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CASES

Tort Law

Agency Law. *Credit Union Central Falls v. Lawrence S. Groff*, 966 A.2d 1262 (R.I. 2009). A clever, albeit ultimately unsuccessful, intervention by a former client sheds light into attorney relationships and duties regarding borrowers, lending institutions, and title insurers. Arising from the embezzlement of funds entrusted to an attorney, this case deals with Credit Union Central Falls' ("CUCF") suit against former attorney Lawrence S. Groff ("Groff").[1] The allegations include malpractice/negligence, breach of contract, breach of fiduciary duty, and conversion.[2] The true hinge of this opinion, however, pertains to an issue between Mortgage Guarantee and Doris Riendeau, a former client of Groff's,[3] in which both are vying for the funds in Groff's clients' trust account.[4] Ultimately, the Court holds that, despite Riendeau's claim to the contrary, an insurer steps into the shoes of a mortgage company upon triggering of an insurance policy, and in doing so, attains the right to file suit on behalf of the mortgage company.[5]

FACTS AND TRAVEL

Groff was a real estate attorney, and for many years, was recommended to borrowers by CUCF as an attorney who could conduct closings for home loans and real estate transactions. In 2003, the volume of loan refinancing became so onerous that CUCF went to the extent of allowing Groff to perform these services at his own office.[6] Moreover, to better expedite this process, CUCF sent checks to closing attorneys in the attorney's name for the total loan amount, from which the attorney was to disburse the money appropriately (via the terms of the agreement) between the lender and the borrower.

Upon such refinancing and subsequent disbursement, Groff

1. Credit Union Central Falls v. Groff, 966 A.2d 1262, 1264 (R.I. 2009).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 1262.

often had the duty to discharge other outstanding loans of the borrowers with the newly acquired money.[7] In two situations (those previously at issue in this case), Groff paid the continued mortgage payments of the loans he was supposed to have discharged, and illegally appropriated the remainder of the funds for his private use.[8] The perpetual payments of the mortgages produced the façade that the loan was discharged, however, these masked activities were soon uncovered.[9]

In addition to this duty of disbursement, Groff also secured title insurance for borrowers of the affected loans and properties.[10] These policies were purchased from Mortgage Guarantee & Title Insurance Company ("Mortgage Guarantee").[11]

As Groff's scheme quickly unraveled, CUCF filed insurance claims on the affected policies and shortly thereafter filed suit against Groff under the aforementioned claims.[12] Having to pay over $223,000, Mortgage Guarantee joined in these claims via subrogation (pursuant to the terms of the insurance policies).[13] Shortly after this, CUCF filed for summary judgment on all claims.[14] Heavily opposing this motion, Ms. Riendeau entered the stage at this point.[15]

Also falling victim to Groff's less than savory ways, Ms. Reindeau, in a separate trial related to a probate matter, filed suit against Groff and obtained a judgment of over $85,000.[16] In a clear move to avoid being squeezed out of recovering this judgment, she then claimed that the instant summary judgment motion should not be granted as more discovery was required to delineate the relationships between the various parties.[17] Cutting to the essence of her argument, she claimed that Groff was an "agent/approved attorney" for Mortgage Guarantee and that Mortgage Guarantee was vicariously liable to CUCF due to Groff's

7. *Credit Union Central Falls*, 966 A.2d at 1262.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 1265.
12. *Id.* at 1264.
13. *Credit Union Central Falls*, 966 A.2d at 1265.
14. *Id.*
15. *Id.*
16. *Id.* at 1264.
17. *Id.* at 1266.

actions.[18] Following this logic, Mortgage Guarantee allegedly could not, at the same time, be the subrogee of the lender, and was ultimately precluded from recovery.[19]

The lower court granted the summary judgment motion; however, it did not address the issues of whether an attorney such as Groff (the closing attorney) represents the lender and/or the mortgagor.[20]

ANALYSIS AND HOLDING

As with all trial decisions to grant summary judgment, review is made on a de novo basis.[21] Thus, Ms. Riendeau had a lighter burden (as opposed to an abuse of discretion standard) of showing that there existed an issue of material fact that remained disputed.[22]

The instant appeal quickly analyzes the ethical ramifications of Groff's apparent representation of both the lender and the borrower,[23] determining that, such representation is allowed where there is full disclosure.[24] The Court then looks at the instant situation to determine whether such proper disclosures were made and whether CUCF was in fact "represented" by Groff.[25] Although many documents (particularly those required to be signed by the borrowers) do indicate that CUCF took proper precautions concerning attorney selection and expressly stated that they were not clients of Groff, the Court refuses to affirm the summary judgment solely on this point.[26] It does, however, indicate that Groff did not legally represent CUCF in a client-attorney relationship.[27]

Thus, the Court looks at Groff's duties to CUCF as a non-client.[28] In order for CUCF to have a valid claim, and ultimately for Mortgage Guarantee to have a claim, CUCF must prove that

18. *Id.*
19. *Credit Union Central Falls*, 966 A.2d at 1266.
20. *Id.*
21. *Id.* at 1267.
22. *Id.*
23. *Id.* at 1268.
24. *Id.*
25. *Credit Union Central Falls*, 966 A.2d at 1270.
26. *Id.*
27. *Id.*
28. *Id.*

"the actual intent of the client to benefit the non-client was a direct purpose of the transaction or relationship."[29] Stated more thoroughly later in the case, "the liability of an attorney may extend to third-party beneficiaries of the attorney-client relationship if it is clear that the contracting parties intended to benefit the third party."[30]

Applying this standard to the facts of the case, the Court focuses on CUCF's involvement in Groff's work in determining that CUCF was indeed a third party beneficiary to Groff's dealings with borrowers, and thus entitled CUCF to a legal duty of care.[31] The Court states that "we are satisfied that CUCF, if not a client, was at the very least an intended beneficiary of the contractual obligations between Mr. Groff and his borrowers, and as such, the attorney owed CUCF a duty of care."[32]

Finally, the Court explains how this affects Mortgage Guarantee's subrogation, and ultimately Ms. Riendeau's claim. Subrogation "allows the title insurer to 'stand in the shoes' of the insured creditor when it pays an obligation in satisfaction of the express terms of their policy."[33] Because Mortgage Guarantee insured CUCF against losses, and because CUCF was owed a duty of care by Groff, upon Groff's misdeeds, Mortgage Guarantee had the ability to exercise its subrogation right.[34] In sum, Mortgage Guarantee was permitted "all rights and remedies which the insured claimant would have had against any person or property in respect to the claim had this policy not been issued."[35]

Thus, Ms. Riendeau's argument fails and the lower court's grant of the summary judgment motion is affirmed.[36] It should be noted that this decision sheds no light as to the legal issues

29. *Id.* at 1271.
30. *Id.* at 1272.
31. *Credit Union Central Falls*, 966 A.2d at 1273. This included required authorization of borrowers to allow CUCF to send the title request to Groff and CUCF's letterhead being used for this "title examination authorization" form. *Id.*
32. *Id.* at 1274.
33. *Id.* at 1275.
34. *Id.* at 1275 (this subrogation right was included, via clause, in Mortgage Guarantee's contract with CUCF).
35. *Id.* at 1275.
36. *Id.* To repeat yet again, Mortgage Guarantee is allowed to recover any compensation allowed by the summary judgment motion that CUCF would be entitled to if there were no insurance policy. *Id.*

between Groff and Ms. Riendeau, but simply resolves the issue concerning Mortgage Guarantee.

COMMENTARY

Although a convoluted panoply of events, this case sheds light on the myriad of legal troubles that could result from misappropriating client funds. Aside from this caveat, and although unsuccessful, Riendeau's attorney, through attempting to stymie this summary judgment, takes a creative route towards attempting to secure Groff's funds for Riendeau's award. Nevertheless, all parties involved in this case can take away the lesson that one must be very careful about who he or she does business with, even if on the recommendation of another.

CONCLUSION

This case addresses the issue of whether an insurer steps into the shoes of a mortgage company where a policy is triggered, thus allowing for the insurance company to file an action on behalf of the mortgage company. The Court holds that such a process is legal and legitimate.

Athanasios Petropoulos

Civil Procedure. *State v. Robinson*, 972 A.2d 150 (R.I. 2009). The jurisdiction of Rhode Island state courts, as provided in the Rhode Island Constitution, is solely determined by the state legislature. Several authorities are granted the power to alter procedural rules within their respective courts, but none can extend jurisdiction. The Rhode Island Supreme Court declined to follow one such jurisdictional grant enacted by the Chief Magistrate of the Traffic Tribunal. The statute extended the jurisdiction of Rhode Island district courts to hear appeals from "any party" in addition to "any person."

FACTS AND TRAVEL

The petitioners in this case are six motorists seeking to reverse a decision of the District Court, Providence County ("District Court").[1] Their main claim is that the District Court did not have jurisdiction over an appeal by the State of Rhode Island ("State").[2]

One of the six motorists, Christine Cabral, was suspected of operating a motor vehicle while intoxicated.[3] She was brought to the police station where an officer read her a form describing her rights.[4] The form, however, did not mention a $200 penalty for refusing to submit to a chemical test.[5] Rhode Island General Laws 1956 § 31-27-2.1(c) requires that the person being asked to undergo a chemical test be informed of the penalties associated with refusing to submit to such a test.[6] Cabral refused the test and was fined $200 for the violation.[7] Cabral appeared in traffic court to contest the merits of the claim.[8] On October 19, 2006, a magistrate judge of the Traffic Tribunal dismissed the refusal

1. State v. Robinson, 972 A.2d 150, 152 (R.I. 2009).
2. *Id.* at 154.
3. *Id.* at 153.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Robinson*, 972 A.2d at 153.
8. *Id.*

charge after finding that she had not been told about the $200 penalty.[9] On January 29, 2007 the appeals panel of the Traffic Tribunal issued a consolidated decision affirming the magistrate's decision to dismiss the charges against Cabral and the other motorists.[10]

The State further appealed to the District Court.[11] Cabral's answers claimed that the District Court lacked jurisdiction.[12] Rhode Island General Laws 1956 § 31-41.1-9(a) (hereafter "§ 31-41.1-9") only authorizes "a person who is aggrieved" by a decision of the appeals panel to appeal to the District Court.[13] Cabral argued that the "state" is not a "person" as defined by the statute.[14] "Person" is defined by Title 31 of the General Laws as "every individual, firm, partnership, corporation or association."[15] Cabral points out that terms such as "state," "government," or "public body" are absent from that definition.[16] The judge for the District Court "did not specifically rule on the jurisdictional issue, but simply cited § 31-41-1.9 as the vehicle for the state's appeal and the basis for jurisdiction.[17]

The State's counter-argument is that Rhode Island General Laws 1956 § 8-8.2-1(a) (hereafter "§ 8-8.2-1") grants the Chief Magistrate of the Traffic Tribunal with "the power to make rules for regulation practice, procedure and business within the Traffic Tribunal."[18] Rule 21(b), provided by the Chief Magistrate, provides that "[a]ny party aggrieved by a decision of the appeals panel may appeal therefrom to the Sixth Division District Court."[19] In this rule the word "party" is the controlling terminology.

ANALYSIS AND HOLDING

The Court first determined that jurisdiction in this case "does

9. *Id.* at 154.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Robinson*, 972 A.2d at 154.
14. *Id.*
15. *Id.* at 156.
16. *Id.*
17. *Id.* at 154.
18. *Id.* at 156.
19. *Robinson*, 972 A.2d at 156.

not spring from the language of § 31-41.1-9."[20] If the language of the statute is "clear and unambiguous," the words must be given their "plain and ordinary meanings."[21] Here, the statute clearly used the word "person," which does not encompass the State.[22]

The Court then looked to the State's argument regarding Rule 21 (b).[23] There is a clear conflict between the two rules.[24] The Court held that § 31-41.1-9 was controlling because the Chief Magistrate lacked the authority to enact Rule 21(b).[25]

The United States Supreme Court has said that the authority conferred upon courts to make rules and procedure does not give them the power to enlarge jurisdiction.[26] It gives the Court no authority to modify, abridge or enlarge the substantive rights of litigants.[27] Here, that is exactly what the Chief Magistrate did. A rule creating jurisdiction in the District Court to hear an appeal, in the absence of statutory authorization, is exactly the expansion of power that this Court has held to be improper.[28] This right to expand jurisdiction "lies solely within the province of the General Assembly."[29]

The Court held that Rule 21(b) was invalid because it expanded the jurisdiction of the District Court by entertaining appeals from "any party" in addition to "any person."[30]

COMMENTARY

It is clear from the Rhode Island Constitution that Rhode Island courts are granted jurisdiction solely from the legislature.[31] The Chief Magistrate of the Traffic Tribunal over-stepped his authority to regulate the "practice, procedure, and business" when he extended the jurisdiction of the District Court to hear appeals

20. *Id.* at 157.
21. *Id.* at 158 (quoting Such v. State, 950 A.2d 1150, 1155-56 (R.I. 2008)(citation omitted)).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Robinson*, 972 A.2d at 159.
26. *Id.* at 158.
27. *Id.*
28. *Id.* at 159.
29. *Id.*
30. *Id.*
31. *Robinson*, 972 A.2d at 157.

from "any party" in addition "any person."[32] The State's argument essentially asks the Court to allow an authority, other than the state legislature, to grant jurisdiction to the courts of this state.

CONCLUSION

An authority conferred upon a court to make rules for regulating procedure can in no way enlarge jurisdiction.[33] This power rests solely with the state legislature.[34] By extending the jurisdiction of the District Court to "any party" as opposed to "any person" the Chief Magistrate of the Traffic Tribunal went beyond the authority granted to him by the General Assembly.[35]

Zachary Mandell

32. *Id.* at 158.
33. *Id.*
34. *Id.* at 157.
35. *Id.* at 159.

Constitutional Law. *In re Michael Derderian*, 972 A.2d 613 (R.I. 2009). When the Providence Journal Company ("the Journal") sought a declaration that it was entitled to have access to the blank questionnaire form used in jury selection for litigation arising from The Station nightclub fire, as well as the information contained therein, the Rhode Island Supreme Court determined that the Journal was not in fact entitled to such a declaration as its action was moot, and not subject to any exception to mootness doctrine.

FACTS AND TRAVEL

The issues in this case concern jury questionnaires employed in a criminal case arising from the February 20, 2003 Station nightclub fire, in which 100 people lost their lives.[1] Because of the intensity and enormity of the fire's impact within the Rhode Island community, the tremendous amount of media coverage, and the "highly charged nature of this criminal proceeding," selecting impartial jurors was to be a difficult task.[2] As such, the trial court developed the thirty-two page juror questionnaire with two express purposes: "(1) to expedite the voir dire process by eliminating repetitious questioning in a case expected to last several months and (2) to elicit candid and complete answers."[3]

When prospective jurors were summoned, the trial court presented each with a questionnaire, complete with both written and oral instructions to complete the questionnaire "full and frankly to the best of each person's ability," and supplemented these instructions by advising potential jurors that every reasonable effort would be made to keep answers private.[4] As of

1. Michael Derderian, part owner of The Station nightclub, faced 100 counts of involuntary manslaughter under a theory of criminal negligence and 100 counts of involuntary manslaughter under a theory of misdemeanor manslaughter. *In re* Michael Derderian, 972 A.2d 613, 615 (R.I. 2009).

2. *Id.* at 615.

3. *Id.*

4. *Id.* The questionnaires included the following instructions: "You should be aware that your answers to these questions are *NOT* CONFIDENTIAL and may be included in the public record or discussed in

September 6, 2006, 421 prospective jurors had completed the questionnaires; counsel had reviewed approximately 200 of these, and "one or both parties identified a number of prospective jurors they hoped the court would excuse for cause."[5]

The Journal filed a miscellaneous petition on September 11, 2006 seeking a declaration that the Journal was entitled to have access to the blank questionnaire form as well as the information contained in the completed questionnaires.[6] However, Mr. Derderian subsequently entered a plea of nolo contendere before the entire jury pool had completed the questionnaires.[7] As a result, jury selection was never completed, nor was any juror ever dismissed.[8]

The Journal continued to seek access to the information contained in the questionnaires, however, and so the trial court conducted a hearing on access to these completed questionnaires.[9] On October 12, 2006, the trial court "permitted the release of the blank form, but denied access to the completed questionnaire" as it found that, although the Journal's petition was not moot, the Journal's presumptive right to access under the First Amendment was not absolute and was in fact rebutted by the specific facts of the case.[10] The trial judge arrived at this conclusion by balancing the constitutional interests of the public's right of access to

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open court. If in response to *ANY* of the questions, you do not wish to answer because the issue is too sensitive, personal, or private, please write the word 'PRIVATE' in the space after the question and circle the entire question. The Court then may ask you privately about the question if you are called to return." *Id.*

5. *Id.*

6. *Id.* The state objected to disclosure of both the blank and completed questionnaires, but the Journal argued that restricting the Journal and the public's right of access to the voir dire proceedings, without making specific findings justifying this restriction, would violate the Journal's rights under the United States Constitution, the Rhode Island Constitution, and the common law. *Id.*

7. The trial court both accepted his plea and sentenced him on September 29, 2006. *Derderian*, 972 A.2d at 616.

8. *Id.*

9. *Id.* at 616.

10. *Id.* Specifically, in considering whether the Journal's petition was moot because of Mr. Derderian's nolo contendere plea and sentencing, the trial judge found that the case was justiciable because "access to juror questionnaires used in future criminal trials is an ongoing issue of great public interest," capable of repetition and evading review. *Id.*

criminal proceedings against future defendants' right to a fair trial, in addition to considering the statutorily created right to privacy in Rhode Island.[11]

Ultimately, these findings were set out in conformity with the four-part inquiry set forth in *State v. Cianci*, which is used to determine whether a limitation on the public's and press's right of access to criminal trials is lawful.[12] Judgment granting access to a blank copy of the questionnaire and denying the petition "in all other respects" was entered on October 31, 2006, and the Journal subsequently appealed.[13]

On appeal, the Journal contended that it had a "First Amendment right of access to the jury selection process in criminal trials, including completed juror questionnaires," and that right is not outweighed by either the Sixth Amendment right to a fair trial nor the privacy interests of prospective jurors.[14] Alternatively, the Journal argued that even if there were compelling governmental interests sufficient to outweigh these First Amendment concerns, the Superior Court's "blanket denial of all completed questionnaires was overly broad and impermissible under the four-part inquiry delineated by *Cianci*."[15]

ANALYSIS AND HOLDING

Mootness

The Court stated its position on mootness, asserting that it will "'only consider cases involving issues in dispute; we shall not address moot, abstract, academic, or hypothetical situations.'"[16] Furthermore, the Court noted that it has "'consistently held that a case is moot if the original complaint raised a justiciable controversy, but events occurring after the filing have deprived

11. *See* U.S. CONST. amend. I & VI; R.I. GEN. LAWS.1956 § 9-1-28.1(a)(3); 972 A.2d at 616.

12. *Derderian*, 972 A.2d at 616 (citing State v. Cianci, 496 A.2d 139, 144 (R.I. 1985)).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 617 (quoting State v. Med. Malpractice Joint Underwriting Ass'n, 941 A.2d 219, 220 (R.I. 2008); Morris v. D'Amario, 416 A.2d 137, 139 (R.I. 1980)).

the litigant of a continuing stake in the controversy.'"[17]

Here, the Court determined that the argument to unseal these documents is technically moot: the claims are unrelated to an actual controversy as the underlying criminal case had concluded with Mr. Derderian's entry of a nolo contendere plea, which precluded the necessity of a jury being empaneled.[18]

Exceptions to Mootness

The Court next recognized that "'a determination of mootness may not end [its] judicial review.'"[19] Indeed, the Court reviews an otherwise moot case when the issues involved implicate matters of "'extreme public importance,'" and when "the circumstances that gave rise to the initial controversy are capable of repetition while evading review."[20] The Court elaborated, noting that resolution in such matters as these is in the public interest, as well as in the interest of guidance in future cases.[21]

In this matter, concerns of "extreme public importance" were undeniably prominent.[22] The Court candidly commented that "The Station nightclub fire has left an indelible mark on every citizen in this state," from forcing citizens to consider matters of personal responsibility to urging reflection on the function of the criminal justice system.[23] Here, the case concerned not only the right of the public to access jury information, as well as future defendants' right to a fair trial, but also the privacy interests of those who have been or who may be called to serve as a juror and the judiciary's notable interest fair and efficient administration of justice.[24]

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17. *Derderian*, 972 A.2d at 617 (quoting Cicilline v. Almond, 809 A.2d 1101, 1105 (R.I. 2002); Sullivan v. Chafee, 703 A.2d 748, 752 (R.I. 1997)).

18. *Id.*

19. *Id.* (quoting In re Court Order Dated October 22, 2003, 886 A.2d 342, 348 (R.I. 2005); Foster-Gloucester Reg'l Sch. Comm. v. Bd. of Review, 854 A.2d 1008, 1013 (R.I. 2004)).

20. *Id.* (quoting Pelland v. State, 919 A.2d 373, 378 (R.I. 2007); Sullivan, 703 A.2d at 752)).

21. *Id.* (citing *Cianci*, 496 A.2d at 142).

22. *Id.* (citing In Re Court Order Dated October 22, 2003, 886 A.2d at 348-39; Providence Journal Co. v. Superior Court, 593 A.2d 446, 448 (R.I. 1991); *Cianci*, 496 A.2d at 142; Edward A. Sherman Publ'g Co. v. Goldberg, 443 A.2d 1252, 1256, n. 6 (R.I. 1982)).

23. *Derderian*, 972 A.2d at 617.

24. *Id.* at 618 (citing Press-Enterprise Co. v. Superior Court of California,

Even with these interests in mind, the Court nonetheless concluded that the circumstances giving rise to the argument are not capable of repetition while evading review, and thus the Journal's arguments were, in fact, moot.[25] The case was unlike any other in the State's history and the facts were extraordinarily unique, and thus, the Court determined that there was "at most a remote likelihood of another tragic event involving so many lives, receiving such significant attention, affecting so many people, and resulting in a criminal trial."[26] The Court pointed out that the massive, unprecedented size of the prospective jury pool and number of completed questionnaires was overwhelming: the Court even calculated the volume of information sought—13,472 pages of questions and answers—and determined, like the trial court before it, that the release of the information would be overly burdensome on the Court.[27]

The Court also made note of the fact that the procedural posture of the case was unusual in that fewer than half of the prospective jurors completed the questionnaires, no juror was dismissed, not one juror was summoned for individual voir dire, the jury was never empaneled, and the trial judge never had cause to comment on the matter of juror selection as Mr. Derderian entered his plea of nolo contendere before the jury could play its role in his criminal trial.[28]

COMMENTARY

In reaching its decision, the Court clearly gave great weight and consideration to the enormity of both public interest and the uniqueness of the underlying facts that gave rise to this appeal. As such, the Court was careful to outline its reasoning as a balancing of Constitutional rights and interests, acknowledging the weight of The Station fire case in the Rhode Island community and the competing interests of First and Sixth Amendment

464 U.S. 501, 505 (1984) (determining that "[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system").

25. *Id.*
26. *Id.*
27. *Id.* at 618 n.4.
28. *Id.*

rights.[29] In the end, the Journal's argument was plainly moot because the case had concluded, and the Court gave greater weight to the privacy interests of jurors.

Notably absent from the opinion, however, is any consideration of whether an impartial jury could have ever been attained in such a sensationalized case as this. The Court chose not to address whether the opinions of prospective jurors ought to be public, namely in light of whether they might have driven any plea discussions. Indeed, as did the trial court, the Court likewise declined to "engage in rank speculation" or "satisfy idle curiosity about what jurors, if any, may have been seated in this case or what role, if any, the jury questionnaires may have had in [Derderian's] motive[] to change [his] plea."[30]

The Court's justifiable reliance on the doctrine of mootness to adjudicate this case certainly resolves the Journal's petition and concludes the case. In doing so, the decision avoids the more problematic constitutional rights at play, leaving open to future interpretation the role of juror questionnaires in criminal trials.

CONCLUSION

The Rhode Island Supreme Court denied and dismissed the appeal of the Journal as the controversy in this case had ended, rendering the Journal's arguments moot, and the extreme factual and procedural posture of this case was unlikely to repeat itself.

Jessica A. Shelton

29. *Derderian*, 972 A.2d at 617-18.
30. *Id.* at 618.

Constitutional Law. *In re Request for Advisory Opinion from the House of Representatives (Coastal Resources Management Council)*, 961 A.2d 930 (R.I. 2009). The Rhode Island Supreme Court advised the House of Representatives that, if reenacted, legislation concerning the organic statute of the Coastal Resources Management Council would violate the November 2, 2004 separation of powers amendments to the State Constitution.

FACTS AND TRAVEL

In considering whether the organic statute of the Coastal Resources Management Council (CRMC) should be reenacted, the Rhode Island House of Representatives called upon the State Supreme Court to provide an advisory opinion concerning the following four issues:[1]

> 1) Whether the constitutional amendment to Article 9, Section 5 is "self-executing?" [2]
>
> 2) Whether the CRMC, "by its nature, purpose, and operation," is a legislative body?[3]
>
> 3) Whether the organic statute, which permits members of the General Assembly to sit as members of the CRMC, would violate the Article 9, Section 5 constitutional amendment pertaining to the constitutionality of the appointing authority?[4]
>
> 4) Whether the organic statute would "permit the Speaker of the House to appoint public members to the [CRMC]?"[5]

Although the Court was reluctant to deliver an advisory

1. *In re* Request for Advisory Opinion from the H.R. (Coastal Res. Mgmt. Council), 961 A.2d 930, 932 (R.I. 2009).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

opinion regarding the constitutionality of an organic statute up for reenactment,[6] it agreed to do so in order to address the important legal questions and public concerns raised by the pending legislation.[7]

Historically, the Rhode Island General Assembly has exercised substantially more executive authority than most other states, including the power to elect all judicial officers and many officers of the executive branch.[8] The 1986 constitutional convention allowed the General Assembly to retain its "continuing powers," which consisted of any power that was not "expressly prohibited by the Constitution."[9]

The constitutional amendments enacted on November 2, 2004 fundamentally changed the separation of powers for the State of Rhode Island.[10] Article 3, Section 6 was amended "to preclude legislators from serving on state boards, commissions, or other state or quasi-public entities that exercise executive power."[11] Article 5 was amended "to provide that the powers of the Rhode Island [G]overnment are distributed into 'three separate and distinct departments'" including the executive, legislative and judicial.[12] Article 6, Section 10 was repealed, which terminated the "continuing powers" that had been vested in the General Assembly.[13] Finally, Article 9, Section 5 was amended to "give the Governor appointment power with respect to members of any state or quasi-public entities exercising executive power, subject to the advice and consent of the Senate."[14]

With the separation of powers amendments in mind, the Rhode Island Supreme Court advised the Rhode Island House of Representatives on whether the reenactment of the CRMC's organic statute would violate the State Constitution.

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6. *Id.* (quoting *In re* Advisory Opinion (C.J.), 507 A.2d 1316, 1319 (R.I. 1986)) (holding that only the Governor can issue advisory opinions pertaining to the "constitutionality of existing statutes which require implementation by the Chief Executive").
7. *In re* Request, 961 A.2d at 932.
8. *Id.* at 934.
9. *Id.* at 935.
10. *Id.* at 933.
11. *Id.*
12. *Id.*
13. *In re* Request, 961 A.2d at 933.
14. *Id.*

ANALYSIS

Upon review of the separation of powers amendments, the Rhode Island Supreme Court first determined that both Article 3, Section 6 and Article 9, Section 5 are self-executing and thus, do not require further legislative action in order to be given the force of law.[15] These amended sections prohibit legislators from sitting on administrative units that exercise executive power and vest the appointment of administrative members in the Governor, with the advice and consent of the Senate.[16]

The Court next considered whether the CRMC is legislative in nature and concluded that the agency is "executive with functions that are quasi-legislative and quasi-judicial in nature."[17] Examples of the agency's authority, as delegated by Article 1, Section 17, include the ability to generate policy, approve regulations, enforce riparian rights, issue written cease and desist orders and assess administrative penalties of up to $2,500.[18]

While it is permissible for the CRMC and other agencies to combine legislative, judicial and executive powers,[19] "direct legislative control of executive powers would be an impermissible usurpation of the central function of a coordinate branch."[20] After determining that the CRMC is predominantly executive in nature, the Court opined that no member or appointee of the General Assembly may sit on the CRMC while occupying a legislative

15. *Id.* at 937; Thomas M. Cooley, LL.D., TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 100 (The Law Book Exchange, Ltd. 1998) (1868), *as reprinted in* Davis v. Burke, 179 U.S. 399 (1900) ("A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.").

16. *In re* Request, 961 A.2d at 933.

17. *Id.* at 940.

18. *Id.* at 937, 941.

19. *Id.* at 940; *see* Town of East Greenwich v. O'Neil, 617 A.2d 104, 112-13 (R.I. 1992).

20. *In re* Request, 961 A.2d at 940; *see* Bowsher v. Synar, 478 U.S. 714, 733-34 (1986) ("[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly–by passing new legislation.").

position.[21] Additionally, the Governor must make all appointments to the CRMC with the advice and consent of the Senate.[22] Therefore, the Rhode Island Supreme Court advised the Rhode Island House of Representatives that the CRMC's organic statute, as proposed for reenactment, would violate the Article 9, Section 5 constitutional amendment and would not permit the Speaker of the House to appoint public members to the agency.[23]

The Court emphasized that the constitutional amendments are not "subordinating the role of the legislative branch to that of the executive,"[24] and that the Senate may continue to approve or reject gubernatorial appointments.[25] The General Assembly retains its ability to "enact, revise or repeal laws concerning coastal management and preservation of natural resources," as long as the agency acts in compliance with the constitution.[26] In conclusion, the Rhode Island Supreme Court advised the Governor and the General Assembly to convene in order to reach a mutual agreement that would allow both the executive and legislative branches of the State Government to operate in compliance with the Rhode Island Constitution.[27]

COMMENTARY

An interesting comment by the Court in reluctantly agreeing to issue the advisory opinion was that they may decline to answer requests for future advisory opinions under circumstances similar to the case at hand.[28] When the constitutionality of pending legislation is in question, the House of Representatives may ask the Court for an advisory opinion;[29] however, when the constitutionality of existing statutes, "which require implementation by the Chief Executive," is at issue, the Governor alone may promulgate an advisory opinion.[30] The organic statute

21. *In re* Request, 961 A.2d at 940.
22. *Id.* at 942.
23. *See id.* at 932, 941.
24. *Id.* at 934.
25. *Id.* at 943.
26. *Id.*
27. *In re* Request, 961 A.2d at 944.
28. *Id.* at 932.
29. *Id.*; *see In re* Advisory Opinion (C.J.), 507 A.2d 1316, 1318 (R.I. 1986).
30. *In re* Request, 961 A.2d at 932; *see In re* Advisory Opinion (C.J.), 507 A.2d at 1319.

of the CRMC was proposed for reenactment and had practically no substantive changes,[31] which would seem to liken it to an "existing" statute rather than to one of "pending legislation." While the Court proceeded to issue the advisory opinion due to the important public policy involved,[32] it remains unclear what conditions must exist for the Court to assent to such an advisory opinion in the future. Additionally, one is left wondering why the Governor was not called upon to deliver the advisory opinion after the Court recognized the unusual circumstances surrounding the constitutionality of reenacting the CRMC's existing organic statute.

Regardless of which branch was responsible for answering the House of Representatives request, the advisory opinion of the Rhode Island Supreme Court provides important assurance that the CRMC will be able to fulfill its duties of protecting the natural environment without political influence from the General Assembly. The coastline and marine environment are crucial to the health and economic well being of the Ocean State and its residents. By forcing the agency to comply with the separation of powers amendments, the Court will effectuate an important check on the balance of powers asserted by the legislative and executive branches of the State Government.

31. *In re* Request, 961 A.2d at 932.
32. *Id.*

CONCLUSION

The November 2, 2004, amendments to the Rhode Island Constitution separated the State's power into three distinct branches, including the executive, legislative and judicial.[33] Additionally, these amendments precluded sitting legislators from serving on the CRMC and required the Governor, with the advice and consent of the Senate, to appoint members to the CRMC.[34] Therefore, the Rhode Island Supreme Court advised that if reenacted as proposed, the organic statute of the Rhode Island CRMC would violate the separation of powers amendments to the State Constitution.[35]

Jacqueline S. Rolleri

33. *Id.* at 933.
34. *Id.* at 941-42.
35. *Id.* at 941.

Constitutional Law. *Irons v. The Rhode Island Ethics Commission*, 973 A.2d 1124 (R.I. 2009). In this constitutionally important case, the Supreme Court grappled with balancing the protection afforded by one constitutional amendment with the powers authorized by another amendment.[1] In the end, the Court found that a former State senator's constitutional right under the speech in debate clause[2] affords him immunity from prosecution under the Ethics Commission provision in the Constitution.[3]

FACTS AND TRAVEL

In the first stage of this constitutional case, Robert Arruda and Beverly Clay[4] filed a complaint in January 2004 with the Rhode Island Ethics Commission ("Ethics Commission")[5] against William V. Irons[6] ("Senator Irons"), who, at the time of the initial complaint, sat as President of the Rhode Island Senate.[7] The complaint alleged, most importantly, that Senator Irons acted wrongfully by "'participating in a governmental decision to affect pharmacy issues, while he was paid significant commissions by Blue Cross & Blue Shield of Rhode Island'. . . when he voted

1. The Constitution referenced is the Rhode Island Constitution.

2. R.I. CONST. art. VI, § 5. The speech in debate clause provides: "For any speech in debate in either house, no member shall be questioned in any other place."

3. R.I. CONST. art. III, § § 7, 8.

4. The complainants are the chair and vice chair, respectively, of Operation Clean Government, an organization "dedicated to promoting honest, responsible, and responsive state government." Irons v. Rhode Island Ethics Comm'n, 973 A.2d 1124, 1126 (R.I. 2009).

5. "The Rhode Island Ethics Commission is a constitutionally established nonpartisan body that was created to adopt, enforce, and administer the Code of Ethics.... It was 'formed to oversee ethics in State Government.'" *In re* Advisory Opinion to the Governor (Ethics Commission), 612 A.2d 1, 3 (R.I. 1992).

6. At all relevant times, Senator Irons was an insurance broker who had a strong economic ties to the pharmaceutical industry by maintaining CVS, Inc. (a major pharmacy retailer) and Blue Cross & Blue Shield of Rhode Island (a health insurance company) as his private clients. *Irons*, 973 A.2d at 1126.

7. *Id.*

against the Pharmacy Freedom of Choice legislation[8] in 1999 and 2000."[9]

The second stage of this case unfolded when the Ethics Commission found that the complaint alleged "'facts sufficient to constitute a knowing and willful violation' of the Code of Ethics," and, after a preliminary investigation, determined the allegations supported a finding of probable cause.[10] At the conclusion of a probable cause hearing in November 2004, the Ethics Commission found probable cause on two counts of the complaint:

> (1) the allegation that Senator Irons had substantial conflict of interest when he participated in the Senate Corporations Committee's consideration of pharmacy choice legislation in the 1999 and 2000 legislative session; and
>
> (2) the allegation that Senator Irons used his public office to obtain financial gain for CVS, his client, during the same legislative sessions.[11]

The next stage occurred several years later, in April 2007, when Senator Irons demanded a jury trial pursuant to sections 10 and 15 of article 1 of the Rhode Island Constitution.[12] In November, he filed a motion seeking dismissal of the remaining two counts of the original complaint, claiming that prosecution under these counts would violate the speech in debate clause.[13] In a hearing later that month, the Ethics Commission denied both the motion to dismiss and the request of a jury trial.[14] Upon this declaration, Senator Irons filed a complaint in the Superior Court stating that the Ethics Commission improperly denied his demand for a jury trial and his motion to dismiss, claiming: "(1) that the

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8. The Pharmacy Freedom of Choice legislation, in its essence, would have given consumers the choice of which pharmacy they could refill their prescriptions. *Id.* at 1126, n. 3.

9. *Id.* at 1126.

10. *Id.* at 1127.

11. *Id.* at 1127-28.

12. R.I. CONST. art. I, §§ 10 and 15, respectively, guarantee that "[i]n all criminal prosecutions, accused person shall enjoy the right to a speedy and public trial, by an impartial jury" and "[t]he right of trial by jury shall remain inviolate." R.I. CONST. art. I, §§ 10, 15.

13. *See Irons*, 973 A.2d at 1128.

14. *Id.* at 1128-29.

protection afforded him by the speech in debate clause rendered him immune from prosecution with respect to the [] counts; and (2) that, if he was not immune, he had a constitutional right to a jury trial."[15] The Superior Court granted Senator Irons' motion to dismiss the remaining counts, but denied his demand for a jury trial.[16]

This decision prompted the Ethics Commission to petition the Rhode Island Supreme Court for a writ of certiorari to review the Superior Court's ruling on the issue of the speech in debate clause.[17] Senator Irons, meanwhile, cross-petitioned for a writ of certiorari regarding his denial for a jury trial.[18] The Supreme Court granted both petitions.[19]

ANALYSIS AND HOLDING

In the final stage of the case, the Court reviewed *de novo* issues raised in a writ of certiorari, and only looked at questions of law raised in the petition.[20]

An Ancient and Venerable Hallmark[21]

The root of this case stems from two constitutional provisions, one that has a long history in Anglo-American jurisprudence, and the other a more recent addition to the Rhode Island Constitution. The former provision, the speech in debate clause, contains "plain and unequivocal language" that protects individual legislators "'from inquiry into their legislative acts or into the motivation for actual performance of legislative acts that are clearly part of the legislative process.'"[22] The speech in debate clause also shields legislators from encroachment by the other branches of government, thereby allowing "'the free flow of debate among legislators and the maximization of an effective and open

15. *Id.* at 1129.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Irons*, 973 A.2d at 1129.
20. *Id.*
21. *Id.* at 1134.
22. *Id.* at 1129 (quoting Holmes v. Farmer, 475 A.2d 976, 983 (R.I. 1984)).

exchange of ideas.'"[23] The provision intended to confer the ultimate benefit onto the people.[24]

While the Court has construed the speech in debate clause to provide legislators with "'absolute' immunity" from encroachment by other branches of government in carrying out their legislative duties, it by no means opens the door for legislators to abuse the Code of Ethics.[25] It simply means that the Ethics Commission may not prosecute "within a narrow class of *core legislative acts*."[26] In the case at hand, both parties agreed that Senator Irons' actions were "core legislative acts" in that he participated in debate and consideration on pharmaceutical legislation and voted in opposition of the Pharmacy Freedom of Choice Act.[27]

In Diametrical Opposition[28]

While both parties agreed that Senator Irons' actions were within the scope of the speech in debate clause, the Ethics Commission argued that under the Ethics Amendment[29] they are allowed to prosecute Senator Irons for violating the Code of Ethics, thus creating a narrow exception to the speech in debate clause.[30] The Ethics Amendment was borne out of the times when "'widespread breaches of trust, cronyism, impropriety, and other violations of ethical standards'" plagued the state, creating a disjunction in the public's trust in the government.[31] To remedy this, the Ethics Commission created an ethics committee, which proposed "an independent nonpartisan ethics commission with sweeping powers. . . to adopt a code of ethics and oversee ethics in state and local government," and finally codifying this proposal in

23. *See id.* at 1130-31 (quoting *Holmes*, 475 A.2d at 982, 985).
24. *Id.* at 1131.
25. *Irons*, 973 A.2d at 1131.
26. *Id.*
27. *Id.* at 1132.
28. *Id.* at 1134.
29. The most pertinent language of this provision provides: "All elected and appointed officials and employees of state and local government, of boards, commissions and agencies shall be subject to the code of ethics. The ethics commission shall have the authority to investigate violations of the code of ethics and to impose penalties, as provided by law, and the commission shall have the power to remove from office officials who are not subject to impeachment." R.I. CONST. art. III, § 8.
30. *See Irons*, 973 A.2d at 1132.
31. *Id.*

the Rhode Island Constitution.[32]

The language of both the Ethics Amendment and the speech in debate clause is "unequivocal and absolute, [and] neither admits of any exceptions," and the Court refused to "abridge such a long-standing and widely accepted constitutional provision [like the speech in debate clause] in the absence of an express and uncontroverted manifestation of electoral intent."[33] Finding that both provisions are "specific, unequivocal, do not allow for exceptions, and both were affirmed by the voters on the same day," the Court rejected any revocation of the immunity afforded by the speech in debate clause.[34] Thus, the Court held that the speech in debate clause gives Senator Irons immunity from prosecution, even when balanced with the weight of the Ethics Commission's authority granted by the Ethics Amendment.[35] Because Senator Irons was immune from prosecution, the Court did not reach the issue of whether he had the right to a jury trial.[36] The Court noted that when an issue is not necessary "for the disposition of the case at bar," it will not review the issue, "leav[ing] the analysis of that argument for another day."[37]

Justice Suttell, in a dissenting opinion, noted that based on the specific intent of the framers of the Ethics Amendment and "in view of the history of the times and state of affairs," the provision "necessarily implies a limitation on the full reach of the speech in debate clause."[38] Thus, the Ethics Amendment creates a narrow exception to the immunity granted by the speech in debate clause.[39]

COMMENTARY

While the Court was correct in refusing to write an exception to the immunity granted by the speech in debate clause into the Ethics Amendment, the justification for this decision remains a fragile levy holding back heavy water. It is understandable that

32. *Id.* at 1132-33.
33. *Id.*
34. *Id.* at 1134.
35. *Id.*
36. *Irons*, 973 A.2d at 1135.
37. *Id.*
38. *Id.* at 1141.
39. *Id.*

the Supreme Court did not want to create precedent for one constitutional provision to trump another because that would simply open the doors for future battles between conflicting provisions within the Rhode Island Constitution. However, the excuse that the speech in debate clause "is widely recognized in this country and most of the English-speaking world"[40] cannot keep the water back forever. Soon enough, an action by a local or state government official will be so egregious to the Code of Ethics that the levy will break, forcing the powers granted by the Ethics Amendment to usurp the immunity granted by the speech in debate clause.

CONCLUSION

The Supreme Court affirmed the Superior Court's judgment in dismissing the remaining counts against Senator Irons and did not review the Superior Court's ruling on the jury trial issue; the Court allowed the record to be remanded to the Superior Court.[41]

Esther Kapinos

40. *Id.* at 1134.
41. *Id.* at 1135.

Constitutional Law. *State v. Germane*, 971 A.2d 555 (R.I. 2009). In this decision, the Supreme Court of Rhode Island conducted a comprehensive analysis of R.I. Gen. Laws Title 11, Chapter 37.1 (1956), the Sexual Offender Registration and Community Notification Act. Defendant challenged the Act on four grounds: (1) his classification pursuant to the sex offender registration statute was improper because, in his view, the statute (both on its face and as applied), violates his right to procedural due process, which right is guaranteed by both the United States and Rhode Island Constitutions; (2) as applied to the facts of his case, the statute violates his right to substantive due process; (3) the statute is not compatible with the principle of separation of powers that is set forth in article 5 of the Rhode Island Constitution; (4) that application of the statute to his case constitutes a violation of the state constitutional prohibition against *ex post facto* laws. The Court determined that R.I. Gen. Laws Title 11, Chapter 37.1 (1956) may be unconstitutional in some instances; however, it was not in the instant matter.

FACTS AND TRAVEL

Notwithstanding the lack of factual detail[1] preserved or presented throughout this lengthy case history, the instant matter before the Supreme Court of Rhode Island arises from the commission of four sexual assaults in the Spring of 1998 by defendant Thomas Germane ("Germane").[2]

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1. "The factual background of this case as reflected in the record must be characterized as murky at best. On the basis of the rather brief nature of the colloquy on the record that took place when the criminal charges which eventually gave rise to the instant case were disposed of through a plea of nolo contendere, it appears that Mr. Germane did not actually plead to any specific facts beyond his bare admission of the use of force or coercion in the commission of four sexual assaults." State v. Germane, 971 A.2d 555, 561 (R.I. 2009).

2. *Id.* The first sexual assault, consisting of forcible or coerced vaginal intercourse, was perpetrated against a nineteen-year-old victim on April 7, 1998. Second, forcible or coerced vaginal intercourse on a forty-eight-year-old cognitively impaired woman on April 15, 1998. Finally, two assaults

On January 6, 2000, Germane pled nolo contendere; the state apparently determined that a plea agreement was "preferable" to proceeding to trial due to complication with background information and "some of the victims."[3] The state recommended a sentence of twenty years[4] at the Adult Correctional Institutions (six months to serve, nineteen and one-half months suspended, with probation), the Superior Court imposed this agreed upon sentence

The Offender Registration and Community Notification Act ("ORCNA"), Rhode Island General Laws 1956 Chapter 37.1 of Title 11, requires the following individuals to register with a designated law enforcement agency: (1) anyone convicted of an enumerated criminal offense against a minor victim; (2) anyone convicted of a sexually violent offense; (3) anyone determined by a board of review to be a sexually violent predator.[5] The third category mandated that offenders register indefinitely until such time as a court might determine that a particular individual was no longer a sexually violent predator.[6] The ORCNA was amended in 1999 to create a new category of offenses which were subject to lifetime registration, "'aggravated offenses,' which included most sexual offenses involving sexual penetration and the use or threat of force."[7]

On February 9, 2000, the Sex Offender Board of Review ("board of review") received Germane's case, and upon a review of a field investigator, determined that Germane was a "sexually violent predator" because he "possesses a personality disorder that make it likely that he will engage in sexually violent offenses in the future."[8] In June 2001, the State sought a determination as to whether or not Germane was a sexually violent predator; there was no action taken and Germane remained an unclassified

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consisting of one act of forcible or coerced fellatio and one count of forcible or coerced anal intercourse perpetrated against a twenty-four-year-old self admitted prostitute on May 19, 1998. *Id.* at 562.

3. *Id.* at 563.

4. Six months to serve, nineteen and one-half months suspended, with probation. *Id.*

5. *Germane*, 971 A.2d at 563, (citing R.I. Gen. Laws § 11-37.1-3).

6. *Id.* at 563.

7. *Id.* (citing Section 11-37.1-2(J), as amended by P.L. 1999, ch. 255, §1).

8. *Id.* at 564.

sexual offender.[9]

In November of 2003,[10] Germane was arrested for soliciting twin twenty-five-year old mentally handicapped sisters from a motor vehicle for an indecent purpose in violation of Rhode Island General Laws 1956 §11-34-8.1.[11] Germane admitted to having violated the terms of his probation, and the court continued his prior sentence and the misdemeanor charge with respect to the underlying solicitation was dismissed.[12]

The Superior Court granted the state's motion to remand[13] Germane's case to the board of review in order to reconsider his case in light of the 2003 amendments to the ORCNA.[14] In March 2005, the board of review issued a risk assessment of Germane concluding that, "[Germane] was determined to have two 'individual risk factors' on the STATIC-99[15], which translates to a 'moderate-low' risk of reoffense according to that instrument's scoring key."[16] The board of review, upon consideration of several therapists' professional opinion, determined that Germane was an overall Risk Level III classification at high risk to recidivate.[17] In making this determination the board of review relied upon "[the] criminal record [and] police, institutional, probation/parole, supervision, and treatment information," "[t]he board of review also noted a number of 'characteristics' specific to appellant's case that in its judgment militated in favor of a higher risk assessment that that indicated by the results of the Static-99."[18] The result of this classification was as follows:

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9. *Id.* at 565.

10. The State's petition for the Superior Court to determine whether or not Germane was a sexually violent predator was still pending. *Germane,* 971 A.2d at 565.

11. *Id.*

12. *Id.* at 566.

13. "This remand was authorized by the then newly enacted §11-37.1-20, as amended by P.L. 2003, ch. 162, §2, which provided for the remand of cases pending adjudication of sexually violent predator status; the cases were to be remanded to the Sex Offender Board of Review for risk level determinations under a revised procedure." *Id.* at 566 n.16.

14. *Id.* at 566.

15. "The STATIC-99 is an instrument designed to assist in the prediction of sexual and violent recidivism for sexual offenders." *Id.* at 567 n.18.

16. *Germane,* 971 A.2d at 567.

17. *Id.*

18. *Id.* at 569.

> Sexual offender community notification is currently governed by the guidelines promulgated in 2007 by the Rhode Island Parole Board pursuant to § 11-37.1-12. Section 9.0 of the guidelines directs that local law enforcement shall provide an "offender fact sheet" to any member of the community likely to encounter appellant. Local law enforcement is further required to notify the community of the offender's presence using a variety of other public information resources—including news releases, fliers, and advertisements in local newspapers. As an aggravated offender, appellant will be subject to community notification for life and will be required to register quarterly with local law enforcement officials.[19]

Pursuant to §11-37.1-13, Germane appealed the decision of the board of review to the Superior Court for judicial review of the board's determination. The Superior Court accepted the STATIC-99 over Defendant's objections and in April 2005, the magistrate affirmed the board of review's classification of appellant as a Risk Level II offender, holding that Germane "had failed to prove by a preponderance of the evidence that the risk level classification and proposed manner of community notification were not in compliance with the ORCNA or the relevant guidelines adopted pursuant to said statute."[20]

Germane timely filed appeal from the Superior Court judgment and raised the following issues: (1) his [Germane] classification pursuant to the sex offender registration statute was improper because, in his view, the statute (both on its face and as applied), violates his right to procedural due process, which right is guaranteed by both the United States and Rhode Island Constitutions; (2) as applied to the facts of his case, the statute violates his right to substantive due process; (3) the statute is not compatible with the principle of separation of powers that is set forth in article 5 of the Rhode Island Constitution; (4) that application of the statute to his case constitutes a violation of the state constitutional prohibition against *ex post facto* laws.[21]

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19. *Id.*
20. *Id.* at 572.
21. *Id.* at 560.

ANALYSIS AND HOLDING

Due Process Claims[22]

A. Procedural Due Process

Germane contends that he was given "no process whatsoever: no notice and no hearing" of the proceedings before the board of review and the allocation of the burden of persuasion before the Superior Court deprived him of due process under the law.[23] The Supreme Court of Rhode Island applied the three-part test enunciated in *Matthews v. Eldridge* to be considered in determining whether a procedure violates due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[24]

A member of the minority, Rhode Island relies on a two-tier sex offender registration program, whereby facts other than conviction are used to assess the risk of future dangerousness and this risk level determination then dictates the scope of community notification.[25] The ramifications of being categorized as a Risk Level III offender are widespread dissemination of an offender's personal information within his or her community and notification to the community that a sexual offender has been determined to be currently dangerous and at high risk to reoffend in the future.[26]

In order to determine the private interest affected by the

22. "The guarantee of procedural due process assures that there will be fair and adequate legal proceedings, while substantive due process acts as a bar against 'certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Germane*, 971 A.2d at 574, (citing L.A. Ray Realty v. Town Council of Cumberland, 698 A.2d 202, 210 (R.I. 1997).

23. *Id.* at 574.

24. *Id.* at 575 (citing Matthews v. Eldridge, 424 U.S. 319, 335 (1976)).

25. *Id.* at 575.

26. *Id.* at 576.

government action in the instant matter, the Court separated that information to be disseminated to the community into two classifications: (1) information relating to his prior convictions and his personal information; and (2) information apprising the public of his assessed level of current dangerousness.[27] Without hesitation, and relying on a decision by the Supreme Court of Oregon, the court held that the ORCNA "burdens a protectible liberty interest and therefore triggers the individual's right to procedural due process under both the federal and state constitutions."[28] The Court stated that "Germane must adhere to the registration requirements indefinitely or else face criminal repercussions; as a result, their legal status is permanently altered."[29]

The Court next addressed the nature and scope of the process due. The answer, the Court proffered, lies within the Supreme Court's statement that "an essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case."[30] The thrust of the argument that Germane was erroneously deprived of a protected interest lies within the contention that he was not afforded a hearing prior to his categorization as a dangerous offender, and that the burden of persuasion at the Superior Court level was not placed on the state.[31]

Relying on the statutory language of Title 11 Chapter 37.1, the Court placed significant weight on the fact that even though Germane was not afforded an opportunity to defend his status to the board of review, he was afforded the right to appeal for a judicial determination at the Superior Court level and Germane did in fact exercise this right.[32] As such, this particular case did not offend the procedural due process afforded to a citizen under the Rhode Island or United States Constitution.[33]

Notwithstanding the determination in the instant case, the

27. *Id.* at 577.
28. *Germane,* 971 A.2d at 578.
29. *Id.*
30. *Id.*
31. *Id.* at 579.
32. *Id.*
33. *Id.*

Court took issue and expressly rejected as unconstitutional the judicial discretion permitted under § 11-37.1-15(a)(2).[34] Specifically, the Court held that an offender could be deprived of his Constitutional right of procedural due process in the event that the Superior Court does not permit a full evidentiary hearing.[35] Effectively the Court eliminated any discretion the Superior Court previously had in the determination of the scope of evidence to be presented.[36]

The Court found the burden argument lacking merit as the burden established by § 11-37.1-16 is initially placed on the state and the offender then bears the burden to invalidate by a preponderance of the evidence the method of testing employed.[37]

The Court held that the above mentioned review of a classification, "strikes an appropriate balance between the liberty interests of those required to register as sex offenders and the legitimate social, administrative, and financial interests of the state."[38] Without further ado, the Court put this issue to rest.

B. Substantive Due Process

The first argument put forth by Germane was that Title 11 Chapter 37.1 impermissibly burdens certain fundamental rights that are protected by the due process clauses of the Rhode Island and United States Constitutions; the Court found the aforementioned without merit.[39] The Court held that persons who have been convicted of a sex offense do not have a fundamental right to be free from the notification requirements set forth in the ORCNA, as such Germane had the near impossible burden of proving no rational relationship existed between the statute and some legitimate state interest.[40]

Germane predominantly challenges the ORCNA as arbitrary or capricious due to the state's reliance on the STATIC-99, claiming that by relying on this test the General Assembly essentially "created an irrational form of mandatory

34. *Id.* at 580.
35. *Germane,* 971 A.2d at 580.
36. *Id.*
37. *Id.* at 581.
38. *Id.* at 582.
39. *Id.* at 584.
40. *Germane,* 971 A.2d at 584.

presumption."[41] However, the Court held that this argument lacked merit due to the statutory inclusion of other factors in the consideration of community notification.[42] Additionally, subsequent to a thorough analysis of the specific factual circumstances of the instant matter, the Court reiterated the recommendation to the board of review the importance of transparency and documentation of considered factors in their review process.[43]

Separation of Powers

Germane argued that the General Assembly may not lawfully define what constitutes the prima facie case as they have in § 11-37.1-16(b); specifically, that the General Assembly has intruded by this definition into the judicial fact-finding process.[44] In evaluating the sufficiency of this argument, the Court relied on precedent to direct the analysis to whether there is a "natural and rational relation between the fact proved presumed and the inferential process is not 'purely arbitrary or wholly unreasonable.'"[45]

The Court states that, contrary to the assertion by Germane, the legislatively mandated presumption is "rebuttable due to the judicial determination on the basis of the proof offered by the sexual offender and/or the state."[46] Therefore, the General Assembly has not impeded on the power of the judiciary by merely creating a statutory scheme by which the state shall offer its prima facie case.

The Ex Post Facto Challenge

Lending little deference to the defendant's argument that the ORCNA is in violation of the state constitutional prohibition against ex post facto laws, the Court held that the registration requirement does not constitute criminal punishment and, as

41. *Id.* at 585.
42. *Id.* at 586.
43. *Id.* at 588.
44. *Id.* at 590.
45. *Id.*
46. *Germane*, 971 A.2d at 591.

such, is "simply part of a nonpunitive, civil regulatory scheme."[47]

COMMENTARY

The Court correctly held that the ORCNA did not violate the Constitution of Rhode Island or the United States, as the defendant was afforded considerable hearings taking into account all the evidence in a fair manner. The heinous crimes committed by this defendant clearly warranted community notification.

CONCLUSION

Accordingly, the Court rejected the claims set forth by Germane. The Rhode Island Supreme Court held that Title 11 Chapter 37.1 was not unconstitutional as applied in the instant matter.

Thomas J. Miller

47. *Id.* at 593.

Contract Law. *DeFontes v. Dell, Inc.*, 984 A.2d 1061 (R.I. 2009). A computer purchaser bringing an action against a computer manufacturer for collecting taxes in violation of the Deceptive Trade Practices Act will not be compelled to submit to arbitration where the "shrinkwrap" terms and conditions agreement, which specifies arbitration as a mandatory means of settlement, does not properly inform purchasers of their rights to reject the agreement by returning the goods. Therefore, the purchasers did not accept the terms and agreements, including the arbitration provision, by retaining the goods.

FACTS AND TRAVEL

Mary E. DeFontes purchased a computer manufactured by Dell, Inc. ("Dell"), an international computer manufacturer, through Dell Catalog Sales LP ("Dell Catalog"), a distributor for Dell.[1] DeFontes supplemented her purchase with an optional service contract with BancTec, Inc. ("BancTec"), which acts as a third-party provider, on behalf of Dell, offering service contracts for on-sight computer repairs.[2] Nicholas Long purchased a Dell computer through Dell Marketing LP ("Dell Marketing"), a separate distributor for Dell, along with a an optional service contract through Dell.[3] Julianne Ricci also purchased a computer through Dell Catalog and opted for a service contract with BancTec.[4] All three consumers paid taxes on their service contracts.[5]

In May 2003, DeFontes initiated a class action suit against Dell claiming that Dell violated the Deceptive Trade Practices Act[6] by including a tax on the optional service contract, which

1. DeFontes v. Dell, Inc., 984 A.2d 1061, 1062-63 (R.I. 2009).
2. *Id.*
3. *Id.*
4. *Id.* at 1065 n.8.
5. *Id.* at 1063, 1065 n.8.
6. R.I. GEN. LAWS § 6-13.1-16 (2009) (Disclosure of service contract agreements). Section 6-13.1-16 provides in part:

(a) It shall be a deceptive trade practice in violation of this chapter

DeFontes claimed is not taxable in Rhode Island.[7] In July 2003, Long joined the suit as a plaintiff and the complaint was amended to include Dell Catalog, Dell Marketing, QualxServ, LLC ("QualxServ") and BancTec as defendants.[8] At a subsequent hearing, Defendants moved to stay proceedings and compel arbitration in accordance with an arbitration provision in the purported contract.[9] The defendants argued that Plaintiffs accepted the "Terms and Conditions Agreement," which included the arbitration provision, by accepting delivery of the goods.[10] Further, Defendants alleged that they made the agreement available to Plaintiffs in three separate forums: (1) the website; (2) the invoice acknowledging receipt of the order; and (3) the terms included in the box with the product.[11]

In January 2004, the hearing judge issued an opinion, finding that the three opportunities the purchasers had to review the terms and conditions agreement were inadequate, and as a result, did not establish a contract between the parties.[12] First, the hearing judge found that the terms on the website were too "inconspicuous" to provide adequate notice.[13] Next, he noted that "shrinkwrap" agreements are generally acceptable to put consumers on inquiry notice, but that shrinkwrap agreements usually provide an express disclaimer that informs consumers that returning the products acts as a rejection of the terms and conditions agreement.[14] The hearing judge stated the "crucial

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for any service contractor to fail to disclose to any person who is a prospective customer, at the time the person makes initial contact by any means with the service contractor, that a service call made by the service contractor to the home or business of the prospective customer will require the payment by the customer of separate and distinct fees for the following:

(1) Service charge . . . .

7. *DeFontes*, 984 A.2d at 1062.

8. *Id.*

9. *Id.* at 1063. The arbitration clause in DeFontes' "Terms and Conditions Agreement" that was included with her purchase, which is almost identical to Long's agreement, stated, "Any claim dispute, or controversy . . . against Dell[] [or its subsidiaries] . . . shall be resolved exclusively and finally by binding arbitration . . . ." *Id.* at n.2.

10. *Id.* at 1063.

11. *Id.*

12. *Id.*

13. *Defontes*, 984 A.2d at 1063.

14. *Id.* at 1064. "A 'shrinkwrap agreement' refers to the common

test" for determining the adequacy of the notice: "whether a reasonable person would have known that return of the product would serve as rejection of those terms."[15] The hearing judge found that the language in the terms and conditions agreement was insufficient to satisfy the reasonable person test, and in the absence of an express disclaimer, Defendants could not demonstrate that the purchasers assented to the terms and conditions agreement.[16] Accordingly, the hearing judge found that Defendants could not compel Plaintiffs to enter arbitration.[17]

In March 2004, the Superior Court entered a final judgment denying Defendants' motions to stay proceedings and to compel arbitration.[18] Defendants subsequently appealed, at which time the two motions were consolidated.[19] In June 2005, "plaintiffs filed an assented to motion to substitute a proposed class representative that replaced Ms. DeFontes with Julianne Ricci" after learning that Plaintiffs' counsel employed DeFontes.[20]

ANALYSIS & HOLDING

On appeal, the Rhode Island Supreme Court determined that a trial court's denial of a motion to compel arbitration is a question of law, and as such, the appropriate standard of review is

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commercial practice of including additional terms and conditions either on the outside of a package or within it when it is shipped to the consumer. " *Id.* at n.5.

15. *Id.* at 1064 (internal quotation marks omitted).

16. *Id.* The terms and conditions agreement read, in part: "By accepting delivery of the computer systems, related products, and/or services and support, and/or other products described on that invoice. [*sic*] You ('Customer') agrees [*sic*] to be bound by and accepts [*sic*] these terms and conditions . . . ." *Id.* (alterations in original). The hearing judge combined the terms and conditions agreements sent to DeFontes and Long, which contained different language. *Id.* at n.6. In particular, DeFontes' agreement did contain an express disclaimer. *Id.* Furthermore, the hearing judge did not distinguish between the invoice and the shrinkwrap agreement, but this issue was not addressed on appeal because Defendants failed to properly preserve it at the hearing.

17. *Id.* at 1065.

18. *Id.*

19. *Defontes*, 984 A.2d at 1065.

20. *Id.* at 1065. While this appeal was pending, the Superior Court addressed other issues, which were ultimately appealed to the Rhode Island Supreme Court. *Id.* at n.9; *see* Long v. Dell, No. 2007-346-M.P., 2009 WL 4791198 (R.I. Dec. 14, 2009).

de novo.[21] In reaching this conclusion, the Court adopted the United State Supreme Court's finding that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit."[22] Further, state contract law governs whether the parties entered into an agreement to arbitrate any disputes arising from the transaction.[23] Accordingly, the hearing judge's determination is a question of law subject to *de novo* review.[24]

The Choice-of-Law Provision

After determining the appropriate standard of review, the Court addressed the applicable law governing the formation of the purported agreement.[25] Dell manufactured and distributed its products in Texas, while the plaintiffs lived in Rhode Island.[26] The terms and conditions agreement contained a choice-of-law provision that stipulates that Texas law governs any disputes arising from the transaction.[27] As such, "parties are [generally] permitted to agree that the law of a particular jurisdiction will govern their transaction."[28] That being said, Rhode Island's procedural laws govern even if another state's substantive law governs.[29]

Here, Plaintiffs conceded that the choice-of-law is of no consequence because both Texas and Rhode Island adopted the Uniform Commercial Code ("U.C.C."), which shifts the burden to "the proponent of arbitration to prove the existence of a written agreement to arbitrate . . . ."[30] Accordingly, the Court "assumes"

21. *DeFontes*, 984 A.2d at 1066.
22. *Id.* (quoting Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002)).
23. *Id.*
24. *Id.* (quoting Stanley-Bostitch, Inc. v. Regenerative Envtl. Equip. Co., 697 A.2d 323, 325 (R.I. 1997)).
25. *Id.*
26. *Id.* at 1062.
27. *DeFontes*, 984 A.2d at 1066.
28. *Id.* (quoting Terrace Group v. Vt. Castings, Inc., 753 A.2d 350, 353 (R.I. 2000)).
29. *Id.* at 1067 (citing McBurney v. The GM Card, 869 A.2d 586, 589 (R.I. 2005)).
30. *Id.* (internal quotation marks omitted).

that Texas law governs the transaction.[31]

Formation of a Contract under the U.C.C.

The Court then analyzed the relevant provisions of the U.C.C. to determine if and when the contract between the parties was formed. U.C.C. § 2-204 provides that "the sale of goods may be formed 'in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.'"[32] Moreover, "[t]he U.C.C. creates the assumption that, unless circumstances unambiguously demonstrate otherwise, the buyer is the offeror and the seller is the offeree."[33] Further, a seller accepts a buyer's offer "by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods . . . ."[34]

The plaintiffs argued that the contract formed upon the consumers' payment for the goods and Dell's promise to ship the goods.[35] If this argument stands, "then any additional terms would necessarily be treated as '[a]dditional [t]erms in [a]cceptance or [c]onfirmation' under U.C.C. § 2-207 or offers to modify the existing contract under U.C.C. § 2-209."[36] However, the prevailing view is that the buyer retains the power of acceptance after the buyer receives the goods containing the modified agreement, so long as the buyer retains the power to either accept or return the goods.[37]

In reaching its conclusion, the Court discusses the two prevailing views regarding shrinkwrap agreements. The defendants urged the Court to adopt the majority view, initially proposed in *ProCD, Inc. v. Zeidenberg*[38] by Judge Frank Easterbrook.[39] In *ProCD*, the court held that "a buyer of software was bound by an agreement that was included within the packaging and later appeared when the buyer first used the

31. *Id.*
32. *Id.* (quoting TEX. BUS. & COM. CODE ANN. § 2.204 (Vernon 1994)).
33. *DeFontes*, 984 A2d at 1067.
34. *Id.* (quoting § 2.206) (omission in original).
35. *Id.* at 1067-68.
36. *Id.* at 1068 (alterations in original) (footnote omitted).
37. *Id.*
38. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452-53 (7th Cir. 1996).
39. *DeFontes*, 984 A.2d at 1068, 1069.

software."[40] The court went even further in *Hill v. Gateway 2000, Inc.*[41]:

> [W]hen a merchant delivers a product that includes additional terms and conditions, but *expressly* provides the consumer the right to either accept those terms of return the product for a refund within a reasonable time, a consumer who retains the goods beyond that period may be bound by the contract.[42]

Other jurisdictions hearing similar suits against Dell have accepted the majority view.[43]

The plaintiffs, on the other hand, urged the Court to adopt the minority view, proposed in *Step-Saver Data Systems, Inc. v. Wyse Technology*.[44] In *Step-Saver Data Systems*, the court held that the buyer did not consent to additional or modified terms included with the product by accepting the product.[45] Instead, the buyer must have expressly assented to the modified terms.[46]

After addressing both views, the Court adopted the majority view and rejected Plaintiffs' argument regarding the formation of the contract.[47] Accordingly, "formation occurs when the consumer accepts the full terms after receiving a reasonable opportunity to refuse them."[48] However, the burden shifts to the seller to establish that the buyer has accepted the seller's terms upon receipt of the product.[49]

Application to the Facts of DeFontes

The Court addressed two issues. First, whether Dell and its subsidiaries clearly established in the terms and conditions

40. *Id.* at 1968 (citing *ProCD*, 86 F.3d at 1452-53) (footnote omitted).
41. Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148-49 (7th Cir. 1997).
42. *DeFontes*, 984 A.2d at 1068 (citing *Hill*, 105 F.3d at 1148-49) (emphasis added).
43. *Id.* at 1069.
44. *Id.* at 1070; Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91, 98 (3d Cir. 1991).
45. *Defontes*, 984 A.2d at 1070 (citing *Step-Saver Data Systems*, 939 F.2d at 99).
46. *Id.* (citing *Step-Saver Data Systems*, 939 F.2d at 100).
47. *Id.* at 1071.
48. *Id.*
49. *Id.*

agreement that the buyers could reject the terms and conditions by returning the computers.[50] Second, whether the sellers "reasonably invited acceptance" by clearly establishing in the terms and conditions agreement that the purchasers were assenting to the terms and conditions contained in the packages, including the arbitration agreement, by accepting the computers.[51]

Regarding the first issue, the terms and conditions agreement sent to DeFontes contained language that explicitly notified her of the appropriate means of rejecting the agreement.[52] Despite some ambiguity in the language, the terms and conditions agreement in DeFontes' package was probably adequate because it established that DeFontes could reject the terms by returning the product.[53] However, the Court did not make a determination as to the adequacy of the language because DeFontes was no longer a party to the suit.[54]

The agreements sent to the remaining Plaintiffs, Long and Ricci, did not contain the provisions contained in DeFontes' documents, and thus failed to adequately articulate that the consumers could reject the agreements by returning the computers.[55] Further, the terms and conditions agreements were very confusing and problematic. The consumer was forced to piece together two separate provisions, which, when read together, still did not adequately explain to the reasonable consumer that he or she may reject the terms by returning the computer.[56] The Court found that the agreement was too obscure and required the consumer to draw too many inferences.[57] Accordingly, the Court held that the shrinkwrap terms and conditions agreement did not adequately inform the consumers of either (1) their right to reject

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50. *Id.*

51. *Defontes*, 984 A.2d at 1071.

52. *Id.* at 1072. The agreement stated, "[i]f for any reason Customer is not satisfied with a Dell-branded hardware system, Customer may return the system under the terms and conditions of Dell's Total Satisfaction Return Policy . . . ." *Id.* (alterations and omissions in original).

53. *Id.*

54. *Id.* at n.16. The Court addressed DeFontes' agreement for the sole purpose of illustrating the deficiencies in the agreements sent to the other plaintiffs.

55. *Id.* at 1073.

56. *Id.*

57. *Defontes*, 984 A.2d at 1073.

the terms and agreements condition by returning the computers or (2) of the appropriate method of rejection of the agreements.[58]

In regard to the second issue, the language in the terms and conditions agreement put the purchasers on notice of Defendants' intent to bind them to the agreement, but the agreement did not dictate to the purchasers the length of time they had to accept the terms.[59] Defendants argued that a reasonable consumer would be familiar with the phrase "accepting delivery."[60] The Court disagreed. The phrase "acceptance of goods" has a legal connotation that a reasonable consumer would not understand.[61] To address this issue, the Court noted that many jurisdictions require the seller to explicitly state the length of time a consumer can retain a product before assenting by silence.[62] Here, the Court found that "a reasonably prudent offeree would [not] understand that by keeping the Dell computer he or she was agreeing to be bound by the terms and conditions agreement . . . ."[63] Thus, the Court held that the consumers did not agree to the shrinkwrap terms and conditions agreement, including the arbitration provision, by accepting the computers.[64]

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58. *Id.*

59. *Id.* at 1071.

60. *Id.*

61. *Id.* at 1072. As defined by statute, "[a]cceptance of goods occurs when the buyer":

> (1) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or
>
> (2) fails to make an effective rejection . . . , but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
>
> (3) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

Id. at n.15 (quoting TEX. BUS. & COM. CODE ANN. § 2.606(a) (Vernon 1994)).

62. *Id.* at 1071. These terms are referred to as "approve-or-return" agreements. *Id.*

63. *Defontes*, 984 A.2d at 1073.

64. *Id.*

COMMENTARY

The Rhode Island Supreme Court addressed the issue of which party has the power of acceptance in a case involving the shipment of goods containing an agreement stipulating additional terms. Courts throughout the country are divided as to these agreements, commonly referred to as "shrinkwrap" agreements, and the drafters of the Uniform Commercial Code has similarly failed to take a stand, instead deferring to the courts.[65] Here, the Court found that the buyer possesses the power of acceptance, but the burden lies with the seller to show that the buyer has accepted the terms by retaining the product. This burden entails providing clear and unambiguous terms and conditions that inform the buyer on his or her ability to accept or reject the terms and conditions agreement and the proper method by which to reject the agreement.

However, the Court left two questions unanswered. First, the Court determined that the buyer accepts the terms after having a "reasonable opportunity" to refuse them.[66] However, the Court did not address how much time constitutes a "reasonable opportunity." Instead, the Court referenced other jurisdictions that provide thirty days after the date of delivery.[67] Having adopted these courts' holdings regarding which party possesses the power of acceptance, the Court should have held that a buyer assents to the terms contained in a shrinkwrap agreement after retaining the product for thirty days after delivery. In the absence of such a holding, the Court will have to resolve this issue in the future.

Further, the Court found that the seller caries the burden of proving that the buyer accepts the full terms and conditions of the agreement. Unfortunately, the Court failed to articulate what the seller must show to demonstrate acceptance. The Court did, however, indicate that the seller must provide clear, explicit and unambiguous terms. Even so, the issues will likely arise again, and the Court will have to set some standard defining the seller's burden.

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65. *Id.* at 1071 n. 13; *see* U.C.C. § 2-207, Comment 5 (2003).
66. *DeFontes*, 984 A.2d at 1071.
67. *Id.*

CONCLUSION

The Rhode Island Supreme Court found that a contract is formed when a buyer accepts the full terms and conditions of a shrinkwrap agreement after having a "reasonable opportunity" to refuse them.[68] The Court also found that the seller carries the burden of proving that the buyer has accepted the seller's terms upon receipt of the product.[69] Here, the seller did not enter into an agreement with the buyers because the terms and conditions agreement did not provide adequate notice to the buyers that the buyers could refuse the terms and conditions by returning the product.[70] Further, the sellers did not enter into a valid contract because they did not adequately inform the buyers that by retaining the product, the buyer assents to the terms and conditions of the agreement.[71] Therefore, the Supreme Court affirmed the hearing judge's decision denying Defendant's motion to compel arbitration, and subsequently remanded the case to the Superior Court.[72]

Greg Rosenfeld

68. *Id.*
69. *Id.*
70. *Id.* at 1073.
71. *Id.*
72. *DeFontes*, 984 A.2d at 1073.

Contract Law. *Shappy v. Downcity Partners, Ltd.*, 973 A.2d 40 (R.I. 2009). The Rhode Island Supreme Court decided that as a matter of law, Plaintiff was negligent in signing a quitclaim deed without reading it first. The deed conveyed Plaintiff's property to his son-in-law, who defaulted on a mortgage loan for that property resulting in a foreclosure sale. Plaintiff claimed that he was fraudulently induced into signing the deed. The Court rejected his claim reasoning that, even if Plaintiff was fraudulently induced into signing the deed, his negligence bars recovery and protects the bona fide purchaser.

FACTS AND TRAVEL

On December 9, 2005, plaintiff Shappy sought pre-approval for a mortgage loan on a property he desired to purchase through his son-in-law, Cataldo, who was a mortgage broker.[1] During their discussions, Cataldo informed Shappy that he may be required to relinquish another property that he already owned as collateral to secure pre-approval for the loan and that this security measure was simply a fall-back, "only if we need it," measure.[2] Relying on Cataldo's representation, Shappy signed a document conveying his Johnston property, 87 Benfield Drive, to Cataldo.[3] Shappy admits that out of trust in his son-in-law he disregarded the fact that the document was entitled "Quit-Claim Deed" and contained a notary clause, deciding not to bother reading it thoroughly.[4]

On January 24, 2006, after supposedly taking advantage of his father-in-law, Cataldo recorded his quitclaim deed for 87 Benfield Drive, and entered into a term mortgage loan with Downcity, in which he borrowed $110,000, and executed a promissory note that the property served to secure; the loan was

1. Shappy v. Downcity Capital Partners, Ltd., 973 A.2d 40, 41 (R.I. 2009).
2. *See id.* at 42.
3. *Id.* at 41-42.
4. *Id.* at 42.

to be satisfied by a single payment on February 1, 2007.[5] Cataldo defaulted on his promissory note with Downcity and decided to grant a second mortgage on the property to RESOL, LLC to secure an additional $50,000 loan.[6] It is undisputed that both Downcity and RESOL relied on the validity of Cataldo's recorded quitclaim deed, and neither of them had knowledge of Shappy's belief that he did not convey property to Cataldo.[7] Downcity then scheduled a foreclosure sale for June 20, 2007 as a result of Cataldo's default.[8]

Shappy learned of the foreclosure and commenced an action against Cataldo and Downcity on June 15, 2007 asserting that Cataldo fraudulently induced him into signing the quitclaim deed; as a result, he sought to enjoin Downcity's pending foreclosure sale, requested that the court vacate and declare the quitclaim deed and the mortgage deed void, and requested punitive damages for Cataldo's "malicious conduct."[9] With its answer to Shappy's complaint, Downcity filed a cross-claim against Cataldo for the amount owed under the mortgage loan.[10] The Superior Court granted RESOL's motion to intervene, and RESOL filed an answer and a cross-claim against Cataldo for the amount that he owed under the second mortgage that the property secured.[11] On January 15, 2008, Downcity filed a motion for summary judgment of Shappy's claims against it as well as its cross-claim against Cataldo, pursuant to Rule 56 of the Superior Court Rules of Civil Procedure.[12] Plaintiff filed an objection to Downcity's motion with supporting documents claiming that he believed that his signature on the quitclaim deed was a formality of the process to secure a loan for the property that he had agreed to purchase.[13]

On March 3, 2008, the Superior Court held a hearing on Downcity's motion for summary judgment.[14] At the hearing, Plaintiff relied on *Dante State Bank v. Calenda,* 183 A. 873 (R.I.

5. *Id.* at 42 n.2.
6. *Id.* at 42.
7. *See Shappy,* 973 A.2d at 42.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Shappy,* 973 A.2d at 42.
14. *Id.* at 43.

1936), in which the Rhode Island Supreme Court held that "even a bona fide purchaser may not enforce its rights under an instrument if the signer, who was fraudulently induced into signing the instrument, was free of negligence."[15] Plaintiff argued that Downcity's motion for summary judgment should not have been granted because whether he was negligent is a question of fact to be decided by a jury.[16] Downcity and RESOL agreed that Cataldo fraudulently induced Shappy to sign the deed; however, they believed that Shappy was negligent as a matter of law when he failed to read[17] the deed before signing it.[18]

The Providence County Superior Court Judge granted Downcity's motion on its cross-claim against Cataldo for money owed under the loan.[19] Further, the judge ruled that Downcity and RESOL were bona fide purchasers and that Shappy's actions of signing the conveyance led to their decision to "extend the financial accommodations they did to Mr. Cataldo in exchange for his promissory notes and the security received by them."[20] The Superior Court granted summary judgment in favor of Downcity and RESOL, with a final judgment entered for Downcity on March 4, 2008, and for RESOL on March 11, 2008.[21] Plaintiff timely appealed.[22]

ANALYSIS AND HOLDING

On review *de novo*, the Court emphasized the need to protect the interest of bona fide purchasers who innocently rely on recorded deeds; the Court defined bona fide purchaser to mean the following: a "purchaser for value, in good faith, and without any knowledge of adverse claims."[23] The law will protect the bona fide purchaser allowing him to enforce the instrument provided that

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15. *Id.*
16. *Id.*
17. At one point Plaintiff argued that the deed did not contain terms of conveyance, contradicting his earlier statements that he failed to completely read the document. *See id.* at 42-43.
18. *Id.* at 43.
19. *Shappy*, 973 A.2d at 43.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 44 (citing Fleckhamer v. Fleckhamer, 147 A. 886, 888 (R.I. 1929)).

there was negligence on the part of the signing party.[24] Plaintiff's argument that his negligence should be an issue for the jury is incorrect because where the facts of the case lead to only one reasonable conclusion, the trial judge may decide the issue as a matter of law.[25] The Court reasoned that unlike the signer in *Dante State Bank,* Shappy reads and understands English, and he admittedly had enough time to read the conveyance but chose not to before signing,[26] and therefore he agreed to the terms set forth in the document.[27] Failing to read a document before signing it does not relieve one of its obligations, and no reasonable person would have signed this document without reading it first; therefore, Plaintiff was negligent as a matter of law and is thus barred from interrupting bona fide purchasers' (in this case Downcity and RESOL) enforcement of the deed and decision to foreclose.[28]

COMMENTARY

The Rhode Island Supreme Court is making a statement that parties to agreements cannot hide behind the fraud protection when they had the means to avoid the fraud. In this case, Plaintiff was negligent in not fully reading or considering the terms of which he obligated himself. If the Court had allowed Plaintiff to hide behind the fraud protection, it could discourage third parties from entering into contracts for fear that their agreements would be void should any party by chance be ill-informed. It is a relief that the Courts will protect bona fide purchasers by holding parties accountable for actions under their own control.

CONCLUSION

In *Shappy v. Downcity Captial Partners, Ltd.,* the Rhode Island Supreme Court affirmed the Providence County Superior

24. *Id.* at 45 (citing *Dante State Bank*, 183 A. at 880).

25. *Shappy,* 973 A.2d at 45. (quoting Kennedy v. Providence Hockey Club, Inc., 376 A.2d 329, 333 (1977)).

26. Plaintiff testified during deposition that he had time to read the document, "' but [he] didn't see no [sic] reason.'" *Id.* at 46 n.7.

27. *Id.* (quoting Carter v. Carter, 291 S.E.2d 218, 221 (Va. 1982)).

28. *See id.* at 46.

Court's decision to grant defendants Downcity and RESOL's motion for summary judgment. Plaintiff claimed that Downcity should not be able to collect on the mortgage for, or participate in a foreclosure sale of, property in which he claimed was fraudulently conveyed to defendant Cataldo who then secured mortgages with Downcity and RESOL. The Court held that Plaintiff was negligent as a matter of law when signing a quitclaim deed for his property, and therefore it was necessary to protect Downcity and RESOL, the bona fide purchasers of the deed per Cataldo's default on mortgage payments.

Jennifer L. Aybar

Criminal Law/Procedure. *State v. Byrne*, 972 A.2d 633 (R.I. 2009). The Rhode Island Supreme Court reversed a Superior Court decision suppressing evidence recovered from a suspect's home due to the failure of the police in their search warrant to support a reasonable inference that criminal evidence stemming from an incident at a defendant's place of business would be found at his home. Writing for a unanimous Supreme Court, then-acting Chief Justice Goldberg vacated and remanded the Superior Court ruling, holding that the search warrant and the reasonable inference that a digital camera could easily be transported from a suspect's business to his home established a sufficient nexus between the items sought and the location to be searched to uphold the warrant.

FACTS AND TRAVEL

On September 17, 2005, Roxanne and Simon Smith and their ten-year old daughter, Barbara, visited the Off-Center Coffee House in Warren.[1] Defendant Thomas Byrne, the proprietor of the coffee shop, was an acquaintance of the Smith family, and Barbara asked to stay at the coffee shop to help out when Mr. and Mrs. Smith were ready to leave.[2]

After Mr. and Mrs. Smith left the coffee shop, Byrne allegedly asked Barbara if she wanted to see the "museum" he maintained downstairs.[3] Upon their arrival downstairs, Byrne asked Barbara, who was wearing a mini-skirt, to kneel down beside his dog so he could take a picture; he asked that she lift her knees into a crouching position.[4] After snapping the picture, Barbara stood up and Byrne dropped down to one knee, and zoomed his camera in on the area below Barbara's stomach.[5]

1. State v. Byrne, 972 A.2d 633, 635-36 (R.I. 2009). A footnote to the Court's opinion notes that fictitious names are used to afford this family a measure of privacy.
2. *Id.* at 636.
3. *Id.*
4. *Id.*
5. *Id.*

After leaving the basement and walking upstairs, Byrne asked Barbara to clean lamps that were hanging from the ceiling.[6] After climbing on top of a table to better reach the lamps, Barbara saw Byrne's reflection in a mirror on a nearby wall and realized that he was aiming his camera lens underneath her skirt.[7] Barbara's parents became aware of these incidents later that day, after Barbara became distraught while preparing for a ride to Boston.[8]

Barbara and her mother submitted written statements detailing these allegations to Detective Joel Camera of the Warren Police Department, who then included the allegations in an affidavit in support of a warrant to search the Off-Center Coffee House as well as Byrne's Barrington residence.[9] Detective Camera asked the District Court for permission to search those locations "and seize any and all camera(s), computer(s), lap tops [sic], electronic and digital data storage devices such as disk drives, floppy disks, CD's, DVD's, etc. as well as contraband or evidence of criminal activity."[10] The search warrant was granted on September 20, 2005, and upon its execution the Warren and Barrington Police Departments found two cameras - one of which was digital - in Byrne's bedroom.[11] These items were seized; police were able to recover approximately one hundred digital photographs from Byrne's camera, including photographs of Barbara kneeling beside Byrne's dog and photographs of underwear matching the pair Barbara wore on the day she stayed

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6. *Id.*
7. *Byrne*, 972 A.2d at 636.
8. *Id.*
9. *Id.*
10. State of Rhode Island v. Byrne, No. P2-05-3432A, P2-05-3433A, 1, 9 n.2 (R.I. Super.Ct. filed Nov. 5, 2007) (Westlaw). Footnote 2. The footnote includes the final paragraph of Det. Camera's affidavit in its entirety: "Therefore, I respectfully request that the court issue a warrant to search the Off Center Coffee House on 30 Child Street, Warren Rhode Island, 02885 and Thomas P. Byrne's residence located at 93 Walnut Road[,] Barrington[,] Rhode Island, 02806 and seize any and all camera(s), computer(s), lap tops [sic], electronic and digital data storage devices such as zip drives, floppy disks, CD's, DVD's, etc. [sic] [a]s well as contraband or evidence of criminal activity."
11. *Byrne*, 972 A.2d at 636. Police also seized a clear plastic bag of marijuana, $567 in cash, a scale that police concluded was used to weigh marijuana, and a potted marijuana plant found on the back deck of Byrne's residence.

at Byrne's coffee shop.[12] Byrne was subsequently charged with violating R.I.G.L. 1956 § 11-64-2, a felony, by "using an imaging device to capture images of the intimate area of a ten year-old girl without her knowledge or consent."[13]

Byrne moved to suppress the evidence found at his home; Superior Court Judge Daniel A. Procaccini granted the motion, holding that the warrant to search Byrne's home lacked any facts to support a reasonable inference that contraband or evidence of a crime would be found at Byrne's home.[14] Judge Procaccini concluded that Det. Camera's affidavit failed to establish a nexus between the items to be seized - cameras and photographs - and the location to be searched.[15] The state appealed Judge Procaccini's decision to the Rhode Island Supreme Court.

ANALYSIS

On appeal, the issue before the Supreme Court was whether Det. Camera's affidavit supplied the District Court with enough information to draw a reasonable inference of probable cause to search Byrne's home for photographs taken at his business.[16] The state argued that the warrant did provide probable cause due to the "fairly probable" inference that Byrne would take the camera containing the images to his home.[17] After noting that probable cause must be found within the four corners of the affidavit prepared in support of a search warrant[18] and that the affidavit should be interpreted in a realistic fashion consistent with common sense[19], the Court declared "it is our view that a reasonable inference could be drawn from the facts that the camera - the instrumentality of the crime and a handheld, easily transportable item of personal property - could be found" at Byrne's home.[20]

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12. *Id.*
13. *Id.* at 637. Byrne was also charged with unlawfully cultivating and possessing marijuana.
14. State of Rhode Island v. Byrne, No. P2-05-3432A, P2-05-3433A at 11.
15. *Byrne*, 972 A.2d at 637.
16. *See id.* at 639.
17. *Id.*
18. *Id.* at 638.
19. *Id.*
20. *Id.* at 640.

To support its holding, the Court first looked to Massachusetts, and the Supreme Judicial Court's decision in *Commonwealth v. Anthony*.[21] In *Anthony*, the Supreme Judicial Court held that the necessary nexus between criminal activity and the location to be searched need not be based on direct observation, but can be found "in the type of crime, the nature of the items sought, the extent of the suspect's opportunity for concealment and normal inferences as to where a criminal would be likely to hide [the items sought]."[22]

The Rhode Island Supreme Court then reasons that the facts and circumstances of this case compel an analysis under the *Anthony* holding. When seeking to define the type of crime Byrne is alleged to have committed, the Court "cannot escape" the similarities between photographing the undergarments of a ten-year old girl and possessing and viewing child pornography, which "is, by it's nature, a solitary and secretive crime."[23] The Court also concludes that a camera - usually a "small, easily transportable item of personal property"[24] - by its nature supports an inference that it might be found Byrne's home.[25] The Court also notes the lack of evidence to indicate that the camera found at Byrne's home was work related or in any way connected to his operation of the coffee house.[26]

The Court also dismisses Byrne's contention that Det. Camera's affidavit did not contain any underlying facts from which an inference that a camera would be found at his home could be drawn, holding that "because a judicial officer may draw reasonable inferences from the nature of the crime alleged in the affidavit and the instrumentality used in it's commission, we are satisfied that the affidavit in this case provided an adequate basis for the District Court judge's finding of probable cause."[27] The Court further supports its holding by stating that a judicial officer's decision to issue a search warrant "is to be accorded great

21. *Byrne*, 927 A.2d at 640; Commonwealth v. Anthony, 451 Mass. 59, 883 N.E.2d 918, 926. (2008).
22. *Byrne*, 972 A.2d at 640.
23. *Id.* at 640-41.
24. *Id.* at 641.
25. *Id.*
26. *Id.*
27. *Id.* at 642.

deference by reviewing courts, and in close cases, the validity of the warrant should be upheld."[28]

COMMENTARY

The Rhode Island Supreme Court's decision here creates a significant expansion of police authority and shows clear deference to police authorities over criminal defendants. Because the Court upheld the validity of a search where the warrant did not articulate any reasonable belief that the items sought in connection with an alleged incident his holding substantially lowers the "substantial basis" test undertaken by an issuing judicial officer.

There are other aspects of this opinion that compel comment. It is noteworthy that the Court could not justify its end here by looking to existing Rhode Island case law. It found a suitable precedent by looking to its "learned colleagues"[29] on the Massachusetts Supreme Judicial Court. Even after looking to other states for applicable case law, the Court still has to twist the facts to fit the law it has chosen. Despite admitting that the photographic images taken by Byrne "may not rise to the level of child pornography"[30] the Court still treats them as exactly that to allow for a neater analysis under *Anthony*.[31] It does not minimize or condone Byrne's alleged conduct to acknowledge - as the Court does - that it is not child pornography. The Court's eagerness to ignore this distinction when applying the law of its choice is disturbing.

Judge Procaccini's Superior Court ruling noted that "a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."[32] Despite considerable effort to bring the facts before it

28. *Byrne*, 927 A.2d at 642.
29. *Id.* at 640.
30. *Id.*
31. *Id.* at 641. The Court, quoting United States v. Lamb, 945 F.Supp. 441, 460 (N.D.N.Y.1996), mentions the "imprimatur of severe social stigma" carried by images of child pornography, as well as the likelihood that "persons interested in those materials" would hoard them in their homes, when supporting its holding that the images allegedly taken by Byrne, by their nature, create the requisite nexus to search a home.
32. State of Rhode Island v. Byrne, No. P2-05-3432A, P2-05-3433A at 5.

in line with its chosen doctrine, the Supreme Court here chose to "change the character" of this search and put itself in the business of augmenting deficient affidavits on behalf of the police. If followed, this decision will make it more difficult for Rhode Island citizens to assert their Fourth Amendment right against unreasonable searches and seizures; instead of simply holding that reasonable inferences should be articulated in a supporting affidavit when a search warrant is sought, the Court has proclaimed itself able to find reasonable inferences - and probable cause - between the lines of a supporting affidavit where, and whenever, it wants too.

CONCLUSION

Justice Goldberg concludes the Court's opinion thusly: "We hold that, based on the nature of the alleged offense and the instrumentality used in its commission, the District Court judge who issued the warrant had a substantial basis to find that there was probable cause to believe that the defendant would conceal the illicit images in his home."[33] The Supreme Court vacated the Superior Court order and remanded the case.[34]

David Leveillee

(quoting United States v. Di Re, 332 U.S. 581, 595 (1948)).

33. *Byrne*, 972 A.2d at 641.

34. *Id.* at 643

Criminal Law/Procedure. *State v. Cardona*, 969 A.2d 667 (R.I. 2009). According to Rule 801(d)(1)(A) of the Rhode Island Rules of Evidence, admission of prior inconsistent statements are allowed as substantive evidence so long as the party declaring it is available for cross-examination and testifies at trial. The Rhode Island Supreme Court determined that a prior inconsistent statement may be sufficient, and the judge will allow it to go to the jury, to support a criminal conviction. So long as there is credible and substantive evidence in addition to the prior inconsistent statement, the jury will determine if it satisfies the burden of proof beyond a reasonable doubt.

FACTS AND TRAVEL

Appellant Gerardo Cardona was arrested and charged with two counts of domestic assault against his wife, Catherine Cardona, and her son Bernard Baton.[1] When officers arrived at the scene, Catherine told them she had witnessed her husband beat her son, alleged that he had also harassed her as she tried to call the police, and signed a witness statement confirming those allegations.[2] Appellant was also issued a no-contact order prohibiting him from having any contact with Bernard or Catherine.[3] However, at trial Catherine changed her testimony to say that it appeared as if her husband and son were in an altercation, refused to look at the witness statement she signed, and claimed that she only asked about a restraining order because she had been fighting with Appellant over an old girlfriend.[4] Testimony by two patrolmen on the scene, Officer Craig Young and Officer Sean Clarke, confirmed the initial statements that Catherine made, as well as the fact that she signed the witness statement.[5]

Appellant moved for judgment of acquittal for assault against

1. State v. Cardona, 969 A.2d 667, 670 (R.I. 2009).
2. *Id.*
3. *Id.*
4. *Id.* at 671.
5. *Id.*

Catherine at the close of the state's case, and the motion was denied.[6] The jury convicted the appellant of domestic assault on and domestic battery on both Catherine and Bernard.[7] Appellant then moved for a new trial, arguing that Catherine's prior inconsistent statement was insufficient evidence to support the criminal conviction, and the trial judge denied his motion.[8]

On appeal to the Rhode Island Supreme Court, Appellant claims that the trial judge erred by denying his motion for judgment of acquittal and his motion for a new trial because the verdict was only supported by Catherine's prior inconsistent statement, which he argued was insufficient evidence as a matter of law.[9]

ANALYSIS AND HOLDING

In regards to Appellant's three arguments on appeal, the Rhode Island Supreme Court held that: (1) trial testimony supported Catherine's prior inconsistent statement sufficiently to support Appellant's convictions,[10] (2) the jury instructions adequately explained the standard of beyond a reasonable doubt,[11] and (3) even though the criminal information only specifically mentioned assault, the Court did not err when it instructed the jury on both assault and battery.[12]

When a defendant's motion challenges sufficiency of evidence, the Court must look at the evidence in light of the jury charge, "independently assess the credibility of the witnesses and the weight of the evidence," and then determine if he or she would have reached a different result than the jury did.[13] Furthermore,

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6. *Id.*

7. *Cardona,* 969 A.2d at 671.

8. *Id.* at 671-72. The Court sentenced him to five years in the Adult Correctional Institution, one year to serve on each count to run concurrently, the balance suspended, with probation, and the petitioner appealed. *Id.* at 672.

9. *Id.* The appellant also made two other arguments, claiming that the trial judge mistakenly failed to include a jury instruction that suspicion alone is insufficient to support a finding of guilt beyond a reasonable doubt, and that his criminal information only charged him with assault and so the trial judge erred in instructing the jury on assault and battery. *Id.*

10. *Id.* at 674.

11. *Id.* at 675.

12. *Id.* at 676.

13. *Cardona,* 969 A.2d at 672 (citing State v. Morales, 895 A.2d 114, 121

the Court will only overrule a previous ruling if it seems the trial judge committed a clear error or overlooked a material or critical piece of evidence.[14] Here, the Court determined that the state's evidence was not limited to Catherine's prior inconsistent statement, but other relevant evidence included the testimony of the two police officers on the scene and the facts that Catherine and Bernard were both noticeably upset and that Bernard had grass stains on his clothes, lifting his shirt when asked about a possible assault.[15] In addition, it is reasonable to assume that Catherine might have altered her testimony to attempt to protect Appellant because of their close relationship.[16] Therefore, the Court upheld the trial court's decision to deny appellant's motion for judgment of acquittal and motion for new trial.[17] The Rhode Island Supreme Court affirmed the judgment of the Superior Court on all counts.[18]

COMMENTARY

State v. Cardona is a crucial Rhode Island Supreme Court case because courts are frequently confronted with a victim of domestic violence changing her testimony to protect the abuser once they have been arrested and charged.[19] Therefore, if courts

(R.I. 2006)).

14. *Id.* at 672-73 (citing State v. Bolduc, 822 A.2d 184, 187 (R.I. 2003)).

15. *Id.* at 673.

16. *Id.*

17. Before the jury charge, the trial judge had provided a written copy of the jury instructions to counsel, and defense counsel did not object, but rather requested additional instructions. *Id.* at 674. However, the Court determined that while a defendant is free to request instructions, "there is no requirement that the trial justice use any particular words or phrases in that instruction." *Id.* (citing State v. Palmer, 962 A.2d 758, 769 (R.I. 2009)). Therefore, the requested language was not necessary, and the jury instructions adequately explained the standard of beyond a reasonable doubt. *Id.* at 675.

18. *Id.* at 676. The Court determined that assault and battery are both chargeable under Rhode Island General Laws § 11-5-3. *Id.* at 675. The Supreme Court reasoned, therefore, that while the two crimes are independent from each other, they are "closely related and often arise from a single incident." *Id.* (citing Proffitt v. Ricci, 463 A.2d 514, 517 (R.I. 1983)). Furthermore, the appellant was never convicted of or sentenced to a criminal battery, so it was not error for the trial judge to instruct the jury on battery, in addition to assault. *Id.* at 676.

19. *Cardona,* 969 A.2d at 669.

uphold a burden of proof that is too high, abusers may be freed simply because their victim changes their testimony at the time of trial. Here, the Court considered all the circumstances, including testimony by officers, physical evidence, and conduct of the parties when the police arrived at the scene, which seems to have produced the right result. Furthermore, the Court also took Catherine's reliability into account, conceding that a court must consider the relationship between the abuser and the victim because that relationship may "influence the victim's memories and eventual testimony concerning what occurred."[20]

In cases such as this one, the state must prove its case beyond a reasonable doubt.[21] The trial judge was correct in rejecting Defendant's request that the jury also be instructed that "surmise, suspicion, or hunch alone is not enough to establish proof beyond a reasonable doubt."[22] Instructions to that extent would certainly influence juries unfairly, emphasizing that they need concrete evidence, and perhaps even implying that the victims are fabricating their initial allegations.[23] So long as the trial judge determines that the state has satisfied a threshold of sufficient evidence, the case should go to the jury with instructions on beyond a reasonable doubt, and the factfinder should then be allowed to make the determination.

By altering jury instructions in the manner defense counsel suggested, the jury will be implicitly suspicious of victims who provide any statements that may be inconsistent. However, the reality of domestic violence shows that victims may change their testimony out of fear or protection for the abuser. Therefore, it is ideal to properly instruct juries on the law of reasonable doubt so that even if these victims change their testimony, if the state is able to present its case through other means, such as in this case, the jury can make a sufficient determination of whether that alleged abuser is guilty. If a judge alters the jury instructions, he or she effectively takes the decision out of the factfinder's hands, and has too much influence in the outcome of the trial.

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20. *Id.* at 673.
21. *Id.* at 674.
22. *Id.*
23. The trial judge was careful to instruct the jury that the standard of beyond a reasonable doubt "cannot be a fanciful or whimsical doubt," but must in fact be "a doubt based on reason." *Id.*

CONCLUSION

The Rhode Island Supreme Court held that if prior inconsistent statements are supported by substantial and credible evidence, a defendant may be found guilty of domestic abuse beyond a reasonable doubt.[24] Such evidence as the testimony of the police officers, the fact that Catherine and Bernard were noticeably upset at the scene, and physical evidence[25] of assault were sufficient to convict appellant despite Catherine's prior inconsistent statement.[26]

Rebecca Aitchison

24. *Id.* at 673.

25. *Id.* Bernard had grass stains on his shirt, and when asked about a possible assault, he lifted up his shirt to show officers. *Id.*

26. *Id.*

Criminal Law/Procedure. *State v. Collazo*, 967 A.2d 1106 (R.I. 2009). Where the judge, in a jury-waived trial, does not overlook or misconceive material evidence, the Supreme Court will give deference to the fact-finder. The trial judge did not commit reversible error in finding that the defendant failed to prove his legal insanity in a first degree murder charge by a preponderance of the evidence. The determination of whether a defendant lacks criminal responsibility due to a mental illness is a question of fact to be determined by the fact-finder.

FACTS AND TRAVEL

On March 10, 2002, Defendant Robert Collazo was found by the Central Falls Police Department and emergency medical personnel in Jenks Park.[1] Earlier that day, Defendant arrived at the home of his friend, Brian Araujo in Central Falls, Rhode Island.[2] After a brief conversation with one another, the two decided to walk to nearby Jenks Park to smoke marijuana.[3] Defendant subsequently pocketed a steak knife from the kitchen.[4] Roughly one hour later, Defendant stabbed Araujo twice in the chest with the knife he had pocketed from the Araujo home.[5] In front of multiple witnesses, Defendant pushed Araujo down two sets of stairs, and subsequently "kicked and stomped on Araujo's head, chest, and throat."[6] Defendant walked to Cogswell Tower within Jenks Park, smoked a cigarette, and subsequently returned to Araujo's body.[7] After a witness identified Defendant as the injurer, police took Defendant into custody, whereupon Araujo's ATM card was found in Defendant's front shirt pocket.[8] When questioned about the blood on his shoes, clothes, and hands,

1. State v. Collazo, 967 A.2d 1106, 1107 (R.I. 2009).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Collazo*, 967 A.2d at 1107.
8. *Id.* at 1107-08.

Defendant responded that he was trying to save his friend.[9] It was around this time that Araujo was pronounced dead.[10]

At the police station, Defendant denied having injured Araujo.[11] Defendant's alibi was that Araujo and he went to the park to smoke marijuana; however, they realized they needed a lighter.[12] According to Defendant, before exiting the park to find a lighter, he heard Araujo scream for help, and saw Araujo "lying on the ground stabbed [. . .] and gasping for air."[13] Defendant claimed that he thought this was the product of a robbery, which was why he took the ATM card for safekeeping.[14] After stating that he suffered from schizophrenia, Defendant hastily changed his story.[15] Among other things,[16] Defendant referred to Araujo as "Satan's incarnate" and declared that he wanted Araujo to "suffer as much as possible before he died."[17] He stated that he committed the murder on a Sunday because "[i]t's the day that God rested."[18]

On August 30, 2002, Defendant was indicted by a grand jury for the murder of Araujo; Defendant moved to rely on the insanity defense, and waived his right to a jury trial.[19] After undergoing six pretrial competency evaluations,[20] Defendant was found competent to stand trial.[21] During the trial, which commenced on

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9. *Id.* at 1107.
10. *Id.* at 1108.
11. *Id.*
12. *Id.*
13. *Collazo*, 967 A.2d at 1108.
14. *Id.*
15. *Id.*
16. *Id.* Defendant also boasted of stabbing and beating Araujo, and referred to the victim as "evil" because "he existed" and "he alleged, without elaboration, that Araujo had raped at least one of defendant's girlfriends, though he acknowledged that it had been a while since he had had a girlfriend. He asserted that he wanted to watch Araujo die and [...] also expressed regret that the murder was not televised and that more people, including his own family, were not present to witness the murder. Finally, defendant claimed that he had planned the murder years in advance." *Id.*
17. *Id.*
18. *Id.*
19. *Collazo*, 967 A.2d at 1108.
20. *Id.* "Three of these evaluations determined defendant to be incompetent. The other three evaluations, including the last, concluded that defendant was competent to stand trial." *Id.* at 1108 n.2.
21. *Id.* at 1108.

March 23, 2006, Defendant primarily relied upon the testimony of his expert-witness[22] Ronald Stewart, M.D., a board-certified psychiatrist.[23]

Dr. Stewart evaluated Defendant several times after the murder and testified to the prior documentation of Defendant's numerous hospitalizations for psychotic and suicidal behavior.[24] Based upon Defendant's symptoms and behavior, Dr. Stewart stated that Defendant suffered from schizoaffective disorder, bipolar disorder, psychotic disorder, substance-induced psychotic disorder, and antisocial personality disorder.[25] Furthermore, Dr. Stewart believed that Defendant, at the time of the murder, suffered from a paranoid delusion; therefore Defendant was unable to appreciate the wrongfulness of his actions.[26]

To rebut the expert testimony of Dr. Stewart, the State introduced the expert testimony of board-certified psychiatrist, Robert Cserr, M.D.[27] Dr. Cserr disagreed with Dr. Stewart's interpretation of the role that these illnesses played in the murder.[28] Dr. Cserr believed that Defendant had not suffered from a paranoid delusion at the time of the murder, but rather "the murder was the product of anger due to his personality disorder."[29] This conclusion was evidenced by "the calmness and deliberateness with which Defendant had planned and executed the murder and the degree to which he clearly recollected the details of the crime."[30] Although Defendant suffered from these illnesses, Dr. Cserr believed Defendant could appreciate the wrongfulness of his actions and could conform his conduct to the

22. *Id.* Defendant did not challenge the state's evidence at trial that he had in fact murdered the victim. The defendant also did not produce any of his own evidence contradicting this contention. *Id.*

23. *Id.*

24. *Id.* at 1108-09.

25. *Collazo*, 967 A.2d at 1109.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* "Dr. Cserr maintained that the murder was the product of anger that defendant had failed to control due to his personality disorder. He hypothesized that the anger derived from a sexual relationship between defendant and Araujo, which the latter had initiated, and which defendant had revealed to Dr. Cserr as having troubled him." *Id.*

30. *Id.*

requirements of law.[31]

In his November 1, 2006 opinion, the trial judge found Dr. Cserr's testimony to be more reliable and credible than that of Dr. Stewart.[32] The trial judge agreed with Dr. Cserr that the mental illnesses did not substantially impair Defendant's capacity to appreciate the wrongfulness of his actions, nor did they impair his ability to conform his conduct to the requirements of law.[33] The trial judge consequently sentenced Defendant to the statutorily defined term of life imprisonment[34] and Defendant appealed.[35]

ANALYSIS AND HOLDING

On appeal, Defendant contends that the trial judge erred in believing the testimony of Dr. Cserr over the testimony of Dr. Stewart.[36] Defendant questions only the trial judge's conclusion that Defendant was legally sane at the time of the murder.[37] Defendant does not challenge the evidence that shows that his appreciation for the criminality of his conduct, but that the evidence shows he lacked the capacity to appreciate the wrongfulness of his act or conform it to law.[38]

Standard of Review

The Supreme Court will give substantial deference to the fact-finder regarding its determination of whether "a defendant lacks criminal responsibility due to a mental illness."[39] "[T]he reviewing court will not disturb a trial justice's findings of fact in a jury-waived trial unless [. . .] the trial justice misconceived or

31. *Collazo*, 967 A.2d at 1109.
32. *Id.* at 1109-10.
33. *Id.* at 1110.
34. R.I.G.L. 1956 § 11-23-2. "Every person guilty of murder in the first degree shall be imprisoned for life."
35. *Collazo*, 967 A.2d at 1110.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* "[T]he insanity defense, place[s] great burdens on the trier of fact. [ ] As an appellate court with only the cold, lifeless record to guide us, we naturally defer to the trier of fact who heard the witness' tone of voice, saw their facial expressions and presumably caught the trial's subtleties – all of which may be lost in the written word." *Id.* (quoting Commonwealth v. Cain, 503 A.2d 959, 971 (P.A. 1986)).

overlooked material evidence on a controlling issue."[40] Thus, the reviewing court may decide to uphold a trial judge's conclusion "even if [the reviewing court] would have found differently had [they] been in the trial justice's position."[41]

Defendant's Criminal Responsibility for the Murder of Brian Araujo

The Rhode Island Supreme Court adopted the American Law Institute's Model Penal Code test for legal insanity in *State v. Johnson*, 399 A.2d 469, 476.[42]

> A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, his capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law is so substantially impaired that he cannot justly be held responsible.[43]

The Rhode Island Supreme Court made a conscious decision to use the word "wrongfulness" over "criminality" in its definition because "a person who, knowing an act to be criminal, committed it because of a delusion that the act was morally justified, should not be automatically foreclosed from raising the defense of lack of criminal responsibility."[44] Although a defendant may engage in bizarre behavior or made unusual statements, this, in and of itself, does not compel a finding of insanity; a defendant may have a mental illness without being declared legally insane.[45]

While the State bears the burden of proving all the elements of murder beyond a reasonable doubt, a defendant who raises the insanity defense bears the burden of proving his or her insanity by a preponderance of the evidence.[46] "A defendant not only must prove that he suffered from this defect at the time of the offense, but also that he suffered from this defect to such a degree that he

40. State v. LaCroix, 911 A.2d 674, 679 (R.I. 2006).
41. *LaCroix*, 911 A.2d at 679.
42. *See Collazo*, 967 A.2d at 1111.
43. *Id.* (quoting State v. Johnson, 399 A.2d 469, 476 (R.I. 1979)).
44. *Collazo*, 967 A.2d at 1111 (quoting *Johnson*, 399 A.2d at 477).
45. *Id.*
46. *Id.*

cannot justly be held responsible for the crime."[47]

In assessing a defendant's claim of legal insanity, the trial judge (in a jury-waived trial) takes into account expert testimony in addition to the defendant's actions surrounding the crime.[48] In a legal insanity determination, it is the expert psychiatrist who informs the fact-finder as to the defendant's mental state.[49] The psychiatrist testifies as to the defendant's characteristics, potentialities and capabilities, from which the fact-finder decides whether the defendant should or should not be held accountable for his acts.[50]

Here, there is no suggestion that the trial judge misconceived or overlooked material evidence in finding the defendant accountable for the murder.[51] The trial transcript indicates that the trial judge considered and understood both expert witnesses' testimony, and found that of Dr. Cserr to be more reliable and credible.[52] The trial judge conveyed his concern that Dr. Stewart chose to believe some of Defendant's statements regarding the incident, while doubting other statements made by Defendant.[53]

The trial judge agreed with Dr. Cserr that Defendant understood the wrongfulness of his conduct, evidenced by the fact that Defendant created an alibi, repeatedly denied wrongdoing, concocted a story to make the incident seem like a robbery, and attempted to save Araujo's life.[54] Additionally, the physical evidence, eyewitness testimony, and videotaped confession admitted at trial were consistent with Dr. Cserr's testimony.[55] In light of the reviewing court's deference to the fact-finder, and because the trial judge did not overlook or misconceive material evidence, the trial judge "did not commit reversible error in finding that the defendant failed to prove his legal insanity by a preponderance of the evidence."[56]

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47. *Id.* (quoting *Johnson*, 399 A.2d at 478).
48. *See id.*; *see also* State v. Barrett, 768 A.2d 929, 936-37 (R.I. 2001).
49. *Collazo*, 967 A.2d at 1111.
50. *Id.* at 1111-12.
51. *Id.* at 1112.
52. *Id.*
53. *Id.* at 1112 n.10.
54. *Id.*
55. *Collazo*, 967 A.2d 1112.
56. *Id.*

COMMENTARY

The question before the Rhode Island Supreme Court was a clarification of the deference, and the reasons thereof, that are given to the fact-finder in a determination of a defendant's legal insanity. At first glance, it may seem that the Court's holding in *Collazo* defeats the purpose of having a reviewing court if substantial deference will nevertheless be given to the fact-finder. However, the Rhode Island Supreme Court accurately reasoned that it is the fact-finder that watches and hears the witnesses, while the reviewing court merely reads the trial transcript.[57]

It is difficult to see how a fact-finder is able to distinguish between two board-certified expert psychiatrists, especially when these expert witnesses are testifying to an area of science that is generally beyond the comprehension of society as a whole. It is equally as difficult then, to determine which expert testimony should be afforded more weight based upon reliability and credibility. However, this determination can be done accurately and without much difficulty if the fact-finder applies the expert testimony to the case at hand. For example, in *Collazo*, the trial transcript indicated that "Dr. Stewart chose to believe some of the things that defendant had told him, while disbelieving other things that he had said."[58] Additionally, Dr. Cserr was able to provide reasons for each action and statement of Collazo,[59] a complex task given Defendant's abrupt changes in behavior. Thus, given Dr. Stewart's inability to explain all of Defendant's intricate behavior, and Dr. Cserr's ability to enlighten the Court as to Defendant's behavior, the fact-finder here relied more heavily on Dr. Cserr's testimony.[60]

This decision will likely provide some guidance in determining future legal insanity cases in which a defendant's ability to appreciate the wrongfulness of his conduct is disputed by two board-certified expert psychiatrists. Regardless of the open-ended

57. *Id.* at 1110 (quoting *Cain*, 503 A.2d at 971).
58. *Collazo*, 967 A.2d at 1112 n.10.
59. *Id.* at 1112.
60. *Id.*

test the Court uses regarding the deference that will be given to the fact-finder, it seems that the Supreme Court made a rational and legally-sound decision in assessing the defendant's claim of legal insanity on appeal.

CONCLUSION

This case has uncluttered and clarified the scope of the deference that will be given to a trial judge's determination of a defendant's claim of legal insanity. Here, there was no indication that the trial judge misconceived or overlooked material evidence in finding Defendant to be criminally responsible for the murder.[61] As the trial transcript demonstrated, the trial judge considered each expert witness's testimony.[62] However, the trial judge found the State's board-certified psychiatrist's testimony as an expert witness to be more reliable and credible than that of Defendant's psychiatrist, and accordingly afforded it more weight.[63] The Rhode Island Supreme Court thus stated that considerable deference will be given to the fact-finder, as "it is the trier of fact who hear[s] the witness' tone of voice, [sees] their facial expression and presumably [catches] the trial's subtleties, all of which may be lost in the written word."[64]

Rachael Schupp-Star

61. *Id.*
62. *Id.*
63. *Id.*
64. *Collazo*, 967 A.2d at 1110 (quoting *Cain*, 503 A.2d at 971).

Education Law. *School Committee of City of Cranston v. Bergin-Andrews*, 984 A.2d 629 (R.I. 2009). The issue in this case was whether a school committee met the statutory prerequisites in bringing a Caruolo action[1] when it was aware of a budget deficit many months prior to the initiation of the suit. The Rhode Island Supreme Court affirmed, *inter alia*, that a Caruolo action, properly considered in light of other education-related statutes, requires that a school committee make a good-faith effort to operate within its initial budget appropriation and to make necessary budgetary adjustments and future requests, in a timely manner, if it discovers an actual or potential budget problem. Additionally, the Court held that the doctrine of laches applies in a Caruolo action where the school committee knowingly incurred an end of the year deficit and waited to initiate the action until a time where no corrective measures can be taken. Because a school committee has a statutory obligation to file a corrective action plan to cure the projected budget shortfall, there is no judicial error when the court requires this report.

FACTS AND TRAVEL

In the event that a school committee finds that its appropriated budget is insufficient to meet the state imposed educational mandates, the school committee may file a special complaint—commonly referred to as a Caruolo action—seeking from its respective towns or cities additional appropriations necessary to meet the its expenditures.[2] In 1995, the Rhode Island Supreme Court held in *Beil v. Chariho School Committee* that before a school committee may file a Caruolo action, it must first: (1) adhere to the original budget the city appropriated; (2) petition the state commissioner of education, seeking alternatives and/or waivers to the state regulations that would enable the school department to balance their budget; and (3) if rejected by

1. R.I. GEN. LAWS §16-2-21.4 (1956).

2. Sch. Comm. of the City of Cranston v. Bergin-Andrews, 984 A.2d 629, 634 (R.I. 2009).

the state commissioner, then the school committee must petition the city council for additional appropriations.[3] Only after these three required steps have been undertaken may a school properly file a Caruolo action.[4]

This case is the consolidation of two separate cases arising from budgetary woes in the City of Cranston. The School Committee of the City of Cranston ("school committee") filed the initial action against the City of Cranston pursuant to the Caruolo Act in hopes of obtaining additional monetary appropriations to help cover a $4.9 million shortfall for fiscal year ("FY") 2007-2008.[5] The City of Cranston subsequently filed a separate action, asking the Superior Court to order the school committee to file corrective action plans and to refrain from certain expenditures.[6] Finding that both cases involved common issues of fact and law,[7] both the Superior Court and later the Supreme Court consolidated the instant cases into one.[8]

While the Court goes into great detail summarizing approximately a year and a half of budgetary wrangling between the city council and the school committee, the most salient facts are as follows: as early as April of 2007, the school committee was already projecting a deficit for the FY 2007-2008.[9] After the school committee amended its budget to match the city's original May 2007 appropriation, the city reduced the school department's budget by an additional $106,743.00 in July 2007 due to a lower amount of state aid.[10] By September 2007, the school's consultant was estimating a projected deficit of $3.5 million.[11] Rather than amending its budget to reflect this reduced appropriation, the school committee included a "budget reconciliation" item in its November 2007 revised budget.[12] By December 6, 2007, the projected budget deficit had increased to $3,888,190.00.[13]

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3. Beil v. Chariho Sch. Comm., 667 A.2d 1259, 1259 (R.I. 1995).
4. *Id.*
5. *Bergin-Andrews,* 984 A.2d at 634.
6. *Id.*
7. *Id.* at 647.
8. *Id.* at 633.
9. *Id.*
10. *Id.*
11. *Bergin-Andrews*, 984 A.2d at 633.
12. *Id.*
13. *Id.*

In December 2007, the school committee was already contemplating a Caruolo action against the city.[14] On December 26, 2007 the school superintendent requested additional funding for special and vocational education programs from the commissioner of the Rhode Island Department of Elementary and Secondary Education, as well as permission to eliminate certain student transportation and to increase some class sizes.[15] All requests were denied on January 15, 2008.[16]

While the city council did not respond to a January 22, 2008 request from the school committee for a supplemental appropriation of $3,839,190.00, it met with the school committee on several occasions over the next few months in an effort to resolve the budget problems.[17]

Finally, in an April 2008 presentation to the city council, the school committee reported that the budget deficit had increased to approximately $4.9 million for FY 2007-2008.[18] The city council asked the mayor to seek a writ of mandamus requiring the school department to operate within its appropriated budget in accordance with state law.[19] On May 13, 2008, the school committee filed the Caruolo action against the city.[20] The city subsequently filed the aforementioned separate actions against the school committee.[21]

After extensive trial testimony from employees of both the school department and the city, the Superior Court granted the city's motion for judgment as a matter of law and dismissed the school committee's Caruolo action for having failed to comply with the prerequisites established in *Beil v. Chariho School Committee*.[22] The Superior Court also issued a writ of mandamus ordering the school committee to file a corrective action plan to address the budget deficit for FY 2007-2008, as was petitioned by city.[23]

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14. *Id.* at 634.
15. *Id.*
16. *Id.*
17. *Bergin-Andrews*, 984 A.2d at 634.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 638.
23. *Bergin-Andrews*, 984 A.2d at 639.

On appeal, the school committee alleged the trial judge committed numerous errors, including: (1) considering other education-related statutes in concert with the Caruolo Act rather than considering the act in isolation; (2) determining that the school did not comply with the statutory prerequisites to filing a Caruolo action; and (3) failing to make proper findings to grant injunctive relief.[24]

ANALYSIS AND HOLDING

Caruolo Actions Should Not Be Considered In A Vacuum

In its appeal, the school committee argued that the General Assembly intended for the Caruolo Act to be applied without any reference to any other statutes.[25] Directly contradicting the school committee's argument, the Court ultimately held that any relevant sections of the General Laws should be considered in any Caruolo action.[26] The Court came to this conclusion by first referring to the text of the Caruolo Act itself.[27] While the school committee focused on the introductory language "[n]otwithstanding any provision of the general or public laws to the contrary" to support its argument that the Caruolo Act should be read in complete isolation,[28] the Court noted that the Act itself referred to other statutes within the same title.[29] Furthermore, the Court had previously interpreted the statutory meaning of the word "notwithstanding" to mean "regardless of hinderance by."[30] The Court next noted that "[u]pon careful examination of the Caruolo Act, as well as the other pertinent sections" no part of the Caruolo Act was "hindered by" including these other education-related statutes.[31] The Court justified this by citing *Providence*

24. *Id.* at 640.
25. *Id.* at 642.
26. *Id.* at 643.
27. *Id.* at 642 (citing R.I. GEN. LAWS §16-2-21.4 (1956)). While the opinion found it noteworthy to quote the majority of this section, it is not necessary here.
28. *Id.* at 642.
29. *Bergin-Andrews*, 984 A.2d at 642. Specifically, the other sections referred to are Chapters 2 and 7 of Title XVI.
30. *Bergin-Andrews*, 984 A.2d at 634 (quoting Defenders of Animals, Inc. v. Dept. of Envtl. Management, 553 A.2d 541, 543 (R.I. 1989)).
31. *Id.* at 643. Specifically, the Court was referring to the other sections

Teachers' Union, Local 958 v. School Committee of Providence, which held that "if two statutes are found not to be inconsistent with one another and relate to the same subject matter, [they] should be considered together."[32] Finding that because these other relevant statutes were also education-related and they were not inconsistent with the Caruolo Act itself, the Court concluded that they should be considered in any Caruolo action.[33]

Timeliness: An Essential Element For A Successful Caruolo Action

The school committee also argued that the trial judge erred in determining that the school did not comply with the statutory prerequisites to filing a Caruolo action.[34] The Court further developed the prerequisites set forth in *Beil v. Chariho School Committee* by articulating that in order to satisfy each prerequisite, timely action is required.[35] The Court pointed out that the intention of the General Assembly in drafting the Caruolo Act was to have "school committees [] amend their budgets, request waivers, and request additional appropriations from their host municipalities at the *first indication* of a possible or actual deficit."[36] The Court further elaborated that the intent of the Caruolo Act was "to encourage *expeditious* action in instances of potential school deficit spending is both practical as a matter of public policy and indisputable as a matter of statutory construction."[37] Additionally, the Court bolstered this conclusion by citing several sections of Title XVI that regulated school districts in managing their budgets by including deadlines and other elements to encourage expeditious action.[38]

While the school committee argues that its attempts to satisfy these three prerequisites were sufficient, the Court concluded that the record provided sufficient evidence to conclude that the school

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of Chapter 2 and 7 of Title XVI.

32. *Id.* (quoting Providence Teachers' Union, Local 958 v. School Committee of Providence, 276 A.2d 762 (1971)).

33. *Id.*

34. *Id.* at 641-42.

35. *Id.* at 645.

36. *Bergin-Andrews*, 984 A.2d at 644 (emphasis added).

37. *Id.* at 644.

38. *Id.* at 643. Specifically, the Court cited R.I. GEN. LAWS §§ 16-2-21(b), 16-2-9(d), and 16-2-9(e).

committee failed to satisfy the first and second prerequisites in the required timely manner.[39] First, the school committee failed to make a timely or good-faith effort to operate within the city council's school budget appropriation by not adhering to the final budget it received in July 2007.[40] The November 2007 "budget reconciliation" was viewed by the court as neither timely nor a good faith effort to conform to the actual appropriation.[41] Second, the Court again held that school committee failed to make a good-faith effort to analyze potential savings.[42] Furthermore, waiting until December 2007 to seek waivers and alternatives from the commissioner was not timely enough to satisfy this second requirement.[43]

Doctrine of Laches Applied

The Supreme Court acknowledged that the trial judge's decision was at least partially based on the equitable defense of laches.[44] After noting that the "defense of laches is not as limited in scope as it once was,"[45] the Court again reemphasized how the "overarching intention" of the Caruolo Act requires school committees "to act quickly when they discover actual or potential budget problems."[46] With this principal in mind, the Court concurred with the trial judge that it is "contrary to the intent of the Legislature to allow a school committee to knowingly incur an end of year deficit where corrective action can no longer be taken, only to be appropriated additional funds under the Caruolo Act."[47] Due to this delay on the part of the school committee that caused a disadvantage to the city, the Court concluded that applying the

39. *Bergin-Andrews*, 984 A.2d at 646.
40. *Id.* at 645.
41. *Beil*, 667 A.2d at 1259.
42. *Bergin-Andrews*, 984 A.2d at 646.
43. *Id.*
44. *Id.* at 644. The doctrine of laches is defined by the Court as: "an equitable defense that precludes a lawsuit by a plaintiff who has negligently sat on his or her rights to the detriment of a defendant . . . . [L]aches, in legal significance, is not mere delay, but delay that works a disadvantage to another." Chase v. Chase, A. 804, 805 (1897).
45. *Bergin-Andrews*, 984 A.2d at 644.
46. *Id.* at 644; *see also* R.I. GEN. LAWS §§16-2-9(f) & 16-2-21.
47. *Bergin-Andrews*, 984 A.2d at 645.

doctrine of laches in this case "was eminently justified."[48]

Corrective Action Plan Required By Writ of Mandamus

On appeal, the school committee improperly framed the trial judge's order for it to file a corrective action plan as injunctive relief granted to the city.[49] The Court clarified that the corrective action plan was properly ordered by the trial judge by writ of mandamus.[50] Section 16-2-9(f) of Title XVI required the school committee to file a corrective action plan with the city council within five days of discovering an actual or potential budget deficit.[51] When the trial judge issued the writ, a definite budget deficit existed, the school committee had been aware of the actual deficit since November 2007, and the school committee had never satisfied the statutory requirement by filing a corrective action plan with the city. Because the trial judge was "merely compell[ing] the school committee to its preexisting statutory obligations," there was no error in the trial judge requiring this action by writ of mandamus.[52]

COMMENTARY

This case adds the essential element of timeliness to earlier precedent regarding what is required for a successful Caruolo action. This case presented a good example of a school committee not only unduly postponing its eventual (and ultimately unsuccessful) Caruolo action, but also presented a good example of how the necessary steps that occur prior to a Caruolo action can be delayed. The Court emphasized how the intent of the Caruolo Act inherently requires school committees to act promptly and in good faith in their efforts to adjust their financial situations to meet the ever-increasing challenge of realizing the state-mandated educational goals while not exceeding their

48. *Id.*
49. *See id.* at 640, 648.
50. *Id.* at 648. The Court explains that a writ of mandamus may be issued when "(1) the petitioner has a clear legal right to the relief sought, (2) the respondent has a ministerial duty to perform the requested act without discretion to refuse, and (3) the petitioner has no adequate remedy at law"(quoting New England Dev. LLC v. Berg, 913 A.2d 363, 368 (R.I. 2007)).
51. R.I. GEN. LAWS §16-2-9(f) (1956).
52. *Bergin-Andrews*, 984 A.2d at 648.

appropriated budgets. While this is no easy task, it cannot be approached in an indecisive manner that only invites delay.

While the intent of requiring a school committee to first adhere to whatever budget the city has appropriated is to encourage a school committee to live within the means they are given, this requirement may only mask the financial problem it is trying to prevent. In order for a school committee to satisfy this prerequisite, the school must say, at least on paper, that there is—and will be—no budget shortfall. While on paper a school may force its overall budget to match the initial appropriation, in reality it may not be able, or particularly concerned, about keeping its spending within those prescribed constraints. Perhaps a fourth prerequisite would be in order: requiring school committees to provide concrete evidence that they have done all in their power to comply with the appropriated budget. Such evidence may come in the form of records indicating a school instituting salary or hiring freezes, confirmed layoffs, protracted maintenance of facilities, etc. While none of these difficult actions are wanted, much less helpful to educating the next generation, the production of these records may help courts determine whether a school committee put forth the required good-faith effort to stay within its budget.

Finally, the courts may not be the right place to start to resolve these types of disputes. State education professionals with extensive training and expertise are the ones who are commissioned to establish the state-mandated educational requirements for each school district. Likewise, local school committees who strive to put methodologies and procedures in place that will meet these state-mandated requirements are made up of education professionals with similar training and backgrounds. This being the case, perhaps judges who lack the specified knowledge and skills are not the proper people to initially resolve the disputes that will inevitably arise from whether or not proper funding has been provided to allow school departments to educate our youth. While the Caruolo Act essentially provides a cause of action for school committees to take advantage of in order to get an audience before the Court, Caruolo actions require extensive fact-finding of complicated educational practices and methodologies. Perhaps it is more proper for these disputes to begin in a series of administrative hearings, where

education professionals with the requisite background and knowledge can analyze the school committees' attempts at reducing their budget without unduly compromising the quality of education. Then, if a party is not satisfied with the state's administrative procedures, the issue may get appealed to the courts. In that case, the judge's role in this extensive and complicated matter will less complicated, as the judge in this scenario can rely on the then-established administrative record.

CONCLUSION

In this case, the Rhode Island Supreme Court affirmed that a Caruolo action, properly considered in light of other education-related statutes, requires a school committee to first make a good-faith effort to operate within its initial budget appropriation and if it discovers a potential or actual budget problem, to make the necessary budgetary adjustments and/or requests in a timely manner.[53] Additionally, when a school committee waits until the end of the fiscal year to file a Caruolo action, the doctrine of laches may preclude the school from successfully obtaining additional funds.[54]

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53. *Bergin-Andrews*, 984 A.2d at 645-46.
54. *Id.* at 645

Evidence. *State v. Nelson*, 982 A.2d 602 (R.I. 2009). A prospective juror's prejudicial comment made during voir dire does not warrant a mistrial unless the statement inflames the passions of the jurors, precluding an objective evaluation of the evidence. A proper instruction to the jury by the trial judge to disregard inappropriate remarks may dispel any prejudicial effects to the defendant, removing the need to conduct an individual voir dire of each juror. Additionally, where the defendant does not produce evidence of tampering with blood alcohol level analysis, and the imperfection in the chain of custody is the unknown identity of the technician performing the analysis, such imperfection goes to the weight of the evidence rather than its admissibility. Lastly, judicial interrogation of a witness is limited to clarifying an issue that the trial judge believed to cause confusion to the jury; otherwise, the judge commits irreversible error where the inquiry simply serves as an extension of direct or cross-examination.

FACTS AND TRAVEL

Transported to South County Hospital after a serious car collision on Route 1, Nicki Nelson's blood alcohol analysis revealed a level more than double the legal limit.[1] Almost a year after the accident,[2] Nelson's charges included: (1) operating a motor vehicle while under the influence of intoxicating liquor and causing serious bodily injury to another;[3] (2) operating a motor vehicle in reckless disregard for others' safety, which proximately caused serious bodily injury to another;[4] (3) operating a motor vehicle while knowingly possessing an illegal substance;[5] and (4)

1. State v. Nelson, 982 A.2d 602, 606-07, (R.I. 2009). Nicki Nelson's blood alcohol level ranged between 0.192 and 0.208 percent. *Id.* at 607. The legal limit is 0.08 percent. *Id.*

2. The collision occurred on July 24, 2004, while charges were brought on May 25, 2005. *Id.* at 606-07.

3. *See generally* R.I. GEN. LAWS § 31-27-2.6 (1956).

4. *See generally* R.I. GEN. LAWS § 31-27-1.1 (1956).

5. *See generally* R.I. GEN. LAWS § 31-27-2.4. (1956). The illegal substance was marijuana. *Nelson*, 982 A.2d at 607.

unlawfully possessing marijuana with knowledge and intent.[6] Nelson's 2007 trial resulted in an acquittal of operating a motor vehicle while possessing a controlled substance; however, she was convicted of the drunk driving charges in Counts One and Two, infra.[7] A timely appeal followed highlighting three issues.[8]

First, a prospective juror indicated during voir dire that past experiences affected her ability to be fair and impartial.[9] Rather than being heard at sidebar, Juror 29 blurted out, "Well, I'm a college professor. I have had three students killed by drunk drivers."[10] Although the potential juror was immediately dismissed, and a cautionary instruction given to the remaining jurors to ignore Juror 29's statements, Defendant moved for a mistrial.[11]

Defendant claimed that the prejudicial statement infected the jury pool by encouraging jurors "to do something about these drunk drivers driving around, and here is your opportunity [to do so]."[12] Further, granting the motion to pass would be ideal given the early stage of trial.[13] The judge denied the motion, holding that the number of available jurors did not enable such a restart, and, in any event, the prospective jurors proclaimed their ability to remain dispassionate and impartial.[14]

Second, during Nicki Nelson's treatment at South County Hospital, a nurse sent a blood sample directly to the laboratory for

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6. *See generally* R.I. GEN. LAWS § 21-28-4.01(c)(2)(ii) (1956); *Nelson*, 982 A.2d at 607. Count Three merged with Count Four. *Id.*

7. *Nelson*, 982 A.2d at 607.

8. *Id.*

9. *Id.* at 608.

10. *Id.*

11. *Id.*

12. *Id.* at 608-09. Defense counsel originally believed Juror 29 to be a University of Rhode Island professor, and that her students had been killed in the same geographic area as the one in this trial. *Id.* at 608. The professor actually taught at Salve Regina University in Newport, Rhode Island. *Id.* at 609 n.4.

13. *Nelson*, 982 A.2d at 609.

14. *Id.* At sentencing, Nelson received ten years imprisonment, alcohol treatment while in prison, a $1,000 fine, a two-year suspended license upon release, and restitution for Bates's incurred and continuing expenses and lost wages on count one. *Id.* at 607. Count Two sentencing included a five-year suspended sentence, five years probation, and substance abuse counseling upon release. *Id.*

alcohol level testing.[15] A clinical scientist testified that the vial arrived the same morning of the accident but could not remember which scientist conducted the analysis.[16] While a standard report recorded the clinician handling the blood sample, Nelson's medical record did not contain the document.[17] Thus, Defendant argued on appeal that because the state failed to satisfactorily prove the chain of custody for Nelson's blood alcohol-level testing, the evidence should not have been admitted since the results were "highly questionable."[18]

Finally, after Nelson's treating physician, Dr. Kettle, testified on direct and cross-examination, the trial judge interrogated Dr. Kettle[19] about the doctor's inability to order a cervical spine assessment.[20] Dr. Kettle clarified that he ordered the x-rays but could not conduct a complete physical examination of Nicki Nelson because of her intoxication.[21] The next day, the justice gave defense counsel an opportunity to object to the judge "hammering in" the state's argument, reasoning that the jury might infer Nelson's guilt based upon the detail and nature of the judge's questions.[22]

The judge also interrogated Mr. Hillard, the director of the Rhode Island State Crime Laboratory.[23] Rephrasing a question the state previously asked, the judge inquired whether Nelson's blood alcohol level at the time of the accident could have been the same when Nelson arrived at the hospital an hour later.[24] Hillard testified, over Defendant's objection, that he could not formulate an opinion because he did not know when Nelson consumed her

15. *Id.* at 612.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Nelson*, 982 A.2d at 612.
20. *Id.*
21. *Id.* at 613-14. Nelson's intoxication prevented her from being a cooperative and reliable patient. *Id.* Conducting the physical exam in her intoxicated state could possibly result in a spinal cord injury. *Id.* The patient must be able to follow commands explicitly during directions to move one's head ever so carefully to the left, right, and tilting the chin upwards in an effort to determine pain. *Id.* The trial judge's questioning revealed all this information. *Id.*
22. *Id.* at 614. The trial judge overruled the objection. *Id.*
23. *Id.* at 613.
24. *Id.* at 615 n.8.

last drink.[25]

The questions presented for review include: (1) whether the trial judge erred in denying defendant's motion to pass and declaration of a mistrial after a prospective juror made an improper statement during voir dire; (2) whether the trial judge erred in admitting evidence of a blood alcohol analysis due to an incomplete chain of custody; and (3) whether the trial judge committed irreversible error by interrogating two of the prosecution's witnesses.[26]

ANALYSIS AND HOLDING

The Supreme Court applies an abuse-of-discretion standard to the trial judge's determination of whether to pass a case and declare a mistrial.[27] The trial judge is in the best position to determine whether a juror's inappropriate comment has a negative effect upon the jury in making an impartial determination of the evidence.[28]

Juror's Prejudicial Comment

The Supreme Court held that no abuse of discretion occurred when the trial judge refused to grant the motion to pass and declare a mistrial.[29] On appeal, Defendant argued that Juror 29's comment proposed Nelson's guilt, and, therefore, it prevented the jurors from brushing aside the suggestion.[30] A prejudicial statement by a potential juror does not render every case subject to a new trial.[31] Instead, the probable effect such prejudicial statements would have on a reasonable juror requires assessment.[32] The statement must "be of a nature to 'inflame the jurors' passions' to preclude 'their calm and dispassionate

25. *Nelson*, 982 A.2d at 615.
26. *Id.*
27. *Id.* at 607-08 (citing State v. LaPlante, 962 A.2d 63, 70 (R.I. 2009)).
28. *Id.* at 607 (quoting State v. Figueroa, 673 A.2d 1084, 1091 (R.I. 1996)).
29. *Id.* at 610.
30. *Id.*
31. *Nelson*, 982 A.2d at 610 (citing State v. Ramirez, 936 A.2d 1254, 1267-68 (R.I. 2007)).
32. *Id.* (citing State v. Harley, 656 A.2d 954, 962 (R.I. 1995)).

evaluation of the evidence.'"[33] The trial judge's finding of prejudicial evidence requires a proper warning or cautionary instruction.[34]

In the case at bar, the probable effect of Juror 29's prejudicial remark remained relatively minimal on the average juror since the prospective jurors already possessed knowledge of Defendant's drunk driving charges.[35] The Supreme Court also held that Juror 29's statement (that three of her students were killed by drunk drivers) would not inflame the passions of the average juror so as to color one's views of Nicki Nelson.[36] The statement did not imply Nelson's guilt nor refer to the defendant in any manner.[37] Rather, Juror 29's emotional response simply reflected her own perceived inability to objectively view the evidence.[38]

By contrasting the Nelson curative instruction with the one enunciated in *State v. Massey*,[39] the Supreme Court further justified its holding.[40] A prospective Massey juror opined that the Massey family committed crimes in the past, and that the defendant likely committed the crime in question.[41] The corrective instruction failed to clearly inform the potential jurors to disregard the comment.[42] Additionally, the instruction given in Nelson mirrored *State v. Coleman*,[43] wherein a witness testified that he knew the defendant since they were juveniles because they served time in jail together.[44] The judge directed the jury to disregard the witness's statement, purging any "harmful effect" by clearly explaining the statement's immateriality to the case and ensuring that the jury could overlook the prejudicial statement.[45] In both cases, the instruction "erased consideration of the

33. *Id.* (citing State v. Luciano, 739 A.2d 222, 228 (R.I. 1999)).
34. *Id.* (citing State v. Carmody, 471 A.2d 1363, 1366 (R.I. 1984)).
35. *Id.* (citing State v. Coleman, 909 A.2d 929, 937 (R.I. 2006)).
36. *Id. But cf.* Carmody, 471 A.2d at 1367 (holding that a juror's opinion as to the defendant's guilt was highly prejudicial).
37. *Nelson*, 982 A.2d at 610.
38. *Id.* at 611.
39. State v. Massey, 382 A.2d 801, 803 (R.I. 1978).
40. *Nelson*, 982 A.2d at 611.
41. *Id.* (citing *Massey*, 382 A.2d at 803).
42. *Id.*
43. State v. Coleman, 909 A.2d 929 (R.I. 2006).
44. *Nelson*, 982 A.2d at 611 (citing *Coleman*, 909 A.2d at 935).
45. *Id.* (quoting *Coleman*, 909 A.2d at 936-37).

statement from the jury's mind."[46]

As a general rule, individual voir dire is only necessary when uncertainty exists as to whether the jurors read or heard prejudicial statements affecting the case, and the force of circumstances require insulating those jurors who did not learn of the damaging information.[47] In Nelson, the Court does not clarify whether all of the potential jurors were present when Juror 29 mentioned her experiences.[48] Rather, the Court determined that no abuse of discretion occurred when the trial judge refused to conduct an individual voir dire.[49]

Chain of Custody

The Supreme Court held that the results of the blood alcohol test were properly admitted since the prosecution showed that "in all reasonable probability the evidence had not been tampered with."[50] Proof of a continuous chain of custody may provide assurance of reliability, but it is not necessary to introduce physical evidence.[51] Eliminating all possibility of tampering is not required by the state.[52] As a result, the relevancy of a continuous chain of custody goes to the weight of the evidence.[53]

The defendant did not offer any proof that the blood sample or test results were subject to foul play.[54] Moreover, no evidence existed that showed a delay between the blood specimen's arrival in the laboratory and the testing of Nelson's blood.[55] The unknown

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46. *Id.* (quoting State v. Manfredi, 372 A.2d 975, 977 (R.I. 1977)).

47. *Id.* at 611-12.

48. *See id.* at 608. The opinion only states that Juror 29's statement occurred on the first day of jury selection, after questioning several jurors on their ability to be fair and impartial. *Id.*

49. *Id.* at 612.

50. *Nelson,* 982 A.2d at 612-13 (citing State v. Cohen, 538 A.2d 151, 154 (R.I. 1988)).

51. *Id.* at 612 (citing State v. Infantolino, 355 A.2d 722, 727 (R.I. 1976)).

52. *Id.*

53. *Id.*

54. *Id.* at 613.

55. *Id.* The Court discussed two cases that had a greater probability of evidence tampering than Nelson but were still properly admitted. *Id.* State v. Bracero, 434 A.2d 286, 290 (R.I. 1981), held no error in admitting a bag of cocaine that arrived in the lab for testing on June 9th and subsequently tested on July 19th. *Cohen,* 538 A.2d at 154, held a sufficient chain of custody existed to render admissible evidence seized from a vehicle the day after the arrest, and testimony regarding the location of the key's vehicles did

identity of the clinician retrieving and conducting the analysis encompassed the problem with the chain of custody.[56] The Court held that in all reasonable probability no tampering of Nelson's blood sample occurred, and the state's inability to declare with certainty who determined the illegal levels of alcohol in defendant's blood was relevant as to the weight of the evidence, not admissibility.[57]

Trial Judge's Interrogation of the State's Witnesses

The Court held that Defendant's objection to the judge's questioning of Dr. Kettelle was properly preserved for appeal.[58] The raise or waive rule requires evidentiary objections to be raised at the trial level, and be "sufficiently focused so as to call the trial justice's attention to the basis for [the] objection."[59] Rhode Island Rule of Evidence 614(C) allows objections to interrogations by the court to occur immediately, or at the next available opportunity when the jury is not present.[60] The rule avoids counsel choosing between interrupting the judge in front of the jury (and losing its favor), or forsaking an objection to preserve for appeal.[61] Counsel's specific sidebar objection, which occurred at the conclusion of the judge's interrogation, was appropriate.[62] Counsel also had the opportunity to formally state the reasons for objecting the following day.[63]

After finding the issue properly preserved, the Supreme Court held that the trial judge committed irreversible error when he interrogated Dr. Kettelle, necessitating a remand for a new trial.[64] Although a judge is allowed to make a limited interrogation of the

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not occur until the seizure.

56. *Nelson*, 982 A.2d at 613.

57. *Id.* (citing *Cohen*, 538 A.2d at 154).

58. *Id.* at 616.

59. *Id.* (quoting State v. Gautier, 950 A.2d 400, 407 (R.I. 2008)).

60. *Id.*

61. *Id.*

62. *Nelson*, 982 A.2d at 616. The court cautioned that a general objection would not suffice as proper preservation. *Id.*

63. *Id.* The jury was not present when defense counsel noted the judge's interrogation negatively affected the defendant by suggesting that the defendant was guilty. *Id.* at 616-17. A jury instruction was not requested by defendant for fear that it would have been ineffective. *Id.* at 617.

64. *Id.* at 617, 619.

witness,[65] in the instant case, the judge exceeded the scope of authority by going beyond mere clarification of matters that confused the jury.[66] The trial judge stated that the interrogation was premised on the witness's lengthy medical log,[67] but the Court held that the length of the medical record's volume did not result in a determination that the jury was confused.[68] The prejudicial questions were comparable to a cross-examination, and resulted in Dr. Kettlle twice stating that he could not perform a full evaluation of Nelson because of her intoxicated state.[69] The witness's testimony had devastating consequences in Nelson's drunk-driving trial because it reinforced the fact sought to be proved, namely Defendant's intoxication.[70] Bolstering the prosecution's case goes well beyond the acceptable scope of judicial interrogation.[71]

Likewise, the judge's interrogation of Mr. Hillard was found to be irreversible error since it also failed to clarify a point that confused the jury.[72] Defendant argued that when the judge asked the witness whether Nelson's blood alcohol level was the same at the time of the accident and the subsequent analysis, it revealed the judge's bias and belief that Nelson had a higher blood alcohol level at the time of the accident.[73] Given the fact that the judge rephrased a question that the prosecution already asked and the witness answered, the jury twice heard Mr. Hillard's inability to opine about Nelson's blood alcohol level at the time of the accident without knowing more.[74] Thus, the judge's questioning failed to clarify a point of confusion for the jury when the judge already knew how the witness would answer.[75] The interrogation

65. *Id.* at 617 (citing State v. McVeigh, 660 A.2d 269, 273-74 (R.I. 1995)).
66. *Id.*; *see also* State v. Figueras, 644 A.2d 291, 293 (R.I. 1994).
67. *Id.* at 613.
68. *Nelson,* 982 A.2d at 617. In fact, the Court points out that the trial judge was attempting to prevent the jurors from becoming confused (not that they were actually confused). *Id.*
69. *Id.*
70. *Id.* at 618. The prosecution and defense already inquired about Nelson's state of intoxication and how it affected Dr. Kettlle's medical assessment. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*; *see supra* note 1.
74. *Nelson,* 982 A.2d at 618.
75. *Id.*

prejudiced the defendant, requiring the trial decision to be vacated.[76]

COMMENTARY

Although the Supreme Court held that the trial judge did not err in its refusal to grant a mistrial when Juror 29 divulged the professor's inability to act impartially,[77] it seems unlikely that the prospective jurors could actually discount the prejudicial statement. It is possible that the jurors would act precisely as Defendant feared - the jury taking the opportunity to put away a drunk driver.[78] A cautionary instruction may not necessarily undo the damage. However, given the fact that all the jurors were directed in a straightforward manner, it is also probable that the jurors would police each other during deliberations to ensure that a decision would not be based upon the forbidden statement.

The trial judge's interrogation of the state's witnesses was not treated as lightly as the aforementioned juror's comment. By emphasizing that trial judges should not extend direct and cross-examinations or reinforce counsel's points, the Court provided no leeway for justices to elicit testimony beyond that which is needed for clarification. The bright line rule follows the idea that the judge acts merely as a gatekeeper whose biases should not unfairly prejudice either party.

CONCLUSION

Prejudicial juror comments require the trial judge to assess the probable effect the information would have on a reasonable juror. If the statement inflames the passions of the jury, rendering them unable to maintain an impartial stance, a new trial is proper. The Court held that Juror 29's comment did not inflame the passions of the jurors, and the trial judge's corrective instruction was proper since it advised the jurors to disregard the prejudicial statement. An individual voir dire was not necessary in this case since no abuse of discretion occurred.[79] A perfect chain

76. *Id.* at 617.
77. *See supra* note 10.
78. *See supra* note 11.
79. The Court's holding suggests that all the prospective jurors heard the prejudicial comment which eliminated the need to insulate ignorant jurors

of custody is not required to admit physical evidence. Rather, "physical evidence is admissible upon a showing that in all reasonable probability the evidence has not been subjected to tampering."[80] The state sufficiently met the standard with regard to Nelson's blood sample and the defendant did not provide any proof to the contrary. The blood alcohol test was, therefore, admissible since the unknown identity of the technician performing the test went to the weight of the evidence.

Judicial interrogation of a witness is limited to clarifying an issue that causes confusion for the jury.[81] The Supreme Court held that the trial judge's interrogation of the prosecution's two witnesses did not conform to the law. The trial judge could not have been clarifying a confusing matter when the witnesses already answered the question posed by counsel.

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from the damaging information. *See supra* note 48; *see also supra* note 49.

80. *Nelson*, 982 A.2d at 612 (citing State v. Bracero, 434 A.2d 286, 290 (R.I. 1981)).

81. *See id.* at 617; *Figueras*, 644 A.2d at 293.

Family Law. *Beauregard v. White*, 972 A.2d 619 (R.I. 2009). Mother's allegations were sufficient under the Uniform Child Custody Jurisdiction Act for Family Court to assert emergency jurisdiction, enter interim custody order, and schedule a hearing. However, the continuance of emergency jurisdiction was improper and impermissibly broad once the Family Court had received a copy of North Carolina's custody decree, which was entitled to full faith and credit under the Parental Kidnapping Prevention Act.

FACTS AND TRAVEL

On May 16, 2000, Jessica Beauregard ("Beauregard") filed a complaint for divorce in North Carolina, part of which sought custody of her two children, Colby (born August 10, 1997) and Nicholas (born August 28, 1999).[1] In addition to establishing jurisdiction by alleging she and her husband, Grady Samuel White ("White"), had lived for a period longer than six months in North Carolina, her complaint also alleged that her husband did not spend time with the children, and spent excessive time on the Internet, where he downloaded pornographic images of men.[2] Once the complaint was filed, Beauregard moved with her children to Rhode Island, where she had family.[3] In June of 2000, the North Carolina General Court of Justice, District Court Division, held a hearing, determining temporary custody of the children as well as establishing jurisdiction and North Carolina as the home state of the children.[4] This temporary order granted custody to Beauregard, and gave White visitation in Rhode Island, and required the children to visit White in North Carolina for one

1. Beauregard v. White, 972 A.2d 619, 622 (R.I. 2009).
2. *Id.*
3. *Id.*
4. *Id.* (referring to Section 28 U.S.C. § 1738A(b)(4), part of the Parental Kidnapping Prevention Act which determines "home state" as "the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as a parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any such persons."). *Id.* at 622 n.1.

week per month.[5] Due to an allegation of substantial change in the situation after Colby told his grandmother that his father had shaken Nicholas, Beauregard filed a motion seeking to terminate White's visitation in August of 2000.[6] The matter was referred to the Rhode Island Department of Children, Youth and Families ("DCYF") for an investigation into White's alleged "excessive and inappropriate discipline."[7] In December of 2000, following an altercation outside of the child psychologist's office in Rhode Island, a magistrate in the Family Court granted Beauregard's protection from abuse order by consent of the parties, continued the visitation as previously ordered in North Carolina, and spoke with the North Carolina judge regarding the matter.[8]

On November 26, 2002, almost a year after the parties were granted a divorce, the North Carolina court held hearings regarding the child custody issues, and the Court entered an order with its findings of the child custody dispute.[9] In September 2002, prior to the decision on the record, the North Carolina judge sent both parties a written memorandum stating what the terms would be in the order.[10] Hoping to avoid those unfavorable terms, such

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5. *Id.* at 622.

6. *Id.* at 623. In addition, Colby saw a child psychologist, with whom he shared that his father shook his brother when he cried and was mean. Nicholas was taken to Hasbro Children's Hospital for a CT scan. *Id.*

7. *Beauregard*, 972 A.2d at 623. DCYF initially indicated that White's discipline of Nicholas was excessive and inappropriate, but declined to take legal action because the incident took place in North Carolina. *Id.* 622-23. In September of 2000, North Carolina issued an order for supervised visits for two months, and later vacated the order. *Id.* at 622. After White filed an administrative appeal in Rhode Island, the claim was determined "unfounded." *Id.* at 622.

8. *Id.* at 623. Following the conversation, the North Carolina judge noted that Beauregard and her parents had behaved in an "unreasonable" manner. *Id.*

9. *Id.* The judge found that Beauregard moved to Rhode Island in an attempt to remove White from their children's lives, and that Beauregard would continue to make trouble for White's visitation if she remained in Rhode Island. *Id.* at 623. Also, the visitation schedule could not remain in effect as the children got older, and Beauregard was hindering White's ability to have a relationship with his children. *Id.* It was in the best interests of the children for them to return to North Carolina, where the couple would have joint legal custody; Beauregard would have primary physical custody, unless she refused to move in which case, physical custody would be given to White. *Id.*

10. *Id.*

as returning to North Carolina with the children, Beauregard filed a complaint in the Rhode Island Family Court seeking emergency relief from the visitation and relocation provisions of the North Carolina order.[11]

The Family Court of Rhode Island issued an *ex parte* order asserting jurisdiction, prohibiting the parties from removing the children from Rhode Island without permission from the court, and scheduling a hearing for November.[12] Beauregard supported her complaint with an assessment from Dr. Parsons, a psychologist, that returning the children to North Carolina would be detrimental, as well as her own fears for the safety of herself and the children because of White's threats of physical violence.[13] During the November *ex parte* hearing, the Family Court found that there was jurisdiction and justification for an "emergency" under the Parental Kidnapping Prevention Act ("PKPA") and the Uniform Child Custody Jurisdiction Act ("UCCJA"), but continued the hearing because service on White had not been effectuated.[14] Even though White had still not been served by February 12, 2003, the Family Court found it in the children's best interest to continue the orders. Then, White sent a certified copy of the North Carolina custody order seeking to register the order, in addition to contemporaneous motions in Rhode Island (contesting jurisdiction) and in North Carolina (contempt proceeding against Beauregard for non-compliance).[15]

Arguing that North Carolina had exclusive jurisdiction over the matter and modification of the custody order, White moved to dismiss the modification complaint in Rhode Island on September 17, 2003.[16] A hearing was held November 5, 2003, and January

11. *Id.*

12. *Id.* at 624.

13. *Beauregard*, 972 A.2d at 623-24. Doctor Parsons found that while the children were in the home White was involved excessively with male pornography, and both the children and Beauregard reported physical abuse by White. *Id.*

14. *Id.* at 624.

15. *Id.* The North Carolina court found that Beauregard failed to return to North Carolina with the children by the prescribed date, that North Carolina has jurisdiction over both the subject matter and parties, and ordered the children to be placed with White. *Id.* North Carolina also found Beauregard in criminal contempt and issued an order for her arrest. *Id.*

16. *Id.* at 625.

29, 2004, the general magistrate denied White's motion to dismiss because of the emergency situation created by the "alleged abuse of the child," and the "apparent pedophilia of the defendant (White) as to the safety of the children."[17] White petitioned the Supreme Court for certiorari, arguing that emergency jurisdiction was improperly exercised under the UCCJEA, and the North Carolina custody order was improperly modified by the magistrate failing to account for the decision already made by North Carolina.[18] Beauregard counters that the Family Court properly exercised jurisdiction because the order was limited in duration, and also challenges the appropriateness of North Carolina continuing jurisdiction because she and the children had lawfully moved to Rhode Island, and had been living there for two and a half years before North Carolina addressed the custody issues.[19]

ANALYSIS

In an opinion written by Justice Flaherty, the Court addressed the issue of whether the Family Court had properly exercised jurisdiction and issued orders regarding a child custody dispute when there was an ongoing proceeding in North Carolina and after an ultimate determination had been made in North Carolina.[20] The Court held that the Family Court erred in two respects: first, the allegations were sufficient for emergency jurisdiction initially, but improper to continue as the circumstances changed, and second, the Family Court exceeded its authority when it exercised jurisdiction over the subject matter of Beauregard's complaint.[21]

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17. *Id.* During the November hearing, Beauregard testified that her children became upset before and after visiting with their father, that the North Carolina Court found White had viewed child pornography, and Doctor Parsons belief that transitioning the children back to North Carolina would cause irreparable harm since the children were afraid of their father and his "apparent pedophilias" and "pornography issues." *Id.* Later, in July of 2004, both parties were ordered to psychological assessments, toxicology screens, and supervised visits between father and children. *Id.* The order did not have an end date or any future hearing scheduled. *Id.*

18. *Id.* at 625-26. (*cert. granted*).

19. *Beauregard*, 972 A.2d at 626.

20. *Id.*

21. *Id.*

Jurisdiction

For the Family Court to have authority over custody proceedings, it must have subject matter jurisdiction, which is reviewed *de novo*.[22] Although subject matter jurisdiction of child-custody disputes is currently governed by the UCCJEA (adopted by the General Assembly in 2003)[23] which supplies the rules for custody disputes involving jurisdictional conflict, when this proceeding started the matter was governed by UCCJA.[24] Emergency jurisdiction, existing for a limited period, lasts "only as long as the emergency exists or until a court that has jurisdiction to enter or modify a permanent custody order is apprised of the situation and accepts responsibility."[25] The Court distinguishes between having jurisdiction and whether it should be exercised.[26]

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22. *Id.* (citing State v. Sivo, 925 A.2d 901, 916 (R.I. 2007); Jordan v. Jordan, 586 A.2d 1080, 1083 (R.I. 1991)).

23. R.I. GEN. LAWS § 15-14.1-16(a) (2003): The court has "temporary emergency jurisdiction" if "the child is present in this state and the child has been abandoned or it is *necessary in an emergency to protect the child* because the child, or a sibling or parent of the child, is *subjected to or threatened with mistreatment or abuse.*" Also Section 15-14.1-16(c): "If there is a previous child custody determination that is entitled to be enforced under this chapter, or a child custody proceeding has been commenced in a court of a state having jurisdiction, any order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires." And, Section 15-14.1-16(d): "If the Rhode Island Court learns that a child-custody proceeding has been commenced or a child-custody determination has been made by a court of another state having jurisdiction, the Rhode Island court *shall immediately communicate* with the court of that state to resolve the emergency, protect the safety of the parties and the child, and *determine a period of the duration of the temporary order.*" (Emphasis added).

24. *Beauregard*, 972 A.2d at 626 (citing Glynn v. Meslin, 532 A.2d 554, 555 (R.I. 1987)). The UCCJA is less stringent and specific with respect to the limits of emergency jurisdiction, however under either statute the same result would be achieved. *Id.* at 627. Under the Court's prior holdings, emergency jurisdiction is temporary in nature and orders. *Id. See* Ogden v. Rath, 755 A.2d 795, 798 (R.I. 2000).

25. *Beauregard*, 972 A.2d at 626 (quoting Nadeau v. Nadeau, 716 A.2d 717, 725 (R.I. 1998)).

26. *Id.* at 627-28. *See Jordan*, 586 A.2d at 1084 (reasoning that the Family Court could properly have emergency jurisdiction when the children were physically in Rhode Island and their father alleged physical and emotional abuse by their mother in Florida, but exercising jurisdiction was

Establishing Emergency Jurisdiction

Emergency jurisdiction is based on extraordinary circumstances where the petitioning parent has established the "existence of a bona fide emergency that constitutes the likelihood of substantial harm to the child," proven by more than mere allegations and self-serving statements from the petitioning parent.[27] Based on precedent, the Family Court had to find that the children were physically in Rhode Island and that there was an allegation of "actual or threatened mistreatment or abuse."[28] Here, Beauregard alleged threats of harm by White, an outstanding order of protection from abuse, and a report by Dr. Parsons, which made the concerns more than "simply parental allegations," and these were sufficient for the Family Court to properly assert emergency jurisdiction and schedule a hearing.[29] The initial order was properly limited in time and scope when it ordered that a hearing was to be held within twenty days and temporarily enjoined the parents removing the children from Rhode Island. Additionally the second order was proper because it simply granted Beauregard more time to serve White.[30] The subsequent orders in this case were errors by the Family Court.[31]

The Allegations were Insufficient to Continue Emergency Jurisdiction

The Family Court should have been aware that continuation of emergency jurisdiction was improper after it received the certified copy of the North Carolina decree in February 2003, and again after the hearing in November 2003 because Beauregard's testimony and Dr. Parson's report were insufficient because they did not create a new emergency.[32] This case is analogous to *Woods v. Winsor*, where the Family Court did not admit evidence

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improper because the Florida court had properly exercised jurisdiction by granting the divorce and reserving jurisdiction over the child-custody dispute, and this was the type of conflict UCCJA was enacted to prevent.) *Id.*

27. *Id.* at 628 (based on the decision in Glynn, 532 A.2d at 555-56).

28. *Id.* at 629. *See generally* Duffy v. Reeves, 619 A.2d 1094 (R.I. 1993); Silva v. Tucker, 500 A.2d 947, 949-50 (R.I. 1985).

29. *Beauregard*, 972 A.2d at 629.

30. *Id.*

31. *Id.*

32. *Id.* at 630.

about abuse that had occurred prior to the decision issued by the Kentucky court because the judge in Kentucky had found these allegations were "simply another ploy" by the mother to deny the father's visitation, and the Supreme Court held Kentucky had jurisdiction and its custody order was entitled to full faith and credit.[33] Here, the Family Court magistrate admitted into evidence allegations of abuse, pedophilia, child pornography, the order for protection from abuse, and the shaking incident to continue jurisdiction even though these were taken into account by the North Carolina judge before he issued his decision.[34] Thus, if the Family Court continued exercising emergency jurisdiction properly, there needed to be new allegations, which if proven, created a real emergency because of mistreatment.[35] Dr. Parson's report does not rise to the level of real emergency, and Beauregard had plenty of time to bring her concerns to the North Carolina Court.[36] Moreover, the orders issued by the Family Court could only be temporary in nature and could not modify the North Carolina custody decree, so the Family Court erred because there was no language in the order indicating they were temporary, nor any termination date.[37] Since there was a proceeding taking place in North Carolina and there were no circumstances for emergency jurisdiction when Beauregard filed her complaint, the Family Court should have declined jurisdiction.[38] The Family Court

33. Woods v. Winsor, 637 A.2d 373, 374 (R.I. 1994) (quoted in Beauregard, 972 A.2d at 630).

34. *Beauregard*, 972 A.2d at 630. Significantly the allegations of child pornography and pedophilia were unsubstantiated by anything other than Beauregard's testimony and the hearsay of Dr. Parsons; the North Carolina judge took into account the incident between the parents outside the child psychologist's office, the alleged shaking, and the father's viewing of pornography; DCYF concluded the allegations of excessive discipline unfounded. *Id.*

35. *Id.* at 630.

36. *Id.* at 631.

37. *Id.* For an order to be temporary in nature it is not enough that the order terminates when complied with. *Id.*

38. *Id.* (relying on Trader v. Darrow, 630 A.2d 634, 637 (Del. 1993), which holds that "the continuing jurisdiction of a sister state is not affected by the child's residence in another state for six months or more.") *See also* 28 U.S.C. §§ 1738A(a), (c), (d), (f); Thompson v. Thompson, 484 U.S. 174, 175-76 (1988) ("imposes a duty on the States to enforce child custody determinations entered by a court of a sister State if the determination is consistent with the provisions of the Act.).

should have been aware that jurisdiction was improper because North Carolina was the "home state" of the children at the time the complaint for divorce and child-custody was filed, no other state had jurisdiction, and North Carolina had not stayed or terminated its jurisdiction.[39] Further, the Family Court should have complied with the UCCJA by staying its proceeding, and contacting the North Carolina court so the matter could be "litigated in a more appropriate forum."[40]

Appropriateness of North Carolina's Continuing Jurisdiction under the PKPA

Under the PKPA, North Carolina's child-custody decree is entitled to full faith and credit because it was the home state of the children at the time the complaint for divorce was filed, the decree is consistent with the PKPA, White continues to be a resident of the state, and the North Carolina has not declined jurisdiction.[41] Due to the length of time that had elapsed because of the drawn-out court proceedings, the Court recognized the children may have little connection to North Carolina.[42] However, this does not relieve the Court from enforcing the North Carolina custody decree.[43]

COMMENTARY

Although in this factual situation the outcome is unsatisfying, the Court properly applies the UCCJA and the PKPA to afford full faith and credit to the North Carolina decree. At the time of the decision, Colby and Nicholas, aged almost twelve and almost ten respectively, had been living in Rhode Island for nearly a decade, and the Court ordered their return to North Carolina unless Beauregard can obtain relief from the provision from the North Carolina court. It does not appear to be in the children's best interest to uproot their home and school lives because the Family

39. *Beauregard*, 972 A.2d at 631-32.
40. *Id.* at 632 (quoting R.I. GEN. LAWS § 15-14-7(c)).
41. *Id.*
42. *Id.*
43. *Id.* at 633. The Court was distressed by the length of time that elapsed between hearings and the numerous continuances in a matter that was cast as an emergency and involved two young lives. *Id.* In the Court's opinion, "the lapse of nearly two years...is simply inexcusable." *Id.*

Court erred in exercising jurisdiction and their parents' actions merit no praise.

However, the Court's analysis of the child-custody issue under the statutory guidelines of UCCJA (in effect when the complaint was filed) and the UCCJEA (in effect now), as well as precedent make it clear that Rhode Island Family court did err, and the Court was under a duty to afford full faith and credit to the North Carolina decree.[44]

Hopefully, the clear language presented in the UCCJEA will prevent a situation like this from happening to other children. Under section 15-14.1.-16(a), temporary emergency jurisdiction is appropriate only when "the child is present in the state, and it is necessary *in an emergency to protect the child* because the child is *subject to or threatened with mistreatment or abuse.*" Also, emergency jurisdiction should be limited in time until an order is received from a sister state or the order expires. This case presents clear guidelines for the Family Court to use when determining if jurisdiction is proper, and also what factors to consider in determining an emergency, i.e. not using factors already satisfactorily dealt with by the sister court.

CONCLUSION

Based on the inappropriateness of exercising jurisdiction over this child-custody dispute, the Court quashed the orders of the Family Court.[45] The case was remanded to order Beauregard to comply with North Carolina's order or to obtain relief from North Carolina within thirty days.[46]

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44. *Id.* at 632.
45. *Beauregard*, 972 A.2d at 632.
46. *Id.*

Family Law. *In re Peter S. et al.*, 973 A.2d 46 (R.I. 2009). The Supreme Court of Rhode Island found that Rhode Island General Laws § 15-7-7(a) dictates the termination of all legal rights of a parent to the child when the parent engages in actions rendered seriously detrimental to the child, including cruel or abusive treatment. The Court held that the Family Court properly terminated the parental rights of a father who had been convicted of felony assault for inflicting injuries upon his three month old son. The Court held that: (1) criminal conviction evidencing an abusive act may be considered as one of the factors in determining whether a parent is unfit, despite remorse on the part of the parent; (2) conduct toward one child is a proper factor to be considered when determining parental fitness as to the other children in the family unit; and (3) the protection offered to children from a divorce decree terminating custody is insufficient as compared to the protection offered under a termination of parental rights. Moreover, the Court found that the Department of Children, Youth and Families ("DCYF") has no obligation to engage in reunification efforts to preserve a family when abuse is present under Rhode Island General Laws § 15-7-7(a)(2)(ii).

FACTS AND TRAVEL

On January 1, 2006, Joshua, the youngest of Peter S.'s three children, was taken to Hasbro Children's Hospital for critical injuries, including seizures and lifelessness.[1] The injuries to three month old Joshua were a result of abusive head trauma, inflicted by Joshua's father, Peter, after Peter shook Joshua because Joshua would not stop crying.[2]

In May 2006, the DCYF instituted proceedings for involuntary termination of Peter's parental rights with respect to his three children.[3] At trial, a DCYF investigator, Mr. Dante

1. *In re* Peter S. et al., 973 A.2d 46, 48 (R.I. 2009).
2. *Id.* at 49-50.
3. *Id.* at 48. The Family Court trial, concerning the termination of Peter's parental rights, began on May 3, 2007. *Id.*

D'Alessio, testified that he interviewed both of Joshua's parents at Hasbro Children's Hospital on January 1, 2006.[4] Mr. D'Alessio testified that Peter explained that Joshua woke up in the early morning so Peter decided to prepare a bottle for him.[5] Peter told Mr. D'Alessio that when he returned to give Joshua the bottle, Joshua was lifeless and limp, so Peter called 9-1-1.[6] Mr. D'Alessio testified that Peter told him he was unaware of any trauma to Joshua.[7] However, the day after the interview a doctor told Mr. D'Alessio that the injury to Joshua's head had been caused by a third party.[8] After again interviewing Joshua's parents, Peter continued to deny any knowledge of the cause of Joshua's injury and insisted that he did not hurt Joshua.[9] Mr. D'Alessio testified that Joshua's mother, Nicole, then called Peter in his presence and the investigator was able to hear their conversation in which Peter admitted to have shaken Joshua three to four times because Joshua would not stop crying.[10]

Dr. Christine Barron, the clinical director of the Hasbro Children's Hospital Protection Program, also testified at the parental rights trial.[11] She testified that Joshua suffered from brain tissue injury and a skull fracture, which were irreparable injuries.[12] She opined that Joshua would be unable to develop normally as a result of his injuries.[13] Dr. Barron further testified that the extensive examination of Joshua at the hospital on January 1, 2006 revealed that he had previously suffered a similar injury to his brain between seven and thirty days before the current injury.[14]

The trial judge held that Peter's abusive conduct toward Joshua affected not only Joshua, but Peter's two other children as

4. *Id.* at 48-49.
5. *Id.* at 49.
6. *Id.*
7. *In re Peter S.*, 973 A.2d at 49.
8. *Id.* Mr. D'Alessio thereafter conveyed this information that Josh's injuries had been inflicted by a third party to the police. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 50.
13. *In re Peter S.*, 973 A.2d at 50.
14. *Id.*

well.[15] The trial judge found that Peter was an unfit parent as to all three of his children, and entered a decree terminating Peter's parental rights under Rhode Island General Laws § 15-7-7(a).[16] Peter filed a notice of appeal.[17]

ANALYSIS AND HOLDING

On appeal before the Rhode Island Supreme Court, Peter contended that the trial judge erred in terminating his parental rights because: (1) there existed merely one isolated incident of abusive behavior and Peter had expressed remorse for that incident; (2) the divorce decree, providing for termination of custodial rights, was sufficient to ensure that he would be unable to see his children or receive custody until determined fit by the Court; (3) the fact of incarceration alone was insufficient to meet the requisite grounds for termination of parental rights; (4) the DCYF should have made reasonable efforts to reunite him with his children; and (5) there existed no evidence tending to show he presented a danger to his children.[18]

The Court held that the fact that Peter expressed remorse concerning his conduct toward Joshua fell significantly short of an assurance that his other children would not be exposed to such conduct in the future.[19] In coming to this conclusion, the Court acknowledged that Peter's behavior did not occur in the distant

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15. *Id.* at 51.

16. *Id.; see* R.I. GEN. LAWS § 15-7-7(a):

> The court shall, upon petition duly filed by a governmental child placement agency....after notice to the parent and a hearing on the petition, terminate any and all legal rights of the parent to the child...if the court finds as a fact by clear and convincing evidence that:
>
> (2) The parent is unfit by reason of conduct or conditions seriously detrimental to the child; such as, but not limited to, the following:
>
> (ii) Conduct toward any child of a cruel or abusive nature.

17. *In re Peter S.*, 973 A.2d at 51. In addition to the parental rights action, criminal charges were instituted against Peter for felony assault. Peter pled nolo contendere and was convicted for inflicting injuries upon Joshua. He was ordered to have no contact with Joshua, and was sentenced to twenty years imprisonment. *Id.* at 48.

18. *Id.* at 51.

19. *Id.* at 53.

past.[20] The Court reasoned that Peter must have demonstrated that his past conduct no longer endangers the safety of any of his children, and remorse alone is insufficient to meet this burden.[21]

Further, the Court found that no judicial or statutory authority was cited to suggest that a divorce decree is equivalent to a state's termination of parental rights in terms of the protection afforded to children.[22] The Court reasoned that protecting children through a termination of parental rights proceeding provides a more effective means of protecting children than does a divorce decree, and the appellant had cited no authority to suggest otherwise.[23]

Moreover, the Court reasoned that nothing in the record suggested that the fact of incarceration alone was determinative in the trial court's decision to terminate Peter's parental rights.[24] The Court found that the trial court considered Peter's incarceration as one factor, amongst other factors, which is appropriate in deciding whether to terminate a parent's rights.[25]

The Court held that, pursuant to the statutory language of Rhode Island General Laws § 15-7-7(b)(1), DCYF had no obligation to exert reasonable effort in preserving and reunifying Peter's family.[26] The Court reasoned that the requirement of reasonable reunification efforts does not apply to situations where abuse is present under Rhode Island General Laws §15-7-7(a)(2)(ii), and because abuse existed in the present case, DCYF was not required to reunify.[27]

Finally, the Court held that the children's interests in freedom from abuse and cruelty are of paramount concern when the parent is found to be demonstrably unfit, and it was in these interests that Peter's parental rights as to his three children were

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20. *Id.* at 52.
21. *See id.* at 53.
22. *Id.*
23. *In re Peter S.*, 973 A.2d at 54.
24. *Id.*
25. *Id.*
26. *Id.*; *see* R.I. GEN. LAWS. § 15-7-7(b)(1): "in the event that a petition is filed pursuant to subdivision[]...(a)(2)(ii) of this section, the department has no obligation to engage in reasonable efforts to preserve and reunify a family."
27. *In re Peter S.*, 973 A.2d at 54-55.

terminated.[28] The Court thus affirmed Family Court's decree which terminated Peter's parental rights.[29]

COMMENTARY

Rhode Island General Laws § 15-7-7 seems to encompass the Rhode Island General Assembly's judgment that cruel and abusive conduct toward a child is impermissible under any circumstance.[30] This judgment is evidenced by the statute's command that "the court *shall*. . .terminate any and all legal rights of the parent to the child" when an abusive situation exists.[31] The legislature's belief that this behavior is intolerable is also supported by the absence of the statutory requirement on the part of DCYF to exert reasonable efforts to reunify the family.[32] It seems that the legislature wanted to eliminate all risk that a child might be exposed further abuse, and thus, the reasonable efforts to facilitate reunification, though normally required, are not obligatory when circumstances of a "cruel or abusive nature" in a parent-child relationship are present.[33]

This decision evidences the harsh consequences which Rhode Island General Laws § 15-7-7(a) imposes upon a parent who decides to engage in as egregious behavior as abusing their child.[34] Though, because of his seemingly genuine remorse, termination of Peter's parental rights may seem, to some, unsympathetic, the case sets forth the reality of Rhode Island General Laws § 15-7-7(a) mandate: if you engage in conduct seriously detrimental to your child, your legal parental right will be terminated, and you will not be afforded a reunification effort by DCYF.[35] Peter's remorse, in this situation, was proven insufficient to overcome his burden of showing that he no longer presented a danger to his children.[36] The Court, through plain meaning statutory interpretation of Rhode Island General Laws §

28. *Id.* at 55.
29. *Id.*
30. *See id.* at 51, 54.
31. *Id.*
32. *See id.* at 54-55.
33. *See In re Peter S.*, 973 A.2d at 54-55.
34. *See id.* at 51, 55.
35. *Id.* at 51, 54-55.
36. *Id.* at 53.

15-7-7(a), sets forth the proposition that legal consequences will proceed from unacceptable behavior, and possible participants in such behavior should take due care to consider what is expected in a cultured society before engaging in said action.[37]

CONCLUSION

In conclusion, under Rhode Island General Laws § 15-7-7, DCYF need not engage in reasonable efforts to reunify and preserve a family when a termination of parental rights petition is filed pursuant to § 15-7-7(a)(2)(ii) situations where abusive circumstances exist.[38] Additionally, a divorce decree does not serve as an adequate measure of child protection, when compared with a termination of parental rights.[39] A criminal conviction may be considered as a factor in determining whether parental rights should be terminated, and signs of remorse are insufficient to demonstrate that a parent no longer presents a danger to his or her children.[40]

Marisa Ruthven

37. *See id.* at 55.
38. *Id.* at 54-55.
39. *In re Peter S.*, 973 A.2d at 54.
40. *Id.* at 53.

Government Liability. *Adams v. Rhode Island Dept. of Corrections*, 973 A.2d 542 (R.I. 2009). The public duty doctrine is a narrow exception to the general rule of state liability and is not met solely because the state performed an activity "for the public good."[1] The Rhode Island Supreme Court held that where the state provided an allegedly defective box of raisins to the plaintiff at a "food giveaway for low-income persons" the public duty doctrine did not shield the state from liability because the storing and providing of food is not an exclusive governmental function and could be performed by private parties.[2]

FACTS AND TRAVEL

The United States Department of Agriculture operates the Emergency Food Assistance Program ("TEFAP"), a federal program that purchases and ships food to state agencies, which then distributes it to public organizations that in turn distribute it to the public.[3] TEFAP does not allow private parties, either individuals or corporations, to distribute the food to the public.[4] The Rhode Island Department of Corrections ("DOC") is Rhode Island's state agency that receives and redistributes the food from TEFAP.[5] In late March of 2004, DOC received six cases of raisins and stored them in its temperature-controlled center in Cranston.[6] In early October of 2004, DOC sent six cases of raisins to the Rhode Island Community Food Bank in Providence, which in turn distributed them to St. Raymond's Church in Providence where they were given to the public.[7] Plaintiff Thomas Adams ("Adams") attended a food giveaway at St. Raymond's Church on October 16, 2004 where he received a box of raisins that he recalls "was

1. Adams v. Rhode Island Dept. of Corrections, 973 A.2d 542, 545, 547 (R.I. 2009).
2. *Id.* at 544, 547.
3. *Id.* at 544.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Adams*, 973 A.2d at 544.

factory-sealed and bore a label reading 'USDA Inspected.'"[8] Adams ate the raisins later that day, noticing that the last raisin in the box had a strange taste and texture.[9] He then discovered insect dung and larvae inside the empty raisin box.[10] He alleges that the discovery provoked "nausea, vomiting, diarrhea, loss of sleep, and mental anguish for several days."[11]

Adams filed a complaint against the DOC in mid April of 2006.[12] In late June of 2007 the DOC filed a motion for summary judgment arguing that the public duty doctrine shielded them from liability, that no exceptions to the doctrine applied, and alternately, that they had no notice of any problems with the raisins as provided to them.[13] The trial judge granted summary judgment to the DOC, finding that the public duty doctrine shielded them from liability because the distribution process undertaken was far more complex than that performed by private parties, private parties were not permitted to distribute the federally provided food, the distribution was undertaken "for the public good as a whole", and no recognized exception to the doctrine was applicable.[14] The trial judge entered final judgment in early November of 2007 and Adams timely filed his notice to appeal.[15]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court uses a *de novo* standard to review a trial judge's grant of summary judgment.[16] A grant of summary judgment is appropriate if the admissible evidence presents "no genuine issue of material fact" and the moving party is entitled to the judgment.[17]

Rhode Island is liable in tort actions "subject to. . .monetary

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Adams*, 973 A.2d at 544-45.
14. *Id.* at 545.
15. *Id.*
16. *Id.* at 545 (citing Planned Env'ts Mgmt Corp. v. Robert, 966 A.2d 117, 121 (R.I. 2009)).
17. *Id.* (citing Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006)).

limitations" in the manner of private individuals or corporations pursuant to R.I. General Laws 1956 § 9-31-1, which overruled the prior doctrine of sovereign immunity under the common law.[18] The Court created a narrow exception to this statutory liability, now known as the public duty doctrine, for the purpose of encouraging government administration particularly when an activity requires "a high degree of discretion such as governmental planning or political decision making."[19] The public duty doctrine applies when the government is performing an activity that private individuals or corporations could not reasonably be expected to perform, such as "licensing of drivers, management...of incarcerated prisoners, and the exercise of police power."[20] When the state is performing an activity identical or parallel to that which a private party may perform, such as ownership of land or vehicles, the public duty doctrine does not apply.[21] In short, if a private party could perform the governmental function at issue then the state has a duty to perform the task with reasonable care.[22]

The "administration of a federally funded program could, potentially, be considered a governmental function" and had Adams alleged that "the discretionary decisions of government agents in administering the TEFAP program" caused his injuries the public duty doctrine might apply.[23] However, in this case the government action at issue is food storage and distribution.[24] Because these are activities that private parties perform often, the public duty doctrine cannot be invoked to preclude state liability.[25]

In finding that the public duty doctrine applied because DOC was performing an activity for the public good, the trial judge misinterpreted the opinion in *Haworth v. Lannon*.[26] Unless a

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18. *Id.*
19. *Adams*, 973 A.2d at 545-46 (quoting Catone v. Medberry, 555 A.2d 328, 333 (R.I. 1989)).
20. *Id.* at 546 (quoting O'Brien v. State, 555 A.2d 334, 336-37 (R.I. 1989)).
21. *Id.* (quoting *O'Brien*, 555 A.2d at 336-37).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Adams*, 973 A.2d at 546.
26. *Id.* at 546-47 (quoting Haworth v. Lannon, 813 A.2d 62 (R.I.2003)). In Haworth v. Lannon the Court explained the policy behind the public duty

government activity or something very similar "cannot be performed by a private party" the public duty doctrine does not apply solely because the activity is performed "for the public good."[27] For these reasons, the Court vacated the grant of summary judgment and remanded the case for further proceedings.[28]

COMMENTARY

The public duty doctrine is a court created exception to a legislatively created liability and is intended to be narrowly construed. While it seems unjust for the beneficiary of a government charity to turn around and bite the hand that feeds him, the alternative would be a shielding of the state from liability in all of its public benefit programs. This absence of liability would likely result in the careless governmental management and performance of operations resulting in more injuries and possibly counterbalancing any good the programs accomplished, thus wasting efforts and funds. The Court made a good decision in this case by keeping the exception narrow while not eliminating it, and in emphasizing the simple rule that an activity must be one that private parties cannot perform for the doctrine to apply, thus greatly aiding adjudications in the future. The Court does give due respect to the trial judge and also notes in Footnote 3 that this ruling does not preclude another grant of summary judgment for other reasons.[29] It is probable that the DOC shall prevail in this case, and though Adams has been dealt back into the game, it seems as if both the Court and the trial judge have seen the writing on the wall.

CONCLUSION

The Court held that the public duty doctrine did not apply to shield the DOC from liability in this case because the function at issue was storage and distribution of food, an activity that private parties can and do perform regularly. The trial judge originally

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doctrine, it did not intend to create a new test for its application.

27. *Id.* at 547.

28. *Id.*

29. *Id.*

found that the doctrine did apply because TEFAP, when viewed as a whole, was more complex than the distribution operations of private parties; had the complaint alleged that some action of a government official in the administration of this large, complex program had caused the injury the Court might have affirmed rather than reversed and remanded. The question of whether or not the public duty doctrine applies requires a determination of whether the specific government activity that allegedly caused the injury could be performed by private parties; if the answer is in the negative, the doctrine applies. Implied in the opinion is the finding that even where private parties are forbidden to perform a function for a specific government program, the doctrine still does not apply if private parties can perform parallel functions in their own capacity. The Court also vacated the trial judge's finding that the doctrine should apply because the function was for the public good. The public duty doctrine is merely a narrow exception to G.L. 1956 § 9-31-1 and thus it is necessary to leave the state susceptible to most liability even when actions are undertaken for the public good.

Alastair C. Deans

Indian Law. *In re Tamika R.*, 973 A.2d 547 (R.I. 2009). A state agency must comply with the provisions of the Indian Child Welfare Act of 1978, §102(e), 25 U.S.C. §1912(e) (ICWA) when revoking a parent's custody of a dependant who is a member of an Indian tribe. First, the state agency must prove by clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. Second, the ICWA requires that any foster care placement order be supported, at least in part, by testimony from qualified expert witnesses. If the state agency fails to adhere to these requirements, a court may not order the child into foster care, taking away the parent's custody over the child without committing an error that will not be considered harmless.

FACTS AND TRAVEL

Mr. Robinson, a member of the Narragansett Indian Tribe, is the father of Tameka, who was born on October 4, 2007.[1] Mr. Robinson lived with Eleanor Wilson for over eight years, raising their four children together.[2] Tameka's mother was not Ms. Wilson, but rather was a woman with whom Mr. Robinson had an affair.[3] Feeling as though she could not adequately care for Tameka, the biological mother agreed to place the child with a social-service agency for adoption.[4] Mr. Robinson objected to the adoption, and on October 19, 2007, he advised DCYF that he wanted custody of the child shortly after the baby's birth.[5] After learning of the affair, Ms. Wilson demanded that Mr. Robinson vacate their home.[6] Mr. Robinson also informed one of the caseworkers that he used marijuana.[7] DCYF required Mr. Robinson to attend a drug treatment facility and refused to place

1. *In re* Tamika R., 973 A.2d 547, 548-49 (R.I. 2009).
2. *Id.* at 549.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *In re Tamika*, 973 A.2d at 549.

Tameka in his custody, pointing to his lack of stable housing and his admitted use of marijuana.[8] On October 19, 2007, DCYF filed a petition against both biological parents alleging dependency on drugs and neglect.[9]

Based on Tameka's and Mr. Robinson's membership within an Indian Tribe, when DCYF stepped into this situation, it was obligated to comply with the provisions of the Indian Child Welfare Act of 1978 (ICWA).[10] The ICWA is a statement of Congressional policy concerning "the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people." [11]

The ICWA imposes two constraints on a state agency attempting to revoke the custody of an Indian child from the parents.[12] First, a state agency must prove by clear and convincing evidence that continued custody "is likely to result in serious emotional or physical damage to the child."[13] Furthermore, testimony from a qualified expert witness[14] must

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8. *Id.*

9. *Id.*

10. *Id.* at 551 ("No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (quoting 25 U.S.C. §1912(e))).

11. *Id.* at 550 (recognizing that "there is no resource [. . .] more vital to the continued existence and integrity of Indian tribes than their children." (quoting 25 U.S.C. § 1901(3)) (explaining that Congress established minimum Federal standards to reflect the unique values of the Indian culture when removing Indian children from their families and placing such children in foster or adoptive homes. Congress found "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and [. . .] that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." (quoting 25 U.S.C. § 1901(4) and (5))).

12. *Id.* at 551.

13. *In re Tamika*, 973 A.2d at 551 (quoting 25 U.S.C. § 1912(e)).

14. *Id.* (defining "qualified expert witness" as "(i) [a] member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and

support the foster care placement.[15] The two interrelated requirements ensure that "Indian child welfare determinations are not based on 'a white, middle-class standard, which in many cases, forecloses placement with [an] Indian family.'"[16]

The trial was held on March 20, 2008, where the trial judge found that (1) Mr. Robinson's family was already being supported by the state rather than a working family member, and (2) that DCYF had provided clear and convincing evidence of Mr. Robinson's dependency on marijuana.[17] The judge then committed Tameka to the care, custody, and control of DCYF.[18] Mr. Robinson's attorney objected that DCYF had failed to establish dependency by clear and convincing evidence, and the agency's failure to adhere to ICWA's provisions requiring the testimony of a qualified expert witness to support the removal of the child.[19]

Although the trial judge initially considered reopening for the submission of expert testimony, after hearing further argument from the state, he concluded that Mr. Robinson's admission regarding his marijuana use of, "I can't stop, it's part of my life," superseded the necessity of expert testimony.[20] The trial judge concluded that DCYF's case plan should include "generous" visitation to facilitate reunification, DCYF should ensure that Mr. Robinson rather than Ms. Wilson would be the primary caretaker of Tameka during these visitations, and that Mr. Robinson submit to random drug screening tests.[21] An initial decree was entered on April 9, 2008, and a second decree was entered on April 23,

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childrearing practices[;] (ii) [a] lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe[; or] (iii) [a] professional person having substantial education and experience in the area of his or her specialty." (quoting GUIDELINES FOR STATE COURTS; INDIAN CHILD CUSTODY PROCEEDINGS, 44 Fed. Reg. 67,584-95 (Nov. 26, 1979))).

15. *Id.*

16. *Id.* (quoting Miss. Bank of Choctaw Indians v. Holyfield, 490 U.S. 30, 37, 109 (1989) (quoting H.R. Rep. No. 95-1386, at 24 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7350, 7546)).

17. *Id.* at 549-50.

18. *Id.*

19. *In re Tamika*, 973 A.2d at 549.

20. *Id.*

21. *Id.* at 550.

2008, where the trial judge added that DCYF had "made reasonable efforts to facilitate reunification as to father."[22] Mr. Robinson appealed.[23]

ANALYSIS AND HOLDING

On appeal Mr. Robinson argued: (1) that DCYF failed to submit clear and convincing evidence of his dependency on marijuana; and (2) that DCYF's failure to comply with the ICWA in not presenting expert testimony had required the trial judge to dismiss the agency's dependency petition.[24] Justice Suttell, writing for the majority, explains the standard of review to be used,[25] discusses the ICWA requirements, and points out that DCYF has conceded noncompliance to the mandatory requirements.[26] DCYF argues that this error was harmless beyond a reasonable doubt, and goes on to explain that because the trial judge's reasoning for his findings were "culturally neutral," allowing an expert to offer his opinion, even though required by the ICWA, would not have outweighed the evidence of dependency presented.[27]

The Court holds that the failure to comply with the requirements of the ICWA was not a harmless error.[28] DCYF failed to present any evidence that serious emotional or physical harm was likely to be sustained by Tameka if Mr. Robinson was granted custody.[29] The Court also points to DCYF's knowledge that its claim of a lack of stable housing was not relevant since Mr. Robinson never left the home, and, in addition, Ms. Wilson had been visiting Tameka and was willing to make the child part

22. *Id.*
23. *Id.*
24. *Id.*
25. *In re Tamika*, 973 A.2d at 550 (explaining that the trial judge's decision will not be disturbed unless there is a showing that the decision is clearly wrong or that material evidence was overlooked or misconceived. The record must be examined to determine whether the trial judge's decision is based on legally competent evidence, and because this case presents a question of statutory construction, the Court will review the record *de novo*).
26. *Id.* at 551.
27. *Id.* (relying on Mr. Robinson's admission that he "can't stop").
28. *Id.* at 552.
29. *Id.*

of her family.[30] The Court also holds that Mr. Robinson's admission of his use of marijuana was not sufficiently "culturally neutral" to allow the trial judge to ignore the requirement of a qualified expert witness because the testimony could have been helpful in assessing the seriousness and cultural relevance of Mr. Robinson's marijuana use.[31] The cases DCYF cites exemplify an expansive definition of a qualified witness, but do not relate to Mr. Robinson's case because in both, expert witnesses testified that continued custody would likely result in serious emotional or physical damage to the children if remaining in the parent's custody.[32]

Although the lower court suggests that Mr. Robinson's marijuana use was likely to result in serious emotional or physical damage, the Supreme Court correctly found it significant that the trial judge merely ordered drug screening, and that DCYF did not attempt to take away Mr. Robinson's other four children that were living with him.[33] Because the trial judge declared that Mr. Robinson's testimony "supersedes [the necessity of] an expert," the Court is satisfied that the ICWA regulations were disregarded in

30. *Id.*

31. *In re Tamika*, 973 A.2d at 552 (suggesting that evidence that only shows the existence of "family poverty, crowded or inadequate housing, alcohol abuse, or non-conforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child." (quoting GUIDELINES FOR STATE COURTS; INDIAN CHILD CUSTODY PROCEEDINGS, 44 Fed.Reg. 67,584-95 (Nov. 26, 1979)); ("Legislative history indicates that the primary reason for requiring qualified expert testimony in ICWA termination proceedings was to prevent courts from basing their decisions solely upon the testimony of social workers who possessed *neither* the specialized professional education *nor* the familiarity with Native culture necessary to distinguish between cultural variations in child-rearing practices and actual abuse or neglect." (quoting L.G. v. State Dep't. of Health and Social Services, 14 P.3d 946, 952-53 (Alaska 2000))).

32. *In re Tamika*, 973 A.2d at 551-52 (People *ex rel.* K.D., 155 P.3d 634 (Colo.App. 2007) ("qualified expert need not possess special knowledge of Indian life where she is testifying about culturally neutral reasons for termination and where she has substantial education and experience in her field); State *ex rel.* Juvenile Dep't. of Lane County v. Tucker, 710 P.2d 793 (Or. C. App. 1985) ("when cultural bias is clearly not implicated, the necessary proof may be provided by expert witnesses who do not possess special knowledge of Indian life").

33. *In re Tamika*, 973 A.2d at 552.

the lower proceedings.[34]

The particular circumstances of this case left uncertainty as to whether Mr. Robinson still would have been prevented from obtaining custody of Tameka had DCYF complied with the ICWA regulations.[35] Tameka was committed to DCYF for foster placement by the trial judge without any testimony from a qualified expert witness supporting that decision.[36] The trial judge also failed to make the required finding that placing the child with Mr. Robinson would likely result in serious emotional or physical damage to the child.[37] With the blatant disregard for the prerequisites of the ICWA, the Court could not find that the trial judge's error was harmless.[38] The case was remanded to be retried or resolved no later than ninety days from the date of the Court's opinion.[39]

COMMENTARY

This case exemplifies the prejudice Indian families tend to face when dealing with public and private agencies. The inability to relate to the Indian culture directly conflicts with the typical autonomy normally granted to biological parents wishing to obtain custody of their children. Congress enacted the ICWA in an attempt to counteract these biases. DCYF and the trial judge seemingly display a preconception in this case that Mr. Robinson is unfit to parent Tameka based on the decision to disregard mandatory regulations that have been statutorily created for these exact situations. Congress discovered that an alarmingly high percentage of Indian tribe children have been removed from their families and placed in non-Indian foster and adoptive homes and institutions.[40] The highly disparate result leads to one of the following conclusions: (1) a greater majority of Indian parents are not able to adequately care for and protect their children: or (2) the prominently "white, middle-class standard"[41] holds a

34. *Id.*
35. *Id.*
36. *Id.* at 553.
37. *Id.*
38. *Id.*
39. *In re Tamika*, 973 A.2d at 553.
40. *Id.* at 550.
41. *Id.* at 551 (quoting *Holyfield*, 490 U.S. at 37).

predisposed assumption that Indian families are different, and because they are different, they are generally incapable of taking care of their own children because they do not adhere to white, middle class actions and beliefs.

After disclosing the affair, Mr. Robinson found himself in what would normally be a typical reaction by any person in a long term relationship; he was told to get out. DCYF did not seem to take into consideration that Mr. Robinson was willing to come clean with this information for the purpose of claiming and taking responsibility for his child. His action not only illustrates the recognition by Congress in creating the ICWA that "there is no resource [. . .] more vital to the continued existence and integrity of Indian tribes than their children,"[42] and it is also an action that in many other cases would be held as exemplary. Mr. Robinson likely knew he would face repercussions at home for the discovery of his fathering another woman's child; some men would likely let that child slip out of their life without breathing a word about it to avoid creating trouble at home. Neither DCYF nor the trial judge seems to think that risking his relationship to gain custody of his child was an act that should garnish much consideration.

Instead, DCYF and the trial judge focus on Mr. Robinson's admission of marijuana use. Justice Suttell points to an illusion of danger and unfitness that both DCYF and the trial judge cling to while preventing Mr. Robinson from recognizing his rights under the ICWA.[43] Had there been any true concern regarding Mr. Robinson's ability to parent and the potential safety of the child placed under his care and supervision, both the trial judge and DCYF would have taken drastically different steps while producing the same result. The trial court likely would have ordered Mr. Robinson into a drug rehabilitation program rather than mere testing, and the living situation with his four other children would have been more closely observed. Without finding that the four children presently in Mr. Robinson's custody are or could be in danger, it is hard to understand how the decision could be made that only Tameka would be in danger if placed within the same household.

However, the argument could be made that both the trial

42. *Id.* at 550 (quoting 25 U.S.C. § 1901(3)).
43. *Id.* at 552.

court and DCYF were in fact aware of a present danger for the children already residing in the home, but chose to rely on the fact that they were also Ms. Wilson's biological children to prevent them from further consideration. The trial judge, after ordering visitation for the father, makes it clear that it is Mr. Robinson that should perform as Tameka's primary caretaker during his visits rather than Ms. Wilson.[44] This statement seems to suggest that the Court felt as though Ms. Wilson was capable of taking care of her children, but it was not Ms. Wilson's child here that was at issue. Ms. Wilson was not the biological mother, and there is no evidence that she intended to adopt Tameka as her own. Therefore, she could kick Mr. Robinson and Tameka out of the house, leaving them with nowhere to go, and with no ability to provide any support for him and his child. At issue was whether custody granted to Mr. Robinson, as the biological father, was likely to result in serious emotional or physical damage to Tameka. Rhode Island courts adhere to the best interest of the child standard in determining custody.[45] A court could reasonably decide that placing an infant in the custody of a person who had no way to care and protect the child on his own satisfied the clear and convincing evidence needed to show that custody held by that parent was likely to result in serious emotional or physical damage to the child, and was not in the best interest of the child.

However the facts of the case, the actions taken by DCYF, and the decision of the trial judge do not relate any of these concerns. These arguments would also ignore that the ICWA does not adhere to a best interest of the child standard. There are statutory requirements that DCYF and the trial judge in this case directly chose to ignore.[46] Therefore, the Court was correct in its holding that the error made in this case was not harmless.[47] If anything, one could say this error was a direct harm, not only to the Indian tribes, but to all individuals because it reinforced the idea that certain categories of people do not necessarily have to adhere to the rules and regulations set before them. The Supreme Court ensured justice where it had not been granted.

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44. *Id.* at 550.

45. Pettinato v. Pettinato, 582 A.2d 909, 913 (R.I. 1990) (citing Petition of Loudin, 101 R.I. 35, 39 (1966)).

46. *In re Tamika*, 973 A.2d at 552.

47. *Id. at* 553.

CONCLUSION

In judicial procedures under 28 U.S.C. §1912(e) of the ICWA, a judge must adhere to the mandatory requirements and not order foster care placement unless there is clear and convincing evidence, including the testimony of qualified expert witnesses, to determine that the continued custody of the child with the parent is likely to result in serious emotional or physical damage to the child.[48] If a judge does not adhere to these statutory directives, it is to be considered a harmful error.[49]

Heather O'Connor

48. *Id.*
49. *Id.*

Labor and Employment Law. *City of East Providence v. Int'l Ass'n of Firefighters Local 850*, 982 A.2d 1281 (R.I. 2009). The City of East Providence appealed after their motion to vacate an arbitration award granting Chief James Moniz injured on-duty benefits was denied. The Rhode Island Supreme Court upheld the award pursuant to § 45-19-1, the injured on-duty statute, and § 45-19.1, the "Cancer Benefits for Fire Fighters" statute.

FACTS AND TRAVEL

In August 2002, James Moniz, the East Providence Fire Department Battalion Chief, was diagnosed with prostate cancer.[1] Consequently, Chief Moniz underwent treatment for his illness and was out on sick leave from August 22, 2002 until November 18, 2002.[2] Fortunately, the treatment was successful and Chief Moniz was able to return to active duty immediately after.[3] Upon his return, Chief Moniz requested that his forty-four day sick leave be converted to "injured on-duty" time in order to have those days credited back to his sick leave reserve.[4] Although Chief Moniz cited two other firefighters who were diagnosed with cancer and who had their sick leave converted to injured on-duty time, the chief of the department denied his request.[5]

Subsequently, International Association of Firefighters Local 850 ("Local 850") filed a grievance pursuant to the collective-bargaining agreement, but the human resources director nevertheless denied the grievance.[6] The director denied the grievance partially because the two firefighters Chief Moniz referenced did not return to active duty following their diagnoses, but retired on sick leave.[7] The director stated that each request is

1. City of East Providence v. Int'l Ass'n of Firefighters Local 850, 982 A.2d 1281, 1283 (R.I. 2009).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 1283-84.
6. *Id.* at 1284.
7. *Int'l Ass'n of Firefighters Local 850*, 982 A.2d at 1283-84.

considered on a case-by-case basis with two factors taken into consideration: (1) the type of cancer, and (2) whether the cancer led directly to disability retirement.[8] Since Chief Moniz was able to, and in fact did, return to active duty, the human resources director denied the grievance.[9]

The collective-bargaining agreement between the City of East Providence ("the City") and Local 850 provides that an "in-line-of-duty illness" must conform with the injured on-duty statute, § 45-19-1.[10] Following the City's denial, Local 850 submitted the grievance to arbitration[11] arguing that § 45-19.1 (the "Cancer Benefits for Fire Fighters" statute)[12] was incorporated into the parties' collective-bargaining agreement through the agreement's adoption of § 45-19-1.[13] Moreover, Local 850 argued that

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8. *Id.* at 1284. "It is the City's policy to evaluate each request that cancer be presumed to be work related on a case-by-case basis. In the past, the City has ruled in two cases, based on the type of cancer and the fact that the cancer led directly to disability retirements, that the sick leave taken immediately prior to the disability pension should be converted to injury on duty leave. In your case, based on the type of cancer and the fact that you have recovered sufficiently to return to active duty, it is the City's position that your sick leave not be converted to injured on duty status." (letter from the human resources director denying Chief Moniz's request) *Id.*

9. *Id.*

10. *Id.* at 1283. Section 45-19-1(a) provides:

> Whenever any [. . .] fire fighter [. . .] of any city, town, fire district, or the state of Rhode Island is wholly or partially incapacitated by reason of injuries received or sickness contracted in the performance of his or her duties [. . .] the respective city, town, fire district, state of Rhode Island or Rhode Island Airport Corporation by which the [. . .] fire fighter [. . .] is employed, shall, during the period of the incapacity, pay the [. . .] fire fighter [. . .] the salary or wage and benefits to which the [. . .] fire fighter [. . .] be entitled had he or she not been incapacitated [. . .] .

R.I. GEN. LAWS § 45-19-1(a) (1956). Article X, Section 10.03(A) of the collective-bargaining agreement reads:

> Members of the fire department, covered by this contract who are injured in the line of duty including non-civic details to which they are assigned, shall receive full salary while their incapacity exists or until they are placed on a disability retirement (This section is in conformance with . . . , as amended, §45-19-1).

Int'l Ass'n of Firefighters Local 850, 982 A.2d at 1283.

11. Article XVI of the collective-bargaining agreement made arbitration obligatory. *Id.* at 1284.

12. R.I. GEN. LAWS § 45-19.1 (1956).

13. *Int'l Ass'n of Firefighters Local 850*, 982 A.2d at 1284.

previously granting firefighters cancer benefits constituted a past practice, which entitled Chief Moniz to benefits under the statute.[14] In response, the City asserted that its firefighters were not entitled to the benefits under the "Cancer Benefits for Fire Fighters" statute because the applicability of the statute is limited to those municipalities participating in the option retirement plan under § 45-21.[15]

The arbitrator awarded Chief Moniz forty-four days of sick leave back to his reserve, concluding that §45-19-1 was incorporated into the collective-bargaining agreement.[16] Moreover, the arbitrator concluded that the General Assembly amended §45-19-1 to include cancer as a potential on-duty injury.[17] Further, in the alternative, the arbitrator determined that any ambiguity in whether the "Cancer Benefits for Fire Fighters" statute was applicable to the agreement could be explained by the parties' past practices.[18] The arbitrator found that the City had previously provided cancer benefits for its firefights; therefore, the parties intended for the "Cancer Benefits for Fire Fighters" statute to be incorporated into the agreement.[19]

The City filed a motion to vacate the arbitration award in Superior Court, but the hearing judge denied the motion.[20] The City appealed arguing that the arbitrator exceeded his authority by finding the "Cancer Benefits for Fire Fighters" statute applicable to its firefighters.[21] The City contends that the arbitration award was irrational because: (1) the "Cancer Benefits for Fire Fighters" statute is limited to municipalities that participate in the option retirement plan pursuant to § 45-21-2, and that its firefighters are not entitled to the benefits because the City does not participate in such a program; (2) implementing the arbitrator's award would cause irreparable, unforeseen fiscal harm; and (3) the application of the "Cancer Benefits for Fire Fighters" statute to its firefighters created new injured on-duty

14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Int'l Ass'n of Firefighters Local 850*, 982 A.2d at 1284-85.
20. *Id.* at 1285.
21. *Id.*

and pension benefits that were not a product of collective-bargaining.[22] Local 850 maintains that § 45-19-1 was incorporated into the parties' collective bargaining agreement, that the "Cancer Benefits for Fire Fighters" statute amended § 45-19-1, and that the plain language of the statute applies to all Rhode Island firefighters.[23]

ANALYSIS AND HOLDING

The Supreme Court stated that arbitration awards enjoy a presumption of validity,[24] and therefore, the award may only be overturned where it is irrational or where the arbitrator has manifestly disregarded the law.[25] A manifest disregard of the law is present when an arbitrator correctly understands and articulates the law, but nevertheless ignores it.[26]

The Court first addressed, and quickly rejected, the City's argument that the arbitrator exceeded his authority by construing the "Cancer Benefits for Fire Fighters" statute to be an amendment to § 45-19-1.[27] Commenting that an arbitrator can, and should, decide questions of state law in resolving a grievance among parties to a collective-bargaining agreement, the Court found the arbitrator to be well within his authority.[28]

Next, the Court rejected the City's argument that conferring injury on-duty benefits to firefighters with cancer would cause irreparable economic harm.[29] The City is statutorily obligated under the "Cancer Benefits for Fire Fighters" statute, as it amended §45-19-1, to provide benefits for cancer-stricken firefighters.[30] Given that the parties collectively bargained for the benefits of § 45-19-1, the City was also contractually obligated to provide such benefits.[31] Finally, the Court noted that cancer was

22. *Id.*
23. *Id.*
24. *Id* (citing N. Providence Sch. Comm. v. N. Providence Fed'n of Teachers, Local 920, 945 A.2d 339, 344 (R.I. 2008)).
25. *Int'l Ass'n of Firefighters Local 850*, 982 A.2d at 1285-86.
26. *Id.* at 1286.
27. *Id.*
28. *Id.* (citing R.I. Bhd. of Corr. Officers v. State of R.I., 643 A.2d 817, 821 (R.I. 1994)).
29. *Id.*
30. *Id.*
31. *Int'l Ass'n of Firefighters Local 850*, 982 A.2d at 1286.

just one type of injury a firefighter may have that would qualify him for injury on-duty benefits.[32]

The Court also rejected the City's argument that the "Cancer Benefits for Fire Fighters" statute is limited to municipalities that participate in the option retirement plan.[33] In agreement with Local 850, the Court found the plain language of the statute to indicate a general application to all Rhode Island firefighters.[34] After looking at the legislative findings,[35] the Court found that the "statute acknowledges the unfortunate fact that in the performance of their duties, firefighters develop cancer at a disproportionate rate."[36] In order to determine whether the "Cancer Benefits for Fire Fighters" statute applied in the present case, the Court examined § 45-19.1-3.[37] Section 45-19.1-3 provides:

> Any fire fighter, including one employed by the state, or a municipal fire fighter employed by a municipality that participates in the optional retirement for police officers and fire fighters, as provided in chapter 21.2 of this title,

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32. *Id.*
33. *Id.* at 1288.
34. *Id.*
35. Section 45-19.1-1 provides:

> (a) The general assembly finds and declares that by reason of their employment: (1) Fire fighters are required to work in the midst of, and are subject to, smoke, fumes, or carcinogenic, poisonous, toxic, or chemical substances; (2) Fire fighters are continually exposed to a vast and expanding field of hazardous substances through hazardous waste sites and the transportation of those substances; (3) Fire fighters are constantly entering uncontrolled environments to save lives and reduce property damage and are frequently not aware of the potential toxic and carcinogenic substances that they may be exposed to; (4) Fire fighters, unlike other workers, are often exposed simultaneously to multiple carcinogens, and the rise in occupational cancer among fire fighters can be related to the rapid proliferation of thousands of toxic substances in our every day environment; and (5) the onset of cancers in fire fighters can develop very slowly usually manifesting themselves from five (5) to forty (40) years after exposure to the cancer-causing agent.
>
> (b) The general assembly further finds and declares that all of the previously stated conditions exist and arise out of or in the course of that employment.

R.I. GEN. LAWS § 45-19.1-1 (1956).
36. *Int'l Ass'n of Firefighters Local 850*, 982 A.2d at 1288.
37. *Id.* at 1287.

> who is unable to perform his or her duties in the fire department by reason of a disabling occupational cancer[38] which develops or manifests itself during a period while the fire fighter is in the service of the department, and any retired member of the fire department of any city or town who develops occupational cancer, is entitled to receive an occupational cancer disability, and he or she is entitled to all the benefits provided for in chapters 19, 21, and 21.2 of this title and chapter 10 of title 36 if the fire fighter is employed by the state.[39]

The City argued that the "Cancer Benefits for Fire Fighters" statute was limited to those municipalities participating in the option retirement plan.[40] However, the Court concluded that the statute was clear and unambiguous.[41] Therefore, the statute is construed by using the plain and ordinary meaning of the language.[42] Section 45-19.1 declares cancer as an on-duty illness among firefighters.[43] The plain language of the statute indicates that any cancer-stricken firefighter is entitled to receive injured on-duty benefits, regardless of whether the municipality participates in the option retirement program.[44]

Therefore, the "Cancer Benefits for Fire Fighters" statute confers injured on-duty benefits to cancer-stricken firefighters as governed by § 45-19-1.[45] Accordingly, the Court concluded that the arbitrator did not exceed his authority in awarding Chief Moniz injured on-duty benefits.[46]

COMMENTARY

Unfortunately, cancer has become a prevalent and

38. "Occupational cancer means a cancer arising out of his or her employment as a fire fighter, due to injury from exposures to smoke, fumes, or carcinogenic, poisonous, toxic or chemical substances while in the performance of active duty in the fire department." R.I. GEN. LAWS § 45-19.1-2 (1956).

39. R.I. GEN. LAWS § 45-19.1-3(a) (1956).

40. *Int'l Ass'n of Firefighters Local 850*, 982 A.2d at 1286.

41. *Id.* at 1288.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 1288-89.

46. *Int'l Ass'n of Firefighters Local 850*, 982 A.2d at 1289.

devastating illness in modern society. Most Americans know someone who has been affected by the disease.[47] As a result, it is natural to empathize with those adversely affected by cancer. In addition, firefighters perform an indispensable and invaluable service to their community that many people would be reluctant to do. Thus, it is easy to see why the Rhode Island Supreme Court was sympathetic to Chief Moniz's situation. The Court commended Chief Moniz for returning to active duty after battling cancer.[48] Not only was the Court showing compassion, but it also seems as if they were wagging their finger at the City of East Providence for not doing the same. Moreover, the Court went to great lengths to explain the legislative intent of the "Cancer Benefits for Fire Fighters" statute, detailing the dangers of being a firefighter.[49]

Although the Court's underlying sentiment was clear throughout the opinion, the Court seems to have conscientiously and rationally decided the case. The Court was careful to explain the logical reasoning behind its decision. Primarily, the Court thoroughly described its reasons for finding the City's arguments to be unpersuasive,[50] even though the case seemed to be fairly straightforward. Moreover, the Court went to great lengths to make it clear why the "Cancer Benefits for Fire Fighters" statute was applicable in this situation.[51] Even though the Court ultimately found for Chief Moniz, the Court does not seem to have been entirely influenced by his sympathetic situation. Thus, the Rhode Island Supreme Court prudently remained levelheaded in order to properly and meticulously apply the law, despite their compassion.

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47. "There is an epidemic of cancer today. One in three Americans will be diagnosed with cancer, often before the age of 65." David Servan-Schreiber, *We Can Stop the Cancer Epidemic* (2008), *available at* http://www.nytimes.com/2008/09/19/opinion/19iht-edservan.1.16308287.html.

48. *Int'l Ass'n of Firefighters Local 850*, 982 A.2d at 1284 n.2.

49. *Id.* at 1287-88.

50. *Id.* at 1285-89.

51. *Id.* at 1286-89.

CONCLUSION

The Rhode Island Supreme Court held that the "Cancer Benefits for Fire Fighters" statute provides injured on-duty benefits to firefighters diagnosed with cancer and, therefore, Chief Moniz is entitled to have his sick leave converted to injured on-duty time.[52] Accordingly, the Court affirmed the Superior Court's judgment.[53]

Kate Early

52. *Id.* at 1289.
53. *Id.*

Labor and Employment Law. *New England Stone, LLC v. Donald C. Conte, et al.*, 962 A.2d 30 (R.I. 2009). In this decision, Justice Maureen McKenna Goldberg, writing for the unanimous Rhode Island Supreme Court, affirmed that where an employment contract specifies that an employee may only be terminated for "cause" demonstrated by a showing of "good faith," that the measure of "good faith" is to be determined through a case-by-case consideration. The Court declined the opportunity to adopt objective measurable standards for determining good-faith, favoring (1) the legislature's role in determining the elements of protection to be conferred on a class and (2) the parties' rights of protection from courts supplying additional protections not included in the original contract. Further, the Court held that a termination for cause is made in good-faith where the employee's conduct is in direct defiance of a superior's repeated instructions.

FACTS AND TRAVEL

The Plaintiff, New England Stone, LLC (hereinafter "NES") is a provider of granite products to clientele across the United States.[1] Prior to 2005, NES was owned by the father-in-law of the defendant, Donald C. Conte (hereinafter Conte), who served as its general manager. In 2005, when NES was sold, Conte remained with the new management as chief operating officer.[2]

The Contract

Prior to undertaking his duties as chief operating officer, Conte entered into an employment agreement specifying that he is to report "exclusively" to Craig Reynolds (hereinafter "Reynolds"), the president of NES.[3] Additionally, the agreement specified grounds for termination, allowing NES to terminate Conte's employment only for cause, defined as "Conte's failure to follow

1. New England Stone, LLC v. Donald C. Conte, et al. 962 A.2d 30, 31 (R.I. 2009).
2. *Id.*
3. *Id.*

any directive of the (p)resident with regard to the conduct of the (c)ompany's business," providing also that cause shall be determined in "good faith."[4]

Under the contract, if Conte was terminated for cause, he was prohibited from competing with NES in the New England area for two years, could not solicit NES customers for two years, and could not disseminate confidential information for five years.[5] He would also only be entitled to his accrued salary.[6]

The Stone Creek Quarry Incident

Sometime prior to the current suit, NES had obtained a $50,000 judgment against a client, Stony Creek Quarry Corporation (hereinafter "Stony Creek") for nonpayment.[7] Despite the ongoing litigation, the two companies continued to do business under Reynold's instructions that Stony Creek was to pay cash upon delivery until payment of the judgment was complete.[8] When Reynolds learned that Stony Creek was being allowed to purchase materials from NES for only 50 percent down payment with the balance due thirty days later, he reiterated his instructions in an email sent to Conte and other employees.[9] In this same email, Reynolds also cancelled all orders from Stony Creek because of their outstanding invoices, which totaled $7,809.[10] However, this directive was shortly repudiated, leaving the cash-on-delivery requirement in effect.[11]

On Friday, May 18, 2007, an associate of Stony Creek traveled to NES to pay for and retrieve a portion of an order of stone tiles.[12] The first truck not being sufficient to retrieve the entire order, Stony Creek dispatched a second truck to pick up the remainder of the tiles, but because of some confusion, the second truck did not have a payment to give to NES in exchange for the

4. *Id.*
5. *Id.*
6. *Id.*
7. *New England Stone,* 962 A.2d at 31.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

tiles.[13] By this time, it was too late in the day for the driver to go back to Connecticut and return to Rhode Island with the payment.[14] Sandy Meyer, NES's logistics officer, adhering to Reynold's instructions, refused to release the order without first receiving payment.[15] Reynolds was out of reach, so the associate contacted Conte and assured him that the payment would be sent the following Monday.[16] In agreement, Conte instructed Meyer to release the tiles without payment, however, she refused.[17] Conte then simply overruled Meyer, and ordered the plant foreman to release the tiles to Stony Creek, which he did.[18] Stony Creek paid NES for the tiles at a later date.[19]

The following week, Reynolds met with Conte and another NES officer to discuss the incident. Reynolds testified at trial that he had not made up his mind whether to terminate Conte at the outset of the meeting.[20] Reynolds further testified that when he questioned Conte about countering his directive regarding Stony Creek, Conte became agitated and displayed an "attitude" and "negative body language."[21] Conte was terminated following the meeting.[22]

After the Stony Creek Incident

Following his termination, Conte acquired partial ownership of AC Stone, LLC, a competitor of NES, prompting NES to institute this action, contending that Conte was in violation of the employment agreement.[23] NES sought a preliminary injunction to enforce the contract.[24] Conte filed a counterclaim, asserting that because he was not terminated for cause, he was entitled his salary for the duration of his contract with NES in addition to

13. *New England Stone*, 962 A.2d at 31.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 31-33.
19. *New England Stone*, 962 A.2d at 32.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*

payment for eleven weeks of accrued vacation time.[25]

The hearing judge held that Conte was terminated for cause in accordance with the employment agreement, noting that "good faith" was limited to a finding that cause for termination existed because of Conte's "blatant disregard of the literal language of the memo precluding what actually subsequently transpired."[26]

The hearing judge granted NES's preliminary injunction, and denied Conte's counterclaim.[27] A temporary stay was issued, during which Conte appealed.[28]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court first resolved that because the defendant is challenging the decision in the Plaintiff's favor on the grounds that the hearing justice made an error of law by not employing a measurable good-faith standard, its review would be *de novo*.[29]

Objective Standards for Good-Faith Termination Contracts

The Rhode Island Supreme Court has held that Rhode Island is an employment-at-will state, and that absent an employment agreement, there is no right to continued employment, and the employee may be discharged at any time, for any reason, or for no reason at all.[30]

The defendant urged that the Court create additional, implied terms to govern situations where a contractual agreement exists between employer and employee that would require would give "due-process mandates" before ensuring a finding of good faith.[31] Such standards would be an objective good-faith standard that is used in other jurisdictions. To illustrate one of these standards, the Court looked to the California requirements for termination for cause, which must be based on "fair and honest reasons,

25. *New England Stone*, 962 A.2d at 32.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 33 (citing Galloway v. Roger Williams Univ., 777 A.2d 148, 150 (R.I. 2001)).
31. *New England Stone*, 962 A.2d at 33.

regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual."[32] The Court held that such a standard would require the employer to support its decision to terminate an employee with "substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond."[33]

Conte argued that NES breached the employment agreement by failing to terminate him in good faith for two reasons. First, that NES failed to conduct a full and thorough investigation, including the interviewing of key witnesses, notifying him of the alleged misconduct, and affording him an opportunity to be heard.[34] Second, that Reynolds terminated him solely because of his alleged negative attitude during the meeting following the Stony Creek incident.[35]

The Court declined to impose such requirements into good-faith termination contracts, citing to case law holding that it is not within the province of the courts to create rights for persons where the Legislature has not chosen to confer such protection.[36] Alternatively, the Court pointed out in a footnote that the California cases adoption of the objective good-faith standard involved cases where the trier of fact was in the position of deciding whether the employee actually committed the act justifying the dismissal, or if the employer could have honestly concluded that the employee committed the act.[37] Here, the issue of whether Conte committed the act was not in dispute, but the question was whether dismissal for such action was a good-faith cause.

32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* (citing Pacheco v. Raytheon Co,. 623 A.2d 464, 465 (R.I. 1993)).
37. *New England Stone,* 962 A.2d at 33 n.3.

Conte's Agreement with NES

After declining to adopt objective, measurable standards for a "good faith" finding of cause for termination, the Court set out to determine whether NES did have a good faith cause to terminate Conte. Agreeing with the lower court, Justice Goldberg wrote that "(i)n our view, Conte's admission to Reynolds that he permitted a representative from Stony Creek to pick up materials without paying for them, in direct defiance of Reynold's order, satisfied the good-faith provision of the employment agreement.[38]

Justice Goldberg also pointed out that the objective standards that Conte had proposed would not have provided him any relief.[39] Because the employment agreement here "clearly and unambiguously" asserted that Conte's failure to follow a direct order from NES's president would constitute cause for termination, the Supreme Court agreed with the lower court that the requisite cause for termination was provided.[40]

COMMENTARY

The state Supreme Court here rejects the opportunity to do as other states have done by refusing to give teeth to the terms "good faith" as contained in employment agreements. Inherently, the decision not to adopt these requirements serves two ends: it spares employers the resources and time required to fulfill concrete, objective judicial standards to satisfy newly established "elements" of a good faith finding. Second, it represents a decision by the court to not define a term that is often used in employment and other agreements, instead leaving such protections for employees to the bargaining process.

Justice Goldberg specifically addresses California's policies regarding a showing of good faith for termination for cause, which specifically requires that the employer conduct an investigation in order to gather the "substantial evidence" it needs to show that the employee actually committed the alleged misconduct. In such a case as the one at hand, this would probably be an unnecessary step, which would produce a judicial quagmire: must the employer

38. *Id.* at 34.
39. *Id.* at 33.
40. *Id.* at 33-34.

in a situation where employee's conduct is clear and not denied still investigate and prove the conduct in order to terminate the employee? The policy of the Rhode Island Supreme Court, in this case, is not to require such actions.

This indicates that this case is likely to be read narrowly in the future. While employees across the state may have cause to feel that the Court may have a pro-employer agenda, the real agenda here is to prevent business from being forced to undergo a judicially-imposed resource-devouring investigation of employee conduct when that employee's misconduct is unquestioned and clearly violative. Conte had been instructed by the superior not to deliver tiles to Stony Creek without payment first. He directly and knowingly violated this order. It would appear that Reynolds had a good and valid reason for instituting the requirement that Stony Creek specifically pay first, as they had been to court with them over the issue of nonpayment, but continued to do business with each other. The payment prior to the transfer of the tiles was a means to avoid a repeat of the problem, and Conte clearly undermined that determination. To hold that Reynolds was then required to undergo an investigation into Conte's actions would be purely duplicitous and unnecessary, as the action itself was so clear-cut.

To the unanimous Rhode Island Supreme Court, there could be no other cause for termination following this incident than one that was made in good faith. To hold that an employer must undergo an investigation after an incident where the employee, a management level officer, is in clear violation of a directive from the company's principal could have the inevitable effect of ultimately undermining management authority. Thus, this case was easy. For a panoply of fact-specific reasons, future cases may not have the same outcome. The Court indeed leaves open the question of what "good faith" constitutes by declining to adopt objective rules to define and measure it. Instead, employees with this term in their contract are indeed left protected, as this case indeed further ensures that "good faith" must at least be clear-cut and unambiguous.

CONCLUSION

The Court held that Conte was terminated for cause, and that cause was found in good faith because he was in clear violation of his superior's direct order. The Court declined to adopt specific measurable bounds for the contractual language "good faith," but indeed implies that a "good faith" finding of cause for termination will only exist where the issue of the employee's misconduct is clear, unambiguous and undisputed.

Jared B. Arader

Law of Debtors and Creditors. *Holden v. Salvadore*, 964 A.2d 508 (R.I. 2009). For a transaction to constitute a loan, the parties to the transaction must intend to enter into a creditor-debtor relationship. Under R.I. General Laws § 5-79-1(a), a party who enters into an agreement and assumes the right of the highest bidder at a foreclosure sale to purchase such foreclosure property does not meet the definition of mortgage foreclosure consultant and thus is not subject to the prohibitions outlined in the Mortgage Foreclosure Consultant Regulation Act.

FACTS AND TRAVEL

The plaintiff, Deborah Holden, was in danger of losing her home from foreclosure by a lending institution, but was able to enter the highest bid of $265,000 for the property at the foreclosure sale.[1] Holden put down a $5,000 deposit and was required to pay the balance within thirty days of the sale date in order to complete the transaction.[2] With two weeks left before the deadline, and having been unable to obtain financing elsewhere, Holden contacted the defendant, Guido Salvadore, for assistance.[3] Holden informed Salvadore that she believed her property had a value of $379,000 and that a realtor had already listed the property on her behalf.[4] After reviewing the foreclosure documents, Salvadore offered to enter into an agreement with Holden, by which Holden would assign Salvadore her rights to purchase the property under the agreement she had entered into with the mortgagee in exchange for the option to repurchase the property later.[5]

At this point, Holden retained an attorney and the parties negotiated and executed a written agreement.[6] Under the terms

1. Holden v. Salvadore, 964 A.2d 508, 509-10 (R.I. 2009).
2. *Id.* at 510.
3. *Id.* Salvadore, an attorney, had assisted Holden with another matter three years earlier. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

of the agreement, Holden assigned Salvadore all of her rights under the memorandum of terms and conditions of sale that she had entered into with the mortgagee, and Salvadore granted Holden a ninety-day option to repurchase the property for $310,000.[7] Alternatively, if Holden were able to secure a third-party buyer for the property, she would be entitled to any profits from the sale that exceeded $310,000.[8] The agreement did not provide for any payment between the parties in exchange for the assignment of the right to purchase the property.[9]

After executing the agreement with Holden, Salvadore obtained a loan, paid the mortgagee the $260,000 balance due and obtained title to the property.[10] Holden continued to market the property for sale and eventually her realtor found a buyer willing to purchase the property for $350,000.[11] However, Holden was intent on repurchasing the property herself and refused this offer.[12] She told Salvadore that she was exercising the option to purchase the property under the agreement and requested that Salvadore extend the closing date by a few days and reduce the purchase price by $10,000.[13] Salvadore subsequently agreed to these modifications.[14] However, there was no further communication between Salvadore and Holden from this point until the time this litigation was initiated by Holden.[15]

Holden filed a complaint against Salvadore alleging usury and fraud and misrepresentation, seeking to recover monetary damages and obtain both a preliminary and permanent injunction.[16] Later, Holden amended the complaint to include counts alleging that Salvadore violated the Mortgage Foreclosure

7. *Holden*, 964 A.2d at 510.
8. *Id.*
9. *Id.*
10. *Id.* During this time, Salvadore allowed Holden to continue to live in the property rent-free. *Id.*
11. *Id.*
12. *Id.*
13. *Holden*, 964 A.2d at 510.
14. *Id.* Holden and Salvadore gave contrary testimony as to whether Salvadore agreed to reduce the price of the property but the trial judge accepted Salvadore's assertion that he did in fact agree to the price reduction. *Id.* n.2.
15. *Id.*
16. *Id.* at 510-11.

Consultant Act and the Deceptive Trade Practices Act.[17]

Before the trial judge, Holden testified that her original purpose in contacting Salvadore was strictly to obtain financing in order to purchase her property at the foreclosure sale, but Salvadore would only agree to be involved if he obtained title to the property.[18] In her testimony, Holden conceded that she had filed for bankruptcy in September 2006 and that her bankruptcy petition failed to list Salvadore as a creditor or claim any ownership interest in the property.[19] Salvadore testified that he believed the transaction presented a business opportunity from which both parties had the chance to profit, and this was what motivated him to enter into the agreement.[20]

The trial judge found that Holden had not presented a prima facie case and failed to meet the burden necessary for a grant of equitable relief.[21] First, the trial judge held that the transaction between Holden and Salvadore was not a loan but merely represented a business agreement from which both parties reasonably anticipated to profit.[22] Second, the trial judge found that because the agreement between Salvadore and Holden "was an arms-length transaction and not a consultation," Salvadore was not a mortgage foreclosure consultant and the Mortgage Foreclosure Consultant Regulation Act did not apply.[23] The Superior Court denied Holden's request for a preliminary and permanent injunction and for other equitable relief and entered partial final judgment in favor of Salvadore.[24] Holden appealed this judgment, maintaining the trial judge erred in finding that the transaction was not a loan and in finding that Salvadore was not a mortgage foreclosure consultant.[25]

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17. *Id.* at 511; *see also* R.I. GEN. LAWS §§ 5-79-1, 6-13.1-1 (1956).

18. *Holden*, 964 A.2d at 511. Holden further testified that she refused to accept the $350,000 offer obtained by her real estate agent because she intended to exercise the option to purchase the property herself, as she needed a roof over her head and this property was her home. *Id.*

19. *Id.* Significantly, Holden never provided the Supreme Court with a copy the transcript of her testimony before the trial judge and thus the Supreme Court was unable to review these facts. *Id.* at 511 n.4.

20. *Id.* at 511.

21. *Id.*

22. *Id.* at 511-12.

23. *Id.*

24. *Holden*, 964 A.2d at 511-12.

25. *Id.* The parties were ordered to appear before the Supreme Court to

ANALYSIS AND HOLDING

Was this transaction a loan?

The Supreme Court first addressed the issue of whether the transaction between Holden and Salvadore was a "loan in disguise."[26] Holden maintained that her agreement with Salvadore did constitute a loan agreement and, therefore, was subject to and in violation of the Rhode Island usury laws.[27] Addressing Holden's argument the Supreme Court established that, in determining whether a transaction such as the one at issue here constitutes a loan, it is necessary to "focus on the substance over the form of the transaction" and to consider the totality of the circumstances in order to determine the "true nature of the transaction."[28] Thus, the Court held that the existence of a loan is a question of fact[29] that turns on "'whether the parties intended to create a debtor-creditor relationship.'"[30]

Here, the trial judge found that Holden and Salvadore merely intended to enter into a business agreement, and the transaction between the parties was not intended to be a loan.[31] After reviewing the record provided, the Supreme Court found that the trial judge was not clearly wrong in finding that the transaction

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show cause why the issues raised by Holden should not be summarily decided. *Id.* at 509. After oral arguments, the court was confident that cause had not been shown and decided the appeal at that time. *Id.*

26. *Id.* at 513. Generally, review of this case would be precluded by Holden's failure to provide the Court with a transcript of her testimony. *See id.* at 513 n.7. However, because Holden maintained that the Superior Court judgment was in error despite the findings of fact, the Supreme Court inferred that she accepted the trial judge's findings and thus review can be granted to determine whether the trial judge "misconceived the law that applies to these facts." *Id.* 513-14 n.7.

27. *Id.* at 513; *see* R.I. GEN. LAWS § 6-26-2.

28. *See Holden*, 964 A.2d at 513 (citing Lancia v. Grossman's of R.I., Inc., 216 A.2d 517, 520 (R.I. 1966); Nazarian v. Lincoln Fin. Corp., 78 A.2d 7, 9 (R.I. 1951); Daniels v. Mowry, 1 R.I. 151, 164 (1842)).

29. *Id.* (citing West Pico Furniture Co. of Los Angeles v. Pacific Fin. Loans, 469 P.2d 665, 671 (Cal. 1970)).

30. *Id.* (quoting Kjar v. Brimley, 497 P.2d 23, 26 (Utah 1972)). In applying these principles to the case at bar, the Court noted that it would overturn the trial judge's finding of fact "only when they are clearly wrong or when the trial judge overlooked or misconceived material evidence." *Id.* (citing Bd. of Governors for Higher Ed. v. Infinity Constr. Servs., Inc., 795 A.2d 1127, 1129 (R.I. 2002)).

31. *See id.*

was not a loan, and the decision was clearly supported by the judge's reasoning.[32] The Supreme Court differentiated this case from a number of cases relied on by Holden, where a sale subject to an option to repurchase had been deemed a usurious loan.[33] The Court found that "[t]he common thread in [those] cases, the absence of which distinguishes them from the case at bar, is the existence of a debtor-creditor relationship between the holder of title and the holder of the option."[34] The Court further established that such a debtor-creditor relationship could "be in the form of personal liability of the debtor to pay a sum of money to the creditor"[35] or "in the form of 'a large margin between the debt or sum advanced and the value of the land conveyed.'"[36]

Here, the Supreme Court found it to be "clear that the parties did not intend to enter into a debtor and creditor relationship."[37] Holden was not personally indebted to Salvadore nor did Salvadore retain the right to collect any money from Holden.[38] The Supreme Court gave particular significance to the fact that Holden "did not relinquish her title to her property in exchange for the use of a sum of money that was significantly less than the

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32. *Id.* at 514. The trial judge reasoned that a loan did not exist because Salvadore did not lend Holden any money, Holden did not owe any debt to Salvadore, and Salvadore considered the arrangement to be a business deal. *See id.* The trial judge further noted that Holden was represented by independent counsel, and the written agreement was a "joint effort" executed by both parties, under which Holden had the potential to realize a profit of $50,000 to $60,000. *See id.* The trial judge found it particularly significant that Holden filed for bankruptcy and her bankruptcy petition did not list this transaction as a loan, nor did it claim any interest in the property at issue. *Id.*

33. *See id.*; *see also* Kawauchi v. Tabata, 413 P.2d 221, 227-28 (Haw. 1966); Robinson v. Durston, 432 P.2d 75, 76 (Nev. 1967); Canon v. Seattle Title Trust Co., 252 P. 699, 701 (Wash. 1927).

34. *Holden*, 964 A.2d at 514 (citing *Robinson*, 432 P.2d at 83-84; *Canon*, 252 P. at 701).

35. *Id.* at 515 (citing *Kawauchi*, 413 P.2d at 228-29).

36. *Id.* (quoting *Kawauchi*, 413 P.2d at 230 (citation omitted)). In *Kawauchi*, the plaintiff deeded property worth $160,000 to the defendant in order to avoid a foreclosure sale in exchange for an option to repurchase the property and $90,000 to pay off the mortgage. *Kawauchi*, 413 P.2d at 224, 225-26. There, the transaction was deemed to be a loan because "'the sum that the defendant paid for the property was inadequate in relation to the value of the property.'" *Id.* at 230-31.

37. *Holden*, 964 A.2d at 515.

38. *Id.*

property's value."[39] Instead, Holden only relinquished her right to purchase the property and take title in her own name in exchange for "the option to buy the property from Salvadore, or in the alternative, an opportunity to make a profit from a third-party sale."[40] Thus, the Supreme Court concluded that there was "no evidence of an actual debt or a transfer of property for inadequate consideration that would have served as security for a debt," and therefore the trial judge was not clearly wrong in finding that the transaction between Holden and Salvadore was not a loan.[41]

Was Salvadore a mortgage foreclosure consultant?

The second issue that the Supreme Court addressed was whether the trial judge erred in concluding that Salvadore was not a mortgage foreclosure consultant and thus not subject to the prohibitions set forth under Rhode Island General Laws § 5-79-4(a)(5).[42] The Rhode Island statute "defines a mortgage foreclosure consultant as a person who, for compensation, renders services to carry out one or more of eight delineated functions."[43] On appeal, Holden alleged that Salvadore fell under this definition because "he performed a service that would either '[s]top or postpone the foreclosure sale' or '[s]ave the owner's residence from foreclosure.'"[44]

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39. *See id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Holden*, 964 A.2d at 515; specifically, the statute states that a mortgage foreclosure consultant is "any person who, directly or indirectly, makes any solicitation, representation, or offer to any owner to perform for compensation or who, for compensation, performs any service which the person in any manner represents will in any manner do any of the following: (1) Stop or postpone the foreclosure sale; (2) Obtain any forbearance from any beneficiary or mortgagee; (3) Assist the owner to exercise the right of redemption provided in § 34-23-2; (4) Obtain any extension of the period within which the owner may reinstate the owner's obligation; (5) Obtain any waiver of an acceleration clause contained in any promissory notes or contract secured by a mortgage on a residence in foreclosure or contained in the mortgage; (6) Assist the owner in foreclosure or loan default to obtain a loan or advance of funds; (7) Avoid or ameliorate the impairment of the owner's credit resulting from the recording of a notice of default or the conduct of a foreclosure sale; or (8) Save the owner's residence from foreclosure." R.I. GEN. LAWS § 5-79-1(a).
44. *Holden*, 964 A.2d at 515-16 (quoting R.I. GEN. LAWS § 5-79-1(a)(1),

The Supreme Court rejected Holden's argument and found that "Salvadore never made a solicitation, representation, or offer to help Holden stop or postpone the foreclosure sale," emphasizing that the sale and foreclosure had *already taken place* when Holden contacted Salvadore for assistance.[45] Holden had been the highest bidder at this foreclosure sale and her subsequent agreement with Salvadore merely represented that he would "step into the shoes of the purchaser and become the grantee/purchaser at the closing."[46] The Supreme Court concluded that "Salvadore did not make any representation to Holden that he would stop or postpone the foreclosure sale or save her residence from foreclosure" and thus there was nothing in the record to justify a finding that Salvadore was a mortgage foreclosure consultant under the Rhode Island statute.[47]

COMMENTARY

Justice Flaherty opens this opinion by acknowledging that, given the nationwide foreclosure crisis, the Court is "not surprised that [it] must consider an appeal presented by a homeowner faced with very difficult financial circumstances whose home was threatened by foreclosure proceedings" and emphasizes that the Court addresses such a case "with empathy for those who have found themselves in that unhappy position."[48] However sympathetic such an introduction may have been towards down-on-their-luck plaintiffs, these comments failed to preface an opinion in which Holden, the unhappy "homeowner," comes out victorious. While the Court sympathizes with Holden's financial plight, it cannot give credit to her legal arguments.

Here, the Supreme Court held that, as with all contractual relationships, it is the parties' intentions in entering into an agreement that is of primary importance in determining the existence of a creditor-debtor relationship.[49] In practice, this principle of contract law makes perfect sense. It prevents parties to a contract from attempting to change the meaning of that

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(8)).

45. *See id.* at 516.
46. *Id.*
47. *See id.*
48. *Id.* at 509.
49. *See id.* at 513.

agreement with the benefit of hindsight. Here, neither Holden nor Salvadore *intended* to create a debtor-creditor relationship in entering into the agreement. This is evident from the both terms of the agreement itself and from the surrounding circumstances. At no point did Holden owe any amount of money to Salvadore. In fact, under the agreement, Holden was not obligated to do anything at all, other than relinquish her rights as the highest bidder at the foreclosure sale. She merely had the *option* to repurchase the property for a specified sum within a specified period of time. Such agreement does not place Holden in the role of debtor and is merely a business relationship in which each party bears his own risks and reaps her own rewards. Unfortunately, this business arrangement between Holden and Salvadore went sour. The Supreme Court held that Holden cannot attempt to rectify this failed business arrangement by trying to redefine the transaction for her own benefit. While the Court may have felt "empathy" for those who find themselves in financial situations similar to that of Holden, such empathy could not persuade the Court to create a loan agreement where, in fact, none existed.

CONCLUSION

The Rhode Island Supreme Court held that the determination of whether a transaction constitutes a loan requires an inquiry into whether the parties intended to enter into a creditor-debtor relationship. The Court concluded that a loan agreement does not exist when there is no evidence that the transaction resulted in an actual debt or a transfer of property for inadequate consideration that would have served as security for a debt. The Court further held that a party to an agreement who assumes the right of highest bidder at a foreclosure sale to purchase foreclosure property does not fall under the definition of a mortgage foreclosure consultant under § 5-79-1(a).

Kathryn A. Primiano

Municipal Law. *Felkner v. Chariho Regional School Committee*, 968 A.2d 865 (R.I. 2009). In *Felkner v. Chariho Regional School Committee* the issue presented is whether an elected official may simultaneously hold a position on the Chariho Regional School Committee and the Hopkinton Town Council. The Rhode Island Supreme Court held that both the Hopkinton Charter and the common law rule of incompatibility forbid an elected official from holding the two positions simultaneously.

FACTS AND TRAVEL

On November 7, 2006, Plaintiff William Felkner was elected to the Chariho Regional School Committee to serve a four year term.[1] Two years later, Plaintiff was elected to the Hopkinton Town Council.[2] The School Committee determined that Plaintiff had effectively resigned his position on the School Committee by taking the oath of office for the Town Council.[3] After having his Superior Court complaint dismissed due to lack of subject matter jurisdiction, the Plaintiff appropriately filed a petition in the nature of quo warranto[4] with the Rhode Island Supreme Court, challenging his removal from the School Committee.[5]

ANALYSIS AND HOLDING

First, the Rhode Island Supreme Court uses jurisprudence on statutory interpretation to construe competing and contradictory provisions in the Hopkinton Town Charter to determine whether the Plaintiff is prohibited from serving both on the School Committee and Town Council simultaneously.[6] When

1. Felkner v. Chariho Reg'l Sch. Comm., 968 A.2d 865, 868 (R.I. 2009).
2. *Id.*
3. *Id.*
4. Plaintiff's petition in quo warranto is an action asserting Plaintiff's title to the office at issue. Plaintiff bears the burden of establishing his title to the position. The authority to hear such a petition is vested in the Supreme Court. *Id.* at 869.
5. *Id.* at 868.
6. One provision of the Hopkinton Town Charter provides that no

interpreting contradictory statutory provisions that cannot be construed consistently, "'the specific governs the general.'"[7] Thus, the Rhode Island Supreme Court holds that the specific language in the Hopkinton Town Charter prohibiting holding more than one elected office at a time and specifically including School Committee members in the definition of elected official governs, despite an alternative provision creating an exception for those serving on boards representing the town regarding the school district.[8] The Court reasons that if the drafters had intended to include School Committee members in the exclusion to the prohibition against holding multiple offices, they would have referred to the School Committee with the same level of specificity as they had in other portions of the Charter.[9]

The Court goes on to apply the common law doctrine of incompatibility which prohibits an elected official from holding multiple public offices with "potentially overlapping duties."[10] Elected offices will be incompatible if there is the potential for a conflict of duties such that the duties of both offices cannot be performed simultaneously.[11] Under the doctrine of incompatibility, when an elected official accepts a second incompatible public office he impliedly resigns the first.[12] The Rhode Island Supreme Court holds that the position of Chariho School Committee Member and Hopkinton Town Councilor are incompatible because the Town of Hopkinton leases property to the School Committee, contracts for water distribution to local schools, fills vacancies on the School Committee, and provides funds for the school's budget.[13] A potential conflict would arise

"member of the Town government" may hold more than one elected office at a time. The Town Charter also specifies that a School Committee member is an elected official. However, another provision provides that "membership on boards or commissions that act as representatives of the Town of Hopkinton in regards to the School District " does not preclude serving on another board or commission. *Id.* at 869-70.

7. *Felkner*, 968 A.2d.at 870 (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992); Morton v. Mancari, 417 U.S. 535, 550-51 (1974)).

8. *Id.* at 870.

9. *Id.* at 871.

10. *Id.* at 872 (citing State v. Brown, 5 R.I. 1, 9-11 (1857)).

11. *Id.* at 872 (citing State v. Lee, 50 N.W.2d 124, 126 (1951)).

12. *Id.* (citing State *ex rel.* Metcalf v. Goff, 9 A. 226, 226 (1887)).

13. *Felkner*, 968 A.2d at 873.

should the Town Council and School Committee disagree over the aforementioned issues.[14] In addition, there is a more fundamental conflict between the positions because a School Committee Member must place the educational interests of students first while a Town Councilor must put first the interests of the residents of the Town of Hopkinton.[15]

Because the holding of multiple elected offices is prohibited by the Hopkinton Town Charter as well as the common law doctrine of incompatibility, the Rhode Island Supreme Court holds that the Plaintiff effectively resigned his position on the School Committee by taking the oath of office for the Town Council.[16]

COMMENTARY

The doctrine of incompatibility prevents an elected official from serving in more than one elected position at a time if the duties of the two positions are incompatible.[17] Although there are obvious public concerns that are remedied by the doctrine of incompatibility such as conflicts of interest and homogeneity in local public office, the fact that Felkner was elected by his constituents to hold two elected offices seems to reflect their belief that Felkner is capable of holding both offices at once or at least that Felkner's abilities as an elected official outweigh the potential for a conflict of interest.[18] The accuracy of this characterization depends largely on whether Felkner was challenged in the Town Council election and how much knowledge voters had of Felkner prior to casting their vote. However, regardless of whether the voters in Hopkinton truly weighed Felkner's value as an elected official against the potential for conflicts of interest, the doctrine of incompatibility represents a characteristically paternalistic view of voters ability to choose their elected officials.

14. *Id.* at 873-74.
15. R.I GEN. LAWS 1956 § 16-2-9.1(a)(11); *Felkner*, 968 A.2d at 874.
16. *Id.* at 867- 68.
17. *Id.* at 872.
18. *Id.* at 874.

CONCLUSION

The Rhode Island Supreme Court uses traditional tenets of statutory construction as well as the doctrine of incompatibility to determine that an elected official may not hold both a position on the Chariho Regional School Committee and the Hopkinton Town Council. As a result, Plaintiff William Felkner fails in his petition to assert his title to his former seat on the School Committee.

Carollynn J. Ward

Property Law. *Cohen v. Duncan*, 970 A.2d 550 (R.I. 2009). Neighbor of hotel challenged granting of permits and zoning approval for hotel renovations. The Superior Court, Newport County, reversed the Newport zoning board's findings that the renovations did not constitute an impermissible alteration to a nonconforming use. Upon the hotel's appeal, the Rhode Island Supreme Court held that alterations to nonconforming uses are permitted under the Newport zoning ordinance, the hotel's renovations did not violate the Newport zoning ordinance, and the renovations were permitted under the Rhode Island Zoning Enabling Act.

FACTS AND TRAVEL

The property on which the Chanler at Cliff Walk ("The Chanler") sits has operated as a hotel since 1945.[1] Under the zoning scheme then in effect, The Chanler was allowed as a conditional use.[2] Subsequent changes to Newport's zoning ordinance have allowed hotels in this zone only by special exception and now, under the current ordinance, hotels are a prohibited use.[3]

In 2000, following the purchase of the property by a new owner, plans were made to renovate The Chanler.[4] The only renovations which have any bearing on this case concern the reconfiguring of exterior deck space, the addition of four sets of stairs and four courtyards on the building's east wing,[5] and the

1. Cohen v. Duncan, 970 A.2d 550, 553 (R.I. 2009).

2. *Id.*

3. *Id.* Hotels which were previously established under prior zoning schemes are permitted to continue as nonconforming uses. *Id.* at 554.

4. *Id.* The renovations were quite extensive and included a significant amount of interior redesign as well as structural and architectural changes to the outside of the building and a shifting of the parking area away from the building and into the southwest corner of the property. *Id.* at 554-55.

5. The decks were reconfigured and the stairs and courtyards were added to create a more upscale appearance for the east wing which previously featured room doors off a common outdoor deck. *Id.* at 557. Under the renovations, each of these four rooms would have a separate entrance and

shifting of the parking area to the southwest corner.[6]

The plans for these renovations were submitted to the city and The Chanler was granted building permits.[7] Additionally, the parking scheme required a zoning certificate.[8] Along with the request, The Chanler sent the Newport Zoning Board ("Board") a 1999 Board decision[9] which had determined that the southwest corner of the property (where The Chanler had proposed moving the parking area) had been used as overflow parking for the hotel and as fee-based parking for non-guest beachgoers since 1945.[10] In reliance on the historic use of the southwest corner as a parking area, the Board issued the zoning certificate.[11]

Cohen, a neighbor of The Chanler,[12] appealed the allowance of the renovations, claiming the renovations constituted an impermissible extension of a nonconforming use under the ordinance.[13] Following several hearings,[14] the Board issued a decision concluding that the renovations to The Chanler did not violate the ordinance as the nonconforming use was not moved, expanded, or changed.[15] The Board found that the proposed parking plan did not amount to a change of use.[16] The Board found that the reconfigured decking and the new courtyards and stairs did not expand or change the use of the property from that of being a hotel.[17] Additionally, the Board concluded that the renovations included reducing the number of guest rooms and would result in a decreased impact on the neighborhood.[18]

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stairway with additional privacy added by the courtyard's six to ten feet high walls. *Id.*

6. *Id.* at 563.
7. *Cohen*, 970 A.2d at 554-55.
8. *Id.* at 555.
9. Previous owners of the hotel had sought permission from the Board to create a commercial parking lot on this part of the property. *Id.* The Board approved the plan but the commercial lot was never built. *Id.* at 555-56.
10. *Id.* at 555.
11. *Id.* at 556. The plans for the parking area were also subject to a development plan review which required adding lights and walkways and providing for water runoff mechanisms within the plans. *Id.* at 556, 567.
12. *Id.* at 553.
13. *Id.* at 556; *see* Newport, RI Municipal Code §17.72.030.
14. *Cohen*, 970 A.2d at 556.
15. *Id.* at 558-59.
16. *Id.* at 558.
17. *Id.* at 559.
18. *Id.*at 558-59.

Cohen appealed the decision of the Board to the Superior Court.[19] Following oral arguments, the Superior Court reversed the Board, finding errors of law and interpretation of the Newport Zoning Ordinance ("Ordinance") and the Rhode Island Zoning Enabling Act ("Enabling Act").[20] Upon the Superior Court's reversal, The Chanler filed for appeal to the Rhode Island Supreme Court.[21]

ANALYSIS AND HOLDING

On appeal, The Chanler argued that the Superior Court misconstrued the Ordinance in regards to the procedure by which a nonconforming use may be altered.[22] Additionally, The Chanler argued that the Superior Court erred in its interpretation of the meaning of the words of the Ordinance and acted beyond its authority in reversing the Board's decision which was founded upon the evidence and a reasonable interpretation of the Ordinance.[23]

Whether the Renovations Violated Section 17.72.030 of the Ordinance

The Supreme Court found that the Superior Court's application of the prohibitive language of the Ordinance was in error.[24] The Superior Court found the renovation to the deck and addition of stairs and courtyards constituted an expansion of the nonconforming use and that shifting the parking area to the southwest portion of the property was also a violation of the Ordinance.[25]

The Supreme Court, in a *de novo* review of the Board's

19. *Id.* at 559.

20. *Cohen*, 970 A.2d at 559-60; *see* R.I. GEN. LAWS § 45-24-40; Newport, RI Municipal Code §17.72.030. The only relevant section of the Newport Zoning Ordinance is § 17.72.030 and the only relevant section of the Enabling Act is § 45-24-40. Unless otherwise specified, any reference to either the Ordinance or the Enabling Act is to the respective section solely.

21. *Cohen*, 970 A.2d at 560.

22. *Id.*

23. *Id.*

24. *Id.* at 564.

25. *Id.* It unclear from the opinion whether the Superior Court found the shifting of the parking area constituted a move/extension, a change of use, or both. *See id.*

statutory construction,[26] determined that the Ordinance prohibited five types of alterations to nonconforming use.[27] Given that no issue had been raised suggesting the structure of The Chanler (meaning the physical building) was nonconforming, but rather that it was its use as a hotel which was nonconforming, the Court limited its focus in applying the Ordinance to whether the renovations: 1) moved or extended the hotel use of The Chanler to another part of the property not previously used in such a manner; or 2) changed the use of the property from that of a hotel to some other nonconforming use.[28]

Decks, Stairs, and Courtyards

The Supreme Court looked first to the issue presented by the aspect of the renovation concerning the decks, stairs, and courtyards.[29] Though there is no concrete rule determining whether an alteration constitutes an extension of a nonconforming use, there are general principles from which to make a finding.[30] Generally, an extension requires construction of a new building or of an additional to an existing building, an extension of land containing the nonconforming use, or a "significant physical change"[31] in the structure housing the nonconforming use.[32]

The Supreme Court found no evidence to suggest the

26. *Id.* at 561.

27. *Cohen*, 970 A.2d at 562; *see* Newport, RI Municipal Code §17.72.030. As found by the Court, the five prohibited alterations are: moving a nonconforming use of land to another part of the property which was not previously used in the nonconforming manner; moving or extending a nonconforming use of a structure to another part of the structure not previously used in the nonconforming manner; moving a structure containing a nonconforming use, unless to rectify nonconformity; moving a nonconforming structure, unless to rectify nonconformity; and changing a nonconforming use of land or structure or changing a nonconforming structure, unless to rectify nonconformity. *Cohen*, 970 A.2d at 562.

28. *Id.* at 563.

29. *Id.* at 564. As the record contained no indication that any part of the renovation (other than the parking area) implicated the "moving" concern of the Ordinance, the Supreme Court limited its focus for this issue to extension of the nonconforming use. *Id.*; *see* Newport, RI Municipal Code §17.72.030B.

30. *Cohen*, 970 A.2d at 564.

31. *Id.* (quoting 4 Edward H. Ziegler, RATHKOPF'S THE LAW OF ZONING AND PLANNING, § 73:16, at 73-75 (Thomson/West 2007)).

32. *Id.*

renovations to the decks increased the building's footprint[33] and the addition of the stairs could not be considered a significant physical change to the structure as it did not extend the area which accommodates the nonconforming use.[34] Because of this, the Supreme Court held that there is no evidence that the renovations extended the nonconforming use of The Chanler and, therefore, the renovations did not violate the Ordinance.[35]

Next, the Supreme Court looked to the second question concerning the deck, stairs, and courtyards.[36] The Ordinance prohibits the changing of a use which is nonconforming, except to rectify the nonconformance.[37] As the Board had found that The Chanler was still a hotel, provided the same services, and neither the amount of business nor The Chanler's effect on the neighborhood had increased, the Supreme Court held that the renovations did not constitute an impermissible change of use under the Ordinance.[38]

Parking Area

Though the Supreme Court evaluated the renovations in terms of the exterior alterations and of the parking area separately, the same rules for determining whether a nonconforming use had been moved, extended, or changed applied.[39] Obviously, from a literal view, the parking area was moved as part of the renovations. However, to be moved within the meaning of the Ordinance, the part of the property to which a nonconforming use is moved must not have been used previously for such a use.[40] Here, as the Board found in its 1999 decision, this part of the property, the southwest corner, to which the parking area had been moved, had been utilized as parking for both the hotel and for non-guest beachgoers since 1945.[41] Because

33. The Supreme Court found Cohen's claim to the contrary unsupported. *Id.*
34. *Id.* at 564-65.
35. *Id.* at 565.
36. *Cohen*, 970 A.2d at 565.
37. Newport, RI Municipal Code §17.72.030C.
38. *Cohen*, 970 A.2d at 565.
39. *Id.* at 566.
40. *See* Newport, RI Municipal Code §17.72.030B.
41. *Cohen*, 970 A.2d at 566.

this area has historically been used for parking, it cannot be said that this nonconforming use (hotel parking) has been moved to a part of the property not previously used for such a purpose.[42]

Neither can it be said that the moving of the parking area constituted an extension of this nonconforming use.[43] The record does not suggest the new parking area takes up a greater area than what had previously been used as parking and new parking scheme reduces the number of parking spaces from one hundred and fifty to only fifty.[44] As such, the Superior Court's finding that shifting the parking area constituted an extension of a nonconforming use under the Ordinance is not supported by the record.[45]

The Supreme Court also found the Board was not in error when it determined that moving the parking area did not amount to an impermissible change of use under the Ordinance.[46] Though changed in appearance, this area of the property is still used for the same purpose, namely for parking.[47]

As such, the Supreme Court held that the Board's findings that The Chanler did not violate the Ordinance by the renovations to the decks, stairs, courtyards, and parking area were not clearly erroneous and were not the product of any error of law.[48] Therefore, the Superior Court exceeded its authority in reversing the Board's decision on this issue.[49]

Whether the Renovations Were Permitted Under the Zoning Enabling Act

Cohen's last argument, as accepted by the Superior Court, is based on the language of the Enabling Act rather than that of the Ordinance.[50] The Newport zoning ordinance, as a whole, is authorized to set standards for the alteration of nonconforming

42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Cohen*, 970 A.2d at 566.
47. *Id.* at 566-67.
48. *Id.* at 562.
49. *Id.*
50. *Id.* at 568; *see* R.I. GEN. LAWS § 45-24-40.

uses by section 45-24-40 of the Enabling Act.[51] Subsection (c) of this section states, "[a] use established by variance or special use permit shall not acquire the rights of this section."[52] The Superior Court reasoned that, as the hotel on the property was originally created as a conditional use and such a procedure is the predecessor of a special use permit, The Chanler is not a nonconforming use under the meaning of the Enabling Act in regards to the right to make any alterations.[53] Essentially, the state has not authorized, by the Enabling Act, the renovations to The Chanler.[54]

In response, The Chanler argued that subsection (c) of the section meant only that uses allowed by variance or special use under a current zoning scheme could not be altered under the Enabling Act.[55] According to The Chanler, once hotels were no longer permitted by the ordinance,[56] The Chanler became a nonconforming use under the Enabling Act and is not to be considered as created by special use permit.[57]

Instead of determining whether the Superior Court or The Chanler was correct in regards to the meaning given to subsection (c), the Supreme Court decided this issue by distinguishing the right to which the section 45-24-40 of the Enabling Act referred.[58] By the language of the Enabling Act, an alteration, for the purposes of the section, is limited to that which amounts to an addition and enlargement, expansion, intensification, or a change in use.[59] As determined by the Supreme Court's review of the Board's findings, none of The Chanler's renovations resulted in an enlargement, expansion, intensification, or a change in use.[60] Because the renovations do not constitute an alteration under this section, the right denied to uses created by variance or special use permit by the section was not extended, impermissibly or

51. *Cohen*, 970 A.2d at 568; *see* R.I. GEN. LAWS § 45-24-40.
52. R.I. GEN. LAWS § 45-24-40(c).
53. *Cohen*, 970 A.2d at 568.
54. *Id.*
55. *Id.*
56. *Id.* The zoning ordinance was changed to prohibit hotels in 1977. *Id.* at 553.
57. *Id.* at 568.
58. *Id.*
59. *Id.*; *see* R.I. GEN. LAWS § 45-24-40(a)(2).
60. *Cohen*, 970 A.2d at 568.

otherwise, to The Chanler by allowance of the renovations.[61] The Superior Court, therefore, was in error when it determined that the renovations ran afoul of the Enabling Act.[62]

COMMENTARY

The Supreme Court went out of its way to avoid addressing the substantive issue presented by the Superior Court's finding that the renovations were not permitted under the Enabling Act as section 45-24-40 denies the right to alter uses created by variance or special permit.[63] The issue of what types of uses are actually referred to by subsection (c) seems to be one of some importance and is likely to be presented again. Additionally, this case offered a perfect opportunity in that such a determination was essential to the disposition of the matter and two seemingly reasonable interpretations were being offered by the opposing sides, each advocating for its position.[64] Instead, the Supreme Court cleverly, though perhaps dubiously,[65] distinguished the Enabling Act as inapplicable to this situation based on the findings of the Board.[66]

This course of action begs the question of why. At best, this only delays the resolution of this issue and this hardly seems to be the type of sticky situation most often the object of judicial "punting." The resolution of this issue has no attendant political repercussions nor does it implicate sensitive matters such as separation of powers or the like. This is simply a matter of statutory construction, well within the purview of the Supreme Court.

Also, upon consideration, it is clear that The Chanler's

61. *Id.*
62. *See id.*
63. *See id.*
64. *See id.*
65. It is certainly arguable whether an "alteration" under section 45-24-40 of the Enabling Act is limited to those having the effects referred to by the Supreme Court. *See id.* In fact, that limiting language appears only in subsection 45-24-40(a)(2). Given that both the title of the section and the main part of subsection (a) contain the word "alteration" or "alter" and in light of the structure of the section as a whole, it seems unlikely the limiting language cited by the Supreme Court was designed to modify "alteration/alter" throughout the section. *See* R.I. GEN. LAWS § 45-24-40.
66. *Cohen*, 970 A.2d at 568-69.

reading of the section is far more accurate than that of Cohen's. The distinctions to be drawn if Cohen's reading was accepted would be arbitrary and not reflective of any practical concerns. Under Cohen's theory, in 1945, had hotels been allowed by right instead of by conditional use or if Newport had yet to adopt any zoning ordinance, subsection (c) would apply here.[67] This is true even though the situation in the present would be precisely the same. It is the fact that hotels are not presently permitted within the zone that creates this issue, not the conditions under which the use was established. The Chanler must be correct in its reading of subsection (c) in that its reading allows for a logical distinction to be drawn between what uses are referred to and which are not. Essentially, subsection (c) states only that uses which currently exist and were created under a current zoning scheme by either variance or special use permit are not nonconforming uses under this section.[68] This is because the section exists to give some rights, at the discretion of the crafters of the individual municipal ordinances, to established nonconforming uses. As the concerns presented by previously established nonconforming uses and those uses created by variance or special use permit under a current zoning scheme are different, it makes sense that alterations allowed to them respectively would be governed by different procedures. Because a Cohen reading would lead to arbitrarily drawn distinctions between uses (distinctions which have no practical import) it is not to be followed.

CONCLUSION

The Rhode Island Supreme Court held that alterations for nonconforming uses are permitted under the Newport zoning ordinance. The hotel's renovations in the instant case did not violate the Newport zoning ordinance. Additionally, the renovations in the instant case were permitted under the Rhode Island Zoning Enabling Act.

Daniel D. Hirseman

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67. *See id.* at 568.
68. *See id.*

Statutory Construction. *Mumma v. Cumberland Farms, Inc.*, 965 A.2d 437 (R.I. 2009). Plaintiff worker filed suit against defendant employer for no longer providing her either suitable alternative employment or paying partial incapacity compensation. Interpreting the Workers Compensation statute, the Rhode Island Supreme Court found that suitable alternative employment is partial incapacity compensation and is thus subject to the 312-week maximum length that the employer is required to pay compensation.

FACTS AND TRAVEL

This case arose from the employment of Karyn Mumma, while she was employed with Cumberland Farms, Inc.[1] During her duties as a store manager, Ms. Mumma was injured on April 22, 1999.[2] After her injury, Ms. Mumma and her employer entered a "memorandum of agreement . . . on December 6, 1999, [and] Ms. Mumma began receiving weekly workers' compensation benefits for her partial incapacity"[3] under Rhode Island General Laws § 28-33-18 (1956).[4] "On February 8, 2001 Cumberland Farms

1. Mumma v. Cumberland Farms, Inc., 965 A.2d 437, 438 (R.I. 2009).
2. *Id.*
3. *Id.*
4. R.I. GEN. LAWS § 28-33-18 (1956) provides in relevant part:

> (a) While the incapacity for work resulting from the injury is partial, the employer shall pay the injured employee a weekly compensation equal to seventy-five percent (75%) of the difference between his or her spendable average weekly base wages, earnings, or salary before the injury as computed pursuant to the provisions of § 28-38-20, and his or her spendable weekly wages, earnings, salary, or earnings capacity after that, but not more than the maximum weekly compensation rate for total incapacity as set forth in § 28-33-17. The provisions of this section are subject to the provisions of § 28-33-18.2.
>
> (b) For all injuries occurring on or after September 1, 1990, where an employee's condition has reached maximum medical improvement and the incapacity for work resulting from the injury is partial, while the incapacity for work resulting from the injury is partial, the employer shall pay the injured employee a weekly compensation equal to seventy percent (70%) of the weekly compensation rate as set forth in subsection (a) of this section. The court may, in its

offered Ms. Mumma 'suitable alternative employment'[5] . . . that was 'closely tailored to meet [Ms. Mumma's] medical restrictions.'"[6] Ms. Mumma was assured that "'[a]cceptance of this employment [would] not result in an inequitable forfeiture or loss of any benefits [she] accrued as an employee with the [c]ompany.'"[7] "Ms. Mumma accepted . . . and on July 13, 2001, a trial judge entered a consent decree recognizing [the] new position as 'suitable alternative employment.'"[8]

The parties agreed that Ms. Mumma "fully and faithfully perform[ed] all job duties" required by her position.[9] "On September 22, 2005, however, Cumberland Farms informed Ms. Mumma of a substantial change in her employment that would be implemented on October 24, 2005."[10] As Ms. Mumma continued to be unable "to work a forty-hour workweek, her employment status was to be reclassified as part-time, which effectively terminated her health insurance, vacation pay, and pension benefits."[11] The parties agreed that "Ms. Mumma had received 312 weeks of partial compensation and, [was] therefore no longer entitled to weekly compensation benefits under [Rhode Island General Laws] §§ 28-33-18 or 28-33-18.2."[12]

Ms. Mumma filed an "'Employee's Petition to Determine a Controversy,'"[13] trying to restore the benefits she had been

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discretion, take into consideration the performance of the employee's duty to actively seek employment in scheduling the implementation of the reduction. The provisions of this subsection are subject to the provisions of § 28-33-18.2.

5. Rhode Island General Laws § 28-29-2(10) (1956) provides:

'Suitable alternative employment' means employment or an actual offer of employment which the employee is physically able to perform and will not exacerbate the employee's health condition and which bears a reasonable relationship to the employee's qualifications, background, education, and training. The employee's age alone shall not be considered in determining the suitableness of the alternative employment.

6. *Mumma*, 965 A.2d at 438 (citing R.I. GEN. LAWS § 28-29-2(10)(1956)).
7. *Id.* (citing R.I. GEN. LAWS § 28-33-18.2(b)(1956)).
8. *Id.* at 438-39.
9. *Id.* at 439.
10. *Id.*
11. *Id.*
12. *Mumma*, 965 A.2d at 439.
13. *Id.* at 440 (citation omitted).

receiving from her suitable alternative employment.[14] The request was denied and Ms. Mumma filed a claim for a trial.[15] On April 11, 2006, the trial judge, after reviewing all the facts and the relevant statutes, declined to extend Ms. Mumma's benefits.[16] The trial judge "reasoned that the benefits could not extend beyond the 312–week period because the 'suitable alternative employment' language of § 28–33–18.2 specifically applies to workers who otherwise would receive benefits for partial disability under § 28–33–18."[17] "The trial judge concluded when reading the two provisions together, an employee's right to 'suitable alternative employment' terminates upon the expiration of her right to partial incapacity benefits."[18] Ms. Mumma appealed and on March 22, 2007 the Appellate Division affirmed[19] the trial court's decision.[20] The Rhode Island Supreme Court granted certiorari on January 31, 2008.[21]

ANALYSIS AND HOLDING

Statutory Construction

The Rhode Island Supreme Court reviews questions of statutory construction *de novo*.[22] However, the Rhode Island Supreme Court found "no valid reason to disturb the Appellate Division's thorough and, . . . , statutorily correct treatment of the relationship between §§ 28–33–18 and 28–33–18.2."[23] The Court found that the purpose of suitable alternative employment was to create a mutually beneficial arrangement in which the partially disabled employee can return to work.[24] The employer benefits by getting some work product from the employee since it would have

14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* (citation omitted).
18. *Mumma*, 965 A.2d at 440.
19. "[T]he Appellate Division, . . . also found no merit to her claim. . . . The Appellate Division declined to construe the statutes as granting an employee more rights after the 312–week period expired than she would have had if she had been terminated before that period expired." *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 441.
23. *Id.*
24. *Mumma*, 965 A.2d at 441.

to pay anyway and the "employee is able to maintain the dignity of gainful employment and any pre-injury incidental benefits of her position."[25]

Ms. Mumma's contention was that "§ 28–33–18.2 should be read as entirely distinct from § 28–33–18 and that the General Assembly's limitation of partial-incapacity benefits should have no effect on the parameters of the suitable alternative employment."[26] The Court disagreed.[27] The Court believed that "[s]ection 28–33–18(d) explicitly limits workers' compensation benefits for partial incapacity to 312 weeks."[28] Both Subsections (a) and (b) of the Rhode Island Generals Laws § 28–33–18 (1956) are "'subject to the provisions of § 28–33–18.2'" and therefore "are effective unless the worker has accepted 'suitable alternative employment'" and then those subsections are inapplicable.[29] However, suitable alternative employment provides an alternative to employers and employees that is more than paying compensation benefits.[30] The employee does not need to accept the suitable alternative employment and the employer is able to terminate the position at any time.[31] The Court found that if this were to happen, the employee is "entitled to be compensated from the employer in whose employ he or she was injured at the rate to which the employee was entitled prior to acceptance of the employment."[32] However, this is limited by "the 312–week cap for the payment of partial incapacity benefits under § 28–33–18(d) and the provisions of § 28–33–18.3 concerning the continuation of partial incapacity benefits."[33]

Ms. Mumma's Claim

The Rhode Island Supreme Court reviews decrees from the "Appellate Division for any error of law or equity pursuant to"

25. *Id.*
26. *Id.*
27. *Id.* at 442.
28. *Id.*
29. *Id.* (citations omitted).
30. *Mumma*, 965 A.2d at 442.
31. *Id.*
32. *Id.* (citing R.I. GEN. LAWS § 28-33-18.2(d) (1956)).
33. *Id.*

Rhode Island General Laws § 28–35–30 (1956).[34] In this case the Court found that on "October 24, 2005, Cumberland Farms modified the terms of Ms. Mumma's employment from full to part time, thus terminating her suitable alternative employment."[35] "The language of § 28–33–18.2 does not require an employer to continue the terms of suitable alternative employment indefinitely."[36] If this had occurred before the 312-week time frame had run fully, Ms. Mumma would have been able to receive partial incapacity compensation but "the parties stipulated that she had 'received 312 weeks of partial compensation' and was 'entitled to no further weekly compensation benefits under Sections 28–33–18.3 and 28–33–18.'"[37]

The Court believed that it would be contrary to the intention of the Rhode Island General Assembly to read the statute as giving the employee more rights than if she was never offered suitable alternative employment or terminated her employment before the 312-week period.[38] The Court was afraid that if this were the statutory construction they were to find, employers would no longer offer suitable alternative employment because they would be committing themselves to payment of compensation for an indefinite period of time.[39] The Court found that the suitable alternative employment was permissibly terminated and Ms. Mumma is no longer entitled to partial incapacity benefits because it was after the 312-week limit had run which meant Cumberland Farms was no longer obligated to pay for Ms. Mumma's partial disability.[40]

34. *Id.* at 441.
35. *Id.* at 442.
36. *Mumma*, 965 A.2d at 442.
37. *Id.* (citations omitted).
38. *Id.*
39. *Id.*
40. *Id.* at 443.

Dissent

Justice Goldberg filed a dissent in this case with her main argument being that the majority misinterpreted the statute and the intention of the Rhode Island General Assembly.[41] In her opinion since "the benefits calculation for an employee performing suitable alternative employment markedly differs from weekly benefits for partial incapacity and . . . has no relevance to partial incapacity benefits."[42] Under her view when the employee is working in a suitable alternative position, the employee is no longer receiving compensation for partial incapacity and "the 312–week gate does not apply to a worker in a suitable alternative employment position."[43] She also believed that the Court should not "read subsections of one statute into another in the absence of a clear legislative intent to the contrary" and "partial incapacity benefits are not the statutory or functional equivalent of suitable alternative employment."[44] Also, in her view, once the employee has accepted the suitable alternative employment the employee is no longer receiving workers compensation benefits, rather the employee is employed and since the employee is not receiving benefits the employee is not subject to the 312-week limitation.[45] Since the statute was misinterpreted, she believes that "this decision is lacking in statutory support, is unjust, and is contrary to our settled principles respecting statutory construction."[46]

COMMENTARY

The Court in *Mumma* has taken on the job of finding the interplay between several sections of the same overarching statute. The "Workers Compensation Statue" is really chapters 29 through 38 of title 28 of the Rhode Island General Laws.[47] This case in particular deals with how the separate provisions are to read together. The Court finds that no matter how the person is compensated, either through partial incapacity or suitable

41. *Id.* at 443-46.
42. *Mumma*, 965 A.2d at 443.
43. *Id.* at 444.
44. *Id.*
45. *Id.* at 445.
46. *Id.* at 446.
47. *See* R.I. GEN. LAWS § 28-29-2.

alternative employment, there is a time limit on how long an employer has to pay benefits.[48] The Court is sympathetic to Ms. Mumma in this case and says that they "recognize the seemingly harsh consequences with respect to this particular employee resulting from the statutory regime."[49] However, for policy reasons, the Court decides that to keep employer's willingness to offer the option of suitable alternative employment by having the incentive to offer it rather than just pay the normal worker's compensation benefits, there must be a limit to the length of the benefits the employer is required to pay.[50]

The dissent in this case is much more sympathetic to the employee and wants to establish a bright line rule that each of the sections of the statute should be read strictly individually unless they refer to another section within it's text.[51] This approach, while very employee friendly, would have to be cut very narrowly because there would be questions on the length of time in which an employer would be required to pay benefits. The dissent seems to look at the intent of the specific section on suitable alternative employment[52] and read it individually while the majority seems to look at the overall scheme of the "Workers Compensation Statute."[53] The majority seems more concerned with the purpose of suitable alternative employment being frustrated by not construing the statute the way they have. It seems to be a valid concern and no employer would offer such a position if they were required to pay compensation indefinitely.

CONCLUSION

The Court in *Mumma* held that partial incapacity benefits are required to be paid for only the 312-week maximum under Rhode Island General Laws § 28-33-18(d) (1956) which includes the benefits and payments received from suitable alternative employment under Rhode Island General Laws § 28-33-18.2 (1956). Since both parties agreed that Ms. Mumma had received

48. *See Mumma*, 965 A.2d at 443.
49. *Id.* at 442.
50. *See id.*
51. *See id.* at 443-46.
52. *See* R.I. GEN. LAWS § 28-33-18.2 (1956).
53. *See generally* R.I. GEN. LAWS § 28-29-2 (1956) (The definitions for the Workers Compensation Statute covers chapters 29 through 38 of title 28).

312 weeks of partial compensation she was "therefore, no longer was entitled to weekly compensation benefits under §§ 28–33–18 or 28–33–18.3."[54]

Ian Anderson

54. *Mumma*, 965 A.2d at 439.

Tort Law. *Berardis v. Louangxay*, 969 A.2d 1288 (R.I. 2009). In a slip and fall case where Plaintiff invitee slipped on ice and snow that had accumulated as a result of an ongoing winter storm, Defendant business invitor owed no duty to Plaintiff to make the premises safe from the naturally occurring dangers associated with the ongoing storm.

FACTS AND TRAVEL

After about three hours of socializing and having drinks at Lei's Bar & Grill, located at 1035 West Shore Road in Warwick, Plaintiff Carlo P. Berardis and his friend set off to leave through the entranceway from which they had come.[1] A winter storm had been steady throughout the prior day and continued into the morning hours of the night, producing a mixture of freezing rain and snow, which created dangerous conditions on the state's roadways, sidewalks, and walkways.[2] Plaintiff had taken two steps outside when he slipped and fell on a thick sheet of ice that had naturally accumulated about one foot from the bar's entrance.[3] As a result, he allegedly suffered injuries to his elbow, knee, and ankle.[4]

Defendants Bounthinh and Oudone Louangxay owned the premises at the Warwick address and leased the property to Louangxay, Inc., d/b/a Warwick Banquet Hall a/k/a Lei's Bar & Grill, and their son, Sithisack Louangxay, who managed the business.[5] On June 19, 2006, Plaintiff filed a complaint against the Louangxays and Lei's Bar & Grill, alleging that Defendants were negligent in failing to maintain the premises in a reasonably safe condition; that Defendants were negligent in causing a

1. Berardis v. Louangxay, 969 A.2d 1288, 1289 (R.I. 2009).
2. *Id.* To get to Lei's Bar & Grill, Plaintiff's friend drove the pair and parked in the bar's parking lot. *Id.* "While the storm continued to produce a mixture of freezing rain and snow, they proceeded to the restaurant along a walkway, which was covered in ice and snow." *Id.*
3. *Id.* at 1289-90.
4. *Id.* at 1290.
5. *Id.* at 1289-90.

dangerous and excessive amount of ice to accumulate on the entranceway; and that Defendants were negligent in failing to remove the ice or to warn Plaintiff of the danger.[6] Plaintiff also alleged the other elements of a negligence claim: duty, causation, and injury.[7]

Defendants timely filed a motion for summary judgment pursuant to Rule 56 of the Superior Court Rules of Civil Procedure, arguing that under the circumstances they owed no duty to Plaintiff to clear the entranceway of ice and snow, or to warn Plaintiff of the dangerous condition.[8] Plaintiff argued that information in Defendant Lei's Bar & Grill's answers to interrogatories showed that the general manager had shoveled the walkway and applied ice melt around noon on March 13, 2005, and that the general manager had inspected the walkway approximately every two hours thereafter.[9] Plaintiff asserted that under these circumstances, Defendants owed him a duty of care concerning the dangerous condition of the entranceway, even though he admitted that the storm was ongoing as he left the bar and alleged no facts to the contrary.[10]

On January 14, 2008, a hearing was held in Superior Court and the judge granted Defendant Lei's Bar & Grill's motion.[11] The judge found that at the time Plaintiff fell, the storm was ongoing because snow and freezing rain were still falling, and as a result, Defendant owed no duty, as a matter of law, to remove the ice and snow from the walkway or entranceway because the storm was continuing and no unusual circumstances existed to call for

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6. *Id.* at 1290.

7. *Berardis*, 969 A.2d at 1290.

8. *Id.*; R.I. SUP. CT. R. CIV. P. 56.

9. *Berardis*, 969 A.2d at 1290. The Court mentions that the general manager arrived on the premises for work around noon, but it is not clear when the general manager's shift ended and when he left the premises. However, he "did not notice any snow or ice on the walkways" when he left the premises, according to defendant Lei's Bar and Grill's answers to interrogatories. *See id.* Plaintiff slipped and fell outside the entranceway shortly after midnight on March 14. *See id.* at 1289.

10. *See id.* at 1290, 1292 n.3.

11. *Id.* at 1290. The attorney for the Louangxays was not present at the hearing, and the Court's record was not clear concerning when the Superior Court judge heard the motion submitted by them. The Court did not have a transcript of the hearing on their motion, but its decision noted that the judge granted the Louangxays motion along with Lei's Bar & Grill in an order dated January 17, 2008. *Id.* at 1290 n.2.

Defendants to remove the ice and snow *before* the storm ended.[12] On January 17, 2008, an order was entered granting all Defendants' motions for summary judgment.[13]

On appeal, Plaintiff argued that the lower court judge erred in finding (1) that Defendants were entitled to judgment as a matter of law because, Plaintiff asserted, the fall occurred on the entranceway, as opposed to a walkway or parking lot, and (2) that there was no genuine issue of material fact about whether Defendants increased the risk of harm to Plaintiff by periodically inspecting, but not shoveling the entranceway.[14]

ANALYSIS AND HOLDING

Central to the Court's analysis was "whether a landlord or business invitor *owes a duty* to an invitee to remove ice and snow during a storm, when ice and snow has naturally accumulated on the exterior entranceway to the building."[15] If the Court finds no legal duty, then "'the trier of fact has nothing to consider and a motion for summary judgment must be granted.'"[16] Whether or not a legal duty exists is a threshold question for Plaintiff's negligence action.[17] "'Only when a party properly overcomes the duty hurdle in a negligence action is he or she entitled to a factual determination on each of the remaining elements: breach, causation, and damages.'"[18] Of course, if Defendants owed Plaintiff no duty to remove the ice and snow, then despite Plaintiff's alleged personal injuries, he would be left without a leg to stand on.[19]

The Court reaffirmed that Rhode Island follows the "Connecticut Rule," which "provides that a landlord or business invitor owes a duty to a tenant or business invitee 'to use

12. *Berardis*, 969 A.2d at 1290 (emphasis added).
13. *Id.* On January 22, 2008, final judgment was entered for Defendants against Plaintiff, from which Plaintiff timely appealed. *Id.*
14. *Id.* at 1290-91.
15. *Id.* at 1291 (emphasis added).
16. *Id.* (quoting Banks v. Bowen's Landing Corp., 522 A.2d 1222, 1225 (R.I. 1987)).
17. *See id.*
18. *Berardis*, 969 A.2d at 1291. (quoting Ouch v. Khea, 963 A.2d 630, 633 (R.I. 2009)).
19. *See id.*

reasonable care to see that the common areas are kept reasonably safe from the dangers created by an accumulation of snow and ice which is attributed to purely natural causes.'"[20] Under the Connecticut Rule, the landlord or business invitor is granted a reasonable time after the storm has ended to remove the accumulation, unless unusual circumstances arise before the end of the storm, which may trigger a duty to remove the accumulation.[21]

The Supreme Court first adopted the Connecticut Rule in the landlord-tenant context in *Fuller v. Housing Authority of Providence*, and extended the rule to the business invitor-invitee relationship in *Terry v. Central Auto Radiators*.[22] On appeal, the Supreme Court, in an opinion by Justice Flaherty, disposed of this case by answering two distinct questions.[23]

Does the Connecticut Rule apply to Plaintiff's case?

The Court explained its rationale behind applying the Connecticut Rule in response to Plaintiff's assertion that the rule should not apply here simply because he fell just outside the entranceway, as opposed to a walkway or parking lot.[24] The Court reasoned that an entranceway is similar to other premises where it had applied the rule, including a parking lot, a road, or a passageway.[25] The rationale behind the rule "does not depend on how the location of the snow and ice is characterized, but rather on the scope of the burden of the obligations imposed upon a landowner, the relationship between the parties, the public policy implications, and concerns about fairness."[26]

Therefore, the Court held that the fact that Plaintiff fell at the entranceway does not distinguish this case from others that have been decided under the Connecticut Rule, and that the rule does

20. *Id.* at 1291-92 (quoting Fuller v. Hous. Auth. of Providence, 279 A.2d 438, 440-41 (R.I. 1971)).

21. *Id.* at 1292 (citing Benaski v. Weinberg, 899 A.2d 499, 503 (R.I. 2006); Terry v. Cent. Auto Radiators, Inc., 732 A.2d 713, 717 (R.I. 1999)).

22. *See id.* at 1291-92; *Terry*, 732 A.2d at 716; *Fuller*, 279 A.2d at 440-41.

23. *Berardis*, 969 A.2d at 1291-93.

24. *Id.* at 1292-93.

25. *See id.*; *Benaski*, 899 A.2d at 501; *Terry*, 732 A.2d at 715; *Fuller*, 279 A.2d at 439.

26. *Berardis*, 969 A.2d at 1293 (citing *Terry*, 732 A.2d at 718-19).

apply here.[27] "'To require a landlord or other inviter to keep walks and steps clear of dangerous accumulations of ice, sleet or snow or to spread sand or ashes while a storm continues is *inexpedient* and *impractical*.'"[28] In other words, it would be unreasonable to impose a duty on a landlord or business owner to be "'required to be at his property, shovel in hand, catching the flakes before they hit the ground.'"[29] Losing on this issue, Plaintiff next argued that there remains a genuine issue of material fact as to whether Defendants created unusual circumstances, under the Connecticut Rule, thereby triggering a duty owed to Plaintiff to clear the entranceway of dangerous ice and snow.[30]

Did Defendants owe Plaintiff a duty to clear the entranceway?

Here, the Court primarily analyzed the issue of duty triggered by unusual circumstances by comparing Plaintiff's allegations to two prior cases wherein it applied the Connecticut Rule: *Terry* and *Benaski*.[31]

In *Terry*, the Court found unusual circumstances because "Defendant's employee directed [Plaintiff] to walk a distance of 100 feet across an 'unknown and difficult terrain' to a rear lot behind the premises, where she fell on rutted ice," even though the employee had warned her of the accumulation of ice and snow.[32] The Court held that Defendant "'exacerbated and increased the risk'" by sending Plaintiff across hazardous ground during an ongoing snowstorm, thereby creating unusual circumstances and triggering a duty Defendant owed to Plaintiff under the circumstances.[33]

Conversely, in *Benaski*, the Court affirmed summary judgment for Defendant business invitor, holding that Plaintiff

27. *Id.* at 1293.
28. *Id.* (quoting Kraus v. Newton, 558 A.2d 240, 243 (Conn. 1989)) (emphasis added).
29. *Id.* (quoting *Benaski*, 899 A.2d at 503).
30. *Id.* at 1290-91, 1292
31. *Id.* at 1292-93 (citing *Terry*, 732 A.2d at 717 and *Benaski*, 899 A.2d at 503-04).
32. *Berardis*, 969 A.2d at 1292 (quoting *Terry*, 732 A.2d at 715, 718).
33. *Id.* (quoting *Terry*, 732 A.2d at 717-18).

failed to show unusual circumstances.[34] The Court found that the road Plaintiff slipped and fell on when she was leaving an office park during an ongoing snowstorm, "was the only means of egress, that the Defendant failed to plow the road before the offices opened for the day, and that the Defendant had failed to inspect the premises."[35] Distinguishing the case from *Terry*, the Court held "that these circumstances did not exacerbate the risks, inherent in an ongoing severe winter storm, which the Plaintiff had embraced by commuting to and from work in such conditions."[36] Therefore, the Court found that Defendant owed no duty to Plaintiff under the circumstances.[37]

Here, the Court held that the facts alleged amounted to a *Benaski* case because Plaintiff Berardis alleged insufficient facts to show that Defendant Lei's Bar & Grill had exacerbated and increased the risk inherent in an ongoing storm, even after viewing the evidence in the light most favorable to Plaintiff.[38] The Court held that Defendant's general manager's actions – shoveling and applying ice melt to the walkway around noon, followed by his periodic inspection of the premises without removing further accumulation from the entranceway – did not amount to unusual circumstances because the general manager's actions did not increase the risks inherent to walking in or out of the premises during an ongoing storm.[39]

COMMENTARY

"Due care is a duty imposed on each one of us to protect society from *unnecessary* danger," said Judge Andrews in his *Palsgraf v. Long Island Railroad Co.* dissent.[40] In applying the Connecticut Rule, the Rhode Island Supreme Court reasoned that snowstorms include inherent dangers from which landlords and business owners cannot be expected to protect their tenants and patrons. It would be unreasonable for landlords and business

34. *Id.*; *see Benaski*, 899 A.2d at 503-04.
35. *Berardis*, 969 A.2d at 1292.
36. *Id.*
37. *Id.*
38. *Id.* at 1293.
39. *Id.*
40. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 102 (N.Y. 1928) (Andrews, J., dissenting) (emphasis added).

owners to insure society against the risks of naturally accumulated snow and ice during an ongoing snowstorm, short of unusual circumstances. On appeal from the lower court judge's grant of summary judgment in favor of Defendants, Plaintiff had to persuade the Court that Lei's Bar & Grill owed him considerably more than a well-poured drink, a good bite, and a convivial atmosphere in which to enjoy a temporary shelter from the storm. Plaintiff failed to allege sufficient facts to meet his burden, as the snowstorm was still going when Berardis and his friend alighted from the Warwick bar, and Defendants took no action to exacerbate or increase the risks inherent to being out and about during a winter storm. As then-Judge Cardozo said, "[O]ne acts sometimes at one's peril."[41]

Rhode Island business invitors and landlords owe their invitees and tenants many legal duties, ranging from the perhaps trivial to the absolutely vital. Add the New England winter storm season into the equation, and it's easy to see how the burdens of doing business could outweigh the benefits. The Connecticut Rule doesn't let business invitors and landlords completely off the hook concerning snow and ice removal because they still have a duty to make their premises safe once a reasonable time has passed after a storm's end.[42]

Here, the Supreme Court could have been persuaded by Plaintiff's argument that a bar's entranceway should be distinguished from its walkway or parking lot. After all, revelers who have given good consideration in return for the use and enjoyment of a restaurant or bar's food, drink, and premises, may not expect to be left hung out to dry the instant they leave the establishment, even (perhaps especially) during a winter storm. That said, the law protects business invitors and landlords from liability arising from slip and falls caused by the *natural* accumulation of ice and snow *during* a storm.[43] Therein lays the fairness of the Court's decision. Freezing rain and snow routinely create treacherous conditions, and it is no secret that to be out and about during a storm is risky, whether one is travelling by foot or automobile. Walking on naturally snowy or icy sidewalks is

41. *Id.* at 100-01.
42. *Berardis*, 969 A.2d at 1291-92.
43. *Id.* at 1291.

obviously dangerous, and when an invitee chooses to venture out to a business establishment's premises the risk should not mechanically shift onto the invitor or landlord, considering the nearly impossible task of keeping premises safe during an ongoing storm.

The Court's decision makes it clear that if business owners choose to stay open during storms they may do so without insuring their invitees against injuries from slip and fall accidents on the premises caused by naturally accumulated snow or ice, so long as the storm is ongoing and the invitor does not take steps to increase the risk of being out and about on parking lots, walkways, and entranceways under inherently risky, inclement conditions. Thus, Rhode Islanders are to an extent both all in it together – and all alone – when they choose to confront the hazards of winter weather.

CONCLUSION

The Supreme Court affirmed the Superior Court's granting of summary judgment in favor of Defendants because Plaintiff Berardis failed to persuade the Court that Defendants, as the owners and operators of Lei's Bar & Grill, owed him a duty to clear the entranceway of naturally accumulated ice and snow during an ongoing storm. In doing so, the Court extended the Connecticut Rule to the entranceways of business invitors' and landlords' premises, and ruled that the periodic inspection of premises without removing ice or snow does not trigger a duty under the "unusual circumstances" exception to the rule.

Shad Miller

Tort Law. *Ouch v. Khea*, 963 A.2d 630 (R.I. 2009). The driver of an automobile does not have a duty to protect passengers from the criminal acts of unknown third parties. In Rhode Island, there is no set formula to determine whether a duty of care exists; its determined on an ad hoc basis, taking into consideration the facts and circumstances of the case. Membership in the same street gang does not establish a special relationship between parties sufficient to give rise to a duty of care.

FACTS AND TRAVEL

Defendant Khan Khea attended a New Year's Eve party on December 31st, 2001, along with Heang Say, Thanaroeuth Ngim, Peary Bun, and Angel Alvarez.[1] When the five men, all members of the Asian Boys gang, decided to leave the party, Khea heard people talking across the street and noticed their attire appeared to be that of a rival gang.[2] Khea asked two fellow party guests to go outside to determine if it was safe for them to leave.[3] A short time later, the five men left the party and walked to Khea's car.[4] The car had just begun to move when one of the passengers shouted, "He's got a gun."[5] Ngim had spotted a person with a rifle, shooting at the vehicle.[6] Both Ngim and Say were struck by bullets; Ngim was shot in the spinal cord, rendering him a paraplegic and Say was fatally shot in the head.[7] Khea attempted to drive away, but lost control of the car and crashed into a tree.[8] Khea, Bun, and Alvarez escaped on foot.[9]

Say's beneficiary, Monica Ouch, brought an action in Rhode Island Superior Court for wrongful death, and Ouch, Ngim, Bun

1. Ouch v. Khea, 963 A.2d 630, 631 (R.I. 2009).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. Ngim testified that the shooter was not among the people he'd previously seen outside the party. *Id.* at 632 n.2.
7. *Ouch*, 963 A.2d at 632.
8. *Id.*
9. *Id.*

and Alvarez sought compensatory damages, claiming that the Defendant's negligence was a proximate cause of their injuries.[10] Defendant moved for partial summary judgment against Ouch, arguing that he did not owe a duty of care to Say to protect him from criminal assault.[11] The court granted Defendant's motion, finding that he had no duty of care to protect others from criminal assault, and that there was no special relationship between the parties which would vitiate the no-duty rule.[12] Defendant later moved for summary judgment against Ngim.[13] Because the first decision was not clearly erroneous and the record had not expanded, the trial court adopted its earlier decision and granted the motion.[14] Final judgment was entered against Ouch and Ngim, and Plaintiffs subsequently filed a timely appeal to the Rhode Island Supreme Court.[15]

ANALYSIS AND HOLDING

On appeal, Plaintiffs argued that Defendant was negligent in operating his vehicle and that his negligence was the proximate cause of their injuries.[16] Plaintiffs asserted that, as the operator of the vehicle, Defendant breached a duty of care by driving near a known danger (rival gang members).[17] Alternatively, Plaintiffs argued that Defendant's status as a member of the same street gang created a special relationship that would give rise to a legal duty.[18] Upon *de novo* review, the Rhode Island Supreme Court affirmed the trial court's grant of summary judgment to the Defendant.[19] In its ruling, the Court held that Defendant did not owe a duty of care to protect his passengers from the intentional criminal actions of third parties.[20] The Court also held that

10. *Id.*
11. *Id.*
12. *Id.*
13. *Ouch*, 963 A.2d at 632.
14. Bun and Alvarez were dismissed as plaintiffs when they failed to appear at their depositions and their attorney was unable to contact them. *Id.* n.3.
15. *Id.*
16. *Id.* at 633.
17. *Id.*
18. *Id.*
19. *Ouch*, 963 A.2d at 632.
20. *Id.* at 633.

membership in the same street gang was not sufficient to support a "special relationship" exception to the no-duty rule.[21]

The Court focused on whether the Defendant owed a duty of care to the Plaintiffs to protect them from the criminal action of a third party.[22] In Rhode Island, to prevail on a negligence claim "a plaintiff must establish a legally cognizable duty owed by a defendant to a plaintiff, a breach of that duty, proximate causation between the conduct and the resulting injury, and the actual loss or damage." [23] There is no set formula for determining whether a duty exists; the Court instead turned to the facts of the case and considered a number of factors, including the relationship between the parties, the scope and burden of the obligation, public policy and the foreseeability of the harm.[24] This legal duty must be established before the Court will determine the remaining elements of breach, causation and damages.[25]

While drivers owe their passengers a duty to operate the car in a safe manner, the Court was unconvinced that this duty included protecting Defendants from the intentional criminal acts of a third party.[26] The Court cited *Thanadabouth v. Kongmany*, in which it held that a landlord did not have a duty of care to provide outdoor lighting to protect tenants from third party criminal acts, even though the building was located in a high crime district.[27] The Court contrasted the case of *Volpe v. Gallagher* where it held that a landlord owed a legal duty to protect her neighbor from the landlord's adult son, because she had allowed her mentally ill son to maintain an arsenal of weapons in her house, one of which he used to kill the neighbor.[28] The Court found that the defendant owed a duty to exercise reasonable care in controlling her son to prevent this type of harm, and that she could have exercised such control by either removing or having the weapons removed.[29]

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21. *Id.* at 634.
22. *Id.* at 633.
23. *Id.* (quoting Selwyn v. Ward, 879 A.2d 882, 886 (R.I. 2005)).
24. *Id.* (quoting *Selwyn*, 879 A.2d at 887).
25. *Ouch*, 963 A.2d at 633.
26. *Id.*
27. *Id.* (citing Thanadabouth v. Kongmany, 712 A.2d 879, 880 (R.I. 1998)).
28. *Id.* (citing Volpe v. Gallagher, 821 A.2d 699, 702 (R.I. 2003)).
29. *Id.* (citing *Volpe*, 821 A.2d at 709).

Finally, the Court referenced *Martin v. Marciano*, in which it held that a special relationship between a defendant and a guest whose injury was foreseeable created an exception to the general rule that there is no duty to protect another from the criminal acts of a third party.[30] In *Martin*, the plaintiff was attacked by a fellow guest at a graduation party hosted by the defendant.[31] Because the defendant furnished alcohol to under-aged guests, including the plaintiff, the Court ruled that there was a special relationship between the parties and, therefore, the defendant owed the plaintiff a duty to protect her from violence at the hands of other attendees.[32]

In the instant case, the Court failed to find the duty-triggering factors seen in *Volpe* and *Martin*.[33] The Court held that the shooting was unforeseeable, and unrelated to the Defendant's operation of his vehicle.[34] Unlike the defendant in *Volpe*, the Defendant here had no control over the gunman's actions.[35] Because testimony elicited at trial tended to show that the gunman was not among the group of people first noticed by the Defendant across the street from the party, the Court was not convinced that the Defendant could have foreseen the particular harm suffered by the Plaintiff.[36]

Turning to Plaintiffs' second argument, the Court declined to find that a special relationship existed between members of the same street gang.[37] The Court stated, "[w]hatever the fraternal structure, if any, under which a street gang operates, we are not prepared to elevate it into a special relationship sufficient to give rise to a duty of care."[38]

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30. *Id.* (citing Martin v. Marciano, 871 A.2d 911, 915 (R.I. 2005)).
31. *Id.* (citing *Martin*, 871 A.2d at 914).
32. *Ouch*, 963 A.2d at 633 (citing *Martin*, 871 A.2d at 915-16).
33. *Id.* (citing *Martin*, 871 A.2d at 915-16; *Volpe*, 821 A.2d 699 at 709).
34. *Id.* at 634.
35. *See Volpe*, 821 A.2d at 709.
36. *Ouch*, 963 A.2d at 634.
37. *Id.*
38. *Id.*

COMMENTARY

While drivers have a duty to exercise reasonable care in transporting their passengers, that duty does not extend to protecting them from the criminal acts of third parties. The determination of a defendant's duty to protect a plaintiff from harm inflicted by a third party turns on foreseeability and control. Here, the Court noted that the Defendant did not drive into an area where he knew a gun battle was taking place.[39] Rather, he neither knew nor could have known that his car was about to pass through the sights of a rifleman. Neither could the Defendant have exercised control over the attacker.[40]

In ruling that the Defendant did not have a duty to protect the Plaintiffs from the gunman, the Court left open the question whether such duty could have been established had the shooter been one of the people the Defendant noticed before leaving the party.[41] Also unstated is whether merely driving within range of known members of a rival gang could be sufficient to prove foreseeability of harm.

An interesting aspect of this case is the Plaintiffs' argument that gang membership, a status chiefly characterized by antisocial and frequently criminal activity, somehow creates a special relationship between gang members sufficient to give rise to a duty of care. Obviously, there are sound policy reasons for not recognizing such a relationship. The Court refused to "elevate"[42] the relationship of gang members to special status, perhaps because doing so would tend to legitimize gangs whose very existence runs counter to the state's best interest.

CONCLUSION

The Rhode Island Supreme Court held that drivers do not owe a duty of care to their passengers to protect them from the criminal acts of unknown third parties. In determining the liability of defendants for the criminal acts of third parties, the Court will evaluate a defendant's ability to exercise control over

39. *Id.*
40. *Id.*
41. *Id.*
42. *Ouch*, 963 A.2d at 634.

the third party as well as the foreseeability of the particular harm to the plaintiff. Additionally, for strong policy reasons, the Court held that membership in a street gang is not sufficient to establish a special relationship between gang members sufficient to give rise to a duty of care.

Jenna Wims Hashway

Tort Law. *Santana v. Rainbow Cleaners, Inc.*, 969 A.2d 653 (R.I. 2009). In this matter of first impression, the Rhode Island Supreme Court held that treatment of an outpatient by a mental health center did not create an affirmative duty to exercise control over that patient to prevent a violent assault. Without any uniform standard to apply, the Court approached the case *ad hoc* and examined the specific facts in the case to determine that as a matter of law, The Providence Center did not have a duty to exercise control over the patient, and therefore, Plaintiff could not prevail on her allegation of negligent supervision and summary judgment was properly granted.[1]

FACTS AND TRAVEL

On May 26, 2004, while at work at Rainbow Cleaners, Inc., a Providence dry-cleaning business, employee Zaida Santana ("Plaintiff") was working in the back area when she heard a commotion in the front of the store.[2] When she went to investigate, Plaintiff witnessed David L. Kelly ("Kelly") attacking her coworker.[3] Plaintiff pleaded with Kelly to stop, but Kelly struck her in the head with a crowbar, resulting in severe head and brain injuries that left her unconscious for two weeks.[4] Kelly was arrested and charged with three counts of felony assault.[5] Kelly lived in an apartment adjacent to Rainbow Cleaners and he occasionally did odd jobs around the store.[6] Plaintiff and other employees were well aware of Kelly's mental health issues due to erratic behavior he had exhibited on prior occasions.[7] Plaintiff said she was afraid of Kelly, but one of the owners of the store told her that he was harmless.[8] For years leading up to the attack,

1. Santana v. Rainbow Cleaners, 969 A2d. 653, 667 (R.I. 2009).
2. *See id.* at 655.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Santana*, 969 A.2d at 655.
8. *Id.*

Kelly had received outpatient mental health treatment at The Providence Center ("Defendant Center"), a private, non-profit, community health center.[9] The last time Kelly had contact with Defendant Center was four months before he attacked Plaintiff.[10] After Kelly's arrest, Defendant Center initiated certification proceedings under the state's Mental Health Law,[11] and Kelly was later admitted to a mental health hospital, where he was deemed incompetent to stand trial.[12]

On October 13, 2005, Plaintiff filed suit against Rainbow Cleaners, Defendant Center, and "John Does I-X,"[13] those who treated Kelly.[14] Plaintiff later amended her complaint to include the owners of Rainbow Cleaners as defendants.[15] Defendant Center is the only party that remained in the appeal.[16] In Plaintiff's claim for negligent supervision, she alleged that Defendant owed a duty to protect those who Kelly might come into contact with because it knew or should have known that Kelly was dangerous and needed supervision to prevent serious harm from occurring.[17] Plaintiff claimed that she was injured as a result of Defendant Center's breach of this duty.[18]

Defendant Center filed a motion for summary judgment on March 30, 2007, maintaining that it had no legal duty to commit

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9. *Id.* The parties agree that Kelly's history revealed his mental health disability and that he was frequently treated by The Providence Center. The Court noted that it was hampered in its analysis of the case because none of Kelly's medical records were part of the record on appeal. *Id.* at n.3.

10. *Id.* at 655.

11. R.I. GEN. LAWS 1956 § 40.1.

12. *Santana,* 969 A.2d at 656.

13. The John Does included in the complaint were never identified, and they were not parties to the appeal. *Id.* at 656 n.5.

14. *Id.* at 656.

15. *Id.* Plaintiff initially filed for benefits in Workers' Compensation Court, which approved and entered and Plaintiff was paid $140,000 on behalf of Rainbow Cleaners. Plaintiff executed a release but nevertheless included Rainbow Cleaners in her complaint. On February 17, 2006, all claims against Rainbow Cleaners were dismissed. After that dismissal, the store owners entered into a settlement agreement with Plaintiff. *Id.* at 656 n.5.

16. *Id.* at 656.

17. *Id.*

18. *Santana,* 969 A.2d at 656. The Court noted that although it was not explicit in the Complaint, one could infer that Plaintiff's claim included an allegation of a breach of duty to exercise control over Kelly by initiating emergency certification proceedings. *Id.*

Kelly or to warn Plaintiff of his dangerousness.[19] Defendant Center argued that Plaintiff failed to point to any evidence that supported her allegations and that she failed to offer any facts to show that Kelly would have met the requirements for commitment under the stringent requirements of the Mental Health Law.[20] The motion judge found insufficient duty-triggering factors in the case and granted Defendant Center's motion for summary judgment.[21]

ANALYSIS AND HOLDING

On appeal to the Rhode Island Supreme Court, Plaintiff argued that the motion judge erred and that Defendant Center owed her a duty because a special relationship existed between Defendant and Kelly, the burden imposed on Defendant as a result of the duty was reasonable and consistent with valid public policy concerns, and the attack was foreseeable.[22]

Duty

The Court addressed the elements of a negligence claim, stating that a defendant cannot be liable under a negligence theory unless the defendant owes a duty to the plaintiff.[23] The Court employed an *ad hoc* approach that examines the particular facts and circumstances of a given case.[24] The Court noted that ordinarily issues of negligence could not be resolved on summary judgment, but that in the absence of a duty, the trier of fact has nothing to consider and a motion for summary judgment must be granted.[25]

Controlling a Third Party's Conduct

The Court noted that it had not previously had the opportunity to assess a duty in the context of an outpatient mental

19. *Id.*
20. *Id.*
21. *Id.* at 657.
22. *Id.*
23. *Santana*, 969 A.2d. at 658.
24. *Id.*
25. *Id.*

health provider and a patient.[26] In addressing whether Defendant Center had a duty in this case, the Court cited the general rule that no duty arises to control a third party's conduct to prevent harm to another individual.[27] However, the Court recognized an exception to the rule when a defendant has a special relationship with either the person whose conduct needs to be controlled or with the intended victim.[28]

Being a case was of first impression, the Court looked to other jurisdictions for guidance.[29] The Court began its analysis with *Tarasoff v. Regents of the Univ. of Califonia,*[30] in which the California Supreme Court held that a mental health professional may have an affirmative duty to protect a third party from the actions of a violent person.[31] The Court addressed other cases that had recognized a duty to warn when a threat is directed toward a specific or readily identifiable victim.[32] The Court recognized that other courts generally require the existence of a special relationship in which the defendant: "(1) knew or should have known that the patient posed a serious risk of violence to others; and (2) had the legal right and ability to control the patient."[33] Finally, the Court looked to other courts that have suggested that mental health providers may have a duty to exercise control by seeking commitment even when the patient is an outpatient.[34]

Commitment of the Mentally Disabled

The Court acknowledged that in harmony with the state's public policy to protect the civil liberties of the mentally disabled, the Mental Health Law makes commitment of a mentally disabled individual a very difficult process.[35] Under Rhode Island law, a

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26. *Id.* at 659.
27. *Id.* at 658.
28. *Id.* (citing Restatement (Second) of Torts § 315 (1965)).
29. *Santana,* 969 A.2d. at 659.
30. 551 P.2d 334, 340 (Cal. 1976).
31. *Id.*
32. *Santana,* 969 A.2d at 659; *see* Thompson v. County of Almeda, 614 P.2d 728, 738 (Cal. 1980).
33. *Id.*; *see* Abernathy v. United States, 773 F.2d 184, 189 (8th Cir. 1985); Hinkelman v. Borgess Med. Ctr., 403 N.W.2d 547, 551-52 (Mich. 1987).
34. *Santana,* 969 A.2d at 661.
35. *Id.*

statute allows mental health professionals to seek the commitment of an individual in both emergency and non-emergency situations;[36] however, the Court enumerated the onerous actions that mental health providers must undergo to be able to initiate a commitment of an individual.[37] Finally, the Court reviewed a decision that held that a mental health provider's duty may include initiating involuntary commitment proceedings against an outpatient.[38]

The Factors in this Case Do Not Give Rise to a Legal Duty

Again recognizing the lack of uniform standards to apply in cases involving legal duties of mental health professionals, the Court examined the particular circumstances of this case.[39] The Court listed the factors as: (1) the relationship between Kelly and Defendant Center, (2) the foreseeability of harm to Plaintiff, (3) the extent of the burden to Defendant Center and the consequences of imposing a duty with resulting liability for breach, and (4) public policy considerations.[40] While the Court was not willing to state that an outpatient relationship would never give rise to an affirmative duty to control a patient's conduct, it was unwilling to accept Plaintiff's argument that the relationship between a mental health provider and an outpatient alone is sufficient to give rise to a duty to control the patient.[41] The Court determined that Defendant Center did not have an opportunity to exercise control over Kelly nor had the legal

36. *See* R.I. GEN. LAWS §§ 40.1-5-7, 40.1-5-8. The sections that provide for the initiation of certification proceedings are discretionary; not mandatory. *Santana*, 969 A.2d at 661; *See* Ferreira v. City of East Providence, 568 F.Supp.2d 197, 214 (D.R.I. 2008).

37. *Santana*, 969 A.2d at 662-63.

38. *Id.* (citing Lipari v. Sears, Roebuck and Co., 497 F.Supp. 185, 193-4 (D.Neb.1980))(where shortly after stopping therapy a mentally ill outpatient fired into a nightclub killing a man, the court denied defendant's motion to dismiss and held that "when in accordance with the standards of his profession, the therapist knows or should have known that his patient's dangerous propensities present an unreasonable risk of harm to others, he has an affirmative duty" to initiate precautions to protect potential victims of his patient). *Id.*

39. *Id.* at 664.

40. *Id.* at 664-65.

41. *Id.* at 665.

authority to do so.[42] The Court noted the lack of information in the record about Kelly's condition when Defendant Center treated him four months prior to the assault.[43]

Based on the lack of evidence that Kelly could have been committed, the Court could not conclude that Defendant Center could have foreseen the harm suffered by Plaintiff.[44] The Court concluded that imposing a duty on Defendant Center would be "manifestly unjust" due to the absence of evidence that Kelly would have met the stringent requirements of the Mental Health Law.[45] The Court expressed concern that imposing liability in this case would force mental health providers to initiate certification proceedings against patients in the absence of evidence that they would meet the statutory requirements of commitment.[46] The Court was troubled that this would result in policies running contrary to state law to treat "patients in a manner that places the least restraint on their liberty."[47]

Finally, the Court addressed the public policy concerns that the decision would have on the vitally important and often difficult services that community mental health centers of this state provide in treating those afflicted with mental illnesses.[48] The Court balanced these concerns against the public's interest in being protected from attacks such as the one against Plaintiff, as well as the liberty interests of those suffering from mental illness.[49] In recognizing Kelly's constitutionally protected liberty interest and the significant deprivation of liberty that a civil commitment would entail, the Court cited the "carefully crafted" Mental Health Law in Rhode Island that ensures that a patient's liberty interests are "scrupulously protected."[50] The Court

42. *Id.*

43. *Santana*, 969 A.2d at 666. The Court seemed especially concerned with the lack of evidence provided by Plaintiff in her assertion that the "defendant knew or should have known" about Kelly's dangerous propensities. *Id.* The Court suggested that had Plaintiff provided supporting physician or expert affidavits, she may have been able to show that Defendant Center "should have known" about Kelly's dangerousness. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 666-67; *see* R.I. GEN. LAWS 1956 § 40.1-8.5-1(a).

48. *Santana*, 969 A.2d at 667.

49. *Id.*

50. *Id.* (quoting *In re* Doe, 440 A.2d 712, 714 (R.I. 1982)).

concluded that public policy concerns and notions of fairness outweighed an imposition of a duty in this case.[51]

COMMENTARY

In this matter of first impression, the Rhode Island Supreme Court recognized the potential consequences of its decision and correctly acknowledged the unreasonable implications of holding an outpatient mental health center responsible for the actions of one of its clients. In making its decision, the Court made a point to approach the duty analysis based on the specific factors present in the case[52] and to avoid making any bright line rule that could change the relationship between outpatient mental health providers and their patients in the future. The reluctance to hold that a duty existed in this case was predicated on the difficulty of controlling any third party's conduct without the presence of a special relationship.[53] It was unreasonable and unfair to impose a duty on Defendant Center, especially in light of the fact that Kelly's only contact with Defendant Center was four months prior to the attack.[54] The Court was also reluctant to impose a duty that may impede the liberties of individuals with mental disabilities.[55] Although not found in this case, the Court suggested that an affirmative duty to control an outpatient's conduct *could* arise in other cases if a number of discussed factors are present.[56]

51. *Id.*
52. *Id.* at 664.
53. *Id.* at 658.
54. *See Santana*, 969 A.2d at 655.
55. *Id.* at 667.
56. *Id.* at 666.

CONCLUSION

The Rhode Island Supreme Court held that a mental health center's treatment of an outpatient did not create an affirmative duty to initiate certification proceedings in order to prevent a violent assault.[57] Accordingly, the Court concluded that the granting of summary judgment by the Superior Court was appropriate.[58] Additionally, the Court refused to impose a bright line rule in this matter of first impression but instead weighed the individual factors present in this case in the duty analysis.[59] Because Defendant Center had no duty in this case, the Court held that Plaintiff could not prevail on her allegation of negligent supervision.[60]

Marissa L. Janton

57. *Id.* at 653.
58. *Id.* at 655.
59. *Id.* at 667.
60. *Santana*, 969 A.2d at 667.