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2007 Survey of Rhode Island Law: Cases

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2007 Survey of Rhode Island Law

CASES

Civil Procedure. *Cassidy v. Lonquist Capital Management Co., et. al.*, 920 A.2d 228 (R.I. 2007). In deciding whether general or specific jurisdiction can be exercised over a non-resident defendant, it is appropriate to consider whether the defendant's trips to the forum state were made only on behalf of an employer, and never at his own direction or with his input; without voluntary contacts outside of employment, personal jurisdiction may be denied.

FACTS AND TRAVEL

The plaintiff and defendant in this case, both Massachusetts residents, worked together at a distribution company in Massachusetts; the defendant was a delivery truck driver who made regular deliveries to restaurants throughout New England, including Rhode Island.[1] At some time around July, 1998, according to plaintiff, while on a delivery trip the defendant viewed false information about plaintiff on a poster, and then tortiously disseminated this information; although the defendants and plaintiffs lived and worked in Massachusetts, and the allegedly tortious dissemination occurred in Massachusetts, the source of the information was a poster the defendant saw in Rhode Island, while defendant was making a delivery as part of his employment.[2] The plaintiff filed suit in Rhode Island, claiming the defendant "had cast him in a false light, violated his right to be secure from unreasonable publicity, and acted intentionally to inflict emotional distress upon him."[3]

The defendant filed a motion to dismiss for lack of *in personam* jurisdiction, which the trial judge granted, ruling that Rhode Island lacked both general and specific jurisdiction over the defendant.[4]

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1. Cassidy v. Lonquist Capital Mgmt. Co., et. al., 920 A.2d 228, 233 (R.I. 2007).
2. *Id.* at 231.
3. *Id.* at 230.
4. *Id.* at 230.

HOLDING AND ANALYSIS

Justice Goldberg's majority opinion noted the significance of the defendant's reasons for his trips to Rhode Island: the defendant "did not conduct business in Rhode Island on his own behalf; he delivered goods at the behest of his employer," and he had no "input into where he went or what deliveries he made."[5] Thus, notwithstanding that the defendant made approximately twelve trips to Rhode Island per year, the defendant could not be said to have "continuous and purposeful" contacts with the state.[6] The Court found that allowing general jurisdiction over an employee in any state to which he made deliveries for his employer "certainly would be at variance with fundamental notions of fairness" in personal jurisdiction, as required by cases such as *Casey v. Treasure Island at the Mirage*, 745 A.2d 743, 745 (R.I.2000) and *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), because a visit is not purposeful when it is done only at the direction of an employer.[7]

Further, the Court held that there was no specific jurisdiction in the case either, because the only connection between the litigation and defendant's contacts with the state was a single instance of viewing a poster made on a single delivery trip, which, according to the Court, cannot be considered a "*purposeful* availment of this state's jurisdiction," both because, again, the reason for the visit to the forum state was solely for the sake of the employer, and because all the allegedly tortious acts occurred in another state, making the connection between the forum and the litigation minor.[8]

COMMENTARY

Although personal jurisdiction is a "mixed question of law and fact" that requires a case-by-case analysis,[9] at the least, the decision here adds a potentially significant factor to determinations of personal jurisdiction: *why* a defendant visits a state can affect the exercise of personal jurisdiction.

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5. *Id.* at 233-34.
6. *Id.* at 233.
7. *Id.*
8. *Id.* at 234 (emphasis added).
9. *Id.* at 232.

In focusing on the motivation for a defendant's contacts with the forum state, the Court has chosen to emphasize the "purposeful" nature of those contacts, rather than their number; despite a dozen visits yearly and despite the location and discovery of information inside the forum state which was then used in the allegedly tortious dissemination at issue in the complaint, the lack of a personal motivation to visit the state appeared to be determinative.

As Justice Robinson stated in his concurring opinion, joined by Justice Flaherty, that the defendant came to the state "because his employer sent him here rather than because he opted to come here . . . has no bearing on the fact that he was indeed present here and conducted commercial activity here," which would seem to make the motive for the visits "legally *irrelevant*."[10] The concurrence notes that in deciding the defendant's "status as [an] employee[]" can in fact "insulate [him] from jurisdiction," the Court's reasoning would seem to conflict with statements of the United States Supreme Court in *Calder v. Jones*.

Interestingly, personal jurisdiction, as the concurrence also notes, could have been defeated in this case without an analysis of the defendant's motivation for his visits, because of the "*de minimus* nature of [defendant's] business dealings here";[11] that the Court chose to address the issue could imply it intends this line of inquiry to act as a primary focus for personal jurisdiction analysis.

The argument for denying personal jurisdiction is stronger for lower-level employees, whose jobs do not permit them the authority to set their schedules or act in the decision-making processes of a business – employees who have little personal stake in a business are perhaps not availing themselves of any opportunity to do business in a state, but are merely fulfilling their own job requirements; refusing to extend personal jurisdiction to such individuals acts to protect such defendants. On the other hand, as Justice Robinson notes, some jobs so clearly require travel – such as train conductors – that "one of the consequences of . . . accepting employment" of that type would be "the likelihood that [defendant] may be subject to the jurisdiction

10. *Id.* at 235 (J. Robinson, concurring) (emphasis in original).
11. *Id.*

of more than one forum";[12] when regular travel to other states is thus foreseeable, being haled to court in those jurisdictions appears less unreasonable.

CONCLUSION

With this case, the Court adds the factor of employee status to determinations of general and specific jurisdiction; if activities in the forum state are "at the behest of [the] employer" only, contacts may not be "purposeful" and personal jurisdiction may be lacking.[13]

Jessica Stanford

12. *Id.*
13. *Id.* at 233-34.

Civil Procedure & Evidence. *Franco v. Latina,* 916 A.2d 1251 (R.I. 2007). The Rhode Island Supreme Court affirmed the trial justice's grant of plaintiff's motion for judgment as a matter of law and the submission of the question of damages to the same jury after the jury returned a verdict for the defendant. The defendant identified a number of potential errors relating to the trial justice's rulings on the defendant's expert testimony, the plaintiff's motion for judgment as a matter of law, and defendant's motion for a mistrial and the subsequent jury determination of damages. The Rhode Island Supreme Court held that (1) striking the defendant's expert witness opinion testimony was not an abuse of discretion; (2) the trial court was justified in discounting the defendant's testimony as an expert in ruling on the plaintiff's motion for judgment as a matter of law; (3) uncontradicted testimony by plaintiff's experts on the applicable standard of care was not inherently improbable; (4) failure to grant a continuance after denying defendant's motion for mistrial was not an abuse of discretion; and (5) submission to the jury as to the amount of damages sustained by plaintiff as a result of defendant's negligence was not improper.

FACTS AND TRAVEL

On Super Bowl Sunday, 1996, the plaintiff, Linda J. Franco experienced severe stomach pain unrelated to another Dallas Cowboy championship win.[1] Franco was diagnosed with gallstones and informed that her gallbladder likely required removal.[2] Franco chose Dr. Joseph A. Latina, M.D. to perform the surgery and met with him on January 29, 1996, when he confirmed that her gallbladder did indeed require removal.[3] Franco expressed concern about the operation's timing because she was scheduled to leave on a Florida vacation later in the week.[4] Latina alleviated Franco's fears by informing her that the

1. Franco v. Latina, 916 A.2d 1251, 1253 (R.I. 2007).
2. *Id.*
3. *Id.* at 1253-4.
4. *Id.* at 1254.

surgical procedure he would use, a "laparoscopic cholecystectomy, required a very short recovery period, and that there would be no need to postpone her vacation."[5] Franco decided to have the surgery immediately and Latina completed the operation in twenty-six minutes with initially no indication of any difficulties or complications.[6]

On February 2, 1997 Franco's scheduled departure day for her vacation, she did not feel up to traveling and delayed the start of her vacation until February 4, 1997.[7] The Franco's drove to North Carolina on the first day of their trip, during which Franco did not feel well and "notice[d] that her skin and eyes looked a little yellow."[8] Franco phoned Latina from Jacksonville, Florida the next day because she believed her condition was deteriorating.[9] Latina told Franco "that she should wait a couple of days to see whether the problems she was experiencing diminished" and to seek medical attention in Florida if she did not improve.[10] Franco arrived at her sister's house in Florida feeling worse and was unable to sleep well or leave the house the next day.[11] The following day Franco sought medical attention at the emergency room at Sarasota Memorial Hospital.[12]

Franco met with a local gastroenterologist, Dr. Kuperman, in addition to emergency room personnel and underwent testing, revealing a blockage in her biliary system requiring a drain "inserted into her, which was attached to an external bag into which the excess bile produced by her system would flow."[13] Dr. Kuperman brought in local physician Dr. Brock to assist with

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5. Id.
6. *Id.* at 1254. The case reports that the consult with the surgeon occurred on 1/29/96, where Franco was upset after learning that she would need surgery because she was leaving on vacation "later that week." The case also reports that Franco's planned departure date for vacation was 2/2/97, which does not make chronological sense given that the consult was one year earlier. I suspect this is an error, but neither this case, nor the prior history of the case clears the confusion up.
7. *Id.*
8. *Id.* at 1255.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

Franco's case.[14] Dr. Brock concluded from the test results "that during the laparoscopic cholecystectomy part of Franco's common bile duct had been clipped and cut."[15] As a result, Franco would require major reconstructive surgery of her biliary system, which the two of them decided should be performed by Dr. Harold Wanebo in Rhode Island.[16] Once back in Rhode Island, Franco underwent successful reconstructive surgery.[17]

Franco filed a medical malpractice claim in Providence County Superior Court against Latina on May 21, 1996, alleging that he negligently performed the laparoscopic cholecystectomy and that he had failed to obtain her informed consent.[18] At a trial held from October 15 – 24, 2001 the jury returned a verdict in favor of Latina.[19] Franco presented expert testimony by Dr. Brock and Dr. Moossa, both of which testified that the standard of care "demands the correct identification of the cystic duct before any clipping and cutting occurs."[20] Latina relied on an article published by Dr. Strasberg, in which Dr. Strasberg posited that the infundibular technique Dr. Latina used to locate the cystic duct when performing Franco's surgery was inherently flawed.[21] Latina argued that the inherent shortcomings of this technique, while still within the standard of care, was the cause of Franco's injury and thus that he was not negligent.[22] Franco filed a motion for a new trial, which the Superior Court granted because Latina admittedly deviated from the standard of care articulated by both parties at trial.[23] Latina appealed the order for a new trial, arguing that the trial justice abused her discretion in granting it.[24] The Rhode Island Supreme Court affirmed the motion for a new trial and the case was returned to the Superior Court for a new trial.[25] Franco filed a motion *in limine* to prevent Latina

14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 1255-56.
20. *Id.* at 1256.
21. *Id.* at n. 7.
22. *Id.* at 1256.
23. *Id.*
24. *Id.*
25. *Id.*

from using the Strasberg article that was the foundation for the flawed technique defense in the first trial.[26] The trial justice granted the motion *in limine* in part, ruling that before evidence of the flawed technique could come in, Latina must put on "competent expert testimony that performance of certain techniques satisfied the standard of care for this procedure."[27]

The second trial began on February 14, 2006.[28] Franco again presented the same expert testimony that the standard of care requires the correct, "unmistakable identification of the anatomical structures to be cut."[29] Latina offered the expert testimony of Dr. Ferguson, who first testified that he objected to the concept of a standard of care and then that the standard of care was the same as that offered by Franco's experts.[30] When asked his opinion regarding Latina's negligence, Dr. Ferguson offered that Dr. Latina was not negligent, but rather Latina's misidentification of the anatomical parts was human error.[31] On cross-examination, Dr. Ferguson conceded that Latina had misidentified Franco's cystic duct and plaintiff moved to strike Dr. Ferguson's opinion that Latina was not negligent because it was not grounded in any articulated standard of care.[32] The trial justice granted plaintiff's motion to strike and defendant immediately moved for a mistrial on the grounds that the decision to strike the testimony was unduly prejudicial to defendant.[33] The trial justice denied the motion for a mistrial on the grounds that defendant had been given fair warning of the dangers of relying on the "flawed technique" defense and therefore reasoned that striking the testimony was not unfairly prejudicial.[34]

At the close of the second trial, Franco moved for a judgment as a matter of law, arguing that expert testimony established an uncontroverted standard of care, which was admittedly violated by Latina when he misidentified her common bile duct as her cystic duct and therefore his performance fell below the standard

26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 1256-57.
31. *Id.* at 1257.
32. *Id.*
33. *Id.*
34. *Id.*

of care and was negligent.[35] The trial justice reserved ruling on the motion and sent the case to the jury, which found for the defendant.[36] At this point, the trial justice considered the motion for judgment as a matter of law and decided that because the opinion testimony of Dr. Ferguson had been stricken from the record, the defense had not presented any expert testimony to controvert plaintiff's expert testimony on the standard of care and Latina's consequent negligence.[37] Therefore "it was legally impermissible for the jury to render a verdict for [the] defendant" because he had not adhered to the established standard of care.[38] The trial justice then asked the jury to make a determination on the amount of damages.[39] The defendant objected, arguing that it was "manifestly unreasonable and prejudicial to ask a jury to assess damages in a case in which the trial justice has determined that its verdict was unreasonable."[40] The jury, after some deliberation on damages, was confused on the issue of negligence and the trial justice instructed it that negligence was not an issue and just to decide what monetary damages Franco had incurred.[41] The jury returned a damage award of $525,000 and Latina appealed.[42]

ANALYSIS AND HOLDING

Latina identified four rulings by the trial justice that he believes compel reversal.[43] First, Latina argues that the decision to strike the opinion testimony of Dr. Ferguson was an abuse of discretion.[44] Second, Latina asserts that the trial justice improperly weighed the evidence and assessed the credibility of witnesses when considering plaintiff's motion for judgment as a matter of law.[45] Third, Latina advances that the trial justice committed error when she denied his motion for a mistrial after

35. *Id.* at 1257.
36. *Id.*
37. *Id.* at 1257-58.
38. *Id.* at 1258.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*.
45. *Id.*

Dr. Ferguson's testimony was stricken.[46] Finally, Latina claims the trial justice's decision to submit the damages question to the same jury that returned a favorable verdict on liability was unfairly prejudicial and therefore error.[47]

Doctor Ferguson's Opinion Testimony

The issue was whether the trial justice improperly struck the opinion testimony of Dr. Ferguson, the defense expert, when he opined that Dr. Latina was not negligent.[48] Expert opinion testimony must be grounded in "sufficiently articulated facts" such that the trial justice can "determine whether the opinion elicited has probative force or is merely speculative."[49] A trial justice's decision to allow expert opinion testimony may be reversed only for abuse of discretion.[50] Here, the trial justice decided to strike Dr. Ferguson's opinion testimony because it could not be reconciled with his opinion regarding the proper standard of care and not because Dr. Ferguson was unqualified as an expert or that he based his opinion on incorrect or inadequate facts.[51] Latina argues that the discrepancy between Dr. Ferguson's opinion and the proper standard of care does not warrant striking the opinion but instead goes to the weight of the evidence.[52] The Rhode Island Supreme Court held that the trial justice's decision to strike Dr. Ferguson's opinion testimony was not an abuse of discretion because she did not question Dr. Ferguson's credentials to testify as an expert but "aptly noted that his ultimate opinion with regard to negligence was not logically tied to what he conceded was the proper standard of care for the procedure."[53]

Judgment as a Matter of Law

The issue was whether the trial justice improperly applied the standard of review for a motion for judgment as a matter of law.

46. *Id.*
47. *Id.*
48. *Id.* at 1259.
49. *Id.* at 1258.
50. *Id.*
51. *Id.* at 1260.
52. *Id.*
53. *Id.* at 1261.

Latina does not dispute the correct standard was applied, but rather argues "that the trial justice did not properly apply [the] standard because she invaded the province of the jury by weighing the evidence and assessing the credibility of witnesses."[54] The Rhode Island Supreme Court held that the trial justice applied the proper standard because her decision was based on her finding that the expert testimony articulated an uncontroverted standard of care.[55] Furthermore, the Rhode Island Supreme Court noted that the trial justice did not mention any competing evidence that she weighed or discuss the relative believability of the plaintiff's experts as opposed to the defendant's witnesses.[56]

Latina, however, argues that the trial justice could not have reached her decision without weighing the evidence and assessing the witnesses' credibility.[57] A trial justice's decision "granting a motion for judgment as a matter of law will be overturned when the trial justice has 'invaded the province of the jury by impermissibly finding facts.'"[58] Specifically, Latina points to inconsistencies in the testimony of the plaintiff's expert witnesses.[59] Latina argues that during discovery and litigation Dr. Brock testified that Franco's injury could have happened even if the standard of care were followed.[60] The Rhode Island Supreme Court held that the specific testimony Latina pointed to did not show that Dr. Brock believed misidentification of the cystic duct could occur within the standard of care.[61] Both plaintiff's experts' testimony agreed that the standard of care requires conclusive, unmistakable, in-fact identification of the cystic duct.[62] Therefore, the Rhode Island Supreme Court held that the trial justice could not have "'found facts' when all she [did] is accept uncontradicted testimony" and thus did not improperly weigh the evidence or assess the credibility of the witnesses.[63]

Latina next argues that the trial justice improperly dismissed

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54. *Id.*
55. *Id.* at 1261-62.
56. *Id.* at 1262.
57. *Id.*
58. *Id.* at 1263.
59. *Id.*
60. *Id.* at 1262.
61. *Id.*
62. *Id.* at 1263.
63. *Id.*

his personal testimony as an expert that the standard of care required only that a surgeon be certain in his own mind that the anatomical structure he was cutting was the cystic duct.[64] The trial justice explained in ruling on the motion for judgment as a matter of law that Latina's personal expert testimony "was discounted because it was not elicited to a 'reasonable degree of medical certainty,' as is required of expert medical testimony."[65] Furthermore, the plaintiff properly requested disclosure of all the defendant's experts and the defendant was not on the list.[66] When deciding whether to grant a motion for judgment as a matter of law, the trial justice must find that the evidence in the aggregate does not raise a legally sufficient question of fact to be decided by the jury and not that there is no evidence in opposition to the result sought by the moving party.[67] Because Latina's testimony did not meet the standard for expert medical opinion, the Rhode Island Supreme Court held that the trial justice did not improperly apply the standard for deciding a motion for a judgment as a matter of law when she found that Latina's testimony did not present a question of fact for the jury.[68]

Finally, Latina argues that the trial justice was not required to accept the uncontroverted testimony of the plaintiff's experts because it was inherently improbable.[69] Latina argues that Moossa's testimony that Latina must have made two cuts when cutting the common bile duct, even when the procedure calls for one is inherently improbable because if true, then Latina must have known he had made a mistake.[70] For a witnesses' testimony to be improbable, it must go against common sense.[71] Here, Latina would infer from Moossa's testimony that the defendant made two cuts *and* was aware of that fact *and* chose not to correct his mistake.[72] The Rhode Island Supreme Court pointed out that Dr. Moossa never testified to that and nor was it a reasonable inference from his testimony and therefore held that the trial

64. *Id.*
65. *Id.*
66. *Id.* at 1263-64.
67. *Id.* at 1264.
68. *Id.* at 1265.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 1265 (emphasis provided).

justice properly accepted the uncontroverted expert opinion testimony of Drs. Brock and Moossa because it was not inherently improbable.[73] Therefore, the Rhode Island Supreme Court held that the trial justice properly granted plaintiff's motion for judgment as a matter of law.[74]

Motion for Mistrial

The issue was whether the trial justice abused her discretion when she denied defendant's motion for a mistrial after striking defendant's expert witness opinion testimony.[75] A trial justice has discretion to determine whether to grant a mistrial.[76] Latina argues that striking his expert's opinion testimony was unfairly prejudicial and thus he should be granted a mistrial or at the very least a continuance.[77] Here, however, Latina did not request a continuance.[78] Furthermore, the trial justice explained that defendant had fair advance warning that such testimony was vulnerable to a motion to strike and therefore the Rhode Island Supreme Court held that it was not an abuse of discretion to deny defendant's motion for a mistrial.[79]

Jury Determination of Damages

The issue was whether the trial justice erred by submitting the question of damages to the same jury.[80] Latina cites Rule 49 of the Superior Court Rules of Civil Procedure in support of his argument.[81] Latina argues that submission of the question of

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73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 1266.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at n.17.

Rule 49 of the Superior Court Rules of Civil Procedure reads:

> "(a) *Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use

damages to the jury was a special interrogatory that asked the jury to render a new verdict inconsistent with its general verdict and as such was impermissible.[82] Latina also argued that because the jury knew the trial justice had overruled it, that it would be inclined to return a higher than justified damages award.[83] The Rhode Island Supreme Court held that the trial justice did not send a special interrogatory to the jury but rather asked it to answer a second question that was only slightly different from the question on the original general verdict form and that defendant's second argument about the damages award

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such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

"(b) *General Verdict Accompanied by Answer to Interrogatories.* The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

"(c) *Verdicts on Multiple Counts.* In cases tried by a jury on more than one count, the court may require the jury to return a separate verdict as to each count."

82. *Id.* at 1267.

83. *Id.*

was "specious at best."[84] Therefore, the Rhode Island Supreme Court rejected Latina's assertion that it was error to ask the same jury to determine damages.[85]

COMMENTARY

This case is significant because jury verdicts are rarely set aside and judgments as a matter of law awarded. Here, not one jury, but two, held Dr. Latina complied with the appropriate standard of care. How could two juries both come to the same 'incorrect' conclusion? The reason for disregarding the jury's verdicts in both cases was based on the same premise – that both party's experts articulated an uncontroverted standard of care. This reason exemplifies that the correct standard used was used when reviewing the evidence in this motion for judgment as a matter of law. The standard requires that the trial justice view "the evidence in the light most favorable to the nonmoving party [and] determine[] that the nonmoving party has not presented legally sufficient evidence to allow the trier of fact to arrive at a verdict in his favor."[86] Therefore, because there was no conflicting testimony regarding the standard of care required of a surgeon, the trial justice properly found that there was no basis that a jury could find for the defendant in this case.

CONCLUSION

The Rhode Island Supreme Court found after a thorough review of the record and examination of defendant's arguments that the trial justice was correct when she entered judgment as a matter of law for the plaintiff. The Rhode Island Supreme Court held that (1) striking the defendant's expert witness opinion testimony was not an abuse of discretion; (2) the trial court was justified in discounting the defendant's testimony as an expert in ruling on the plaintiff's motion for judgment as a matter of law; (3) uncontradicted testimony by plaintiff's experts on the applicable standard of care was not inherently improbable; (4) failure to grant a continuance after denying defendant's motion for mistrial

84. *Id.*
85. *Id.*
86. *Id.* at 1259.

was not an abuse of discretion; and (5) submission to the jury as to the amount of damages sustained by plaintiff as a result of defendant's negligence was not improper.

B Jen Lemieux

Civil Procedure. *Lamarque v. Fairbanks Capital Corp. et al*, 927 A.2d 753 (R.I. 2007). In this case of first impression, the Rhode Island Supreme Court determined the proper scope of review when an absent class member collaterally attacks on lack of due process grounds the binding effect of a class action judgment entered by a foreign court.[1] After discussing competing views on the issue, the court adopted the narrower of the two approaches and held that the scope of review is limited to an examination of whether the procedures adopted by the foreign court were adequate to insure due process was afforded.[2] The court found that in the present case the notice procedures adopted by the foreign court were adequate and there were no errors in their application, and thus affirmed the Superior Court's grant of summary judgment in favor of the defendant.[3]

FACTS AND TRAVEL

This case arises out of defendant Fairbanks Capital Corp.'s ("Fairbanks") foreclosure on property owned by Kathy Lamarque ("Kathy") and Andre Lamarque ("Andre").[4] Fairbanks had serviced the loan resulting from Kathy and Andre's 1995 refinance of their property, the note for which was secured by the property.[5] In 2001, after a dispute regarding whether and by how much the loan obligations were in default, Fairbanks foreclosed on the property and it was sold to Anthony P. Ciccarone ("Ciccarone").[6] Seeking damages and to have the foreclosure declared void, Kathy and Andre filed suit on January 18, 2002 naming Fairbanks and Ciccarone as defendants and alleging illegal foreclosure, breach of an implied contract not to foreclose, and use of deceptive trade

1. Lamarque v. Fairbanks Capital Corp., 927 A.2d 753, 759-60 (R.I. 2007).
2. *Id.* at 762-65.
3. *Id.* at 766-67.
4. *Id.* at 755.
5. *Id.*
6. *Id.*

practices by Fairbanks.[7] According to Kathy, in the course of negotiations regarding the status of the loan, Fairbanks had advised her that foreclosure would not be initiated until 2002.[8] In addition, although she sent Fairbanks partial payment checks, it would not cash or deposit them, and would continually change the amount it stated was necessary to bring the mortgage current.[9]

Concurrently, *Curry v. Fairbanks Capital Corp.*, a class action suit making allegations almost identical to those made by Kathy and Andre was filed against Fairbanks in the United States District Court for the District of Massachusetts.[10] After the parties presented a settlement agreement to the court, it held a fairness hearing and entered a final order certifying the class and approving the settlement agreement on May 19, 2004.[11] Kathy, however, never received individual notice of the suit or the settlement.[12]

In September 2004, Fairbanks moved for summary judgment in Rhode Island suit on the grounds that *res judicata* barred the plaintiffs' action because, "as absent class members who had not opted out of the class action, they were bound" by the final judgment entered in *Curry*. [13] Kathy argued that "her claims were not encompassed by the claims covered" in *Curry*; "that, even if she was covered by the class action, her type of claim against Fairbanks was expressly excepted"; and "that she was not provided proper notice" of that suit or its settlement.[14] The hearing justice disagreed with each of these arguments and thus granted summary judgment in favor or Fairbanks.[15] The court entered final judgment, and Kathy, but not Andre, appealed to the Rhode Island Supreme Court.[16] Ciccarone then moved for and was granted summary judgment, only Kathy appealed, and her two appeals were consolidated.[17]

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7. *Id.*
8. *Id.* at 757 n.12.
9. *Id.*
10. *Id.* at 755, 757 n.12.
11. *Id.* at 755-56.
12. *Id.* at 760 n.16.
13. *Id. at* 756.
14. *Id.*
15. *Id.*
16. *Id.* at n.10.
17. *Id.* at n.11.

ANALYSIS AND HOLDING

The Rhode Island Supreme Court initially addressed what it found to be the least complex of plaintiff's arguments: that she was not bound by *Curry* because her claims were either not covered by the definition of the certified class or expressly excepted from the settlement.[18] The court then devoted the majority of its opinion to the less straight-forward issue of whether plaintiff was not bound by *Curry* because she was not afforded adequate notice and thus, the process she was due.[19]

First, the court found that plaintiff clearly fell within the class in *Curry*, which the settlement agreement defined as including as all persons whose loans were serviced by the defendant during a specified time period and who were either in default, or treated by Fairbanks as being in default.[20] The court quickly dismissed three arguments raised by plaintiff, finding that she was in fact a borrower because she was listed as such on the loan documents, that she was a class member within the definition regardless of whether her name appears on the class member list, and that the settlement "indisputably was intended to encompass individual claims as well as pending or potential class actions."[21]

Next, the court found that plaintiff's claim did not qualify for exception from the settlement agreement as a reserved claim or defense because the plaintiff commenced her action after foreclosure on her property was complete, while the exception was for claims or defenses asserted in regards only to pending or future foreclosures.[22]

Finally, the court discussed plaintiff's claim that the notice of the *Curry* suit and settlement afforded to her was inadequate, and that therefore, she was not bound by the final judgment in that suit.[23] Refraining from review of plaintiff's and defendant's substantive arguments on the issue, the court instead turned its attention to the "difficult threshold question: when a party seeks to invoke a prior class action judgment against another party in a

18. *Id.* at 757.
19. *Id.* at 757-67.
20. *Id.* at 758.
21. *Id.*
22. *Id.* at 759, 765.
23. *Id.* at 759-60.

foreign court, what scope of review should the latter court employ when it determines whether due process was afforded to the party against whom enforcement is sought?"[24]

The court found that although the United States Supreme Court had not yet directly addressed the issue of what the proper scope is for collateral review of a class action judgment, two different approaches had emerged from courts that had previously considered the question.[25] Agreeing with reasoning of the Ninth Circuit and the South Carolina Supreme Court, the Rhode Island Supreme Court adopted the narrow scope of review limited "to consideration of 'whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue.'"[26] Rather than "substantive analysis of the merits," which the Second Circuit's more broad scope of review would involve,[27] the limited scope of review adopted by the Rhode Island Supreme Court only requires determination of "'whether there were safeguards in place to guarantee sufficient notice and adequate representation'" and "'whether such safeguards were, in fact, applied.'"[28]

Applying this newly adopted scope of review to plaintiff's inadequate notice grievance, the court found that procedurally, there were "adequate safeguards in place" in *Curry* "to guarantee sufficient notice to all."[29] The court noted that a fairness hearing in *Curry* confirmed that the notice methods adopted had been complied with and that "significantly" plaintiff "presented no evidence showing any infirmity with the notice procedure either in the mandate itself or in the manner in which it was complied."[30]

Unable to reach the merits of plaintiff's complaint that notice was inadequate because she received no notice, despite the fact that the procedures in *Curry* should have afforded her notice if properly followed, the court advised plaintiff her only recourse was

24. *Id.* at 760.
25. *Id. at 762.*
26. *Id.* (quoting Epstein v. MCA, Inc., 179 F.3d 641 (9th Cir. 1999).
27. *Id.* at 763-64.
28. *Id.* at 765 (quoting Hospitality Mgmt. Ass'n v. Shell Oil Co., 591 S.E.2d 611 (S.C. 2004)).
29. *Id.* at 765.
30. *Id.* at 766.

with the court that rendered the judgment in *Curry*. Consequently, the court affirmed the judgment of the Rhode Island Superior Court.[31]

Justice Robinson's Dissent

In his brief dissent, Justice Robinson expressed his concern that the narrow scope of review adopted by the majority did not sufficiently respect a plaintiff's right to choose his or her own forum, and that a more broad scope of review would better align with fundamental right to notice protected by due process guarantees.[32]

COMMENTARY

The Rhode Island Supreme Court's decision bolsters the finality of class action judgments because it closes off one avenue of attack for an unsatisfied absentee class member seeking to escape the binding effect class action judgment. On the one hand, the decision is in accord with the principle of full faith and credit and the goal of finality in class action litigation. To the extent that finality provides an important incentive to settlement, the more broad scope of review rejected by the court could, in theory, have had the potential to dissuade some defendants from agreeing to settle.

On the other hand, the decision seemingly conflicts with traditional notions of due process. In a non-class action suit, a party may collaterally attack, in a forum of his or her choosing, the judgment of a foreign court on the grounds that the court lacked personal jurisdiction, and the reviewing court will undertake a substantive analysis of the claim. Under the court's holding however, an absent class member wishing to collaterally attack a class action judgment looses his or her choice of forum; recourse is with the court that entered the judgment. In this case, because the geographic distance between the Rhode Island Supreme Court and the *Curry* court is not insurmountable, the effect of the loss of choice of forum may not be dramatic. However, geographic distance could potentially make a challenge by an

31. *Id.* 766-67.
32. *Id.* at 767.

absent class member impracticable if the forum is restricted to the court rendering the judgment.

The court did note that "[s]ignificantly, plaintiff [] presented no evidence showing any infirmity with the notice procedure either in the mandate itself or in the manner with which it was complied,"[33] which leaves open the question of whether the result would have been different if Kathy Lamarque had presented such evidence. However, the fact that if the notice procedures in *Curry* had been properly followed, Kathy Lamarque would have been mailed individual notice, might in itself be considered evidence that there was an infirmity with Fairbanks' compliance with those procedures.

Ultimately, the practical repercussions of the court's adoption of this scope of review will depend not only on how often an absent class member seeks to challenge a class action judgment in a foreign court, but also whether recourse with the court issuing the judgment is a geographically viable option for the party seeking to escape the binding effect of the judgment.

CONCLUSION

In this case of first impression, the Rhode Island Supreme Court held that the scope of review when a party collaterally attacks a judgment in a class action suit entered by a foreign court is limited to an examination of whether the procedures employed by the foreign court adequately safeguarded the plaintiff's due process rights. In the instant case, because the court found the notice procedures adopted by the *Curry* court in the class action suit were adequate and that the *Curry* court had also found that the procedures were complied with, the plaintiff's collateral attack failed and *res judicata* barred her claim. Accordingly, the court affirmed the Superior Court's grant of summary judgment and entry of final judgment in favor of the defendant.

Stephanie J. Bowser

33. *Id.* at 766.

Civil Procedure. *Marcil v. Kells*, 936 A.2d 208 (R.I. 2007). The Rhode Island Supreme Court overturned a jury verdict of civil conspiracy and slander against two defendants who in the year 2000 were both on the ballot in the Providence, RI, Democratic primaries. In a decision written by Justice Flaherty, the Court vacated the Superior Court judgment because the Court determined that the alleged statements made were not, in fact, defamatory.

FACTS AND TRAVEL

The Plaintiff, James D. Marcil, was a serviceman at the Providence Gas Company (hereinafter "Gas Company").[1] In August of 2000, the Plaintiff approached a Mr. John F. Morris at Morris' plumbing supply store, Charron Supply, to discuss a campaign sign which was displayed prominently on the premises.[2] The sign promoted the candidacies of the Defendants, Robert T. Kells and Thomas C. Slater, for the state Senate and House of Representatives, respectively.[3] At the time, Kells was involved in a "hotly contested" primary race and Slater supported Kells, although he himself had no primary opponent.[4]

It was undisputed that a "pointed conversation" occurred between the Plaintiff and Morris about the sign, but the parties disputed what was actually said.[5] In a statement to the police, the Plaintiff claimed he told Morris that he was not comfortable doing business with Charron Supply with the sign on the premises, because it appeared the business was taking a political position.[6] At trial, the Plaintiff testified that he told Morris "he should take down the sign because Morris probably would lose business by supporting any candidate in a contested race."[7]

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1. Marcil v. Kells, 936 A2d. 208, 209 (R.I. 2007).
2. *Id.*
3. *Id.* at 210.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

Morris testified that his decision to take the sign down was a business decision made in direct response to his conversation with the Plaintiff.[8]

In a letter memorializing his conversation, Morris wrote that the Plaintiff "stated his opposition to. . . Mr. Kells and asked that [the business] not support him for reasons he gave."[9] Morris recounted that the Plaintiff stated he worked at the Gas Company, lived in the neighborhood and had spoken to many neighbors and Gas Company employees who shared his view.[10] According to Morris, the Plaintiff further stated that if Charron Supply supported Kells, that the community would not support Charron Supply.[11] However, Morris wrote that the plaintiff "never threatened any influence over gas company business."[12]

When Defendant Kells learned of the sign's removal, he went to speak with Morris.[13] Morris testified that he told Kells someone in the neighborhood, who worked at the Gas Company, had objected to the sign.[14] Morris denied telling Kells that the Plaintiff had threatened exercising influence over Gas Company business if the sign was not removed.[15] Kells later testified that Morris told him he had taken down the sign to avoid community problems, because the Plaintiff had told Morris that the community objected to the sign.[16]

Kells related his conversation with Morris to Defendant Slater.[17] Although his account of their conversation varies slightly from Slater's, Kells testified he told Slater that the Plaintiff, wearing his Gas Company uniform, had insinuated that the Gas Company would not do business with Charron Supply if Morris did not remove the sign.[18] Slater testified that Kells said that the Plaintiff told Morris he had many friends in the community who would look unfavorably on the store if Morris did

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 209-10.
12. *Id.* at 209.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*

not remove the sign, but denied that Kells mentioned anything about the Gas Company's not doing business with Charron Supply.[19]

Soon thereafter "an upset Kells" went to the Plaintiff's home.[20] The plaintiff testified that Kells accused him of removing the sign and said, "I'll get you, win or lose this election, I'm going to get you."[21] The Plaintiff also testified that Kells then got in his car, drove a few feet, stopped, got out, and yelled, "Do you know who Bob Owens is?"[22] At that time, Bob Owens was the Gas Company's vice president.[23]

Slater then took action of his own and called his longtime friend, Helen Toohey, a community relations representative at the Gas Company.[24] The parties dispute Slater's exact words to Toohey.[25] Toohey testified "I guess. . . that [the plaintiff] found those political signs to be offensive and in fact likely, if [Morris] didn't remove those signs that [the] Gas Company would not do business with him."[26] Toohey said she accepted Slater's comments as a complaint, treated the comments like any other complaint, and referred the matter to her supervisor.[27] Slater denied ever mentioning Gas Company employees in that conversation.[28]

Shortly thereafter, the Plaintiff's supervisors called him in for a meeting, along with his union representative.[29] The supervisors said that if the Plaintiff was holding himself out as a representative of the Gas Company when he confronted Morris, his actions could amount to extortion for which he could be subject to discipline or termination.[30] The Plaintiff testified that the references to possible allegations of extortion caused him significant anxiety.[31]

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19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 211.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*

Thereafter, the Plaintiff went back to see Morris who subsequently wrote the above-referenced letter describing their initial conversation.[32] The Plaintiff was "overjoyed" because he believed that the letter exonerated him, but testified that he continued to experience retaliation, recounting statements Kells made to him when he went to vote on election night, as well as various customer complaints that were placed in his personnel file.[33] The Plaintiff testified that in his eighteen-year career at the Gas Company he had never received a single customer complaint prior to the incident.[34]

A year after the initial conversation with Morris, the Plaintiff filed this action alleging that the Defendants conspired to slander his reputation and cause him injury by defaming him to his employer, among other claims.[35] At the conclusion of their case, the Defendants filed a motion arguing that no evidence had been produced to support a claim of slander per se, and that any statements made by either Defendant were not defamatory because they were substantially true.[36] The trial justice denied the motion because he found that reasonable minds could differ as to both issues.[37]

The jury found the Defendants guilty and returned a verdict of $50,000 in the Plaintiffs favor.[38] The Defendants presented motions for a new trial, judgment as a matter of law and remittitur.[39] The trial court conditionally granted the motion for a new trial unless the Plaintiff accepted a remittitur, reducing the amount of the judgment to $20,000.[40] Although the Plaintiff accepted the remittitur, the Defendants appealed to the Rhode Island Supreme Court.[41] The Plaintiff, in turn, filed a cross appeal.[42]

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32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 40.
41. *Id.*
42. *Id.*

ANALYSIS AND HOLDING

The Defendants presented a number of issues on appeal, including that the lower court should have found that their statements were not defamatory.[43] The Supreme Court agreed that the statements were not defamatory and accordingly held that the trial justice erred when he denied the Defendant's motion as a matter of law.[44] As a result, the Court did not have occasion to address the other issues raised on appeal.[45]

When the Supreme Court reviews a denial of a judgment as a matter of law it considers the evidence in the light most favorable to the non-moving party, drawing from the record all reasonable inferences that support the position of the non-moving party.[46] The court must deny judgment as a matter of law if factual issues exist upon which reasonable people may draw different conclusions.[47] Whether the meaning of a particular communication is defamatory, however, is a question of law for the court to decide, rather than a factual issue for the jury to decide.[48]

To prevail in a defamation action, a plaintiff must show that the statement is "false and malicious, imputing conduct which injuriously affects a man's reputation, or which tends to degrade him in society or bring him into public hatred or contempt."[49] A plaintiff must show that the statement was defamatory on its face, or by way of innuendo.[50] The decisive question is what the person(s) to whom the communication was made reasonably understood as the meaning intended to be expressed.[51]

The Supreme Court did not agree with the trial justice that the statements at issue were defamatory per se.[52] A statement is defamatory per se if it charges improper conduct, lack of skill or integrity in one's profession or business, and is of such a nature that it is calculated to cause injury to one in his profession or

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43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 213.
49. *Id.* at 212.
50. *Id.* at 213.
51. *Id.*
52. *Id.*

business.[53] The disparaging words must affect the plaintiff in some way that is peculiarly harmful to one engaged in his trade or profession; disparagement of a general character, equally discreditable to all, is not enough unless the particular quality is especially valuable to the plaintiff's business or profession.[54] Thus, "the imputation of moral misconduct is not actionable per se to a tradesman, though it might be if spoken about a clergyman."[55]

The Rhode Island Supreme Court held that the statements were not defamatory per se "because they neither harmed the plaintiff's business reputation nor alleged that he committed any crime, either on their face or by any reasonable connotation."[56] The Court based its determination of the facts on Toohey's testimony because they determined it was the version more injurious to the Plaintiff.[57] The Court held that even Toohey's version of Slater's statements did not in any way harm the Plaintiff's business reputation.[58] The Court disagreed with the Plaintiff's argument that Slater's statements did harm to the Plaintiff's business reputation in that Slater accused him of dishonesty.[59] The Court referred to a dictionary definition of "dishonesty" which included a disposition to lie, cheat or steal, and determined that Slater's words did not address any of these characteristics.[60] Thus, the Court held that Slater's statements to Toohey did not harm the Plaintiff's business reputation.[61]

The Court further determined that the statements at issue, on their face, did not accuse the Plaintiff of committing any crime.[62] A defendant must allege the essential elements of a crime for his statements to be considered defamatory per se.[63] Here, the Plaintiff alleged that Slater accused him of committing

53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 214.
63. *Id.*

extortion.[64] In Rhode Island, extortion consists of an oral or written threat to harm a person or property, which is accompanied by the intent to compel someone to do something against his or her will.[65]

The Court determined that none of Slater's words alleged that the Plaintiff threatened Morris with the intent to compel him to act unwillingly.[66] Rather they held that his statements, at most, amounted to a suggestion of a potential economic boycott of Morris' business.[67] The court reasoned that Toohey's reaction to the statements supported this conclusion, because she treated the statements as a standard complaint, not a criminal charge.[68] Although the Plaintiff's supervisors later used the word extortion, Toohey testified that Slater never used that word.[69]

The Court further determined that no reasonable connotation of Slater's statements about the Plaintiff could be said to be defamatory because there were no extrinsic factors known by Toohey that would have led her to believe that the statements harmed the Plaintiff's business reputation or charged him with the commission of a crime.[70] Innuendo may be used to define the defamatory meaning of words, but it cannot be used to enlarge the meaning of words or give to language a construction it will not bear.[71]

The Court reasoned that the Plaintiff offered no extrinsic factors known to Toohey that would support the proposition that Slater's statement connoted defamation, or that Toohey interpreted Slater's words to be defamatory.[72] Justice Flaherty observed that none of the words Slater used are susceptible to a secondary defamatory meaning.[73] Because the Court determined that the meaning of Slater's words could not be enlarged to show that the statements either harmed the Plaintiff's business reputation or alleged that he committed a crime, they held that

64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 215.
72. *Id.*
73. *Id.*

the Defendants' motion as a matter of law should have been granted.[74]

COMMENTARY

Justice Flaherty began his opinion with a reminder that "political campaigning, especially on the party primary election level, is not a game for the faint of heart."[75] The Plaintiff alleged clearly inappropriate conduct on the part of Defendant Kells.[76] This case, however, hinged entirely on what Defendant Slater said to Toohey. The extrinsic factors that the Plaintiff stressed, including that Defendant Kells intimidated him at his home and at the polls, could not add any meaning to the words spoken by Defendant Slater because Toohey was not aware of those encounters.[77]

Justice Flaherty accurately characterized this case as a "he said, she said" dispute.[78] I believe it can be further characterized as a case in which, assuming the Plaintiff's account is true, at least one of Defendants clearly behaved badly, but in which the Plaintiff nonetheless failed to state a claim upon which relief could be granted. The Court, by overturning a jury verdict, sent a strong message that it is difficult to establish a claim of civil conspiracy and slander in Rhode Island.

CONCLUSION

The Rhode Island Supreme Court vacated the lower court's judgment of civil conspiracy and slander against the two defendants because the court determined that Slater's statements to Toohey were not, in fact, defamatory.

Sally P. McDonald

74. *Id.*
75. *Id.* at 209. .
76. See *Id.* at 211.
77. *Id.* at 214.
78. *Id.* at 211.

Constitutional Law. *Mackie v. State*, 936 A.2d 588 (R.I. 2007). The Equal Protection Clause of the Rhode Island State Constitution is not violated by § 42-128.1-8(e)(4), an exemption from the Lead Hazard Mitigation Act for owner-occupied, two- and three-unit rental properties. The Rhode Island Supreme Court found that because the Rhode Island General Assembly might conclude that the classification of rental properties was rationally related to realizing the goal of targeting areas where lead poisoning in children was most prevalent, the classification did not violate the Equal Protection Clause.

FACTS AND TRAVEL

The Rhode Island General Assembly enacted the Lead Hazard Mitigation Act (LHMA) in 2002, and after two postponements, it went into effect on November 1, 2005.[1] *To "promote the prevention of childhood lead poisoning in Rhode Island" the General Assembly intended:*

"(1) To increase the supply of rental housing in Rhode Island in which lead hazards are, at a minimum, mitigated; (2) To improve public awareness of lead issues and to educate both property owners and tenants about practices that can reduce the incidence of lead poisoning; (3) [and] [t]o resolve disjointed insurance practices arising from lead liabilities exclusions."[2]

As originally enacted, the LHMA required all owners of rental residences constructed prior to 1978 to (1) attend a lead hazard awareness seminar; (2) assess rental units and property for lead hazards; (3) correct lead hazards to meet the lead hazard mitigation standard; (4) provide tenants with information; and (5) within thirty days after notification correct lead hazards.[3] However, before the LHMA came into effect in 2005 it was

1. Mackie v. State. 936 A.2d 588, 590-91 (R.I. 2007). (Originally, the LHMA was scheduled to apply to the first change in tenancy after July 1, 2004. The Act ultimately came into effect on November 1, 2005 after postponement first to July 1, 2005 and then to the November date.).
2. *Id.* at 590.
3. *Id.*

amended to include an exemption from these duties for certain property owners of pre-1978 rental dwellings.[4] Included in the exception are units "comprised of two (2) or three (3) units, one of which is occupied by the property owner."[5] Finally, the call for the department of health to "report to the legislature annually on the number of children who are lead poisoned in any of the exempted dwelling units" ensured monitoring of childhood lead poisoning in exempted apartment units would continue, thereby placing a check on the exemption.[6]

Owners of rental properties in Rhode Island brought suit on the grounds that the exemption from the LHMA found in subsection (e)(4) for owner-occupied rental properties comprised of two- or three-units.[7] The Plaintiffs claimed that the distinction between owner-occupied two- and three-unit residences and owner-occupied four- and five-unit residences was arbitrary.[8] In addition to seeking declaratory and injunctive relief, the Plaintiffs asked that the Court declare the LHMA unconstitutional and enjoin the state from enforcing it.[9]

At trial the Plaintiffs and the state both introduced numerous evidentiary exhibits and affidavits.[10] Despite evidence presented by the State that showed conceivable reasons for distinguishing between owner-occupied and non-owner-occupied properties, the trial justice held that § 42-128.18(e)(4), an exemption to the LHMA, violated the Equal Protection Clause of the Rhode Island Constitution and was therefore unconstitutional.[11] The trial justice found "'no rationale basis for allowing the children who live in these two- and three-unit owner-occupied buildings to be at risk while children living in other units

4. *Id.* at 590. *See also* R.I. GEN. LAWS § 42-128.1-8(e) "Notwithstanding the foregoing, the provisions of this chapter shall not apply to common areas in condominium complexes that are owned and operated by condominium associations, or to pre-1978 rental dwelling units that are: (1) Lead safe or lead free; or (2) Temporary housing; or (3) Elderly housing; or (4) Comprised of two (2) or three (3) units, one of which is occupied by the property owner."
5. *Id.* at 591.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 591-94.
11. *Id.* at 594.

enjoy the protections of the [LHMA].'"[12] Furthermore, the trial justice saw no reason for children of owner-occupied apartments to be at the "'tender mercies'" of the building's owners, while children in non-owner-occupied apartments enjoyed the "'salubrious benefits'" of the LHMA.[13]

This case came before the Rhode Island Supreme Court in a unique fashion because despite deciding that the LHMA was unconstitutional, the trial justice did not enjoin the state from enforcing the statute.[14] The trial justice instead encouraged the state legislators to revisit and revise the LHMA.[15] The trial justice refused to enter a final judgment from which appeal could be sought denying the state's motion for entry of final judgment on January 30, 2006 and subsequently denying the state's motion of March 6, 2006 to stay the decision.[16] The state petitioned the Rhode Island Supreme Court for a writ of certiorari on March 14, 2006.[17]

ANALYSIS AND HOLDING

In its appeal to the Rhode Island Supreme Court, the state asserted three legal errors. First, the state contended that the trial justice erred in finding that the exemption to the LHMA violates the Rhode Island Constitution.[18] The second argument the state made was that trial justice shifted the burden of proof for the rational basis test improperly.[19] Finally, the state complained that the denial of its motion for final judgment made any other form of appellate review impossible.[20]

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12. *Id.* (quoting Mackie v. State, No. C.A. PC05-5144, 2006 WL 61053 at *9 (R.I. Super. Ct. Jan. 10, 2006)).
13. *Mackie*, 936 A.2d at 595 (quoting *Mackie*, 2006 WL 61053 at *9).
14. *Mackie*, 936 A.2d at 595.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* When a trial judge in Rhode Island makes a final judgment, that judgment is automatically appeallable to the Rhode Island Supreme Court because the State does not have an appellate court. The Rhode Island Constitution provides the Rhode Island Supreme Court with "final revisory and appellate jurisdiction upon all questions of law and equity." *See* R.I. CONST. art. 10 § 2. Therefore, without a final judgment from the trial court, it is harder for a party to have his case heard at the Rhode Island Supreme

The Supreme Court's Standard of Review

In the opinion written by Chief Justice Williams, the Rhode Island Supreme Court began by establishing the standard of review it employed for issues regarding the constitutionality of a state law. The Court "presumes that [a] legislative enactmen[t] [is] valid and constitutional" and will not find it unconstitutional unless the challenging party can prove beyond a reasonable doubt that the Act violates a specific provision of the Rhode Island or the United States Constitution.[21]

Equal Protection

Of the three issues raised on appeal, the Rhode Island Supreme Court specifically addressed only the plaintiffs' argument that the exception to the LHMA violates the Equal Protection Clause of the Rhode Island Constitution by discriminating against owners of rental property with four or more dwelling units.[22] The Court applied the rational basis test because the LHMA does not encroach upon a fundamental right.[23] Under this test, the statute is upheld as constitutional if the Court conceives any reasonable basis to justify the classification.[24] The intent of the Legislature was when it passed the legislation is irrelevant to the finding.[25]

In applying the rational basis test, the Court established that the proper inquiry was "whether the General Assembly rationally could conclude that the legislation would resolve a legitimate problem."[26] Therefore, LHMA would only violate the Equal Protection Clause if the classification it established rested on grounds "wholly irrelevant" to achieving the state's objective.[27] Finally, the Court established that the burden is on the challenging party to "negate *every* conceivable basis" which might

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Court because he must petition and have granted a writ of certiorari.

21. *Id.* at 595.

22. *Id.* (quoting R.I. CONST. art. 1 § 2 ("nor shall any person be denied equal protection of the laws.")).

23. *Mackie*, 936 A.2d at 596.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

support the legislative classification.[28]

The exemption to the LHMA treats owners of owner-occupied two- and three-units differently than owners of rental properties the same size that do not live on the property, and owners of properties with four or more rental units. Despite this disparate treatment, the Court concluded that the General Assembly could rationally have decided that the LHMA took a step toward reducing the lead poisoning of Rhode Island's children.[29]

The state was not required to support the LHMA exemption with empirical evidence, but provided affidavits from professionals who identified studies showing that children with lead poisoning were less likely to live in owner-occupied rental properties than non-owner-occupied residences.[30] Persuaded by these affidavits, the Court read the trial justice's holding that there was "'no rational basis for allowing the children who live in these two[-] and three-unit owner-occupied buildings to be at risk while children living in other units enjoy the protections of the [LHMA]'" as indicating the trial justice found the statute unconstitutional because it did not equally protect all children living in rental units.[31] Instead the Court said that the proper inquiry should have been "whether the General Assembly had a rational basis to believe that its chosen solution would remedy a legitimate state problem."[32]

Using this inquiry the Court found that it would be reasonable for the General Assembly to conclude that owners who live on the premises would be more likely to address and fix lead hazards for their own safety, thus making the rental units on the premises safer.[33] Additionally, the General Assembly could find that owners living on the premises were more available and more attentive to maintenance needs.[34] The legislators could further conclude that rental properties with four or more units were harder to maintain.[35] With larger rental properties more difficult to maintain, even if the owner lived on the premises, the

28. *Id.* at 597.
29. *See id.*
30. *Id.*
31. *Id.* (quoting *Mackie*, 2006 WL 61053 at *9).
32. *Mackie*, 936 A.2d at 597.
33. *Id.*
34. *Id.*
35. *Id.* at 598.

legislature could also conclude that owners would not keep up with their maintenance duties.[36] Finally, because rental properties with four or more units can house more residents, the number of children that could potentially suffer lead poisoning would be greater.[37]

While the Court's suggests that the LHMA and the exception for two- and three-unit owner occupied properties would not eradicate the lead poisoning problem, the Court reasoned that the General Assembly could view it as one step toward that end.[38] The Court found that the plaintiffs failed "to carry their heavy burden of negating every conceivable rational basis" that could support the LHMA exemption.[39] The Court therefore concluded that the trial justice erred in finding the exemption to the LHMA unconstitutional.[40]

While the Court did not find it necessary to decide the case based on the other issues on appeal, the Court made a point to address the actions taken by the trial justice. The Court noted that while it would not sanction the trial justice for his refusal to enter a final judgment, he "circumvented [the] Court's constitutionally vested jurisdiction" and burdened the litigants who were required to petition for a writ of certiorari.[41]

COMMENTARY

The Rhode Island Supreme Court's application of the rational basis test follows a standard and predictable pattern. Once the Court established that the rational basis test was appropriate, the state easily demonstrated a reasonable basis for its classification. In declaring the exception to the LHMA constitutional, the Court solidified the constitutionality of the entire LHMA. This brings a new path to remedy for cases of childhood lead poisoning in Rhode Island. The duties imposed by the LHMA on the owners of rental properties built before 1978 means that renters can now expect owners to search for and mitigate high lead levels in their rental

36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 598 n.3.

units. Perhaps more importantly, the implication of this holding is that tenants now have grounds for filing suit under the LHMA if their landlords fail to ensure that the properties they rent have safe levels of lead. Although the exception excuses certain rental-property owners from these duties, the Court's holding might lead to concrete studies on the occurrences of lead poisoning in children living in the different classifications of rental properties as established by the LHMA. As a result of the Court's decision in *Mackie*, Rhode Island courts can expect even more lead-paint cases in its future.

The more interesting part of the Court's opinion in *Mackie* is perhaps the tone of displeasure the Court sets when discussing the trial justice's failure to issue a final judgment in the case. The Court made a specific point to address the trial justice's failure to enter a final verdict noting: "we pause to note our concern with the trial justice's refusal to enter final judgment."[42] Additionally, the Court specifically notes that it "cannot sanction such judicial action," but gives as a reason the burden on the litigants rather than the lack of wrongdoing on the trial justices part.[43] Therefore, the Rhode Island Supreme Court emphasizes the requirement for final verdicts going forward because the failure to issue a final verdict burdens the litigants who must seek a writ of certiorari to have their case heard on appeal.

CONCLUSION

In *Mackie v. State* the Rhode Island Supreme Court held that the exemption, which relieves owners of owner-occupied two- and three-unit rental properties from duties under the LHMA, did not violate the Equal Protection Clause of the Rhode Island Constitution. The Court further admonished the trial justice's failure to enter a final judgment, thereby leaving the aggrieved party in "legal limbo."[44]

Gwen Hancock

42. *Mackie*, 936 A.2d at 598.
43. *Id.*
44. *Id.*

Contract Law. *Bucklin v. Morelli*, 912 A.2d 931 (R.I. 2007). In Rhode Island, specific performance of a real estate agreement is an available remedy if a purchaser can demonstrate that at all times he or she was ready and willing to perform the contract. In this case, the plaintiff sufficiently established by clear and convincing evidence that she was ready, willing and able to pay the agreed-upon consideration and accept encumbered title within a reasonable time after the specified closing date. Also, the *de facto* existence of an extended closing date can be inferred from the conduct of the parties to a purchase and sales agreement despite the absence of an explicit written extension, when no "time is of the essence" clause is included in the contract. In Rhode Island, the trial judge has broad discretion in a decision to grant specific performance of a real estate contract.

FACTS AND TRAVEL

What began as the search for an affordable home for Mr. and Mrs. Allan Bucklin's son, resulted in seven-year battle for the right to purchase a parcel of real property at 126 Lakedell Drive in Warwick.[1] On July 7, 2000, Frances Morelli (as the executrix of her father's estate) entered into a purchase and sales agreement with Judith Bucklin, in which Ms. Morelli agreed to sell Mrs. Bucklin the Lakedell property for $77,000.[2] The agreement stipulated that the closing was to be held on September 1, 2000 at the Office of the Registry of Deeds; however no "time is of the essence" provision was included.[3] Of particular importance to this case was Paragraph Ten of the purchase and sales agreement, which provided that:

> "If the Seller is unable to [convey good, clear, insurable, and marketable title], Buyer shall have the option to: (a) accept such title as Seller is able to convey without abatement or reduction of the Purchase Price, or (b)

1. *See* Bucklin v. Morelli, 912 A.2d 931, 932 (R.I. 2007).
2. *See id.* at 932.
3. *See id.*

> cancel this Agreement and receive a return of all Deposits."[4]

In addition, the agreement required the approval of the Probate Court as a condition of sale, and included an integration clause.[5]

After a title search conducted later that July by Mrs. Bucklin's attorney revealed the existence of several liens on the Lakedell property, Ms. Morelli's attorney was notified, and the two parties communicated frequently as to how the issue may be resolved before the upcoming closing.[6] During this process, the attorneys came to acknowledge that resolving the marketable title issue would be impossible by the September 1st closing date.[7] However, no written extension was ever executed, and communication between the two ceased. [8] Believing the closing to be only a "target" date, Mrs. Bucklin chose not to exercise her rights under Paragraph Ten of the agreement on or before September 1, 2000 in order to allow Ms. Morelli's attorney more time to have the liens on the property removed.[9] In addition, she suggested the closing date be extended to September 15th in a letter to Ms. Morelli, dated August 30, 2000.[10]

At some time between September 15th and October 1st, Mrs. Bucklin expressed her desire to exercise her rights under Paragraph Ten of the agreement, which would allow her to purchase the property without clear title.[11] This desire was formalized in a letter sent by Mrs. Bucklin's attorney to Ms. Morelli on October 16, 2000.[12] Neither Ms. Morelli nor her attorney responded to this letter, or communicated any intention to terminate the purchase and sales agreement.[13] Mrs. Bucklin maintained sufficient funds to purchase the property at all times between the execution of the purchase and sales agreement and

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4. *Id.*
5. *See id.*
6. *See id.* at 933.
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.* at 934.
13. *See id.*

the sending of the October 16th letter.[14] A deposit was still being held in escrow at the time of trial.[15] However, Mrs. Bucklin did acknowledge that at some point, Ms. Morelli's realtor attempted to return her deposit check.[16]

In both November and December of 2000, Mrs. Bucklin reiterated her desire to purchase the Lakedell property without clear title or inspections in two separate letters to Ms. Morelli.[17] After no response from Ms. Morelli or her representatives, Mrs. Bucklin brought an action for specific performance in Rhode Island Superior Court.[18] At trial, Ms. Morelli testified that although she never personally communicated her desire to end the deal, she did instruct her realtor to return the deposit check in September of 2000.[19] She also testified that despite the provision in Paragraph Ten, she believed that she would not be legally capable of selling the property without first resolving the liens issue.[20] Thus, she understood the letter from Mrs. Bucklin's attorney on October 16th, and any subsequent letters from Mrs. Bucklin, to be offers to form a new agreement.[21]

On May 25, 2001, Superior Court Justice Mark A. Pfeiffer issued a bench decision in favor of Mrs. Bucklin, and ordered specific performance of the purchase and sales agreement.[22] Ms. Morelli appealed, asserting that the trial justice erred in granting the plaintiff's request for specific performance of the real estate sales contract.[23] She also contended that the trial judge abused his discretion in allowing a certain realtor to testify as an expert witness.[24]

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14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.*
18. *See id.* at 932.
19. *See id.* at 935.
20. *See id.*
21. *See id.*
22. *See id.* at 932.
23. *See id.*
24. *See id.*

ANALYSIS AND HOLDING

Request for Specific Performance

The Rhode Island Supreme Court first held that the trial justice did not err in granting the plaintiff, Mrs. Bucklin, specific performance of the purchase and sales agreement.[25] The court noted that specific performance is an available remedy when the purchaser in a written real estate contract establishes that he or she was at all times ready and willing to perform the contract.[26] In addition, the court recognized the availability of the remedy when a party "unjustifiably refuses or fails to perform under the agreement."[27]

The court proceeded to review the lower court's conclusions, noting that a trial justice has broad discretion in a decision to grant specific performance.[28] Before specific performance could be granted, the plaintiff was required to show that both a valid agreement existed, and that she was ready, willing and able to pay the agreed-upon consideration and accept encumbered title within a reasonable time after the September 1, 2000 closing date.[29] The trial justice found through clear and convincing evidence that both requirements were met, and the Rhode Island Supreme Court agreed with his analysis.[30] Importantly, the trial justice reasoned that although there was no explicit extension of the closing date, the "*de facto* existence" of an extension could be inferred from the parties' conduct.[31]

At trial, the defendant, Ms. Morelli, contended that she had made an earnest effort to return the deposit check to the plaintiff.[32] She also maintained that the cash nature of the real estate transaction created a time mandate.[33] The Rhode Island Supreme Court found that the trial justice properly addressed, and subsequently rejected both contentions, within his sound

25. *See id.* at 936.
26. *See id.* (citing Thompson v. McCann, 762 A.2d 432, 436 (R.I. 2000).
27. *Id.* (quoting Yates v. Hill, 761 A.2d 677, 679 (R.I. 2000).
28. *See id.* at 935-36.
29. *See id.* at 936.
30. *See id.* at 936-37.
31. *Id.* at 936.
32. *See id.* at 937.
33. *See id.*

discretion.[34] Thus, the court found no abuse of discretion in either the grant of specific performance, or the analysis supporting it.[35]

Admissibility of Expert Testimony

The Rhode Island Supreme Court also rejected the defendant's second argument on appeal regarding the testimony of a Rhode Island realtor as an expert witness at trial.[36] The plaintiff called the realtor to testify that when there is an absence of "time is of the essence" language in a purchase and sales agreement, the closing date is viewed in the industry as merely a target date.[37] The realtor also testified that without such a provision, it is not uncommon for transactions to close after the target date.[38] The trial justice allowed the testimony to help clarify that ambiguity in the contract, and chose to determine the probative value of the testimony at the close of trial.[39]

The court reasoned that the trial justice did not abuse his discretion in allowing the testimony of the realtor because the statements were not actually relied upon in the making of the decision.[40] Instead, the trial justice relied only upon the conduct of the parties in making the determination that they wanted to extend the closing to a later date.[41] Thus, both issues on appeal were denied, and the judgment of the Superior Court was affirmed.[42]

COMMENTARY

This case presented the Rhode Island Supreme Court with little more than a typical abuse of discretion review. However, the decision does help to further define the rights of a real estate purchaser who may be strung along or left in the dark by a confused or irresponsible seller. Conversely, it serves as a

34. *See id.*
35. *See id.*
36. *See id.*
37. *See id.* .
38. *See id.*
39. *See id.*
40. *See id.*
41. *See id.*
42. *See id.* at 938.

warning to sellers who may believe that remaining silent after a closing date has passed terminates the agreement. This dual-purpose holding stems mainly from the newly-created rule that closing date extensions can be inferred from the parties' conduct in the absence of a written postponement.[43] However, this "*de facto* extension" rule now leaves the door open for further inquiries: What are the allowable types of conduct to consider? How much conduct is needed? Could enough conduct ever invalidate a written extension?

This case also serves as a reminder for any party to a purchase and sales agreement interested in establishing a firm closing date that one cannot undervalue the importance of even the smallest contractual provisions. Here, the absence of a "time is of the essence" clause left the closing date open to interpretation using both conduct and industry standards.[44] However, some buyers and sellers may actually find flexibility desirable, especially if many loose ends remain untied. The testimony of the realtor in this case showed that leaving out a time mandate generally permits the closing to occur during a reasonable target period, rather than on a fixed date.[45]

Interestingly, the court opted not to rule on whether the realtor should have been allowed to even testify as an expert witness.[46] Because the trial judge had not relied on the testimony in his decision, it was not necessary for the court to reach that question.[47] However, Justice Robinson, writing for the court, did acknowledge the issue as "intriguing."[48] If the trial justice had relied on the realtor's testimony beyond its ambiguity-clarifying function, the court would have been forced to address this "intriguing" issue, including an analysis on the qualification of the realtor as an expert.

CONCLUSION

The Rhode Island Supreme Court denied and dismissed the defendant's appeal, finding no error in either the trial justice's

43. *See id.* at 936.
44. *See id.*
45. *See id.* at 937.
46. *See id.*
47. *See id.*
48. *Id.*

analysis or in his final decision to grant specific performance in favor of the plaintiff purchaser. Particularly, the court affirmed the trial justice's use of an inferred *de facto* extension of the closing date in his reasoning. The court also found no abuse of discretion in the admitting of testimony of a realtor as an expert witness because the statements were not relied upon in the trial justice's final decision. However, the interesting question as to whether the realtor should have been allowed to even testify as an expert remains unanswered.

Amanda J. Argentieri

Criminal Law. *State v. Drew*, 919 A.2d 397 (R.I. 2007). Evidence of the defendant's prior manslaughter conviction is admissible at the defendant's current murder trial to impeach his credibility if he chooses to testify, as the evidence is of probative value with respect to the defendant's credibility. Letters sent by the defendant incarcerated at the ACI to his cohort while awaiting trial for murder coupled with cohort's testimony were relevant, and the trial court acted within its discretion in determining that the probative value of the letters did not outweigh their prejudicial effect at trial.

FACTS AND TRAVEL

Prior to 2001, the victim Harold Jackson Andrews ("Jack") and his wife had lived in relative normalcy, but this blissful domestic interlude was shattered in 2000 when Jack came under the bewitching influence of the jezebel Bobbie-Jo Dumont, an abuser of alcohol, cocaine, methadone, and heroin in addition to being the mother of four children and an exotic dancer at Cheaters, a Providence strip club.[1] Jack met Bobbie-Jo while she was working, and from that night they began a relationship in which Jack acted as a personal taxi service for Ms. Dumont to take her anywhere she asked, and furnished her with money to buy drugs, clothes, and food, and to pay her rent and bills.[2]

Although their relationship was initially platonic, Jack began to demand sexual gratification in exchange for the money he supplied to Dumont, and she acquiesced to this arrangement.[3] In 2001, Dumont quit her gainful employment at Cheaters, replacing this with a career in the world's oldest profession, and proceeded to lose custody of her four offspring and get evicted from her apartment, whereupon Jack paid for Dumont to stay in various motels and occasionally snuck her into his home to allow her to sleep next to his bed.[4] Around this time Jack confessed to his wife

1. State v. Drew, 919 A.2d 397, 400 (R.I. 2007).
2. *Id.*
3. *Id.* at 400-01.
4. *Id.* at 401.

that he was taking care of Dumont and, not surprisingly, the Andrews' marriage began to disintegrate.[5] Jack was frequently away from the marital home for days at a time, became surly and laconic, lost weight, stopped going to work, frequently argued with his stepson and ceased caring for his infirm mother.[6] Mrs. Andrews finally left Jack in 2002.[7]

Also during that year, Ms. Dumont was admitted into SSTAR of Rhode Island, a drug detoxification service in North Kingstown, where she first met the defendant, Harold T. Drew.[8] Ms. Dumont stated that she and Drew "were just perfect for each other"—an idyllic romance they were able to sexually consummate within the week on SSTAR property, resulting in the expulsion of both of them from the detoxification program.[9] After their expulsion, Drew and Dumont stayed in abandoned buildings and cars, eventually settling down to reside in a van on defendant's father's yard.[10] Despite Dumont's discovery of her "Mr. Right," Jack continued to faithfully ferry Ms. Dumont to her morning methadone dosage, while expressing his stern disapproval of the dreamy coupling of Dumont and Drew.[11]

Jack lost his job in 2002, leaving the doomed triumvirate without further financial means to satisfy the $200 per day drug habits of Dumont and defendant, and consequently the three began a series of daily breakings and entering into residences in the South County area, with Jack driving getaway.[12] According to Dumont the only time Jack entered one of the abodes was to help the defendant Drew carry a gun locker from the cellar of a house, which they buried in a secluded field in Exeter after removing some of the firearms which they stored in the defendant's father's home.[13]

On May 12, 2003, Jack told Ms. Dumont that he wanted to cease his participation in the thefts the bizarre love triangle were involved in and that she must choose between himself and the

5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 401-02.

defendant.[14] An altercation ensued in which Jack struck Ms. Dumont, and upon her reporting this incident to the defendant, he stated that he wanted to kill Jack.[15] The following day, at the defendant's request, Ms. Dumont contacted Jack and persuaded him to help defendant dispose of the firearm cache in the lonely, distant Exeter field.[16]

The cursed three returned to the field off of William Reynolds Road, and under the instructions of defendant, Dumont and Jack began wiping off fingerprints from the jettisoned gun locker.[17] Drew then picked up the weapons from Jack's pickup truck, approached Jack from behind, and shot him in the back of the head with a shotgun.[18] Drew then proceeded to steal Jack's wallet, Ms. Dumont covered the corpse with a quilt and the gun locker, and the two drove away in the former Jack's pickup truck.[19] The defendant Drew proceeded to assure Dumont that things would be alright and instructed her to say that if asked what had happened was an accident.[20]

On June 1, 2003 the lifeless remains of Jack were found, and five days later Dumont and Drew were arrested for his murder.[21] On July 31, 2003 Ms. Dumont entered into a cooperation agreement with the state to testify against the defendant, and approximately one week following the grand jury indicted defendant for murder in violation of G.L. 1956 § 11-23-1[22], discharging a firearm while committing a crime of violence in violation of G.L 1956 § 11-47-3.2(b)(3)[23] and three counts of

14. *Id.* at 402.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 402.
20. *Id.*
21. *Id.*
22. *Id.* R.I. GEN. LAWS § 11-23-1 (2007) states, in relevant part, "[t]he unlawful killing of a human being with malice aforethought is murder. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing...is murder in the first degree."
23. *Id.* R.I GEN. LAWS § 11-47-3.2 (2007) states, in relevant part, "(a) No person shall use a firearm while committing or attempting to commit a crime of violence...(b) Every person who, while committing an offense violating subsection (a) of this section, discharges a firearm shall be guilty of a felony and be imprisoned as follows: ...(3) Life...if the death or permanent

entering a dwelling with the intent to commit larceny therein in violation of G.L. 1956 § 11-8-3.[24] While in prison at the Adult Correctional Institution ("ACI"), defendant and Ms. Dumont penned several romantic missives which contained potentially damaging admissions, and the defendant sought fruitlessly to have three of his passionate written musings excluded from evidence at trial.[25]

At defendant's trial, which began in October 2004, the state presented an array of witnesses and physical evidence, including the testimony of Dumont and Mrs. Andrews, the victim's former wife, as well as William Reis, a man who had known the defendant for a quarter of a century and was co-resident of a cell at the ACI with him.[26] Defendant reportedly confided to Mr. Reis that the murder of Jack was an accident, and attempted to obtain Mr. Reis's assistance in a plot to embroil one Donald Perraro as Jack's murderer, later altering this connivance to point the finger to Dumont as the killer of Jack.[27]

A jury convicted the defendant on all five counts on November 10, 2004.[28] On Februrary 7, 2005, defendant was sentenced to two mandatory life sentences, one each for first-degree murder and for discharging a firearm while committing a crime of violence, to be served consecutively, plus ten years to serve for each of three counts of breaking and entering, to be served concurrently with each other and the life sentence for first-degree murder.[29]

ANALYSIS AND HOLDINGS

A. Jury Instructions

The defendant argued that the trial justice, committed reversible error by erroneously omitting two instructions from his charge, one a comprehensive accident instruction and the other an accomplice instruction.[30]

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incapacity of any person (other than the person convicted) results from the discharge of the firearm."

24. *Drew*, 919 A.2d at 402.
25. *Id.* at 403.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*.

1. Accident Instruction

Based on the testimony of co-cellmate Mr. Reis that the killing of Jack had been described by defendant as an "accident," the defendant sought a jury charge which gave a lengthy explication on the niceties which exist between the concepts of intent and accident.[31] The trial justice settled on a charge which stated "[a]s to the word 'willfully,' you are instructed that an act is done willfully if it is done voluntarily and intentionally and not by mistake or accident. . .".[32] The defendant objected, but the trial justice ruled that he had sufficiently instructed the jury on the elements of first and second degree murder. [33]

On appeal the defendant took specific issue with the weak reference to "accident" in the jury charge.[34] However, the Rhode Island Supreme Court held that considering the utter dearth of evidence admitted at trial to support the defense's theory that Jack's death was the result of an accident, the trial justice was not obligated to give a more comprehensive accident instruction.[35] The court pointed out that the defendant admitted at oral argument that he did not present accident as a defense at trial, that defendant did not present evidence of accident at trial, nor did he argue it in his closing argument.[36] In addition, the Court pointed out that the only testimony supporting any possible argument for accident was presented by Mr. Reis, a state's witness.[37] Thus, the court concluded that based upon the paltry evidence of accident at trial, a further mention of accident in the jury charge would only serve to confuse or mislead the jury, and the trial justice committed no error.[38]

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31. Defendant's proposed jury instruction as to accident stated in relevant part "[T]he state must prove that the homicide was intentional. Every crime involves a physical element—the doing of the act—and a mental element—the wrongful or criminal intent. If the intent does not exist, then the act is not a crime. An example would be an accidental death. Accident is the opposite of intent. If a person kills another accidentally, he or she lacks the wrongful intent, which, would, if the other elements were present, make the act a murder." *Id.* at 404.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 405.

36. *Id.*at 404.

37. *Id.*

38. *Id.* at 405.

2. Accomplice Instruction

The trial justice offered a jury instruction which defendant contested did not include his requested accomplice provision which read in part:"[T]he law now is that the jury must look with particular care at the testimony of an accomplice and scrutinize it very carefully before they accept it."[39] However, the court noted that the well-settled law of Rhode Island is that it is not necessary for a trial justice to give an accomplice charge.[40] The court pointed out that the role of a trial justice is not to act for the prosecution or defense, and that counsel, not the court are the proper agents to contest to the jury the credibility or lack thereof of a particular witness.[41] The court stated specifically that it will overturn such firm precedent only "if the motivating purpose is to eliminate inconsistency and anomalous results" and that because in the defendant's imploration of the court he proffered no evidence that the instant case undermined existing law, and all supporting authority cited by the defense were from foreign jurisdictions, the defendant's contention on this point was meritless.[42]

B. Evidentiary Challenges

1. Admissibility of Letters

The defendant's first evidentiary challenge contended that the trial justice erred by denying his motion *in limine* to exclude from evidence three of the amorous writings the defendant scribed to Ms. Dumont while both were in the ACI, all of which contained "cryptic passages" that Ms. Dumont testified alluded to the murder of Jack.[43] Defendant claimed the letters were irrelevant or alternatively unduly prejudicial, but the Supreme Court held that the amatory epistles were indubitably relevant, the first two of which explicitly hinted towards defendant's motives for killing Jack and thus were probative of premeditation, an element of

39. *Id.*
40. *Id.* (citing State v. Sivo, 809 A.2d 481, 491 (R.I. 2002)).
41. *Drew*, 919 A.2d at 405-06.
42. *Id.* at 406, quoting State v. Werner, 865 A.2d 1049, 1056 (R.I. 2005).
43. *Id.* at 406.

first-degree murder.[44] The third writing also demonstrated relevance in that it could be cognized as illustrative of defendant's guilty knowledge—an attempt by the defendant to enlist Ms. Dumont, the sole witness to the defendant's crime, in a stratagem to conceal the truth of the murder.[45] Furthermore, the Court held that defendant's argument that the letters were unduly prejudicial was meritless in that although the compositions failed to show defendant in his best possible light, the Court could not say that the trial justice abused his discretion by ruling that any prejudice the letters instilled was not outweighed by their probative value.[46]

2. Rule 609 (Admissibility of prior conviction)

Defendant also contended that the trial justice misapplied Rule 609 of the Rhode Island Rules of Evidence[47] by permitting the state to introduce defendant's prior conviction for manslaughter to impeach his credibility if he chose to testify.[48] Irrespective of defendant's formidable litany of violations against the law, the trial justice ruled that only four prior convictions would be admissible to impeach his credibility if he chose to testify, one being a 1982 conviction for manslaughter, the others a 2002 conviction for possession of a controlled substance, a 1997 conviction for possession of heroin, and evidence of a 1990 breaking and entering.[49] On appeal the defendant contended that the admission of the manslaughter conviction was probative of propensity rather than veracity, and that the similarity of the offense and the homicide for which he was being tried created a

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44. *Id.; see* R.I.GEN. LAWS § 11-23-1 (2007), *supra*, note 21.
45. *Drew*, 919 A.2d at 407.
46. *Id.*
47. *Id.* R.I.R.EVID. 609. Impeachment by Evidence of Conviction of Crime reads in relevant part: "(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record. "Convicted of a crime" includes (1) pleas of guilty, (2) pleas of nolo contendre followed by a sentence (i.e. fine or imprisonment), whether or not suspended and (3) adjudications of guilt. (b) Discretion. Evidence of a conviction under this rule is not admissible if the court determines that its prejudicial effect substantially outweighs the probative value of the conviction..."
48. *Drew*, 919 A.2d. at 407.
49. *Id.* at 407-08.

high degree of prejudice and outweighed the conviction's probative value.[50] Based upon this the defendant argued that the trial justice abused his discretion in permitting the state to use the prior manslaughter conviction to impeach the defendant's credibility should he choose to testify, and that this error prevented the defendant from testifying in opposition to his constitutional rights.[51]

The Court held that in Rhode Island a prior conviction which is similar or identical to the charged offense is not presumptively prejudicial; and that rather the similarity of a prior conviction to a charged offense is only one factor for the trial justice to consider when balancing probative value of a prior conviction against its prejudicial effect.[52] The Court reasoned that under 609(b) any conviction can be used for impeachment purposes unless its prejudicial effect substantially outweighs its probative value.[53] This is based upon Rule 609's manifestation of the recognition that the testimony of "one who has lived within the rules of society and the discipline of the law" is of more credence than that of a person who has exhibited "antisocial tendenc[ies]" by being involved in and convicted of a serious crime.[54] The Court noted that in the past it had frequently upheld the use of prior convictions which were similar or identical to the crime the defendant was on trial for.[55]

The Court expressed dismay at the reasoning of the trial justice—because he found two prior convictions admissible that were similar to the charged offenses, and excluded other prior convictions apparently because they were unlike the pending charges, the Court said the trial justice mistakenly encouraged the inference that the prior manslaughter conviction was admissible as probative of propensity rather than for the purpose

50. *Id.* at 408.
51. *Id.*
52. *Id.* at 409.
53. Id. at 408.
54. *Drew*, 919 A.2d. at 408. (quoting State v. Mattatall, 603 A.2d 1098, 1117 (R.I. 1992); State v. Sands, 386 A.2d 378, 386 (1978)).
55. Drew, 919 A.2d. at 408-409 (citing State v. Remy, 910 A.2d 793 (R.I. 2006); State v. Rodriguez, 731 A.2d 726, 731-32 (R.I. 1999); State v. Taylor, 581 A.2d 1037, 1039 (R.I. 1990); State v. Maxie, 554 A.2d 1028, 1031-32 (R.I. 1989)).

of impeachment.[56] However, because the Court had the power to affirm a trial justice's evidentiary ruling even though the grounds the justice relied on at trial were erroneous, the Court could not conclude that the trial justice's ruling was an abuse of discretion regardless of his reasons for finding the prior conviction probative.[57] Furthermore, the Court found no merit in the defendant's claim that his constitutional rights were violated because the admission of the manslaughter conviction caused him not to testify.[58] The Court noted that a defendant may choose to not take the witness stand because of the risk of cross-examination, but his constitutional right to testify does not include the right to prohibit impeachment by prior convictions.[59]

C. Limited Cross Examination of State's Witness

The defendant next argued that the trial justice violated his constitutional right to confrontation when he limited the cross-examination of Dumont.[60] During cross-examination Dumont resisted attempts by the defendant to portray her as an aggressor, and she instead was adamant that she had previously struck Jack only in self-defense—thus undermining Mrs. Andrews testimony that Jack was in fear of Dumont and consequently the defendant's contention that Dumont was the true murderer of Jack.[61] The State objected, and after discussion at sidebar the trial justice ruled that defendant's question of Dumont about Mrs. Andrew's prior testimony was impermissible because it asked Dumont to comment on the credibility of Mrs. Andrews's testimony.[62]

The court reasoned that based upon the U.S. and Rhode Island Constitutions a criminal defendant has the fundamental right to cross-examine his or her accusers, but that this right is not without limits.[63] The decision of a trial justice to limit the scope of cross-examination is reviewed only for clear abuse of discretion and can only be overruled if such a decision constitutes

56. *Drew*, 919 A.2d at 409.
57. *Id.*
58. *Id.* at 410.
59. *Id.*
60. *Id.* at 411.
61. *Id.* at 411.
62. *Drew*, 919 A.2d at 411.
63. *Id.* at 411, (quoting State v. Stansell, 909 A.2d 505, 509 (R.I. 2006)).

prejudicial error.[64] The court mentioned the principle that the determination of the truthfulness or credibility of a witness lies within the exclusive province of the jury, from which emerges the rule that a witness is not permitted to offer an opinion concerning the truthfulness of the testimony of another witness.[65] This is because questions as to the truthfulness of the statements of another witness as a general rule have no probative value, and are improper and argumentative because they fail to assist the jury in determining witness credibility.[66] Because the defendant's question would not have assisted the jury in any way, it was consequently irrelevant and the court held that trial justice did not abuse his discretion by curtailing the defendant's cross-examination on this point.[67]

D. Refresh Recollection

Lastly, the court held that the trial justice had committed no error in refusing to allow the defendant to refresh Ms. Dumont's recollection with a document that was a district court complaint charging an offense which listed the perpetrator as "Bobbie-Jo Dumont a/k/a Angela Wilkinson."[68] Defendant was apparently attempting to impeach the testimony of Dumont by having her admit to a prior conviction, but failed to get Dumont to acknowledge use of such an alias.[69] Over the state's objection the trial court allowed the defendant to lay a foundation for using the document, but determined that it would disallow the document if Dumont did not say that it either would or might refresh her recollection to see the complaint.[70] Dumont refused to cave in to the defendant's queries, repeatedly answering that the document would not refresh her memory.[71] The court reiterated prior case law that stated that the only foundational requirement for refreshing a witness's testimony is that the witness must clearly be unable to remember something of relevance to the matter being

64. *Id.*
65. *Id.* at 412.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 413.

litigated, and a witness's recollection cannot be refreshed simply on the basis that it conflicts with another written statement.[72] Thus the Court held that the trial justice's exclusion of the District Court complaint was proper because it was made on the basis that admitting the document would not refresh the witness's memory, not on the basis that the document itself was somehow improper.[73]

COMMENTARY

This case is certainly far more notable for the tragic and outlandish set of factual circumstances behind it than any novel issues of law it raises or confronts. The Rhode Island Supreme Court expressed great deference to the decisions of the trial court on all issues of the defendant's appeal. Furthermore, there seemed to be no contentious issues which fell at the margins of either statutory or case law in Rhode Island. The defendant's appeal thus appears as a desperate grab for clemency from the court crossing over areas of jury instruction, evidence, and constitutional law, which the court all found to be resoundingly meritless.

If any of the court's holdings or reasoning could be argued to be in any way groundbreaking or controversial, it would be the holding that a prior manslaughter conviction is admissible to impeach the credibility of a witness on trial for murder under Rhode Island Rules of Evidence 609. Although at first blush the situation seems to potentially raise the sensitive evidentiary issue of the admission of propensity or character evidence, the fact that nothing in the evidentiary rule itself excludes similar or identical convictions squarely puts the power with and onus upon the trial justice to determine if the probative value of the prior conviction is substantially outweighed by its prejudicial effect. The extension of the admissibility of a similar or identical prior conviction from assault,[74] or robbery,[75] to the instant case involving homicide seems to be an extension of degree rather than a change in kind,

72. *Id.*
73. *Id.*
74. *See Remy*, 910 A.2d at 796, 799.
75. *See Rodriguez*, 731 A.2d at 731-32; *Taylor*, 581 A.2d at 1039; *Maxie*, 554 A.2d at 1031-32.

and firmly rooted in Rhode Island precedent.

The logic of the court here was crystal clear: the jury is free to believe that a person who has committed serious crimes in the past is more likely to lie than a law-abiding citizen, regardless of whether those crimes were similar to the current one at issue or not, and it is firmly within the trial justice's discretion to determine whether any possible adverse influence on the jury obviates the use of such evidence at trial. In Rhode Island, the similarity between a prior conviction and the crime being tried is no more than one factor of many for the trial justice to enter into the calculus of weighing the conviction's probative value against its prejudicial effect.

CONCLUSION

The Rhode Island Supreme Court held that the trial justice in a murder trial was not required to provide a comprehensive jury instruction on accident; letters written by the defendant to his cohort while they were imprisoned, in conjunction with the cohort's testimony at trial, were relevant; the trial court did not abuse its discretion in determining that probative value of the letters outweighed their prejudicial effect; evidence of the defendant's prior manslaughter conviction was admissible to impeach his credibility if he chose to testify; the trial court did not violate the defendant's constitutional right to confrontation when it prohibited him from continuing to ask questions which required the witness to comment on the credibility of another witness's testimony; and the trial justice did not abuse his discretion in refusing to permit the defendant to refresh a witness's recollection when she repeatedly testified that showing her a document would not aid in refreshing her recollection.

Alec Rice

Criminal Law. *State v. Gonzalez*, 923 A.2d 1282 (R.I. 2007). A trial justice abused his discretion by not granting a mistrial as a result of the State's discovery violation by failing to furnish defendant with FBI reports about uncharged drug purchases that an informant had made before the date of the first offence charged.

FACTS AND TRAVEL

On August 13, 2006, the defendant Radames Gonzalez was arrested and charged with three counts of delivery of cocaine, possession of one ounce to one kilogram of cocaine, possession with intent to distribute cocaine, and resisting arrest.[1] Prior to his arrest, Gonzalez engaged in several cocaine transactions in the presence of and with Detective Michael Douglas, who was working undercover for the High Intensity Drug Trafficking Area Narcotics Task Force (Task Force) formed by the Federal Bureau of Investigation (FBI) and the Rhode Island State Police.[2] Initially, Detective Douglas accompanied an informant on these drug transactions.[3] During the course of these meetings, Detective Douglas learned where Gonzalez lived and his vehicle registration.[4] He also obtained a photograph of Gonzalez and verified that he was the person engaged in selling drugs.[5] Furthermore, these encounters afforded Gonzalez an opportunity to become familiar with Detective Douglas.[6] Significantly, the State did not provide much of this information and the FBI Reports of these earlier encounters to Gonzalez in discovery.[7]

Eventually, Gonzalez began dealing with Detective Douglas directly and the two would meet at a prearranged location on West

1. State v. Gonzalez, 923 A.2d 1282, 1285 (R.I. 2007).
2. *Id.* at 1284.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

Friendship Street in Providence.[8] Detective Douglas testified that when he arrived at the location in his undercover vehicle, Gonzalez would motion for him to approach his vehicle, and the two would exchange money for a bag of cocaine.[9] These meetings occurred several times prior to Gonzalez's arrest.[10]

On August 13, 2003, Detective Douglas had arranged to meet again with Gonzalez, purportedly to purchase $400 worth of cocaine.[11] However, this time Task Force officers who planned to arrest Gonzalez accompanied Detective Douglas.[12] As Detective Douglas approached Gonzalez's car at the West Friendship Street meeting spot, Gonzalez became aware of the other officers and attempted to escape through the vehicle's window.[13] Gonzalez resisted arrest, but eventually the officers apprehended him.[14]

Before the arrest, the officers had obtained search warrants for Gonzalez's person, as well as for his home and vehicle.[15] A search of Gonzalez's vehicle produced a small black film canister that contained six bags of cocaine, as well as a cellular telephone that corresponded to the number Detective Douglas had called to set up the drug transactions.[16] The officers also seized cash, cocaine, and drug paraphernalia from Gonzalez's home.[17] Detective Douglas testified that at the home, he and Gonzalez "responded to an upstairs bedroom" and that defendant "had informed us that that was his bedroom."[18] In the bedroom, the officers found thirty-eight plastic bags of cocaine, a larger block of cocaine, cash, and two scales.[19] In total, between five and six ounces of cocaine were seized.[20]

At trial, the jury found Gonzalez guilty of all charges against him and he was sentenced to fifteen years in the Adult

8. *Id.* at 1285.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*

Correctional Institution, with three years to serve, and twelve years suspended, with probation for the cocaine offenses and a concurrent sentence of one year to serve for resisting arrest.[21] The defendant filed a timely notice of appeal.[22]

ANALYSIS AND HOLDING

On appeal, Gonzalez argued that three separate discovery violations by the State denied him a fair trial.[23] First, Gonzalez contended that the State failed to produce three of the four toxicology reports for the cocaine allegedly purchased during the investigation and defense counsel prepared for trial with the assumption that the reports did not exist.[24] The Court rejected this assignment of error and held that Gonzalez did not preserve the issue because he failed to object until after the State admitted the reports into evidence without objection.[25] Under the "raise-or-waive" rule, issues not preserved by specific objection at trial will not be considered on appeal.[26] The State further argued that it mentioned these reports numerous times in its answer and defense counsel could have inspected or copied the evidence, but failed to do so.[27]

Gonzalez's second contention was that the State violated Rule 16 of the Rhode Island Rules of Criminal Procedure[28] when it failed to furnish him with FBI reports, known as Form 302 reports (302s),[29] about uncharged drug purchases that Detective Douglas

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21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 1287.
25. *Id.*
26. *Id.; see* State v. Wiggins, 919 A.2d 987, 990 (R.I. 2007) (holding that in accordance with the well settled "raise-or-waive" rule, issues not preserved by a specific objection at trial will not be considered on appeal).
27. *Gonzalez,* 923 A.2d at 1287.
28. *Id.* R.I. SUP. CT. R. CRIM. P. 16(a)(5) requires the State, upon written request, to provide defendant with "all results or reports in writing, or copies thereof,... made in connection with the particular case[.]"
29. *Gonzalez,* 923 A.2d at 1287, n.3, (citing United States v. Torres–Galindo, 206 F.3d 136, 143 n. 2 (1st Cir. 2000) (stating that a "302 is prepared by an agent after an interview based on the agent's recollection of the interview, that other agents may assist in the preparation of the 302," which is "prepared in anticipation of prosecution"); United States v. Urciuoli, 470 F.Supp.2d 109, 111 (D.R.I. 2007) (describing FBI 302 report that summarizes statements by key witness during interviews)).

made with the informant before August 7, 2003, the date of the first offense charged.[30] Detective Douglas revealed for the first time during cross-examination that he had prepared reports of the earlier drug purchases, which were in the custody of the FBI.[31]

Both the prosecution and the defense agreed that the nondisclosure was not deliberate; the prosecutor was not made aware of the 302s until after trial commenced.[32] The Court held that it would grant a mistrial in order to remedy the State's discovery violations which were highly prejudicial albeit unintentional, because they deprived Gonzalez of evidence tending to show prior criminal conduct.[33] Furthermore, the Court agreed that, the defense counsel's unawareness of the 302s irreparably impaired his trial strategy because he unwittingly opened the door to this evidence of uncharged drug offenses through his questioning of Detective Douglas.[34] The Court held that the trial justice's refusal to grant the defendant a mistrial was erroneous and a clear abuse of discretion.[35]

Gonzalez's final contention was that he suffered irreparable harm by the State's failure to turn over evidence of what the defense characterized as a confession.[36] Gonzalez contended that the trial justice should have declared a mistrial because the absence of this evidence denied him the opportunity to litigate the voluntariness of the "confession" pretrial, and left him unprepared to address this statement during his case in chief.[37] The State's answer referred Gonzalez to an FBI 302 report dated August 13, 2003, for any statements made by him.[38] The court found, however, that the 302 report was silent with respect to any admission or statement that Gonzalez made about his bedroom,

30. *Gonzalez*, 923 A.2d at 1287.
31. *Id.*
32. *Id.* at 1288.
33. *Id.*
34. *Id.* at 1287-1288. Defense counsel argued that he would not have asked Detective Douglas if, on August 7, 2003, he had approached defendant, "a man you never met in your life" and "he [sold] you drugs" if he had been provided with the 302s and knew that the witness would tell the jury that he and Gonzalez had become acquainted during the course of several drug transactions that occurred before the charged offenses.
35. *Id.* at 1289.
36. *Id.*
37. *Id.*
38. *Id.*

and it did not reflect Detective Douglas's direct examination testimony that Gonzalez "had informed us that that was his bedroom."[39] The Court did not agree with defense counsel that the alleged statement amounted to a confession.[40] However, it was evidence about Gonzalez and his bedroom, where most of the narcotics were found, and that should have been provided to defense counsel under Rhode Island Criminal Procedure Rule 16(a)(1).[41] Notwithstanding, the Court held that, standing alone, this violation, although error, was not so prejudicial as to warrant a mistrial, and could have been remedied by an adequate continuance.[42]

COMMENTARY

The Rhode Island State Legislature designed the rules of discovery to apprise the accused of the charges against him or her and the evidentiary basis for those charges.[43] Because the goal is to prevent trial by ambush and unfair surprises, the prosecution may not gain a strategic advantage by violating, whether intentionally or not, the rules of discovery.[44] However, in the past, Rhode Island trial justices and the Rhode Island Supreme Court have found that sanctions are not always warranted for unintentional discovery violations.[45]

Sanctions for discovery violations are set out in Rule 16(i) of the Rhode Island Superior Court Rules of Criminal Procedure. In addition to the enumerated sanctions, a trial justice "may enter such other order as it deems appropriate," including declaring a mistrial.[46] The trial justice has flexibility in determining appropriate sanctions under Rule 16(i), including the ability to

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39. *Id.*
40. *Id.*
41. *Id.* at 1290. R.I. SUP. CT. R. CRIM. P. 16(a)(1) requires the State, upon written request, to provide defendant with "all relevant or recorded statements or confessions, signed or unsigned, or written summaries of oral statements or confessions made by the defendant, or copies thereof[.]"
42. *Gonzalez,* 923 A.2d at 1290.
43. *Id.* at 1285.
44. *Id.*
45. *Id. See also* State v. Horton, 871 A.2d 959, 971 (R.I. 2005); State v. Pona, 810 A.2d 245, 250 (R.I. 2002).
46. R.I. SUP. CT. R. CRIM. P. 16(i); *See* State v. Darcy, 442 A.2d 900,902 (R.I. 1982).

impose no sanction at all. Unless the defendant can show harmful prejudice that no other measure can neutralize, it is unlikely that the court will grant a mistrial for unintentional discovery violations.[47]

Gonzalez was able to meet the criteria for a mistrial by showing that he was significantly prejudiced and his counsel's trial strategy irreparably harmed by the unintentional discovery violation. Evidence of uncharged criminal conduct coming before the jury could not be addressed by anything short of a mistrial.[48] By granting a mistrial for the unintentional discovery violation, the *Gonzalez* Court reaffirms the importance of defense counsel being apprised of all evidence against the accused in order to present his or her best case. This decision is in accordance with Rhode Island and other States' case law.[49] However the Court's willingness to accept that argument, even though it was the defense counsel who unwittingly brought out that evidence, *is* significant. The State did not introduce the evidence of prior, uncharged criminal conduct to gain a tactical advantage. In fact, the prosecutor herself was unaware that the evidence existed.[50] Instead, the defense counsel brought out the evidence his own cross-examination.[51] This decision highlights the fact that unintentional violations of the discovery rules are still violations, though they may not have been made with the plan to gain any sort of tactical advantage over opposing counsel. In a criminal case, where the accused faces years in prison, tactical advantage ought not to be the only consideration. Prejudicial effect should and does play a large role in determining the appropriateness of discovery violation sanctions. The Court rightly recognizes this when it weighs the totality of the circumstances surrounding the trial justice's decision to impose sanctions or not.[52]

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47. *See* State v. Barrett, 710 S.W.2d 489, 493 (Mo. Ct. App. E.D. 1986); *Pona*, 810 A.2d at 250; *Darcy*, 442 A.2d at 902; State v. Greiff, 10 P.3d 390, 395 (Wash. 2000).

48. *Id.*

49. *See* State v. Kutzen, 696 P.2d 351, 352 (Haw. 1985); Evans v. State, 499 A.2d 1261, 1268 (Md. 1985); State v. Evans, 668 A.2d 1256, 1260 (R.I. 1996); *Darcy*, 442 A.2d at 902;

50. *Gonzalez*, 923 A.2d at 1288.

51. *Id.*

52. On Appeal, the Rhode Island Supreme Court examines the totality of the circumstances, including four, well-established factors: (1) the reasons for

CONCLUSION

The Rhode Island Supreme Court vacated the lower Court's decision and held that a mistrial was required as result of the State's unintentional discovery violation by failing to furnish the defendant with FBI reports containing information about uncharged drug purchases that an informant had made before the date of the first charged offense. The Court found that the prejudice of this information was significant because the jury learned about prior, uncharged criminal conduct of the defendant. The Court also found the introduction of this information irreparably altered the defense's strategy. The Court held that the trial justice's refusal to grant the defendant a mistrial was a clear abuse of discretion.

A. Chace Wessling

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the violation/nondisclosure, (2) the prejudice caused to the aggrieved party, (3) the ability to rectify the prejudice, and (4) all other relevant factors. *See Gonzalez*, 923 A.2d at 1286; *see also* State v. Musumeci, 717 A.2d 56, 60 (R.I. 1998); State v. Verlaque, 465 A.2d 207, 213 (R.I. 1983).

Criminal Law. *State v. Matthew Thomas et al.*, 936 A.2d 1278 (R.I. 2007). In this highly publicized case involving the execution of a search warrant at a smoke shop operated by the Narragansett Indian Tribe, the Rhode Island Supreme Court declined to rule on whether or not it would recognize an executive testimonial privilege for the state governor. Instead, the Court ruled that the Governor's alleged testimony was not relevant to the defense's theory that the state troopers used excessive force in effectuating the warrant.

FACTS AND TRAVEL

On July 14, 2003, the Rhode Island State Police executed a search warrant at a smoke shop operated by the Narragansett Indian Tribe.[1] The search warrant was issued by a District Court judge after finding there was probable cause to believe the smoke shop violated state law by selling unstamped and untaxed cigarettes.[2] When the troopers attempted to execute the search warrant, a violent confrontation with the seven defendants allegedly occurred.[3] All seven defendants were arrested and charged with various criminal misdemeanors.[4]

The Superior Court consolidated the seven cases for trial. Among the State's pretrial motions was a "motion *in limine* to preclude evidence of an alleged instruction by the Governor to Colonel Steven M. Pare, then superintendent of the state police, during the days leading up to the raid."[5] The trial justice denied the motion *in limine* after concluding that the Governor's alleged

1. State v. Matthew Thomas et al., 936 A.2d 1278, 1280 (R.I. 2007).
2. *Id.*
3. *Id.*
4. Defendants Matthew Thomas and Hiawatha Brown were arrested and charged with misdemeanor counts of resisting arrest, disorderly conduct, and simple assault. *Id.* Defendant Bella Noka, was charged with disorderly conduct, simple assault, and obstructing a police officer. *Id.* Thawn Harris was charged with resisting arrest and simple assault, while John Brown, Randy Noka, and Adam Jennings were charged with disorderly conduct and resisting arrest. *Id.*
5. *Id.*

statement may have been "relevant to some of the charges and defenses in th[e] case."[6] Likewise, the defendants subpoenaed the Governor to compel his appearance and testimony at trial.[7] In so doing, the defendants hoped to elicit testimony from the Governor establishing that he had ordered the superintendent of the police to retreat if the troopers encountered any resistance in executing the warrant.[8] In response, the Governor filed a motion to quash the subpoena alleging that his testimony was protected by the executive privilege.[9] The trial justice denied the motion to quash, [10] and the Rhode Island Supreme Court granted the Governor's petition for a writ of certiorari and his motion to expedite.[11]

THE COURT'S ANALYSIS AND HOLDING

The existence of an executive testimonial privilege is an issue of first impression for the Rhode Island Supreme Court.[12] The Governor argued that Rhode Island should follow the lead of other jurisdictions that have adopted an executive testimonial privilege. According to the Governor, the privilege provides that "the chief executive of the state cannot be haled into court unless he or she has personal knowledge of a matter that is highly relevant to the issues before the court and the information cannot be obtained by other means."[13] The defendants on the other hand argue that this Court should not recognize this privilege; however, in the event the privilege is recognized, the defendants argue the Governor has waived any such privilege.[14]

In deciding the case, the Rhode Island Supreme Court declined to rule on the existence of an executive privilege, and instead held the Governor's testimony irrelevant and thus inadmissible regardless of the validity of the privilege.[15] The defendants argued that the Governor's testimony would be

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6. *Id.*
7. *Id.* The defendant, Thawn Harris, did not subpoena the Governor, and therefore he is not a party to these appellate proceedings. *Id.* at fn. 2.
8. *Id.* at 1280-81.
9. *Id.* at 1281.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 1282.

relevant to their theory that the state troopers used excessive force, which they claim is a defense to the charges against them.[16] The defendants, however, argued that the issue of relevancy should not be before the court because the Governor failed to challenge the trial court's denial of the state's motion to quash *in limine*.[17] The Court disagreed with the defendants and found the issue of relevance was properly before the Court.[18] The Court found the trial justice's ruling on the motion to quash indicated that she found the subpoenaed information to be relevant because she explicitly stated that the defendants could only compel the Governor to testify on matters "deemed relevant to the case."[19] Moreover, in finding the Governor did not waive his right to challenge the relevancy of the evidence the Court noted that the first opportunity the Governor had to challenge the trial justice's ruling regarding the relevancy of the evidence was after the ruling on the motion to compel.[20] When the state's motion *in limine* was before the court, the Governor had not been subpoenaed nor had he been ordered to appear.[21]

In describing the standard of review, the Court noted that the determination of whether evidence is relevant is vested in the sound discretion of the trial justice,[22] and on appeal the Supreme Court will not disturb such a determination absent an abuse of discretion.[23] Although an appellate court will rarely reverse a trial justice's ruling, in this case, the Court found there was a clear abuse of discretion.[24] The Supreme Court could not perceive of any possible grounds to support the trial justice's ruling that the Governor's testimony was relevant to the defense's theory that the

16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* Additionally, the court noted that even if a party has knowingly waived an objection, the court may excuse it when an "extreme injustice would be done." *Id.* at 1282-83 (quoting Broadly v. Mashpee Neck Marina, Inc., 471 F. 3d 272, 276 (1st Cir. 2006)).
20. *Id.* at 1283.
21. *Id.*
22. *Id.* at 1281 (citing State v. Silva, 898 A.2d 707, 716 (R.I. 2006)).
23. *Id.* (citing *Silva*, 898 A.2d at 716). Only when there are no grounds to support the trial justice's decision, will the Court hold that the trial justice abused his or her discretion. *Id.* (citing State v. Carvalho, 892 A.2d 140, 148 (R.I. 2006)).
24. *Id.* at 1283.

state police used excessive force.[25]

The Court explained that the search warrant provided the only instructions legally binding on the state troopers.[26] The Governor's alleged conversation with Colonel Pare occurred several days before the search warrant was issued, and thus the search warrant superseded any informal directions the Governor may have given.[27] Therefore, being bound by bound by the warrant's command, and not the Governor's alleged order, the state troopers executed the warrant and used their own judgment about the amount of force necessary to execute the warrant.[28] Consequently, the Court found that the testimony defendants sought to elicit from the Governor had no impact on the trier of facts determination of the reasonableness of the troopers' judgment.[29]

The Court noted that "all allegations that law enforcement officers have used excessive force to effectuate an arrest are subject to the Fourth Amendment's 'reasonableness standard'".[30] Under the Fourth Amendment, whether the force used was reasonable should be evaluated 'from the perspective of a reasonable officer on the scene.'[31] Whether or not the troopers' conduct was reasonable depends on the circumstances at the moment that force was employed, not on any prior events or circumstances.[32] Thus, the Governor's instructions would not aid the trier of fact in determining whether the troopers used reasonable force under the circumstances.[33] Even if the troopers did not comply with the Governor's instruction to back down if they encountered resistance, this fact has no bearing on whether the amount of force used *at the time of execution* was reasonable under the Forth Amendment.[34] Moreover, the Court noted that

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25. *Id.* at 1283.
26. *Id.*
27. *Id.* There is no precedent which would allow the Governor's instructions to interfere with a court order such as the search warrant at issue here. *See id.*
28. *Id.* at 1283-84.
29. *Id.* at 1284.
30. *Id.* (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).
31. *Id.* (quoting *Graham*, 490 U.S. at 396).
32. *Id.* (quoting Elliott v. Leavitt, 99 F.3d 640, 643 (4th Cir. 1999)).
33. *See id.*
34. *Id.*

the introduction of the Governor's statement would confuse the jury, and the avoidance of confusion is another permissible reason for excluding the evidence.[35]Thus, the Court held the Governor's intent and instructions were not relevant to the determination of the whether the troopers' use of force was objectively reasonable, and thus the Governor's petition for certiorari is granted and the order of the Superior Court is quashed.[36]

COMMENTARY

The Rhode Island Supreme Court correctly ruled that Governor Carcieri's instructions were not relevant to the defense's theory that the state police used excessive force in executing the warrant. In so doing, the Court avoided ruling on whether or not it would recognize an executive testimonial privilege. The disputed privilege was an issue of first impression in Rhode Island; however, the Court was able avoid addressing it by deciding the case on less controversial grounds.

The presidential testimonial privilege was first recognized by the United States Supreme Court in the landmark case of *United States v. Nixon*.[37] In *Nixon*, the prosecutor issued a subpoena for tapes and records possessed by President Nixon.[38] The tapes and records were going to be used as evidence in criminal prosecutions against governmental officials linked to the Watergate break-in.[39] The Court recognized that the President's unique role in the government made the privilege necessary.[40] The Court, however, rejected President Nixon's contention that the privilege was absolute, and instead recognized that the presumptive privilege could be overcome by a demonstration of need in a particular criminal case.[41] In *Nixon*, the President alleged a generalized interest in confidentiality, and the Court held that such an interest, unsupported by claim of need to protect military, diplomatic, or sensitive national security secrets, yielded to the

35. *Id.* (citing State v. Snell, 892 A.2d 108, 122 (R.I. 2006)).
36. *Id.* at 1285.
37. U.S. v. Nixon, 418 U.S. 683 (1974).
38. *Id.* at 688.
39. *Id.* at 687.
40. *Id.*
41. *Id.* at 713.

"specific need for evidence in a pending criminal trial."[42]

As the Governor's petition for a writ of certiorari mentioned, executive privilege has been extended to state executive officials. Many states have looked to the *Nixon* decision for guidance in applying executive privilege to governors;[43]however, a review of the cases makes it clear that there is no uniform standard in the way state courts apply the privilege.[44] In fact, state courts that have analyzed and applied the federal doctrine of executive privilege have produced decisions that seem to blur the executive privilege, recognized in *Nixon*, with the deliberative process privilege.[45] However, under either one of the recognized privileges, the outcome of *Matthew Thomas* would be the same: Governor Carcieri's statement would be deemed inadmissible. That is, if a privilege was recognized the evidence would be inadmissible because it would be protected, and if no privilege was recognized the evidence would be inadmissible because it was not relevant.

In the event this issue comes before the Rhode Island Supreme Court again, it should be aware that most states that recognize either privilege have done so by drawing an analogy between the role of the president and the governor.[46] The United States Supreme Court, however, has explained that the "President's unique status under the Constitution distinguishes him from other executive officials,"[47] and thus perhaps the presumption in favor of nondisclosure should be weaker at the state level.

CONCLUSION

42. *Id.* at 713-14.

43. *Matthew Thomas*, 936 A.2d at 1281.

44. *See* Arch T. Allen, III, *A Study in Separation of Powers: Executive Power in North Carolina*, 77 N.C. L. REV. 2049, 2100-03 (Sept. 1999).

45. *See* Matthew W. Warnok, *Stifling Gubernatorial Secrecy: Application of the Executive Privilege to State Executive Officials*, 35 CAP. U. L. REV. 983 (2007) (discussing how state courts' application of executive privilege has blurred the distinction between executive privilege and the deliberative process privilege); Russel L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279 (1989) (discussing the distinction between the deliberative process privilege and the executive communication privilege).

46. *See* Warnok, *supra* note 45 at 1012.

47. *Nixon*, 457 U.S. at 750 (1982).

The Rhode Island Supreme Court declined to rule on Governor Carcieri's assertion of an executive testimonial privilege by correctly holding that the Governor's testimony was not relevant to the defense's theory.

Ashley Taylor

Criminal Law. *State v. Quinlan. State v. Sanchez-Collins,* 921 A.2d 96 (R.I. 2007). A trial court does not err when it holds that a vehicle with items hanging from the rear view mirror is proper justification for stopping of a vehicle and is not a violation of the Fourth Amendment. A trial court has also not abused its discretion in holding a vehicle occupant does not have standing to challenge the search of a vehicle if the occupant neither owns the vehicle nor uses it on a regular basis. Therefore, the occupant of the vehicle does not have the necessary subjective and objective expectation of necessary privacy to support standing. A mere assertion of selective prosecution based on race without any supporting evidence is not sufficient without demonstrating both a discriminatory effect deliberately based an such an unjustifiable standard as race. A trial court has not abused its discretion in refusing to grant a mistrial when a juror made statements to other jurors of having observed where the crime too place. In absence of any finding that the juror's statements went toward other jurors' determination of guilt or innocence, the court did not abuse its discretion. A trial court has not abused its discretion by sentencing a defendant to life without the possibility of parole so long as both mitigating and aggravating factors have been weighed.

FACTS AND TRAVEL

In March 2001 Officer Costa of the Somerset, Massachusetts Police Department was on routine traffic patrol when he saw a Jeep, bearing Rhode Island license plates.[1] Officer Costa observed materials, including a fringed flag, beads and various cardboard air fresheners, hanging from the rearview mirror and extended down the to the dashboard of the car.[2] Officer Costa determined the obstruction of the windshield was in violation of *Mass. Gen. Laws Ann. ch. 90,* §13 which prohibits any item which would

1. State v. Quinlan, State v. Sanchez-Collins, 921 A.2d 96, 100-101 (R.I. 2007).
2. *Id.*

"interfere with or impede driver's safe operation."[3] Officer Costa pulled into the road to stop the vehicle and observed the four passengers, one white and three either Hispanic or African American, "fidgeting, leaning forward and turning around in their seats and looking back at him," at which point officer Costa requested backup due to the "occupants' suspicious behavior."[4] The vehicle then made an "abrupt" turn into an adjacent parking lot, at which point Officer Costa stopped behind the vehicle.[5]

Officer Costa observed continued movement by the occupants within the vehicle while awaiting backup, and when Sergeant Leonard arrived, the two officers approached the vehicle.[6] The driver, later identified as Osiris Parra (Parra), had no license or registration.[7] Parra averted eye contact while responding to questions and the officers observed that none of the passengers were wearing seat belts.[8] Officer Costa requested the names and social security numbers of all the occupants in order to issue citations.[9] Officer Kerrigan arrived on scene and, shortly after, Officer Costa learned of an outstanding warrant for defendant Quinlan, who was then taken into custody.[10] Officer Kerrigan observed continued movement of the vehicle occupants who "ignored her directions to keep their hands where she could see them" and "defendant Collins continuously reached to the floor of the Jeep."[11] Officer Kerrigan testified that their conversations with occupant Parras was "highly unusual and an attempt to distract her from what was going on in the vehicle."[12] Officer Kerrigan informed the other officers of the disregard of her orders and stated she saw a dark mask and dark clothing in the back of the vehicle, at which point the officers decided to "pat-down the occupants and conduct a protective sweep of the vehicle for

3. *Id.* at 101. (Items hanging from mirror included a fringed flag measuring several square inches, string of beads and cardboard air fresheners, and went from the mirror to the dashboard)
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 102.
12. *Id.*

weapons."[13]

Officer Costa swept the vehicle for weapons and focused on the front passenger seat where defendant Collins had been seen fidgeting and reaching for the floor, and found a shirt tied in a bundle which was heavy, wet and hard.[14] Within the shirt Officer Costa "discovered a white plastic grocery bag covered in blood; he opened the bag and saw a human hand and a rock."[15] All four men were handcuffed and transported separately to the police station and the vehicle was impounded.[16] Pursuant to a search warrant, police found two knives, including a machete, within the impounded vehicle.[17]

Parra, the driver, and passenger Marcos Quinones (Quinones), denied involvement in the crimes involving the severed hand and cooperated with police, as well as testified at trial.[18] Parra testified that both defendants Collins and Quinlan carried combat knives and "regularly hung out with the victims."[19] Parra stated that shortly before the murder Quinlan got upset about the quality of the used car which Michael Batista (Batista), one of the victims, had sold him.[20] Quinones similarly testified that Quinlan was angry after having to walk home from work because the battery died in the used car he bought from Batista.[21] Quinlan stated he planned to kill Batista, and asked Quinones to participate, which Quinones did not take seriously.[22] Quinones further testified that Collins participated in the murders because Quinlan owed $300 to both Collins and Batista and with Batista dead, Collins believed he would be more likely to get paid.[23] Parra stated that defendants arrived at his home the morning of the murders to smoke marijuana, at which point Parra borrowed his mother's vehicle, the Jeep, and was told to drive to

13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* Parras initially fainted on scene when the bloody hands were found. *Id.*
17. *Id.* at 102 n.2.
18. *Id.* at 102.
19. *Id.*
20. *Id.*
21. *Id.* at 103.
22. *Id.*
23. *Id.*

Quinones house.[24]

After picking up Quinones, Collins removed a plastic bag covered in blood from a dumpster in Providence and showed Parra the four human hands it contained. [25]Collins then placed a rock in the bag and wrapped it in a shirt and refused to return home until they had disposed of the hand.[26] Defendants had planned to discard the bag at India Point Park, but too many people were at the park so plans changed to throw the hands off the Braga Bridge in Fall River, Massachusetts.[27] Parra testified that during the ride Collins discussed the events from the prior night.[28] Collins stated he and Batista had been drinking and doing drugs with victims Batista and Ortega when, based on the "premeditated plan," Quinlan stabbed Ortega in the neck and Collins hit Ortega in the head with a claw hammer.[29] The two then "laid in wait" for Batista, and later sliced off his ear and killed him as he begged for his life.[30] The two defendants then cleaned the apartment and dismembered the hands.[31]

The plan of dumping the hands off the Braga Bridge also failed due to traffic and the bridge's fencing.[32] When the police pulled the car over in Somerset, Collins told them to remain silent and if caught say that a "Dominican" had paid them to dispose of the hands.[33] Somerset police notified Providence police of the hands being found, which they believed to be connected with a double murder in Providence.[34] Providence Police detectives, based on statements by Parra and Quinones, found the crime scene and the bodies of both victims, Ortega and Batista, whose hands had both been severed.[35] At trial, medical examiner Doctor Laposata, who performed Batista's autopsy, testified that Batista suffered from multiple traumas, a minimum of seventeen wounds,

24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 104.
35. *Id.*

numerous skull fractures, his brain was torn in two places, his "scalp was 'nearly pulverized,'" along with thirty-one punctures to his face and wounds to multiple vital organs all consistent with the combat knives and a hammer claw.[36] Dr. Laposata also stated that Batista's ear had been severed before death and his hands were likely removed post-mortem.[37] Dr. Sikirica performed Ortega's autopsy and found him to have suffered from "multiple traumatic injuries to the head, face and torso," his left eye was ruptured and teeth, as well as nearly a pint of blood, were found in his stomach; all puncture wounds were consistent with the use of the combat knives.[38]

Angelo Isom (Isom), defendant Collin's cousin, testified that he had been present in the house the night of the murder.[39] He awoke and observed "Quinlan standing over Ortega, hitting him in head with a hammer" and the "apartment was covered in blood." [40] After being told by Collins that he and Quinlan were waiting for Batista, Isom stated he then left the apartment.[41]

Both defendants admitted to being present in the apartment the night of the murder but denied killing the victims.[42] Instead, each defendant accused Isom of killing the victims while the defendants claimed to only be part of the clean up and cutting off the hands.[43] Both defendants were convicted of two counts of murder and two counts of conspiracy to murder Michael Batista and Rafael Edwards Ortega.[44]

ANALYSIS AND HOLDING

On December 4, 2006, the defendants separately appealed to the Rhode Island Supreme Court, which the Court consolidated for oral argument, regarding constitutional challenges to the initial stop and search of the motor vehicle. [45] Defendant Collins also argued selective prosecution based on race, and by defendant

36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 105.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 99.
45. *Id.* at 100.

Quinlan claiming mistrial based on juror misconduct and inappropriateness of sentence. [46]

The Vehicle Stop

Traffic stops constitute seizures under the 4th Amendment for that reason must be "reasonable under the circumstances."[47] The Supreme Court conducted a *de novo* review of the questions of law.[48] After reviewing the record and photographic evidence, the Court held that the officer was "legally justified in stopping the vehicle" under Massachusetts law and held that the items hanging from the mirror interfered with the view though the windshield and were within the statute's prohibition.[49] The Court further held that exceptions for decals and window tinting on out of state vehicles had no relevance, and that the stop was justified on *Mass. Gen. Laws Ann. ch. 90, § 13* which applies to both in state and out of state vehicles and contains no such exception for out of state vehicles.[50] The Court held that this case was unlike *Commonwealth v. Brazeau,* where the Massachusetts Court of Appeals held that a small one inch prism hanging from a mirror did not constitute a warranted vehicle stop.[51] The Court distinguished the present case from *Brazeau,* indicating that the "cluster of items. . .spanned from the review mirror to the dashboard" and was not only visible from far away, but photographs verified the size of the obstruction. [52]

The Court also held that the officers' actions after the traffic stop were reasonable under the circumstances.[53] Officers can have the driver and passengers get out of the vehicle as well as conduct a search for weapons in the outer clothing of the person without violating the fourth amendment prohibition against unreasonable search and seizure.[54] The Court held that the pat down for

46. *Id.* at 110-111.
47. *Id.* at 106, (citing Whren v. U.S. 517 U.S. 806, 809 (1996)).
48. *Id.*
49. *Id.* at 106-07; *See* MASS.GEN. LAWS ANN. CH. 90 § 13.
50. *Id.*
51. *Id.* at 107-08, (citing 831 N.E.2d 372, 373 (Mass. 2005)).
52. *Id.*
53. *Id.* at 108.
54. *Id.* (citing Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977); State v. Collodo, 661 A.2d 62, 65 (R.I. 1995)).

weapons was further justified due to the "furtive and suspicious behavior" and the fact that the vehicle's occupants "repeatedly ignored orders to keep hands" visible.[55]

Standing to Challenge Search

Both defendants allege error in the trial justice's finding that they lacked requisite standing to challenge the vehicle search because they did not own the vehicle and were not "regular passengers."[56] The defendants bear the burden of establishing standing and the Supreme Court examined the standing issue *de novo*.[57] "A party has standing when he or she is found to have a reasonable expectation of privacy in the area searched or the thing seized."[58] Factors in determining whether there was an expectation of privacy include: ownership, prior use, ability to control the property or exclude other's use in the property.[59] The determination is both whether the defendant had a "subjective expectation of privacy" and whether the expectation is one which "society accepts as objectively reasonable."[60] The Court held that because he did not own the vehicle and only used it occasionally as passengers the situation "did not give rise to any legitimate expectation of privacy in the vehicle."[61] The Court distinguished the present case from *State v. Milette,* where a defendant had a reasonable expectation of privacy in a vehicle owned by his father, which he possessed keys to, kept his possessions in and frequently used, which was unlike the defendants in the present case who had "no possessory or ownership interest" in the vehicle.[62] Therefore, the Court held that the defendants lacked standing to challenge the search of the vehicle.[63]

Defendant Collins- Selective Prosecution Based on Race

Defendant Collins claimed that the stop of the vehicle for the

55. *Id.*
56. *Id.* at 109.
57. *Id.*
58. *Id.* (citing State v. Casas, 900 A.2d 1120, 1129-31 (R.I. 2006)).
59. *Id.*
60. *Id.* (citing State v. Bertram 591 A.2d 14, 19 (R.I. 1991)).
61. *Id.*
62. *Id.* at 109-10 (citing 702 A.2d 1165, 1166 (R.I. 1997)).
63. *Id.* at 110.

items hanging from the mirror was pretextual and was instead "motivated by race and discriminatory intent."[64] In order to establish elective prosecution must show both that there was a discriminatory effect and prosecution was "deliberately based upon unjustifiable standard" including race or religion.[65] The Court rejected this claim as allegations with no evidence to support either required element of the claim. [66]

Defendant Quinlan- Mistrial Based on Juror Misconduct

Defendant Quinlan appeals the refusal to grant a mistrial and admonish the jury when during trial "jurors spoke about the case, visited the crime scene, and possibly read a news report about the murder."[67] The Court stated it was within the trial judge's discretion whether or not they declare a mistrial and that extraneous information does not create a rebuttable presumption of prejudice, instead the court must consider the effect on the jury. [68] The trial judge had found that the juror's statements did not relate to guilt or innocence and did not influence other members of the jury, who ignored his statement, to justify a mistrial.[69] The juror had merely commented that he viewed the scene while passing it on a bus and that it was in a "'working-class' or 'low class' neighborhood."[70] The judge dismissed the juror at issue and the defendant waived objection to instructions by not requesting any such charge.[71]

Defendant Quinlan- Life without the Possibility of Parole

Defendant Quinlan appealed his sentence of life without the possibility of parole.[72] The Court made an independent review of the factors considered in the sentencing, *de novo*, and stated "based on the degree of brutality evident in the entire record, we

64. *Id.*
65. *Id.* (quoting State v. Ricci, 704 A.2d 210, 211 (R.I. 1997)).
66. *Id.*
67. *Id.*
68. *Id.* at 110-11 (quoting State v. Suero, 721 A.2d 426, 429 (1996)); State v. Hartley, 656 A.2d 954, 961-62 (R.I. 1995).
69. *Id.* at 110-11.
70. *Id.* at 111 n. 12.
71. *Id.*
72. *Id.*

are hard pressed to envision a case that is more deserving of the most severe punishment under our law."[73] The state had provided proper notice of its recommendation of the sentence and jury was specifically asked to determine whether the murders were "committed in a manner involving torture or aggravated battery to the victims."[74] The jury answered unanimously in the affirmative.[75] The Court held that the trial court considered both aggravating and mitigating factors, including the "nature of the offenses and balanced Quinlin's relative youth against his refusal to accept responsibility for these murders and his failure to show any real remorse."[76] The trial judge had stated that "the depth and depravity of these two murders knew no bounds" and that drugs and alcohol were not the "root" of the crimes, demonstrated by the extensive efforts to cover up the crimes.[77] The trial court denied the possibility of parole, and held that the pre-mortem evidence of "torture and mayhem" and little evidence of potential rehabilitation, without even considering the "post-mortem dismemberment," the Supreme Court held the sentences were "entirely just and proper."[78]

COMMENTARY

In this case, the Rhode Island Supreme Court upheld the conviction of the perpetrators of one of the most gruesome and brutal murders in recent Rhode Island history without any significant departure from existing law. This case demonstrates the practical need of upholding the precedent *Whren v. U.S*, which allows for vehicles to be reasonably stopped if the officer has probable cause to believe that a traffic violation or other infraction has occurred. [79] While such stops may appear pretextual they often lead to the apprehension of either the drivers or occupants for more serious crimes.

What is slightly worrisome is how quickly the Court

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73. *Id.* at 112.
74. *Id.* (quoting G.L. 1956 § 11-23-4(4)) (consideration of aggravating and mitigating circumstances)
75. *Id.*
76. *Id.*
77. *Id.* at 112-13.
78. *Id.* at 113.
79. *Id. at 106.* (Citing *Whren,* 517 U.S. 806, 810 (1996)).

dismissed the claim that the traffic stop was based on race and that the traffic violation was merely pretexual. While the Court asserted that one cannot make a bare assertion of race based prosecution and the defendants put forth no evidence to support there claim. The Court does not even touch on the difficulty in asserting such a claim or where one would get evidence that in the mind of the officer, and whether objectively or subjectively the officer pulled the vehicle over on account of the occupants being four males, three of which were minorities. While the holding in *Whren,* which is clearly the basis for upholding the traffic citation here, states that if a vehicle stop is objectively reasonable, even if it is based on a minor traffic violation, it does not matter what the officer's subjective intentions were. Such a holding leaves no room at all for pretexual or race based stops absent blatant and outward discrimination or animus.

CONCLUSION

The Rhode Island Supreme Court upheld the convictions of both defendant's Quinlan and Collins for first degree murder and conspiracy to the murders of Michael Batista and Rafael Edwards Ortega and affirmed the sentences of life without the possibility of parole, and in doing so denied all grounds of appeal.

Alexandra Pezzello

State Criminal Law. *State v. Rodriguez*, 917 A.2d 409 (R.I. 2007). The Rhode Island Supreme Court ruled a defendant was not impermissibly subject to double jeopardy for the same offense, in violation of both the United States and Rhode Island Constitutions, when prosecuted for a felony, which earlier served as the predicate felony for a felony murder charge in a different state, because under the principle of dual sovereignty the same act can result in separate offenses in two jurisdictions.[1]

FACTS AND TRAVEL

On a date around May 23, 1999, Ricardo Gomez was kidnapped in Rhode Island, and his remains were later discovered in New York.[2] After investigations by the Rhode Island and New York police officials, it was theorized the defendant, Marcos Rodriguez, kidnapped Mr. Gomez in Rhode Island, and later murdered him over an outstanding cocaine debt.[3] Rodriguez was tried and convicted in New York of second-degree felony murder and sentenced to twenty-five years to life.[4] Subsequently, the defendant was brought to Rhode Island under the Interstate Agreement on Detainers Act.[5] Upon his return to Rhode Island the defendant was tried for the offenses of kidnapping with the intent to extort money and conspiracy to commit the crime of kidnapping.[6]

Before the trial court, the defendant moved to dismiss the kidnapping count on double jeopardy grounds, arguing the United States and Rhode Island Constitutions precluded prosecuting

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1. *See* State v. Rodriguez, 917 A.2d 409, 411-12 (R.I. 2007).
2. *Id.* at 412.
3. *Id.*
4. *Id.*
5. *Id.* at 412 n.4 (citing R.I. GEN. LAWS § 13-13-2) ("'[I]t is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of [outstanding] charges [against prisoner detainers] and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints.'").
6. *Id.* at 412.

him.[7] Additionally, the defendant argued the cooperation between the two states to prosecute him created a merger of the two jurisdictions, and therefore, invalidated the doctrine of dual sovereignty.[8]

The defendant's motion for dismissal was denied, and the defendant appealed to the Rhode Island Supreme Court.[9]

ANALYSIS AND HOLDING

On appeal, the defendant asserted the same arguments he did before the trial judge: that the Rhode Island charge placed him in double jeopardy for the same offense, and that Rhode Island waived any right to dual sovereignty because of its cooperation with New York officials to convict the defendant.[10]

Double Jeopardy

The defendant contended a line of Rhode Island and United States Supreme Court cases barred prosecuting him for a lesser included offense, "*e.g.*, kidnapping, after conviction for a greater offense, *e.g.*, felony murder."[11] However, the court found the principle of dual sovereignty to be dispositive of the defendant's double jeopardy claim.[12] Dual sovereignty is the principle that the federal government and each state are independent and separate sovereigns which possess, "'the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each 'is exercising its own sovereignty.'"[13] Therefore, when a defendant commits a single act which violates the laws of two distinct sovereigns, the defendant has committed two separate

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7. *Id.*
8. *Id.* at 412-413.
9. *Id.* at 413.
10. *See id.* at 413-414.
11. *Id.* at 413. *See, e.g.*, Lewis v. United States, 523 U.S. 155 (1998); Whalen v. United States, 445 U.S. 684 (1980); Harris v. Oklahoma, 433 U.S. 682 (1977) (per curiam); Blockburger v. United States, 284 U.S. 299 (1932); State v. Doyon, 416 A.2d 130 (R.I. 1980); State v. Innis, 391 A.2d 1158 (R.I. 1978).
12. *See Rodriguez*, 917 A.2d at 414.
13. *Id.* at 414 (citing United States v. Wheeler, 435 U.S. 313, 320 (1978)) (quoting United States v. Lanza, 260 U.S. 377, 382 (1922)).

and distinct offenses.[14]

Of course, the federal Double Jeopardy Clause, applied to the states through the Fourteenth Amendment, requires no defendant be "subject for the same offense to be twice put in jeopardy of life or limb."[15] However, the United States Supreme Court has repeatedly held identical offenses are not considered double jeopardy if prosecuted by separate sovereigns.[16] Additionally, the court noted that Rhode Island cases have followed the same line of reasoning when applying the Rhode Island double jeopardy clause in the Rhode Island Constitution.[17] Thus, while the federal and state double jeopardy clauses forbid multiple prosecutions by a single sovereign, multiple prosecutions by independent sovereigns are not prohibited.[18]

According to the court, the critical determination to be made in applying the doctrine of dual sovereignty is whether, "the entity that seeks to prosecute a defendant for the same course of conduct, for which another entity previously has subjected the defendant to jeopardy, draws its authority to punish the offender from a distinct source of power."[19] The court found no reason to suspect a state was not a separate sovereign with respect to the federal government, because the authority to prosecute is derived from each state's "'inherent sovereignty'" and not the federal government.[20] Additionally, states are no less sovereign with respect to each other, because, again, the power to prosecute criminal cases "derives from 'separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment.'"[21] As such, a state's sovereign interest is never satisfied by another state's "'enforcement of its own laws,'" because the state, as an independent sovereign, is entitled to determine its own interests have not been sufficiently vindicated.[22] Therefore, a state is free to prosecute a defendant for any crime committed within its

14. *Id.* at 414.
15. *Id.* (citing U.S. CONST. amend. V).
16. *See Rodriguez*, 917 A.2d at 414.
17. *Id.* at 415.
18. *Id.*
19. *Id.*
20. *Id.* (quoting *Wheeler*, 435 U.S. at 320 n.14).
21. *Id.* (quoting Heath v. Alabama, 474 U.S. 82, 88 (1985)).
22. *Id.* (quoting Bartkus v. Illinois, 359 U.S. 121, 137 (1959)).

jurisdiction, regardless of whether the defendant has been previously convicted for the same crime in a different state.[23]

The Barktus Exception

The defendant in this case also contended Rhode Island had waived any right to its enforcement of dual sovereignty because of its cooperation with New York to convict the defendant.[24] In *Barktus*, the United States Supreme Court inferred dual state and federal prosecutions may violate double jeopardy if one authority "was acting as a 'tool' of the other, or if the state prosecution merely was 'a sham and a cover for a federal prosecution.'"[25] However, the Rhode Island Supreme Court noted this exception is incredibly narrow and difficult to prove, and applies only to situations in which one sovereign, "'so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings.'"[26]

Applying this standard to the present case, the court found no merit in the defendant's contention Rhode Island waived its right to dual sovereignty because of the joint efforts of New York and Rhode Island police officials.[27] To support his claim, the defendant alleged the extradition of his accomplice to Rhode Island, while he was awaiting trial in New York, evidenced an agreement between the Rhode Island Attorney General and the New York District Attorney to divide the prosecutions for murder and kidnapping.[28] Further, the defendant alleged the offer of immunity to the defendant's girlfriend, by both jurisdictions, for her alleged involvement in the kidnapping, in exchange for her testimony, demonstrated the existence of an agreement.[29]

However, the court found no reason to infer any type of agreement, either express or implied, from the defendant's assertions and "'[t]he purely speculative conclusory allegations of the defendant . . . do not demonstrate that either state was acting

23. *Id.* at 414-416.
24. *Id.* at 414.
25. *Id.* at 416 (quoting *Bartkus*, 359 U.S. at 123-24)).
26. *Id.* (quoting United States v. Guzman, 85 F.3d 823, 827 (1st Cir. 1996)).
27. *Id.* at 416.
28. *Id.* at 417.
29. *Id.*

as the prosecutorial tool of the other.'"[30] According to the court nothing in the conduct alleged by the defendant was close to rising to a level "insidious" enough to "devastate the sovereignty of either jurisdiction."[31]

COMMENTARY

This case clearly delineates the difference between double jeopardy and dual sovereignty law. The court's decision serves to reinforce Rhode Island's right to charge a defendant for any crime they commit within the state's jurisdiction. Indeed, the court does not expound a new theory, or alter the current state of the law, and in large part the decision simply recites United States Supreme Court opinions. Functionally, the purpose of this decision was likely to eliminate future appeals from defendants who committed a crime in Rhode Island and another state, and were then charged with the crime in both states. The opinion serves as a clear line of demarcation between what constitutes double jeopardy and a state's right to vindicate its interests when its laws have been violated under the doctrine of dual sovereignty.

CONCLUSION

The Rhode Island Supreme Court found no merit in the defendant's contention Rhode Island had waived its right to exercise dual sovereignty because of its interaction with New York. As such, Rhode Island was perfectly within its right to charge the defendant for the kidnapping offense under the doctrine of dual sovereignty, and did not need to address the defendant's substantive double jeopardy claim. Consequently, the court affirmed the order denying the defendant's motion to dismiss the kidnapping charge against him.

Scott M. Carlson

30. *Id.* (quoting trial judge).
31. *Id.*

Employment Law. *Horn v. Southern Union Co. et al,* 927A.2d 292 (R.I. 2007). An employment discrimination claim filed under the Rhode Island Civil Rights Act G.L. 1956 chapter 112 of title 42 is subject to a one-year statute of limitations.

FACTS AND TRAVEL

Plaintiff Lynore Horn was employed by Southern Gas Company and New England Gas Company for approximately 16 years.[1] She filed a complaint in United States District Court for the District of Rhode Island, alleging the defendant, her employer, sexually discriminated against her in violation of the Rhode Island Civil Rights Act, G.L. 1956 chapter 112 of title 42 (RICRA).[2] The defendants moved for summary judgment, arguing that the claim was time-barred.[3] Attempting to rule on the motion, the district court determined there was no controlling precedent concerning the statute of limitations for employment discrimination claims asserted under RICRA.[4] The Court noted, the First Circuit and the United States District Court have been faced with the same issue in the past and have had differing outcomes.[5] As a result, the Court certified to the Rhode Island Supreme Court the question: "what is the statute of limitations applicable to an employment discrimination claim asserted under the Rhode Island Civil Rights Act?"[6]

The Rhode Island Supreme Court focused on two Rhode Island statues: the RICRA and the Rhode Island Fair Employment Practices Act, G.L. 1956 chapter 5 of title 28 (FEPA).[7] These statutes are complementary because they both provide protection for employees against discrimination by their employer.[8] More

1. Horn v. Southern Union, 927 A.2d 292, 293 (R.I. 2007).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 294 (citing Rathbun v. Autozone, Inc., 361 F.3d 62 (1st Cir. 2004) and Rathbun v. Autozone, Inc., 253 F.Supp. 2d 226 (D.R.I. 2003)).
6. *Horn,* 927A.2d at 293.
7. *Id.* at 294.
8. *Id.*

specifically, the General Assembly enacted FEPA in 1949 to eliminate discriminatory practices and assure equal employment opportunities for all persons.[9] FEPA contains a one-year statute of limitations.[10]

On the other hand, RICRA was enacted in 1990, to provide broad protection against all forms of discrimination.[11] The General Assembly enacted RICRA in response to the United States Supreme Court case *Patterson v. McLean Credit Union*, in which the Court narrowly construed 42 U.S.C. §1981, the federal counterpart to RICA.[12] The Act allows an employee to file directly with the court and no statute of limitations is enumerated.[13] In this case, the Defendant argued that FEPA's one-year statute of limitations should apply to RICRA employment discrimination claims.[14] The plaintiff countered that the three-year, Rhode Island residual statute of limitations for injuries to the person, G.L. 1956 §9-1-14(b), should be applied to employment discrimination claims filed under RICRA.[15]

ANALYSIS AND HOLDING

Majority

The Rhode Island Supreme Court harmonized the FEPA and RICRA by reading them in *pari materia*. Accordingly, the court held that FEPA's one-year statute of limitations should be applied to employment discrimination claims filed under the RICRA.[16] The court pointed out that the General Assembly specifically enumerated a statute of limitations for employment discrimination claims, for the first time when it enacted FEPA.[17] According to the court, the foregoing fact "reflects the General Assembly's weighing of policy considerations and its legislative

9. *Id.* at 293.
10. *Id.*
11. *Id.*
12. *Id.* (citing 491 U.S. 164 (1989)).
13. *Id.*
14. *Id.*
15. *Id.* at 294.
16. *Id.*; the principle *pari materia* provides that two statutes, on the same subject and enacted by the same jurisdiction, will be read in relation to each other.
17. *Id.* at 295.

judgment that one year is the appropriate amount of time within which claims of employment discrimination should be brought."[18] When it crafted a brief statute of limitations, the General Assembly's intent was to encourage prompt investigation of claims.[19] Notwithstanding the administrative process required under FEPA, the same necessity of prompt investigation applies to employment discrimination claims brought under RICRA.[20] Additionally, other courts have pointed out similar policy rationales for brief periods of limitations in employment discrimination claims brought under FEPA.[21]

According to the court, it is unnecessary to consider the Rhode Island residual statute of limitations which pertains broadly to "injuries to the person," because the General Assembly has expressly chosen to treat employment discrimination differently from other injuries to the person.[22] The majority argued that it is being true to the legislative intent of the General Assembly by reading the FEPA and RICRA in *pari materia*, and engrafting the one year statute of limitations from FEPA (which it has specifically determined is the appropriate limitations period for employment discrimination claims) onto RICRA.[23]

Accordingly, the Rhode Island Supreme Court's answer to the certified question, is that a one-year statute of limitations applies to employment discrimination claims brought under RICRA.[24]

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18. *Id.*
19. *Id.* at n. 10.
20. *Id.* at 295-96.; the one year statute of limitations for FEPA claims is not a result of its administrative process requirements, but rather a result of the General Assembly's effort to preserve evidence. According to the court, that same rationale should apply to claims brought under RICRA.
21. *Id.* at 296 (citing Roadway Express, Inc. v. Rhode Island Comm'n for Human Rights, 416 A.2d 673, 676 (R.I. 1980) (the time limit also ensures that persons charged with violating the Act will receive notice of those charges within one year of the alleged violation. Prompt notification will enable such persons to investigate alleged violations and to preserve evidence) and Ferguson Perforating and Wire Co. v. Rhode Island Comm'n for Human Rights, 415 A.2d 1055, 1056 (R.I. 1980) (These procedural protections are designed to provide respondents with adequate time for such matters as scheduling witnesses, hiring lawyers, and gathering and compiling evidence of the alleged violations before witnesses' memories of the incidents become too obscure)).
22. *Id.*
23. *Id.* at 295-96.
24. *Id.* at 296.

Dissent

In dissent, Justices Flaherty and Suttell argued that the appropriate statute of limitations for employment discrimination claims should be three years, as set forth in G.L. 1956 §9-1-14(b), which governs actions for injuries to the person.[25] As the dissent pointed out, RICRA was passed in response to the United States Supreme Court decision, *Patterson v McLean Credit Union*,[26] in which the Court narrowly interpreted the Civil Rights Act, 42 U.S.C. §1981, to protect only discrimination based on race.[27] The RICRA statute is broader than the Civil Rights Act and expands protection to discrimination based on age, sex, religion, disability, and national origin.[28]

According to the dissent, application of the three year statute of limitations provided by G.L. 1956 §9-1-14(b), for injuries to the person, is more appropriate for employment discrimination claims than the statute of limitations for FEPA claims.[29] The dissent states that the legislative intent behind §9-1-14(b), "was to enact a comprehensive statute that included 'all actions that reasonably could be viewed as arising out of injuries to the person.'"[30]

Both federal and Rhode Island state courts have determined the type of violations that constitute injuries to the person.[31] According to precedent, federal civil rights violations constitute injuries to the person.[32] For example, in *Partin v. St. Johnsbury Co.*, the United States District Court for the District of Rhode Island, held that §9-1-14(b), includes the appropriate statute of limitations for a federal employment discrimination claim filed

25. *Id.* at 299.
26. *Id.* at 297.
27. *Id.* (citing *Patterson*, 491 U.S. 164 (1989)).
28. *Id.* at 298 (citing Rathbun v. Autozone, Inc., 361 F.3d 62, 67 (1st Cir. 2004)).
29. *Id.* at 299.
30. *Id.* (citing Commerce Oil Refining Corp. v. Miner, 98 R.I. 14, 19 (1964) (resulting injures from violations of rights to which one is entitled by reason of being a person in the eyes of law, are included within the period of limitation provided for in §9-1-14(b). Such rights are distinguished from those which accrue by contract)).
31. *Id.*
32. *Id.* at 300 (citing Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) (the United States Supreme Court held that §1981 claims were subject to the relevant state statute of limitations governing personal injury claims)).

under 42 U.S.C. §1981.[33] The Court determined that the statute of limitations in §9-1-14(b), is not limited to physical injuries, but also covers injuries to personal dignity.[34] Other injuries that fall under §9-1-14(b), are written defamation or libel and civil rights actions under 42 U.S.C. §1983.[35] The dissent concluded that because the RICRA includes almost identical language as its federal counterpart, 42 U.S.C. §1981, similar violations under RICRA would also constitute injuries to the person.[36]

Because the imposition of a statute of limitations is a matter of policy, the General Assembly should determine the appropriate statute of limitations rather than the court.[37] When drafting RICRA, the General Assembly presumably knew the precedent applying the three-year statute of limitations from §9-1-14(b), to federal civil rights violations and it "must have intended the state law to trigger the same limitations period."[38] Further, in *Nappi v. John Deere & Co.*, the Rhode Island Supreme Court acknowledged that it was the intent of the legislature to subject all injuries to the person to the same statute of limitations.[39]

By applying a one-year statute of limitations to employment discrimination claims filed under RICRA, the court has essentially divided RICRA into subclasses that will be governed by differing limitations depending on the type of claim.[40] The dissent concluded that it is unlikely the legislature's intent was to divide RICRA into subclasses because such division conflicts with the Rhode Island Supreme Court's acknowledgment in *Nappi*.[41] According to the dissent, there should be a uniform statute of limitations for all claims filed under RICRA, whether or not employment related.[42]

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33. *Id.* (citing *Partin*, 447 F.Supp. 1297 (D.R.I. 1978)).
34. *Id.*
35. *Id.* (citing Mikaelian v. Drug Abuse Unit, 501 A.2d 712 (R.I. 1985); Walden, III, Inc. v. State of Rhode Island, 576 F.2d 945 (1st Cir. 1978)).
36. *Id.* at 300.
37. *Id.* at 297.
38. *Id.* at 300; *see also Goodman*, 482 U.S. 656.
39. *Id.* (citing 717 A.2d 650, 651 (R.I. 1998)).
40. *Id.*
41. *Id.* at 301 (citing 717 A.2d at 650); *see also Rathbun*, 361 F.3d at 66 (when a rights-creating statute is silent as to what limitations period should apply, the Rhode Island Supreme Court's practice has been to look first to residual statutes of limitations).
42. *Id.*

The dissent further argued, even though FEPA and RICRA protect related interests, they are independent of one another and each has a separate focus.[43] The FEPA was enacted to eliminate discriminatory practices and assure equal employment opportunities for all persons.[44] Whereas, the RICRA was enacted to provide broad protection against all forms of discrimination.[45]

Harmonization of FEPA and RICRA statutes might frustrate the conciliatory purpose of FEPA.[46] The dissent compared the relationship between FEPA and RICRA to the relationship between Title VII and §1981, the respective federal counterparts, and cited the United States Supreme Court decision, *Johnson v. Railway Express Agency, Inc.* to support its conclusion.[47] In *Johnson*, the Supreme Court held:

> The filing of a lawsuit might tend to deter efforts at conciliation, that lack of success in the legal action could weaken the Commission's efforts to induce voluntary compliance, and that a suit is privately oriented and narrow, rather than broad, in application, as successful conciliation tends to be.[48]

The Court held that even though Title VII and §1981, are directed towards most of the same ends, they are separate, distinct, and independent.[49]

Finally, the dissent argued the FEPA and RICRA may co-exist under differing timeliness requirements and still serve their purpose of protection of individual rights.[50] The FEPA may continue to "foster the employment of all individuals in this state in accordance with their fullest capacities [. . .] and to safeguard their rights to obtain and hold employment without discrimination" and the RICRA may continue "to provide compensatory and/or injunctive relief to those people whose civil rights have been violated."[51] The dissent would ultimately

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43. *Id.* at 301.
44. *Id.* at 293.
45. *Id.*
46. *Id.* at 302.
47. *Id.* (citing 421 U.S. 454 (1975)).
48. *Id.* (citing 421 U.S. at 461).
49. *Id.* (citing 421 U.S. at 461).
50. *Id.*
51. *Id.* at 303 (citing *Rathbun,* 361 F.3d at 69).

answer the certified question by applying the three-year statute of limitations set forth in §9-1-14(b), to employment discrimination claims brought under RICRA.[52]

COMMENTARY

The Rhode Island Supreme Court was faced with the difficult task of determining the applicable statute of limitations for employment discrimination claims brought under RICRA. The task was difficult because the statute is silent on what the timeliness requirements are for employment discrimination claims asserted under RICRA. The majority's conclusion that a one-year statute of limitations applies to employment discrimination claims brought under RICRA is appropriate. The holding substantiates policy considerations in support of prevention of stale claims and preservation of memories. However, as the dissent pointed out, the issue may have been better served if left to the General Assembly.

The intent of the legislature with regard to the statute of limitations is ambiguous. The difference of opinion between the majority and dissent elucidates that fact. The majority pointed out that the legislature specifically set forth what it believed to be an appropriate statute of limitations for employment discrimination claims when it drafted FEPA, and therefore it probably intended that same limitation to apply to employment discrimination claims brought under RICRA. On the other hand, the dissent argued that the legislature surely knew about the tremendous amount of precedent applying §9-1-14(b) to injuries to the person, and must have intended the three-year statute of limitations to apply.

Additionally, the reading of the FEPA and RICRA statute in *pari materia* makes sense, because the two statutes were enacted by the same jurisdiction and provide for similar remedies in successfully proved employment discrimination claims. However, FEPA is narrower because it applies only to employment claims. Whereas, RICRA is much broader because it applies to all civil rights claims. Providing a statue of limitations for employment discrimination claims brought under RICRA leaves many other

52. *Id.*

discrimination claims under that statute without clear timeliness requirements. As the dissent pointed out, the Rhode Island Supreme Court has held that all injuries to the person should be subject to the same statute of limitations. And, substantial precedent supports the contention that civil rights claims are injuries to the person.

The dissent further pointed out that the Supreme Court of the United States has faced the issue of determining the appropriate statute of limitations with regard to the federal statutory counterparts of the Rhode Island statutes. The Supreme Court held that even though Title VII and 42 U.S.C. §1981 provide for similar protections, they are separate, distinct and independent.[53] FEPA and RICRA should be examined the same way.

Nevertheless, a shorter statute of limitation supports the policy of preventing stale claims and preserving evidence, which is essential in employment discrimination claims. However, there is enough discrepancy with regard to the proper classification of an employment discrimination injury and the intent behind RICRA and other statutes protecting individuals from discrimination, that the matter is better left with the legislature.

CONCLUSION

Both the majority and the dissent support their arguments with compelling case law and analysis, but the intention of the General Assembly with regard to the appropriate statute of limitations for employment discrimination claims filed under RICRA is still unclear. The majority explicitly avoided a determination with regard to the statute of limitations for other RICRA actions. Next time there is a discrepancy about the appropriate statute of limitations for a discrimination claim other than employment, the answer will not be any simpler as a result of this decision. Instead, it may be more confusing. However, going forward, the statute of limitations for employment discrimination claims brought under RICRA is one year.

Jillian N. Taylor

53. *Id.* at 302 (citing *Johnson*, 421 U.S. at 461).

Employment Law. *Rhode Island Telecommunications Authority v. Russell*, 914 A.2d 984 (R.I. 2007). Plaintiff, a veteran, sued his employer, the Rhode Island Telecommunications Authority, and the Department of Administration, after being laid off, seeking a position of similar grade to the one he previously held, as well as back pay, under Rhode Island Gen Law §36-5-7 (2007). The Rhode Island Supreme Court held that while the Department of Administration did have a duty to place the plaintiff in a position of similar grade, that duty seized when plaintiff voluntarily submitted a retirement request. Also, because the plaintiff had failed to notify the state of his veteran status at the time he began working, the Department of Administration was only liable for back pay that had accumulated from the time the department found out about the veteran status.

FACTS AND TRAVEL

The defendant, Glenn F. Russell, was for many years a familiar person on Rhode Island's public television station (Channel 36), until he was notified that due to state financing reductions, his position of director of public affairs had been eliminated and he was being laid off. [1] That act of laying Russell off began this saga in which Russell is seeking to return to the television station, or in the alternative, to secure a similar position within state service.[2]

Mr. Russell's service with the state of Rhode Island began in 1978 when he was hired by the Department of Education to work as an unclassified state employee at Channel 36.[3] At that time, he had filled out an application for employment, on which he misrepresented his age, the year he graduated from high school, the years he attended college, and his status as a war veteran.[4] He continued working as a non-classified employee when the

1. Rhode Island Public Telecomm. Auth. v. Russell, 914 A.2d 984, 986 (R.I. 2007).
2. *Id.*
3. *Id.*
4. *Id.*

Rhode Island Public Telecommunications Authority took Channel 36 over in 1982.[5] On July 23, 1992, Russell was notified by Susan Farmer, the president and chief executive officer of the authority, that his director of public affairs position had been abolished, and he would be laid off as of August 21, 1992.[6] At this point, Russell notified his union, who concluded that pursuant to the Collective Bargaining Agreement between the union and the authority, a sixty day notification was needed before a layoff.[7] There was a subsequent agreement that in exchange for a waiver of all claims and grievances associated with the layoff by Russell, the date of the layoff would be pushed back accordingly.[8]

On September 18, 1992, now Russell's official lay-off date, he applied for and received a Certificate of Veteran's Status from the Department of Administration (DOA) Office of Personnel Administration. He admitted that he had known of the statute[9] regarding veteran's status, but was unsure of his standing until he received the certificate.[10] He admits that he did not raise his veteran status at any time during the layoff or negotiations with

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5. *Id.* at 986-87.

6. *Id.* at 987.

7. *Russell*, 914 A.2d at 987

8. *Id.* This agreement was set forth in a memorandum of agreement dated August 21, 1992. The relevant part read as follows: "The effective date of the placement of Mr. Glenn Russell on lay-off is hereby extended by the Rhode Island Public Telecommunications Authority from August 21, 1992 to September 18, 1992. In consideration of said extension all grievances and claims by or on behalf of Glenn Russell regarding his lay-off from Channel 36 are hereby withdrawn, waived and settled. From August 21, 1992 to September 18, 1992 Mr. Russell is not assigned duties on Station premises." *Id.*

9. *See* R.I. Gen. Laws §36-5-7 (1956); The pertinent part reads as follow: "(a) Any person who is an honorably discharged veteran of the armed forces of the United States and who has completed fifteen (15) or more years, not necessarily consecutive of service credits, those credits having been earned in either the classified, nonclassified, or unclassified service of the state or a combination of both, shall be deemed to have acquired full status in the position he or she holds at the time of obtaining fifteen (15) years of service credit...(2) That in case of layoff or the abolition of a position through reorganization or otherwise, any person in that position or subject to layoff, who has full status, otherwise qualified under this section, shall be retained within state services in a position of similar grade; (3) That this section shall not apply to employees of the state government whose method of appointment, salary, and term of office is specified by statute." *Id.*

10. *Russell,* 914 A.2d at 987.

Channel 36.[11] Channel 36 said they received no notice of the veteran status until they received a letter from Russell's attorney more than a year after the layoff.[12] At trial, Russell stated that he had attempted to gain employment within the state based on this status.[13]

In a letter to the DOA dated September 3, 1993, Russell questioned the lack of attention given him and asked "how and when the state intended to honor my Tenure under R.I.G.L. 36-5-7." A preliminary hearing was scheduled, at which time the administrator of adjudication held that Russell did qualify for veteran's status and that he was "hereby restored to his previous classification or, if that is impossible, to a position of similar grade at Channel 36."[14] Russell's attorney then sent Channel 36, whom at no point had known of the proceeding, a letter asking when Russell should return to work.[15] Channel 36 responded on December 30, 1993 by filing this action for declaratory relief in Superior Court seeking: (1) a declaration that the administrator of adjudication lacked jurisdiction to hear the case since Russell was a nonclassified employee and therefore not subject to the merit system laws; (2) a declaration of Channel 36's rights under the August 21, 1992 agreement; and (3) appellate review of the administrator of adjudication's decision.[16] Russell counterclaimed, seeking enforcement of the decision. Then Channel 36 amended its complaint and joined the DOA as a defendant, resulting in Russell amending his counterclaim and also filing a cross-claim against the DOA.[17] Russell's claims stated that Channel 36 and/or the DOA must comply with §36-5-7 and provide him with a new, equal position.[18] Prior to trial, Russell submitted a retirement request and began to collect a pension.[19]

A bench trial in the Superior Court ensued in two phases, the first concerning Russell's veteran status, the second focusing on

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 988.
15. *Id.*
16. *Russell*, 914 A.2d at 988.
17. *Id.*
18. *Id.*
19. *Id.*

the damages.[20] On May 2, 2000, the trial justice ruled that Russell was entitled to veteran's status and the waiver clause did not bar Russell from pursuing his claim.[21] The court also ruled that DOA was responsible for placing Russell in state employment.[22] On November 13, 2003, after the damages phase of the trial, the court found that DOA was responsible for placing Russell in a new, equal position, while Channel 36 was liable for paying Russell back pay.[23] After each party filed a motion for reconsideration, "on July 23, 2004, the Superior Court ordered Channel 26 to pay Russell $439,306.17 without prejudgment interest and $362.34 for 15 percent of his sick leave accumulated at the time of his payoff."[24] Each side filed this appeal.

ANALYSIS AND HOLDING

Mr. Russell's Veteran's Status

The Supreme Court affirmed the Superior Court's holding that Mr. Russell is eligible for veteran status under Rhode Island Gen. Laws §36-5-7 (2007).[25] Both Channel 36 and the DOA stipulated in an "Agreed Partial Statement of Facts" that Russell is an honorably discharged veteran with fifteen years of service.[26] Because of this, the DOA and Channel 36 cannot now argue that Russell has not met one of the two statutory prerequisites for "full status" in his job, and this issue is no longer a question for consideration.[27] The court also found that this issue was not saved for appeal because neither Channel 36 nor the DOA moved at trial to withdraw or repudiate any of the agreed stipulations.[28] Because of these stipulations, the validity of Russell's "Certificate of Veteran's Status" and the jurisdiction of the administrator of adjudication is not relevant.[29]

The DOA and Channel 36 also argued that the exception for

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20. *Id.*
21. *Id.*
22. *Russell*, 914 A.2d at 989.
23. *Id.*
24. *Id.*
25. *Id.* at 992.
26. *Id.* at 990.
27. *Id.*
28. *Russell*, 914 A.2d at 991.
29. *Id.*

"employees of the state government whose method of appointment, salary and term of office is specified by statute" puts Russell outside the scope of the statute.[30] However, the court found that this exception did not apply to the case at bar because Russell's tenure was not "coterminous" with Mrs. Farmer's incumbency as general manager.[31]

For these reasons, the court affirmed the trial court's finding as to Mr. Russell's veteran status.

Liability of Channel 36

The Supreme Court reversed the Superior Court's judgment holding that Channel 36 was "solely responsible to compensate Russell for the income that he would have received during the period of his lay off."[32] This decision stemmed from the memorandum of agreement discussed earlier between Russell and Channel 36 which stated that "all grievances and claims by or on behalf of Glenn Russell regarding his layoff from Channel 36 are hereby withdrawn, waived and settled."[33] The trial court found that the waiver "does not prevent Russell from pursuing his statutory right to veteran's status" and that Russell "did not waive his right to veteran's status under § 36-5-7."[34] Although the Supreme Court agrees that this is not a complete waiver of all of Russell's rights, it does "relieve Channel 36 of any liability it might otherwise have borne relative to his veteran's status."[35] His post-layoff claim against Channel 36 is too intertwined with his layoff to not be within the scope of his employment. At the time of the layoff, Channel 36 did not know of Russell's veteran status, due to his misrepresentation on his application. While Russell argues that his veteran's status involves a post-layoff right, the statute ensures that any qualified veteran whose position has been abolished or is subject to layoff shall be retained within state service.[36] The agreement at issue waived all of his claims against Channel 36 and his post-layoff claim invokes the

30. *Id.*
31. *Id.* at 992.
32. *Id.* at 993.
33. *Id.* at 992.
34. *Russell*, 914 A.2d at 992.
35. *Id.*
36. *Id.*

same status that might have secured his uninterrupted employment if it had been correctly raised.[37] Therefore, while Russell is entitled to his veteran's status, he cannot presently use this status against Channel 36.[38]

Liability of the DOA

The Supreme Court affirmed the trial court's finding that the DOA is liable for paying Mr. Russell back pay, although not to the extent the trial court found.[39] After determining that Russell did in fact qualify for veteran's status, the trial court found that the DOA had the responsibility to place Russell in a position "of similar grade" to the one he had held at Channel 36. From this, it followed that DOA was liable for the "income he would have received during the period of his lay-off."[40] However, this case was not so easy. Because Mr. Russell was not classified as an employee having veteran's status, Channel 36 had no duty to notify the DOA of Russell's impending layoff.[41] Even if Channel 36 had notified DOA of Russell's impending layoff, due to the misrepresentation Russell made about his veteran's status on his application, his employment records would not reflect his status.[42] However, the language of § 36-5-7 makes it clear that the General Assembly intended for all honorably discharged war veterans, whether in the classified, unclassified, or nonclassified service of the state, to receive the benefits of full status. Based on this, although the Supreme Court was willing to place responsibility on the DOA to place Russell in state employment, the court was unwilling to award back pay for the part of his unemployment that preceded DOA's awareness of his circumstances.[43] The court also found that Russell's voluntary retirement, which he requested prior to trial, relieved the DOA of all responsibility it had in finding him a state job.[44]

37. *Id.*
38. *Id.* at 992-93.
39. *Id.* at 993-94.
40. *Id.* at 993.
41. *Russell*, 914 A.2d at 993.
42. *Id.*
43. *Id.*
44. *Id* at 994.

Vacation and Sick Leave Benefits

The Supreme Court affirmed the trial court's finding that neither vacation time nor additional sick leave should be included in the calculation of back pay. These items are not additional income, but provide payment of an employee's regular salary when the employee is authorized to be out of work.[45] Mr. Russell pointed to *Pettway v. American Cast Iron Pipe Co.*[46] and *Cox v. American Cast Iron Pipe Co.*[47] to support his argument that vacation time and sick leave should be included in his back pay, however the Court distinguished these cases from the case at bar. While in those cases the court had found instances of "egregious discrimination" and the damages were calculated under federal employment discrimination statutes, in this case, there were no allegations of discrimination.[48] Nor was he wrongfully terminated, as in *Wilkinson v. The State Crime Laboratory Commission.*[49] Because of these reasons, the court found that his back pay should not include sick leave and vacation time.

Prejudgment Interest

Finally, the Supreme Court affirmed the trial court's finding that there should be no prejudgment interest added to the award of back pay. While Mr. Russell contended that once a statute establishes a property right, here in the award of back pay, the government cannot invoke sovereign immunity to escape liability from that right.[50] While the court agreed with Mr. Russell's interpretation up to a point, the court found that "liability for back pay and liability for prejudgment interest are two separate matters; the latter does not automatically flow from the former."[51] The text of § 36-5-7 does not include a right to prejudgment interest.[52] Therefore, absent any statutory provision to the contrary, the court held that "the doctrine of sovereign immunity

45. *Id.*
46. 494 F.2d 211, 263 (5th Cir. 1974).
47. 784 F.2d 1546, 1562 (11th Cir. 1986).
48. *Russell*, 914 A.2d at 994.
49. *Id.*; *see* 788 A.2d 1129 (R.I. 2002).
50. *Russell*, 914 A.2d at 994-95.
51. *Id.* at 995.
52. *Id.*

insulates the state from paying prejudgment interest."[53]

COMMENTARY

In this complex case, the Supreme Court was confronted with the issue of what rights a veteran who has been laid off by the state has under § 36-5-7 when the veteran initially failed to notify the state at the time of his employment of his veteran status. The court successfully managed this issue when finding that Mr. Russell was due the full rights under the statute, yet also decreasing his total award amount due to his earlier misrepresentation. In this way, the Supreme Court followed the plain language of the statute, but made it clear that it was not going to tolerate such a blatant misrepresentation to the state.

The main lesson that can be taken from this case is how important it is to disclose all information at the time of employment. Although the case does not make clear the reasons for Russell's misrepresentations, it is clear that he would have fared much better during the course of the layoff if the state had been aware that he was an honorably discharged veteran. The DOA would immediately have been notified of the impending layoff, and it is very likely that Mr. Russell would never have had the span of unemployment. Even if he still had to go through a period of unemployment, the DOA would have had to provide him with back pay for the entire length of time he was out of work. If he hadn't made this misrepresentation, it is also very possible that this piece of litigation would not have ensued.

CONCLUSION

In conclusion, the Supreme Court affirmed the trial court's finding that Mr. Russell did qualify for veteran's status under § 36-5-7, and it was the DOA's responsibility for placing him in a similar position within the state. However, the court reversed the finding that the DOA had an ongoing duty to place him in state services. The court also reversed the trial court's finding of liability against Channel 36. The court directed judgment against the DOA, awarding him an award of back pay without prejudgment interest, vacation time, or sick leave.

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53. *Id.*

Erin B. Rosenthal

Employment Law. *Shoucair v. Brown University*, 917 A.2d 418 (R.I. 2007). An employee's limited opportunity to be heard during later stages of employment review does not, as a matter of law, indicate that an independent investigation has taken place, purging all traces of a retaliation-based discrimination claim. Additionally, a retaliation-based discrimination claim requires evidence beyond the *prima facie* case of retaliation when an employer introduces an alternative justifiable explanation for termination. Unless an employer participated in, authorized, or ratified the retaliatory act of its employee, punitive damages cannot be properly awarded against that employer. In the context of a professor being unable to find work in academia, he or she is obligated to search for a position outside of academia to mitigate his or her damages for awards of back pay and front pay from an employment discrimination claim. Likewise, reinstatement is not an appropriate remedy for a professor who is denied tenure if he or she has not stayed current with research and experience in the field of his or her profession.

FACTS AND TRAVEL

Plaintiff Professor Fred Shoucair, Ph.D., was hired by the defendant, Brown University ["Brown"], as an assistant professor in the Electrical Services group of the Division of Engineering in July 1987.[1] Not long after arriving at Brown, Shoucair was invited to join the Laboratory for Engineering Man/Machine Systems ["LEMS group"] by Professor Harry Silverman.[2] Shoucair joined the LEMS group, which consisted of a number of professors in the electrical sciences group who met on a regular basis to discuss common academic and research interests.[3] In May 1990, however, Shoucair left the group following a disagreement with Silverman concerning a grading controversy in one of Shoucair's undergraduate engineering classes.[4]

1. Shoucair v. Brown Univ., 917 A.2d 418, 421 (R.I. 2007).
2. *Id.* at 422.
3. *Id.*
4. *Id.*

Specifically, Silverman felt that Shoucair had "a disproportionately large number of noncredit grades" for his "Engineering 52" class.[5] Apparently, Silverman demanded that Shoucair change the grades and he refused.[6] Silverman then left the room and came back with two other professors and proceeded to alter the grade sheets, which Shoucair signed under protest, acknowledged by the other two professors in a written note.[7] After Shoucair wrote a letter of complaint to the Dean of Engineering, Alan Needleman, the original grades were restored.[8]

In 1992, Silverman, who was then Dean of Engineering, recused himself from Shoucair's tenure proceedings, since the two had not spoken since the 1990 grading dispute.[9] Silverman appointed Professor Maurice Glicksman to chair Shoucair's tenure review committee ["TRC"], who subsequently enlisted Professors Nabil Lawandy and Subra Suresh to fill the committee.[10] During the 1992-93 academic year, the TRC compiled and evaluated Shoucair's tenure dossier.[11] Simultaneously, Glicksman was co-chairing a search committee to hire a new professor in the electrical sciences division to replace a retiring faculty member.[12] In February 1993, it was announced by Dean Silverman that the search committee recommended hiring Eli Kapon.[13] The tenured faculty voted to approve the recommendation, but Brown's Affirmative Action Monitoring Committee would not accept the recommendation until one more "viable underrepresented minority candidate (Asian)" was interviewed.[14] Shortly thereafter in early March, Glicksman's secretary contacted Shoucair to ask him to interview the additional minority candidate for "some affirmative action considerations."[15] Shoucair declined, indicating that that "it might be illegal to interview a candidate for a position

5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 423.
13. *Id.*
14. *Id.*
15. *Id.*

that had already been offered to someone else."[16] A week or two later, Glicksman appeared in Shoucair's office, unannounced, with the minority candidate whom Shoucair had declined to interview.[17] Shoucair agreed, reluctantly, to spend fifteen minutes with the candidate.[18]

Shortly after this episode, on March 23, 1993, the TRC voted to recommend Shoucair for tenure, but with a significant disclaimer that the committee was unable to endorse him "with enthusiasm."[19] On March 24, 1993, the tenured faculty of the electrical sciences group met and voted 5-0 (with Glicksman and Dean Silverman abstaining) to allow Shoucair's contract to lapse and not extend him tenure.[20] Shoucair made himself available for questioning (none were asked) at a meeting of all tenured faculty, which voted 15-5 (with four abstentions) to not extend tenure to Shoucair.[21] On May 17, 1993, Shoucair appeared before the Committee on Faculty Reappointment and Tenure ["ConFRaT"], which would make a recommendation to the provost about tenure.[22] The ConFRaT members asked questions of Silverman, Glicksman, and Lawandy, before asking Shoucair questions, including some by Provost Frank Rothman.[23] ConFRaT voted 7-1 to deny Shoucair's tenure application. In response, Shoucair filed a grievance with the Faculty Executive Committee ["FEC"], which in September 1993 heard testimony concerning the grievance.[24] Here, Shoucair alleged for the first time that Glicksman "had undermined [Shoucair's] tenure bid in retaliation for Shoucair's misgivings about interviewing the minority candidate" for the open faculty position.[25] After the FEC decided that Shoucair's grievance was without merit, and a failed plea to Brown's then-President Vartan Gregorian, "Shoucair was effectively finished at Brown."[26] After Shoucair's contract expired on June 30, 1994, he

16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 423-24.
21. *Id.* at 424.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 425.

submitted "around the order of a hundred" employment applications to colleges and universities through 1995, but received no offers until 1996, when he accepted an adjunct faculty position at the University of California-Berkeley.[27] He worked at UC-Berkeley until 1999, when he believed that the position offered him no opportunity for advancement.[28]

Shoucair filed the underlying lawsuit in May 1996, alleging "(1) Brown had 'tolerated and even condoned' an ethnically hostile work environment created by Dean Silverman in the division of engineering; (2) Professor Glicksman, acting as an agent of Brown, had retaliated against Shoucair for opposing Glicksman's discriminatory interviewing practices; and (3) Shoucair was denied tenure because of his national/ancestral origin."[29] In May 2003, at the conclusion of the trial, the jury found for Shoucair on the retaliation claim only, and awarded him $400,000 in back pay, $175,000 in compensatory damages, and $100,000 in punitive damages.[30] The trial judge denied Brown's renewed motion for judgment as a matter of law, motion for a new trial, and motion to strike the punitive damages.[31] However, the trial judge reduced Shoucair's back pay by 30 percent.[32] The trial judge denied Shoucair's motions for reinstatement and front pay, but awarded Shoucair's motions for attorney's fees and costs.[33] Brown subsequently appealed and Shoucair cross-appealed.[34]

ANALYSIS AND HOLDING

Brown argued, on appeal, that the evidence failed to establish Shoucair's retaliation claim as a matter of law.[35] The Rhode Island Supreme Court found that evidence existed to show that Glicksman acted in retaliation, and that Shoucair overcame both his initial burden of a *prima facie* case and his second burden of showing that the defendant's alternative explanation for

27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 425-26.
32. *Id.* at 426.
33. *Id.*
34. *Id.*
35. *Id.*

termination was "unworthy of credence."[36] Brown also maintained that the trial judge erred when not requiring expert medical testimony in order to sustain an award for compensatory damages to prove that Shoucair suffered from physical and emotional ailments.[37] The court held that expert medical testimony was not necessary for a jury to determine whether a person would suffer from emotional distress and humiliation following a retaliatory discrimination act.[38] Brown's final argument on appeal asserted that the trial judge erred when she sustained the award of punitive damages because an employer must participate in, authorize, or ratify the retaliatory act of its employee, which was not present in this case.[39] The court found that the trial justice erred when she sustained the punitive damages because the evidence did not implicate anyone other than Glicksman as participating in the wrongful retaliatory act and punitive damages are only appropriate against an employer when it expressly participates in the discriminatory act.[40]

Shoucair contended on appeal that the trial judge abused her discretion when she reduced the jury's back pay award by 30 percent, as well as by denying his motions for reinstatement and front pay.[41] The court held that trial judge did not abuse her discretion as Shoucair's lack of mitigation provides a rational basis for the reduction of back pay award[42] as well as the lack of a front pay award,[43] and reinstatement would be an improper remedy, as Shoucair did not stay up to date on the evolving field of engineering.[44]

Professor Shoucair's Retaliation Claim

The Fair Employment Practices Act ["FEPA"] prohibits employer discrimination "against any individual because he or she has opposed any practice" under the act, such as discriminating

36. *Id.* at 429.
37. *Id.* at 432.
38. *Id.* at 433.
39. *Id.* at 434.
40. *Id.*
41. *Id.* at 432, 435-36.
42. *Id.* at 432.
43. *Id.* at 436.
44. *Id.*

based on race, religion, gender, or country of ancestral origin.[45] Rhode Island uses the three-step burden shifting analysis established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green.*[46] Under this test, the employee must first make out a *prima facie* case of retaliation.[47] If a *prima facie* case is made, then discrimination is presumed with the burden of production, not persuasion, falling to the employer to show some legitimate reason for the act at issue.[48] If the burden of production is met by the employer, the employee then must demonstrate that the employer's given justification is merely an excuse.[49]

Here, the Rhode Island Supreme Court found that the evidence allowed for more than one legitimate conclusion about whether Brown's reason for denying him tenure was pretextual.[50] A reasonable jury could find that based on Shoucair's testimony, the presented testimony of respected authorities in the field, and the TRC recommendation, "albeit without enthusiasm," showed that Shoucair was entitled to tenure.[51] While Brown met its burden of production of a justifiable reason of "publish or perish"[52] to deny Shoucair tenure, there was evidence that would allow a reasonable jury to conclude that Brown's justifications were "unworthy of credence."[53] Specifically, Shoucair presented evidence that had a tendency to show that Glicksman was aware of Shoucair's refusal to interview the minority candidate and then shortly thereafter, "authored a very qualified recommendation for Shoucair," as well as testimony that "this was the first instance [multiple witnesses] could recall in which the recommendation of the TRC was rejected by the tenured faculty."[54]

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45. *Id.* (See R.I. GEN. LAWS §28-5-7(5) (2007)).
46. *Id.* (citing McConnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).
47. *Id.* at 427 (citing *McDonnell Douglas*, 411 U.S. at 802).
48. *Id.* (citing *McDonnell Douglas*, 411 U.S. at 802).
49. *Id.* (citing *McDonnell Douglas*, 411 U.S. at 802).
50. *Id.* at 428.
51. *Id.*
52. This is the concept that, in order to receive tenure, a professor must stay current within his specialization, receive grants to conduct research within his specialization, and publish the results of such research on a constant basis. *Id.* at 421.
53. *Shoucair*, 917 A.2d at 429 (citing Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 142 (2000)).
54. *Id.*

The court also rejected Brown's argument that, as a matter of law, the multiple layers of the tenure approval process and Shoucair's opportunity to be heard by subsequent reviewers showed that Shoucair's denial of tenure was not the result of a single retaliatory act by Glicksman.[55] The court distinguished a Massachusetts case[56] that concluded courts should place "considerable emphasis" on the independence of the ultimate decision maker and the employee's opportunity to address the underlying allegations.[57] Specifically, the court held that while the opportunity to be heard is a "strong indicator that an independent investigation has taken place, we are not prepared to say that as a matter of law by granting Shoucair a limited opportunity to be heard during subsequent stages of review[,] Brown completely purged all traces of Glicksman's alleged retaliation."[58]

Damages

The court found that the trial judge did not abuse her discretion when she reduced Shoucair's back pay award because he bore some responsibility to mitigate his damages.[59] The trial judge based her ruling on two decisions[60] of the United States Court of Appeals for the First Circuit, where the plaintiffs who failed to "sustain reasonably diligent efforts to find suitable new employment saw their back pay damages reduced as a result."[61] Here, Shoucair admitted that he abandoned his "systematic" job search after three years, after it began vigorously.[62] Brown additionally produced testimony that Shoucair's knowledge and expertise could lead to many opportunities outside of academia.[63] Taken together, the court could not detect an abuse of discretion

55. *Id.* at 431.
56. *Id.* (*citing* Mole v. University of Massachusetts, 814 N.E.2d 329 (Mass. 2004)).
57. *Shoucair*, 917 A.2d at 431 (citing *Mole*, 814 N.E.2d at 344).
58. *Id.*
59. *Id.* at 432.
60. Conetta v. Nat'l Hair Care Ctr, Inc., 236 F.3d 67 (1st Cir. 2001); Carey v. Mt. Desert Island Hosp., 156 F.3d 31 (1st Cir. 1998).
61. *Shoucair*, 917 A.2d at 432 (citing *Conetta*, 236 F.3d at 77; *Carey*, 156 F.3d at 40-41).
62. *Id.*
63. *Id.*

in the trial judge's decision to reduce Shoucair's back pay by 30 percent.[64]

The court reaffirmed earlier jurisprudence in Rhode Island when it held in *Shoucair* that expert medical testimony was not necessary in order for a claimant to receive compensatory damages.[65] Brown had argued that a claimant seeking recovery in a claim for tortious infliction of emotional distress, a causal relationship between the defendant's misconduct and the plaintiff's physical and psychic injuries must exist and proved by expert medical testimony.[66] The court found, however, that the present case was more similar to *Adams v. Uno Restaurants, Inc.*, 794 A.2d 489 (R.I. 2002).[67] *Adams* involved a claim under the Whistleblowers' Protection Act[68] and held that ordinary lay people would be able to determine if emotional distress and humiliation would result from a loss of employment.[69] The court in *Shoucair* thus held that a jury does not need expert medical testimony to determine whether emotional distress flowed from the ending of Shoucair's career at Brown.[70]

Citing previous case law restricting punitive damages in cases involving liability based on *respondeat-superior* theory, the court vacated Shoucair's punitive damage award of $100,000.[71] The court cited *AAA Pool Service & Supply, Inc. v. Aetna Casualty and Surety Co.*, which stated:

> It has long been the law in this state that punitive or exemplary damages will not be allowed in situations in which a principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him *particeps criminis* of his agent's act. . . . In Rhode Island, unless an employer participated in, authorized, or ratified the noisome act of its employee, punitive damages cannot properly be awarded against

64. *Id.*
65. *Id.* at 432-33.
66. *Id.* at 433 (*See e.g.* Wright v. Zielinksi, 824 A.2d 494, 499 (R.I. 2003)).
67. *Shoucair*, 917 A.2d at 433.
68. *Id.* (*citing* R.I. GEN. LAWS §28-50 (2007)).
69. *Shoucair*, 917 A.2d at 433 (citing *Adams*, 794 A.2d at 493).
70. *Id.*
71. *Id.* at 433-35.

that employer.[72]

The court in *Shoucair* held that unless the employer as an entity participated in the retaliatory act, then there could be no punitive damages.[73] Here, Shoucair failed to show that the university was even aware of, much less participated in, authorized, or ratified Glicksman's alleged retaliatory act.[74] Consequently, the evidence was insufficient to impute liability for punitive damages against Brown.[75]

The court affirmed the trial judge's decision to deny Shoucair's motion for reinstatement, or in the alternative, for front pay.[76] Citing *Kamberos v. GTE Automatic Electric, Inc.*,[77] the court held that reinstatement is not an appropriate remedy unless the person discriminated against "is presently qualified to assume the position sought."[78] Here, the trial judge exercised her sound discretion, as "[t]he science of engineering undoubtedly has advanced in numerous ways while Shoucair has been out of the loop."[79]

The court in *Shoucair* also held that remedy of front pay is the province of the sound discretion of the trial judge.[80] The court adopted the holding of *Johnson v. Spencer Press of Maine, Inc.*,[81] that restricted the availability of front pay to a "more limited set of circumstances than back pay."[82] Here, Shoucair advanced the same arguments for front pay as he did with back pay.[83] As it was not an abuse of discretion to reduce the back pay award of Shoucair, and in light of the remedial relief that he was awarded otherwise, the court found that the trial judge did not abuse her discretion to deny Shoucair's front pay motion.[84]

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72. *Id.* (citing 479 A.2d 112, 116 (R.I. 1984)).
73. *Id.* at 435.
74. *Id.*
75. *Id.*
76. *Id.* at 435-36.
77. *Id.* at 436 (citing 603 F.2d 598 (7th Cir. 1979)).
78. *Id.* at 436 (quoting *Kamberos*, 603 F.2d at 603).
79. *Id.*
80. *Id.*
81. 364 F.3d 368 (1st Cir. 2004).
82. *Shoucair*, 917 A.2d at 436 (quoting *Johnson*, 364 F.3d at 380).
83. *Id.*
84. *Id.*

COMMENTARY

The Rhode Island Supreme Court in *Shoucair* fleshed out what is necessary for a claim of discrimination based on a retaliatory act by a fellow employee. Much like other discrimination claims under FEPA, the three-step burden-shifting framework applies to retaliatory acts, not just overtly discriminatory acts. Here, the jury found that Shoucair was not discriminated against on the basis of his ancestral origin, but rather that he was "retaliated against" for communicating displeasure with a possibly discriminatory act by his employer. This holding has the potential to open up more claims, by professors denied tenure and others, under FEPA as a discriminatory act does not necessarily need to take place – only a retaliatory act in response to commentary based on possibly discriminatory acts. This is not to say, however, that this holding opens the proverbial "floodgates of litigation." It merely allows more claims to get to a jury on an employment discrimination claim.

Another significant holding is the court's narrowing of the circumstances in which punitive damages can be awarded. While the employer generally is still ultimately responsible for the actions of its employees through the vicarious liability theory of *respondeat superior*, the court likewise clarifies that actual participation, authorization, or ratification of the retaliatory act on the part of the employing entity is necessary for an award of punitive damages. This is not only a high threshold to reach, but also may be hard to prove given the facts of this case. The provost of an institution is clearly a management level position in an entity with the authority to ratify decisions on behalf of that entity and, in this case, was the ultimate decision maker for whether a professor receives tenure. Yet, Provost Rothman was deemed not to have participated in a retaliatory act based on the recommendation of his employee (Glicksman), even with as much oversight as Brown was claiming in this case. In other words, it may be difficult, and may be near impossible, to prove an entity's knowledge or intent other than by the actions of its employees and management. Perhaps this will not be a problem if *Shoucair* is read strictly on its facts on this issue, namely the idea that Glicksman poisoned the tenure process at the beginning, and each

step afterwards was a matter of "rubber-stamping."

The Rhode Island Supreme Court in *Shoucair* also resolved the issue that, unlike tortious infliction of emotional distress claims, employment discrimination claims do not require expert medical testimony for a jury to determine that a claimant has suffered physical and psychic harm as a result of a retaliatory act. The stricter standard is not applied by the court, allowing for employment discrimination claimants to receive compensatory damage awards for medically unsubstantiated injuries. Tort reformers will probably not be pleased with such a ruling.

A final noteworthy issue from *Shoucair* concerned the need for a professor who is denied tenure to stay up to date in the field of his or her expertise, even if not in academia, in order to remain eligible for reinstatement or front pay resulting from a discrimination action. Granted, the level of staying up to date will vary, depending on the profession (e.g. a lower burden for a history professor, where changes are less frequent, than for a biological sciences professor, where the field is always changing). The notion that a professor must even seek work outside of academia in order to be eligible for an appropriate remedy, including reinstatement, will probably seem radical to many in the education profession. Nonetheless, at least in Rhode Island, such pursuit of nonacademic employment will be required in order to mitigate damages from an employment discrimination claim.

CONCLUSION

The Rhode Island Supreme Court found an employee's limited opportunity to be heard during the later stages of an employment review does not indicate, as a matter of law, that an independent investigation has taken place to purge all traces of a retaliation-based discrimination claim. The court held that expert medical testimony was not necessary for a jury to determine whether a person would suffer from emotional distress and humiliation following a retaliatory discrimination act. Additionally, the court reaffirmed the three-step framework for a retaliation-based discrimination claim, by requiring evidence beyond the *prima facie* case of retaliation, when an employer introduces an alternative justifiable explanation for termination. Furthermore, unless an employer expressly participated in, authorized, or ratified the retaliatory act of its employee, punitive damages

cannot be awarded against that employer.

David R. Petrarca, Jr.

Evidence. *State v. Oster,* 922 A.2d 151 (R.I. 2007). The presence of a seal, or a "satisfactory explanation" for its absence, is an independent condition precedent to the use of wiretap evidence. Even a defendant who is not an "aggrieved person" has standing to challenge a sealing violation and move to suppress the evidence. Rule 16 of the Superior Court Rules of Criminal Procedure does not require the State to provide a defendant with a definitive list of witnesses and summaries of their anticipated testimony, the specification of defendant's prior statements it intends to use, the specification of the precise trial exhibits it intended to use, or a list of 404(b) material it intends to introduce.

FACTS AND TRAVEL

In February 2002, the defendant, Jonathan Oster, was arrested and indicted on two counts of obtaining or attempting to obtain a bribe, and two counts of conspiracy to do the same.[1] Leading up to the arrest, the Financial Crimes Unit of the Rhode Island State Police had been intercepting the telephone conversations of codefendant Robert Picerno pursuant to an order from the Superior Court Justice authorizing the wire-tapping under R.I. Gen. Laws 1956 §12-5.1.[2] After arresting Picerno, the State Police convinced him to participate in a sting operation to implicate Oster.[3] The operation involved a telephone call from Picerno to Oster, and a subsequent meeting in which Picerno delivered $10,000 to Oster while under police surveillance.[4] The sting operation led to Oster's arrest and indictment.[5]

The Wiretap Evidence

Before trial, the defendants moved to exclude the wiretapping

1. State v. Oster, 922 A.2d 151, 153, 155 (R.I. 2007).
2. *Id.* at 154; R.I. GEN. LAWS §12-5.1-4(a) (. . . presiding justice . . . may enter an ex parte order, . . . authorizing the interception of wire, electronic, or oral communications . . .").
3. *Oster*, 922 A.2d at 154.
4. *Id.* at 154-55.
5. *Id.*

evidence based on the State's failure to properly seal and store it pursuant to §12-5.1-8(a).[6] At an evidentiary hearing on the motion in April 2004, the State called six witnesses whose testimony established the chain of custody of the wiretap tapes.[7] Within three days of the commencement of the surveillance operation, a detective brought the tapes to the Superior Court where an Assistant Attorney General sealed them and placed them under a desk.[8] Instead of being kept in a commercial bank vault or safe deposit box pursuant to the Presiding Justice's explicit and implicit instructions,[9] the box remained under a paralegal's desk for almost a year.[10] It was not until 2003, when a change in administration resulted in a new assistant taking over the paralegal's desk, that someone moved the box to a secured storage area.[11] At some point before being moved to a secure location, the seal on the box had been intentionally broken.[12] After the State produced the unsealed and opened box of wiretap tapes, Oster and Picerno argued that the circumstances surrounding the sealing and storage of the wiretap evidence violated §12-5.1-8(a).[13] The trial justice's first decision in the case found that because the clear language of §12-5.1-8 requires that the evidence must be properly sealed in order to be used; the wiretap evidence at issue must be excluded.[14]

Prior to the April 2004 evidentiary hearing establishing the chain of custody of the wiretap tapes, Picerno entered a plea of

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6. *Id.* at 155; R.I. GEN. LAWS §12-5.1-8(a) ("The presence of the seal provided for by this section, or a satisfactory explanation for its absence, shall be a prerequisite for the use or disclosure of the contents of any wire, electronic, or oral communication . . .").

7. *Oster*, 922 A.2d at 155.

8. *Id.* at 156-57.

9. *Id.* at 156 n.9. (It was the understanding of the Presiding Justice that he had instructed the tapes to be kept in a bank vault or safe-deposit box. The trial justice found that this, coupled with historic storage practice created an implied order that the tapes be stored in such a place.)

10. *Id.* at 156.

11. *Id.*

12. *Id.* at 156-57

13. *Id.* at 157; R.I. GEN. LAWS §12-5.1-8(a) ("The presence of the seal provided for by this section, or a satisfactory explanation for its absence, shall be a prerequisite for the use or disclosure of the contents of any wire, electronic, or oral communication . . .").

14. *Oster*, 922 A.2d at 157.

nolo contendere and received his sentence.[15] Subsequently, the State argued that Oster lacked standing to challenge the sealing violation of the tapes because he was not an "aggrieved person."[16] The trial justice rejected this argument, reasoning that because the sealing requirements were meant to preserve the integrity of the evidence and not to further Fourth Amendment protection from unreasonable searches and seizures, it did not matter whether or not the recorded conversations included Oster.[17] Because the State offered no explanation for the sealing violation, the trial justice granted Oster's motion to suppress the wiretap tapes.[18]

The Discovery Orders

In October 2003, the trial justice granted defendant's motions for a bill of particulars and for so-called "*Verlaque*" material.[19] Relying on *State v. Verlaque*[20] and Rule 16 of the Superior Court Rules of Criminal Procedure,[21] the trial justice ordered the State to "identify the evidence, witnesses, and aspects of prior testimony it intend[ed] to introduce . . . [and to] clarify and identify any evidence it propose[d] to elicit pursuant to Rule 404(b)" of the Rhode Island Rules of Evidence.[22] After the order and following Picerno's conviction, the State responded by reducing its witness list from sixty-six to almost twenty-five names, yet simultaneously "reserve[d] the right to call any additional witnesses. . . or to introduce any additional evidence referenced" in its previous discovery disclosures.[23] Oster again moved to compel more detailed discovery.[24] He argued that the State's summaries of

15. *Id.*
16. *Id.* at 157-58.
17. *Id.* at 158. Although it did not matter whether Oster was a subject of the surveillance, the trial justice nonetheless found that at least some of the taped conversations included Oster. *Id.*
18. *Id.*
19. *Id.* at 158-59.
20. 465 A.2d 207 (holding that to allow for the defendants to properly prepare a defense, timely disclosure of discoverable information is necessary).
21. R.I. Sup. Ct. R. Crim. Pro. 16
22. *Oster*, 922 A.2d at 158-59; (providing that although "evidence of other crimes, wrongs, or acts" is not admissible for propensity purposes, it may be "admissible for other purposes").
23. *Oster*, 922 A.2d at 159.
24. *Id.*

testimony were too general, and that its reservation of the right to use witnesses and evidence listed in previous discovery documents removed all significance from the decreased witness list.[25] In response, the trial justice exercised her "trial management" authority and followed the alleged "dictates of Rule 16" to issue the discovery order addressed in this appeal.[26] This final discovery order provided that the State must identify all witnesses, their anticipated testimony, and any of their prior statements it intended to introduce. [27] It also required the state to identify any of Oster's previous statements that it intended to introduce; any specific documents or tape recordings it intended to introduce; and any Rule 404(b) material it intended to introduce.[28]

ANALYSIS AND HOLDING

On appeal to the Rhode Island Supreme Court, the State challenged both Oster's standing to seek exclusion of the wiretap evidence,[29] and the trial justice's discretion to order discovery not explicitly required by Rule 16 or Rule 404(b).[30] Even though the

25. *Id.*
26. *Id.*
27. The judge provided that:

> "1. The [s]tate is ordered to clearly indicate and identify those witnesses who the [s]tate intends to call as witnesses at the trial. The [s]tate is further ordered to detail whether the anticipated testimony is based on a prior statement and/or prior testimony and, if so, the portion(s) * * * the [s]tate intends to use; and insofar as there are no prior statements and/or prior testimony of witnesses or the witnesses' expected testimony goes beyond the identified statements/prior testimony in material part, the state shall summarize the witnesses expected testimony.
>
> "2. The [s]tate is ordered to specify the statements of the defendant that it intends to introduce at trial. The defendant's statements should be summarized and clearly itemized.
>
> "3. The [s]tate is ordered to specify the documents and specific tape-recorded telephone calls that the [s]tate intends to introduce at trial.
>
> "4. The [s]tate is ordered to identify any Rule 404(b) material the [s]tate intends to introduce at trial.
>
> "5. The [s]tate is ordered to deliver a transcript of Robert Picerno's testimony from the suppression hearing and plea." *Id.*

28. *Id.*
29. *Id.* at 160.
30. *Id.* at 159.

State did not challenge the trial justice's finding that there was a sealing violation, the Supreme Court nonetheless commented on the "shocking" character of the State's failure to adequately store the wiretap evidence.[31]

Standing to Challenge the Wiretap Evidence

The State argued that because the Superior Court Justice directed the interception order at Picerno's telephone, and because Oster participated in only some of the intercepted conversations, Oster was not an aggrieved person and therefore did not have standing to challenge the admission of the wiretap evidence.[32] In support of its argument, the State found similarities between §12-5.1-8(a) and 18 U.S.C. §2518(8)(a), and argued that the Court should follow federal decisions that have suppressed wiretap evidence for "aggrieved persons."[33] The State argued that Oster did not fall under the definition of an "aggrieved person" as defined under 18 U.S.C. §2510(11).[34] The Supreme Court never decided whether Oster qualified as an "aggrieved person,"[35] but instead focused only on the language of § 12-5.1-8(a)[36] to conclude that "the presence of a seal or a 'satisfactory explanation' for its absence" is an "independent condition precedent to the use of wiretap evidence."[37]

To reach this conclusion, the Court contrasted the language of §12-5.1-12[38] with the language of §12-5.1-8(a). [39] §12-5.1-12

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31. *Id.* at 162.

32. *Id.* at 160.

33. *Id.* at 160-61; 18 U.S.C. §2518(8)(a) ("The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.").

34. *Oster*, 922 A.2d at 161; 18 U.S.C. §2510(11) (defining "aggrieved person" as "a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed[.]").

35. *Oster*, 922 A.2d at 161 n.18 (although it was unnecessary for the Court to decide whether Oster was an aggrieved person, it noted that he was one of the named targets of the wiretaps and that some of his conversations were in fact intercepted).

36. *Id.* at 161.

37. *Id.* at 162.

38. Any aggrieved person may move to suppress the contents of any intercepted wire, electronic, or oral communication or evidence derived from

explicitly restricts relief to aggrieved persons and lists specific grounds for suppression of the evidence that are distinct and separate from §12-5.1-8(a).[40] On the other hand, §12-5.1-8(a) states that "the presence of the seal . . . or a satisfactory explanation for its absence, shall be a prerequisite for the use or disclosure of the contents[.]"[41] The Court found that §12-5.1-8(a) offers the exclusion of wiretap evidence as an independent remedy for a sealing violation, supplementary to any remedy given to aggrieved persons under §12-5.1-12(a).[42] Therefore, regardless of whether Oster was an "aggrieved person,"[43] he had standing to challenge the use of the wiretap evidence.[44] Because the trial justice found that there was a sealing violation and the State offered no reason for such a violation, the wiretap evidence was

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them on the grounds that:

(1) The communication was unlawfully intercepted;

(2) The order under which it was intercepted is insufficient on its face;

(3) The interception was not made in conformity with the order;

(4) Service was not made as provided in § 12-5.1-11; or

(5) The seal provided in § 12-5.1-8(b) is not present and there is no satisfactory explanation for its absence.

39. The contents of any wire, electronic, or oral communication intercepted by any means authorized by this chapter shall, if practicable, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, electronic, or oral communication under this section shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions of the order, the recordings shall be made available to the presiding justice of the superior court issuing the order and sealed under his or her directions. Custody of the recordings shall be wherever the presiding justice of the superior court orders. They shall not be destroyed except upon an order of the presiding justice of the superior court, and in any event, shall be kept for ten (10) years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of § 12-5.1-10(a) or (b) for investigations and bail hearings and any pre-trial hearings. The presence of the seal provided for by this section, or a satisfactory explanation for its absence, shall be a prerequisite for the use or disclosure of the contents of any wire, electronic, or oral communication or evidence derived from them at any bail hearing or pre-trial hearing. R.I. GEN. LAWS §12-5.1-8(a).

40. *Oster*, 922 A.2d at 161.

41. *See* infra. note 38.

42. *Oster*, 922 A.2d at 161-62.

43. *Id.* at 161 (noting that whether Oster is an "aggrieved person" is a close question).

44. *See id.* at 161-62.

inadmissible.[45]

The Sealing Violation

The State declined to challenge the finding of a sealing violation, but the Supreme Court discussed it nonetheless. Though the evidence was left under a paralegal's desk, the seal was broken, and the contents removed; the State offered no explanation for its condition.[46] According to the Court, "the gravity of the State's laxity and negligence in the mishandling and storage of this evidence . . . [was] shocking."[47] The Court easily determined that because the seal was absent without an explanation, the condition precedent to its admissibility had not been met, and therefore it was inadmissible.[48]

The Discovery Order

The State appealed the final discovery order issued by the trial justice, arguing that she went beyond the power of Rule 16 and that she abused her discretion in invoking "trial management" authority.[49] The State assigns error to the requirement of a definitive list of witnesses and summaries of their anticipated testimony, the specification of Oster's prior statements it intended to use, the specification of the precise trial exhibits it intended to use, and a list of 404(b) material it intended to introduce.[50]

The Supreme Court held that Rule 16 only requires a summary of witness' expected testimony when there is no prior testimony or written statements of the witness.[51] Furthermore, neither rule 16 nor trial management considerations are sufficient to justify requiring the State to provide such specific details about the testimony of expected witnesses.[52] Finally, the Court distinguished *State v. Verlaque*, finding that it was inapplicable to

45. *Id.*
46. *Id.* at 162.
47. *Id.*
48. *Id.*
49. *Id.* at 163.
50. *Id.*
51. *Id.* at 164.
52. *Id.* at 165.

the case at bar, and that it did not increase the State's discovery obligations.[53]

Although the State has a duty to provide the defendant with a list of witnesses it plans to present, it neither has to specify which document their testimony is based on nor does it have to specify portions of testimony it intends to use.[54] The Court reiterated its holdings in *State v. Woodson*[55] and *State v. Williams*[56] that Rule 16 requires a written summary of the expected testimony only when there is no prior testimony or written statements from that particular witness, and in neither case is a detailed narration necessary.[57] Here, the State had already provided a list of witnesses and summaries of their expected testimonies, and the Court's holding did not require the State to provide the types of detailed explanatory notes called for by the discovery order.[58] Oster argued that because *Verlaque* required the list of witnesses to be a list of those who will actually testify at trial, the caveat in the State's narrowed list of witnesses that reserved the right to call additional witnesses rendered it illusory and inadequate.[59] The Court distinguished *Verlaque*, holding that it was inapplicable and did not increase the State's discovery obligations.[60] *Verlaque* addressed the State's failure to timely comply with discovery orders, recognizing that a list of fifty-three witnesses delivered on the eve of trial could be just as useless as no list at all.[61] Here, Oster had sufficient time to examine the witness list.[62]

The Court accepted the State's argument that it should not be required to specify which of the defendant's own statements it intended to introduce at trial.[63] Rule 16(a)(1) requires the State to provide the defendant with "all relevant written or recorded statements . . . or written summaries of oral statements or

53. *Id.* at 165, 167.
54. *Id.* at 164.
55. 551 A.2d 1187, 1192 (R.I. 1988).
56. 752 A.2d 951, 953 (R.I. 2000).
57. *Oster*, 922 A.2d at 164.
58. *Id.* at 165.
59. *Id.*
60. *Id.* at 165, 167.
61. *Id.*
62. *Id.* at 165.
63. *Id.* at 166.

confessions made by the defendant."[64] The Court reasoned that Rule 16 required summaries of defendant's statements only when there was no written record of them.[65] Accordingly, because the Court held that the State's obligation did not extend beyond Rule 16, it vacated the portion of the order demanding itemization of witness testimony.[66]

The Court held that it was erroneous for the trial justice to have ordered the State to "specify the documents and specific tape-recorded telephone calls that [it] intend[ed] to introduce at trial."[67] The Court turned to its decision in *State v. Mollicone*[68] for guidance, and reasoned that by providing Oster with access to all the documents and wiretap evidence long before trial, the State had complied with Rule 16(a)(4).[69] As long as the State provides the defendant with access to all the evidence and ample time to inspect it, no need exists for it to reveal the specifics of its case-in-chief before trial.[70]

Finally, the Supreme Court held that the portion of the discovery order directing the State to reveal any 404(b) material it intended to introduce at trial was erroneous.[71] Rule 404 is an evidentiary rule, and not a vehicle for discovery.[72] Nothing in Rule 16 even refers to Rule 404 evidence.[73] The Court noted that rule 404(b) evidence must be dealt with through objections and motions *in limine* made during trial, and that it would be "repugnant to the adversial underpinnings of [the] criminal justice system" to force the State to go beyond its Rule 16 obligations.[74]

COMMENTARY

Going to great lengths to recount the wiretap tapes' chain of custody, the Rhode Island Supreme Court's decision in *Oster* emphasizes the tremendous importance of maintaining the

64. R.I. Sup. Ct. R. Crim. Pro. 16
65. *Oster*, 922 A.2d at 166.
66. *Id.*
67. *Id.* at 166-67.
68. 654 A.2d 311 (R.I. 1995).
69. *Oster*, 922 A.2d at 167.
70. *Id.*
71. *Id.* at 168.
72. *Id.*
73. *Id.*
74. *Id.*

integrity of such surreptitiously obtained evidence. Because the State did not even challenge the alleged sealing violation, the Court could have dealt with this case simply by affirming Oster's standing to challenge the evidence's admissibility. Though it ultimately took this route, the Court did not get there without first criticizing the State's "shocking" negligence in the handling of the evidence.[75] Even the iteration of the facts themselves seemed superfluous, for the only facts crucial to the decision were that there had been a sealing violation that prompted Oster to seek the exclusion of the evidence. Though the ultimate decision was certainly an important one, the Court went beyond what was necessary and seized an opportunity to caution against such atrocious evidence handling practices.

The Court's opinion ultimately decided that it was unnecessary for Oster to be an "aggrieved person" in order to challenge the admission of improperly sealed and stored wiretap evidence. However, the opinion seemed to strongly hint that if it was necessary, the Court could easily find Oster to be aggrieved.[76] In light of this, the Court could have simply disposed of this case by finding that Oster had standing because he was an "aggrieved person." It seems evident that by choosing to circumvent the necessity of being an "aggrieved person," the Court was interested in protecting a wide class of defendants from improperly stored and sealed wiretap evidence.

By deciding to not require the State to comply with the trial justice's discovery orders, the Supreme Court has placed some outer limits on the State's liberal discovery mechanisms. The Court distinguishes between liberal discovery that will prevent a "trial by ambush,"[77] and discovery that will ultimately require the prosecution to do the defendant's work for him.[78] Though the Court seems to be proud of the State's liberal discovery mechanisms, its opinion here clarifies that it will not tolerate their abuse. One prominent form of such abuse is an attempt to force the prosecution with "an evidentiary road map of its case-in-chief."[79]

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75. *Id.* at 162.
76. *Id.* at 161 n.18
77. *Id.* at 163.
78. *Id.* at 164.
79. *Id.* at 167.

CONCLUSION

By recognizing that §12-5.1-8(a) creates an independent condition precedent to the use of wiretap evidence, the Rhode Island Supreme Court held that regardless of whether a defendant is an "aggrieved person," he has standing to seek exclusion of wiretap evidence that had not been properly sealed and stored. The Court also placed limits on its liberal discovery mechanisms by not requiring the State to do anything beyond its Rule 16 obligations.

David Casale

Evidence and Criminal Law. *State v. Kenneth Day*, 925 A.2d 962 (R.I. 2007). The crimes of robbery and carjacking are but two objects of the same conspiracy when the same evidence is used to prove the two conspiracies and where the people, places, and time during which the activities took place are essentially the same. Furthermore, under the "same evidence" test, the substantive offenses of carjacking resulting in death and robbery merge into a single offense when the elements of the two crimes are proven by the same evidence. Finally, a defendant's *Sixth Amendment* right to confront witnesses is not violated when a court admits prior recorded testimony where defendant had ample opportunity and "had in fact seized the opportunity" to confront the witness through thorough cross-examination at the prior trial.

FACTS AND TRAVEL

On the evening of June 8, 2000, twenty-year-old Jason Burgeson picked up Amy Shute, his twenty-one-year-old girlfriend, in his white 1991 Ford Explorer, and the two headed into Providence. [1] There they met up with two friends at Tommy's Bar and Grill downtown, at around 10:30 p.m.[2] The group next moved on to Bootleggers, a dance club in Providence, via Jason's Explorer.[3] Later the four headed from Bootleggers to where Jason had parked his car. [4] Jason then drove the four back to the parking lot at Tommy's Bar and Grill where they sat in another car for approximately twenty minutes before Jason and Amy headed back to Jason's Explorer.[5]

In the early afternoon hours of June 9, 2000, a groundskeeper at Button Hole Golf Course discovered two bodies, ultimately identified as those of Jason and Amy.[6] Johnston Police found "spent handgun casings and a live round of handgun

1. State v. Day, 925 A.2d 962, 968 (R.I. 2007).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 969.

ammunition", among other things, but did not locate any handgun.[7] Upon further investigation, the police learned that Jason had been driving a white 1991 Ford Explorer on the night of June 8. At approximately 8:30 p.m. on June 9, police pulled over a car fitting the Explorer's description and detained its driver, Gregory Floyd.[8]The police then executed a search warrant on the home where Floyd lived with the defendant (Day).[9] The police seized a .40 caliber handgun and took the defendant into custody.[10]

The court believed the testimony of Gregory Floyd to be the "most detailed account" of the happenings of early June 9, 2000.[11] According to Floyd, he and defendant ventured downtown in the late afternoon hours of June 8 with gun in tow.[12] The two met up with acquaintances Burdick, Anderson and Sanchez and scoured the streets of Providence for potential robbery victims.[13] Shortly after midnight, according to Floyd, the five men spotted Jason and Amy and hatched a plan to rob them and carjack the Explorer.[14] The plan saw Floyd and Burdick successful in the carjacking, with Floyd driving the Explorer and Jason and Amy held at gunpoint in the back seat.[15] The others followed in the Sanchez vehicle and eventually the two cars found their way to the Button Hole Golf course.[16]

The men then exited the cars and according to Floyd, defendant suggested raping Amy and urged Floyd to kill both Amy and Jason.[17] Next, Jason and Amy were set on the ground in front of the Explorer where they remained "frightened, crying, and pleading for their lives" until Floyd ended it all by pulling the

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7. *Id.*.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 970.
12. *Id.*
13. *Id.* at 971.
14. *Id.* "The defendant denied that he himself had intended to participate in the robbery" of Jason and Amy, "noting that he had just received his paycheck." *Id.* at 969.
15. *Id.* at 971-72.
16. *Id.* at 972.
17. *Id.* The defendant, in his statement to police, maintained that it was Floyd who wished to kill Jason and Amy. *Id.*

trigger "about three times".[18]

On December 18, 2000, the grand jury indicted the five men for (1) conspiracy to commit carjacking and (2) carjacking with death resulting in violation of federal statutory law.[19] While the four others entered plea agreements in order to avoid the possibility of a death sentence, the defendant opted to go to trial where a judge granted his motion for a judgment of acquittal.[20]

On August 29, 2003, the State indicted the defendant on the following nine counts: (1) conspiracy to commit robbery; (2) conspiracy to commit carjacking; (3)conspiracy to commit murder; (4) and (5) first-degree robbery; (6) and (7) carjacking of a motor vehicle resulting in death; and (8) and (9) first-degree murder.[21] On June 10, 2004, a jury found the defendant guilty on all nine charges. [22] The judge denied the defendant's motion for a new trial and Day timely filed an appeal. [23]

ANALYSIS AND HOLDING

The defendant raised seven issues on appeal to the Rhode Island Supreme Court contending (1) that the trial justice exceeded his authority in imposing four consecutive sentences of life imprisonment without parole; (2) that the trial justice erred in denying defendant's motion for a judgment of acquittal; (3) that defendant's conviction on both murder and the underlying carjacking felony violated the double jeopardy clause; (4) that the trial justice violated defendant's Sixth Amendment right to confrontation when he admitted the recorded testimony of a witness who had testified in an earlier criminal trial in federal court; (5) that the trial justice erred in allowing the introduction of evidence of a conversation between that same witness and defendant while they were in custody; (6) that the trial justice erred in denying defendant's motion for a new trial; and (7) that

18. *Id.* at 972-73. Defendant's version of the same event had him running away from the scene as soon as Floyd shot Jason allowing him to only hear the shooting of Amy. *Id.* at 970.

19. *Id.* at 973.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

defendant's sentence was excessive.[24] This survey will tackle issues (2) and (4) as the most important to future decisions.[25]

Motion for Judgment of Acquittal

The defendant's contention that the trial justice erred in denying his motion for judgment of acquittal on the conspiracy to commit murder charge was discarded by the court on the ground that "[i]t is well settled that issues that were not raised at the trial level 'are not properly preserved for appellate review.'" [26]

The defendant also argued that the court erred in denying his motion for a judgment of acquittal on the conspiracy to commit carjacking.[27] Defendant believed that insufficient evidence existed to prove beyond a reasonable doubt that he had entered into two separate conspiracies and therefore insufficient evidence existed to prove that he conspired to carjack the two victims.[28] The court adopted the United States Supreme Court's "same evidence" test[29] as employed by the First Circuit in the context of conspiracy charges.[30] The five factors considered by the court in determining "whether or not two or more conspiracy charges are, in actuality, reducible to a single conspiracy are: "(1) the time during which the activities occurred; (2) the persons involved in the conspiracies; (3) the places involved; (4) whether the same evidence was used to prove the two conspiracies; and (5) whether the same statutory provision was involved in both conspiracies."[31]

In applying the five factors to the case at bar, the Court "conclude[d] that the robbery and the carjacking were but two objects of the same conspiracy."[32] The Court reasoned that the two criminal conspiracies occurred over the course of the same night, involved the same people, in the same place (downtown

24. *Id.* at 968.
25. The Court afforded no relief to the defendant on the five grounds of his appeal not dealt with in this survey. *Id.* at 989.
26. *Id.* at 974. (quoting State v. Cardoza, 649 A.2d 745, 748 (R.I. 1994)).
27. *Id.*
28. *Id.*
29. State v. Day, 925 A.2d 962, 976 (R.I. 2007)(citing Blockberger v. U.S., 284 U.S. 299, 304 (1932)).
30. *Day*, 925 A.2d at 976 (R.I. 2007)(citing U.S. v. Booth, 673 F.2d 27,29 (1st Cir.1982)).
31. *Id.*
32. *Id.* at 976.

Providence) and were proved by the same evidence. While the fifth factor was not present in the case, the Court nevertheless found only one conspiracy and therefore "direct[ed] a judgment of acquittal with respect to the conspiracy to commit carjacking. . ."[33]

The defendant then argued that because the State utilized the same evidence to prove both the *substantive* robbery and carjacking offenses, the two merge into a single offense entitling him to a judgment of acquittal on the robbery counts.[34] The Court again employed the "same evidence" test to determine whether two offenses constitute two separate offenses or merge into one single offense.[35] The Court considered "whether each provision required proof of a fact which the other [did] not."[36] The Court outlined and compared the elements of the common law felony of robbery and the statutory crime of carjacking resulting in death and could not conclude that each offense "requires proof of a fact which the other does not."[37] The Court afforded heavy weight to language in the carjacking statute that essentially "equat[ed] carjacking to robbery."[38] The Court therefore had "no choice but to direct a motion for a judgment of acquittal" on the robbery counts.[39]

Prior Recorded Testimony

The defendant next argued that the trial justice violated his *Sixth Amendment* right to confrontation when he admitted the recorded testimony of Gregory Floyd from defendant's federal trial.[40] First the defendant argued that the trial justice wrongly

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33. *Id.* at 976-77.
34. *Id.* at 977.
35. *Id.* (citing *Blockberger*, 284 U.S. 299, 304 (1932)).
36. *Id.* at 978. (quoting *Blockberger*, 284 U.S. 299, 304 (1932)).
37. *Id.* at 978(quoting *Blockberger*, 284 U.S. 299, 304 (1932)).
38. *Id.* The relevant portion of the carjacking resulting in death statute reads:

> "(a) Every person who shall unlawfully seize a motor vehicle from its lawful owner, lessor, or occupant by use or threat of use of a dangerous weapon against the owner, lessor, or occupant resulting in serious bodily injury * * * shall be guilty of first degree robbery * * *." *Id.* (quoting R.I. GEN LAWS § 11-39-2 (1956)).

39. *Id.*
40. *Id.* at 979. The trial justice allowed the testimony in reliance on Rule 804(b)(1) of the Rhode Island Rules of Evidence. *Id.*

determined that the witness was unavailable.[41] The Court rejected the argument on familiar grounds, holding that the defendant had failed to properly preserve the issue for review.[42] The Court based its holding on the fact that defendant had limited his objection solely to the adequacy of his opportunity to cross-examine Floyd at the earlier trial.[43]

The defendant, therefore, did properly preserve his objection that he was not afforded an adequate opportunity to confront Floyd.[44] He based his argument on the fact that his only cross-examination of Floyd had occurred during a federal trial "concerning a different charge."[45] He rests his argument on *Sixth Amendment* language that "the accused should enjoy the right. . .to be confronted with the witnesses against him."[46] However, the Court noted that Rule 804(b)(1) of the Rhode Island Rules of Evidence allows previous sworn testimony of an unavailable witness to be admissible if the party against whom admission is sought was afforded an adequate opportunity to cross examine the witness.[47] The Court required "only that there be a *substantial* identity of issues and of parties before former testimony will be deemed admissible."[48] The Court then concluded that "[w]hile the specific crimes at issue in the two trials differed slightly, both trials related to the same sequence of events" thereby constituting a substantial identity of issues and parties.[49]

The Court proceeded to hold that the trial justice had not abused his discretion in admitting Floyd's prior recorded testimony for the testimony did not violate the confrontation clause because the defendant "not only had ample opportunity to cross-examine Floyd, but. . .had in fact seized the opportunity."[50] The Court noted that not only was defendant present to confront

41. *Id.* Floyd was present but refused to testify at the state trial. *Id.* at 979 n.25.
42. State v. Day, 925 A.2d 962, 979 (R.I. 2007).
43. *Id.*
44. *Id.* at 980.
45. *Id.*
46. *Id.* (quoting U.S. CONST. amend. VI.).
47. *Id.*
48. *Id.* (citing State v. Ouimette, 298 A.2d 124, 131(1972))(emphasis in original).
49. *Id.* at 980-81.
50. *Id.*

the witness at the federal trial but had questioned Floyd as to the events prior to, during, and after the carjacking, a cross examination that spanned 222 pages of transcript. [51] The Court held that this cross-examination of Floyd easily "constitute[d] a sufficient probing of the witness's credibility" and rejected the defendant's Sixth Amendment challenge.[52]

COMMENTARY

Day involved a rather senseless and extremely tragic sequence of events that ended with the execution-style murders of Jason Burgeson and Amy Shute. The Rhode Island Superior Court heard the charges against Day only after the federal government failed to make its case against Day on charges of conspiracy to commit carjacking and carjacking with death resulting in violation of federal statutory law. After a lengthy recitation of the facts of the case, which relied considerably on the testimony of Gregory Floyd, Day's friend and co-conspirator, the court conducted a thorough analysis of the defendant's nine count appeal.

The court appeared reluctant to grant defendant's motions for judgment of acquittal as to the conspiracy to commit carjacking and robbery charges and acknowledged that the "same evidence" tests as applied to the facts of each case had forced their hand. While the court arguably had some room to maneuver here-most notably the absence of the fifth Boone factor and the defendant's failure to raise his substantive merge argument in a motion before commencement of the trial- they wisely erred on the side of caution. These were but small, almost inconsequential battles.

For it was clear that the most important issue before the court in determining the fate of Kenneth Day lay in its determination whether to allow the prior recorded testimony of Gregory Floyd into evidence. The state's case against Day relied heavily, if not exclusively, on Floyd's testimony. Day argued that the trial judge's decision to allow the testimony violated his Sixth Amendment right to confront witnesses. The court properly disagreed, invoking Rule 804(b)(1) before determining that

51. *Id.* at n. 29.
52. *Id.*

defendant had had an adequate opportunity to cross-examine Floyd at the federal trial. The court cited the length and depth of that cross-examination in holding that its admittance did not violate the *Confrontation Clause*. In addition, as a practical matter, the defendant was facing a possible death sentence should he have been convicted of the federal charges, a strong incentive to cross-examine Floyd not only adequately, but exhaustively.

CONCLUSION

The Rhode Island Supreme Court used the "same evidence" test, albeit in different contexts and in slightly different forms, to grant defendant's motions for a judgment of acquittal on the conspiracy to commit carjacking and robbery counts.[53] In addition, the court held that the *Confrontation Clause* was not violated by the admission of a witness's prior recorded testimony.

Tim St. Lawrence

53. *Id.* at 976-77, 979. Defendant was unsuccessful on all other counts of his appeal. *Id.* at 989.

Family Law. *Chambers v. Ormiston,* 935 A.2d 956 (R.I. 2007). A same – sex couple, properly married in Massachusetts, may not seek a divorce from the Rhode Island Family Court. The Rhode Island Supreme Court held that the Family Court's limited statutory jurisdiction does not grant it the power to divorce a same – sex couple validly married in another state. The Supreme Court further suggested that the proper forum for this discussion is the General Assembly, not the courts.

FACTS AND TRAVEL

Following *Goodridge v. Department of Public Health,* the landmark decision in Massachusetts allowing same – sex couples to marry, Rhode Island residents, Margaret Chambers and Cassandra Ormiston, traveled to Fall River, Massachusetts and were properly married there on May 26, 2004.[1] They returned to Rhode Island and resided together, as a married couple, until they decided to dissolve their marriage two years later.[2] On October 23, 2006, Ms. Chambers filed a petition for divorce in the Rhode Island Family Court.[3] Thereafter, on October 27, Ms. Ormiston filed an answer and counterclaim.[4] Since Rhode Island is one of the few states that lacks any legislation on same – sex marriages, whether permissive or prohibitory, the Family Court was unsure how to proceed. Consequently, on December 11, 2006, the Family Court certified a question to the Supreme Court as to whether it had subject matter jurisdiction to grant the Chambers – Ormiston petition for divorce.[5]

The Supreme Court considered the certified question in two separate conferences on January 4, 2007 and January 10, 2007, ultimately deciding to send the question back to the Family Court

1. Chambers v. Ormiston, 935 A.2d 956, 959 (R.I. 2007) (citing Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003)).
2. Chambers v. Ormiston, 935 A.2d at 958-59.
3. *Id.* at 959.
4. *Id.*
5. *Id.*

for more fact finding.[6] Specifically, the Supreme Court asked the Family Court justice for findings of facts on the following three questions: (1) whether the case presented an actual case or controversy, (2) whether the Full Faith and Credit Clause of the United States Constitution was relevant to the case, and (3) whether the Defense of Marriage Act, 28 U.S.C. §1738C (2000) was pertinent.[7] The Family Court responded February 21, 2007, answering that the case did present an actual case or controversy, that the Full Faith and Credit Clause was relevant and finally, that the Defense of Marriage Act had only "nominal" effect.[8] The Supreme Court decided to hear the case on May 23, 2007 and worded the question to be answered as follows: "May the Family Court properly recognize, for the purpose of entertaining a divorce petition, the marriage of two persons of the same sex who were purportedly married in another state?"[9] On October 9, 2007, the Supreme Court heard oral arguments from the parties with respect to the certified questions.[10]

ANALYSIS AND HOLDING

Justice Robinson wrote the opinion for the Court, which included Chief Justice Williams and Justice Flaherty. The majority held that the Family Court, a court of limited statutory jurisdiction, was without jurisdiction to entertain the Chambers – Ormiston divorce petition.[11] Thus, the Court answered the question presented in the negative.[12] The Court relied on the definition of marriage when the General Assembly created the Family Court to arrive at its conclusion. Justice Suttell, along with Justice Goldberg dissented.

The Court began its analysis by looking to the General Law that created the Rhode Island Family Court in 1961.[13] The

6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 958.
10. 935 A.2d at 959. It is also of note that the Supreme Court received over twenty-seven amici curiae briefs due to the controversy surrounding this case, although none of the parties representing the briefs were permitted to argue before the Court during oral arguments.
11. *Id.* at 958.
12. *Id.*
13. Chambers v. Ormiston, 935 A.2d at 959 ("General Laws 1956 § 8-10-

relevant language from that the statute centered on the Family Court's power to hear and determine a "divorce from the bond of marriage."[14] The Court's task then became to determine what was the meaning of "marriage" within the Rhode Island statute that granted the Family Court the power to hear divorces.[15] More specifically, the Court needed looked back to1961 to determine exactly what the General Assembly meant when it included the word "marriage" into the law at issue.

The Court then made it clear that the role of the Supreme Court is to be the final arbiter with respect to statutory construction.[16] The Court explained how it addresses statutory construction: it must first determine whether the statute at issue is ambiguous. Again, the issue here was whether the word "marriage" was a clear meaning or rather, ambiguous. Justice Robinson cited to three separate dictionaries that existed at the time that the General Assembly created the Family Court to determine that the definition of marriage was clear.[17] The word "marriage" within the 1961 dictionaries was meant to refer solely to the union between a man and a woman.[18] Although the Court made it quite clear that the law only needed a plain meaning analysis, the Court went on to reason in the alternative as well.The Court suggested that even if the statute were viewed as "ambiguous," it nevertheless would have reached the same result.[19] Citing the *Noscitur a Sociis* Canon of Statutory Construction, which guides courts to look at other words associated with the one in question, the Court again determined that the meaning of "marriage" within the General Assembly's law

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3(a) reads in pertinent part as follows: 'There is hereby established a family court, consisting of a chief judge and eleven (11) associate justices, to hear and determine all petitions for divorce from the bond of marriage * * *.' (Emphasis added.)").

14. *Id.*

15. *Id.*

16. *Id.* (citing New England Expenditure-Providence, LLC v. City of Providence, 773 A.2d 259, 263 (R.I. 2001)).

17. *Id.* at 962.

18. *Id.* (*see* Webster's Third International Dictionary of the English Language, the American College Dictionary, or Funk & Wagnalls Standard College Dictionary.

19. *Id.* at 963 (the Court's main reason for taking this unusual turn of reasoning in the alternative appears to be the controversial nature of the case, *see* footnote 16).

have referred to man and woman.[20]

The majority concluded by discussing the proper role of the judiciary. The Court noted that since it had clearly applied the definition of "marriage" from 1961 to the statute, any other outcome would be to usurp the legislative function.[21] Citing to previous cases, the Court elaborated on it's role: "the role of the judicial branch is not to make policy, but simply to determine the legislative intent as expressed in the statutes enacted by the General Assembly."[22] While the Court appeared to be concerned with its role as the judicial branch, it acknowledged the "palpable hardship" its ruling may have on any married same – sex couples seeking a divorce in Rhode Island.[23]

Dissent

The dissent was written by Justice Suttell and joined by Justice Goldberg; they concluded that the plain meaning of the statute, along with other legal principles, would have allowed the Family Court to grant this divorce.[24] Unlike the majority, which based its entire decision on the 1961 definition of marriage, the dissent was nearly silent on that issue. More specifically, the dissent was concerned that the majority overlooked one critical fact: that Mr. Chambers and Ms. Ormiston were lawfully married under the laws of Massachusetts.[25] The dissent added that basic principles of comity, as well as the Family Court divorce statute itself, should have allowed to Court to hear this divorce.[26] To be precise, the dissent noted that the statue that created the Family Court included a catchall provision that allows the Family Court

20. *Id.* at 964-965 (More specifically, the Court looks to applications for marriage licenses, polygamy and bigamy laws and also, incest laws).

21. *Id.*

22. *Id.* at 965 (citing Little v. Conflict of Interest Comm'n, 397 A.2d 884 (R.I. 1979)).

23. *Id.* at 966.

24. *Id.* at 967.

25. *Id.* at 968 (the dissent also cited to Massachusetts ruling in Cote-Whitacre v. Department of Public Health, 844 N.E.2d 623 (Mass. 2006) holding that same-sex marriage was not prohibited in Rhode Island and couples married in Massachusetts but residing in Rhode Island shall have their marriages processed, for more on how this applies to Rhode Island law, *see* Kevin Lewis, *2006 Survey of Rhode Island Law Cases, Family Law,* 12 ROGER WILLIAMS U. L. REV. 604 (Winter 2007)).

26. *Id.* at 972.

to hear all divorces, whether void or voidable by law.[27] Therefore regardless of the definition of marriage under Rhode Island law, the Family Court should have been able to entertain this divorce.

The dissent also took into account the reality of what the majority's holding would mean, stating that now Ms. Chambers and Ms. Ormiston will literally have to move out of the state and reside in Massachusetts for one year before seeking a divorce there.[28] To conclude, the dissent was arguing that Rhode Island should recognize and respect valid court decisions of other states.[29] Similar to the majority, the dissent concluded that the proper place for the greater same – sex marriage debate in Rhode Island rests at the State House.[30]

COMMENTARY

When deciding "controversial" decisions, courts must walk a fine line between maintaining their constitutionally – mandated role to "say what the law is" and avoiding actual lawmaking.[31] However, a case like this one brings those two roles into conflict because of the increased attention brought to the Court's decision. Further, as one can tell from reading both the majority and the dissent in this case, the Supreme Court was clearly concerned with its role as the judicial branch. It is intriguing that both sides of the opinion suggest and even more, urge the General Assembly to take up this issue, perhaps demonstrating that neither side wanted to venture into this area of the law.[32]

On the one hand, the Supreme Court should read and apply the law as it is written. On the other hand, in this particular case, the majority appears to go out of its way to focus on one particular

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27. *Id.*

28. 935 A.2d at 973 ("The result of the majority's opinion, in our view, places the parties, and all those similarly situated, in an untenable position. They are denied access to the Family Court and thus are left in a virtual legal limbo, unable to extricate themselves from a legal relationship they no longer find congenial without establishing the domicile and residency requirements of some other jurisdiction.").

29. *Id.*

30. *Id.* at 974.

31. *See* Marbury v. Madison, 1 Cranch 137, 166, 2 L.Ed. 60 (1803).

32. *Id.* at 966 (the majority, while speaking of the General Assembly: "That body is free, if it so chooses, to enact divorce legislation that it might possibly deem more appropriate.").

word in the Family Court statute, "marriage." While the dissent takes the opposite approach and instead bases its reasoning on "any," as in the Court should be able to grant any divorce.[33] Of course, there is also an entirely different way to approach this entire issue. The Rhode Island Supreme Court could have also considered the very real effect this ruling will have on everyday Rhode Islanders that have entered into same – sex marriages in Massachusetts.[34]

Whatever one's opinion may be on the larger issue of whether Rhode Island should have same – sex marriage or its equivalent (civil unions), it is clear that the Court believes this debate resides for the members of the General Assembly.[35] That said, at least one of the attorneys representing the parties has not yet given up the battle. Shortly after the Supreme Court announced its decision in *Chambers v. Ormiston*, Louis Pulner, attorney for Ms. Chambers, re-filed his client's complaint in Superior Court, perhaps realizing that the Supreme Court's holding was based entirely on a procedural definition.[36] Pulner thinks that the Superior Court's broad, "extraordinary equitable jurisdiction" will allow these two women to seek a divorce here, because as he put it: "I cannot fathom that there is not a forum in the state of Rhode Island for a legally married couple to dissolve their marriage."[37]

CONCLUSION

The Rhode Island Supreme Court held that the Family Court, a court of limited statutory jurisdiction, was without jurisdiction to entertain a divorce petition involving a same – sex couple that

33. *Id.* at 970 ("The subject-matter jurisdiction of the Family Court does not turn on the gender of the parties; rather it turns on their status as a married couple.").

34. Gary J. Gates, *Geographic Trends Among Same Sex Couples in the U.S. Census and the American Community Survey*, The Williams Institute, November 2007 (In a recent study by the Williams Institute at the UCLA School of Law ranked ranked Rhode Island as tenth in a survey determining the top ten states of same sex couples per thousand households).

35. It is at least interesting to note that this may be one of the only decisions handed down by the Supreme Court where both parties were urging the Court to rule the same way, and they did not.

36. Edward Fitzpatrick, *Despite ruling, woman asks court for same-sex divorce*, THE PROVIDENCE JOURNAL, December 14, 2007.

37. *Id.*

was legally married in Massachusetts.[38] Both the majority and dissenting opinions suggest that this battle does not belong in the court system, but rather in the General Assembly.[39]

Kimberly Ahern

38. 935 A.2d at 958.
39. *Id.* at 967, 974.

Judicial Ethics. *In re Comm'n on Judicial Tenure & Discipline*, 916 A.2d 746 (R.I. 2007). Due process is not violated by members of the Commission on Judicial Tenure and Discipline who participate in preliminary hearings and in adjudication on the merits because the Rhode Island Supreme Court ultimately has the plenary and exclusive power to discipline judges. Additionally, in the absence of a finding of bad faith, bias, or willful disregard for fundamental rights, legal error is not enough to charge a judicial officer who is attempting to faithfully and impartially discharge her or his judicial responsibilities with ethical misconduct. However, the Constitutional rights of arrestees, not accused of new offenses but who have been apprehended on costs warrants, cannot be compromised.

FACTS AND TRAVEL

On August 26, 2002, defendant Patrick Sprague (defendant) appeared before Judge Robert K. Pirraglia (Pirraglia) in Newport District Court in connection with an outstanding bench warrant issued for defendant's failure to appear in court and pay court costs and fines from several criminal convictions.[1] After reviewing defendant's record, Pirraglia suggested that defendant admit to being in contempt of court in exchange for a six-month jail sentence.[2] During the course of this interaction, defendant asked whether he could speak to a member of the Public Defender's office.[3] Pirraglia acquiesced to the request, but warned defendant that his offer would not remain open if defendant sought counsel.[4] As a result, defendant accepted the offer without conferring with an attorney and was sentenced to a period of incarceration.[5]

On October 10, 2002, John Hardiman, the Public Defender,

1. *In re* Comm'n on Judicial Tenure & Discipline, 916 A.2d 746, 747-48 (R.I. 2007).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

filed a complaint with the Commission on Judicial Tenure and Discipline (Commission), alleging that Pirraglia had denied defendant his constitutional rights.[6] Following a finding of fact, the Commission concluded that Pirraglia had engaged in a threatening behavior and coercive actions that violated defendant's constitutional rights.[7] Ultimately, the Commission concluded that Pirraglia had violated Canons 2A, 3B.2, 3B.8, and 3B.9 of Article IV of the Code of Judicial Conduct of the Supreme Court Rules.[8] As a result, the Commission unanimously recommended that the Rhode Island Supreme Court censure Pirraglia.[9] Pirraglia then filed a petition to reject the recommendation of the Commission pursuant to § 8-16-6, arguing that his actions did not rise to a level of judicial misconduct.[10]

ANALYSIS AND HOLDING

In his appeal, Pirraglia contended that his due process rights were violated by the Commission's practice of having a subcommittee conduct preliminary investigation and then allowing the members of that subcommittee participate in the public hearing.[11] Pirraglia also argued that he was denied appropriate discovery into the Commission's internal practices.[12]

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6. *Id.* at 748-49.
7. *Id.* at 749 (R.I. 2007).
8. *Id.* Canon 2A states that:

"[a] judge shall respect and comply with the law and shall act at all times in a matter that promotes public confidence in the integrity and impartiality of the judiciary." Id. at 749, n. 1. Cannon 3B.2 states that: "[a] judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism." Id. Cannon 3B.8 states that: "[a] judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding..." (exemptions omitted) (alternation in original) Id. Canon 3B.9 states that: "[a] judge shall dispose of all judicial matters promptly, efficiently and fairly." Id. at 749, n. 1.

9. *In re* Comm'n on Judicial Tenure & Discipline, 916 A.2d 746, 749 (R.I. 2007).
10. *Id.*
11. *Id.* at 749-50.
12. *Id.* at 750.

Finally, Pirraglia alleged that he did not violate Canons 2A, 3B.2, 3B.9, and 3B.9, and that even if his actions amounted to a legal error, this single instance did not constitute judicial misconduct.[13]

The Rhode Island Supreme Court found that the Commission's procedures were unambiguous and fair.[14] The Court reached this conclusion based on its opinion that the Commission is designed in such a way that any complaints against judges are addressed fairly and expeditiously by an unbiased tribunal of limited authority.[15] Here, the Court relied on the precedent set forth in *La Petite Auberge, Inc. v. Rhode Island Comm'n for Human Rights*,[16] that the mere existence of a combination of both investigatory and adjudicative roles in a single administrative body does not amount to a denial of due process rights.[17] Moreover, the Court reasoned that there was no violation of due process rights because the Commission's role is restricted to making recommendations while it is the Rhode Island Supreme Court who ultimately has the exclusive and plenary power of the to discipline judges.[18]

Furthermore, the Court refused to examine the denial of Pirraglia's motion to compel more responsive answers to his requests for discovery.[19] Here, Pirraglia declared the purpose of these requests was to discover which Commission members participated in the preliminary investigation.[20] However, because the Court found that no merger exists between the prosecutorial and adjudicative functions of the Commission, the denial of the request for discovery was inconsequential.[21]

Finally, the Court disagreed with the Commission that Pirraglia engaged in threats or coercive conduct and held that not every single incidence of error of law would automatically deserve discipline.[22] Here, the Court could not find a single point at which

13. *Id.*
14. *Id.* at 751.
15. *Id.*.
16. *Id.* (citing La Petite Auberge, Inc. v. Rhode Island Comm'n for Human Rights, 419 A.2d 274 (R.I. 1980)).
17. *Id.*
18. *Id.*
19. *Id.* at 752.
20. *Id.*
21. *Id.*
22. *Id.* at 753-54.

Pirraglia's statements to defendant rose to the level of threats, or a point where Pirraglia's conduct exceeded the bounds of judicial propriety.[23] Moreover, because the phrase "to coerce" implies the use of force or threat of force, the Court refused to hold that Pirraglia's conduct rose to the level of coercion.[24] Furthermore, because this was a single incident, and the Court recognized that at times judges err, the Court agreed with the Maine Supreme Judicial Court[25] that not every error of law automatically deserves discipline, even when that error is one that a reasonable and competent judge would avoid.[26] Instead, the Court reasoned that when determining whether a judge has engaged in judicial misconduct, the Court should apply a reasonableness test where a judge's action constitutes judicial misconduct when a reasonably prudent and competent judge would consider the conduct wrong in all circumstances.[27]

COMMENTARY

This case will be held near and dear to the hearts of many members of the judiciary because the Rhode Island Supreme Court used it as a vehicle to "safeguard the independence of our judiciary."[28] But alas, there is a rub, the Court also took this case as an opportunity to reminds us that judges are not infallible, and do occasionally make legal mistakes. Nevertheless, our esteemed judges will be able to sleep soundly at night as the court sets the precedent that a judicial officer who is attempting to faithfully and impartially discharge her or his judicial responsibilities should not face a charge of ethical misconduct for a legal error. In spite of this, any fears of a runaway judiciary can be assuaged because the Court was quick to clarify that an error of law that "clearly and convincingly reflects bad faith, bias, abuse of

23. *In re* Comm'n on Judicial Tenure & Discipline, 916 A.2d at 752-54. Here the court referred to Black's Law Dictionary to define a threat as a "communicated intent to inflict harm or loss on another or another's property, esp[ecially] one that might diminish a person's freedom to act voluntarily or with lawful consent[.]" (citing Black's Law Dictionary 1519 (8th ed. 2004)) (emphasis in original) *Id.*

24. *Id.* at 753.

25. *Id.* (*See* Matter of Benoit, 487 A.2d 1158, 1163 (Me. 1985)).

26. Id. at 754 (R.I. 2007).

27. *Id.* at 755.

28. *Id.* at 754.

authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty," may constitute ethical misconduct.[29] Additionally, the Court made clear that citizens are entitled to a fair proceeding by an impartial judge, by concurring with the commission that constitutional rights of those who are not accused of new offenses but have simply been apprehended on costs warrants, cannot be compromised.

To avoid inevitable quagmires of applying judicial misconduct sanctions, the Rhode Island Supreme Court adopted a reasonableness test. Under this test, "[i]f a reasonably prudent and competent judge would consider that conduct obviously and seriously wrong in all the circumstance," the judge's action rises to the level of judicial misconduct.[30] In the case at hand, the court did not find that Pirraglia's actions rose to the level of threats or coercion, yet the reasonableness of Pirraglia's actions weighed towards something more than legal error, but less than something meriting censure. It would perhaps be remiss not to also note that the Court took into account Pirraglia's twenty-plus years of exemplary judicial service when declining to impose the sanction of censure. Interestingly, however, what place "exemplary judicial service" has in a reasonableness test for judicial misconduct is something the Court did not explore. Then again, perhaps this is also something that this author, who has the utmost respect for judges, should not delve into either.

CONCLUSION

Ultimately the Rhode Island Supreme Court agreed with the Commission that Pirraglia's conduct in depriving defendant of the opportunity to consult with counsel violated Canons 2A and 3B.2. Although the Court rejected some of the Commission's findings as being overly broad, the Court did agree that Pirraglia's actions amounted to more than legal error. Here, the Court was making certain that the constitutional rights of arrestees, like defendant, are not compromised. Nevertheless, the Court declined to impose the sanction of censure, taking into account that the Court modified several of the Commission's findings of fact and also

29. *Id.* at 754-54 (quoting *In Re* Curdia, 49 P.2d 255, 258 (Alaska 2002)).
30. *Id.* (quoting *In Re* Matter of Benoit, 487 A.2d 1158, 1163 (Me. 1985)).

Pirraglia's distinguished service to the judiciary and to the people of Rhode Island.

L. Evan Van Gorder

Labor law. *Arena v. City of Providence*, 919 A.2d 379 (R.I. 2007). Retired members from the City of Providence's fire and police departments sued the city over a Cost of Living Adjustment ("COLA") the argued was attached to their pension funds. The city attempted to withdraw the COLA because they did not retire under an appropriately ratified Collective Bargaining Agreement ("CBA"). However, the plaintiffs did retire under a city ordinance that provided them with an annual five percent-compounded COLA. Because the court must refer to a retirement plan's provisions at the time of retirement and COLA benefits vest once retirement occurs, the city ordinance applied; however, the retirees waited five years before they filed a lawsuit and therefore are only entitled to the COLA adjustment from the filing of the lawsuit under the theory of laches.

FACTS AND TRAVEL

The City of Providence received home rule in 1980 and the City Council ("Council") replaced the General Assembly as the body creating the City's municipal pension program.[1] However, the council never used its power to legislate retirement benefits until 1991 and during that gap the Fraternal Order of Police ("FOP") and the International Association of Firefighters ("IAFF") engaged in collective bargaining separately.[2] Prior to enactment of a 1989-91 police CBA and a 1990-92 fire CBA, police officers and fire fighters contributed 8 percent of their salaries with a 3 percent non-compounded COLA after they retired.[3] The new CBAs changed this amount, however the CBAs needed approval from the General Assembly because the council had not implemented its authority over the pension system.[4] The city eventually adopted the changes to the pension plan in the City of Providence Ordinance, ch.1991-5.[5]

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1. Arena v. City of Providence, 919 A.2d 379, 382 (R.I. 2007).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 383. The new pension plan involved an increase in

Problems developed with the 1993-95 police CBA and 1992-95 fire CBA when both Mayor Vincent A. Cianci ("Mayor") and the respective union presidents signed the CBA without completing the necessary step of receiving approval from the council.[6] The council attempted to limit the Mayor's power through Providence City Ordinance 401 limiting the mayor's ability to enter into valid labor contracts for more than one year.[7] In the resulting power struggle, the mayor violated that ordinance by entering into a CBA with the Laborers' International Union of America ("Local No. 1033 CBA") while refusing to submit the contract to the council for ratification.[8] The city sought a declaratory judgment forcing the mayor to comply, however the Superior Court found for the Mayor declaring Local No. 1033 CBA valid but limiting the term of the CBA to one year.[9] Both parties appealed and the Rhode Island Supreme Court held that the council had the right to require ratification and that the Mayor's failure to seek that ratification made the CBA invalid.[10] The result of this judgment was to make the 1993-95 police CBA and the 1992-95 fire CBA invalid as well.[11] The council, knowing full well of the judgment's effect, passed City of Providence Ordinance, ch. 1995-17 which reduced the COLA benefit of current and former employees to a 3 percent simple COLA.[12] In an effort to further reduce the tension on the pension fund, the council passed City of Providence Ordinance, ch. 1996-4 reducing COLA benefits to certain employees even further.[13] This cause of action developed when the city applied the COLA calculations from the 1995-17 and 1996-4 ordinances to police and fire retirees whom retired before the effective dates of those ordinances.[14] On May 4, 2001, the

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contributions from 8 to 9.5 percent in return for a two-part COLA increase resulting in a 5 percent compounded COLA. *Id.* at 382.

6. *Arena*, 919 at 383.
7. *Id.*
8. *Id.*
9. *Id.* *See also* Providence City Council v. Cianci, 650 A.2d 499 (R.I. 1994).
10. *See Cianci*, 650 A.2d at 503.
11. *Arena*, 919 A.2d at 383.
12. *Id.* at 383-84.
13. *Id.* at 384.
14. *Id.*

plaintiffs filed their complaint.[15] While a total of eighty-one plaintiffs were involved in the appeal, the court divided them into four separate groups: those who retired between July 1, 1993 and June 30, 1995 while a non-ratified CBA was in place, a twenty-two year veteran of the fire department who eventually took a civilian position and retired in 1992, firefighters who retired between July 1, 1992 and June 30, 1993, and firefighters who retired between July 1, 1993 and June 30, 1995 under a non-ratified CBA.[16]

ANALYSIS AND HOLDING

The defendants argued that the trial court erred when it found the Superior Court had jurisdiction to decide the COLA dispute.[17] Further, the defendants argued that the Firefighter's Arbitration act ("FFAA") applied regarding the plaintiff's contractual rights, the plaintiffs were not eligible for COLA benefits as defined in a Providence ordinance and the defendants could adjust this ordinance as they saw fit.[18] On cross appeal, the plaintiffs argue that the terms of the last ratified CBA govern their COLA benefits.[19]

Jurisdiction

The standard of review for this case, because it involves applying the law to the facts, is *de novo*.[20] First, the court analyzed the jurisdictional issue and the use of the FFAA in determining an appropriate remedy for the retirees.[21] Despite the

15. *Id.* It is important to note that the litigation surrounding this case also involved both consent decree litigation in 1990 and federal court litigation in 1998. *See Id.* at 384-86. The consent decree litigation did not affect this case because the plaintiffs retired after an adjudicated effective date for specific COLA benefits. *Id.* at 385. The federal litigation had no bearing on this case because the court dismissed the case under lack of jurisdiction under the *Rooker-Feldman* doctrine, lack of standing, *res judicata*, and collateral estoppel. *Id.* at 385-86. Because of numbers of lawsuits and time spent on litigation (approximately 17 years), Justice Williams analogized this case to a scene in Dickens' *Bleak House*. *Id.* at 384.

16. *Arena*, 919 A.2d at 386-87.

17. *Id.* at 381.

18. *Id.*

19. *Id.*

20. *Id.* at 387.

21. *Id.*

ruling by the Superior Court that it had subject matter jurisdiction, an interest arbitration panel was formed approximately eight months after the decision at the request of the IAFF.[22] The panel only dealt with the claims from group three who retired during the first year of the non-ratified CBA.[23] The panel eventually resolved the COLA controversy and the defendants argued in Superior Court that the trial justice should defer to the arbitration panel's decision.[24] Rather, the trial judge held that the Superior Court had exclusive jurisdiction and rejected any authority alleged by the arbitration panel.[25] On appeal, the defendants argued that the FFAA was controlling authority because an arbitration panel's authority extended to rights of retirees and the trial court erred by finding the panel had no bearing on its decision.[26]

To support its claims, the defendants cited to *City of East Providence v. Local 850, International Association of Firefighters, AFL-CIO* ("*Local 850*") and *Lime Rock Fire District v. Rhode Island State Labor Relations Board* ("*Lime Rock*").[27] Both cases addressed the FFAA; *Local 850* held that decisions made by an arbitration panel are binding when involving unresolved collective bargaining issues and *Lime Rock* held a union must exhaust mandatory arbitration remedies before it files an unfair labor practices claim.[28] The court distinguished both *Local 850* and *Lime Rock* from the present case because the plaintiffs are not unions nor do unions represent them.[29] Because of their status as retired firefighters the FFAA does not apply to their claim.[30] Further, the plaintiffs do not qualify as employees because the word "employees" does not encompass retirees in the National Labor Relations Act.[31]

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22. *Id.*
23. *Id.*
24. *Id.* at 388.
25. *Id.*
26. *Id.*
27. *See* Lime Rock Fire District v. Rhode Island State Labor Relations Bd., 673 A.2d 51 (R.I. 1996); City of East Providence v. Local 850, Int'l Ass'n of Firefighters, AFL-CIO, 366 A.2d 1151 (R.I. 1976).
28. *Arena*, 919 A.2d at 388.
29. *Id.* at 389.
30. *Id.*
31. *Id. See also* Allied Chemical & Alkali Workers of America, Local

Next, the court held that the public policy behind the FFAA does not apply to retirees because the purpose of the FFAA is to provide "some alternative mode of settling disputes where employees must, as a matter of public policy, be denied the usual right to strike."[32] Here, the possibility of a strike simply does not exist and the retirees cannot pressure the city to support their COLA demands by forcing a work stoppage.[33] Finally, the term "firefighter" in the FFAA does not include retirees because current employees do not have the same interest regarding the COLA benefits.[34]

Terms of the Last Ratified Collective Bargaining Agreement

The plaintiffs argued two potential sources for their appropriate COLA percentage: the terms of their last ratified CBA or Ordinance 1991-5.[35] First, the plaintiffs point to prior Rhode Island State Labor Relation Board ("SLRB") decisions holding that an expired CBA should control while a new agreement is still pending negotiation.[36] The court disagreed with this contention holding that the only organization to determine whether the terms of an expired agreement control during a dispute pending a new agreement is the SLRB itself.[37] The court cannot "stand in the place of the SLRB to make such a determination."[38] Further, the plaintiffs point to provisions in the Municipal Police Arbitration Act ("MPAA") and the FFAA stating that the terms of CBAs shall continue into the following CBA unless they are changed.[39] However, the court held that no authority allows the court to take terms from an expired CBA to "fill a gap" between CBAs particularly when the time frame is more than one year.[40] Therefore, the court held the last ratified CBA could serve as the

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Union No. 1 v. Pittsburg Plate Glass Co., 404 U.S. 157 (1971).

32. *Id.* at 390 (quoting R.I. GEN. LAWS §28-9.1-2(c)).
33. *Id.*
34. *Id.*
35. *Id.* at 391. Note that both the last ratified CBA and Ordinance 1991-5 provide for a 5 percent compounded COLA adjustment. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 392.

source of COLA benefits.[41]

Reduction of Retirees' COLA Benefits by Ordinance AFTER their Date of Retirement

Both parties and the court agreed that Ordinance 1991-5 governed the COLA benefits at the time of the plaintiffs' retirement.[42] However, the court analyzed the different interpretations of the parties regarding whether it was a vested pension benefit or whether it was a gratuitous benefit that could be reduced by future ordinance.[43] When dealing with pension benefits, most jurisdictions define them as contractual or gratuitous.[44] If they are deemed contractual, they are viewed as a piece of the actual employment contract that vests once the contract is signed.[45] Pensions are gratuitous when they are "springing from the appreciation and graciousness of the state" allowing reduction or elimination of such benefits without recourse.[46] The court adopted a middle ground called the mixed contract/deferred compensation theory by holding that "pension benefits vest once an employee honorably and faithfully meets the applicable pension statute's requirements."[47]

The court acknowledged that the city has broad powers to change pension plans of firefighters and police officers whom have yet to retire.[48] However, the issue in this case was whether the council can retroactively change the terms of a pension plan.[49] Ordinance 1991-5 states that retirement benefits eligibility begins on the last day of a retiree's employment and defines a pension as "annual payments for life derived from appropriations provided by the City of Providence under the provisions of this ordinance."[50] Despite the fact that separate COLA classifications were added to

41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 392-93 (quoting Haverstock v. State Public Employees Ret. Fund, 490 N.E.2d 357, 361 (Ind. Ct. App. 1986)).
47. *Id.* at 393. *See also In re* Almeida, 611 A.2d 1375,1386 (R.I. 1992).
48. *Arena*, 919 A.2d at 393.
49. *Id.*
50. *Id.*

subsequent revisions of Ordinance 1991-5, the court refused to read it as a gratuitous benefit.[51] The court held that the conditions of Ordinance 1991-5 support the "plaintiffs' vested interest in a lifetime 5 percent compounded COLA."[52]

In support of its holding, the Court pointed to federal case law addressing similar labor disputes while coming to the same conclusion.[53] In *Shaw v. International Association of Machinists and Aerospace Workers Pension Plan*, the Ninth Circuit was asked to decide whether a "living pension" similar to a COLA adjustment was an accrued benefit or an ancillary benefit.[54] The court held that it was a promised benefit and to reduce it in any way violated the plaintiffs' right to receive a vested pension.[55] Additionally, the Court addressed *Howell v. Anne Arundel County* where the court held that while an ordinance can prospectively change COLA benefits, it still dismissed the case brought by the retiree for lack of standing because he was totally unaffected by the COLA changes.[56] The rationale was the retiree's right to have his pension determined by the original COLA formula vested at his retirement and could not be modified.[57] Finally, in *Board of Trustees of the Sheet Metal Workers' National Pension Fund v. Commissioner of Internal Revenue*, the Fourth Circuit held that a court must look a retirement plan's provision at the time of retirement to determine the appropriate benefits.[58] In *Sheet Metal,* the court determined that a COLA cutback could occur because the plaintiff's original pension did not have a COLA benefit and they would have no reason to expect that benefit going forward.[59] *Sheet Metal* is distinguishable from the current case because the plaintiffs had a "reasonable expectation at the time they retired that they would receive a 5 percent compounded

51. *Id.* at 394.
52. *Id.*
53. *Id.*
54. *Id. See also* Shaw v. Int'l Ass'n of Machinists and Aerospace Workers Pension Plan 750 F.2d 1458,1466 (9th Cir. 1985).
55. *Arena*, 919 A.2d at 394.
56. *Id.* at 394-95. *See also* Howell v. Anne Arundel County, 14 F.Supp.2d 752, 754 (D.Md. 1988).
57. *Arena*, 919 A.2d at 395.
58. *Id. See Also* Bd. of Trustees of the Sheet Metal Workers' Nat'l Pension Fund v. Comm'r of Internal Revenue, 318 F.3d 599 (4th Cir. 2003).
59. *Arena,* 919 A.2d at 395.

COLA that would vest upon retirement."[60]

Remedy

While the Court held that the council exceeded its authority by reducing the retirees' COLA benefit, the court also held that the retirees sat on their rights by waiting five years before seeking a declaratory judgment.[61] In response, the court applied the equitable doctrine of laches limiting the amount the plaintiffs could recover.[62] The plaintiffs could only receive the COLA benefit from the date of the filing of this action and could not recover any past COLA adjustments.[63] Further, the COLA adjustment for the year 2001 when the suit was filed should be prorated, excluding payments that would have been received between January and May.[64]

COMMENTARY

The almost seventeen year battle between the City of Providence and the retired firefighters and police officers involved the federal courts, the Mayor, almost 80 plaintiffs and ultimately the Rhode Island Supreme Court. In the words of Chief Justice Williams, "It is time for this litigation to end."[65] While this litigation could be classified as a long and drawn out battle, it does provide the State with valuable precedent. This case is significant because it outlines Rhode Island's interpretation of pension benefits, specifically COLA benefits, and when they vest. While the court does not view them as entirely gratuitous it holds that, "a COLA is a vested pension benefit when a jurisdiction has adopted a mixed contract/deferred compensation theory of pension benefits."[66] By describing pension benefits as a mixed contract/deferred compensation agreement, it provides both businesses and retirees with a framework to help them understand how their benefits will be interpreted by the courts.

60. *Id.*
61. *Id.* at 395-96.
62. *Id.* at 396.
63. *Id.*
64. *Id.* The action was officially filed on May 4, 2001. *Id.*
65. *Id.*
66. *Id.* at 394.

This allows for efficient planning when CBA's or other types of employee benefit contracts are being negotiated.

Further, this case is significant because the court reinforces its position that it will not help people who "sleep on their rights."[67] While the court ultimately found for the firefighters and police officers, it chastised them for failing to initiate their cause of action sooner. The consequences of this was a loss of the five percent COLA increase from 1996 when the reduction in benefits began until May of 2001 when the case was filed.[68] This serves as a warning for all potential plaintiffs that one must begin to fight their legal battles sooner rather than later. The Court held that the consequences of waiting to file suit involve a limitation on the remedy sought.

CONCLUSION

The court held that the retired police and firefighters were entitled to a five percent compounded COLA adjustment based on the agreement that was in place when the group retired. The court rejected the argument of the City of Providence that the group was not operating under a ratified CBA and therefore the city could reduce COLA benefits as it saw fit. Further, the court held that pension benefits are interpreted under the mixed contract/deferred compensation theory and the benefits vest once retirement occurs. However, because the plaintiffs waited almost five years before they filed their cause of action, the remedy will be limited to a reinstatement of COLA benefits from the time the suit was filed.

Katherine A. Sulentic

67. *Id.* at 395.
68. *Id.* at 396.

Labor Law. *State of Rhode Island (DOA) v. Rhode Island Council 94*, 925 A.2d 939 (R.I. 2007). An overtime provision included in a Collective Bargaining Agreement (CBA) that does not directly contradict with a merger statute constitutes an arbitrable grievance. The provisions of the CBA will govern unless those provisions directly contravene state law, or where the CBA and the statute cannot both be applied to resolve the issue.

FACTS AND TRAVEL

In July 2001, the Rhode Island General Assembly decided to merge the Rhode Island Sheriffs and Marshals into one office, the Division of Sheriffs.[1] Previously, the sheriffs and marshals fulfilled distinct duties and responsibilities, belonged to separate unions, and underwent different training programs.[2] The new "merger statute" permitted the director of the Department of Administration (DOA) to delay merging the functions of the two offices as long as necessary, as long as the DOA transferred all of the functions to the new Division of Sheriffs within three years.[3]

Prior to the merger, the marshals had almost exclusively performed the function of extraditing prisoners, and so the marshals received all the overtime from extraditions.[4] However, the sheriffs and marshals generally shared other inmate transports between courts or other places.[5] The merger statute provided for a special operations unit to perform the extraditions, among other duties, but this never materialized.[6] Instead, the Inmate Transportation Unit (ITU) carried out extraditions, where the marshals continued to extradite prisoners "to the exclusion of other qualified members of the division."[7] Plaintiff Council 94

1. State of Rhode Island (DOA) v. Rhode Island Council 94, 925 A.2d 939, 941 (R.I. 2007).
2. *Id.*
3. *Id.* (citing G.L. 1956 § 42-11-21 (d)(2)).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

became the bargaining representative of the employees of the two unions, and consequently the State of Rhode Island and the employees signed a collective bargaining agreement (CBA).[8] Council 94 asserted that the State breached the overtime distribution clause of the agreement by continuing to exclude the sheriffs from the opportunity to get overtime pay from extraditions, and thus it took the matter to arbitration.[9] During arbitration, the State contended that the merger statute permitted the director to limit the extradition work to the former marshals.[10] The State reasoned that permitting the sheriffs, who had not done extraditions before would imperil the public as well.[11] Furthermore, the State argued that the conflict between the merger statute and the CBA was not an arbitrable grievance according to court precedent.[12]

On November 29, 2004, the arbitrator handed down his decision.[13] He ruled in favor of Council 94, because it was only seeking extradition work for those sheriffs with the appropriate training.[14] The arbitrator did not find that the CBA provision conflicted with the merger statute, because the director had never actually "exercised his statutory discretion to postpone transferring any functions to the division."[15] The arbitrator found that the facts of the present dispute did not fall within the ruling in *State v. Rhode Island Alliance of Social Services Employees, Local 580, SEIU*, where the overtime policy in question was in direct conflict with a statute governing overtime eligibility.[16] In contrast, here the State refused to allow all members of the bargaining unit to perform extradition work, even qualified members and those who had performed extraditions in the past.[17] Therefore, the arbitrator held that all qualified sheriffs and marshals had to be included in the rotation for extradition

8. *Id.* at 941-42.
9. *Id.* at 942.
10. *Id.*
11. *Id.*
12. *Id.* (citing State v. R.I. Alliance of Social Serv. Employees, Local 580, SEIU, 747 A.2d 465, 469 (R.I. 2000).
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 943 (citing *Local 580, SEIU*, 747 A.2d at 468).
17. *Id.*

overtime shifts.[18]

The State filed a motion to vacate the arbitration award, but Council 94 objected to this, and thus the matter went to the state Superior Court.[19] At the Superior Court, the judge found that the issue was non-arbitrable, because the CBA effectively breached state law and the arbitrator had exceeded his authority by ignoring the relevant statute.[20] Consequently, the Superior Court vacated the arbitration award.[21]

ANALYSIS AND HOLDING

The Supreme Court of Rhode Island reviewed the arbitrability issue *de novo* when it came before the Court on appeal.[22] Council 94 contended that the State had to comply with the CBA unless there was a "direct conflict between the language of the relevant statute and the CBA and that no such direct conflict existed in the case."[23] The Court agreed with the State that where a "statute provides for nondelegable or nonmodifiable duties. . .in connection with the functions of state government," the state does not have to comply with a contrary CBA provision.[24] However, the Court held that no language in the merger statute forbade the sheriffs from performing extradition work.[25] As the arbitrator had noted in his own finding, the merger statute did not dictate how the extradition work should be distributed.[26] Had the director of the DOA actually established a "special operations unit," the director would have had "exclusive authority" to select who could do extradition work, but the DOA never formed this unit.[27] Furthermore, sheriffs currently performed other functions that had originally assigned to the "special operations unit," such as executing warrants and transporting inmates, even though they

18. *Id.* (The arbitrator also granted a "make-whole remedy" to those members who had been qualified to perform extraditions after April 4-6, 2002, but who were not permitted to take the overtime shifts.).
19. *Id.*
20. *Id.*
21. *Id.* at 943-44.
22. *Id.* at 944.
23. *Id.* at 945.
24. *Id.*
25. *Id.* at 946.
26. *Id.*
27. *Id.*

were not a part of the ITU.[28]

The merger statute provided that "initially" the "special operations unit" would be comprised of the state marshals, but the arbitrator found that this no longer applied once new vacancies opened up.[29] The Supreme Court agreed with this finding, and upheld the arbitrator's decision to fill these vacancies according to the CBA provisions.[30] The Court also rejected the State's contention that adhering to the CBA would threaten public safety, since only qualified members with the proper training would be allowed to perform extraditions and receive overtime.[31] Therefore, the Court ruled that the grievance was arbitrable, because the CBA provisions did not directly conflict with the merger statute.[32] The judgment of the Superior Court was reversed and the arbitration award for plaintiff affirmed.[33]

COMMENTARY

The Court correctly found for the plaintiffs here, because the language of the merger statute was ambiguous and inapplicable. The State sought to use only the parts of the statute that suited its purposes, even though it had failed to implement a majority of the statute's provisions, such as creating a "special operations unit." The State complained that the director of the DOA should have full discretion in determining which members of the Division of Sheriffs could perform extradition work, but as the arbitrator noted, this would only be the case if the State had actually formed the "special operations unit."[34] In fact, the director serving at the time that the state passed the merger statute commented that he found it "unacceptable" for only the marshals to receive extradition overtime, demonstrating that the DOA supported the idea of using sheriffs to perform extradition work.[35]

28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 947.
34. *Id.* at 946.
35. *See id.*

Arbitration and Public Policy

The State's other major contention, that it had the prerogative to regulate the extradition overtime based on its duty to promote public safety, had little evidentiary support. Rhode Island law recognizes the authority of the State in matters of public policy, particularly for public health and safety priorities.[36] Where the Court finds a public safety issue, the Court will be more willing to hold void the provisions of a collective bargaining agreement.[37]

The safety issue, however, was not a real factor in this case. Undisputedly, the sheriffs already performed work of the same nature as extraditions, such as transporting high-risk offenders and executing warrants, yet no one claimed that the sheriffs executed these functions improperly or in a manner that endangered the public. Nor was Council 94 demanding that every sheriff receive the opportunity to gain overtime from extradition work. Council 94 only requested that those sheriffs with sufficient training, including weapons certification, be admitted in the rotation for extradition overtime shifts. Because the sheriffs and marshals performing extraditions would have the same training background, the State's public safety argument was not logically valid.

CONCLUSION

The Supreme Court of Rhode Island found that where a CBA does not directly contradict a statutory provision, the provisions of the CBA will prevail unless there is some overriding public policy issue. In this case, the State could not show that the CBA's redistribution of extradition overtime, previously reserved to the marshals, conflicted with the merger statute, because the DOA never enacted relevant portions of the statute, and nothing in the statute explicitly forbade the sheriffs from performing extradition work. The State was unable to show that a valid public safety issue existed, since the agreement allowed only qualified sheriffs to share extradition overtime with the marshals. Therefore, the

36. City of Central Falls v. American Fed'n of State, County and Mun. Employees, 2003 WL 22048737, at *4 n.8 (R.I. Super.,2003).

37. *Id.*

Court reinstated the arbitration award for Council 94, which had been overturned by the Superior Court.

Andrea Harrison

Labor Law. *Unistrut Corp. v. State of R.I. Dept. of Labor and Training*, 922 A.2d 93 (R.I. 2007). A steel support structure for various electrical equipment was not one of the uses of an "apparatus *** for carrying or using electricity" that required a licensed electrician for installation under R.I. Gen. Laws 1956 § 5-6-2, assuming that when the contractor completed its support structure, no electrical components were attached to it. When interpreting statutory terms such as "apparatus", context in the statute and practicality should be taken into account.

FACTS AND TRAVEL

This case arose from the construction of a new emergency room for Rhode Island Hospital.[1] Capco Steel, the general contractor, hired Unistrut Corporation ("Unistrut"), a subcontractor with over 60 years experience, to construct and install a "steel support system upon which certain surgical equipment, including lighting, would be mounted."[2] A complaint was made to the Rhode Island Department of Labor and Training (the "Department") that Unistrut employees were performing electrical work on the job site without proper permit or license.[3] After investigation, notices of violation were issued to the project manager and three other individuals at the job site (petitioners) on September 30, 2004.[4] Unistrut continued construction and two additional violations were issued to petitioners on October 1 and 6, 2004.[5]

Additionally, the assistant director of the Department issued cease-and-desist orders on October 5, 7, and 8, 2004.[6] The orders sought to stop construction and installation of the steel support

1. Unistrut Corp. v. State of R.I. Dept. of Labor and Training, 922 A.2d 93, 94 (R.I. 2007).
2. *Id.* at 95.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

system and levied fines totaling $19,200[7] for violations of § 5-6-2.[8] On the advice of counsel, Unistrut completed the construction and installation of the steel support structure.[9]

Petitioners appealed both the fines and cease-and-desist orders to the Director of the Department ("Director") and the Board of Examiners of Electricians (the "Board") held a hearing, pursuant to § 5-6-32, on November 17, 2004.[10] The court noted three facts that were demonstrated by the record of that hearing.[11] First, the purpose of the structure was to "support lights and other electrical equipment in the emergency room", but that this equipment was to be attached by a separate electrical contractor.[12] Second, no electrical components had been installed on the structure upon completion of Unistrut's work.[13] Third, the "electrical code requires that electricians provide adequate support for any electrical devices, fixtures, or appliances they install."[14] The board made three findings based on that hearing:

> (1) that the structure that Unistrut built was an "apparatus * * * for carrying or using electricity" as described in § 5-6-2; (2) that Unistrut was required to obtain an electrical permit to install the structure; and (3) that the workers who installed the structure were required to be licensed electricians. Consequently, the board recommended to the director that both the cease-and-desist orders and the fines be enforced.[15]

Based on these findings and the recommendation of the board, the Director affirmed the cease-and-desist orders and the fines for

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7. Fines levied in accordance with R.I. Gen. Laws 1956 § 5-6-32.

8. *Id.* at 95. R.I. GEN. LAWS § 5-6-2(a)(1): No person, firm, or corporation shall enter into, engage in, solicit, advertise, bid for, or work at the business of installing wires, conduits, apparatus, fixtures, electrical signs, and other appliances for carrying or using electricity ... unless that person, firm, or corporation shall have received a license and a certificate for the business, issued by the state board of examiners of electricians of the division of professional regulation of the department of labor and training in accordance with the provisions set forth in this chapter."

9. *Unistrut Corp.*, 922 A.2d at 95.

10. *Id.* at 95-96.

11. *Id.* at 96.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

each of the petitioners in decisions issued on December 10, 2004.[16]

Unistrut appealed these administrative decisions,[17] challenging the validity of the fines levied before an administrative hearing had taken place as required by §5-6-32[18]. Also, petitioners alleged that the board erred in its determination that the installation of the support structure constituted electrical work that statutorily required a license.[19]

In a decision dated March 28, 2006, a Superior Court magistrate ruled that the fines were "impermissibly levied because Unistrut had not been afforded a hearing before they were assessed."[20] However, he affirmed the issuance of the cease-and-desist orders, agreeing that the steel support structure constituted an "apparatus" under §5-6-2.[21] Judgment was entered in accordance with that decision on April 3, 2006.[22] Unistrut then petitioned the Rhode Island Supreme Court for a writ of certiorari on April 13, 2006, challenging the judgment.[23] The Supreme Court granted the petition and after a show cause hearing, the Court held that cause had been shown and agreed to hear the case.[24]

ANALYSIS AND HOLDING

As this case concerned an issue of statutory interpretation, the court applied a *de novo* standard of review.[25] However, before embarking on this quest, the court was careful to note that, although neither side had raised the issue, the controversy at hand was moot.[26] In this case, the fines levied had already been vacated by the Superior Court and construction was complete, leaving the fate of the cease-and-desist orders irrelevant to the

16. *Id.*
17. *Id.* at 97. Appealed decisions pursuant to authority in R.I. GEN. LAWS § 42-35-15 (1956). *Id.*
18. *Id.* at 98.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* (citing Marques v. Pawtucket Mut. Ins. Co., 915 A.2d 745, 747 (R.I. 2007))
26. *Id.* at 99.

parties.[27] The court chose to review this case despite its mootness as it "involves the right of an individual to earn a livelihood."[28]

The Court focused mainly on the interpretation of the term "apparatus" as it applies to §5-6-2. The Court began by noting that absent a relevant statutory definition both the board and the Superior Court magistrate relied on a series of dictionary definitions of the term.[29] The Court went on to discuss a Ninth Circuit case relied upon by the Superior Court which used Webster's Dictionary to define "apparatus" as "a collection or set of materials * * * [or] * * * appliances * * * designed for a particular use."[30]

The court used two Rhode Island Supreme Court cases to exemplify the canon of statutory interpretation to be used when considering questions of whether to give deference to agency interpretation of a statute.[31] The first, *McConaghy*,[32] involved a dispute over whether a voucher (given in lieu of a paycheck) intended to be cashed by the employer, at the place of employment, constituted an "instrument" under the relevant check-cashing statute.[33] The court determined that the statute was ambiguous and capable of multiple interpretations.[34] Therefore, the court held the regulating agency was entitled to deference to its reasonable interpretation of the statute.[35] In *Rossi*,[36] a case involving a dispute over whether an employee was

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27. *Id.*

28. *Id.* Mootness was overcome in this case as this right to earn a livelihood arises in a situation that is both capable of repetition and likely to evade review, due to the inherent short-term nature of such construction projects. *Id.* (citing Krivitsky v. Town of Westerly, 823 A.2d 1144, 1146-47 (R.I. 2003)).

29. *Unistrut Corp.*, 922 A.2d at 99-100.

30. *Id.* at 100 (quoting U.S. v. Migi, 329 F.3d 1085, 1088 (9th Cir. 2003)). The court foreshadowed its decision in this case in the corresponding footnote when it pointed out in no uncertain terms that the magistrate's discussion of *Migi* overlooked the fact that the word "apparatus" was modified by the phrase "intended for the use of children." *Unistrut Corp.*, 922 A.2d at n.14 (quoting U.S. v. Migi, 329 F.3d 1085, 1089 (9th Cir. 2003)).

31. *Id.* at 100-01 (citing Labor Ready Northeast v. McConaghy, 849 A.2d 340 (R.I. 2004) and Rossi v. Employees' Ret. Sys., 895 A.2d 106 (R.I. 2006)).

32. Labor Ready Northeast v. McConaghy, 849 A.2d 340 (R.I. 2004).

33. *Unistrut Corp.*, 922 A.2d at 100 (citing *McConaghy*, 849 A.2d at 342).

34. *Id.* (citing *McConaghy*, 849 A.2d at 345-46).

35. *Id.* (citing *McConaghy*, 849 A.2d at 345-46).

36. Rossi v. Employees' Ret. Sys., 895 A.2d 106 (R.I. 2006).

eligible for a disability pension, the court found that the statute had been interpreted erroneously as "aggravate" and "reinjure" could not be defined synonymously, as the legislature would not have added the second term with the intent of redundancy.[37] Therefore, the court held that the language was unambiguous, not open to multiple interpretations and, consequently, the Court need not give deference to the agency's interpretation of statutory terms.[38]

Applying another canon of statutory interpretation, the court first determined that given the plain meaning of "apparatus", accepted by both the board and the Superior Court, the term is unambiguous and not open to multiple interpretations.[39] As a result, the court is under no obligation to give deference to the agency's interpretation, reasonable or not.[40] More significantly, the court declined to give deference to the agency's interpretation of "apparatus" due to the fact that the agency made this interpretation out of context.[41] The court held that because the administrative body in question had generally interpreted the word "apparatus" alone, and failed to interpret the phrase "apparatus for * * * carrying or using electricity," as a whole, when making its determination, the judgment of the Superior Court must be reversed.[42]

The court goes on to clarify that the phrase "apparatus for * * * carrying or using electricity" is unambiguous.[43] By again applying the plain meaning of the word apparatus, this time in context, the court found that the specific use defined by the statute is use by carrying or using electricity.[44] Providing support for the electrical equipment in question is not included as a use of an apparatus that would require an electrician for installation under § 5-6-2.[45] The record of the hearing before the board showed that when Unistrut completed its work no electrical components

37. *Unistrut Corp.*, 922 A.2d at 100-01 (citing *Rossi*, 895 A.2d at 108-13).
38. *Id.* at 101 (citing *Rossi*, 895 A.2d at 113-14).
39. *Id.*
40. *Id.* (citing *McConaghy*, 849 A.2d at 345-46)
41. *Id.*
42. *Id.* (*see Rossi*, 895 A.2d at 113-14).
43. *Id.*
44. *Id.*
45. *Id.* at 101-02

had been attached to the structure.[46] Therefore, the Court held that the statute clearly and unambiguously does not include the work done by Unistrut in this case and vacated the cease-and-desist orders.[47]

COMMENTARY

The refusal of the court in this case to defer to the statutory interpretation of the governing agency[48] strikes a blow to the often seemingly omnipotent power of the executive branch. This case allowed the judiciary to stake its claim as an influential force, not just in the law but in issues affecting society. The approach taken by this court shows that an administrative agency does not have the power to enforce laws that are seemingly unjust or to manipulate statutory language to serve their means. Rather, the court here took a step to remind administrative agencies that their job is just that, to administer the law and not to rewrite it. In this case, the Court required the Department to enforce the statute in the manner intended by the legislature upon enactment.

This issue was of obvious import to the court. One indication of this fact was that the court chose to hear and decide this case despite the fact the issue had become moot. As easily as the court found that this was a case that "involves the right of an individual to earn a livelihood" and meets the criteria to overcome mootness,[49] the issue could have been framed narrower and the case merely rejected as moot.

Interesting to note is the fact that the court, in its closing remarks, specifies that the "statute clearly and unambiguously does not include within its ambit *the work done by the carpenters* employed by Unistrut".[50] This phrase clearly indicates that the court was taking a step to protect honest workers whose livelihood was being put at risk by the Department's restrictive interpretation of the statute. This statement seems to exclude even the idea that the intention of the court and its opinion is to

46. *Id.* at 102.
47. *Id.*
48. *Id.*
49. *Unistrut Corp.*, 922 A.2d at 99.
50. *Id.* at 102 (emphasis added).

protect those electricians and other workers who lack a proper permit or license to complete work that the statute was intended to apply to. The Court attempted to ensure a just application of the law, not a loophole for those who want to drive the cost of building up by requiring work to be completed by individuals who are unnecessarily overqualified, and consequently, there services more expensive.

CONCLUSION

The Rhode Island Supreme Court held that a steel structure used only to support electrical equipment, and with no electrical equipment attached at the completion of the contractors work, was not one of the uses of an "apparatus *** for carrying or using electricity" that requires an electrician for installation under R.I. Gen. Laws § 5-6-2. The interpretation of this phrase of the state is that it applies to what would otherwise be considered apparatus under the general definition that in addition serve the purpose of carrying or using electricity.

Alexandra Wilcox

Municipal Law. *Town of Smithfield v. Churchill & Banks Companies, LLC*, 924 A.2d 796 (R.I. 2007). The Town of Smithfield sought judicial review of the State Housing Appeals Board's (hereinafter "SHAB") decision that the application of a private developer was substantially complete before the town imposed a temporary moratorium on development. The town claims SHAB ignored the explicit language of R.I. Gen. Laws § 45-53-6 which imposed a moratorium on all applications of for-profit developers that were not substantially complete prior to February 13, 2004. The statute was a response to the over-development of the town. In its decision, SHAB took into account the fact that the local zoning board denied Churchill & Banks Companies, LLC, the private developer, an opportunity to present expert testimony at a zoning board meeting, which may have completed its application prior to the moratorium date. The Rhode Island Supreme Court held SHAB made errors of law in ignoring the plain language of the statute and by taking extrinsic evidence into account to form an exception for the lost opportunity when no such exception exists in the statute. The Court held the application was not substantially complete as of the moratorium date, and therefore the zoning board was under no obligation to continue hearings for this permit.

FACTS AND TRAVEL

Churchill & Banks Companies, LLC, a private construction company, submitted a petition to the Smithfield Zoning Board for a zone change in order to construct 336 apartment units on 28 acres of land in Smithfield.[1] The Smithfield Zoning Board denied this petition on June 3, 2003.[2] In response, Churchill & Banks changed their original plans and designated 25 percent of the units as affordable housing.[3] On July 22, 2003, Churchill & Banks

1. Town of Smithfield v. Churchill & Banks Companies, LLC, 924 A.2d 796, 797 (R.I. 2007).
2. *Id.*
3. *Id.*

filed a new application with the zoning board for a comprehensive permit to construct the units on the same parcel, but this time under the "fast track" approval process of R.I. Gen. Laws § 45-53-4.[4] The parties agreed to begin hearings on the Churchill & Banks application on October 8, 2003, and the hearings continued into early 2004.[5] Churchill & Banks was one of five private developers seeking expedited approval for five separate projects in the Town of Smithfield.[6] Because the potential impact of these five projects was significant, on February 5, 2004, the General Assembly responded to the large number of applications for new development by enacting R.I. Gen. Laws § 45-53-4(b)(1), which imposed a temporary moratorium on applications by for-profit developers if the applications were not substantially complete by February 13, 2004.[7]

The board members and Churchill & Banks's counsel believed the moratorium legislation had been passed on February 5, 2004, so at the February 11, 2004 zoning board meeting they focused on the impact the moratorium would have on the Churchill & Banks application instead of dedicating the meeting to completing the Churchill & Banks application.[8] Unfortunately, the moratorium did not become effective until February 13, 2004, so Churchill & Banks could have used the February 11, 2004 zoning board meeting to present experts and move its application closer to being substantially complete prior to the moratorium taking effect.[9] Regrettably, at the February 11th meeting, both the zoning board and Churchill & Banks incorrectly assumed the moratorium would not apply to the Churchill & Banks application due to the amount of money and time it had spent in reliance on the zoning board's continued advancement of the application.[10] At the next scheduled zoning board meeting on March 10, 2004, the town solicitor expressed his view that the moratorium did apply to the Churchill & Banks application and, as a result, the board tabled further progress until after the moratorium was due to expire on

4. *Id.*
5. *Id.* at 798.
6. *Id.*
7. *Id.*
8. *Id.* at 798.
9. *Id.*
10. *Id.*

January 31, 2005.[11]

Churchill & Banks filed an appeal with SHAB asserting the moratorium should not affect its application because the application was substantially complete under the terms of §45-53-6(f)(1) before the February 13, 2004 meeting.[12] On December 29, 2004, SHAB considered the memoranda, heard oral arguments, and ruled that the Churchill & Banks application was substantially complete as of February 13, 2004, and the zoning board had acted in a manner demonstrating it considered the application to be substantially complete.[13] The SHAB remanded the matter to the zoning board and ordered it to consider the application under the pre-moratorium guidelines.[14] The Town appealed SHAB's ruling to the Rhode Island Supreme Court and filed a writ of certiorari to include SHAB's rulings on the Churchill & Banks application.[15] The Supreme Court granted certiorari and stayed SHAB's orders.[16] The Supreme Court ordered SHAB to hold a rehearing *de novo*. At this hearing the town alleged the application of Churchill & Banks was deficient in six of the ten areas set forth in § 45-53-6(f)(1)(i)(A) through (J).[17] However, SHAB also found Churchill & Banks was prepared to present evidentiary findings at the February 11, 2004 meeting, but the zoning board denied it the opportunity because both parties incorrectly assumed the moratorium was already in effect.[18] SHAB felt Churchill & Banks should not be punished for this lost opportunity. On November 14, 2004, SHAB issued a decision holding the application was substantially complete as of the moratorium date, and reiterated the previous holding that the zoning board had treated the application as though it was substantially complete.[19]

On April 3, 2006, the Rhode Island Supreme Court in *New Harbor Village, LLC v. New Shoreham Zoning Board of Review* ruled there is no right of appeal to this court from an adverse

11. *Id.*
12. *Id.*
13. *Id.* at 798-99.
14. *Id.* at 799.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

ruling by SHAB on the substantial completeness of an application submitted under § 45-53-4. [20] As a result, the Court denied the town's appeal but assigned the case to the "show cause" calendar on the issues which Churchill & Banks preserved for appeal by virtue of the earlier grant of certiorari.[21]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court ordered the parties to address three specific issues:

1) whether it was an error of law for SHAB to consider any information which would have been provided by Churchill & Banks on or before February 13, 2004 if they had been given the opportunity to present evidence; 2) If the SHAB impermissibly considered such evidence, whether Churchill & Banks submitted sufficient to the board on or about February 13, 2004 to sustain SHAB's finding of substantial completeness; and 3) whether sufficient evidence exists to hold the zoning board acted in a manner demonstrating it considered the application to be substantially complete.[22] The Court applied *de novo* review with regard to the first issue because the decision turned on statutory interpretation.[23] Although the statute does not define "substantially complete", the legislature provided ten criteria to guide the assessment of whether a permit application is "substantially complete" before the moratorium took effect on February 13, 2004.[24] The court reviewed the application as it stood on this date and determined it was not substantially complete because it did not meet the criteria set forth in the statute.[25]

The second issue was whether SHAB considered any information not in the Churchill & Banks application as of February 13, 2004, or granted deference to Churchill & Banks for its lost opportunity to present additional evidence at the February

20. New Harbor Village, LLC v. New Shoreham Zoning Bd. of Review, 894 A.2d 901, 909 (R.I.2006).

21. *Town of Smithfield*, 924 A.2d at 799.

22. *Id.* at 799-800.

23. *Id.* at 801.

24. *Id.* at 800, 801 n5 (setting forth the statutory criteria in § 45-53-6(f)(1)(i)(A) through (J)).

25. *Id.* at 805.

11, 2004 meeting.[26] The statute clearly excludes from SHAB's review any information not included in an application prior to the February 13, 2004.[27] The court ruled that SHAB needed to consider the Churchill & Banks application as it stood on February 13, 2004, and could not speculate as to what would have been included had they not lost their opportunity to present evidence at the February 11, 2004 board meeting.[28] Churchill & Banks failed to make an offer of proof at the February 11, 2004 meeting or submit documents into the record, which would have furthered the application.[29] However, the court ruled no lost opportunity could overcome the clear language of the statute.[30] The Court recognized the fact that Churchill & Banks had seven months between the time when it first submitted its application and the beginning of the moratorium.[31] The court reviewed the record of SHAB's hearing which clearly indicated SHAB's partially based its decision on the fact Churchill & Bank's inability to present additional expert testimony at the February 11, 2004 meeting and ruled by taking this into account, SHAB ignored the explicit language of the statute and made an error of law.[32]

The final issue was whether the zoning board had treated the Churchill & Banks application as if it was substantially complete.[33] The standard of review on this issue was more deferential. The court held the SHAB ruling that the zoning board treated the application as if it was "substantially complete" would be entitled to deference by court if there was legally competent evidence to support that ruling.[34] The court defined legally competent evidence as "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion; more than scintilla but less than preponderance".[35] The statute states if the zoning board acted in a manner demonstrating it considered the application to be substantially complete for reviewing purposes

26. *Id.* at 802.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 803.
32. *Id.* at 803.
33. *Id.* at 805.
34. *Id.*
35. *Id.* at 806.

then the SHAB shall also consider it substantially complete.[36] Churchill & Banks did not debate this issue, and there was no fact-finding before the SHAB decision. SHAB based its decision on the fact that the zoning board had held two hearings on the application, and had neither certified as incomplete, nor halted the hearings due to deficiencies in the application.[37] The Court struck this claim down because the zoning board conducted these hearings over the course of seven months, and the moratorium took effect prior to the enactment of the certification process of declaring an application incomplete and notifying the party.[38] The court also noted the zoning board sent Churchill & Banks a memo in October of 2003 and put them on notice that its application was deficient in twelve areas.[39] Based on these facts, and the reasons for enacting the moratorium, the Court held there was insufficient evidence to support a finding the zoning board acted as if the application of Churchill & Banks was substantially complete.[40] This effectively left Churchill & Banks without legal recourse because the Smithfield Zoning Board was no longer under an obligation to hear the permit application of Churchill & Banks.[41]

COMMENTARY

The lesson to be learned from this case is that developers need to be cognizant of any moratoriums which pose a threat to the permits. Unless there is an ambiguity in the statute, the court will not read between the lines and ignore the plain language. It is unfortunate Churchill & Banks did not to use the February 11, 2004 board meeting to present expert testimony to further its application, but the statute does not make an exception for such lost opportunities. The plain language of § 45-53-6 required all applications of for-profit developers to be substantially complete prior to the February 13, 2004 moratorium.

Furthermore, Churchill & Banks was put on notice well before the February 13, 2004 deadline that its application was

36. *Id.* at 805.
37. *Id.* at 806.
38. *Id.* at 806-07.
39. *Id.* at 808.
40. *Id.* at 805, 808 (setting forth the legislature's reasoning for imposing the moratorium).
41. *Id.* at 808.

deficient in several respects. If Churchill & Banks had used due diligence it would have known the effective date of the legislation, and would have taken all necessary steps prior to this date to insure its application would not be harmed by the passage of this legislation. In the absence of an express exception in the plain language of the statute for such lost opportunities the Court and the SHAB were powerless to grant an exception for Churchill & Banks. If Churchill & Banks should be given an exception based on the unusual facts presented in this case it must come from the legislature in the form of an amendment to the statute to allow the court to use discretion in determining if an application is substantially complete.

CONCLUSION

In this case, the Rhode Island Supreme Court overruled the SHAB decision, which held the application submitted by Churchill & Banks to build 336 apartment units within the town of Smithfield was substantially complete under the criteria set forth in R.I. Gen. Laws § 45-53-6. The court ruled SHAB ignored the explicit language of the text of the statute, and took into consideration extrinsic evidence, which was expressly prohibited by the statute. The court looked no further than the plain words of the statute to determine the application was not substantially complete by February 13, 2004, and was therefore subject to the terms of the temporary moratorium imposed by R.I. Gen. Laws § 45-53-6.

Meaghan E. Kelly

Property Law. *Manchester v. Pereira*, 926 A.2d 1005 (R.I. 2007). A party who signs an instrument demonstrates his or her assent to the document and the party's unreasonable reliance on others' misrepresentations does not void the document. Unless specified in writing or through clear actions, common law principles of cotenants control and each cotenant holds an equal interest in the property which does not grant them authority to exclude other cotenants from enjoying their own equal privilege.

FACTS AND TRAVEL

The challenged property in this case is a one-acre lot located at 20 Snell Road in Little Compton, Rhode Island.[1] On December 18, 1990 the owners of the property, Ronald A. Manchester, Jr. (Ronald) and his wife Anna Manchester (Anna), conveyed the property in a quitclaim deed to their son, Ronald Manchester (Roald).[2] In the same deed Ronald and Anna reserved a life estate in the property and Roald agreed to support and care for his parents for the rest of their lives.[3] At the time of this transfer Ronald and Anna lived in the house on the property while Roald and his wife Judy lived in the trailer on the property as well.[4]

In 1991, Anna's son from a prior marriage, Joseph Pereira (Joseph), moved into the house with his mother and Ronald.[5] In return for Joseph's agreement to help financially support Ronald and Anna, on June 19, 1991, Roald conveyed his remainder interest in the property to himself, Judy and Joseph.[6] After this conveyance in 1991, the interests in the 20 Snell Road property were as follows: Ronald and Anna held a life estate; Roald, Judy, and Joseph held the remainder interest.[7] Joseph married in 1993 and moved his new family into the house on Snell Road; Ronald

1. Manchester v. Pereira, 926 A.2d 1005, 1006-07 (R.I. 2007).
2. *Id.* at 1007
3. *Id.*
4. *Id.* (a camper was also located on the property).
5. *Id.*
6. *Id.*
7. *See Id.*

and Anna subsequently moved out of the house into the camper on the lot. In 1994, Joseph and his family moved to Georgia.[8] Regardless of these developments, Ronald, Anna, Roald, Judy, and Joseph's respective interests in the property remained the same until 1998.[9]

In 1998 Roald and Judy borrowed money through Equity Concepts, Inc. (Equity Concepts).[10] Equity Concepts extended a loan to Roald and Judy with the requirements that (a) Roald, Judy, and Joseph grant Equity Concepts a mortgage in the Snell Road property and (b) that Ronald and Anna relinquish their life estate interest.[11] The resulting quitclaim deed had clear unambiguous language stating that Ronald and Anna terminated their life estate interest and transferred their entire interest in the property to Roald, Judy, and Joseph as tenants in common.[12] Ronald, Anna, Roald, and Judy all signed the quitclaim deed, while Joseph granted a power of attorney allowing Roald to carry out all necessary documentation on Joseph's behalf because he still lived in Georgia at the time of this transaction.[13] Each family continued residing on the property—Ronald and Anna in the camper, Roald and Judy in the trailer—and when Joseph returned from Georgia shortly after this 1998 deed, he and his family moved back into the house on Snell Road.[14]

In 2001, the parties executed the final relevant deed for this property.[15] In June, Roald, Judy, and Joseph apportioned their interests to give Joseph an undivided one-half interest and themselves the other undivided one-half interest.[16] This deed contained no mention or reference to a life estate interest.[17] Later in 2001, in the process of obtaining a home-improvement loan, Joseph and his wife Debbie saw the 1998 quitclaim deed for the first time.[18] Ronald did not appear to remember this deed when

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8. *Id.*
9. *See Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *See id.*
16. *Id.*
17. *Id.*
18. *Id.*

they showed it to him, and each party continued living on the property: Ronald in the camper, Roald and Judy in the trailer, and Joseph and his family in the house.[19]

The impetus of the conflict and resulting lawsuit occurred in the Summer or Fall of 2004 when Joseph and his family moved out of the Snell Road house again.[20] Over the objections of Ronald, Roald, and Judy, Joseph allowed his niece, Monique Medeiros (Monique), and her family (including Travis Cory "Travis") to move into the house.[21] Ronald, Roald, and Judy initiated suit in October 2004, and after an amended complaint in November, they alleged Joseph was guilty of fraud, breach of fiduciary duty, and breach of contract and sought "(1) a mandatory injunction to enjoin Joseph from transferring any interest in the property and to enjoin Monique and Travis from depriving Ronald of complete access to the house; (2) a declaration that Monique and Travis are trespassers; (3) an order requiring Joseph to execute a deed evidencing a life estate in Ronald; (4) a declaratory judgment regarding the rights and obligations of all the parties."[22]

On November 12, 2004, the trial justice denied the plaintiffs' motion for injunctive relief because they did not have a substantial probability of prevailing on the merits.[23] The nonjury trial began in April 2005 and each party testified in turn as to his or her understanding of the effect of the 1998 quitclaim deed, as well as to the alleged breaches.[24] Ronald, Roald, and Judy each testified to their belief that the 1998 quitclaim deed was never going to be recorded and that Ronald and Anna would retain their life estate interest in the property as long as the mortgage payments were made on time.[25] Roald further testified that he

19. *Id.* at 1007-08 (Anna had died in 1999).

20. *See id.* at 1008.

21. *Id.*

22. *Id.* (the plaintiffs also sought partition however by mutual agreement of the parties the partition count was dismissed).

23. *Id.* (note also that after filing this suit Roald and Judy conveyed to Ronald a life estate interest in Roald and Judy's interest in Snell Road property. All parties and trial justice agreed this execution was immaterial concerning the ongoing trial).

24. *See id.* at 1008-11.

25. *See id.* at 1008-10. ("the signed quitclaim deed was needed so that 'if [she and Roald] missed three consecutive payments or defaulted on [their] mortgage, than the bank had the right to come down and take the property'").

did not inform Joseph of the quitclaim deed in 1998 because of his belief of its insignificance, and that the true nature of the deed was first brought to his attention in 2004 as a result of the conflict over Monique's residence in the house.[26] Ronald testified as well to first learning of the implications of the 1998 quitclaim deed in 2004, and emphasized he never intended to relinquish his interest in life estate in the Snell Road property.[27] Joseph testified that he first saw and learned of the 1998 quitclaim deed in 2001 while searching for documents for a home-improvement loan, and acknowledged he did not understand that Ronald had given up his life estate in the property.[28]

On May 25, 2005 the trial justice denied and dismissed all of the plaintiffs' claims and make the following declarations:

> (1) Joseph holds a present "undivided one-half interest in fee in common" in the 20 Snell Road property; (2) with respect to the house on that property, Joseph has rights of use and control (which include the right to allow tenants, guests, and other invitees to enter and occupy) to the exclusion of Ronald, Roald, and Judy; (3) Roald and Judy hold an undivided one-half interest in the property but their interest is subject to a life estate held by Ronald; and (4) Joseph and Roald are contractually obligated to continue performing on the 1991 agreement by paying to or for the benefit of Ronald a total of $75,000 each in $400 monthly increments.[29]

As the result of an eviction proceeding initiated by the plaintiffs, on June 16, 2005 the trial justice reiterated that "Joseph Pereira's rights of use and control of the single-family residence on the property include the right to allow tenants, quests and other invitees, including Monique Medeiros and Travis Cory, to enter upon the property and occupy the house."[30] On October 27, 2005, the trial justice denied the plaintiffs' motion for

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26. *Id.* at 1009 ("Debbie bluntly told Roald that Ronald no longer had a life estate in the property and that 'there's nothing [Roald could] do about it'").
27. *Id.* at 1010.
28. *Id.*
29. *Id.* at 1011.
30. *Id.*

a new trial.[31] The plaintiffs then filed a timely appeal contending (1) that the 1998 quitclaim was voidable because Ronald had relied on a misrepresentation by a fiduciary at the time of signing; (2) that Joseph had breached his fiduciary duties and therefore they are entitled to a constructive trust on the property; (3) that by deciding issues not before her the trial justice exceeded her authority; and (4) that the trial justice erred in denying the motion for a new trial.[32]

ANALYSIS AND HOLDING

Misrepresentation

In addressing the plaintiffs' claim of misrepresentation, the Supreme Court stated that in accordance with established case law, the plaintiff must show *justified reliance* on the misrepresentation in order to succeed on a claim of misrepresentation.[33] The Court concluded that Ronald's reliance on Roald's representation that the 1998 quitclaim would not dissolve his life estate interest was neither justified nor reasonable.[34] The Court first points to the straightforward language of the deed: "THE PURPOSE OF THIS QUIT-CLAIM DEED IS TO DISSOLVE THAT CERTAIN LIFE ESTATE GRANTED TO GRANTORS AS RECORDED ON JUNE 21, 1991."[35] The meaning of this clause is transparent, and the court easily determined that "no reasonable person would have signed this document based merely upon another person's secondhand assurance that the document would not dissolve the life estate."[36] Adding weight to their decision, the court also noted the long settled principle that once a party signs a document he or she has then demonstrated assent, regardless of whether he or she later claims not to have read or understood the document.[37] Accordingly, the Supreme Court upheld the trial justice's decision to deny the plaintiffs' claim of misrepresentation. Consequently,

31. *Id.*
32. *Id.* at 1011, 1006.
33. *Id.* at 1012 (emphasis added).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*

the validity of the 1998 quitclaim stands and Ronald's interest in life estate in the Snell Road property dissolved in 1998.

Breach of Fiduciary Duty

The central concept behind of a constructive trust is "the equitable prevention of unjust enrichment of one party at the expense of another in situations in which legal title to property was obtained by fraud or in violation of a fiduciary or confidential relationship."[38] Ronald, Roald, and Judy contended that Joseph established a fiduciary relationship in 1991 by agreeing to support Ronald and then breached this duty by exploiting Ronald's alleged misunderstanding of the 1998 quitclaim deed.[39] A court imposed constructive trust requires a plaintiff to prove by clear and convincing evidence (1) that a fiduciary duty existed between the parties and (2) that either an act of fraud or breach of a promise occurred as a result of that relationship.[40] The Supreme Court foreclosed themselves from ruling on the question of the existence of a fiduciary relationship since they found no breach had occurred.[41] Because they previously decided that Ronald was unreasonable in his reliance on any representation concerning the 1998 quitclaim deed, it followed that there could be no breach of alleged fiduciary duties.[42]

Trial Justice's Alleged Overreaching

Under this the claim, the plaintiffs argued that the only issue in the case was whether Ronald's life estate, dissolved in 1998, should be reconveyed to Ronald.[43] As a result they contended the trial judge overreached herself when she gave the following judgment: "that Joseph possessed rights of use and control over the house on the Snell Road property to the same extent as would a 'sole owner in fee simple absolute.'"[44] The Supreme Court first noted the common law principles of cotenantency: (1) unless

38. *Id.*
39. *Id.* at 1012-13.
40. *Id.* at 1013.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 1013-14.

otherwise specified, cotenants possess equal shares of the property and (2) that a cotenant may not use the property in such a manner that excludes the other cotenants from enjoying their rightful and equal interests.[45] Under these principles, the Supreme Court held that the trial justice erred in declaring Joseph had the authority to rent the property and exclude from the house Ronald, Roald, and Judy.[46] While Ronald, Anna, Roald, and Joseph never created a written document of the 1991 agreement, the trial justice gave the actions of the parties weight, specifically how they had been respectively residing at 20 Snell Road.[47] The Supreme Court ruled, however, that despite the living situations, insufficient evidence exists to support the judgment that the plaintiffs had agreed to let Joseph not only live in the house, but also to permit other tenants or guests in the house on an exclusionary long-term basis.[48] Given the absence of evidence to augment the executed deed interests, the Supreme Court abided by common law principles, reversed the trial justice's judgment, and concluded that as a result of their cotenant relationship, Joseph, Roald, and Judy hold exactly the same rights with respect to the Snell Road property and its dwellings.[49]

Motion for a New Trial

In order to prevail on a motion for a new trial, the plaintiffs needed to demonstrate that there was either (1) a clear error in the judgment based on the existing evidence; or (2) that new and significant evidence is available.[50] Ronald, Roald, and Judy's contention for a new trial argued only that there was a clear error in judgment.[51] The court dealt with this claim quickly, holding that the only error in the trial justice's judgment was her ruling concerning Joseph's authority to exclude others from the house,[52] which had already been reversed through the court's application of

45. *Id.* at 1013; *see also* Lucchetti v. Lucchetti, 127 A.2d 244, 248 (R.I. 1956); Silvia v. Helger, 67 A.2d 27, 28 (R.I. 1949).
46. *Id.* at 1014.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 1015.
51. *Id.*
52. *Id.*

common law.[53] Consequently, the court denied affirmed the trial justice's denial of the motion for a new trial.[54]

COMMENTARY

The Rhode Island Supreme Court held that notwithstanding a *reasonable* reliance on a misrepresentation, if the signed legal instrument has clear unambiguous language the party is held to the language of the instrument.[55] In this case, the Court held Ronald responsible for his own actions when he signed the 1998 quitclaim deed that clearly stated its purpose to dissolve Ronald's life estate interest.[56] While such a holding may in other cases completely suspend a party's interest in property, Ronald was able to resurrect a life estate interest in the property even before the case went to trial.[57] Pitting certain family members against other family members, this case attempted to render justice in the midst of a family quarrel. Relying on multiple default common law principles, the Supreme Court sliced through the family history and rendered a judgment based on simple principles of contract and property law. Adherence to the long-standing rule that cotenants share equal divisions of the property not to the exclusion of the other cotenants ultimately rendered justice by positioning each family member on rightful equal footing with which to go forth. The Supreme Court reaffirmed foundational rules of property and contract law, and made clear that regardless of elaborate family drama the court must apply and allow legal standards to prevail. Where the trial justice erred by conflating the parties' entwined and varied history with standard legal procedures, the Rhode Island Supreme Court relied on fundamental principles to hold each party responsible to their respective legal actions.

CONCLUSION

The Rhode Island Supreme Court held that clear unambiguous language in a deed forecloses a claim of

53. *See supra* discussion in text and notes 41-45
54. *Id.* at 1015.
55. *Id.* at 1012.
56. *Id.*
57. *Id.* at 1008.

misrepresentation because of the requirement of *unreasonable* reliance. Further, upon signing a legal document, a party cannot later claim confusion because he or she did not read or understand the instrument. The Court also held that unless specified in writing or with sufficient supporting evidence, the common law principle that cotenants share equal interests and cannot use their interest to the exclusion of other cotenants prevails.

Maureen McCrann

Property Law. *New England Development, LLC v. Noel Berg,* 913 A.2d 363 (R.I. 2007). § 45-23-40(e) of the Rhode Island Land Development and Subdivision Review Enabling Act requires that a town planning board issue a written decision, to approve, approve with changes, or deny a master plan, within one hundred and twenty (120) days of certification of completeness. However, the absence of a sanction in this section makes it directory as opposed to mandatory. Conversely, § 45-23-40(f) provides a sanction for the board's failure to act in the requisite time period. This section merely requires that the board take action within the statutorily requisite time period and does not require a written decision. Therefore, the planning board cannot be sanctioned for the failure to produce a written decision within the 120 day time period if the board takes action to approve, approve with changes, or deny the master plan.

FACTS AND TRAVEL

New England Development (NED) filed a petition for a writ of mandamus to compel Noel Berg, the administrative officer for the Tiverton Planning Board, to issue a certificate of the Planning Board's failure to act pursuant to § 45-23-40(f) of the Rhode Island General Laws.[1] NED wanted approval to build a shopping center in Tiverton to be known as Tiverton Commons.[2] On September 3, 2004, pursuant to the Rhode Island Land Development and Subdivision Review Enabling Act of 1992, NED submitted a major land development master plan to the Tiverton Planning Board.[3] On October 27, 2004 the board issued a Certificate of Completeness for the application which set in motion a one hundred and twenty (120) day time period in which the statute required the planning board to approve of the master plan as submitted, approve with changes and or conditions, or deny the

1. New England Dev., LLC v. Noel Berg, 913 A.2d 363, 367 (R.I. 2007); *See* R.I. GEN. LAWS § 45-23-40(f) (1956).
2. *Berg*, 913 A.2d 366.
3. *Id.*

application.[4] NED consented to eight different extensions of the statutory deadline, eventually agreeing on an ultimate deadline set for December 30, 2005.[5] The Planning Board, following numerous discussions of the application at regularly held meetings and workshops held jointly with NED, voted unanimously to deny the master plan.[6] The board filed a written decision on January 13, 2006, clearly subsequent to the December 30, 2005 deadline.[7]

NED contends that the planning board's failure to file a written decision in accordance with the statutory deadline triggered its entitlement to a certificate of the planning board's failure to act and the resulting approval of its master-plan application pursuant to § 45-23-40(f).[8] On January 3, 2006, NED requested that Berg issue a certificate of the planning board's failure to act which would have resulted in the approval of the master plan.[9] Acting on behalf of the Planning Board, Noel Berg refused to issue that certificate and NED, on January 10, 2006, petitioned the Superior Court for a writ of mandamus to compel the issuance of the certificate.[10] In addition, NED filed a timely appeal of the decision to deny the master plan to the Tiverton Board of Appeals.[11] Trial was held in Superior Court on the petition for writ of mandamus on February 28, 2006.[12]

NED asserted that § 45-23-40(e) and (f) required the planning board to issue "a written decision and file it with the town clerk with respect to its vote on the master plan application by the conclusion of the statutory time period."[13] NED contended that failure to file such written decision by that date triggers a ministerial duty on the part of the administrative officer for the planning board, Berg, to issue the certificate of the planning board's failure to act, and the resulting approval of the master

4. *Id.* at 366.
5. *Id.*
6. *Id.* at 367.
7. *Id.*
8. *Id. See* R.I. GEN. LAWS § 45-23-40(f) (R.I. 2007).
9. *Id.*
10. *Id.*
11. Appeal to the Tiverton Board of Appeals stayed pending the outcome of this appeal. *Id.*
12. *Id.*
13. *Id* at 367-368.

plan.[14]

The planning board responded that the requirement for the board to reach a decision by the statutory deadline did not involve the requirement of a written decision to be issued within that period.[15] The board contended that the November 21st vote to deny the master plan was all that was required to satisfy the requirements.[16] Therefore, the board contended NED had no right to the certificate and mandamus was unavailable.[17] Alternatively, the planning board argued that the mandamus was unavailable because all administrative appeals had not been exhausted as NED has filed for an appeal to the Tiverton Board of Appeals.[18]

Standard of Review

For mandamus to lie NED must show (1) that it had a clear legal right to the relief sought; (2) that Berg has a ministerial duty to perform the requested act without discretion to refuse; and (3) that NED has no adequate remedy at law.[19] Once these prerequisites have been shown, the Superior Court has sound discretion to issue the writ.[20] The "existence of unexhausted administrative remedies" however, may "prevent the issuance of a writ of mandamus."[21]

Superior Court Holding

The Superior Court held that mandamus was unavailable to NED because an administrative remedy had not been exhausted, namely, an appeal of the denial by the planning board to the Tiverton Board of Appeals.[22] NED timely appealed to the Rhode

14. *Id.* at 368.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. A ministerial function is one that is to be performed by an official in a prescribed manner based on a particular set of facts without regard to or the exercise of his own judgment upon the propriety of the act being done. *Id. See* Union Station Associates v. Rossi, 862 A.2d 185, 193 (R.I. 2004).
20. *Berg,* 913 A.2d at 369; *See* Martone v. Johnston School Comm., 824 A.2d 426, 429 (R.I. 2003).
21. *Id.; See* Krivitsky v. Town of Westerly, 849 A.2d 359, 363 (R.I. 2004).
22. *Berg,* 913 A.2d at 368.

Island Supreme Court.[23] In addressing the merits of the case, the court found that the plain language of the statute required "the planning board to approve of the master plan as submitted, approve with changes and or conditions, or deny the application" within 120 days of issuing the certificate and mandated that the planning board issue a written decision within the statutory time frame. [24] The court "further found that because the planning board failed to issue a written decision by the deadline, the statute imposed a mandatory duty on the administrative officer, at the request of the applicant to issue the certificate of the planning board's failure to act."[25]

Parties' Arguments

On appeal, NED argued that the trial justice erred when he decided the writ of mandamus.[26] NED argued that the statutory scheme provides for a clear legal right to a certificate of the planning board's failure to act and that therefore a ministerial duty was imposed on Berg to issue that certificate without any exercise of discretion.[27] In fulfillment of the second element for a writ of mandamus, NED contends that it has "no other adequate remedy at law to obtain the relief it sought."[28] The planning board, through Berg, asserts that NED did not have a clear legal right to the issuance of the certificate because the planning board denied the application within the statutory time limit by voting to do so at its meeting on Nov. 21, 2005 and that there was no requirement that this decision be in writing.[29] Furthermore, even if NED did have a right to the certificate, NED did not exhaust other administrative remedies, namely the appeal, and therefore had other adequate remedies at law.[30] The planning board offered additional arguments which were not addressed by the Supreme Court.[31]

23. *Id.* at 369.
24. *Id.* at 368. *See* R.I GEN. LAWS § 45 23-60 (e) (R.I. 2007).
25. *Id. See* R.I GEN. LAWS § 45 23-60 (f) (R.I. 2007).
26. *Id.* at 369.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 369 n.11.

ANALYSIS AND HOLDING

The Court affirmed the decision of the trial court, and held that NED did not have a clear legal right to the issuance of the certificate based on the statutory requirements, but did not adopt the trial court's interpretation of the applicable statutes.[32]

§ 45-23-40(e) requires the planning board to produce a written decision within 120 days

§ 45-23-40(e) requires that the "planning board shall, within [120] days of certification of completeness, or within a further amount of time that may be consented to by the applicant, approve of the master plan as submitted, approve with changes and or conditions or deny the application according to the requirements of § 45-23-63."[33] § 45-23-63 requires that the "all records of the planning board proceedings and decisions shall be written and kept permanently available for public review."[34] The court found that this language was unambiguous and therefore requires that under § 45-23-40(e) the planning board is required to produce a written decision within the 120 day time period.[35] The court found that this court has previously held that "statutes imposing apparently mandatory time restrictions on public officials are often directory in nature" when there are no sanctions provided for the failure to perform that duty.[36]

§ 45-23-40(f) provides a sanction, in the form of a certificate constructively approving the master plan, for the failure to act within the 120 day time period

§ 45-23-40(f) states that the "failure of the planning board to act within the prescribed period constitutes approval of the master plan, and a certificate of the administrative officer as to the failure of the planning board to act within the required time and the resulting approval will be issued on request of the applicant."[37]

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32. *Id.*
33. *Id.* at 370-71; *See* R.I GEN. LAWS § 45-23-40(e).
34. *Berg*, 913 A.2d at 371; *See* R.I GEN. LAWS § 45-23-63(a).
35. *Berg*, 913 A.2d at 371; *See* R.I GEN. LAWS § 45-23-40(e).
36. *Berg*, 913 A.2d at 371; *See* Washington Highway Dept., Inc. v. Bendick, 576 A.2d 115, 117(R.I. 1990).
37. *Berg*, 913 A.2d at 371; *See* R.I GEN. LAWS § 45-23-40(f).

The court found that the requirement under the statute "to act" is, according to its plain meaning, the requirement to do something and does not require a written decision.[38] Therefore, although § 45-23-40(e) requires a written decision, the failure to produce a written decision by the time limit does not result in a sanction under § 45-23-40(f).[39] § 45-23-40(f) merely requires that the board take action to approve, approve with changes, or deny the master plan.[40]

Policy Argument

In support of the court's statutory interpretation the court refers to legislative intent.[41] The court stated that it did "not believe that the legislature intended to tacitly remove the authority of municipalities to control development within their borders when they have timely voted to deny a master plan application but failed to file a written decision within the prescribed period."[42] The court goes on to state that although the statute requires a written decision, it would be overly burdensome to require by threat of sanction that this decision be written and filed with in the 120 time period.[43] The court cites the policy and goal of the legislature in ensuring consistency in local development regulations, as support for these assertions.[44] The court found that in this case the board's decision was filed within a reasonable time after the statutory limit had expired and did not interfere with NED's right to an appeal.[45]

The court held that although § 45-23-40(e) does include a requirement that the planning board file a written decision in 120 days there is no sanction to render the requirement mandatory and is instead merely directory.[46] On the other hand, the court held that § 45-23-40(f) is a mandatory requirement that the planning board act on the application within the statutory time

38. *Berg*, 913 A.2d at 371.
39. *Id.*
40. *Id.*
41. *Id.* at 373.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 370-371.

limit and that failure to act would result in constructive approval of the master plan and require the administrative officer to issue the certificate of the planning board's failure to act.[47]

In this case the planning board took action in voting to deny the master plan clearly within 120 day period fulfilling statutory requirement under § 45-23-40(f) which provides for the sanction requested by NED.[48] Therefore NED had no clear legal right to the issuance of the certificate of the planning board's failure to act and mandamus can not lie.[49]

Dissent

Justice Goldberg wrote separately to concur in the result but dissent to the interpretation of the majority.[50] In her opinion, Justice Goldberg agrees with the holding of the Superior Court in which Mandamus was denied on account of NED's failure to exhaust its administrative and legal remedies.[51] Furthermore, although finding it unnecessary for the purposes of deciding this case, Justice Goldberg finds that § 45-23-40(e) does not require the planning board to issue a written opinion.[52]

Justice Goldberg finds the statutory scheme of § 45-23-40(e) is unclear and ambiguous and requires the application of the usual rules of statutory construction.[53] She reasons the requirement that the decision, in 120 days, be in the form of a written decision means that the planning board would have less than 120 to "review and pass upon" the major development project.[54] Justice Ginsburg applies the intent of the General Assembly and reasons that there is no intent to provide less than 120 days for the planning board to decide the application.[55] Furthermore, Justice Ginsburg reasons that § 45-23-40(f) requires that the board must within 120 vote for or against application and that a written decision must be provided within a reasonable time.[56]

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47. *Id.* at 371.
48. *Id.* at 372.
49. *Id.*
50. *Id.* at 373.
51. *Id.*
52. *Id.* at 374.
53. *Id.*
54. *Id.* at 375.
55. *Id.*
56. *Id.*

COMMENTARY

The Rhode Island Supreme Court in failing to adopt the holding of the Superior Court ignored the Rhode Island precedent for ruling on a petition for a writ of mandamus. Both the trial justice and Justice Goldberg in the dissent point to *Krivitsky II,* 849 A.2d at 363 in which the Supreme Court "vacated an order of mandamus upon [the] determination that he plaintiff failed to exhaust its administrative appeals to various town officials."[57] Furthermore, the dissent points out that "if the license ultimately was denied by the town, the plaintiff could seek review in [The Supreme Court] by way of certiorari."[58]

In choosing to break from precedent, by not performing an exhaustion analysis first, the Supreme Court was able to interpret the statute to give other town planning boards predictability in the procedures of land development, so as not to overly burden planning boards or to unduly sanction taxpayers. The court looked to both traditional concepts of statutory interpretation and to social policy to interpret the statute for the benefit of the town planning board, and ultimately the taxpayers.

The Supreme Court statutory interpretation reflects the text of the statute. § 45-23-40(e) explicitly states that decisions should be "according to the requirements of § 45-23-63," which requires that "all records of the planning board proceedings and *decisions* shall be in writing." The text of the statute leaves little room for interpretation. However, by holding that the sanction in § 45-23-40(f) does not apply to subsection (e) the court is able to emphasis a social policy of protection for the planning board and the taxpayers of the town.

The majority decision points out that a sanctionable requirement to file a written decision within 120 days would be overly burdensome on the planning board. As pointed out by the dissent, the 120 days are provided to allow the planning board to solicit input from numerous agencies, ranging from the police and fire departments to adjacent communities and environmental stakeholders in order to make an informed decision beneficial to

57. *Id.* at 374.
58. *Id.*

the town and creating the least impact on the tax payers of the town.[59] If the 120 day time limit required the board to not only make a decision but also to write a decision this function would not be carried out. Furthermore, the policy behind the statute is to keep decisions in the hands of the local officials. If the sanction could be implemented for failure to file a written decision it would be likely that the sanction would be implemented more often resulting in construction projects which were not explicitly approved by the planning boards and were instead approved constructively.

Ultimately, the policy behind the statute is for the benefit of taxpayers. The Supreme Court is protecting the people in the town of Tiverton from being unnecessarily burdened with the construction of a major shopping center which had been denied by the Town Planning Board. The Supreme Court is setting the precedent to defer to the discretion of the local officials who have a better understanding of the needs of the town.

CONCLUSION

The Rhode Island Supreme Court held under the Rhode Island Land Development and Subdivision Review Enabling Act a town planning board must, pursuant to § 45-23-40(e), provide a written decision approving or denying the plan within 120 days of the approval of the master plan application. However, the court further held that this requirement is not sanctioned under § 45-23-40(f). Instead, § 45-23-40(f) merely imposes the sanction of constructive approval for the failure of the board *to act* in making a decision to approve or deny the application. In this case, the Tiverton Planning Board *acted* in voting to deny the application within the 120 day time period and therefore NED does not have a clear legal right to the sanction of constructive approval and the associated certificate of the board's failure to act. For these reasons NED's petition for a writ of mandamus to compel the issuance of the certificate of the board's failure to act is denied.

Siobhan Gannon

59. *Id.* at 375.

Property Law. *Warwick Housing Authority v. McLeod*, 913 A.2d 1033 (R.I. 2007). The Residential Landlord and Tenant Act codifies the rule that existed at common law that deemed a landlord's unqualified acceptance of rent to be a waiver of any breach in the lease of which he was aware.

FACTS AND TRAVEL

In 1996, Barbara McLeod ("McLeod") began living in Meadowbrook Terrace, a housing facility providing subsidized housing primarily for elderly residents.[1] In 2002, WHA began receiving complaints from McLeod's neighbors that she had allowed her adult son Mark Anthony to live with her in violation of her rental agreement.[2] An investigation by WHA officials followed where they concluded that Mark Anthony was in fact living in McLeod's apartment.[3] Also, on January 4, 2005, Mark Anthony was arrested at McLeod's apartment for first-degree sexual assault, among other crimes, against his ex-wife who had been visiting.[4] Mark Anthony stated to police that the apartment at Meadowbrook Terrace as his address.[5] On January 8, WHA sent McLeod notice that her rental agreement would be terminated as of January 31 because of her son's criminal activity in the apartment (WHA did not seek to terminate on the grounds that he simply resided there in violation of the rental agreement).[6]

Despite being notified that her rental agreement would terminate as of January 31, McLeod paid February's rent, which WHA accepted without reservation.[7] Again, WHA sent McLeod notice on February 2 that her rental agreement would be

1. Warwick Housing Authority v. McLeod, 913 A.2d 1033, 1034-35 (R.I. 2007).
2. *Id.* at 1035.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

terminated as of February 28th because McLeod had pled *nolo contendere* to an identity fraud charge on November 17, 2004.[8] WHA claimed that this was another violation of her rental agreement, however McLeod paid rent for March and continued to pay rent while this litigation has been pending, and each month WHA accepted the rent unconditionally.[9]

WHA filed a complaint for eviction in the District Court on February 24, 2005 and the agency obtained a judgment against McLeod on June 7, 2005.[10] Defendant McLeod appealed on June 10, 2005 and again lost in Superior Court.[11] During the trial WHA argued that (1) McLeod had breached her rental agreement and (2) at all relevant times McLeod was on actual notice that WHA was prosecuting an eviction against her.[12] McLeod argued that the Residential Landlord and Tenant Act applies and sets out the circumstances in which a landlord waives the right to terminate a lease by accepting rent:

"Acceptance of rent with knowledge of a default by the tenant. . .constitutes a waiver of the landlord's right to terminate the rental agreement for that breach unless the landlord gives written notice within ten (10) days."[13] McLeod argues that WHA waived its right to evict her on the grounds of either her son's criminal activity or her own plea to a criminal offense because WHA continued to accept her rent without written reservation after discovering those breaches of the rental agreement.[14]

The trial court relied on R.I. Gen. Laws § 34-18-14, a general notice provision, which provides that a person has notice of a fact "(i) if he has actual knowledge of it (ii) has received notification or (iii) from all the facts and circumstances known to him or her at

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 1036 (citing R.I. GEN. LAWS § 34-18-41).
14. *Id.* (The court was skeptical that either of those transactions, the son's arrest and McLeod's plea to identity fraud, even qualify as grounds to terminate the rental agreement because the agreement requires tenants and guests to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premesis. McLeod was not home when her son was arrested, and there was no evidence that McLeod's identity fraud disturbed any of her neighboring tenants).

the time in question he or she has reason to know it exists."[15] The trial court reasoned that because McLeod had notice of WHA's continuing efforts to evict her, the requirement that WHA notify her in writing of such continuing efforts after accepting her rent each month was obviated.[16]

ANALYSIS AND HOLDING

On appeal, McLeod maintained that the trial justice erred in holding that she had notice of the eviction under § 34-18-14 and that WHA, in failing to comply with the specific notice provisions of R.I. Gen. Laws § 34-18-41, waived its right to pursue this eviction action.[17]

WHA also pursues two new arguments on appeal. First, that the provision of the rental agreement that says that the waiver by the landlord of one breach does not constitute a waiver of another abrogates the effects of § 34-18-41.[18] Second, that a different statute, § 34-18-36 (f) frees WHA from the notice requirement if it wants to evict a tenant for a crime of violence.[19] The court, using the well-established "raise or waive" rule, refuses to consider WHA's new arguments because WHA failed to raise either of those contentions at trial.[20] Thus,the only issue the court addressed was whether "a landlord who is aware that a tenant is in breach of a rental agreement [is] estopped from pursuing an eviction action against a tenant for that breach if he accepts rent without a written reservation of that right, even though the tenant has actual notice of the pending eviction action."[21]

The court answered that question positively using a long history of case law: As early as 1896 the court had held that a landlord who accepts rent after learning of a breach waives his right to pursue eviction for that breach.[22] Over the past century

15. *Id.* at n. 4.
16. *Id.*
17. *Id.* at 1037.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 1038.
22. *Id.* (citing Smith v. Edgewood Casino Club, 19 R.I. 628, 629-30 (1896)).

the court has abided by that rule.[23] Since the cases upon which the court relied were decided the Rhode Island legislature passed the Residential Landlord and Tenant Act, § 4-18-41 of which "is crystal clear in requiring that the landlord give written notice of his intention to continue termination proceedings to the tenant within ten days of accepting rent."[24] The court finds that this statute codified the common law rule deeming a landlord's unqualified acceptance of rent to be a waiver of any breach of which he was aware.[25]

The court held that the trial justice made an error of law when she held that since McLeod had "notice" as defined under § 34-18-14, the landlord was no longer obligated to deliver the specific *type* of notice mandated by § 34-18-41.[26] The court reasoned that the specific mandate of § 34-18-41 cannot be overcome by the general provisions contained in § 34-18-14.[27] WHA continued to accept McLeod's rent after giving her two notices alleging a breach of the rental agreement and purporting to terminate the agreement but WHA did not reserve its right, in writing, to terminate her tenancy for those breaches.[28] Thus the court precluded WHA from pursuing the eviction action against McLeod.[29]

COMMENTARY

A landlord waives the right to terminate for a breach of which he has notice when he accepts rent unless he reserves the right to terminate for that breach in writing within ten days. Here, the landlord continued to accept rent month after month without reserving the right to continue eviction proceedings with a simple letter. The court did not look favorably upon this landlord, who failed to follow the clear rule and instead argued that the rule requiring written notice was eviscerated by the fact that the

23. *Warwick Housing Authority*, 913 A.2d at 1038 (citing Cardi v. Amoriggi Sea Foods, Inc. 468 A.2d 1223, 1226 (R.I. 1983); Bove v. Kates Properties, Inc. 444 A.2d 193, 195 (R.I. 1982)).
24. *Warwick Housing Authority*, 913 A.2d at 1038; § 34-18-41.
25. *Id.*
26. *Id.*
27. *Id.* at 1039.
28. *Id.*
29. *Id.*

tenant must have known that the eviction was still going to go forward. It would be dangerous to any rule requiring a particular type of notice if the court were to find that actual notice was sufficient here. Thus, the landlord waived its right to evict McLeod for any breach of the rental agreement of which it knew because it failed to notify McLeod in writing of its intent to continue seeking eviction with each month her rent was accepted.

CONCLUSION

The language of Rhode Island General Law § 34-18-41, which requires the evicting landlord, within ten days of receipt of rent, to notify the tenant that he does not waive his right to evict the tenant, is mandatory. Thus a rent-accepting landlord is required to notify a tenant in writing to preserve his right to evict even if the tenant has actual notice that the landlord intends to continue the eviction proceeding.

Kathryn H. Petit

Tort Law. *Bucki v. Hawkins*, 914 A.2d 491 (R.I. 2007). A property owner is not liable for injuries that a guest suffered while on an owner's premises when that guest was engaging in an open and obvious danger. In general, Rhode Island premise liability law requires all property owners to exercise reasonable care for the safety all people reasonably expected to be on their property. However, that duty will not extend to guests who engage in open and obvious danger where a property owner's warning sign would have made no difference to the guest's actions. Additionally, the state's Recreational Use Statute was not intended to apply to private property owners since it would effectively shield them from any liability occurring on the property.

FACTS AND TRAVEL

Carol J. Hawkins is the owner of a parcel of lakefront property located in Glocester.[1] While she is the record owner, Ms. Hawkins typically only visits on summer weekends and has allowed Patricia and Philip Gagnon to live on her property year round.[2] The Gagnon's son, perhaps taking advantage of a weekend without his parents, decided to have some friends over for a campout in August 1996, a decision that ultimately led to this litigation.[3]

On August 10, 1996, the plaintiff, Mr. Richard P. Bucki, arrived at Ms. Hawkin's lake property to visit with his friend Timothy Gagnon.[4] At approximately 11:30 p.m., plaintiff decided it was an ideal time for a quick dive into the lake. Although plaintiff would later testify that he had taken many dives of the dock previously, it was this particular dive that resulted in a tragic injury.[5] Plaintiff proceeded to dive off the dock into the dark lake below and hit his head on the bottom.[6] What resulted

1. Bucki v. Hawkins, 914 A.2d 491, 493 (R.I. 2007).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

from that tragic dive were a traumatic cervical spinal cord injury and fracture and a significant amount of painful and costly, medical work.[7]

Richard Bucki filed this premise liability action against Carol Hawkins, the Sand Dam Reservoir Association, Philip Gagnon and Timothy Gagnon, alleging that the defendants breached their duty to warn of unsafe diving, failure to maintain the premises in reasonably safe manner, and for negligent supervision of guests on the premises.[8] Plaintiff voluntarily dismissed all defendants save for Hawkins.[9] The jury rendered a verdict for the plaintiff though finding him 90 percent comparatively negligent and awarded him $60,300 plus interest.[10] Hawkins moved for a renewed judgment as a matter of law and the trial justice agreed, finding, *sua sponte*, that Rhode Island's Recreational Use Statue shielded defendant from liability and further, that defendant did not owe plaintiff a duty of care.[11] Plaintiffs subsequently filed a timely appeal to the Rhode Island Supreme Court.[12]

ANALYSIS AND HOLDING

On appeal, the plaintiff argued that the trial justice erred when he relied on Rhode Island's Recreational Use Statute.[13] Alternatively, plaintiff also argues that Hawkins did owe a duty of care, which she breached.[14] Upon *de novo* review, the Rhode Island Supreme Court affirmed the trial justice's order of a renewed motion as a matter of law, but on different grounds finding that the defendant did not owe a duty of care.[15] The court additionally held that the trial justice clearly erred by applying the Recreational Use Statute because it was against legislative intent and public policy.[16]

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7. *Id.*
8. 914 A.2d at 493.
9. *Id.*
10. *Id.* at 494.
11. *Id.* (citing Rhode Island's Recreational Use Statute, R.I. GEN. LAWS § 6-32 (1956)).
12. *Id.* at 494.
13. *Id.*
14. *Id.*
15. *Id.* at 495, 497.
16. *Id.* at 498.

Premises Liability

The Court principally focused on whether the defendant owed a duty of care to Bucki, which is a question of law for the court and not the jury.[17] Rhode Island premises liability law imposes an affirmative duty upon property owners to exercise a duty of care to all people reasonably expected to be on the premises.[18] In addition to this basic duty of care owed, owning property also comes with ". . . an obligation to protect against the risks of dangerous conditions existing on the premises, provided the property owner knows of, or by the exercise of reasonable care would have."[19] In order to determine if the property owner did owe a duty of care in this particular situation, the court looks to five factors to assist in determining negligence as well as considerations of public policy and fairness.[20] The five factors are: (1) the foreseeabiltiy of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered an injury, (3) the closeness of connection between the defendant's conduct and the injury suffered, (4) the policy of preventing future harm, and (5) the extent of the burden to the defendant and the consequences to the community for imposing a duty to exercise care with resulting liability for breach.[21]

In this instance, the court dismissed the first two factors quickly by holding that the plaintiff's harm was foreseeable and there was indeed a serious injury that resulted.[22] However, the fatal flaw in plaintiff's case appears to be in the third factor since defendant's "failure to warn" would have done little to prevent plaintiff from diving off the dock.[23] By the plaintiff's own admission he had taken many other dives off the dock and doing so at night was clearly an "open and obvious danger" that plaintiff

17. *Id.* at 495.

18. *Id.* (citing Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 133 (R.I. 1975)).

19. *Id.* (citing Mead v. Papa Razzi Restaurant, 840 A.2d 1103, 1107 (R.I. 2004) (quoting Tancrelle v. Friendly Ice Cream Corp., 756 A.2d 744, 752 (R.I. 2000))).

20. *Id.*

21. *Id.* at 495-96 (quoting Banks v. Bowen's Landing Corp., 522 A.2d 1222, 1225 (R.I. 1987)).

22. *Id.* at 496.

23. *Id.*

should have taken greater responsibility for.[24] The Court established an important precedent here, "The danger of diving into shallow water was open and obvious to a twenty-four-year-old man, regardless of whether a sign was erected alerting him to the danger. Therefore, as a matter of law, plaintiff must be held to have had knowledge and an appreciation of this risk."[25] Applying the fourth factor, the court found that the policy behind requiring property owners to install warning signs would do little to prevent plaintiffs, like Mr. Bucki, from engaging in such dangerous activities.[26] Finally, while applying the fifth factor, the court reiterated it would be of little good to require every waterfront property owner in the community the burden of applying signs.[27]

Recreational Use Statute

The Court began by restating that the trial justice invoked this statute on his own accord, without either the plaintiff or defendant raising the issue.[28] The court held that the Recreational Use Statute was misapplied to the case at bar and ultimately finding error on the part of the lower court.[29]

The Recreational Use Statute was passed to grant qualified immunity to public property owners as the ultimate goal being that more land would be opened for public recreational activity while at the same time shielding those property owners from potential liability.[30] The Court stressed the importance of applying the legislative intent to the current case.[31] Here, Hawkins was not opening up her land for public recreational use; rather it was for private use. The Court correctly applied the legislative intent and found that the Recreational Use State cannot apply to this case or that would effectively shield every private property owner from liability while having any recreational activity on their premises.[32]

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24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 497.
28. *Id.*
29. *Id.* at 497-98.
30. *Id.* at 497 (citing Hanley v. State, 837 A.2d 707, 713-14 (R.I. 2003)).
31. *Id.*
32. *Id.* at 497-98.

COMMENTARY

This decision reinforces a general principle of tort law that a plaintiff will be barred from recovery if there is no duty of care owed, particularly when the plaintiff engages in an activity that is an open and obvious danger. It perhaps best understood from a policy perspective: if we allowed every plaintiff to recover for accidents that are their own doing with the additional fact being they were on someone else's property, then we would be dealing with a significant amount of litigation that goes against basic tort law principles. Here, the court makes it quite clear that it was Mr. Bucki's own decisions preventing his recovery, stating, "Ultimately, it was plaintiff's own behavior that caused his injuries."[33]

It is important to realize that the court was not extending a shield of immunity to all property owners in premises liability actions. Rather, the court elaborated on an important caveat to the general rule that property owners do in fact owe a duty of care to all those people reasonable expected to be on the property.[34] The caveat is that in certain situations, when the danger is so open and obvious that no reasonable person would have engaged in it, regardless of a warning, then this will relieve the property owner of liability.[35] Were property owners liable for the injuries of their negligent guests, property owners would essentially become full time watchdogs on their own land as well as insurers of anyone that comes upon it. This duty would be nearly impossible for most property owners and potentially deter individuals from inviting guests over for activities. Using the case at hand as an example, Ms. Hawkins was not even on the property when this unfortunate accident occurred, however on numerous occasions prior, the plaintiff had engaged in this same behavior and did so again while it was completing dark outside.[36] Holding Ms. Hawkin's liable for negligent actions of visitors to her property would set a bad precedent for Rhode Island.

Also of interest is the court's dismissal of the trial justice's

33. *Id.* at 496.
34. *See id.* at 495.
35. *Id.*
36. *Id.* at 493.

misapplication of the Recreational Use Statute.[37] If the court had simply affirmed the lower court's ruling, this too would set a precedent contrary to legislative intent behind the statute. The Recreational Use Statute is primarily to grant a limited statutory immunity to public property owners who open their property for recreational use and serves to clam property owner's fear of litigation resulting from every accident that may occur.[38] Extending this protection to private property owners that have guests over for recreational use would be contrary to the legislative intent and also lead to a very silly precedent indeed. If the lower court's ruling were allowed to stand, it would transform every visitor on private property into a trespasser with no duty owed. This would be contrary to the general rule that property owners do owe a duty of care to all visitors, that the court made clear before discussing the caveat above.

CONCLUSION

The Rhode Island Supreme Court held that private property owners do not owe a duty of care when individuals are engaging in an open and obvious danger on the premises.[39] Additionally, the court held that just because a private property owner opens their land for recreational use, does not place them under the reach of the state's Recreational Use Statute.[40] If that were the case, then all private property owners having a cookout or any other recreational activity would be shielded from liability, a result against the legislative intent of the statute. In this case, the defendant property owner owed no duty to the plaintiff who was injured while diving off defendant's dock into swallow water in the middle of the night.

Kimberly Ahern

37. *Id.* at 498.
38. *Id.*
39. *Id.* at 497.
40. *Id.* at 498.