim of defamation against a television station. Finally, the court held that a television station had a right to rebroadcast portions of previously aired non-defamatory material in an effort to promote or advertise its services, and that, by doing so,

---

35. *Id.*; FED. R. CIV. P. 12(b)(6).

36. *Leddy*, 843 A.2d at 490.

37. *Id.*; *See, e.g,*. Allen v. Nat'l Video, Inc., 610 F. Supp. 612 (S.D.N.Y 1985); Gautier v. Pro Football, Inc., 107 N.E.2d 485, 488 (N.Y. 1952).

38. *Mendonsa*, 678 F. Supp at 971; N.Y. CIV. RIGHTS LAW § 51 (Consol. 1995).

39. *Leddy*, 843 A.2d at 490 (quoting Velez v. VV Publ'g Corp., 524 N.Y.S.2d 186, 187 (N.Y App. Div. 1988).

it did not open itself up to a claim that it had violated the dictates of section 9-1-28.

Bridget N. Longridge

Constitutional Law. *Mosby v. Devine*, 851 A.2d 1031 (R.I. 2004). The Firearms Act, Rhode Island General Laws section 11-47-18, does not infringe upon "the right of the people to keep and bear arms" under the Rhode Island Constitution. Also, the rejection of an individual's application for a concealed weapon permit does not necessitate a hearing, and further does not constitute a contested case under the Administrative Procedures Act (APA). The only method available to obtain judicial review of a denial of a gun permit is through a writ of certiorari.

FACTS AND TRAVEL

In 1998, Charles H. Mosby and Steven Golotto submitted separate applications to the Rhode Island Department of the Attorney General (Department) for permits to carry a concealed weapon pursuant to Rhode Island General Laws section 11-47-18 (Firearms Act)[1] Under section 11-47-18(a), the Department is authorized to issue a permit "upon a proper showing of need."[2] Mosby, who was an avid gun collector, and Golloto, a self-employed shopkeeper, sought the permit for the purposes of personal protection as they both occasionally traveled with large sums of cash.[3]

The Department reviewed and ultimately denied Mosby and Golotto's applications stating that the department found "insufficient need" for the issuance of a permit to carry a concealed weapon.[4] Although neither of the letters mentioned the possibility of meeting with the department to contest the denial, Mosby and his attorney met with Vincent McAteer, former Chief of the Rhode Island Bureau of Criminal Identification, to discuss the board's reasons for denying the permit.[5] In June of 1999, the department promulgated guidelines for reviewing applications to obtain a

1. Mosby v. Devine, 851 A.2d 1031, 1034-35 (R.I. 2004).
2. *Id.* at 1035; R.I. GEN. LAWS § 11-47-18 (Supp. 2004).
3. *Mosby,* 851 A.2d at 1035.
4. *Id.*
5. *Id.*

permit under the Firearms Act.[6] Prior to this date, the department had no written guidelines either explaining the application process or criteria used to review applications.[7]

Mosby and Golotto filed suit in superior court claiming that the department's denial of their original applications violated the APA and their civil rights as guaranteed under the Rhode Island Constitution.[8] Both sought a declaratory judgment or writ of mandamus compelling the issuance of the licenses.[9] In the alternative, plaintiffs asked the department to "(1) conduct a hearing on their applications, (2) provide written copies of the rules, procedures and standards that the department used to review applications for licenses, and (3) pursuant to the APA, promulgate rules applicable to applications to carry concealed weapons filed under section 11-47-18."[10]

The department moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Superior Court Rules of Civil Procedure. The hearing justice granted the department's motion, finding that the APA did not vest the superior court with subject-matter jurisdiction to review the department's decision as the application process under section 11-47-18 was not a contested case.[11] Mosby and Gilotto subsequently appealed to the Rhode Island Supreme Court. After hearing oral arguments, the Supreme Court concluded that cause had been shown, thus warranting further briefing and argument.[12]

ANALYSIS AND HOLDING

1. *Due Process: Article I, Section 22*

The Rhode Island Supreme Court, applying the standard presumption of constitutionality, held that the Firearms Act did not trigger due process concerns.[13] The court noted "[o]nly when we conclude that a constitutionally protected interest has been in-

6. *Id.*
7. *Id.*
8. *Id.*
9. *Id;* R.I. CONST. art. XXII, § 2.
10. *Mosby*, 851 A.2d at 1035-36.
11. *Id.* at 1036.
12. *Id.*
13. *Id.* at 1049.

fringed '[will] we inquire whether the procedures afforded were 'constitutionally sufficient.'"[14] Consequently, Mosby was not entitled to a hearing on his application under section 11-47-18(a).[15] The court reasoned that although the Firearms Act "regulate[d] and prohibit[ed] the ownership and possession of firearms," the mandatory and discretionary licensing provisions contained in the statute were sufficient to satisfy the constitutional guarantee to "keep and bear arms."[16] The court further noted that the Firearms Act does not infringe upon the citizens' right to possess a rifle, shotgun, pistol, or revolver *in their homes or places of employment* as guaranteed by article I, section 22 of the Rhode Island Constitution.[17]

The court relied upon a variety of both contemporary and historical authorities in concluding that the framers of the Rhode Island Constitution intended to extend the right to "bear arms" exclusively to those in a branch of the military service.[18] The court began its analysis of the phrase "bear arms" by referencing the Tennessee Supreme Court's decision in *Aymette v. State*.[19] Under the Tennessee Constitution, "bear arms" was qualified by the statement "for their common defense."[20] However, the court acknowledged the "divergent conclusions" reached by the United States Court of Appeals for the Ninth and Fifth Circuits.[21] The court found it notable that both the Ninth and Fifth Circuits looked to the Rhode Island Ratification of the United States Constitution to support the proposition that a military connotation was intended by use of the term "bear arms" as evidenced by the express reference to this term by the conscientious objector provision.[22]

---

14. *Id.* at 1038 (quoting DiCiantis v. Wall, 795 A.2d 1121, 1126 (R.I. 2002) (quoting Kentucky Dep't of Corrs. v. Thompson, 490 U.S. 454, 460 (1989))).

15. *Id.* The court found that Mosby was the only party to the appeal as Golotto had failed to timely pay his appellate filing fee. *Id.* at 1036.

16. *Id.*

17. *Id.*

18. *Id.* at 1041.

19. *Id.* (citing Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840)).

20. *Id.* (quoting *Aymette*, 21 Tenn. at 156).

21. *Id.*

22. *Id.* ("'[A]ny person religiously scrupulous of baring arms, ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.'"

2. *Firearms Act and Gun Permits in General*

The court further held that the Firearms Act, considered in its entirety, was an orderly act designed to "regulate the possession and use of an array of weapons."[23] After reviewing the provisions of the act, the court noted that the purpose of the act was to reduce gun violence and protect children from negligent gun owners and consequently fell within the state's police power.[24] The court further found that the General Assembly was careful to avoid imposing any restrictions on gun ownership by a homeowner or landowner.[25] With respect to the discretionary authority vested in the department, the court stated that when considered in relation to the overarching "comprehensive scheme," section 11-47-18 did not infringe upon "'[t]he right of the people to keep and bear arms.'"[26]

The court also considered both the discretionary and mandatory components of the licensing provisions in support of the finding that the Firearms Act did not infringe upon the "constitutional guarantee to keep and bear arms."[27] The court acknowledged that

---

23. *Id.* at 1045.
24. *Id.* at 1045-46.
25. *Id.* at 1047.
26. *Id.*
27. *Id.* The court stated that

> [under section 11-47-11(a)] Mosby, a resident of Massachusetts who holds several gun licenses from other states, was entitled to a carrying permit from the licensing authority of any city or town. An avid gun collector, plaintiff has a proper reason for carrying a pistol or revolver and there is no suggestion that he is an unsuitable person.

Id.; *see also* R.I. GEN. LAWS § 11-47(a)(Supp. 2004):

> The licensing authorities of any city or town *shall*, upon application of any person twenty-one (21) years of age or over having a bona fide residence or place of business within the city or town, or of any person twenty-one (21) years of age or over having a bona fide residence within the United States and a license or permit to carry a pistol or revolver concealed upon his or her person issued by the authorities of any other state or subdivision of the United States, issue a license or permit to the person to carry concealed upon his or her person a pistol or revolver everywhere within this state for four (4) years from date of issue, if it appears that the applicant has good reason to fear an injury to his or her person or property or has any other proper reason for carrying a pistol or revolver, and that he or she is a suitable person to be so licensed. The license or permit shall be in triplicate in form to be prescribed by the attorney general and shall bear the fingerprint, photograph, name, address, description, and signa-

section 11-47-18(a) conferred broad discretion to the department when deciding whether to grant a permit; however, the court found that this discretion did not infringe upon "the right of the people to keep and bear arms."[28] The court thus held that because due process concerns were not triggered, Mosby was not entitled to a hearing on his initial application filed in accordance with section 11-47-18(a).

3. *Implicit Hearing Requirement under Section 11-47-18*

Relying on *Colonial Hilton Inns of New England, Inc. v. Rego*,[29] Mosby argued that a hearing was implicitly required under section 11-47-18.[30] The court distinguished *Colonial Hills*, noting that section 46-6-2 expressly acknowledged that the rights of riparian property owners could be impaired by the filling of submerged lands.[31] Thus, in *Colonial Hills,* the court found that section 46-6-2 triggered procedural due process concerns, which called for a pre-deprivation hearing. With respect to section 11-47-18, the court found "no analogous limitation on the licensing of individuals to carry concealed weapons."[32]

4. *Required Procedures Under Section 11-47-18.*

The court held that although the Firearms Act was "reasonable and lawful," the department cannot be vested with "carte blanche authority" when deciding who may carry a concealed weapon.[33] The court reasoned that "unfettered discretion" would

---

ture of the licensee and the reason given for desiring a license or permit and in no case shall it contain the serial number of any firearm. The original shall be delivered to the licensee. Any member of the licensing authority, its agents, servants, and employees shall be immune from suit in any action, civil or criminal, based upon any official act or decision, performed or made in good faith in issuing a license or permit under this chapter (emphasis added).

Id.

28. *Id.* at 1048. The court further found that "because the statute under consideration vests the Attorney General with discretion to refuse a license even if a person makes a 'proper showing of need,' we are of the opinion that it has no impact on any constitutionally protected liberty interest." *Id.*

29. 284 A.2d 69 (R.I. 1971)

30. *Id.* at 1049.

31. *Id.*

32. *Id.*

33. *Id.* at 1050.

render the constitutional right to bear arms illusory.[34] To prevent the abrogation of this right, the court held that review of these licensing decisions was available through a common law writ of certiorari.[35] Although the court noted that review of these decisions would be limited to determining whether sufficient facts supported the denial of the permit, the court found that the department must adhere to the minimal procedural safeguards as required by section 11-47-18 and provide applicants with the reasons for the denial of their permit requests.[36] Because Mosby did not seek a writ of certiorari, the court determined that it could not properly consider the merits of the department's denial of his request.[37]

5. *Justice Flanders's Dissenting Opinion*

In a lengthy dissent, Justice Flanders noted that the right to keep and bear arms is necessary for both self-defense and as a "counterweight to the omnipresent threat that government rulers exercising arbitrary power."[38] Justice Flanders lamented the "favorite son" treatment that the majority bestowed upon the term "keep arms" at the expense of its "arms-bearing brother."[39] Justice Flanders further commented that the majority's treatment of the right to bear arms reduced the right to "a much diminished paltry thing – more a one-trick toy pony than a palladium of republican liberty."[40]

COMMENTARY

The majority's decision in *Mosby*, although not explicitly addressing the Second Amendment of the United States Constitution, reflects the considerable controversy over the proper interpretation of the term "bear arms." By endorsing the position in that "bear arms" was intended to have a military connotation as opposed to the textual interpretation advocated by Justice Flanders, the majority has highlighted the inherent difficulties in-

34. *Id.*
35. *Id.* at 1051.
36. *Id.*
37. *Id.*
38. *Id.* at 1052 (Flanders, J., dissenting).
39. *Id.* at 1057.
40. *Id.*

volved when assessing historical evidence. Although both the majority and dissenting opinions purport to give unambiguous words in the constitution their plain and ordinary meaning, the majority and dissent accorded very different meanings to the text of article I, section 22 in their respective interpretations.

The majority essentially undertook a pragmatic approach in assessing the procedures specified by the Firearms Act. After emphasizing that the Firearms Act was intended to prevent criminals from acquiring dangerous weapons, while ensuring that it was not unduly difficult for other members of society to attain such weapons, the majority affirmed the application of the police power to legislation which does indeed make it more difficult for an individual to carry a concealed weapon.

CONCLUSION

This case confirms the right of the Department of the Attorney General to deny requests to carry weapons without providing a hearing. However, the decision ensures that the right to "keep and bear arms" will not be swallowed by the police power as the department will be forced to articulate with specificity the factual basis upon which it relied upon to deny the requested permit. Furthermore, these denials may be reviewed through a writ of certiorari.

Jon Kukucka

Contract Law. *Gorman v. St. Raphael Academy*, 853 A.2d 28 (R.I. 2004). In this case of first impression the Rhode Island Supreme Court held that the arbitrary and capricious standard is not the proper test for evaluating the lawfulness of a private school rule or regulation. Rather, the appropriate inquiry is whether a private school contract term is contrary to law or public policy. Unless a contract term violates public policy, the court will not inject itself into a private school's rule-making authority.

FACTS AND TRAVEL

Hair battles that combed their way through courts during the 1970s returned last year when a Saint Raphael Academy student and his parents fought for his right to wear his hair in a mullet style.[1] While the Rhode Island Superior Court would have allowed the student to sport his mullet-styled hair,[2] the Rhode Island Supreme Court sent the student back to the barbershop.[3]

In fall 2000 plaintiff Russell Gorman III applied for admission to St. Raphael Academy, a Catholic, coeducational high school in Pawtucket, Rhode Island.[4] With mullet-styled hair, the honors student visited the school several times and interviewed with school officials before finally receiving a letter of acceptance from the school principal in January 2001.[5] During the eighth grader's visits no school official mentioned his long locks.[6] Russell began

1. Gorman v. St. Raphael's Academy, C. A. No. PC 2001-4821, 2002 R.I. Super. LEXIS 141, at *38 (R.I. Super. Oct. 17, 2002) (citing Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970)).

2. *Id.* at *46-47.

3. Gorman v. St. Raphael Academy, 853 A.2d 28, 31-32 (R.I. 2004). The court gave the student the option of cutting his hair to conform with the school's policy or be subject to disciplinary action and possible dismissal as provided for in the 2002-03 student handbook. *Id. See also* Edward Fitzpatrick, *Court: School has Right to Expel Student*, PROVIDENCE J., July 16, 2004, at B-01 ("While the state's high court did not tell [the student] to cut his hair, [Justice Paul A.] Suttell concluded the 17-page opinion by . . . encourag[ing] him to complete his senior year at Saint Raphael.").

4. *Gorman*, 853 A.2d at 30-31.

5. *Id.* at 31.

6. *Id.*

the ninth grade in August 2001 but by his second or third week of school, school officials gave Russell an option: cut his hair or be expelled.[7]

Unable to convince the school to allow him to keep his tresses, Russell, with the support of his parents, Kimberly Gorman and Russell Gorman, Jr., filed a complaint against the school in Rhode Island Superior Court alleging breach of contract.[8] On September 25, 2001 the trial justice granted a temporary restraining order enjoining the school from expelling Russell because of his hair.[9]

In May 2002, the school's principal revised the student handbook to include a new hair code for male students.[10] Included in the provision was "Outlandish hairstyles (ex. any designs, lettering, Mohawks, pony tails, etc. engraved/cut into their hair . . .) are not in keeping with the school's education mission and will not be tolerated. A boy's hair may not be longer than the bottom of his shirt collar."[11]

In August 2002, the Gormans filed an amended complaint alleging breach of contract and seeking injunctive relief allowing Russell to attend school within the dictates of the 2001-2002 handbook, or within the dictates of the 2002-2003 handbook except the provision relating to hair length.[12]

The school agreed to permit Russell to remain at the school until the court heard the case so long as he tucked his pony-tailed hair into his shirt collar.[13]

In October 2002, Associate Justice Stephen J. Fortunato, Jr. granted the permanent injunction[14] in a decision quoting the musical "Hair"[15] and Pink Floyd.[16] The trial justice also granted plaintiff's motion for attorney's fees of $1,505 for litigating the temporary restraining order.[17] The plaintiff's motion for attorney's

---

7. *Id.* at 30-31.
8. *Id.* at 30.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 32.
13. *Id.*
14. *Id.*
15. Gorman v. St. Raphael's Academy, C. A. No. PC 2001-4821, 2002 R.I. Super. LEXIS 141, at *1 (R.I. Super. Oct. 17, 2002) ("Hair, hair, hair, hair, hair, hair; Flow it, show it; Long as God can grow it hair. . . .").
16. *Id.* at *51 ("Leave the kids alone!").
17. *Id.*

fees for the hearings on the permanent restraining order was denied.[18] The order for costs was stayed pending appeal.[19]

Saint Raphael appealed, asserting six errors. The school contended that the trial justice erred (1) by failing to apply contract law; (2) by applying a rational relationship test, which required the defendant to prove that the hair code was related to the educational process; (3) by improperly placing the burden of proof on the defendant; (4) by finding that the rule was arbitrary and capricious without supporting evidence; (5) by improperly substituting its judgment for that of Saint Raphael's the administration; and (6) by erroneously disregarding the constitutional rights of parents who choose to educate their children at Saint Raphael.[20]

ANALYSIS AND HOLDING

While the case was one of first impression in Rhode Island,[21] the court was quick to note that strict adherence to contract law is unnecessary when private school contracts are at issue.[22] The court looked to other jurisdictions that recognize an educational contract carries with it the right to modify disciplinary and academic rules and regulations.[23] As such, courts typically construe educational contracts to give schools flexibility to meet their educational responsibilities.[24] The court concluded that Gorman's tuition contract with the school was renewable annually.[25] Each year students' parents or guardians were required to sign a tuition contract for the specific academic year, along with a student handbook each year.[26] Thus, when the handbook was revised to prohibit certain hairstyles, students were bound by the handbook's terms for that academic year.[27]

The trial court used a rational basis test to strike down the school's policy.[28] The trial justice acknowledged that private

18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at *20.
22. Gorman v. St. Raphael's Academy, 853 A.2d 28, 34 (2004).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 35.

schools may change their policies; however, changes made to controlling rules and regulations "should be enacted in good faith and not bespeak the arbitrary or capricious."[29] The trial justice further noted that the school had failed to produce any evidence proving that "long hair worn by male students affects the educational process, discipline or decorum of the school, or has anything to do with the dogma or rules of the Roman Catholic Church."[30]

Despite the trial court's ruling, the supreme court concluded, "the determination of what rules or policies comply with the school's mission statement is an exercise more appropriately and properly left to the school administration."[31] The court relied upon testimony from the school's principal indicating that the policy was implemented in response to a lack of student discipline and respect for teachers.[32] The hair code was one part of the school's effort to "create a sense of community and shared values for all students, prevent distractions, promote a team-spirit, and create a common value-based culture of calmness and order."[33] With this background, the supreme court concluded that the hair-length regulation was not arbitrary or capricious, nor did it lack a rational basis.[34]

In reversing the decision of the superior court, the Rhode Island Supreme Court took issue with the trial court's application of the arbitrary and capricious standard.[35] The court instead held that the proper inquiry is "whether the term at issue in a contract involving a private educational institution is contrary to law or public policy."[36] The trial court relied on *Herbert v. Ventetuolo*[37] for the proposition that "there should be 'no judicial interference with the internal affairs, rules and by-laws of a voluntary association unless their enforcement would be arbitrary, capricious or constitute an abuse of discretion.'"[38] In rejecting application of the arbi-

29. *Id.* (quoting Gorman v. St. Raphael's Academy, 2002 R.I. Super. LEXIS 141, at *34 (R.I. Super. Oct. 17, 2002)).
30. *Id.* at 36.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 36-37
35. *Id.* at 38.
36. *Id.*
37. 480 A.2d 403 (R.I. 1984).
38. *Id.* at 37 (quoting *Herbert*, 480 A.2d at 407).

trary and capricious standard in this case, the supreme court found that *Herbert*, a case involving a voluntary association of *public* school principals did not control cases involving *private* school regulations, such as the hair policy at issue in *Gorman*.[39]

Having rejected the arbitrary and capricious standard for examining private school regulations, the court instead held that the appropriate inquiry is "whether the term at issue in a contract involving a private educational institution is contrary to law or public policy."[40] Stressing that private schools, such as Saint Raphael, have voluntary contractual relationships with students, the court noted that "[p]rivate schools must have considerable latitude to formulate and enforce their own rules to accomplish their academic and educational objectives. These rules and regulations generally are binding on those who wish to remain members, provided however, that said rules do not conflict with public policy."[41]

Under general contract law in Rhode Island, a contract violates public policy only if it is "1) injurious to the interests of the public, 2) interferes with the public welfare or safety, 3) is unconscionable; or 4) tends to injustice or oppression."[42] The court adopted the same standard to determine whether a rule or regulation in a private school contract is lawful.[43] Because the plaintiffs failed to prove that the hair provision was contrary to public policy, the court held that the rule was a "valid exercise of [the school's] discretionary authority and an enforceable provision of its educational contract with students."[44] Accordingly, the Rhode Island Supreme Court reversed the judgment of the superior court.[45]

COMMENTARY

The Rhode Island Supreme Court's decision marks the first time a court has been called upon to decide the validity of a pri-

39. *Id.* ("A private school is not a state actor, and thus no governmental intrusion is implicated in the promulgation and enforcement of a private school's rules and regulations.").
40. *Id.* at 38.
41. *Id.* at 39.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*

vate school hair-length regulation.[46] While the superior court thought that any changes made to pre-existing rules and regulations must be enacted in good faith,[47] the supreme court summarily concluded it best to overlook strict adherence to contract law when dealing with private school contracts.[48] The court offered little explanation for abandoning contract principles beyond expressing the importance of providing school administrators with flexibility to determine the institution's educational goals.[49] The supreme court decision garnered local support as the state newspaper's editorial page proclaimed, "[f]inally a ray of sanity in the case involving young Russell Gorman and his silly hairdo."[50] The editorial continued, "[t]he state Supreme Court has now said what was obvious and sensible: A private school may make its own rules on such matters as length of hair."[51]

While it was difficult for the supreme court to find legal support for its conclusion, it appears the newspaper editorial was right. Logic dictates that parents who enroll their children in private high schools should expect that the school will make rules that will help foster its educational mission. Although the trial court still disputes whether the hair code actually effectuated educational goals, this factor was not critical for the supreme court because the voluntary contract did not violate public policy. No further showing was necessary for the court to reach its conclusion to sustain the regulation.

While the result is legally sound, equity may dictate the opposite result. Adolescent students wishing to express themselves through hairstyles that divert from the norm are hindered by the school's prohibition. Indeed, the trial court distinguished hairstyles from school uniforms, maintaining that at the end of the day, a student can strip away the uniform and don the clothing of his choice, but a student cannot wear a crew cut to school and a

---

46. *Id.* at 34 ("[W]e have found no other published case from any other jurisdiction that examines the validity of a hair-length rule in a private educational institution.").

47. Gorman v. St. Raphael's Academy, C. A. No. PC 2001-4821, 2002 R.I. Super. LEXIS 141, at *35 (R.I. Super. Oct. 17, 2002).

48. *Gorman*, 853 A.2d at 34.

49. *Id.*

50. Editorial, *Cutting the Nonsense*, PROVIDENCE J., July 18, 2004, at I-08.

51. *Id.*

mullet on the weekend.[52] Although public school hair regulations have been continually struck down as unconstitutional on the grounds that students have a fundamental right to select their "own individual hair style without government direction,"[53] the issue is altogether different with respect to private school regulations. Regardless of the degree that private school regulations stifle a student's expression, contract law changes the issue. A party to the contract must abide by the terms of the voluntary association. When the private school chose to add a hair code for male students in its 2002-2003 student handbook, the Gormans had a choice: abide by the rule or withdraw from the school.

Beyond its decision regarding the school's hair policy, the decision is significant for its import in future private school cases. Instead of examining private school rules and regulations under general contract law, with considerations of good faith and fair dealing, the only way a student will be able to challenge a private school regulation under contract law is if the regulation violates public policy.

CONCLUSION

Rhode Island private schools may impose contractual rules and regulations so long as they do not violate public policy. Under Rhode Island law, the arbitrary and capricious standard applied to voluntary associations is not applicable to private schools. Because a hair regulation does not violate public policy, it may be imposed on students whose parents or guardians sign the tuition contract and student handbook for that academic year.

Nicole J. Dulude

52. Gorman v. St. Raphael's Academy, C. A. No. PC 2001-4821, 2002 R.I. Super. LEXIS 141, at *43-44 (R.I. Super. Oct. 17, 2002).

53. *See, e.g.*, Breese v. Smith, 501 P.2d 159, 169 (Alaska 1972).

Criminal Law. *State of Rhode Island v. Dearmas*, 841 A.2d 659 (R.I. 2004). Rhode Island General Laws section 12-5-2, defining the Rhode Island Superior Court's power to issue search warrants, prohibits the issuance of a search warrant for the seizure of a blood sample taken from a suspect involuntarily. Blood samples do not constitute "property" under this provision. Further, the Rhode Island Supreme Court refused to modify this statute judicially, reserving that option for the legislature. The search warrant statute was amended, in reaction to and as a result of the *Dearmas* decision, allowing issuance of such search warrants.

FACTS AND TRAVEL

Petitioner was indicted by a grand jury on two counts of first-degree child molestation.[1] After pleading not guilty to the charges, the Rhode Island Superior Court issued a blood-seizure order. Recognizing petitioner's unwillingness to consent to give a blood sample, the court "instructed the state to apply for the issuance of a search warrant."[2] Subsequently, the court granted the state's request for a search warrant but stayed the execution of that warrant pending review from the Rhode Island Supreme Court.[3] Thereafter, a duty justice of the Rhode Island Supreme Court stayed the superior court blood-seizure order.[4] The court granted petitioner's writ of certiorari and continued the stay until further order.[5]

ANALYSIS AND HOLDING

The question before the Rhode Island Supreme Court in this case was whether "issuing an order granting the state's motion to seize a sample of petitioner's blood, authorizing the state to apply for a search warrant to effectuate this seizure, and then issuing a

1. State v. Dearmas, 841 A.2d 659, 661 (R.I. 2004).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

search warrant for the police to seize a vial of petitioner's blood"[6] exceeded the power of the superior court.[7] Noting that the superior court "is statutory in origin"[8] and, therefore, derives its power solely from legislative enactments, the court looked to Rhode Island General Laws section 12-5-2 to determine whether the superior court's issuance of the blood-seizure order and the corresponding search warrant were within the ambit of authority granted by that statute.[9]

At the time of the decision, section 12-5-2 read in relevant part: "A warrant may be issued under this chapter to search for and seize any property . . . [w]hich is evidence of the commission of a crime."[10] Holding that "section 12-5-2 expressly limited the trial justice's authority . . . to issue search warrants only to 'search for and seize any property,'"[11] the supreme court limited the issue to whether blood samples constitute property under section 12-5-2.[12] Because section 12-5-2 does not define "property," the court, pursuant to the rules of statutory construction, looked to the plain meaning of the word "property".[13] Citing Black's Law Dictionary and prior case law, the court held that the plain meaning of the word "property" excluded blood samples taken from an unwilling suspect as a form of property subject to seizure under section 12-5-2.[14] The court reasoned that allowing blood samples seized from an unwilling suspect to constitute property for the purposes of section 12-5-2 "would raise a host of practical and interpretive problems" and would give attorneys the opportunity to argue for the issuance of "even more intrusive warrants for the seizure of other body parts and biological material, and, indeed, of even living persons themselves if needed to prove a criminal case."[15] The court recognized the potential public-policy implications noting that "[v]iolent confrontations could result if the state were allowed to forcibly extract a blood sample from an unwilling suspect or de-

6. *Id.*
7. *Id.*
8. *Id.* (quoting State v. DiStefano, 764 A.2d 1156 (R.I. 2000)).
9. *Id.* at 661-62.
10. R.I. GEN. LAWS § 12-5-2 (Supp. 2004).
11. *Dearmas*, 841 A.2d at 662.
12. *Id.*
13. *Id.*
14. *Id.* at 663.
15. *Id.* at 663-64.

fendant."[16]

Finally, the court squared its holding that blood samples do not constitute property for the purposes of section 12-5-2 with the intent of the Rhode Island Legislature to limit authorization of general searches and seizures of a person's bodily fluids. The court reasoned that because "the Legislature has deliberately identified certain limited and specific circumstances under which a person must submit to the involuntary extraction of his or her blood," then it should be the legislature, and not the judiciary, that decides whether to expand section 12-5-2 to encompass such circumstances.[17]

Pursuant to its holding that the superior court did not have the authority to issue a search warrant for the seizure of blood samples from the unwilling petitioner, the court quashed the blood-seizure order and corresponding search warrant, and remanded the case to the superior court for further proceedings.[18]

COMMENTARY

The court's holding in *Dearmas* made positive law out of the dicta that was enunciated three years prior in *State v. DiStefano*.[19] In *DiStefano*, the court was required to interpret the driving-under-the-influence laws to determine whether "the 'none shall be given' language of Rhode Island General Laws section 31-21-2.1(b) barred the use of a search warrant to seize a nonconsenting motorist's blood after the state arrested the motorist for driving under the influence, death resulting."[20] While making this determination, Justice Goldberg and two other justices expounded on the potential invalidity of the issuance of a search warrant for the seizure of blood samples under the then current language of section 12-5-2,[21] because a majority of the court did not need to decide that precise issue in order to reach its ultimate holding, the language of the *DiStefano* case regarding the limits of the superior court's warrant power pursuant to section 12-5-2 lived on only in

16. *Id.* at 664.
17. *Id.* at 664-65.
18. *Id.* at 668.
19. 764 A.2d 1156 (R.I. 2000).
20. *Dearmas*, 841 A.2d at 663 (referring to the holding in *DiStefano*).
21. *DiStefano*, 764 A.2d at 1168.

dicta.[22] The *DiStefano* court's unwillingness to define blood samples as "'property' or evidence of the commission of a crime" however, proved influential to the ultimate decision in *Dearmas*.[23]

In *DiStefano*, "two justices . . . were of the opinion that section 12-5-2 did not authorize the seizure of a blood sample, while a third justice . . . noted that section 12-5-2's 'apparent property-seizure limitations . . . raises very difficult and troubling questions about the propriety of issuing search warrants at all to seize a person's blood.'"[24] These three justices, however, did not take the position that authority to issue search warrants for the seizure of blood samples ought not to be extended to the superior court. In fact, Chief Justice Weisberger observed that while "sound policy would support legislation that would enable a police officer to obtain a warrant for the production of a blood sample . . . [t]he sad fact is that [section 12-5-2] simply does not authorize the issuance of such a warrant."[25] While the justices of the *DiStefano* court may have believed that search warrants for the seizure of blood samples should issue in appropriate circumstances, they indicate that the ultimate decision to extend section 12-5-2 to encompass those circumstances was one that rested solely with the Rhode Island Legislature.[26] The court's decision in *Dearmas,* which excluded blood samples from the types of material for which search warrants may issue under section 12-5-2, simply codified the supreme court's position in *DiStefano* that proper judicial restraint requires the court to avoid "tortur[ing] the language of these various relevant statutes in order to bring about [a] desired result."[27]

Interestingly, while the Rhode Island Legislature did not amend section 12-5-2 subsequent to the *DiStefano* decision (despite Chief Justice Weisberger's plea to that effect in that case[28]). However, following the *Dearmas* decision, the statute was amended to read: "A warrant may be issued . . . to search for and seize . . . [s]amples of blood, saliva, hair, bodily tissues, bodily fluids, or dental impressions from the body of a person . . . ."[29] This

22. *See Dearmas*, 841 A.2d at 663.
23. *See id.*
24. *Id.* (citing *Distefano*, 764 A.2d at 1172).
25. *Distefano*, 764 A.2d at 1170.
26. *See id.*
27. *Id.*; *see Dearmas*, 841 A.2d at 664-65.
28. *Distefano*, 764 A.2d at 1170-71.
29. R.I. GEN. LAWS § 12-5-2 (Supp. 2004).

new language authorizing the issuance of search warrants for the seizure of blood samples seemingly closes the book on the *DiStefano/Dearmas* controversy and the ability of defendants to contest the validity of such warrants. However, defendants who find their blood the target of a search warrant issued pursuant to the new language of section 12-5-2 may find themselves arguing that article 1, section 13, of the Rhode Island Constitution – which provides: "No person in a court of common law shall be compelled to give self-criminating evidence"[30] – renders such warrants unconstitutional infringements of a person's privilege not to be compelled to give self-criminating evidence.

The Fifth Amendment to the United States Constitution states that "no person . . . shall be compelled in any criminal case to be a witness against himself."[31] In *Distefano*, Justice Flanders's dissent compares this language to that of article I section 13 of the Rhode Island Constitution.[32] Noting that the language of the Fifth Amendment limits it to a prohibition against compelling people to give testimonial or communicative self-incriminating evidence, Justice Flanders stated that "the Rhode Island Constitution does not seem to incorporate, by its terms, an express testimonial or a communicative limitation on the compelled giving of evidence by a person."[33] Thus, according to Justice Flanders, it is possible that "the framers drafted article 1, section 13, in such a manner as to provide for a broader ban on the government's compelling of self-incriminatory acts than the Fifth Amendment."[34] While Justice Flanders admits that prior Rhode Island judicial decisions have refused to differentiate between the applicable standard to be used under article 1, section 13 and that of the Fifth Amendment, he also notes that the Rhode Island Supreme Court has yet to had the opportunity to "examine the potentially critical difference in the wording of these two constitutional provisions and its arguable significance in cases in which the government requires a suspect 'to give self-criminating evidence' that is not in itself of a commu-

30. R.I. CONST. art I, § 13.
31. U.S. CONST. amend. V.
32. *DiStefano*, 764 A.2d at 1172 (Flanders, J., concurring in part and dissenting in part).
33. *Id.*
34. *Id.*

nicative or a testimonial nature"[35] – i.e., cases where defendants are required to give blood samples.

If the Rhode Island Supreme Court were to construe article 1, section 13, as expansively as Justice Flanders opines, then, logically, the newly amended language of section 12-5-2 authorizing the issuance of a search warrant for potentially self-criminating evidence such as blood samples would be considered invalid the state constitution. This question, however, remains open.

CONCLUSION

In *Dearmas*, the Rhode Island Supreme Court held that the plain language of section 12-5-2 prohibited the issuance of a search warrant for the seizure of a non-consenting suspect's blood. Although an amendment to this statute allowing for the issuance of such search warrants has rendered the *Dearmas* decision irrelevant, thereby eliminating possible statutory challenges to the issuance of search warrants for blood samples, there remains the possibility that the court may still strike down the new amendment as unconstitutional pursuant to the expansive language of the state constitution's privilege against self incrimination.

Thomas Gonnella

35. *Id.* at 1172-73.

Criminal Law. *State of Rhode Island v. Grant*, 840 A.2d 541 (R.I. 2004). Appeal of the admission of identification testimony pursuant to Rule 602 of the Rhode Island Rules of Evidence is impermissible if the specific grounds for objection have not been articulated at trial under the "raise or waive" rule. Furthermore, an individual convicted of robbery is not entitled to jury instructions on the crimes of obtaining money by false pretenses or receiving stolen goods because those crimes are not lesser included offenses of robbery.

FACTS AND TRAVEL

For fifty-three years, Lane's Discount Store on Hartford Avenue in Providence was never robbed.[1] On February 9, that incident-free existence was shattered when three masked men brandishing guns burst into the store, leapt over the counter and demanded that the proprietor, Pasquale Lanfredi, and two of his employees, Gloria Marovelli and Joanne Pelosi, show them the money.[2] All three were held at gunpoint, and Marovelli and Pelosi were forced into a back cooler where their hands were bound with rope.[3]

The robbers forced Lanfredi, at gunpoint, to the front of the store and demanded he lock the doors; however, he did not lock them.[4] He was then forced to the floor behind the counter while the robbers looted the cash drawers.[5] While this was taking place, Maritza Montes, a regular customer, entered the store.[6] One of the robbers immediately approached her, waving a gun, and took her into the back cooler where she was bound with the other women.[7] Montes stated that she saw the robber's face because his mask was rolled up on his head when she was first approached, and that

1. State v. Grant, 840 A.2d 541, 544 (R.I. 2004).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 544-45.

later, while bound, she looked over her shoulder and once again saw the robber's face.[8] The robbers then bound Lanfredi, put him in the cooler, and fled.[9]

On February 11, the police summoned Montes to the station where she identified the defendant, James Grant, as one of the robbers from a photo array.[10] Police arrested Grant the next day.[11] An inventory search was conducted following the arrest, and several items were seized from Grant, including a backpack.[12] However, during this initial inventory search the contents of the backpack were not inventoried.[13] Noticing this defect in the initial search, Officer Corey Morris conducted a second inventory search and catalogued the contents of the backpack.[14] His inventory search revealed a roll of nickels and lottery tickets linked to the robbery.[15] The prosecution sought to have that evidence admitted at trial.[16]

At trial, both Montes' identification testimony and the items found in the backpack were admitted into evidence.[17] Grant did not object to the admission of Montes' testimony at trial, but made only a "boilerplate written motion" prior to trial to all identification testimony arguing that, in general, admission of such evidence would violate his state and federal constitutional rights.[18] Additionally, defense counsel waived argument on this motion, choosing instead to answer questions from the trial justice.[19] Those questions focused on whether the photo array was suggestive, not whether Montes had the requisite personal knowledge.[20] The generalized motion was denied, and Grant was convicted on five charges including first-degree robbery.[21]

On appeal, Grant raised several points of error. First, he ob-

---

8. *Id.*
9. *Id.* at 545.
10. *Id.*
11. *Id.*
12. *Id.* at 549.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 549-50.
17. *Id.* at 547-48.
18. *Id.* at 547.
19. *Id.*
20. *Id.*
21. *Id.* at 549-50.

jected to the admission of Montes' identification testimony on the basis that she lacked the personal knowledge to make the identification.[22] Grant also argued that the trial justice should have instructed the jury as to the "lesser included offenses" of receiving stolen property and obtaining money by false pretenses, a question never before considered by the court.[23] Finally, Grant averred that, because the second inventory search conducted by Officer Morris was improper, the items recovered from the backpack were inadmissible at trial.[24] Grant, however, failed on all counts as the Rhode Island Supreme Court, in an opinion by Justice Goldberg, rejected his claims and affirmed the trial justice's decision.

BACKGROUND

Two Rhode Island doctrines are relevant to Grant's contention that Montes lacked the personal knowledge necessary to make the identification. First, Rule 602 of the Rhode Island Rules of Evidence states: "A witness may not testify to a matter unless evidence is produced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself or herself."[25] In *State v. Nhek*,[26] the Rhode Island Supreme Court held that this rule addresses whether the witness had the opportunity to perceive the events about which she will testify, not the likelihood that her recollection was accurate.[27]

Secondly, the well-established "raise or waive" doctrine concerning whether issues have been preserved for appeal is pertinent.[28] For an issue to be heard on appeal, the appellant must have timely and appropriately objected during the trial.[29] Additionally, that objection must be sufficiently particular so that the trial justice could have known the basis for the objection.[30]

Grant's claim that the trial justice should have instructed the

22. *Id.* at 547.
23. *Id.* at 548.
24. *Id.* at 549.
25. R.I. R. EVID. 602.
26. 687 A.2d 81 (R.I. 1997).
27. *Id.* at 83.
28. *Grant*, 840 A.2d at 546-47.
29. State v. Toole, 640 A.2d 965, 972-73 (R.I. 1994).
30. State v. Addison, 748 A.2d 814, 820 (R.I. 2000).

jury on lesser included offenses is governed by both state and federal law requiring all of the elements of a lesser included offense be present in the offer of proof for the greater offense.[31]

Finally, the law governing Grant's challenge of the inventory search performed on his backpack is well-established. It is a fundamental principle of both the Fourth and Fourteenth Amendments that citizens shall be free from unreasonable searches and seizures.[32] Article I, section 6 of the Rhode Island Constitution ensures this same protection.[33] Furthermore, Rhode Island precedent has long held that inventory searches are explicitly protected as valid warrantless searches provided they are conducted in accordance with valid police procedures.[34]

ANALYSIS AND HOLDING

Two elements of the court's holding bear significance in the development of Rhode Island law: (1) the application of the "raise or waive" doctrine to Grant's claim that Montes lacked personal knowledge; and (2) the determination that obtaining money by false pretenses and receiving stolen goods are *not* lesser included offenses of robbery.

First, the court held that the "raise or waive" doctrine barred consideration of Grant's claim because the objection had not been made with sufficient particularity to be preserved for review.[35] The "boilerplate" written objection made prior to trial did not address the issue of whether Montes had personal knowledge, and, therefore, it was improper to consider the issue of personal knowledge on appeal.[36]

The court did, however, examine the propriety of Montes' identification in the photo array, finding that she had the requisite knowledge to make the identification.[37] Because Montes stated that she saw the assailant's face and that the room was

31. *See* State v. Godette, 751 A.2d 742, 747 (R.I. 2000); State v. Rodriquez, 731 A.2d 726, 729-30 (R.I. 1999); Blockburger v. Unites States, 284 U.S. 299, 304 (1932).

32. U.S. CONST. amends. IV, XIV.

33. R.I. CONST. art. I, § 6.

34. *See* State v. Halstead, 414 A.2d 1138, 1149 (R.I. 1980). For the corresponding federal doctrine, see Florida v. Wells, 495 U.S. 1, 4 (1990).

35. State v. Grant, 840 A.2d 547 (R.I. 2004).

36. *Id.*

37. *Id.* at 547-48.

well-lit, the court found that she certainly had the opportunity to obtain the knowledge required to make the identification under Rule 602.[38] To hold otherwise, the court reasoned, would require the trial justice to make a determination as to Montes' credibility, a determination properly made by the jury.[39]

In disposing of the claim that the jury should have been instructed on the misdemeanor crimes of receiving stolen property and obtaining money by false pretenses as lesser included offenses of robbery, the court directed its attention to the statutes defining the crimes.[40] The court held that each of the misdemeanor crimes was statutorily defined to include at least one element that was not included in the common law definition of robbery.[41] Therefore, none qualified as a lesser included offense.[42]

Finally, in examining the propriety of the inventory search, the court simply looked to the reasonableness of the second inventory search and the extent to which it was consistent with police procedure.[43] Because it was police procedure to conduct inventory searches, and it was reasonable to follow up on an incomplete inventory search with a second, complete inventory search, nothing about the search of Grant's backpack was improper.[44] Therefore, the "fruits" of that search were admissible at trial.[45]

COMMENTARY

For the most part this case is a fairly unremarkable application of existing law to a new set of facts. Particularly, both the determination of the propriety of the inventory search and the analysis of the personal knowledge requirement of Rule 602 add nothing to Rhode Island law.

The determination that both receiving stolen property and obtaining money by false pretenses are not lesser included offenses of robbery is, as the court acknowledged, novel.[46] However, it is

38. *Id.* at 547.
39. *Id.* at 547-48.
40. *Id.* at 548-49.
41. *Id.* Robbery is not statutorily defined in Rhode Island, thus, the common law definition of the crime governs in this state.
42. *Id.* at 548.
43. *Id.* at 550.
44. *Id.*
45. *Id.* at 551.
46. *Id.* at 548.

novel only insofar as the question had never been considered. It was not some ground breaking determination, but rather a straightforward application of the law defining what is and what is not a lesser included offense. Nevertheless, those two misdemeanors are definitely not lesser included offenses of robbery.

The aspect of the case with the greatest amount of import, however, is the application of the "raise or waive" rule to bar consideration of the personal knowledge claim under Rule 602. While the "raise or waive" rule long has been an element in determining what is appropriate for appellate review,[47] it has generally been applied in circumstances when there has been no objection at trial.

In *Grant*, the defendant *did* object to the identification testimony of Montes before trial.[48] The objection, however, was a general objection to all identification testimony.[49] The court previously stated in *State v. Bettencourt*, that when a specific objection is made at trial, other grounds for objection will not be considered on appeal.[50] Furthermore, the *Bettencourt* opinion suggested that if only a general objection is made, the matter is not properly preserved for appeal.[51] In *Bettencourt*, however, defense counsel orally objected at trial without stating the basis or grounds.[52] In *Grant*, defense counsel did specifically object to identification testimony on the basis that it violated his client's constitutional rights.[53]

The implication is that the manner in which an evidentiary issue can be preserved for appeal is narrowed to include only an objection on specifically articulated grounds. It is not enough to object to a specific type of evidence, or to argue that admission of certain evidence will violate specific rights. Instead, counsel must object by stating the specific reason or reasons that the evidence is inadmissible. Otherwise, the argument will be lost forever. In fact, *Grant* has already twice been cited to stand for this proposition.[54]

---

47. *See* State v. Toole, 640 A.2d 965, 972 (R.I. 1994).
48. *Grant*, 840 A.2d at 547.
49. *Id.*
50. State v. Bettencourt, 723 A.2d 1101, 1107 (R.I. 1999).
51. *Id.*
52. *Id.*
53. *Grant*, 840 A.2d at 547.
54. *See* Union Station Assocs. v. Rossi, 862 A.2d 185, 192 (R.I. 2004); Harvard Pilgrim Health Care of New England, Inc. v. Rossi, 847 A.2d 286,

CONCLUSION

The *Grant* decision impacts Rhode Island common law in two ways. First, receiving stolen goods and obtaining money by false pretenses are not lesser included offenses of robbery. Second, in order to preserve an objection to the admission of evidence for appellate review, the precise reasons for the objection must be articulated, otherwise the argument will be lost pursuant to the "raise or waive" doctrine. This second determination may potentially be reconsidered in a more difficult case. After all, despite finding that the issue was not appealable, the court still determined that the defendant would not have won his argument. In a case in which the defendant's rights appear to have been egregiously violated, this decision could come under scrutiny, or perhaps be weakened by the extension of already recognized exception to the "raise or waive" rule.[55]

Adam M. Ramos

---

293 (R.I. 2004).

55. The "raise or waive" rule does not apply when: "(1) the error complained of is not harmless, (2) the record is sufficient to permit a determination of the issue, (3) the mistake is one of constitutional import, and (4) counsel's failure to raise the issue is attributable to a novel rule of law that counsel could not reasonably have known about during the trial." State v. Rupert, 649 A.2d 1013, 1016 (R.I. 1994).

Family Law. *Dupre v. Dupre*, 857 A.2d 242 (R.I. 2004). The "compelling reason test" is an improper standard of review to determine whether it is in the best interest of a child for a divorced parent, in actual custody of the child, to relocate outside of the United States. Rather, a court should consider the factors set forth by the American Law Institute to determine a child's best interests, but such factors should not be exhaustive.

FACTS AND TRAVEL

Melanie and Robert Dupre were married in 1987.[1] They first came to Providence, Rhode Island in 1980 after living in French Polynesia.[2] Robert purchased property and rented apartments in the city.[3] According to Melanie, the revenue from Robert's apartments was intended to enable the couple to return to Huahine.[4] Melanie was unhappy in New England and wished to return to Huahine, but Robert did not wish to relocate because his business had become quite successful.[5]

In August 1999 Robert filed for divorce.[6] A consent decree was given that enabled Melanie to relocate with their two children to Tahiti for the 1999-2000 academic year.[7] The following year, another decree was proposed for the 2000-2001 year providing that both parents would alternate placement of the children in Rhode Island, except for two months when Melanie could take them to Huahine.[8] On December 31, 2001 final judgment was entered for their divorce. The parties could not agree on the primary placement of the children in the 2001-2002 school year.[9]

Hearings for primary custody were held in October and No-

1. Dupre v. Dupre, 857 A.2d 242, 245 (R.I. 2004).
2. *Id.*
3. *Id.*
4. *Id.* at 245-46.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

vember 2001.[10] A psychologist, Brian Hayden, Ph.D., testified that in his opinion, it was in the best interests of the children to remain in physical custody of Melanie, rather than that of Robert.[11] Doctor Hayden's opinion was that the children viewed Melanie as the primary caregiver.[12] Although Dr. Hayden believed Robert was a good father, he noted that the children did not see much of him when they lived with him, and were unable to communicate with their mother during that time.[13] He also commented that he believed Melanie's wish to return to Tahiti was not a desire, but a need.[14] She testified that living in New England made her not only unhappy, but physically ill.[15]

The trial court denied the relocation of Melanie with her children under a best interests standard. The trial justice held that Melanie failed to demonstrate a compelling reason for her to relocate with her children to Huahine.[16] Because there was no compelling reason, the trial justice denied her custody.[17] Consequently, the placement of the children was granted to Robert.[18]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court ultimately held that relocation of children should not be decided under a compelling reason standard of review.[19] The court began by reviewing the different approaches of sister states toward relocation of parents. The traditional approach, still favored by some states, presumes that it is in the best interest of the child not to relocate.[20] Consequently, relocating parents have to uphold a burden of proof in order to prevail.[21]

One of two recently emerging trends by other states has created a presumption in favor of relocation, either by statute or case

10. *Id.*
11. *Id.* at 247.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 248.
18. *Id.*
19. *Id.* at 262.
20. *See, e.g.*, Pollock v. Pollock, 889 P.2d 633, 635 (Ariz. Ct. App. 1995); McAlister v. Patterson, 299 S.E.2d 322, 323 (S.C. 1982).
21. *Dupre*, 857 A.2d at 249.

law.[22] The other approach is a burden shifting approach, in which the relocating parent suffers the initial burden of proving that it is in the best interests of the child to relocate in good faith.[23] Once this burden has been met, the burden shifts to the non-relocating parent to prove that the move is not in the best interests of the child.[24] In light of these varying standards, Justice Suttell emphasized that the overall pattern of developing these approaches is demonstrating an effort away from the traditional approach[25]

Turning to Rhode Island statutory law on relocation, Rhode Island General Laws section 15-5-16(d)(1), Justice Suttell discussed its pertinent language: "the court shall provide for the reasonable right of visitation by the natural parent not having custody of the children, except upon the showing of cause why the right should not be granted."[26] Thus, the language of the statute created no presumptions or standards regarding the relocation of parents.

The court then discussed a litany of prior decisions, which analyzed the application of the best interests standard for relocation. The only case that suggested a compelling reason standard was *Garrison v. Mulcahy*.[27] In *Garrison*, however, the court issued an order without a full opinion.[28] Justice Suttell held that *Garrison* was a "less than compelling precedent" in light of the fact that "[an order] is not the type of vehicle commonly utilized by the court for pronouncing new standards . . ."[29] The language of "compelling reason" was first used by an expert witness in that case, and the court simply agreed with his conclusion that it was not in the best interest of the children to stay with the father, who may

22. *See e.g.*, MINN. STAT. § 518.18(d) (2002); OKLA. STAT. ANN. tit. 10, § 19 (West 1998); S.D. CODIFIED LAWS § 25-5-13 (Michie 1999); WIS. STAT. ANN. § 767.327(3)(a)2.a (West 2001); Hollandsworth v. Knyzewski, 109 S.W.3d 653, 658 (2003); *In re* Marriage of Burgess 913 P.2d 473, 478 (1996); Jaramillo v. Jaramillo, 823 P.2d 299, 303 (N.M. 1991).

23. *See, e.g.*, Baures v. Lewis, 770 A.2d 214, 230-31 (N.J. 2001); Ireland v. Ireland, 717 A.2d 676, 682 (Conn. 1998); Lavane v. Lavane, 201 A.2d 623 (N.Y. 1994).

24. *Dupre*, 857 A.2d at 249.

25. *Id.* at 250.

26. R.I. GEN. LAWS §15-5-16(d)(1) (Supp. 2004).

27. 636 A.2d 732 (R.I. 1993).

28. *Dupre* 857 A.2d at 253 ("We first note that *Garrison* is not a full opinion of the Court, but rather an order.").

29. *Id.*

relocate out of the state.[30] Consequently, in *Dupre*, the court was not convinced that *Garrison* even stood for that precedent.

Because past case law had simply held that relocation was either in the best interest of the child or not, without any standard or presumptions, the court was compelled to turn to alternative persuasive authorities. Particularly, the court gave attention to the American Law Institute's Principles of the Law of Family Dissolution[31] and the proposed Model Relocation Act of the American Academy of Matrimonial Lawyers.[32] From these two sources, the court concluded that the following factors must be considered in determining relocation:

> The nature, quality and extent of involvement, and duration of child's relationship with the parent proposing to relocate;
>
> The reasonable likelihood that the relocation will enhance the general quality of life for both the child and the parent seeking the relocation;
>
> The probable impact that the relocation will have on the child's physical, educational, and emotional development;
>
> The feasibility of preserving the relationship between the non-relocating parent and child through suitable visitation arrangements;
>
> The existence of extended family or other support systems available to the child in both locations;
>
> Each parent's reasons for seeking or opposing relocation;
>
> In cases of international relocation, whether the country is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction; and
>
> The *Pettinato* factors.[33]

---

30. *Id.*

31. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.17(4)(a) (American Law Institute 2002).

32. 15 J. AM. ACAD. MATRIM. LAW. §405 (1998).

33. *Dupre*, 857 A.2d at 242, 258-59. The *Pettinato* factors include:

> The wishes of the child's parent or parents regarding the child's cus-

In the case at bar, the court held that the trial court was correct in finding that it was in the best interests of the children to live with Melanie.[34] However, the court went on to find that the lower court failed to determine whether this remained in their best interests, in light of the relocation.[35] Thus, some issues needed consideration. The court emphasized that Melanie was already living in Huahine at the time of the divorce proceeding and that she had voiced her desire to move during her marriage with Robert.[36] Accordingly, the court remanded the case to the lower court for further findings consistent with its opinion.[37]

COMMENTARY

Relocation of children in post-divorce proceedings is controversial. Consider the following consequences of *Dupre*: Melanie's move to Huahine would effectively prevent any meaningful visitation rights Robert was afforded. Robert would have to travel around the world to see his children. It would be a great expense for all involved.

The court recognized that there have been contradicting studies determining the effect that relocation has on children of divorce. On the one hand, studies have shown that stability of positive child development is more dependent upon the substan-

---

tody.

The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.

The interaction and interrelationship of the child with the child's parent or parents, the child's siblings, and any other person who may significantly affect the child's best interest.

The child's adjustment to the child's home, school, and community.

The mental and physical health of all individuals involved.

The stability of the child's home environment.

The moral fitness of the child's parents.

The willingness and ability of each parent to facilitate a close and continuous parent-child relationship between the child and other parent.

Pettinato v. Pettinato, 582 A.2d 909, 913-14 (R.I. 1990).

34. *Dupre*, 857 A.2d.at 262.

35. *Id.*

36. *Id.*

37. *Id.*

tive relationship the child has with the primary parent than it does with retaining consistent contact with the other parent.[38] However, other social scientists claim that frequent contact with both parents is the most important factor in the child's development.[39]

The bottom line is this: there must be a determination that focuses on *the best interests of the child.* However, the issue of relocation suggests a natural deviation from focusing on the child's interests and a move toward the autonomy of parents. Evidence of this phenomenon is in the A.L.I.'s Principles of the Law of Family Dissolution underlying policy itself: "a parent, like any other citizen should be able to choose his or her place of residence, and that the job of [child] rearing . . . should not be made too financially or emotionally burdensome to the parent who has the majority share of custodial responsibility."[40] On its face, the A.L.I. may not seem the best advocate for best interests of the child; but perhaps we can feel confident in the ability of the courts to provide for the well-being of every child. For now, researchers continue to struggle on the effects that relocation has on a child, and this debate may continue indefinitely.

Importantly, these sociological studies and opinions by experts suggest another important theme: the acceptance by society at large of new definitions of family. That is, how do we look at modern family groupings, and how do these ideals affect a divorce determination being made, presumably, in the best interest of the child? Surely, current trends suggest that the judicial system will have many more opportunities to examine these issues in the future. As researchers continue to struggle on the effects of relocation on a child of divorce, the debate will continue accordingly.

CONCLUSION

The Rhode Island Supreme Court held that a "compelling reason" standard is inapplicable to determine whether relocation of a child with the primary parent is in the best interests of the child. The court looked to current trends in statutory construction and

38. *Id.* at 256.
39. *Id.* at 256.
40. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.17 cmt. D (American Law Institute 2002).

case law from other jurisdictions, but unfortunately, found that there is no dominant trend or standard among sister states that address the issue of relocation. The court relied on the A.L.I.'s Principles of the Law of Family Dissolution and the proposed Model Relocation Act of the American Academy of Matrimonial Lawyers to supplement the factors considered on this matter.

Christopher J. Davidson

Products Liability Law. *Clift v. Vose Hardware*, 848 A.2d 1130 (R.I. 2004). In a products liability suit in which the product that allegedly caused the injury is discarded, the plaintiff's claim will not survive a motion for summary judgment unless affidavits supporting the claim contain specific facts and evidence regarding who actually sold and manufactured the product; mere conclusory assertions and suppositions will not suffice.

FACTS AND TRAVEL

The plaintiff, Paul M. Clift, was an employee of Harvey Industries, Inc.[1] In May of 1998, while at work, Mr. Clift was securing a storm door to a company vehicle with a bungee cord when the cord gave way and struck his left eye.[2] As a result, Clift lost sight in that eye.[3] After being treated for his injuries, Clift returned to his place of employment to retrieve the cord which caused the injuries.[4] At that time he was informed that the cord had been discarded. Mr. Clift stated that he believed the bungee cord which caused his injuries was sold by defendant, Vose Hardware, because prior to his injury he picked up similar bungee cords for his employer at a Vose True Value Hardware store in Woonsocket.[5] Additionally, after his injury, Clift inspected a bungee cord which was bought from defendant Vose and concluded that this cord was identical to the cord he was using when the injury occurred.[6]

On May 24, 2001, Mr. Clift and his wife filed an action in the Rhode Island Superior Court alleging negligence, breach of warranty, and strict liability against Mr. Clift's employer, Harvey Industries, the alleged seller of the cord, Vose Hardware, and the alleged manufacturer, T.W. Evans Cordage Co., Inc.[7] The superior

1. Clift v. Vose Hardware, Inc., 848 A.2d 1130, 1131 (R.I. 2004).
2. *Id.*
3. *Id.*
4. *Id.* at 1133.
5. *Id.*
6. *Id.*
7. *Id.* at 1131-32.

court dismissed plaintiffs' suit against his employer, Harvey Industries, pursuant to the exclusivity provision of Rhode Island General Laws section 28-29-20, because plaintiff received worker's compensation benefits.[8]

Defendant Vose moved for summary judgment, alleging the Clifts presented no evidence that Vose sold the cord to plaintiff's employer, Harvey.[9] Additionally, Vose asserted that plaintiffs also offered no evidence that the cord in question was defective.[10] Thereafter, Cordage moved for summary judgment arguing that plaintiffs had also failed to prove that the cord was manufactured, designed or distributed by the company.[11]

After examining the affidavits, pleadings and other evidence, the superior court judge granted the summary judgment motions of both defendants.[12] The judge ruled that plaintiffs could not establish any facts to support the claims that the bungee cord was sold by Vose or manufactured by Cordage.[13] The judge explained, "[t]here are discovery techniques available to give plaintiff full opportunity to develop its case, and that just hasn't been done here."[14] Plaintiffs, Paul M. Clift and Susan L. Clift, appealed the judgment of the superior court granting the defendants, Vose and Cordage, motions for summary judgment.[15]

ANALYSIS AND HOLDING

The superior court judge granted summary judgment with respect to both defendants because the plaintiffs could not establish "any facts to support their claims that the bungee cord either was sold by Vose or manufactured by Cordage."[16] The Rhode Island Supreme Court agreed with the motion judge.[17] The court explained that in a products liability case, the plaintiff bears the burden of proving causation.[18] The court went on to state that

8. *Id.* at 1132.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id*
18. *Id.*

while "in some instances, circumstantial evidence may be used to establish the identity of the manufacturer or the seller of the defective product,"[19] the evidence must be "reasonably probable . . . . Mere speculation, guess, or conjecture is insufficient to establish identification."[20]

In analyzing the appeal, the court held that plaintiff did not present any "competent" evidence to connect either defendant to the cord involved in the injury.[21] The court noted that the affidavits submitted by the plaintiff in opposition to the motion for summary judgment contained only "conclusory assertions and suppositions" and additionally contradicted previous statements made by Clift in which he admitted that "he was not sure where the bungee cord was purchased and that he was merely assuming that a coworker had purchased it from Vose."[22] The court also stated it was immaterial that defendants did not submit any evidence in support of their motions because Rule 56(b) of the Superior Court Rules of Civil Procedure plainly states that a party against whom a claim is asserted "may, at any time, move *with or without* supporting affidavits for summary judgment . . . ."[23] For the foregoing reasons, the Rhode Island Supreme Court affirmed the granting of defendants' motions for summary judgment.

COMMENTARY

In the current climate of tort reform and sensationalized media coverage of "excessive" personal injury awards, the courts have become even more cognizant of the image of the judicial system as a medium used by plaintiffs seeking to reap colossal verdicts from corporate America. In response, it seems that some courts have chosen to increase the plaintiff's burden particularly in the area of strict products liability, which contravenes the rationales that underlie the doctrine. The well settled goals of strict liability are risk spreading, accident reduction and reduction of the plaintiff's burden. In other words, this area of law was meant to hold manufacturers of unreasonably dangerous products liable for injuries

19. *Id.* (quoting LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 3.04[1] at 3-50).
20. *Id.*
21. *Id.* at 1133.
22. *Id.*
23. *Id.*; R.I. R. CIV. P. 56(b).

caused by their products because the manufacturers are best able to absorb the cost of any injury. Additionally, forcing the manufacturers to pay for injuries resulting from an unreasonably dangerous product will incentivise manufacturers to make safer products.

In this case the Rhode Island Supreme Court held that the Plaintiff's affidavits, in which he stated he was familiar with and had previously bought bungee cords from the defendant's store, were "conclusory."[24] It is arguable however that this issue should have been decided on a motion for summary judgment but instead should have gone to the jury as a question of fact. Yet, the court stated that "the inferences that plaintiffs asked the court to draw... were merely speculative."[25] In affirming the granting of defendants' motions for summary judgment the court makes clear that in a products liability suit the product which allegedly caused the injury must be preserved or the claim may never get to the jury, thereby placing a higher burden on the plaintiff than was originally intended in a products liability suit.

CONCLUSION

The Rhode Island Supreme Court held that in a products liability suit in which the product that allegedly caused the injury is discarded, the plaintiff's claim will not survive a motion for summary judgment unless affidavits supporting the claim contain specific facts and evidence regarding who actually sold and manufactured the product; mere conclusory assertions and suppositions will not suffice.

Stephanie M. Modica

24. *Clift*, 848 A.2d at 1133.
25. *Id.*

Property Law. *Dowdell v. Bloomquist*, 847 A.2d 827 (R.I. 2004). A row of trees may be found to be sufficiently similar to a fence and therefore, may violate section 34-10-20 of the Rhode Island General Laws even if they were planted for privacy reasons. Furthermore, the remedy for violation of section 34-10-20 may include abatement of the fence.

FACTS AND TRAVEL

In November of 2000 Peter Bloomquist sought a zoning variance from the Charlestown zoning board to construct a second-story addition to his home.[1] Bloomquist's neighbor, Cheryl Dowdell, opposed the variance due to her belief that it would obstruct her view of the Atlantic Ocean.[2] For six months the neighbors presented their conflicting arguments to the zoning board of review on the merits of the addition.[3] As a result, the once friendly relationship between the neighbors was destroyed.[4] In May of 2001, one day after the zoning board granted the variance request, Bloomquist planted four western arborvitae trees on the property line between his and Dowdell's homes.[5] The forty foot trees obstructed Dowdell's view of the ocean and blocked light from entering her second and third story windows.[6] The trees caused Dowdell's home value to depreciate by as much as $100,000.[7] Dowdell brought an action in superior court alleging that the four trees created a fence erected to exact revenge against her and therefore violated Rhode Island General Laws section 34-10-20.[8] The superior court justice ruled that the trees were maliciously planted in violation of section 34-10-20 and granted plaintiff injunctive relief ordering the trees to be removed or reduced to

1. Dowdell v. Bloomquist, 847 A.2d 827, 829 (R.I. 2004).
2. *Id.* at 829.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id*
7. *Id.*
8. Dowdell v. Bloomquist, WC 2001-0617, 2002 R.I. Super. LEXIS 85 (R.I. Super. June 28, 2002).

six feet in height.[9] Bloomquist then appealed the decision contending that: (1) the trees did not constitute a fence in violation of section 34-10-20; (2) even if the trees did constitute a fence under the statute, the justice "erroneously granted relief in the face of testimony that the trees serve a useful purpose of privacy for the defendant[;]" and (3) the justice lacked the authority to award injunctive relief for a violation of section 34-10-20.[10]

BACKGROUND

The Rhode Island spite-fence statute provides that:

> A fence or other structure in the nature of a fence which unnecessarily exceeds feet (6') in height and is maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance, and any owner or occupant who injured, either in the comfort or enjoyment of his or her estate thereby, may have an action to recover damages for the injury[11]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court found that the statute clearly allows for a row of trees to be considered a fence under the spite-fence statute.[12] The statute refers to a "fence or other structure in the nature of a fence . . . ."[13] The court found that the positioning and size of the trees made them "fall well within the statutory definition of a 'structure in the nature of a fence.'"[14]

The court held that the spite-fence statute is violated if a fence is put up maliciously even if it was done for the purpose of creating privacy.[15] The defendant argued that he planted the trees for the beneficial purpose of creating privacy and therefore should not be held in violation of the statute.[16] The court recognized that a fence maliciously installed for a useful purpose could sometimes

9. *Dowdell*, 847 A.2d at 828.
10. *Id.* at 830.
11. R.I. GEN. LAWS § 34-10-20 (Supp. 2004).
12. *Dowdell*, 847 A.2d at 831.
13. R.I. GEN. LAWS § 34-10-20 (Supp. 2004).
14. *Dowdell*, 847 A.2d at 830.
15. *Id.* at 831.
16. *Id.*

leave a victim without remedy but stated that a "defendant needed to provide more than just privacy as justification for the fence."[17] The court reiterated that "[a]ccepting privacy alone would simply result in the statute being rendered meaningless and absurd."[18] Since the defendant only relied on privacy as a justification for the fence, the court found that he violated the spite-fence statute.

The final ruling by the court was that the spite-fence statute allows for injunctive relief as an available remedy for a violation.[19] The defendant unsuccessfully tried to argue that the spite-fence statute only provided for a monetary damages remedy.[20] The court agreed with the defendant that there is no common law right to light and air but found that a violation of the spite-fence statute is considered a private nuisance.[21] The court went on to find that equitable relief was an available remedy for a private nuisance. The defendant also argued that the language of the statute limits the remedy for a violation to damages.[22] The court found that the explicit language in the statute, "may have an action to recover damages for the injury," merely allowed for the additional remedy of damages and did not exclude injunctive relief.[23] Therefore, the court affirmed the superior court's ruling that the trees had to be removed or cut to less than six feet in height.[24]

Justice Flanders's Dissenting Opinion

Justice Flanders concurred with the portion of the majority decision finding that the spite-fence statute was violated but disagreed with the majority that injunctive relief was available for a violation.[25] Flanders argued that "[c]ourts should not infer causes of action and remedies that are not expressly provided for in a statute such [as the spite-fence statute which] creates a right and a remedy that was not available at common law."[26] Flanders ar-

17. *Id.*
18. *Id.*
19. *Id.* at 832.
20. *Id.* at 831.
21. *Id.* at 832.
22. *Id.* at 833.
23. *Id.*
24. *Id.*
25. *Id.* at 833-34.
26. *Id.* at 835.

gued that when the legislature provides a remedy, such as for damages in the spite-fence statute, the court should not expand the remedies made available.[27] He goes on to find that the majority opinion uses cases to support its ruling that are "inapposite because they interpret either a statute, unlike section 34-10-20, provid[ing] specifically for abatement of the offending structure . . . or they do not interpret a spite-fence statute at all."[28] Flanders argued that the court is "require[d] to accord statutes their plain and ordinary meaning, to strictly construe statutes such as this one that grant rights not recognized at common law, and to refrain from inferring causes of action and providing remedies that are not contained in the express language of the statute."[29] Therefore, Flanders argued that the superior court was wrong in granting a type of relief that the spite-fence statute did not authorize.

COMMENTARY

The issue of whether a row of trees may be considered a fence within the meaning of the spite-fence statute was an issue of first impression for the Rhode Island Supreme Court.[30] The *Dowdell* case now makes it clear that trees can be considered a fence like structure and subject to the spite-fence statute. The court also found that "where evidence of malicious intent plainly outweighs the discounted benefit claimed by defendant, the court [can find] defendant's actions to violate the spite-fence statute."[31] This ruling was required to ensure that section 34-10-20 did not become a meaningless statute. Had the court ruled otherwise, defendants would have been able to avoid liability under the statute by simply stating that they built the fence for privacy reasons. This would have been inconsistent with the obvious intent of the statute.

The third issue determined by the court was whether injunctive relief is available to victims when the spite-fence statute has been violated. By ruling that injunctive relief was an available remedy the court expanded the remedies available under the spite-fence statute. In Rhode Island, spite-fences were not consid-

27. *Id.*
28. *Id.* at 837.
29. *Id.* at 838.
30. *Id.* at 830.
31. *Id.* at 831.

ered a private nuisance at common law and they did not become a private nuisance until the spite-fence statute was enacted.[32] The majority holds that the statute making spite-fences a private nuisance implies that equitable relief is available to victims. The court came to this conclusion despite the fact that the statute specifically allows for victims to recover damages and makes no mention of injunctive relief. Justice Flanders's dissent is far more convincing and points out that "[d]eeming the erection of a spite-fence to constitute a private nuisance only suffices to establish the perpetrator's civil liability for violating the statute . . . it does not speak to what civil remedy is available."[33] He further points out that "[c]ourts should not infer causes of actions and remedies that are not expressly provided for in a statute such as [the spite-fence statute] that creates a right and a remedy that was not available at common law."[34] In *Dowdell*, the majority opinion seems to ignore the wording of the statute while providing a remedy that is not allowed under the spite-fence statute or common law.

The majority's attempt to use case law from other states is unpersuasive because the cases either analyze statutes that are dissimilar to section 34-10-20 in that they explicitly provide for abatement of the fence or "they do not interpret a spite-fence statute at all.[35] Further, the court makes a serious mistake in analyzing *Rice v. Moorehouse*,[36] which it uses to support its ruling. In *Rice* the Massachusetts court ruled that abatement was an available remedy for violation of the spite-fence statute and the Rhode Island Supreme Court uses this as persuasive authority to show that abatement is proper even if not mentioned in the statute. However, *Rice* was not interpreting Massachusetts General Laws chapter 49, section 21 (1994). Rather, *Rice* was decided using Massachusetts General Laws chapter 348, sections 1-2 (1887)[37], a completely different statute than what the majority opinion of *Dowdell* says was being analyzed.[38] The actual statute used in deciding the *Rice* case allows for abatement of the fence and is there-

32. *Id.* at 837.
33. *Id.* at 836.
34. *Id.* at 835.
35. *Id.* at 837.
36. Rice v. Moorehouse, 150 Mass. 482 (1890).
37. *Id.* at 483.
38. *Dowdell*, 847 A.2d at 836.

fore not similar to the Rhode Island statute.[39] Therefore, the *Dowdell* majority opinion is based, at least in part, on erroneous case law. It is difficult to understand how the majority could make such an oversight in interpreting a case.

The majority opinion is lacking support and goes against the well settled principal that courts should read statutes narrowly and not expand the remedies made available by the legislature.

CONCLUSION

The Rhode Island Supreme Court held that a row of trees can constitute a fence for purposes of the spite-fence statute section 34-10-20 and that privacy alone could not justify maliciously putting up a fence. Further, the Court found that injunctive relief is allowed under section 34-10-20. Therefore, defendant Bloomquist was found to have violated section 34-10-20 by putting a row of large trees up on the property line between his and the plaintiff's home. The remedy given to the plaintiff by the court was an order for the abatement of the trees.

Richard Moskowitz

39. *See Rice*, 150 Mass. at 483.

Tort Law. *DeLaire v. Kaskel*, 842 A.2d 1052 (R.I. 2004). Animal control officers are not barred from bringing negligence actions against property owners under the "public safety officer's rule," which prohibits firefighters and police officers from bringing suit for injuries sustained when confronting the ordinary, foreseeable risks inherent in their lines of work. Animal control officers fall outside of the two policy rationales for the rule – primary assumption of the risk and fundamental concepts of justice as to double compensation – because they differ from fire fighters and police officers as to their compensation, training, benefits, duties, and the statutory protections afforded them.

FACTS AND TRAVEL

The plaintiff, David DeLaire, was an animal control officer in the town East Greenwich.[1] On February 16, 2000, he was called to Rick and Louise Kaskel's home to remove a stray cat.[2] DeLaire stated that he had previously visited the home on three other occasions, on calls to restrain the same stray cat.[3] After driving onto defendants' property and while exiting his vehicle, DeLaire slipped and fell on a patch of snow and sustained a broken arm.[4] Delaire nonetheless was able to retrieve the cat, which defendants had caught, and sought medical attention later in the day.[5]

On May 25, 2001, DeLaire filed suit against the Kaskels in the Superior Court of Rhode Island, alleging negligence and seeking damages for personal injury.[6] The Kaskels moved for summary judgment, claiming that the plaintiff's suit was barred by the "public safety officer's rule."[7] The trial justice, after a hearing, granted the defendants' motion and entered judgment in their favor.[8] Plaintiff subsequently appealed.[9]

---

1. DeLaire v. Kaskel, 842 A.2d 1052, 1053 (R.I. 2004).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 1054.

ANALYSIS AND HOLDING

On appeal, the plaintiff argued that the trial justice erred in granting the defendants summary judgment.[10] He claimed that the public safety officer's rule did not apply to him because he was neither a police officer nor a firefighter.[11] Additionally, DeLaire argued that the rule did not apply as he was not responding to an emergency of the magnitude or type to which police officers and firefighters respond.[12] Thus, the plaintiff presented the Rhode Island Supreme Court with a question of first impression: does the public safety officer's rule apply to animal control officers?[13] Stating that the court has never expressly applied the rule to public employees other than police officers and firefighters, the Rhode Island Supreme Court reversed the trial justice's order of summary judgment.[14] The court then remanded the case to the superior court based on the holding that the two historical rationales that support application of the public safety officer's rule do not apply to animal control officers.[15] The court then held that animal control officers are exempted from the rule and may seek damages for injuries resulting from landowners' ordinary negligence.[16]

1. *Primary Assumption of the Risk*

The first rationale that has traditionally supported application of the public safety officer's rule is the doctrine of primary assumption of risk.[17] This doctrine states that firefighters and police officers assume the ordinary, foreseeable risks inherent in their lines of work, which include responding to dangerous situations, as a matter of law, and as such are precluded from suing landowners to recover for injuries sustained when confronting these foreseeable risks.[18] Although the court explained primary assump-

9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 1056.
16. *Id.*
17. *Id.* at 1055 (citing Mignone v. Fieldcrest Mills, 556 A.2d 35, 38-39 (R.I. 1989)).
18. *DeLaire*, 842 A.2d at 1055 (citing *Mignone*, 556 A.2d at 39).

tion of the risk as a past-supporting rationale for application of the public safety officer's rule, the court did not explain how this rationale might support or oppose plaintiff's arguments on appeal.

2. *Fundamental Concepts of Justice*

The primary focus of the court's analysis was one of "fundamental concepts of justice."[19] The court stated that "because the public compensates police officers and firefighters for confronting the dangerous situations that they may face, . . . [these] officials should not be allowed to seek compensation for the negligence that creates the need for their services in the first place."[20] Otherwise, the court stated, such officials would be allowed a form of double compensation.[21] Defendants argued that plaintiff was similar enough to firefighters and police officers (as he drove a police vehicle, carried a police issued firearm, was a police constable, and reported to a police sergeant) to also be ineligible for this type of double compensation. [22]

The court, however, found that the plaintiff animal control officer was distinct enough from police officers and firefighters so as to fall outside the ambit of the rule. Thus, animal control officers could be allowed to pursue a negligence action for damages from personal injury against the defendant landowners.[23] The court based its distinction upon the difference in duties, training, benefits, and compensation between animal control officers and police officers and firefighters.[24] Additionally, the court highlighted the statutory protection allowed police officers and firefighters under Rhode Island General Laws section 45-19-1(a), which permits these employees to receive their full salary as well as medical expenses if injured in the line of duty,[25] while animal control officers may only recover for such injuries under the Workers' Compensation Act[26] section of the Rhode Island General Laws.[27] This protec-

19. *Id.* (quoting Aetna Cas. & Sur. Co. v. Vierra, 619 A.2d 436, 438 (R.I. 1993) (quoting *Mignone*, 556 A.2d at 39)).
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. R.I. GEN. LAWS § 45-19-1(a) (Supp. 2004).
26. R.I. GEN. LAWS § 28-29-2(4) (1997).

tion, in addition to the larger salary paid to police officers, police training academy preparation and the protections provided by the Law Enforcement Officer's Bill of Rights[28] led the court to find that animal control officers are relatively under compensated when compared with police officers and firefighters.[29] Thus, the court held that animal control officers should not be precluded "from seeking redress from private landowners when they are injured as a result of the landowner's ordinary negligence."[30]

3. *Justice Flanders's Dissenting Opinion*

Justice Flanders's dissenting opinion, running more than twice the length of the majority opinion, did not accord the weight that the majority did to the job titles, benefits, training, and statutory protections enjoyed by the different public safety officers in question.[31] Instead, Justice Flanders focused on the underlying purpose of the rule as found in the primary assumption of the risk and fundamental public policy considerations. He stated that these two doctrines together prevent certain classes of public safety officers from recovering for the very negligent acts that create the need for their employment in the first place, and that the public safety officer's rule was created to avoid the unfairness that would be inherent in such double compensation.[32]

Justice Flanders's dissent also focused on the result that the majority's rule will have on homeowners in need of emergency aid. He noted that another public policy served by the rule has been that of "encouraging homeowners . . . to freely solicit assistance from public-safety officers without fear that they will be sued by such officers if they injure themselves on the taxpayer's property."[33] Now that animal control officers are exempt from coverage by the rule, taxpayers may be deterred from calling for a public safety officer when they are in need of assistance due to "fear [of] facing tort lawsuits or increased insurance premiums if the wrong

27. *Id.* at 1056.
28. R.I. GEN. LAWS § 28.6 *et seq.* (1997).
29. *DeLaire*, 842 A.2d at 1056.
30. *Id.*
31. *Id.*
32. *Id.* at 1057-58.
33. *Id.* at 1058.

type of public safety officer responds to their call for help."[34]

Justice Flanders found that animal control officers, like police officers and firefighters, also assume the normal risks inherent in their lines of work and respond to emergency calls for help, just like these other officers.[35] He stated that in this case, the risk of slipping and falling on snow when responding to a homeowner's call for help with a stray animal was a very foreseeable risk and that the plaintiff was already paid by taxpayers to encounter just such a risk.[36] Additionally, Justice Flanders noted that the plaintiff DeLaire is not totally without recourse, as he can recover under worker's compensation.[37]

The dissent also believed that the plaintiff in this particular case should be barred from double-recovery since he held himself out to the public as an actual police officer where he "dressed like a policeman, worked out of an office in the police station, . . . drove a police van . . . [and] was vested with arrest powers, carried a firearm and wore a constable's badge."[38] Justice Flanders stated that "he should be estopped by his conduct from asserting that the rule does not apply to him," implying that the rule might not really apply to this particular officer, but his behavior should estop him from rebutting the defense.[39]

COMMENTARY

As Justice Flanders's dissent points out, the outcome of the majority's rule is that the public in need of assistance must now be on alert as to whether an actual police officer or firefighter responds to a call for help, in which case the taxpayer is protected from tort lawsuits. On the other hand, if some other public safety officer might respond, instead leaving the taxpayer vulnerable to suit and potentially dissuading the same from calling for help in the first place.

Part of the weakness of the rule and its exclusions is that there are no clear lines as to when a police officer, firefighter, dog officer, or other public safety officer might respond to a public call

34. *Id.*
35. *Id.* at 1059.
36. *Id.* at 1060.
37. *Id.* at 1058.
38. *Id.* at 1061.
39. *Id.*

for help. Both the majority and dissent cite *Sobanski v. Donahue*[40] as a case in which the public safety officer's rule did apply to a police officer who was barred from suing a landlord for injuries resulting from a dog bite.[41] Justice Flanders might ask why the taxpaying public should have to concern themselves with who responds to a call for help (be it police officer or dog officer) when they are paying the salaries of all public safety officers.

The majority's rule in this case takes that puzzlement one step further in providing a truly bizarre end result: under the majority's rule, if a police officer is bitten by a dog on a homeowner's property, a risk he or she is arguably not necessarily paid to face, he cannot sue the homeowner. However, if the homeowner correctly calls the animal control officer for assistance with his or her dog, the very public official most properly paid to face the obviously foreseeable risk of *animal bites* inherent in his or her day to day job *can* sue the homeowner if bitten. Surely, this is nonsensical at best. The lesson to take away from the majority here is under no circumstances call the animal control officer or else you, as the tax paying homeowner, may easily get bitten back in a very costly fashion.

CONCLUSION

The Rhode Island Supreme Court held that animal control officers are not covered by the "public safety officer's rule" which prohibits certain public employees from bringing negligence and other tortious claims against landowners for injuries sustained when responding to emergency calls for help. In this case, the plaintiff animal control officer may pursue damages for injuries sustained from a slip and fall when responding to defendant's call for help with a stray cat.

Esme Noelle DeVault

40. 792 A.2d 57 (R.I. 2002).
41. *DeLaire*, 842 A.2d at 1054, 1060.

Tort Law. *Konar v. PFL Life Insurance Co.*, 840 A.2d 1115 (R.I. 2004). In Rhode Island, the "Independent Contractor Rule", which releases the employer of an independent contractor from liability stemming from the negligent acts of that contractor, is not affected by section 425 of the Restatement (Second) Torts. However, given the appropriate facts, the issue may be re-visited in the future. Also, a Plaintiff's complaint of premises liability must contain more than a general claim for negligence, in order to give the opposing party fair and adequate notice of the type of negligence claim being asserted.

FACTS AND TRAVEL

In June 1995, Dennis DePalma attacked and injured the plaintiff, Bryan D. Konar, outside of Newport Mall.[1] PFL Life Insurance Company (PFL), the owner of Newport Mall, had contracted with National Development Asset Management of New England (National Development) to be the on-site manager.[2] National Development had a contract with the Rhode Island Bureau of Investigation and Protection, Ltd. (RIBI) to provide security services at the mall.[3]

Plaintiff brought suit against PFL alleging negligent failure to provide security.[4] The plaintiff's complaint stated that he was injured when "a male assailant, known to the defendant . . . to pose an immediate threat of bodily harm to the plaintiff was allowed to remain on the [mall] premises" and that his injuries were a "direct and proximate result of . . . the defendant's, its' [*sic*] agents, servants and/or employees [*sic*] negligent failure to provide security . . . ."[5] Defendant PFL then filed a third-party complaint against National Development, which in turn stated a fourth-party complaint for contribution and indemnification against DePalma and RIBI. Subsequently, RIBI asserted a cross-

1. Konar v. PFL Life Ins. Co., 840 A.2d 1115, 1116 (R.I. 2004).
2. *Id.* at 1117.
3. *Id.*
4. *Id.*
5. *Id.* at 1119.

claim against DePalma for contribution and indemnification.[6]

The Rhode Island Superior Court granted PFL's motion for summary judgment finding that RIBI was the party responsible for patrolling the mall when Konar was attacked; and thus, any liability on the part of RIBI could not be imputed to PFL pursuant to the independent contractor rule.[7] The superior court further noted that "this complaint is not one sounding in . . . premises liability which would warrant a different analysis."[8] Plaintiff appealed.[9]

ANALYSIS AND HOLDING

Despite Rhode Island's liberal pleading rule,[10] the "majority of [the Rhode Island Supreme Court was] not willing to overlook the overly broad, scatter-shot style of pleading on the part of the plaintiff in this case to allow him to proceed on a premises liability claim."[11] The Court stated that the plaintiff's complaint did not include a claim for premises liability, but rather only a general claim for negligence.[12] Under premises liability law in Rhode Island, landowners must "exercise reasonable care for the safety of persons reasonably expected to be on the premises . . . including an obligation to protect against the risks of a dangerous condition existing on the premises, provided the landowner knows of, or by the exercise of reasonable care would have discovered, the dangerous condition."[13] Furthermore, a landowner can delegate the duty of performance to an independent contractor; however, the landowner cannot avoid liability for non-performance of that duty.[14] In contrast, the trial justice, in granting summary judgment for the defendant, applied the independent contractor rule as it applies to a general negligence claim.[15] Under this version of the independ-

6. *Id.* at 1117.
7. *Id.*
8. *Id.* at 1117, 1120.
9. *Id.*
10. *See* R.I. SUP. CT. R. 8(a)(1) (requiring that a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief").
11. *Konar,* 840 A.2d at 1119.
12. *Id.* at 1118-19.
13. *Id.* at 1118 (quoting Kurczy v. St. Joseph Veterans Ass'n, Inc., 820 A.2d 929, 935 (R.I. 2003)).
14. *Id.* at 1118.
15. *Id.* at 1119.

ent contractor rule, "a party who employs an independent contractor generally will not be liable for the negligence of that contractor."[16] Although there are exceptions to this independent contractor rule, none of the exceptions are applicable in this case.[17]

When making the determination that the complaint did not set forth a claim for premises liability, the Rhode Island Supreme Court focused on how the complaint only alleged "negligent failure to provide security" and did not mention the phrase "premises liability" or "the underpinning of a premises liability claim."[18] The court acknowledged that a complaint need not state the precise legal theory; however, the complaint must still give "the opposing party fair and adequate notice of the type of claim being asserted."[19] Because the complaint only generally mentioned the word "negligence," the complaint lacked sufficient specificity to put the opposing party on notice of the type of negligence claim being asserted.[20]

Additionally, the court also declared that it would not *sua sponte* apply premises liability law when reviewing an appeal from a summary judgment on a "completely distinct negligence claim."[21] The court reasoned that the motion justice's ruling was conclusive because the plaintiff failed to challenge the motion justice's "classification of the claim as a general claim for negligence."[22] The plaintiff, as the appealing party, does not get "a second bite at the apple," and as a result, the court limited its review to whether it was an error to grant summary judgment in favor of the defendant on a general claim for negligence.[23]

Recognizing that the exceptions to the independent contractor rule were not applicable in the case at bar, plaintiff urged the

16. *Id.* at 1117.

17. *Id.* For example, a party would be liable for the acts of its independent contractor if the independent contractor was hired "to carry out a duty to the public that is set out in a statute or ordinance" or if the independent contractor is performing "inherently dangerous work." *Id.* at 1117-18.

18. *Id.* at 1119.

19. *Id.* at 1118.

20. *Id.* at 1119 (quoting Hendrick v. Hendrick, 755 A.2d 784, 791 (R.I. 2000)).

21. *Id.* at 1121.

22. *Id.* at 1120.

23. *Id.* at 1120-21.

Court to adopt section 425 of the Restatement (Second) Torts in order to prevent business owners from escaping liability by hiring independent contractors.[24] Section 425 states that:

> *One who employs an independent contractor to maintain in safe condition* land which he holds open to the *entry of the public* as his place of business, or a chattel which he supplies for others to use for his business purposes or which he leases for immediate use, is *subject to the same liability for physical harm caused by the contractor's negligent failure to maintain the land* or chattel in reasonably safe condition, as though he had retained its maintenance in his own hands.[25]

However, the court declined to adopt section 425 of the Restatement because the facts of this case did not warrant its application.[26] In reaching the decision not to adopt this section of the Restatement, the court reasoned that section 425 applies only to premises liability claims and does not affect the independent contractor rule.[27]

Consequently, the court denied plaintiff's appeal and affirmed summary judgment in favor of defendants pursuant to the independent contractor rule because the complaint failed to set forth a claim for premises liability.[28]

The Dissent

In the dissenting opinion, Justice Flanders and Justice Flaherty succinctly stated that "if ever there was a premises liability case, this is it."[29] The dissenters contended that the plaintiff's complaint includes a claim for premises liability because it "adequately alleged a breach of defendant's duty as owner of a Newport shopping mall to provide safe premises for members of the

---

24. *Id.* at 1118.
25. RESTATEMENT (SECOND) TORTS § 425 (1965) (emphasis added).
26. *Konar*, 840 A.2d at 1121. The Rhode Island Supreme Court did state that "[g]iven the right facts and circumstances, which are not present here, this Court may revisit the issues of § 425 as they pertain to premises liability." *Id.*
27. *Id.* at 1121.
28. *Id.*
29. *Id.* at 1126.

invited public."[30] To support this contention, the dissent explained that "no magic words are required to state a claim," merely a short plain statement that gives the opposing party notice of the type of claim being asserted is sufficient.[31] Furthermore, the dissent found it irrelevant that the plaintiff's complaint did not mention the phrase "premises liability" because a landowner is in the "best position to protect against harm" and therefore owes a duty to a business invitee to exercise reasonable care in maintaining the safety of its premises.[32]

In reaching its conclusion, the dissent also relied upon the idea that the independent contractor rule should not apply to commercial property owners who invite members of the public on their premises because a landowner should not be able to evade its duty "by contracting with a third party."[33] The dissent advocates the adoption and application of section 425 of the Restatement as a way of ensuring that commercial landowners are held responsible for providing safe premises for invitees.[34] Thus, the dissenting justices would reverse and remand the case for trial to determine if PFL breached its duty to the plaintiff to maintain the premises in a reasonably safe condition because the independent contractor rule should not "serve to insulate the mall owner from liability."[35]

COMMENTARY

In light of the liberal pleading rule in Rhode Island, the majority's holding in this case is curious. Complaints need only contain a short and plain statement that serves to afford the opposing party adequate notice of the claims alleged. In this case, the majority seems to be demanding a great deal more specificity in pleadings than is required under Rhode Island law. The dissenting opinion accurately assessed the plaintiff's complaint and de-

30. *Id.* at 1121-22.
31. *Id.* at 1122.
32. *Id.* at 1123. The dissent also lists a string of cases from other jurisdictions that have held that "a commercial property owner's failure to protect an invitee from the criminal acts of third persons or the failure to provide 'security' to a business invitee may. . . fall within the duty of the landowner . . . to keep the premises reasonably safe for the purposes of the invitation." *Id.* at 1124.
33. *Id.* at 1125.
34. *Id.*
35. *Id.* at 1126.

termined that at the very least, the complaint "sounded in premises liability" because of the duty a landowner has to its invitees to provide reasonably safe premises.

Furthermore, public policy concerns would seem to advocate for the adoption of section 425 of the Restatement and the rejection of the independent contractor rule. It is senseless to allow a commercial landowner to avoid liability by simply hiring independent contractors to provide security on its premises, as is the case under the independent contractor rule. Undoubtedly, a landowner who invites the public onto its premises for business purposes possesses a duty to ensure that the premises are maintained in a reasonably safe condition and to exercise reasonable care in protecting the public from harm. Anything short of this duty needlessly shields a landowner from liability while still allowing the landowner to reap the benefits of having the invited public visit its premises for business purposes.

CONCLUSION

The Rhode Island Supreme Court denied and dismissed plaintiff's appeal declaring that it was unwilling "to look past the ambiguous state of the pleadings" and "the motion justice's specific conclusion that plaintiff did not assert a premises liability claim."[36] Consequently, summary judgment in favor of defendant was affirmed pursuant to the independent contractor rule under a general negligence claim and the court rejected the adoption of section 425 of the Restatement (Second) Torts.

Jamie M. Landry

36. *Id.* at 1120-21.

Tort Law. *Mead v. Papa Razzi Restaurant*, 840 A.2d 1103 (R.I. 2004). Owners and possessors of property have an affirmative duty to exercise reasonable care for the safety of persons reasonably expected to be on the premises. This duty includes an obligation to protect against the risks of a dangerous condition existing on the premises, provided the landowner knows of, or by the exercise of reasonable care would have discovered, the dangerous condition. Also, without a satisfactory explanation that a report mandated by corporate policy never existed, the jury is permitted to infer that the production of such a report would have adverse consequences for the corporate party.

FACTS AND TRAVEL

After an afternoon of shopping on September 13, 1997, Virginia and Richard Mead stopped at the Papa Razzi Restaurant in Cranston, Rhode Island, for some much needed nourishment.[1] By the time the Meads finished dining, the restaurant had become much more crowded than when they arrived, and "the establishment bustled with activity."[2] The Meads made their way to the door; Virginia Mead following behind her husband.[3] At that point, things took an unexpected, and unfortunate turn for the couple. Virginia Mead's foot slipped out from under her, and she fell to the floor of the restaurant, landing on her right knee.[4] Richard Mead came immediately to his wife's aid, and an ambulance was called.[5] As the Meads awaited medical assistance, both Richard and Virginia noticed a puddle of liquid on the floor close to where Virginia Mead had lost her footing.[6] A staff member of the restaurant took some information from the Meads, but did not discuss the incident with the couple at that time.[7] The slip and fall at the Papa Razzi Restaurant resulted in a fracture to Virginia Mead's kneecap,

1. Mead v. Papa Razzi Restaurant, 840 A.2d 1103, 1105 (R.I. 2004).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

which required surgery and rehabilitation.[8]

Virginia and Richard Mead filed a negligence action against Papa Razzi Restaurant, and its parent organization claiming the negligence of the restaurant caused their injuries.[9] A jury trial commenced on September 3, 2002, where the Meads testified, as did a loss prevention manager from the restaurant's corporate company, in support of their claim.[10] When testifying about the spill on the floor, neither of the Meads were able to offer evidence as to what the liquid was, where it had come from, or how long it had been on the floor.[11] However, both testified that the liquid appeared clear, and that it was located in the area where Virginia Mead had fallen.[12] Their testimony also described the area as a common walkway used by customers and employees of the restaurant. They further testified that they both had observed that several employees carried trays and pitchers in the walkway on that evening.[13]

The loss prevention manager, Karen Eaton, testified as to two corporate policies in effect at the time of Virginia Mead's fall. The first policy required that an incident report be prepared in conjunction with any incidents that occurred in its restaurants.[14] Eaton's testimony revealed that with a slip and fall, "the standard incident report contained information about the cause of the fall, the identification of any employees involved, and the condition of the floor."[15] More importantly, Eaton testified that corporate policy was to retain copies of these reports.[16] The second policy mandated a sanitation checklist be prepared by the restaurant staff throughout the course of the day, recording the cleaning activities undertaken by the staff.[17] Within two days of Virginia Mead's fall, Eaton was personally notified, however she could not explain why

8. *Id.*
9. *Id.* Richard Mead also sought compensation for the loss of his wife's comfort, society and consortium. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* Eaton was not aware of any policy that required these sanitation checklists be retained. *Id.* at 1106.

neither of the two reports were available to the Meads when requested during discovery.[18]

The testimony of the Meads and Eaton made up the plaintiffs' case in chief. Following the plaintiffs' case, the defendants moved for judgment as a matter of law, and the trial justice granted the motion.[19] In doing so, the trial justice stated there was "no competent evidence before [the] jury to give any indication other than rank speculation that a six inch pool of liquid was occasioned by a negligent act of the defendants' agent."[20] The trial justice found that: (1) the plaintiffs' evidence was insufficient for a jury to find that employees of the restaurant were responsible for the spill; and (2) if the spill resulted from a customer, the evidence was insufficient for a jury to find the defendants had the opportunity to receive notice of the spill.[21] Finally, the trial justice reasoned that "because our case law clearly indicates that premises liability is not an insurer of the safety of the public, [the court was] constrained to grant the motion and direct a verdict to the defendant[s]."[22] The Meads filed separate notices of appeal.[23]

BACKGROUND

On appeal, the Meads argued that the trial justice erred by failing to draw all reasonable inferences in their favor. First, they argued that the evidence presented at the trial was sufficient for the jury to find that it was "more probable than not that employees of Papa Razzi themselves had caused the liquid to accumulate on the floor."[24] The Meads further argued that notice is not required if the unsafe condition was created by an employee of the restaurant.[25] The plaintiffs' final contention was that there was evidence of *spoliation*[26]of the incident report, which warranted an

18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* All parties were ordered to appear before the Rhode Island Supreme Court to show cause why the issues on appeal should not be decided summarily. Following oral argument on November 13, 2003, the court determined that cause had not been shown and the case would be decided at that time. *Id.*
24. *Id.*
25. *Id.*
26. The doctrine of spoliation provides that "the deliberate or negligent

adverse inference against the defendants.[27]

The defendants asserted on appeal that the Mead's claims of negligence were "speculative at best."[28] Because the plaintiffs failed to provide any evidence relating to the origin and nature of the liquid, and the length of time the liquid was on the floor, the defendants argued that there was no evidence that the defendants were ever put on notice.[29] The defendants argued that notice is a required element in a premises liability negligence action, unless there is unequivocal evidence that a dangerous condition existed on the premises, or that the condition was caused by an employee.[30] With respect to the incident reports, the defendants argued that their failure to produce the reports was not evidence of spoliation because there was no evidence that the reports were ever created, or subsequently destroyed.[31]

ANALYSIS AND HOLDING

After first recognizing instances where an injured plaintiff has failed to meet their burden of proving a business owner's negligence because of a lack of evidence relating to the length of time a dangerous condition existed, or whether the owner knew or should have known of such a condition, the Rhode Island Supreme Court stated that a "plaintiff must introduce evidence from which a reasonable jury could conclude that the defendant more probably than not was negligent."[32] The court then cited a prior holding which recognized that evidence that an employee of a defendant was in the immediate location just prior to the accident was sufficient to raise a jury question as to whether or not the defendant was on notice of the condition.[33] Similarly, the court noted that when evidence is presented that the defendant caused the dangerous condition, notice may be presumed.[34] The court then assessed

---

destruction of relevant evidence by a party to litigation may give rise to an inference that the destroyed evidence was unfavorable to that party." Tancrelle v. Friendly Ice Cream Corp., 756 A.2d 744, 748 (R.I. 2000).

27. *Mead*, 840 A.2d at 1106.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 1106-07.
32. *Id.* at 1107.
33. *Id.* at 1107-08 (citing DeRobbio v. Stop & Shop Supermarket, 756 A.2d 209, 212 (R.I. 2000) (per curiam)).
34. *Id.* at 1108.

the evidence that the plaintiffs had presented in their case. This evidence "clearly indicated that a puddle of liquid was seen near the accident site, and that defendants' busy employees were in the walkway where Mead's fall occurred."[35] Even though the Meads had not presented conclusive evidence relating to the nature or origin of the liquid, the court opined that the evidence presented, coupled with the circumstances surrounding the defendants' failure to produce the incident report required by corporate policy, created issues of fact that should not have been kept from the jury.[36]

The court went on to discuss the spoliation doctrine, and its applicability to the case. Little merit was found in the defendants' argument that there was no evidence of spoliation because there was no evidence of the report ever being prepared, even though there was evidence of a mandated policy for doing so.[37] The court reasoned to allow defendants to benefit from their own unexplained failure to preserve and produce relevant information would be something the court would not condone.[38] Because there was testimony presented by the plaintiffs that the defendants prepared and maintained such incident reports in line with corporate policy, the question of whether or not the report was prepared was a question of fact for the jury to decide.[39] The court explained further that "without a satisfactory explanation that such a report never existed, the jury should be permitted to infer that its production would have had adverse consequences for defendants. . . . [The court] decline[s] to place the burden on the plaintiffs to prove that an unpropitious report was destroyed by defendants in anticipation of trial."[40]

The court recognized the difficult task plaintiffs often face in proving negligence in slip and fall cases because the defendant is rarely ever going to admit liability.[41] The court found that the Meads faced an even more challenging task because of the defendants failure to produce the incident report which may have been

35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*

helped establish the defendants' negligence.[42] Notwithstanding this "handicap," the court held that evidence produced by the Meads about the procedures surrounding documenting and retaining reports of incidents that occurred at their restaurants, was such that a jury could infer that there was a report, and that it was damaging to the defendants.[43] For this reason, the Rhode Island Supreme Court held that the trial justice "impermissibly resolved evidentiary inferences in favor of the defendants that were more properly suited for [ ] the jury. . . . [The trial justice] erred in granting judgment as a matter of law in favor of the defendants."[44]

COMMENTARY

While this case produced two opinions, both the *per curiam* opinion and Justice Flanders's concurrence make the same point. The spoliation doctrine was what prevented the Mead's lawsuit from being spoiled. Even the *per curiam* opinion makes it clear that the evidence of the liquid alone was not be enough to defeat a directed verdict. It was this evidence "coupled with the circumstances of defendants' failure to produce a policy-mandated incident report" that created factual issues to be decided by the jury.[45]

Mead brings forth the importance the spoliation doctrine often plays in civil litigation. It is important to note that while spoliation may provide the vehicle for a plaintiff to overcome a motion for a directed verdict, as was seen in *Mead*, there are no guarantees that the jury will be sensitive to the plaintiff's situation. When evidence of spoliation is presented, the jury *may* infer that the evidence was adverse to the defendant's case. If the defendant presents evidence that the spoliation was negligent, or done in the normal course of business, the jury may not wish to make any in-

42. *Id.* 1108-09.

43. *Id.* at 1109.

44. *Id.* In a concurring opinion, Justice Flanders showed less sympathy for the challenges faced by plaintiffs in slip and fall actions: "The bottom line is that, no matter how difficult it may be to prove a slip-and-fall case, we should not allow juries to speculate that, just because somebody slipped and fell, the defendant or its agent must be responsible." *Id.* (Flanders, J., concurring). Justice Flanders tied his horse to the spoliation doctrine in concurring with the per curium decision: "[B]ut for the application of the spoliation doctrine, I do not believe the evidence was sufficient to allow the jury to speculate about who caused the spill . . . and how long it was there before the injury occurred." *Id.*

45. *Id.* at 1108.

ferences against the defendants. If the spoliated evidence was the sole basis for the plaintiff's claim, and the jury decides not to make an adverse inference, the plaintiff may be left with no redress to his injuries. Moreover, when a defendant is aware that the adverse inference is not mandatory, and he is able to provide a believable explanation, he may find it in his best interest to see that the evidence never makes it to the courtroom. Due to these shortcomings in the current spoliation doctrine, it has been suggested that Rhode Island adopt an independent tort for the spoliation of evidence in civil litigation.[46] An independent tort would help to maintain the integrity of the Rhode Island judiciary by assuring an injured plaintiff is not denied the right of redress for another's wrong. Similarly, independent liability would further the interests of the injured parties, and provide added deterrence for those who may be in a position to spoliate evidence.[47]

CONCLUSION

The Rhode Island Supreme Court held that the plaintiff's evidence of spoliation by the defendants prevented the trial justice from granting a directed verdict in favor of the defendant. The evidence of spoliation, along with scant evidence relating to a puddle of liquid on the floor, presented questions of material fact as to whether the defendant was on notice of the liquid. Evidence that the defendants' corporate policy mandated the preparation and maintenance of incident reports was sufficient for a jury to infer that because the reports were not provided to the plaintiffs, the information therein was adverse to the defendants' case. The decision of the superior court to grant the defendants' motion for a directed verdict was reversed, and the record was remanded to the superior court. The Meads' claim against Papa Razzi remains alive.

T. Patrick Gumkowski

46. *See* T. Patrick Gumkowski, *Protecting the Integrity of the Rhode Island Judicial System and Assuring an Adequate Remedy for Victims of Spoliation: Why an Independent Cause of Action for the Spoliation of Evidence is the Solution*, 10 ROGER WILLIAMS U. L. REV. 795 (2005).

47. *Id.*

Tort Law/Contract Law. *Read & Lundy, Inc. v. Washington Trust Co. of Westerly*, 840 A.2d 1099 (R.I. 2004). There is no implied duty restricting a bank's internal use of a customer's loan information when considering another customer's loan application. Furthermore, a civil conspiracy claim requires a valid underlying intentional tort theory.

FACTS AND TRAVEL

This case involved an appeal by the plaintiffs, Read & Lundy, Inc. ("R&L") and Clifford McFarland (McFarland), from a grant of summary judgment in favor of the defendant, The Washington Trust Company of Westerly (Washington Trust).[1] More specifically, R&L and McFarland alleged that the motion justice improperly ruled that summary judgment should be entered in favor of Washington Trust on its breach of contract, tortious interference with contractual relations, and civil conspiracy claims.[2] R&L and McFarland also claimed that the motion justice erroneously concluded that the statute of limitations had tolled on their claim for violation of Rhode Island's *Uniform Trade Secrets Act*.[3]

This litigation had a long and complex history, including an appeal by R&L and McFarland to the Rhode Island Supreme Court in a related case, *McFarland v. Brier*.[4] In that case, R&L and McFarland filed an action against defendants Dennis Bibeau (Bibeau), Michael Brier (Brier), his accounting firm, Michael Brier & Company, and Consigned Systems, Inc. (CSI), alleging tortious interference with contractual relationships, misappropriation of trade secrets, breach of professional duty through the illegal disclosure of confidential information, and interference with a prospective business advantage and trade disparagement.[5] The

1. Read & Lundy, Inc. v. Washington Trust Co. of Westerly, 840 A.2d 1099, 1101 (R.I. 2004).

2. *Id.* at 1101-02.

3. *Id.* at 1003. Rhode Island's *Uniform Trade Secrets Act* is contained within R.I. GEN. LAWS §§ 6-41-1 – 41-11 (Supp. 2004).

4. 769 A.2d 605 (R.I. 2001). For a survey of *McFarland*, see 7 ROGER WILLIAMS U. L. REV. 403, 479 (2002).

5. *Id.* at 609.

principals of CSI were Bibeau and Brier.[6] Bibeau was a former R&L employee who had tried unsuccessfully to purchase the company from McFarland, the owner of R&L.[7] Bibeau and Brier's business relationship began during the attempted buyout when Bibeau, while serving as president of R&L, hired Brier's accounting firm to assist him with the acquisition of the company.[8] However, when Bibeau failed to make the required payments, McFarland, acting pursuant to the buyout agreement, removed him as president of the company.[9] The buyout was never completed and Bibeau resigned from R&L shortly thereafter.[10]

After his resignation, Bibeau, in defiance of the non-competition clause contained in the buyout agreement with McFarland, immediately began soliciting R&L customers.[11] At the same time, Brier founded CSI to compete directly with R&L and immediately hired Bibeau.[12] Bibeau then filed a declaratory judgment action in the United States District Court for the District of Rhode Island where he sought a determination that the non-competition clause in the buyout agreement was void.[13] While this matter was pending before the district court, CSI contacted First Bank (Bank), a predecessor in interest to Washington Trust, in reference to obtaining a loan.[14] The events surrounding the loan application were the basis of the *Read & Lundy, Inc. v. Washington Trust Company of Westerly* litigation.

R&L and McFarland alleged that when the Bank was in the process of determining whether to make a loan to CSI it used confidential financial information concerning R&L's business operations.[15] The Bank obtained this information from Bibeau and Brier when Bibeau had applied for a loan to finance his buyout of

---

6. *Id.* at 608.
7. *Id.* at 607.
8. *Id.* at 608.
9. *Id.*
10. *Id.*
11. *Id.*
12. *See* Read & Lundy, Inc. v. Washington Trust Co. of Westerly, C.A. No. PC99-2859, 2002 R.I. Super. LEXIS 181,*4 (R.I. Super. Dec. 13, 2002).
13. *See id.* In February 1996, the District Court issued a preliminary injunction barring Bibeau from soliciting two of Read & Lundy's customers. *Id.* n.2.
14. *See id* at *5.
15. *Read & Lundy, Inc.*, 840 A.2d at 1101.

R&L.[16] Despite being aware of the rather contentious relationship between Brier and Bibeau and R&L and McFarland, the Bank granted CSI a five-hundred thousand dollar loan.[17] In March of 1996, R&L and McFarland filed the aforementioned *McFarland v. Brier* action, where after prolonged litigation, they ultimately prevailed and were awarded substantial damages.[18] However, it appears that R&L and McFarland never collected any of this award from Bibeau, CSI, Brier, or his accounting firm.[19]

R&L and McFarland then brought suit against Washington Trust in June 1999, where they alleged that the Bank: (1) breached its implied contract with them not to use Read & Lundy's confidential business information in its consideration of a competing customer's loan; (2) tortiously interfered with the contractual relations between them and Brier, Bibeau, CSI, and their customers; (3) civilly conspired with Brier, Bibeau, and CSI to violate the *Uniform Trade Secrets Act*; and (4) violated the *Uniform Trade Secrets Act*.[20] Believing that R&L and McFarland's action was driven by their inability to collect the judgment rendered against Bibeau, Brier, his accounting firm, or CSI,[21] Washington Trust moved for summary judgment in August 2002 following pretrial discovery.[22] The trial justice granted Washington Trust's motion for summary judgment in full and R&L and McFarland appealed to the Rhode Island Supreme Court.[23]

ANALYSIS AND HOLDING

1. *Breach of Contract*

On appeal, R&L and McFarland argued that the parties had mutually agreed that the financial information supplied to the Bank in connection with Bibeau's attempted buyout of R&L from

16. *Id.*
17. *See Read & Lundy, Inc.*, C.A. No. PC99-2859, 2002 R.I. Super. Lexis 181 at *5. It should be noted that the loan did contain a covenant that CSI would not solicit customers of Read & Lundy. *Id.* at *5-6.
18. *Id.*
19. *Id.* at *6 n.3.
20. *Read & Lundy, Inc.*, 840 A.2d at 1101.
21. *See Read & Lundy Inc.*, C.A. No. PC99-2859, 2002 R.I. Super. LEXIS 181 at *6 n.3.
22. *See id* at *7.
23. *Read & Lundy Inc.*, 840 A.2d at 1101.

McFarland would not be used beyond the consideration of Bibeau's loan application.[24] The Rhode Island Supreme Court rejected this claim and affirmed the motion justice's grant of summary judgment on R&L and McFarland's breach of contract claim, stating that "[a]n essential element to the formulation of any true contract is an 'intent to contract.'"[25] More specifically, the court noted there was simply no evidence indicating that the parties had ever considered what would happen to the information after it was provided to the Bank.[26] Additionally, the court adopted the proposition that absent an agreement to the contrary, a bank does not violate any legal duty when it uses information provided by one customer in deciding whether to lend money to another prospective borrower.[27]

2. *Tortious Interference with Contractual Relations*

In reviewing the motion justice's grant of summary judgment of R&L's and McFarland's claim for tortious interference with contractual relations, the court reestablished that a successful cause of action requires proof of: (1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) the wrongdoer's intentional interference; and (4) damages.[28] Although it did not definitively state which elements R&L and McFarland failed to establish, the Rhode Island Supreme Court upheld the motion justice's ruling.[29] The court seemingly was focused on the "damage" element, stating that R&L and McFarland failed to demonstrate any connection between the alleged loss of profits that they sought to recover and the Bank's action in lending money to CSI.[30] The court further suggested that there was no evidence that the Bank had intended to harm R&L and McFarland, thus making summary judgment of this claim appropriate.[31]

---

24. *Id.* at 1101-02.
25. *Id.* at 1102 (citing Bailey v. West, 249 A.2d 414, 417 (R.I. 1969)).
26. *Id.*
27. *Id.*
28. *Id.* at 1102 (citing Toste Farm Corp. v. Hadbury, Inc., 798 A.2d 901, 906 (R.I. 2002)).
29. *Id.*
30. *Id.*
31. *Id.*

3. *Civil Conspiracy*

As for the civil conspiracy claim, the court held that R&L and McFarland needed to show evidence of an unlawful enterprise.[32] However, the court also noted that since civil conspiracy was not an independent basis of liability, a valid underlying intentional tort theory was required.[33] Yielding to the judgment of the trial justice, the court affirmed summary judgment of this claim for primarily two reasons.[34] First, the court noted that R&L and McFarland failed to establish an underlying intentional tort theory upon which the civil conspiracy claim was based.[35] Additionally, the court reasoned that R&L and McFarland produced no evidence indicating that the Bank had conspired to harm them or engaged in any other misconduct.[36]

4. *Uniform Trade Secrets Act*

Finally, R&L and McFarland claimed that the motion justice erred in concluding that their claim for violation of the *Uniform Trade Secrets Act* (UTSA) was time-barred.[37] However, after reviewing the deposition testimony of a Bank officer taken in January 1996, the court ultimately rejected this argument as well.[38] More particularly, it noted that during the deposition the officer had testified that the Bank had kept information concerning R&L in its loan file for CSI for comparison purposes.[39] Thus, the court reasoned that R&L and McFarland had been on notice since at least January 1996 that the Bank was possibly using its information to consider CSI's loan request, but failed to file suit until June 1999.[40] Therefore, because the three-year statute of limitations for a UTSA claim would have expired in January 1999,[41] the court

32. *Id.* (citing ERI Max Entertainment, Inc. v. Streisand, 690 A.2d 1351, 1354 (R.I. 1997)).
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *See* R.I. GEN. LAWS § 6-41-6 (Supp. 2004) (prescribing a three-year statute of limitations for UTSA claims that commences to run when the claimant discovers or should discovered the misappropriation).

held that the trial justice appropriately ruled that R&L and McFarland's claim was time-barred.[42]

COMMENTARY

This case presented the Rhode Island Supreme Court with an issue of first impression, mainly whether a bank may internally use the information in one commercial customer's loan application to consider another customer's loan request.[43] Although the court clearly held that a bank may use such information in this fashion, absent an agreement between the bank and the customer,[44] it did not articulate any rationalization for adopting this rule. The decision of the trial court, however, did identify several policy arguments in favor of not imposing a common law duty on the part of a bank to refrain from internally using commercial information from a customer in its consideration of another customer.[45]

The trial justice noted that prohibiting a bank from considering all available information in making its own loan decisions would create at least two undesirable outcomes.[46] First, it could have the effect of forcing banks to blindly enter into loan transactions.[47] This would be a problematic situation for banks, as they potentially could violate the duties that they owe to their depositors and shareholders.[48] The second implication of this result would be that the free flow of funds being loaned by banks would be chilled.[49] In a broader sense, the trial justice also reasoned that because banking is so vital to the national economy, the need for uniformity in regulations affecting banking practices would likely result in any state common rule imposing such a duty upon banks being preempted by federal law.[50] More specifically, the trial justice noted that federal law did not prohibit banks from engaging in the practice question in this case.[51]

---

42. *Read & Lundy Inc.*, 840 A.2d at 1103.
43. *Id.* at 1102.
44. *Id.*
45. *See* Read & Lundy, Inc. v. Washington Trust Co. of Westerly, C.A. No. PC99-2859, 2002 R.I. Super. LEXIS 181, *19-20 (R.I. Super. Dec. 13, 2002).
46. *Id.* at *21.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at *22.
51. *Id.* at *22 n.7.

However, despite these policy considerations cited by the trial justice in support of rejecting the imposition of a duty, the Rhode Island Supreme Court did leave open the possibility of recognizing such a restriction if the bank and customer mutually agreed to it. While having the option to contractually impose this duty on a bank certainly provides commercial customers with a method of protecting their loan information, it would seem unlikely that banks would be willing to agree to such terms. In a practical sense, by agreeing to such a restriction, banks would be purposely exposing themselves to the negative consequences cited by the trial justice for not imposing an implied duty. Stated differently, banks essentially would be contracting to enter blindly into other loan transactions without the benefit of potentially useful information which, of course, may potentially cause them to violate the duties that they owe to their depositors and shareholders. Additionally, when this concept is considered in light of the fact that banks, in most situations, will be in a superior bargaining position over the customer, it seems implausible that a bank would ever agree to impose such a restriction on itself.

As the noted in the trial justice's opinion, the area of banking and lending is "archetypically within the domain of legislative judgment."[52] Since the Rhode Island Supreme Court has spoken on this issue, now may be the time for the state's legislature to weigh in and "consider the delicate financial issues at stake and strike a balance between sound economics on the one hand, and expectations of loyalty on the other."[53]

CONCLUSION

In the absence of any agreement between a bank and its customer providing that the bank will not use any information received from the customer in deciding whether to lend money to another borrower, there is no implied contractual duty on the part of a bank that restricts the internal use of commercial loan application information for such purposes.

Marc A. Antonucci

52. *Id.* at *22 (quoting Washington Steel Corp. v. TW Corp., 602 F.2d 594, 601 (3rd Cir. 1979)).

53. *Id.*

Trusts and Estates. *Gaspar v. Cordeiro,* 843 A.2d 479 (R.I. 2004). The Rhode Island Supreme Court held that a joint bank account carries no right of survivorship after one of the tenants to that bank account dies unless the parties explicitly agree to a right of survivorship by a signed writing. The court reaffirmed its language from *Robinson v. Delfino*, which held that "absence [of a joint bank account providing survivorship rights] will be conclusive evidence of an intent not to transfer any right of ownership in the survivor . . . ." [1]

FACTS AND TRAVEL

In 1999, Joseph Cordeiro created two joint bank accounts with his sister-in-law, Maria F. Gaspar, the defendant.[2] It was undisputed that the defendant made no contribution to these accounts.[3] At the time the accounts were formed there were no provisions for a right of survivorship on either the signature cards or the customer agreement, both of which were signed by Joseph Cordeiro and the defendant.[4]

Two years after the formation of the bank accounts, the bank issued a Personal Deposit Account Agreement, which stated that "[o]n the death of any joint owner, the funds in the Account will pass to the surviving joint owner."[5] Neither Joseph Cordeiro nor the defendant signed the Personal Deposit Account Agreement.[6]

Joseph Cordeiro died in July 2002 and the plaintiffs, Joseph Cordeiro's sisters-in-law, brought this action on behalf of Cordeiro's widow, Alice Cordeiro, seeking a restraining order to block the defendant from using the funds.[7]

The plaintiffs claimed that the defendant was only placed on the account to assist Joseph Cordeiro in paying his bills, while the

1. 710 A.2d 154, 161 (R.I. 1998).
2. Gaspar v. Cordeiro, 843 A.2d 479, 480 (R.I. 2004).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

defendant claimed that she had a right of survivorship and the funds belonged to her.[8] Both parties moved for summary judgment.[9]

Based on the signature cards and customer cards signed in 1999 and the unsigned Personal Deposit Account Agreement later sent out by the bank, the motion judge granted summary judgment for the plaintiffs, concluding that there was no right of survivorship.[10]

Defendant appealed.[11]

BACKGROUND

The Rhode Island Supreme Court decided *Robinson v. Delfino* in 1998, overturning a lower court decision ordering the surviving account-holder of a joint bank account with a right of survivorship to return funds to the estate of the deceased account-holder.[12]

The court held both "that the opening of a joint bank account wherein survivorship rights are specifically provided for is conclusive evidence of the intention to transfer [ownership at death]"[13] and that "absence [of a signed agreement granting survivorship rights] will be conclusive evidence of an intent not to transfer any right of ownership in the survivor. . . ."[14]

By adopting a bright line rule, the court in *Robinson* sought to extract itself from the inconsistencies that result when courts are forced to determine the subjective intent of the deceased joint.[15] The court also sought to rescue surviving named joint account-

---

8. *Gaspar*, 843 A.2d at 480.
9. *Id.*
10. *Id.*
11. *Id.*
12. 710 A.2d 154, 161(R.I. 1998).
13. *Id.*
14. *Id.*
15. *See id.* at 159. The court quoted *Wright v. Bloom*, 635 N.E.2d 31 (Ohio 1994), which stated:

> Recent cases have created a morass of unpredictability, often occasioned by ambiguous and conflicting results. Presently, the depositor cannot rest assured as to whether the funds remaining in the account at his death will immediately pass to the survivor. Identical survivorship language expressly set forth in one joint and survivorship account agreement may be adjudged sufficient to pass ownership to the survivor while found to be insufficient in another.

Id. at 33.

holders from "the necessity of first having to travel through several court systems and to have lawyers, trial judges, juries, and appellate judges perform post mortem cerebral autopsies in order to determine and second guess what the subjective intent of the deceased joint-owner of the account was at the time the account was created."[16]

ANALYSIS AND HOLDING

The holding in *Robinson* stands for the idea that the court will look to whether the written agreement creating the joint bank account contains a right of survivorship as the sole evidence of the deceased joint account-holder's intent.[17] *Robinson* does not stand for the idea that the intent of the deceased account-holder is unimportant,[18] nor does it stand for the idea that all joint bank accounts give rise to a right of survivorship.[19]

The defendant in *Gaspar* relied on the Personal Deposit Account Agreement sent out by the bank years after Joseph Cordeiro and the defendant signed the customer agreement and signature cards at the opening of the account as evidence that a right of survivorship existed,[20] but neither Joseph Cordeiro nor the defendant ever expressed intent to be bound to the later agreement with a signature.[21]

The allegation by the plaintiffs that Joseph Cordeiro's intent when he opened the joint bank account was to facilitate bill paying was equally meaningless.[22] The only issue was whether or not Joseph Cordeiro explicitly provided for a right to survivorship.

Although the *Robinson* court in its reasoning stated that "the absolute common understanding of the vast majority of people establishing joint bank accounts nowadays is that they create immediate possessory as well as survivorship rights,"[23] that statement merely indicates that, where a right of survivorship exists in the bank's customer agreement, the court is justified in

16. *Robinson*, 710 A.2d at 160.
17. *Id.* at 161.
18. *Id.*
19. *Id.*
20. Gaspar v. Cordeiro, 843 A.2d 479, 480 (R.I. 2004).
21. *Id.*
22. *Id.*
23. *Robinson*, 710 A.2d at 160

presuming the deceased account-holder understood it was there.[24] It does not create a right of survivorship where none existed in the agreement itself.[25]

CONCLUSION

In *Gaspar v. Cordeiro* the Rhode Island Supreme Court held to both the spirit and letter of its decision in *Robinson*. The court will not delve into the vagaries of trying to determine the intent of the deceased account-holder, nor will it create intent where none is expressed. The court simply looks to the signed agreement and the presence or absence of the survivorship rights in that document is determinative.

Thomas Connolly

24. *See id.* at 161.
25. *See Id.*

2004 R.I. Pub. Laws ch. 198. *An Act Relating to Health and Safety – Rhode Island Workers' Safety Act of 2004.* Establishes a ban on smoking in public places. However, the act does provide for the maintenance of designated smoking and non-smoking areas in certain "pari-mutual" facilities, which feature "gaming areas."

2004 R.I. Pub. Laws ch. 204. *An Act Relating to Criminal Offenses – Assaults.* When serious bodily injury is the proximate result of criminal negligence, the person who committed the act shall be guilty of battery, a felony, and be eligible for imprisonment for up to ten years, and fines up to ten-thousand dollars, or both. The chapter defines criminally negligent behavior as behavior which is incompatible with a proper regard for human life or indifferent to consequences.

2004 R.I. Pub. Laws ch. 311. *An Act Relating to Unfair Sales Practices.* Prohibits any business from requiring a consumer to provide his or her social security number on an application for a discount card. Prohibits the sale or transfer of any personal information obtained through the application for such discount cards to any third party.

2004 R.I. Pub. Laws ch. 313. *An Act Relating to Real Estate Sales Disclosures.* Requires the seller of real estate to disclose to the buyer and any party involved in the transaction any known encroachments or legally existing easements on the property.

2004 R.I. Pub. Laws ch. 343. *An Act Relating to Human Services – Health Care for Working with Disabilities.* Authorizes the department of human services to establish a Medicaid buy-in program pursuant to the "Balanced Budget Act of 1997" to assist disabled individuals in entering and reentering the work force. Provides health care and social services to disabled individuals by allowing them to purchase Medicaid coverage that is necessary to

enable such individuals to continue their employment activity.

2004 R.I. Pub. Laws ch. 356. *An Act Relating to Motor and Other Vehicles – Racial Profiling Prevention Act of 2004.* Prohibits state and municipal law enforcement officers and agencies from participating in any activities of racial profiling. Racial profiling is broadly defined in this chapter as any disparate treatment of any individual based on, in whole or in part, the ethnic or racial status of that individual. Establishes a civil cause of action for the victim of such treatment and includes a possible award of reasonable attorneys' fees.

2004 R.I. Pub. Laws ch. 371. *An Act Relating to Businesses and Professions – Pharmacies.* Includes special provisions to regulate licensed Canadian pharmacies that ship or transport pharmaceutical products into the state. Provides that if the ownership or location of such a pharmacy should change the original license will become immediately null and void.

2004 R.I. Pub. Laws ch. 393. *An Act Relating to Education – Education Equity and Property Tax Relief.* Establishes a joint legislative committee to develop a basic foundation support program and an appropriate transition plan to fully implement a new funding system requiring an equitable division of resources among the state's school districts. This committee will be assisted by an appointed foundation aid technical advisory group and a property tax relief technical advisory group.

2004 R.I. Pub. Laws ch. 400. *An Act Relating to Administrative Procedures.* Gives responsibility to the governor's office and economic development corporation to determine whether any particular rule propounded by an agency may adversely affect a small business. The economic development corporation will act as advocate for the small business, notifying the relevant agency of any adverse affects on any business after making determinations of costs, benefits, alternatives, as well as other factors. This chapter also requires each agency to review all existing agency rules every five years to determine what, if any changes need be made. Amends Rhode Island General Laws sections 42-35-1, 42-35-3 and 42-35-15.

2004 R.I. Pub. Laws ch. 443. *An Act Relating to Elections.* Amends Rhode Island General Laws section 17-25-10.1 entitled "Rhode Island Campaign Contributions and Expenditures Reporting" to permit campaign contributions to be made via credit card or internet transaction in addition to check, money order or cash contributions of less than twenty-five dollars as long as mandatory reporting procedures are followed.

2004 R.I. Pub. Laws ch. 453. *An Act Relating to Health – Defibrillators.* Requires licensed health clubs to maintain at least one "automated external defibrillator" which is accessible to staff and guests, and to ensure that at least one employee who is trained in the proper use of such defibrillators be present on each working shift. A civil cause of action arising out of the use of a defibrillator in a health club does not exist unless the claim involves the failure to use the device, or wanton and willful negligence.