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2011 Survey of Rhode Island Law: Cases and 2011 Public Laws of Note

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Administrative Law. *Narragansett Improvement Co. v. Wheeler*, 21 A.3d 430 (R.I. 2011). The Rhode Island Supreme Court held that a party cannot bring a substantive due process claim against a governmental body acting in a purely advisory capacity, and that when a purely advisory government body acts, a plaintiff has no constitutionally protected interest in the advisory body's actions that may give rise to a procedural due process claim.

FACTS AND TRAVEL

November 2005. Plaintiff land developers, including the Narragansett Improvement Company, file an application with the North Smithfield Planning Board to develop property in North Smithfield.¹ From September 2006 to August 2007, the planning board reviews the application.² The application is denied in August 2007 for a variety of reasons.³ This case revolves around one: certain rock piles at the property may be Native American burial mounds.⁴

2001. Plaintiffs hire the Public Archaeological Library (PAL) to study the rock piles. PAL “conclude[s] that the stone mounds [are] not burial sites.”⁵

April 2007. PAL’s conclusion is contested.⁶ The North Smithfield Conservation Commission presents an individual who is both an anthropologist and an archaeologist to the North Smithfield Town Council.⁷ The anthropologist relates that he has studied the pertinent property and noted “significant historical artifacts and mound piles” and “thought . . . [they] contain[ed] the

1. *Narragansett Improvement Co. v. Wheeler*, 21 A.3d 430, 433 (R.I. 2011).

2. *Id.*

3. *Id.* at 435.

4. *Id.* at 433-34.

5. *Id.* at 435 n.9

6. *Id.* at 435.

7. *Id.* at 434.

remains of American Indians.”⁸ The Town Council approves a motion requesting that the anthropologist and the conservation commission “defin[e] and protect[] the area and present it⁹ to the [p]lanning [b]oard for their review.”¹⁰ Shortly thereafter the anthropologist is hired by the town council in order to “conduct an archaeological study of a site adjacent to the proposed [development] site.”¹¹ During this time, the planning board has been holding informational meetings as it reviews plaintiffs’ application.¹²

August 2, 2007. The planning board holds its fourth and final informational hearing.¹³ Evelyn Wheeler, chairperson of the Rhode Island Advisory Commission on Historical Cemeteries, testifies to the planning board that the cemeteries commission has “identified and registered” two cemeteries [that are at least partially on the proposed site¹⁴] as historical.¹⁵ She provides the planning board with a June 2007 letter she sent to a member of the conservation committee.¹⁶ The letter states that the cemeteries commission “ha[d] been informed by [a member of the cemeteries commission], of the two (2) new cemeteries which ha[d] been registered with the RI Historical Cemetery Database”¹⁷ The anthropologist testifies too. He is “95% certain that the stone mounds on the proposed [development site] are burial mounds.”¹⁸ He explains that the 2001 PAL report (which, the reader may recall, contradicts his conclusion) is “at best cursory.”¹⁹

August 16, 2007. The planning board unanimously votes to

8. *Id.* (internal quotation marks omitted).

9. This enigmatic “it” is not explained in the Court’s opinion. The opinion alludes to a “final report” to be prepared by the anthropologist. The contents of this report are not discussed, but the Court notes that it was not completed by the time the planning board rendered its decision. *See id.* at 442.

10. *Id.* at 434.

11. *Id.* (internal quotation marks omitted).

12. *Id.*

13. *Id.*

14. *See generally id.* at 435 (The extent to which either or both of these two cemeteries encroach upon plaintiffs’ property is unclear from the Court’s opinion).

15. *Id.* at 434 (internal quotation marks omitted).

16. *Id.*

17. *Id.* (internal quotation marks omitted).

18. *Id.* (internal quotation marks omitted).

19. *Id.* at 434-35 (internal quotation marks omitted).

deny plaintiffs' application for development.²⁰

October 24, 2007. Plaintiffs file a seven count complaint against the cemeteries commission:

[C]ount 1 sought declaratory judgment on a violation . . . of the substantive due process clause of the Rhode Island Constitution; count 2 sought declaratory judgment on a violation of the procedural due process clause of the Rhode Island Constitution; count 3 sought a declaration that chapter 18.3 of title 23 [which statute creates the advisory committee] is unconstitutional, both on its face and as applied; count 4 sought a declaration that the 'registration' of the historical cemeteries by the advisory commission is null and void; count 5 alleged slander of title; count 6 alleged trespass [voluntarily dismissed by the plaintiffs]; and count 7 alleged tortious interference with expected business advantage, opportunity, and expectation.²¹

November 15, 2007. The planning board issues a written decision addressing the denial of plaintiffs' application.²² The decision evinces great deference to the anthropologist's testimony and near disregard of the PAL report.²³ The latter, the decision explains, "offer[ed] no reference to historical data, empirical evidence or any other historical records to support [its] conclusions."²⁴ Furthermore, the authors of the PAL report never appeared before the planning board; the anthropologist did.²⁵

December 2007. Defendants move to dismiss all but the trespass claim.²⁶ In June 2008 plaintiffs object to the motion to dismiss, and file for summary judgment.²⁷ On July 8, 2008, a hearing is held at the trial court: Defendants argue that any registration by the cemeteries commission is merely "symbolic."²⁸ Plaintiffs reply that the cemeteries commission acted *ultra vires*

20. *Id.* at 435.

21. *Id.* at 436.

22. *Id.* at 435.

23. *Id.*

24. *Id.* (internal quotation marks omitted).

25. *Id.*

26. *Id.* at 436.

27. *Id.*

28. *Id.* (internal quotation marks omitted).

when it sent a letter to the conservation committee saying that it had registered the cemeteries as historic; that the cemeteries commission intended for the planning board to rely upon the asserted registration; and that the planning board did rely upon that registration.²⁹ The plaintiffs suggest that the motion to dismiss had been transformed into a motion for summary judgment, on account of the breadth of materials presented to the trial justice.³⁰ "I guess so," elucidates the trial justice.³¹ At the end of the July 8, 2008 hearing, the trial justice grants defendants' motion to dismiss.³² Because the cemeteries commission is purely advisory, "no cause of action of constitutional dimension" can be raised against it, opines the trial justice.³³ The trial justice clarifies that when the chair of the cemeteries commission said that the cemeteries were registered as historic cemeteries, she did not mean that the cemeteries were registered in a legally operative fashion, she merely meant that they had been listed in an internal database.³⁴

December 17, 2008. Final judgment is entered; only one of the plaintiffs timely appeals.³⁵

ANALYSIS AND HOLDING

The Supreme Court of Rhode Island treated the entry of dismissal for defendants as though it were one of summary judgment, for procedural reasons related to the quantum of evidence presented to the trial judge.³⁶

Plaintiffs claim that the cemeteries commission violated plaintiffs' procedural due process rights: the commission violated constitutionally protected interests without affording notice or an opportunity to be heard.³⁷ Nay, responds the Supreme Court.³⁸ When a purely advisory government body acts, a plaintiff has no

29. *Id.*

30. *Id.* at 436-37.

31. *Id.* at 437.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 438.

38. *Id.* at 439.

constitutionally protected interest in the advisory body's actions.³⁹ The Court cites a 2007 case involving the Commission on Judicial Tenure and Discipline.⁴⁰ There, the commission was relieved of liability because it acted in an advisory role; it lacked the authority to enforce its recommendations.⁴¹ In that case, the authority (the Rhode Island Supreme Court) "conduct[ed its] own evaluation of the evidence adduced by the commission and reach[ed] an independent conclusion."⁴² So too here. The North Smithfield Planning Board acts independently of the cemeteries commission and is not bound by its recommendations.⁴³

Plaintiffs claim that the cemeteries commission violated plaintiffs' substantive due process because the cemeteries commission's actions were "arbitrary and unreasonable."⁴⁴ Nay, responds the Supreme Court.⁴⁵ "[A] party cannot bring a substantive legal claim against a governmental body acting in a purely advisory capacity."⁴⁶ Since the cemeteries commission's actions were purely advisory, the plaintiff has no substantive due process claim.⁴⁷

Plaintiffs claim that the cemeteries commission's slandered plaintiffs' title.⁴⁸ "Slander of title occurs when a party maliciously makes false statements about another party's ownership of real property, which then results in the owner suffering a pecuniary loss."⁴⁹ Malice, as used here, refers only to "an intent to deceive or injure."⁵⁰ Nay, responds the Supreme Court.⁵¹ The planning board did not rely upon Wheeler's testimony or the letter she presented to the planning board when it denied plaintiffs'

39. *Id.* at 438.

40. *Id.* (citing *In re Comm'n on Judicial Tenure and Discipline*, 916 A.2d 746 (R.I. 2007)).

41. *Id.* (citing *Comm'n on Judicial Tenure and Discipline*, 916 A.2d at 751-52).

42. *Id.*

43. *Id.* at 440.

44. *Id.* at 438.

45. *Id.* at 441.

46. *Id.* at 440.

47. *Id.*

48. *Id.* at 441.

49. *Id.* (citations omitted).

50. *Id.* (citations omitted).

51. *Id.* at 442.

application.⁵² The Court supports this proposition by referring to the planning board's written decision that frequently references the anthropologist's findings, and, according to the Court's reading, only infrequently or unimportantly refers to the cemeteries commission's "registration."⁵³ While "the plaintiffs did present competent evidence establishing a dispute concerning . . . whether the advisory commission made false statements and . . . acted with malice[, the record lacks competent evidence showing] . . . that the actions of the advisory commission resulted in a pecuniary loss to the plaintiffs."⁵⁴ The Court acknowledges that Wheeler admitted that she intended for her statements to be used by the planning board to block the planned development.⁵⁵ Yet, Chief Justice Suttell boldly opines, "[i]t is clear" that the planning board did not actually rely upon Wheeler's allegations.⁵⁶

Finally, even if the planning board did rely upon Wheeler's allegations, its independent decision to deny plaintiff's application is a superseding cause of appellant's pecuniary loss.⁵⁷ The Court cites a First Circuit opinion dismissing a complaint against a researcher, noting that "[e]ven if . . . government officials relied on [the researcher's] research and opinions, the independent decision to credit his views and [act upon them] stands as a superseding cause of plaintiff's claimed harm."⁵⁸ Finally, the Court notes that there were a "host of [other] reasons" to deny the application.⁵⁹

The Supreme Court affirmed the judgment of the Superior Court.⁶⁰

COMMENTARY

The cemeteries commission is a creature of statute that may only study cemeteries and make recommendations relative to cemeteries in Rhode Island.⁶¹ It cannot actually register cemeteries as a historic cemeteries; that privilege is reserved for

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 441.

56. *Id.*

57. *Id.* at 442.

58. *Id.*; see also *Jacob v. Curt*, 898 F.2d 838, 839 (1st Cir. 1990).

59. *Narragansett Improvement Co.*, 21 A.3d at 442.

60. *Id.*

61. See R.I. GEN. LAWS § 23-18.3-1 (2008).

the recorder of deeds in the appropriate municipality.⁶² Thus, unremarkable is the conclusion that the cemeteries commission did not violate plaintiffs' procedural or substantive due process rights by merely mouthing off.

More suspect is the conclusion that the defendants did not slander plaintiffs' titles. Slander of title requires that a party "[1] maliciously [2] makes false statements about another party's ownership of real property, [3] which then results in the owner suffering a pecuniary loss."⁶³ The Court acknowledged that the plaintiff had carried its burden (that is, showed a genuine issue of material fact) on at least the first two elements, but failed on the third. The Court reasoned that the defendants' conduct did not proximately cause plaintiff's injury because 1) the planning board did not rely upon the cemeteries commission's report, and because 2) even if it did, the planning board's decision represents a superseding cause which negates proximate cause.⁶⁴

The undersigned demurs. Ms. Wheeler, the chairperson of the Rhode Island Advisory Commission on Historical Cemeteries, informed the planning board that portions of the plaintiff's land had been "identified and registered" as historic cemeteries.⁶⁵ One might easily mistake this as a legally operative registration: Wheeler's word choice and grammar obscure the internal, inoperative nature of the registration.⁶⁶ Who would guess that she merely "inventor[ied]" them in an internal "database"?⁶⁷ Perhaps the members of the North Smithfield planning board sleep with a dog-eared copy of title 23, section 18 of the Rhode Island General Laws beneath their pillows. But the members' intimacy vel non with the minutiae of state law is at least a genuine issue of material fact.

The Court believes that the planning board's non-reliance upon Wheeler's allegation is demonstrated by the planning board's

62. R.I. GEN. LAWS § 23-18-10.1 (2008).

63. *Narragansett Improvement Co.*, 21 A.3d at 441.

64. *Id.* at 442.

65. *Id.* at 434.

66. See, e.g., *id.* at 434 ("[The cemeteries commission] ha[d] been informed by the Providence County Commissioner [of the cemeteries commission], of the two (2) new cemeteries which ha[d] been registered with the RI Historical Cemetery Database as NS 52 and NS 53.").

67. See *id.* at 434 n.8.

written decision.⁶⁸ However, the plaintiffs' application was denied on August 16, 2007. A written decision released in November is thus watery, attenuated evidence of what the planning board thought on August 16.⁶⁹ Since it was released weeks after the plaintiffs had filed suit in October, the planning board's decision may have been trimmed of any references to the cemeteries commission's finding. Even assuming the months-late, post-litigation decision honestly reflected the planning board's rationale on August 16, 2007, the decision contains repeated references to the cemeteries commission's registration and even adopts the purportedly internal nomenclature of the cemeteries commission.⁷⁰ A jury may have found that the planning board relied on Wheeler's statements.

The Court's fall-back justification is that, even if the planning board had relied upon the cemeteries commission registration, the planning board's independent deliberation and decision acted as a superseding cause. This too is suspect. Imagine that the planning board did indeed operate under the assumption that portions of plaintiffs' land was registered as historical cemeteries under the Rhode Island statute entitled "Registering historical cemeteries." A dispositive legal classification *clearly robs the planning board of its ability to make independent decisions.*

The Court's citation to *Jacob v. Curt* is inapt. There the American defendant co-authored an article that criticized a foreign clinic's safety and efficacy.⁷¹ But the American author was clearly not acting as an employee of the foreign government, with either actual or apparent authority to classify the clinic as unsafe.⁷² Here Wheeler was the chairperson of a statutorily created entity named the Rhode Island Advisory Commission on

68. *Id.* at 441.

69. Even if the planning board had learned at some point between August 16 and the issuance of the written decision that Ms. Wheeler's registration was legally inoperative and still decided to deny the application on other grounds, then the plaintiffs would be entitled to damages for the delay in developing the land between August 16 and the date that the planning board realized its error and decided upon different grounds.

70. "Historic Cemetery NS 52 is comprised of a number of graves marked by stone mounds . . ." *Narragansett Improvement Co.*, 21 A.3d at 442.

71. *See id.*; *see also Jacob v. Curt*, 721 F. Supp. 1536, 1538 (D.R.I. 1989) *aff'd*, 898 F.2d 838 (1st Cir. 1990).

72. *Narragansett Improvement Co.*, 21 A.3d at 442.

Historical Cemeteries. And her allegation that land had been registered as a historical cemetery at least superficially tracks the language in the legally operative statute entitled “Registering historical cemeteries.”⁷³ Yet the Court cites no evidence suggesting that the planning board was aware of the impotence of Wheeler’s classification. The Court’s peremptory one-sentence conclusion that the application would have been denied on other grounds satisfies only the uncritical reader.⁷⁴ Thus the author offers that plaintiffs were entitled to test the credibility of the planning boards’ purported non-reliance on the cemeteries commission registration in front of a jury; to explore the basis of the August 16, 2007 denial without being forced to rely upon the attenuated evidence of a written decision issued in November (which arguably demonstrates reliance anyhow); and to have a jury decide, to what extent if at all, Ms. Wheeler’s machinations deprived plaintiffs of their ability to lawfully develop their land.

CONCLUSION

The Court affirmed the judgment of the Superior Court and concluded that the plaintiffs have neither protected liberty interest nor substantive due process rights in a purely advisory body’s actions. Furthermore, the defendants are not liable for slander, if slander there was, because the planning board did not rely upon the slander when it rendered its decision.

William Wray

73. R.I. GEN. LAWS § 23-18-10.1 (2008).

74. “Moreover, the planning board conducted a comprehensive review of the proposed development project and denied the plaintiffs’ application for a host of reasons other than the possible existence of historical cemeteries, including the plaintiffs’ failure to comply with a number of statutory requirements and subdivision regulations.” *Narragansett Improvement Co.*, 21 A.3d at 442.

Administrative Law. *Pierce v. Providence Ret. Bd.*, 15 A.3d 957 (R.I. 2011). After a review of Providence, Rhode Island Code of Ordinances section 1-2 and section 17-189(5), the Rhode Island Supreme Court determined that a firefighter, retired due to a permanent disability resulting from several work-related injuries, is entitled accidental disability retirement benefits so long as his disability was the “natural and probable” result of a work-related injury.

FACTS AND TRAVEL

During twenty-six years of service as a firefighter for the City of Providence, Scott Pierce (“Pierce”) sustained several accidental, on-the-job injuries to his right ankle.¹ His first injury occurred between May 1, 1989 and sometime in 1994.² Finally, on June 29, 2006³ Pierce sustained a final on-the-job injury while responding to a fire.⁴ The injury later resulted in Pierce’s ankle being surgically fused and he was unable to return to work.⁵ After being unable to return to work, Pierce applied to the Providence Retirement Board (“Board”) for accidental-disability retirement (“ADR”) benefits based on section 17-189(5) of the Providence, Rhode Island Code of Ordinances (“the ordinance” or “section 17-189(5)”).⁶

1. *Pierce v. Providence Ret. Bd.*, 15 A.3d 957, 958-59 (R.I. 2011); PROVIDENCE, R.I. CODE OF ORDINANCES § 17-189(5) (2011).

2. *Pierce*, 15 A.3d at 959 n.3. Here, the Court notes that there is some discrepancy in the record about the date of the initial injury, but considers 1994 as the date of initial injury for consistency since it is not particularly important to the appeal. *Id.*

3. *Id.* at 958 n.1. The Court notes that there is some discrepancy in the record about the date of the June 2006 injury but uses the date June 29, 2006 for consistency because the exact date is irrelevant to their analysis. *Id.*

4. *Id.* at 959.

5. *Id.*

6. *Id.* Section 17-189(5) of the code is captioned “Benefits payable” and creates a three tiered system of retirement benefits termed “service retirement,” “ordinary disability retirement,” and “accidental disability

As required by the ordinance, Pierce was examined by three physicians.⁷ Each physician concluded, because of injuries related to his employment Pierce was permanently disabled from performing his full duties as a firefighter.⁸ Further, each physician checked a box on a questionnaire supplied by the board indicating that Pierce's "incapacity [was] the natural and proximate result of an accident while in the performance of duty."⁹ On the same questionnaire, when asked to indicate the date and location of the accident, each physician indicated in various ways that the injury was the result of more than one accident at more than one location.¹⁰ After receiving the opinions of the physicians, the board had its medical advisor send follow-up letters asking the physicians to clarify whether Pierce's injury was the result of the single event in June 2006 or multiple events.¹¹ Two of the physicians responded that the disability was the result of cumulative injuries and one physician responded that the injury was the result of the original 1994 injury and would have progressed regardless of Pierce's duties.¹²

On May 23, 2007 the board voted to deny Peirce's ADR benefits but made no findings of fact or conclusions of law in support of its decision.¹³ Subsequently, the Rhode Island Supreme Court granted Pierce's writ of certiorari to review the May 23, 2007 decision by the board.¹⁴ The Rhode Island Supreme Court vacated the board's decision on the grounds that it was impossible to review the decision in the absence of findings of fact

requirement." The service retirement acts as a normal retirement pension while accidental and ordinary disability are pensions for employees that become permanently disabled in a manner that prevents them from performing their normal work duties. The primary difference between eligibility for ordinary and accidental disability retirement benefits is that ordinary includes non-work-related injuries while accidental includes only work-related injuries that disable the employee. The primary difference between the two with regards to benefits is that accidental disability benefits are significantly higher than ordinary disability benefits. *Id.* at 961.

7. *Pierce*, 15 A.3d at 959. (The physicians were James E. McLennan, M.D., Randall L. Updegrove, M.D., and Thomas F. Morgan, M.D.).

8. *Id.*

9. *Id.* (brackets in original, internal quotation marks omitted).

10. *Id.*

11. *Id.* at 959-60.

12. *Id.* at 960.

13. *Id.*

14. *Id.*

by the board and remanded for a new hearing with a written decision setting including findings of fact and legal conclusions.¹⁵

On January, 28, 2009 and March, 25, 2009 the medical disability subcommittee of the board once again reviewed Pierce's application for ADR benefits.¹⁶ The subcommittee recommended that the board deny Pierce's application on the grounds that his disability was not the result of a single accidental injury.¹⁷ Taking this recommendation under advisement, the board again denied Pierce's application in a written decision.¹⁸ In the written decision the board determined that "[t]he independent physician reports and other evidentiary material . . . do[] not indicate that a specific accident was the cause of Pierce's injury" but instead that Pierce's disability flowed from many, repeated injuries, "none of which could be said to be the natural or proximate cause of his incapacitating disability."¹⁹ The board then concluded that, as a matter of law, Pierce could not establish that he was "incapacitated as a proximate result of an accident as required by [the] ordinance."²⁰ Therefore, the board denied Pierce's application.²¹ It is from this denial that Pierce appealed.²²

ANALYSIS AND HOLDING

The Supreme Court began by establishing the appropriate standard of review. The Supreme Court determined that it was their task to "discern whether any legally competent evidence supports the lower tribunal's decision and whether the decision[]maker committed any reversible errors of law in the matter under review," and that "legally competent evidence" consists of "some or any evidence supporting the agency's findings."²³ When the Court evaluates a question of law the review is *de novo* and if error of law is found it must "so infect[] the validity of the

15. *Id.* (quoting *Pierce v. Providence Ret. Bd.*, 962 A.2d 1292, 1292-93 (R.I. 2009)).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* (internal quotation marks omitted, brackets in the original).

20. *Id.* at 960-61 (internal quotation marks omitted).

21. *Id.* at 961.

22. *Id.*

23. *Id.* (quoting *Sobanski v. Providence Emps. Ret. Bd.*, 981 A.2d 1021 (R.I. 2009) (internal quotation marks omitted)).

proceedings as to warrant reversal,” for the Court to reverse the board’s decision.²⁴

The Supreme Court noted that ADR benefits are only available to those employees that are disabled in the line of duty and are more lucrative than those benefits available to those injured outside of work (66 2/3 percent of final compensation for ADR benefits as compared to 45 percent of final compensation for non-work-related disability).²⁵ The Supreme Court also noted that the greater ADR benefits require more stringent criteria than other retirement benefits.²⁶ The Supreme Court pointed out that Pierce met nearly all of the ADR benefits requirements set forth in section 17-189(5), a fact confirmed by the board in its decision.²⁷ However, the board rejected Pierce’s application because his ankle disability resulted from multiple accidents and was therefore “not the natural and ‘proximate result of an accident,’” namely the “specific” June 2006 accident.²⁸

The Supreme Court divided its review of the board’s statutory interpretation of section 17-189(5), specifically the “a natural and proximate result of an accident” language, into two elements.²⁹ The first analysis was of the meaning of the phrase “natural and proximate result” and the second was of the phrase “an accident.”³⁰ The Court prefaced its analysis by turning to Providence Code section 1-2 (“section 1-2”) which embodies a canon of interpretation for Providence ordinances requiring that words and phrases in the singular should be construed as plural and vice-versa unless manifestly inconsistent with the evident intent of the city council.³¹ Section 1-2 further provides that

24. *Id.* (citing *Lynch v. R.I. Dept. of Env. Mgmt.*, 994 A.2d 64, 70 (R.I. 2010); quoting *Cullen v. Town Council of Lincoln*, 850 A.2d 900, 903 (R.I. 2004) (brackets in original)).

25. *Id.* (quoting *Connelly v. City of Providence Ret. Bd.*, 601 A.2d 498, 500 (R.I. 1992)).

26. *Id.* at 962.

27. *Id.*

28. *Id.*

29. *Id.* at 963.

30. *Id.* at 963, 966.

31. *Id.* at 963-64 (“[Providence Code § 1-2] requires that the interpretations ‘shall be placed on the words and phrases hereinafter mentioned, unless such construction or interpretation shall be manifestly inconsistent with the evident intent of the city council.’”); PROVIDENCE, R.I. CODE OF ORDINANCES § 1-2 (2011).

"[w]ords and phrases shall be construed according to the common and approved usage of the language," and "technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning."³²

The Court determined that the phrase "a natural and proximate result of an accident" has "acquired a peculiar and appropriate meaning in the law," because the term is not defined in the statute and its meaning is not "commonly known and understood by the lay public."³³ Therefore, the Court applied the legal definition to the terms "natural" and "proximate," in accord with section § 1-2.³⁴ The Court defined the term "natural" to mean "consequences which are normal, not extraordinary, [and] not surprising in the light of ordinary experience."³⁵ It then defined the word "proximate" in the context of legal "proximate cause" to mean that there be a factual finding that the "harm would not have occurred but for the [accident] and that the harm [was a] natural and probable consequence of the [accident]."³⁶

The Supreme Court noted that neither the questionnaire nor the follow up letters from the examining physicians address whether Pierce's injury was a "proximate result" of his June 2006 injury, only whether the injury "[was] solely the result of the accident [on] 6/29/06" or whether multiple accidents caused the disability.³⁷ Since "sole cause" and "proximate result" are not synonymous, the Court looked to the entirety of the physicians' medical opinions to determine if their findings established that the June 2006 injury was the proximate cause of Pierce's disability.³⁸

The Supreme Court concluded that Pierce's disability was "a

32. *Pierce*, 15 A.3d at 964 (quoting Providence Code § 1-2) (internal quotation marks omitted, brackets in original); § 1-2.

33. *Pierce*, 15 A.3d at 964.

34. *Id.*

35. *Id.* (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 43 at 282 (W. Page Keeton ed., 5th ed. 1984) (internal quotation marks omitted)).

36. *Id.* (quoting *DiPetrillo v. Dow Chem. Co.*, 729 A.2d 677, 692-93 (R.I. 1999)).

37. *Id.* at 965.

38. *Id.*

natural and probable consequence of” the June 2006 accident.³⁹ The Court held that the physicians’ opinions stated that the each of Pierce’s accidents, including the June 2006 accident, were part of a causal matrix that resulted in Pierce’s disability.⁴⁰ Since the physicians’ opinions show a causal matrix between the accidents, the Supreme Court concluded that the June 2006 injury was one of the proximate causes resulting in Pierce’s disability.⁴¹ Because the June 2006 injury was a proximate cause of Pierce’s disability, the board’s requirement that Pierce show that the June 2006 injury was the sole cause of his disability was a legal error that “infected the validity of the proceedings.”⁴²

After analyzing the “natural and proximate” phrase the Court turned its analysis to the phrase “of an accident.”⁴³ The Court held that section 1-2 requires that the term “of an accident” must be interpreted to include multiple accidents.⁴⁴ Accordingly, the Supreme Court concluded that since there was no other defect with Pierce’s ADR benefit application, the board had improperly denied his application.⁴⁵ The Court went on to note that its decision was in accord with several other jurisdictions including New York, Maryland, and Louisiana.⁴⁶ As a result of its reasoning the Supreme Court quashed the board’s denial of Pierce’s benefits and remanded the case to the board with directions to award Pierce ADR benefits retroactive to the date of his original retirement on June 28, 2007.⁴⁷

39. *Id.*

40. *Id.*

41. *Id.* at 965-66.

42. *Id.* at 966 (quoting *Cullen*, 850 A.2d at 903) (internal quotation marks omitted).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 966-67. The Court cited to three cases from New York, Maryland, and Louisiana respectively, where an injury was not the sole cause of permanent disability to a state employee, but the courts individually held that the disabling injury need not be the sole cause of the disability. *See* *Bridgwood v. Bd. of Trs. of the New York City Fire Dept.*, 2612 N.Y.S.2d 621, 622 (N.Y. App. Div. 1994); *Hersl v. Fire & Police Emps. Ret. Sys.*, 981 A.2d 747, 758 (Md. Ct. Spec. App. 2009); *Bowers v. Firefighters’ Ret. Sys.*, 6 So.3d 173, 179 (La. 2009).

47. *Pierce*, 15 A.3d at 968.

COMMENTARY

The Rhode Island Supreme Court clarified the meaning of Providence, Rhode Island's statutory retirement plan for city employees under section 17-189(5). It held that under the current law an employee will not be denied ADR benefits because that employee is permanently disabled by a series of injuries, rather than a single disabling injury.⁴⁸ The Court is clear that, given the command of section 1-2, the Court will not require a single accident to be the cause of disability in ADR cases.⁴⁹ However, the holding does not reach two related factual situations.

It is unclear what the result would be if an employee was previously injured in non-work-related accidents which led to a final disabling accident that was work related. It is equally unclear what the result would be if an employee was injured many times while on the job but the final disabling injury was non-work-related. There is some evidence that in these situations the Supreme Court would reverse a denial of benefits. In adopting a torts based "proximate cause" standard in interpreting section 17-189(5), the Court noted that "proximate cause need not be the sole and only cause[,] [i]t need not be the last or latter cause."⁵⁰ This certainly leaves open the possibility that as long as a work-related injury was part of "the causal matrix" of the disability, ADR benefits may be awarded if the proximate cause standard is satisfied.⁵¹ The Court also bolstered its reasoning with, *Hersl v. Fire & Police Employees' Retirement System*,⁵² a case from Maryland where the disabled employee originally injured his knee outside of work but permanently disabled the knee in a work-related accident.⁵³ The Court specifically stated that even though the permanency of Pierce's condition was not attributed solely to the June 2006 injury he was still entitled to ADR benefits.⁵⁴ The Court leaves open the possibility that non-work-related injuries would not preclude an award of benefits by its reasoning, so long

48. *Id.* at 966.

49. *Id.*

50. *Id.* (quoting *Hueston v. Narragansett Tennis Club, Inc.*, 502 A.2d 827, 830 (R.I. 1986) (internal quotation marks omitted)).

51. *See id.* at 965-66.

52. *Id.* at 967 (quoting *Hersl*, 981 A.2d at 758).

53. *Id.*

54. *Id.*

as a work-related injury is the proximate cause of the permanent disability, even though it is not directly addressed in the instant case.

However, it is less clear what the outcome would be in the second case where the disabling injury was non-work-related. At a minimum, the appellant would have some heavy evidentiary lifting to prove that there were enough significant work-related injuries in “the causal matrix” to say that the permanent disability was the “natural and proximate” result of work-related injuries and not only the disabling non-work-related injury.⁵⁵ The Supreme Court has not foreclosed this possibility, noting “proximate cause ‘need not be the sole and only cause. It need not be the last or latter cause. It’s a proximate cause if it concurs and unites with some other cause which, acting at the same time, produces the injury of which complaint is made.’”⁵⁶ The obvious hypothetical situation can be drawn from the facts of the instant case. One of Pierce’s examining physicians concluded that Pierce’s original injury in 1994 caused “degenerative arthritis” that “would have progressed . . . regardless of his duties.”⁵⁷ If the other examining physicians had accepted that opinion, it could certainly be argued that the 1994 injury was the “natural and proximate” cause of Pierce’s disability even if his final disabling injury in 2006 had occurred at home.

One final note of interest relates to section 1-2, which the Supreme Court used to interpret the singular form “of an accident” in the ADR benefits ordinance. Instead of relying on section 1-2 in his arguments, the appellant relied on Rhode Island General Laws section 43-3-4 (“section 43-3-4”), which requires that singular constructions of a word also must include plural constructions.⁵⁸ The Supreme Court acknowledged that section 43-3-4 would apply to the instant ordinance, but went on to expound on the applicability and effect of section 1-2, the analogous section of the Providence Code.⁵⁹ In *Murphy v. Zoning*

55. *Id.* at 965-66.

56. *Id.* at 966 (quoting *Hueston*, 502 A.2d at 830).

57. *Id.* at 960.

58. *Id.* at 962-63, n.9; R.I. GEN. LAWS § 43-3-4 (1956).

59. *Id.* at 962 n.9 (citing *Murphy v. Zoning Bd. of Review of Town of South Kingstown*, 959 A.2d 535, 541 (R.I. 2008)).

*Board of Review of South Kingstown*⁶⁰, the Supreme Court held that a more restrictive municipal ordinance interpretation applied to a zoning ordinance because the state had clearly delegated the power to define zoning subdivision to the municipality.⁶¹ It is not clear how the analysis of the instant case would have changed had the state and municipal statutory canons of interpretation been different. It seems likely that the state canon would generally preempt unless the state had delegated power for a more restrictive interpretive canon to the municipality.⁶² Though, the full bounds of that state/municipal preemption question are beyond the scope of this survey the state could clarify its canons of interpretation to the extent that they are applicable to municipal ordinances.

CONCLUSION

The Rhode Island Supreme Court held that disability caused by multiple work-related injuries, based on the applicable canon of statutory construction, section 1-2, and the legal definition of proximate cause, qualified for accidental-disability retirement benefits set forth in section 17-189(5), so long as the disability was the “natural and proximate” result of the accidents. The Court held that the board misinterpreted section 17-189(5) when it determined that an employee’s disability must be proximately caused by a single work-related accident to receive ADR benefits.⁶³ Since there was no other defect in Pierce’s ADR benefit application, the Court quashed the board’s denial of Pierce’s ADR benefits and remanded to the board with instructions to retroactively award Pierce ADR benefits.⁶⁴

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60. *Murphy*, 959 A.2d at 541.

61. *Id.*

62. *Id.*

63. *Pierce*, 15 A.3d 957 at 967-68.

64. *Id.* at 968.

Bankruptcy Law. *In re Edwin H. Tetreault*, 11 A.3d 635 (R.I. 2011). A devisee of real property under the residuary clause of a will satisfies the ownership or possessory rights enumerated in Rhode Island General Laws section 9-26-4.1 thereby qualifying for the Rhode Island homestead estate exemption. A joint owner of property, who is the sole occupant of the property, can acquire a homestead exemption under section 9-26-4.1. The devisee of a residuary interest in real property does not have legal standing to occupy, or intend to occupy property, after the executrix has initiated a procedure to evict the devisee and/or initiate probate proceedings to sell the property.

FACTS AND TRAVEL

On June 4, 2006, Ruth B. Tetreault (testatrix) passed away as the sole owner of the disputed parcel of real property.¹ The residuary clause of testatrix's will, which controlled the disposition of the property, provides that "the rest, residue, and remainder of the estate be divided equally between Ms. Anne M. O'Mara and Mr. Edwin Tetreault."² Following testatrix's death, Mr. Tetreault resided alone at the property.³

On June 6, 2007, Ms. Anne M. O'Mara (executrix) was appointed executrix of testatrix's estate.⁴ A separate clause of testatrix's will granted the executrix the power of sale over the property in order to satisfy any debts and expenses of the estate.⁵ The executrix was authorized to exercise the power of sale over the property "whenever in [her] opinion it shall be necessary or advisable."⁶ On August 27, 2008, pursuant to Rhode Island

1. *In re Edwin H. Tetreault*, 11 A.3d 635, 636-37 (R.I. 2011). The real property is located in Lincoln, Rhode Island (the property).

2. *Id.* at 637

3. *Id.* "Mr. Tetreault had lived at the property most, if not all, of his life." *Id.*

4. *Id.* at 636-37.

5. *Id.* at 637.

6. *Id.* at 637 & n.2

General Laws section 34-18-37, executrix mailed Mr. Tetreault a notice of termination of tenancy directing him to vacate the property by October 1, 2008.⁷ After Mr. Tetreault failed to vacate the property by the set date, executrix initiated an eviction action in District Court on October 7, 2008.⁸

The following day in Bankruptcy Court, Mr. Tetreault filed a petition for relief under Chapter 7 of the Bankruptcy Code.⁹ Mr. Tetreault, in his bankruptcy schedules, listed a one-half interest in the property and claimed therein a homestead exemption under Rhode Island General Laws section 9-26-4.1.¹⁰ Mr. Tetreault alleged "his claimed homestead interest in the property places any interest that he may have in the property beyond the laws of attachment, levy on execution and sale for payment of debts or legacies."¹¹

On December 2 and 3, 2008, the bankruptcy trustee filed objections to Mr. Tetreault's claim of homestead exemption.¹² The trustee had three points of contention against Mr. Tetreault claiming a homestead exemption.¹³ First, Mr. Tetreault "lacked sufficient ownership interest in the property to claim the homestead exemption."¹⁴ Second, even if Mr. Tetreault's ownership interest were sufficient to claim the exemption, "he does not fall within the statutory definition of 'family' under the homestead statute."¹⁵ Third, Mr. Tetreault "lacked the legal standing to occupy or intend to occupy the property after executrix had initiated the procedure to sell the property and/or evict him from the property."¹⁶

Due to Mr. Tetreault's bankruptcy filing, the eviction action in District Court was stayed in accordance with 11 U.S.C. § 362.¹⁷

7. *Id.* at 637; *see also* R.I. GEN. LAWS § 34-18-37 (1995).

8. *Tetreault*, 11 A.3d at 637.

9. *Id.* "Mr. Joseph M. DiOrio (trustee) was appointed bankruptcy trustee." *Id.*

10. *Id.*; *see also* R.I. GEN. LAWS § 9-26-4.1 (1997 & Supp. 2010).

11. *Tetreault*, 11 A.3d at 637.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* As defined in R.I. GEN. LAWS § 9-26-4.1 (1997 & Supp. 2010), "family" includes "a parent and child or children, a husband and wife and their children, if any, or a sole owner." *Tetreault*, 11 A.3d at 641.

16. *Id.* at 637.

17. *Id.* & n.3 (citing in relevant part 11 U.S.C. § 362 (2006), concerning

On January 5, 2009, the Bankruptcy Court ended the automatic stay by discharging Mr. Tetreault.¹⁸ Accordingly, by way of a Bankruptcy Court order, executrix recommenced the eviction action against Mr. Tetreault.¹⁹ Following cross-motions for summary judgment in the probate estate's eviction action, the District Court judge granted summary judgment for possession of the property in favor of the estate, which Mr. Tetreault appealed to the Superior Court.²⁰

Further, executrix filed a petition in Probate Court for the sale of the property in order to administer the estate in an efficient and timely manner as well as to pay the debts and expenses of the estate.²¹ Executrix's petition for sale was granted by the Probate Court on April 3, 2009, a decision which Mr. Tetreault also appealed to the Superior Court.²²

On April 29, 2009, four questions were certified and submitted by the Bankruptcy Court judge to the Rhode Island Supreme Court, which accepted the certification order.²³ Mr. Tetreault's appeals to the Superior Court were consolidated and after a hearing on cross-motions for summary judgment, a Superior Court justice granted summary judgment in favor of the estate on both appeals.²⁴ However, the Superior Court justice held that the orders should not become final until the Rhode Island Supreme Court either determined that the pendency of the certified questions did not prohibit the orders from becoming final or issued a final ruling on the case at bar.²⁵

In response, executrix filed an emergency motion seeking removal of the conditions imposed by the Superior Court and

automatic stays).

18. *Id.* at 637.

19. *Id.*

20. *Id.*

21. *Id.* at 638.

22. *Id.*

23. *Id.* In accepting certification on the four enumerated questions, the Rhode Island Supreme Court declared its decision "should in no way be construed as requiring or justifying the delay or postponement of any other pending judicial proceeding involving the parties to this litigation." *Id.*

24. *Id.* This decision upheld the District Court's judgment of eviction and affirmed the Probate Court's order permitting executrix to sell the property. *Id.*

25. *Id.*

entry of final orders and judgment.²⁶ In support of her motion, executrix stated that since testatrix's death, Mr. Tetreault "continued to occupy the property alone without paying real estate taxes, insurance premiums, or rent to the estate or executrix."²⁷ Further, executrix declared that she could no longer pay the property's expenses causing it to "become uninsured and imperiled."²⁸ Executrix argued it was necessary to effectuate a timely sale of the property in order to limit the estate's liability, pay the debts and expenses of the estate, and to administer the estate in an efficient and timely manner.²⁹

In response to executrix's motion, the conditions of the Superior Court order were removed and final judgments were entered in favor of the estate.³⁰ Mr. Tetreault moved to stay the enforcement of the judgments pending a timely appeal to the Rhode Island Supreme Court.³¹ Mr. Tetreault filed appeals which were eventually withdrawn, making the Superior Court's final judgments no longer contestable.³²

ANALYSIS AND HOLDING

The first question certified to the Rhode Island Supreme Court was "[m]ay a devisee of real property under the residuary clause of a Rhode Island will satisfy the ownership or possessory rights enumerated in Rhode Island General Laws section 9-26-4.1 in order to qualify for the Rhode Island homestead estate exemption?"³³ To answer this question, the Court had to determine whether Mr. Tetreault had the requisite "ownership or possessory rights" to satisfy the homestead statute.³⁴ When testatrix passed away, Mr. Tetreault and executrix were each

26. *Id.*

27. *Id.*

28. *Id.* Executrix provided documentation of two separate appraisals and an inspection report of the property which demonstrated that the condition of the property was worsening. *Id.*

29. *Id.*

30. *Id.* Therefore, both of Mr. Tetreault's appeals were denied and the District Court's judgment of eviction was upheld. Further, the Probate Court's order authorizing the sale of the property was affirmed. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 639.

34. *Id.*

immediately vested with a one-half interest in the property as tenants in common.³⁵ While the trustee argued Mr. Tetreault was not an “owner” of the property because his interest in the property was defeased at the commencement of the eviction action, the Court held this was not consistent with the language of the homestead statute.³⁶ Using a *de novo* standard of review of the clear and unambiguous statutory language, the Court declared, “it is clear that one in debtor’s position—a general devisee with a defeasible fee simple interest in the property as a tenant in common—qualifies as an ‘owner’ of the property until such time that his interest may become defeased.”³⁷ Accordingly, the Court held, “a devisee of real property under the residuary clause of a Rhode Island will satisfies the ownership requirement enumerated in the homestead statute to qualify for the homestead estate exemption until that point when he or she is divested of that interest.”³⁸

The second certified question was, “[m]ay a joint owner of property, who is the sole occupant of the property, acquire a homestead exemption therein under Rhode Island General Laws section 9-26-4.1?”³⁹ The trustee argued that even if Mr. Tetreault satisfies the ownership prong of the homestead statute, he is outside the scope of the exemption because he does not satisfy the statutory definition of “family” since he is a tenant in common who resides on the property alone.⁴⁰ The trustee argued the statute unambiguously requires the exemption be claimed for the benefit of a “family” which the General Assembly intended to include “sole owner[s]” but not tenants in common because the term “owner of a home” was excluded from the statute.⁴¹ Mr. Tetreault argued the homestead statute is ambiguous because it authorizes a “family” can be comprised of a “sole owner,” while further providing an

35. *Id.* at 640 (citing R.I. GEN. LAWS § 34-3-1 (2010)); *see also* DiCristofaro v. Beaudry, 320 A.2d 597, 601 (1974).

36. *Tetreault*, 11 A.3d at 639, 640. According to § 9-26-4.1(b) of the Rhode Island General Laws, an “owner of a home” includes a sole owner, joint tenant, tenant by the entirety or tenant in common.” *Tetreault*, 11 A.3d at 640.

37. *Id.* at 639, 640.

38. *Id.* at 640.

39. *Id.*

40. *Id.*

41. *Id.* at 641.

"owner of a home" can be a tenant in common.⁴² The Court agreed with Mr. Tetreault that the statutory use of "family" is ambiguous, therefore, must take the entirety of the statute into consideration to determine the legislative intent.⁴³

Many jurisdictions have held that the homestead exemption must be "construed liberally in favor of debtors"⁴⁴ in order to advance the underlying policy, which is to "promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune."⁴⁵ Accordingly, the Court interpreted the statute liberally in favor of debtors and determined that while tenants in common are not explicitly included in the statutory definition of family, the General Assembly did not intend to allow a sole owner residing alone to be eligible for the exemption but preclude a tenant in common who is also residing alone.⁴⁶ Therefore, the Court held "a tenant in common, who is the sole occupant of a property, may qualify as a family and therefore may be eligible for a homestead exemption under § 9-26-4.1."⁴⁷ The Court reasoned that subsection (a) of the homestead statute defines who may acquire the exemption while subsection (b) limits the exemption to one homestead per family and one family per homestead.⁴⁸

The third certified question was, "[d]oes the devisee of a residuary interest in real property have legal standing to occupy, or intend to occupy property, after the executrix has initiated a procedure to evict the devisee from the property, and/or initiate probate proceedings to sell the property?"⁴⁹ Bankruptcy exemptions are determined at the time of filing the bankruptcy petition.⁵⁰ Mr. Tetreault did not file his petition for bankruptcy until one day after executrix initiated the eviction action, which

42. *Id.*

43. *Id.* (citation omitted).

44. *Id.* (referencing *Dwyer v. Cempellin*, 673 N.E.2d 863, 866 (Mass. 1996)).

45. *Id.* at 641 (citing *Pub. Health Trust of Dade Cnty. v. Lopez*, 531 So. 2d 946, 948 (Fla. 1988)).

46. *Tetreault*, 11 A.3d at 642.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* (citing *In re Cunningham*, 354 B.R. 547, 553 (D. Mass. 2006)).

was over a month after notice of termination of tenancy had been issued.⁵¹ These affirmative actions taken by executrix clearly demonstrated her intent to exercise her power of sale over the property granted to her by testatrix's will.⁵²

With public policy that favors the prompt settlement of estates, the Court held, "the express testamentary grant of power of sale includes the right of an executrix to immediate possession and control of the generally devised property in order to make such property marketable for sale."⁵³ The Court further stated that this authority includes the power to evict a tenant in common.⁵⁴ The Court reasoned that the executrix did not need to invoke the statutory procedure of section 33-12-6 of the Rhode Island General Laws, requiring Probate Court approval for the sale of real property to settle an estate, because her affirmative actions demonstrating her intent to sell were sufficient and in accordance with public policy.⁵⁵ In conclusion, "a general devisee of a residuary interest in real property does not have legal standing to occupy or intend to occupy property after the executrix has initiated a procedure to evict the devisee from the property based on the authority granted in an express power of sale in the testatrix's will" because they no longer have a possessory interest in the property.⁵⁶ "In light [of the Court's] answers to the previous three questions," the Court found that there was "no need to answer question four."⁵⁷

COMMENTARY

The Rhode Island Supreme Court, in answering the questions certified to it, demonstrated the importance of the public policy behind both the homestead estate exemption and probate proceedings. As previously mentioned, the policy behind the homestead estate exemption is to "promote the stability and

51. *Tetreault*, 11 A.3d at 642.

52. *Id.* at 644.

53. *Id.*

54. *Id.*

55. *Id.* at 643, 645.

56. *Id.* at 645.

57. *Id.* at 636. Rhode Island Rules of Appellate Procedure Rule 6 affords the Rhode Island Supreme Court the discretion in deciding whether it should respond to certified questions. *Id.* at 639.

welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune."⁵⁸ The Court advanced this policy by recognizing that a devisee of real property through a Rhode Island will satisfies the ownership requirement of the homestead statute.⁵⁹ Further, the Court interpreted the ambiguous language in the homestead statute, specifically the term "family", to include tenants in common who solely occupy the property.⁶⁰ These decisions allow a larger class of people to qualify for the homestead estate exemption which, in turn, will promote more stability and welfare in those families.

Again, the public policy underlying probate proceedings is the prompt and efficient administration of estates.⁶¹ The Court repeatedly stated the importance of this policy and took it into consideration when making its decisions.⁶² As such, the Court held that even though Mr. Tetreault satisfied the ownership and family requirements of the homestead estate exemption, executrix could proceed with the sale of the property because she had taken affirmative steps to exercise her power of sale before the bankruptcy petition was filed.⁶³ It is apparent that this decision furthers the public policy as it denied Mr. Tetreault legal standing to occupy the residence and allow executrix to administer the estate, which took nearly four years.⁶⁴ The Probate system would be seriously hindered if proceedings were not dealt with in a prompt and efficient manner. Further, as the administration of estates drags out, negative consequences result on the property such as becoming "uninsured and imperiled."⁶⁵ Therefore, it is necessary to adhere to the policy of administering probate estates in a prompt and efficient manner.

58. *Id.* at 641 (quoting *Pub. Health Trust of Dade Cnty.*, 531 So. 2d at 948).

59. *Tetreault*, 11 A.3d at 640.

60. *Id.* at 642.

61. *Id.* at 644.

62. *Id.* at 642-43, 644.

63. *Id.* at 645.

64. *See id.* at 638.

65. *Id.* at 638.

CONCLUSION

The Rhode Island Supreme Court held that a devisee of real property satisfies the ownership requirement of the homestead estate exemption. Also, the Court held that a tenant in common who solely occupies the property qualifies as a “family” making them eligible for the homestead exemption. Finally, the Court held that a devisee of real property does not have legal standing to occupy or intend to occupy property after the executrix has initiated eviction proceedings or probate proceedings to sell the property. The Court determined as long as the executrix has not exercised her testamentary power of sale by initiating eviction proceedings, or demonstrating her intent to do so, the policies underlying the homestead estate exemption and probate proceedings were intended to include tenants in common, that solely occupy the property, to be able to claim a homestead exemption.

Gregory N. Hoffman

Criminal Law. *State v. Enos*, 21 A.3d 326 (R.I. 2011). The Rhode Island Supreme Court held that a defendant was in a substantive dating relationship in accordance with Rhode Island General Laws section 12-29-2 and covered under the Domestic Violence Protection Act, because the defendant had been in an “intimate relationship” with the victim for six months and even though the relationship had recently ended, the couple had “communication since the breakup relative to affairs of the heart.”¹

FACTS AND TRAVEL

The defendant, James Enos, and the victim, Mary, met on the dating website www.Match.com in January 2008.² They began dating and eventually this developed into an “intimate relationship.”³ In August 2008, after dating for six months, Enos broke off the relationship and subsequently asked for the return of

1. *State v. Enos*, 21 A.3d 326, 327, 329-30, 331-32 (R.I. 2011). R.I. GEN. LAWS § 12-29-2(a) (2002 & Supp. 2010) defines domestic violence as “includ[ing] but not limited to, [a felony assault] when committed by one family or household member against another.” *Id.* at 329 (quoting R.I. GEN. LAWS § 12-29-2(a)). The statute defines a family or household member as:

spouses, former spouses, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past three years, and persons who have a child in common regardless of whether they have been married or have lived together, or if persons who are or have been in a substantive dating or engagement relationship within the past one year which shall be determined by the court’s consideration of the following factors: (1) the length of time of the relationship; (2) the type of the relationship; (3) the frequency [sic] of the interaction between the parties.

Id. at 329-30 (quoting R.I. GEN. LAWS § 12-29-2(b)). The Court further held that unsolicited testimony by a police officer did not require the declaration of a mistrial because the trial justice immediately instructed the jury to “disregard the errant remark.” *Enos*, 21 A.3d at 332, 333-34.

2. *Id.* at 327-28. The victim is only referred to as Mary throughout the case.

3. *Id.* at 328.

jewelry that he had given to Mary.⁴ After unsuccessful attempts to return the jewelry by mail, Mary agreed to meet Enos at a restaurant in Wakefield to return it.⁵ Enos then suggested that they go inside for a drink, which they did, and after talking for more than an hour an altercation ensued.⁶ The defendant began swearing at Mary, apparently about “some aspect of Mary’s job as a student-nurse.”⁷ Mary attempted to leave but Enos “grabbed her from behind in a bear hug and began hitting her on the head with drinking glasses.”⁸ Mary fell to the floor and the defendant “continued to assault her by kicking her until restaurant employees restrained him.”⁹ The police arrived upon the scene and found Enos outside lying on the ground holding onto his left hand, which was “bleeding profusely.”¹⁰ Prior to receiving his *Miranda*¹¹ rights, the defendant uttered to a police officer “oh my God, what have I done? What have I done?”¹² Enos was subsequently given his *Miranda* rights and arrested.¹³

On December 8, 2008, Enos was charged with one count of assault with a dangerous weapon, a drinking glass.¹⁴ The defendant was convicted of domestic assault with a dangerous weapon and sentenced to twenty years in prison with eighteen months to be served and eighteen and a half years probation.¹⁵ The defendant appealed his conviction to the Rhode Island Supreme Court.¹⁶

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 328 n.1.

8. *Id.* at 328.

9. *Id.*

10. *Id.*

11. *See* *Miranda v. Arizona*, 384 U.S. 436 (1966).

12. *Enos*, 21 A.3d at 328.

13. *Id.*

14. *Id.* The defendant was charged with violating R.I. GEN. LAWS § 11-5-2 (2002) and sentenced according to R.I. GEN. LAWS §12-29-5 (2002 & Supp 2010).

15. *Enos*, 21 A.3d at 328. During the trial seven witnesses, including the victim, restaurant patrons and employees testified. The defendant was also ordered to have no contact with the victim, pay restitution, and attend a mental-health program, substance-abuse counseling, and a batterers' intervention.

16. *Id.* The defendant filed his appeal prior to the entry of judgment on conviction. The appeal was premature under Article I, Rule 4(a) of the

ANALYSIS AND HOLDING

The defendant challenged his conviction on two grounds.¹⁷ First, he argued that the evidence presented by the prosecution was insufficient for a reasonable juror to conclude that the defendant and Mary were in a domestic relationship as defined by Rhode Island General Laws section 12-29-2.¹⁸ He argued that “the trial justice erred when she denied [the] motion for acquittal under Rule 29 of the Superior Court Rules of Criminal Procedure.”¹⁹ The defendant also challenged his conviction on the ground that “the trial justice erred when she refused to declare a mistrial” after a police officer made unsolicited remarks during testimony that the defendant declined to speak after being informed of his *Miranda* rights.²⁰

Substantive Dating Relationship

At trial, the defendant presented a motion for judgment of acquittal, in which he argued that there were “insufficient facts to allow a reasonable juror to find that the parties were in a domestic relationship,” but the trial justice disagreed and denied the motion.²¹ When reviewing the denial of a motion for judgment of acquittal the Court applies the same standard as the trial justice, which requires the Court to look at the “evidence in the light most favorable to the state, without weighing the evidence or assessing the credibility of the witnesses, and draw therefrom every reasonable inference consistent with guilt.”²² Viewing the evidence in the totality, if the inferences drawn “would justify a reasonable juror in finding a defendant guilty beyond a reasonable doubt, the motion for the judgment of acquittal must be denied.”²³

The Court set out to determine what minimum facts were

Superior Court Rules of Appellate Procedure. However, the Court has previously held that the appeal would be treated as timely, because of the interests of justice and to prevent undue hardship. *See Enos*, 21 A.3d at 328 n.4.

17. *Id.*

18. *Id.* at 328-29.

19. *Id.*

20. *Id.* at 329.

21. *Id.* at 330.

22. *Id.* at 329 (quoting *State v. Mercado*, 635 A.2d 260, 263 (R.I. 1993)).

23. *Id.* (quoting *State v. Forbes*, 779 A.2d 637, 641 (R.I. 2001)).

needed to serve as a foundation for the conclusion that a couple had been in a substantive dating relationship under Rhode Island General Laws section 12-29-2.²⁴ The Court stated that this is a somewhat flexible concept and that other jurisdictions handling the problem have also struggled to effectively define it.²⁵ In deciding whether a couple is in a substantive dating relationship, the Court takes into consideration three factors defined by the statute, which are: “(1) the length of time of the relationship; (2) the type of the relationship; [and] (3) the frequency of the interaction between the parties.”²⁶ The Court stated that the factors are just a guide for courts to consider when making the determination of whether “the evidence is capable of proving” that a couple was in a substantive dating relationship.²⁷ The Court interpreted this to mean that it must look at the “substance of the relationship as a whole.”²⁸ The Court further stated that it is the Court’s “responsibility in interpreting a legislative enactment to determine and effectuate the legislature’s intent.”²⁹ The legislature explicitly stated in Rhode Island General Laws section 12-29-1 that they wanted the laws to be enforced to “protect the victim” and that “criminal laws [are to] be enforced without regard to whether the persons involved are or were married, cohabitating, or involved in a relationship.”³⁰ The legislature enacted this statute due to the lax enforcement of existing laws in domestic assault cases.³¹ The Court therefore held that the statute is flexible and does not require reaching “specific findings about the precise number of times two people saw each other before reaching a conclusion that the parties are in a substantive dating relationship.”³²

The Court noted that when the trial justice ruled on the motion, evidence had been offered to show the couple had “started dating in January 2008,” that “they had terminated the relationship within a couple of weeks preceding the assault,” that

24. *Id.* at 330; *see* R.I. GEN. LAWS §12-29-2(b).

25. *Enos*, 21 A.3d at 330.

26. *Id.* at 329-30 (quoting R.I. GEN. LAWS §12-29-2(b)).

27. *Id.* at 331.

28. *Id.*

29. *Id.*

30. *Id.* at 330-31 n.6 (quoting R.I. GEN. LAWS §12-29-1(c) (2002)).

31. *Id.* at 330 n.6.

32. *Id.* at 331.

they had spoken since the breakup on matters “relative to affairs of the heart,” and they got together so the victim could return jewelry.³³ The Court also noted that this evidence, combined with the fact that the defendant referred to Mary as his girlfriend, and when asked, Mary stated it was “an intimate relationship,” that “a reasonable juror certainly could infer that the couple saw each other on a regular basis over a period of six months.”³⁴ Given the evidence and the nature of the interactions, the Court stated that it was satisfied that the trial justice considered both of these matters when reviewing the evidence in the light most favorable to the state, as is required on motions of acquittal, and denied the motion.³⁵ A majority of the Court affirmed the trial justice’s ruling.³⁶

Justice Goldberg issued a dissent which argued that there was not enough evidence to establish that the defendant and Mary were in a domestic relationship.³⁷ Justice Goldberg could not agree that the concept of a substantive dating relationship “is by its very nature, a somewhat flexible concept.”³⁸ Justice Goldberg further stated that this is an “element of the crime” and “it is well established that ‘the language of a penal statute must be read narrowly, [and] that penal statutes must be strictly construed in favor of the defendant.’”³⁹ There was no evidence as to the length of the relationship, the type of relationship, or the frequency of interaction between Enos and Mary.⁴⁰ Justice Goldberg also stated that Mary’s testimony did not suggest that she and the defendant saw each other often or that they in fact had a serious relationship.⁴¹ Justice Goldberg concluded by arguing that “[t]he nature of the relationship must establish mutual affection, shared expectations, or a growing expectancy, and a frequency of interaction that reflects substance and meaning.”⁴² Justice Goldberg did not believe that the existence of a serious

33. *Id.*

34. *Id.*

35. *Id.* at 331-32.

36. *Id.* at 332, 334.

37. *Id.* at 334 (Goldberg, J. dissenting).

38. *Id.*

39. *Id.* (quoting *State v. Martini*, 860 A.2d 689, 691 (R.I. 2004)).

40. *Id.* at 335.

41. *Id.*

42. *Id.* at 336.

relationship was established here and would have reversed the lower court on this issue.⁴³

Justice Robinson separately dissented from the majority's opinion, arguing that the State did not sufficiently show that the parties had "been in a substantive dating . . . relationship within the past one year."⁴⁴ Justice Robinson further argued that "too much was left unaddressed" as there was no evidence as to how often Enos and Mary saw each other during the relationship.⁴⁵ Accordingly Justice Robinson, dissented with the majority's opinion and would have reversed the lower court's decision.⁴⁶

Witness's Remark

On appeal the defendant argued that the trial justice should have granted a mistrial following Officer Joshua Eidam's unsolicited statements made on the witness stand.⁴⁷ At trial while giving testimony as to the incident between Enos and Mary, Officer Eidam gave unsolicited testimony that "after [he] advised [the defendant] of his *Miranda* rights [the defendant] declined to give [the officer] any information."⁴⁸ Following this, the defendant moved for a mistrial.⁴⁹ The trial justice refused but did immediately tell the jury that Enos had a right to remain silent and that could not be used against him.⁵⁰ The defendant argued that this was not sufficient and a mistrial should have been declared.⁵¹ When reviewing the denial of a motion for a mistrial, the Court stated that "[a] trial justice's decision to deny a motion for a mistrial is accorded great weight and will not be disturbed on appeal unless it is clearly wrong."⁵²

43. *Id.*

44. *Id.* (quoting R.I. GEN. LAWS §12-29-2(b). Justice Robinson also stated that the "statute indicates that it is the Court's role" to determine "whether or not there was a substantive dating relationship," however, here the question was submitted to the jury. Neither party challenged this so the Court did not review the decision. *Id.* at 337 n.14.

45. *Id.* at 337.

46. *Id.*

47. *Id.* at 332.

48. *Id.*

49. *See id.* at 332, 333.

50. *Id.* at 333.

51. *Id.* at 334.

52. *Id.* at 332 (quoting *State v. Higham*, 865 A.2d 1040, 1044 (R.I.

In deciding this issue, the Court looked to a similar situation that it took up in *State v. Higham*,⁵³ although not involving *Miranda*, where a witness also made an unsolicited comment that could be viewed as prejudicial to the defendant.⁵⁴ The lower court there also did not declare a mistrial but struck the comment from the record and provided the jury with a curative instruction.⁵⁵ The Rhode Island Supreme Court held that the one statement was not prejudicial to the defendant because it was only one unsolicited comment, there was no follow up to the comment, and the trial justice "immediately proceeded to give the . . . curative instruction to the jury."⁵⁶ The situation presented in this case was virtually the same except for the facts that *Miranda* was mentioned, and the officer's comments were not stricken from the record.⁵⁷ The Court held that "the trial justice was not clearly wrong when she denied the defendant's motion for a mistrial and instead opted to instruct the jury to disregard the errant remark."⁵⁸

COMMENTARY

In this case the Rhode Island Supreme Court struggled with establishing the minimum requirement needed to determine whether a couple is in a substantive dating relationship as outlined by the statute.⁵⁹ The Court established a flexible standard that uses the factors enumerated in the statute as a guide for courts to consider when deciding if a particular couple is in a substantive dating relationship.⁶⁰ The majority noted that many other states have also struggled with this issue and that a number of states have also adopted a more flexible standard.⁶¹

2004)).

53. *Higham*, 865 A.2d at 1046-47.

54. *See Enos*, 21 A.3d at 333.

55. *Id.*

56. *Id.*

57. *See id.* at 333-34.

58. *Id.* at 334.

59. R.I. GEN. LAWS §12-29-2(b).

60. *See Enos*, 21 A.3d at 331.

61. *See id.* at 330. In discussing how other jurisdictions have also struggled with this issue and how many have also decided on a flexible standard, the Court cites to a number of cases from states ranging from California to Alabama.

This is an area in the law where a flexible standard is more effective, as it allows a trial justice, who has the best view, to evaluate each situation applying the factors as a guide. The trial justice can then more accurately decide whether a particular relationship falls within the statute. The dissenting Justices both argued that the factors should be applied rigidly and that the statute should be read narrowly.⁶² However, the very nature of relationships arguably requires a flexible standard. A case could present facts that when rigidly applied do not satisfy the factors enumerated, however, because of the nature of the relationship it in fact may be a substantive dating relationship.

The Court is supported in its decision to adopt a flexible standard by the fact that every relationship is different. With the advancements in technology and the widespread use of online networking websites such as, Facebook, many people now have less traditional dating relationships. These facts support the Court's decision that a flexible system should be used to determine if a couple is in fact in a substantive dating relationship.

The Court has established a system in which a trial justice is able to view all of the facts in their totality.⁶³ The trial justice is then able to use the factors as a guide in order to decide whether a couple is in fact in a substantive dating relationship.⁶⁴ This system is better than being forced to rigidly apply the factors to the facts of a case, and often reaching an arguably less accurate decision. Furthermore, the majority, in applying a flexible standard to the statute, appears to have acted in accordance with the legislative intent, which was to provide couples in dating relationships with protection of the statute.⁶⁵ Therefore, the Court's decision to establish a flexible system was supported by the facts and by the legislative intent of the statute.⁶⁶

The Court, in upholding the denial of the defendant's motion for a mistrial, stated that the single statement by the police officer was unlikely to be unfairly prejudicial to the defendant, as it was a single unsolicited comment and was not followed up with any

62. See *Enos*, 21 A.3d at 334 (Goldberg, J., dissenting), 337 (Robinson, J., dissenting).

63. See *id.* at 330, 331.

64. See *id.*

65. See *id.* at 330-31 n.6; see also R.I. GEN. LAWS § 12-29-2.

66. See *id.* at 330-31 n.6, 332.

commentary.⁶⁷ Furthermore, the trial justice immediately gave a curative instruction to the jury that was sufficient to alleviate any possibility of prejudice.⁶⁸ Therefore, the Court's decision to uphold the denial of the mistrial was supported by the facts.⁶⁹

CONCLUSION

The Rhode Island Supreme Court affirmed the judgment of the Superior Court in denying the motion for judgment of acquittal, and in denying the motion for a mistrial.⁷⁰ The Court held that when viewing the "evidence in the light most favorable to the state" that a reasonable juror could conclude the defendant and Mary were in a substantive dating relationship, and therefore, correctly denied the motion for dismissal.⁷¹ The Court also stated that "the trial justice was not clearly wrong when she denied the . . . motion for a mistrial and instead [instructed] the jury to disregard" the comment, and therefore, the Court upheld the denial of the motion for a mistrial.⁷²

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67. *See id.* at 333, 334.

68. *Id.*

69. *See id.* at 334.

70. *Id.* at 332, 334.

71. *See id.* at 329, 331, 332.

72. *See id.* at 334.

Criminal Law. *State v. Graff*, 17 A.3d 1005 (R.I. 2011). The Supreme Court of Rhode Island held that sentencing is a discrete, one-time event. If a defendant is not ordered to a work release program at the time of sentencing, the defendant can only gain access to a work release program through the Rhode Island Department of Corrections procedures. An inmate's motion to modify her sentence and be transferred to the work release program two years after her original sentencing was granted by a Superior Court justice, who determined that because the term "sentencing" was ambiguous, it could be interpreted to grant him continuing authority. The Rhode Island Supreme Court vacated the motion, finding that the Superior Court justice did not have the authority to modify the defendant's sentence by ordering her to a work-release program.

FACTS AND TRAVEL

On June 18, 2007, defendant Brandy Graff received a concurrent sentence of fifteen years, ten to serve and five years suspended with probation, after pleading *nolo contendere* on April 23, 2007 to two counts of driving under the influence, death resulting.¹ On April 27, 2009, Graff filed a "Motion to Modify Sentence for Court Ordered Work Release," seeking an order to allow her to participate in the work release program during her incarceration at the Adult Correctional Institutions (ACI).² Graff's motion was granted and the order issued on May 26, 2009 by a justice of the Superior Court.³ The Rhode Island Department of Corrections (DOC) moved to vacate the order, arguing that the Superior Court justice lacked the authority to issue such an order because under *State v. Pari* and section 12-19-2 of the Rhode

1. *State v. Graff*, 17 A.3d 1005, 1006 (R.I. 2011).

2. *Id.* Defense counsel's certificate of the motion was sent to the Office of the Attorney General, but there is no record that it was served upon the DOC.

3. *Id.*

Island General Laws there are only two ways for a defendant to gain access for participation in the work release program: "(1) by a court order to that effect *at the time of sentencing* where the relevant statute so permits . . . or (2) by placement in the program pursuant to the DOC's 'standard classification/re-classification system.'" ⁴ The DOC argued that since Graff had not been ordered to participate in the work release program at her June 18, 2007 sentencing, her only path to participation in the "program would have been through the DOC's classification procedures."⁵

At the July 10, 2009 hearing on the DOC's motion to vacate the hearing justice rejected Graff's argument that the DOC did not have standing and vacated the order of May 26, ruling that had the DOC been given notice by Graff, they "certainly would have had the right to be heard" on Graff's April, 27, 2009 motion.⁶ A new hearing on the motion commenced immediately.⁷

At this second hearing, Graff acknowledged the significance of *State v. Pari*, but suggested that its age lessened its precedential value and that because the case never defines "sentencing," the term remains ambiguous.⁸ Graff argued that "sentencing is not a discrete, one-time event."⁹ The prosecutor responded to the defense's argument first by saying that the definition of sentencing is obvious; it is in fact a one-time event, which, in this case, occurred on June 18, 2007.¹⁰ The DOC also suggested that creating yet another way to access work release for inmates who do not qualify under the rules of the Department of Corrections

4. *Id.* (emphasis added); *State v. Pari*, 553 A.2d 135 (R.I. 1989). R.I. GEN. LAWS § 12-19-2(b) (2002) provides that: "The court upon the sentencing of a first time offender, excluding capital offense and sex offense involving minors, may in appropriate cases sentence the person to a term of imprisonment, and allow the person to continue his or her usual occupation or education and shall order the person to be confined in a minimum security facility at the A.C.I. during his or her non-working or study hours." *Graff*, 17 A.3d at 1006 & n.4.

5. *Id.* at 1006.

6. The defendant argued that the Department of the Attorney General became the "voice" of the DOC, and put them on notice of the May 26 proceeding, and that the DOC was therefore "estopped" from being entitled to ask the court "to do anything." *Id.* at 1007.

7. *Id.*

8. *Id.*; *Pari*, 553 A.2d 135.

9. *Graff*, 17 A.3d at 1007.

10. *Id.* at 1008.

would open the “floodgates.”¹¹ In response to defense counsel’s argument that *Pari* is too old to follow, the prosecutor noted that “the age of a judicial opinion should not have a bearing on whether or not the holding set forth in the opinion is to be followed,” and added that *Pari* “has never been overruled and remains ‘bedrock law.’”¹²

The Superior Court justice relied on section 31-27-2.2 of the Rhode Island General Laws, which establishes sentencing parameters within the judge’s discretion, not section 12-19-2 which governs work release.¹³ The justice ruled that in addition to the avenues to work release described in *State v. Pari*, which construed section 12-19-2, section 31-27-2.2 provides “another way” pursuant to which he, as the sentencing judge, could order defendant to the work release program *at this time*.¹⁴ Having determined that he, as the sentencing judge, was authorized to hear the motion, he proceeded to grant the motion, deciding that while Graff had a lack of remorse at the *original sentencing*, she appeared to finally accept responsibility for her crime and understand the gravity of it, and therefore deserved to be allowed to “continue along this path.”¹⁵

After granting Graff’s motion and ordering her to be transferred to the work release program, the DOC requested the hearing justice stay the order pending appeal; he granted the stay.¹⁶ The hearing justice recognized that there was a substantial legal issue “as to what sentencing means or when sentencing occurs, whether it’s a one-time event or [an] ongoing process.”¹⁷ Graff’s motion was granted on July 21, 2009 and the DOC appealed in a timely manner.¹⁸

11. *Id.*

12. *Id.*; *Pari*, 553 A.2d 135.

13. *Graff*, 17 A.3d at 1008. R.I. GEN. LAWS § 31-27-2.2(b) (2010) says “(1) Every person convicted of a first violation shall be punished by imprisonment in the state prison for not less than five (5) years and not for more than fifteen (15) years, in any unit of the adult correctional institutions *in the discretion of the sentencing judge*.” *Graff*, 17 A.3d at n.9 (emphasis added).

14. *Graff*, 17 A.3d at 1008-09.

15. *Id.* at 1009.

16. *Id.*

17. *Id.* (brackets in original).

18. *Id.*

ANALYSIS AND HOLDING

On appeal to the Rhode Island Supreme Court, the DOC contended that the hearing justice erred in granting the motion because: (1) the Superior Court Rules of Criminal Procedure do not provide for a motion to modify a sentence; (2) the DOC controls the classification of inmates in the Adult Correctional Institutions, and Graff was subject to their existing work release procedures; and (3) the order granting her work release violated the doctrine of the separation of powers.¹⁹ In response, Graff argued that the hearing justice's ruling was correct because section 31-27-2.2 of the Rhode Island General Laws, the specific statute, governs section 12-19-2, the general statute.²⁰ In addition, Graff argued that *Pari* did not provide a definition of the word "sentencing," which gave the hearing judge, who was also the original sentencing judge under section 31-27-2.2, continuing authority to transfer Graff to the work release program.²¹

The standard of review applied by the Supreme Court in cases of statutory interpretation is *de novo*.²² This requires a close review of the language of section 31-27-2.2, which the hearing justice concluded granted him "residual authority to order defendant to work release long after he had sentenced her."²³ It appeared that the hearing justice's decision to grant the defendant's motion to modify "was predicated on a notion that sentencing is *not* a singular event and on a belief that the judicial officer who is the 'sentencing judge' . . . *continues to have* the discretionary powers accorded by that statute even after the sentence has been meted out."²⁴

The Rhode Island Supreme Court rejected this "expansive interpretation" of sentencing under section 31-27-2.2 as erroneous, finding nothing in the statute that suggests that sentencing is "some sort of ongoing process."²⁵ The Court held that the

19. *Id.*

20. *Id.* at 1008-09.

21. *Id.*; *Pari*, 553 A.2d 135.

22. *Graff*, 17 A.3d at 1010.

23. *Id.*

24. *Id.* at 1010-11.

25. *Id.* at 1011. The Court also noted the absurdity on which defendant based her argument. During oral argument, defense counsel stated that under the interpretation of "sentencing judge" that she was urging the Court to adopt the result would in fact depend on whether or not the particular

discretion given to the sentencing judge is only exercisable at the time he pronounces the sentence, and that except in circumstances provided for under Rule 35 of the Superior Court Rules of Criminal Procedure, that discretion “ceases to exist after that event takes place.”²⁶ In support of their holding, the Court examined dictionary definitions of the words “sentence” and “sentencing” finding “nothing . . . even remotely suggestive of an ongoing process.”²⁷ Furthermore, the Court found it noteworthy that Rule 35 “is replete with language that presupposes that the imposition of sentence is a discrete act and not a sort of continuing process which . . . the sentencing judge may from time to time revisit.”²⁸ Perhaps most tellingly, the 120-day period for filing most Rule 35 motions is measured from the date when “sentence is imposed.”²⁹

Since the Court decided that “sentencing” was a one-time event, it determined that the hearing justice did have the authority at the original sentencing hearing on June 18, 2007 to order the defendant to the work release program, but that the justice did not have continuing authority after that time and had erred in granting the defendant’s motion.³⁰

COMMENTARY

Although the definition of “sentencing” seemed to be obvious to the Department of Corrections and the Rhode Island Supreme Court, defense counsel and the hearing justice apparently inferred a level of ambiguity great enough to argue, and decide, against logic. The hearing judge based his continuing authority on the fact that he had been the sentencing judge, differentiating between the *original sentencing*, and what he apparently perceived to be subsequent sentencing.³¹ The hearing justice was

judge that sentenced the defendant was the same judge considering the motion to modify; if the judge had retired or died, the defendant would be out of luck. However, the court rejected this argument and noted that it is a fundamental principle that the Court “will not construe a statute to reach an absurd result.” *Id.* at n.11 (citation omitted).

26. *Id.* at 1011.

27. *Id.*

28. *Id.* at 1011-12.

29. *Id.* at 1012.

30. *Id.*

31. *Id.* at 1009.

attempting to create another loop-hole through which Brandy Graff could be ordered to work release, perhaps because he believed that her indiscretion as a twenty-year old should not be determinative of her future success. Whatever the reason, the Rhode Island Supreme Court easily identified the absurdity of defense counsel's argument and the absurd result which would be created if they were to affirm the hearing justice's decision.³² The Court bitingly noted that when a statute does not define a word, "courts often apply the *common meaning* as given by a recognized dictionary."³³ Defense counsel defied common sense by asking "When is sentencing?"³⁴ The hearing justice defied common sense by deciding in her favor. The Court was forced to resolve this issue in order to place on the record what common sense already tells us—that sentencing is a one-time event. Although the result may seem harsh for Ms. Graff, this decision does not preclude her from gaining access to the work release program through the DOC's classification system.

CONCLUSION

The Court vacated the order of the Superior Court granting the defendant's motion and concluded that "sentencing" is a discrete, one-time event and the judicial officer who is "the sentencing judge" referred to in section 31-27-2.2 of the Rhode Island General Laws does not continue to have discretionary powers after a sentence has been issued.

Kendra Levesque

32. *See id.*, at 1011 & n.11.

33. *See id.* at n.13 (emphasis added) (quoting *Defenders of Animals Inc. v. Dep't of Env'tl. Mgmt.*, 553 A.2d 541, 543 (R.I. 1989)).

34. *Id.* at 1007.

Criminal Law. *State v. Sampson*, 24 A.3d 1131 (R.I. 2011). The Rhode Island Supreme Court reversed a defendant's second degree child abuse conviction after finding that his Sixth Amendment right to counsel had been violated given that his waiver of counsel was not voluntary, knowing, and intelligent. The Court ruled that the defense counsel's statement that it was he, and not the defendant, who had the ultimate power to decide between a bench or jury trial, coupled with the trial justice's affirmation of that statement, rendered the defendant's subsequent waiver of counsel inadequate under the Sixth Amendment.

FACTS AND TRAVEL

On September 27, 2007, Mark Sampson was charged with second degree child abuse for allegedly abusing his son at some point between July 30 and August 3, 2007.¹ The defendant was charged under "Brendan's Law," which criminalizes the knowing or intentional infliction of serious physical or bodily injury upon a child.² The statute defines "serious physical injury" as "any injury, other than serious bodily injury, which arises other than from the imposition of nonexcessive corporal punishment."³ On February 26, 2008, after Mr. Sampson's first attorney was permitted to withdraw, Mr. Sampson's second attorney made his first appearance and, in early March, filed a motion to dismiss challenging both the constitutionality of Brendan's Law as well as the specific allegations pending against Mr. Sampson.⁴ Later that month, Mr. Sampson's second attorney filed a motion to withdraw, citing a "complete and total breakdown of communication" that had led to his being fired by Mr. Sampson; however the hearing

1. *State v. Sampson*, 24 A.3d 1131, 1132 (R.I. 2011).

2. R.I. GEN. LAWS § 11-9-5.3 (2002).

3. *Id.* § 11-9-5.3(d).

4. *Sampson*, 24 A.3d at 1143 (Goldberg, J., dissenting). The names of Mr. Sampson's attorneys were not provided in the opinion.

ended with Mr. Sampson retaining his attorney.⁵

Mr. Sampson's trial was set to begin on April 7, 2008, but prior to the start of *voir dire*, Mr. Sampson raised the issue of ineffective counsel and cited disagreements between him and his attorney regarding whether or not to call the defendant's other son to testify and whether to proceed with a bench or jury trial.⁶ With regard to the witness selection disagreement, the trial justice stated that he presumed that there was a valid reason for defense counsel's decision not to call the defendant's son, but that the issue would be on the record for post conviction relief.⁷ However, with respect to the jury dispute, the trial justice asked defense counsel whether he believed that the decision between jury or bench trial was within his purview, to which defense counsel responded in the affirmative.⁸ Following this exchange, the trial justice informed Mr. Sampson of his attorney's duty to make decisions that he believed were in his client's best interest and told Mr. Sampson, as he did on the witness selection issue, that if Mr. Sampson still believed after the trial that his attorney had not made the proper decision then he could argue that issue on appeal.⁹

After this exchange, the parties moved forward to *voir dire* and a jury was impaneled, at which point Mr. Sampson again requested to address the court and expressed serious concern with the composition of the impaneled jury.¹⁰ Next, the defendant reiterated his dissatisfaction with his current counsel along with his desire to represent himself and the trial justice began an

5. *Id.* at 1143-44, 1146 (Goldberg, J., dissenting).

6. *Id.* at 1133.

7. *Id.*

8. *Id.* The trial justice's question to defense counsel was preceded by counsel's statement that: "I do believe it is in Mr. Sampson's best interest . . . not to waive the jury trial . . . these are decisions that are made by counsel, not by the client. The client decides whether or not he wants to testify. I've advised Mr. Sampson in this regard." *Id.*

9. *Id.* at 1134. The Supreme Court decision later criticized the Superior Court's repeated suggestions that post conviction relief was Mr. Sampson's only option for addressing his disagreement with counsel's decisions. *Id.* at 1140-41.

10. *Id.* at 1134. Mr. Sampson's chief concern was that there were no black jurors impaneled, an argument that he advanced by asking the trial justice whether there were "no blacks in Coventry, West Warwick and East Greenwich?" *Id.* at 1152 (Goldberg, J., dissenting).

extensive inquiry of the defendant to determine whether his waiver of counsel was voluntary, intelligent, and knowing.¹¹ The hearing was continued and, on April 9, the trial justice asked Mr. Sampson why he wanted to represent himself to which the defendant responded that he wished to have a bench trial but that his attorney wanted to continue with the jury.¹² At the end of the hearing the trial judge found that Mr. Sampson had knowingly and voluntarily waived his right to counsel, allowed Mr. Sampson to represent himself, and granted Mr. Sampson's motion to waive jury trial and to proceed with a bench trial.¹³

After a three day bench trial, the trial justice found, beyond a reasonable doubt, that the defendant had struck his son on his buttocks and that the contact had been intentional and excessive.¹⁴ Furthermore, the trial justice ruled that a second degree conviction under Brendan's Law did not require a finding of whether the injury was "serious," but merely that there was an injury and that the injury arose from excessive corporal punishment, which the trial justice found had been established.¹⁵ Accordingly, Mr. Sampson was found guilty of second degree child abuse and on June 17, after his motion for a new trial was heard and denied, he was sentenced to five years in prison.¹⁶ Mr. Sampson appealed to the Rhode Island Supreme Court arguing, *inter alia*, that his Sixth Amendment right to counsel had been violated given that the trial justice had effectively "forced" him to choose between exercising his right to counsel and exercising his right to waive jury trial and that the Brendan's Law statute is unconstitutionally vague.¹⁷

ANALYSIS AND HOLDING

The Rhode Island Supreme Court conducted a *de novo* review

11. *Id.* at 1134-35.

12. *Id.* at 1135.

13. *Id.* at 1136.

14. *Id.* at 1137.

15. *Id.* at 1138-39.

16. *Id.* at 1139. Mr. Sampson was sentenced to serve fifteen months and the remainder suspended with probation. *Id.*

17. *Id.* at 1132. The defendant also argued that reversible error had been committed given that the evidence presented was insufficient to sustain a conviction and that the trial justice had abused his discretion in denying the defendant's motion for a new trial.

to determine whether the defendant's waiver of counsel was knowing, intelligent, and voluntary, as required by the Sixth Amendment.¹⁸ In reviewing the constitutionality of a defendant's waiver of counsel, the court engages in a "totality of the circumstances" analysis to determine if the defendant knew what he was doing and whether his "choice [was] made with eyes open."¹⁹ The Court focused its review on Mr. Sampson's attorney's erroneous claim to the right to decide whether to opt for a jury or bench trial and the trial justice's affirmation of that illegitimate claim.²⁰ At the outset, the Court definitively stated that the decision regarding whether a trial will be conducted in front of a jury or judge is ultimately the defendant's to make.²¹ The Court found that the trial justice had essentially given Mr. Sampson two options: "(a) a trial by jury, against his wishes, represented by counsel or (b) a bench trial, in accordance with his wishes, representing himself."²² The Court held that he was entitled to a third option: "(c) a bench trial, in accordance with his wishes, represented by counsel."²³ The Court held that this missing third option had infected Mr. Sampson's waiver of counsel, that the waiver was not intelligent, knowing, and voluntary, and that Mr. Sampson's Sixth Amendment right to counsel had indeed been violated.²⁴ Accordingly, the Court vacated the conviction and remanded for a new trial.²⁵

The dissent, written by Justice Goldberg, with whom Chief Justice Suttell joined, agreed that the trial justice had erred in his interpretation of the law, but focused less on that single mistake and engaged in a broader review of the proceedings.²⁶ Justice

18. *Id.* at 1139 (citing *State v. Laurence*, 848 A.2d 238, 253 (R.I. 2004)).

19. *Id.* at 1140 (quoting *State v. Chabot*, 682 A.2d 1377, 1379-80 (R.I. 1996)).

20. *Id.* The Court did make a point to acknowledge that they held no suspicions that Mr. Sampson's attorney had intentionally misled the trial court. *Id.*

21. *Id.* (citing *State v. Moran*, 605 A.2d 494, 496 (R.I. 1992)).

22. *Id.* at 1141.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 1142, 1149 (Goldberg, J., dissenting). The dissenting opinion focused a portion of its analysis on the fact, one largely ignored in the majority's opinion, that at one point during the April 9 inquiry Mr. Sampson stated: "I have no problem with jurors taking over [the] case, but at least

Goldberg cited the “defendant’s knowledge of the law, experience with the criminal system, and obvious motivation to inject error into the record” as factors that the majority’s analysis should have more strongly considered.²⁷ The dissent commended the trial justice in his thorough inquiry of the defendant’s ability to waive counsel²⁸ and found that, given the defendant’s behavior during the proceedings, the trial would not have been able to continue unless the justice allowed the defendant to represent himself.²⁹ The dissent further emphasized the fact that, during the trial justice’s three inquiries into Mr. Sampson’s ability to knowingly waive counsel, Mr. Sampson became extremely impatient with the need for such an extensive examination.³⁰ After reviewing the entirety of the circumstances, the dissent was satisfied that the defendant’s waiver had been knowing and intelligent and therefore his Sixth Amendment right to counsel had not been violated.³¹

Given that the Court had already vacated Mr. Sampson’s conviction based on the inadequate waiver of counsel issue, the Court found it unnecessary to rule on whether Brendan’s Law is unconstitutionally vague.³² The Court did, however, criticize the trial justice’s interpretation of Brendan’s Law and, more specifically, the justice’s decision to read the word “serious” out of the “serious bodily injury” requirement for a second degree child abuse conviction.³³ The justice ruled that the injury element of second degree child abuse was satisfied if the prosecution established that the defendant had engaged in excessive punishment which caused an injury, an interpretation that the justice found to be most congruent with the legislature’s intent.³⁴ The Supreme Court disagreed.³⁵ The Court held that the

discuss what you’re doing before you do it instead of telling me after you did it after you do it and then telling me there is nothing I can do about it.” *Id.* at 1155 (Goldberg, J., dissenting).

27. *Id.* (Goldberg, J., dissenting).

28. *Id.* at 1147 (Goldberg, J., dissenting).

29. *Id.* at 1156 (Goldberg, J., dissenting).

30. *Id.* at 1152.

31. *Id.* at 1157.

32. *Id.* at 1141.

33. *Id.* at 1141-42.

34. *Id.* at 1138.

35. *Id.* at 1142.

legislature's specific inclusion of the word "serious" in Rhode Island General Laws section 11-9-5.3(b)(2) clearly indicates their intent to require courts to find that the defendant had inflicted a serious physical injury before a second degree child abuse conviction could be sustained.³⁶

COMMENTARY

In *State v. Sampson*, both the majority³⁷ and dissenting³⁸ opinions agreed that, mistake aside, the trial justice had engaged in a thorough inquiry of whether the defendant was waiving his right to counsel in a voluntary, knowing, and intelligent manner. Accordingly, the point of contention between the two opinions was whether the defense counsel's misstatement of law had irreparably "infected" the defendant's waiver, as the majority contended,³⁹ or whether this error was but one blemish on an otherwise clean set of circumstances.⁴⁰ While the traditional analysis regarding the constitutionality of a waiver requires the court to engage in a totality of the circumstances review, the majority seemingly forwent that traditional review in light of the constitutional conundrum that it found that the defendant had been placed in.⁴¹

While the Court certainly made clear the irreversible effect

36. *Id.* The dissent also objected to the majority's handling of the defendant's constitutional challenge to Brendan's Law, stating that it could remember no other case in which the Court had vacated a conviction and remanded for a new trial without deciding whether the statute under which the new trial would be conducted was constitutional. *Id.* at 1157 (Goldberg, J., dissenting).

37. Justice Robinson, despite the trial justice's clear mistake of law, did "pause to observe that the trial justice's inquiry into Mr. Sampson's waiver of counsel was, in fact, *extraordinarily extensive*—touching upon Mr. Sampson's education, occupation, familiarity with the rules of evidence and procedure, familiarity with the charge he faced, and the penalties that could be imposed" *Id.* at 1136 n.6 (emphasis in original).

38. Justice Goldberg commented that "the record depicts a jurist who was committed to protecting this defendant's rights at every point in this trial." *Id.* at 1147 (Goldberg, J., dissenting).

39. *Id.* at 1140.

40. *Id.* at 1149 (Goldberg, J., dissenting).

41. See *id.* at 1143, 1155 (Goldberg, J., dissenting). The majority did recognize that there were numerous disagreements between counsel and Mr. Sampson but ultimately refocused its attention back to the misstatement. *Id.* at 1141 n.12.

that such a legal mistake can have on a defendant's ability to waive their right to counsel, the Court was much less clear with respect to future application of Brendan's Law. As stated above, Brendan's Law criminalizes the intentional infliction of injury upon a child and distinguishes between first degree child abuse, carrying a ten year minimum sentence, and second degree child abuse, carrying a five year minimum sentence.⁴² However, the law differentiates the two by requiring the prosecution to show, for first degree child abuse, that the defendant inflicted "serious *bodily* injury" while requiring, for second degree child abuse, the infliction of "serious *physical* injury."⁴³ The remaining provisions are no more helpful in distinguishing these injury elements as the statute merely defines "serious physical injury" as "any injury, other than a serious bodily injury."⁴⁴ Accordingly, a strict reading of Brendan's Law would suggest that the sentence of a defendant convicted under the statute could vary up to five years based merely on the difference between the words "bodily" and "physical."⁴⁵ To add to the confusion, section 11-9-5.3(d), in defining the type of injury needed to sustain a second degree child abuse conviction, inexplicably deletes the word "serious" from the "other serious physical injury" requirement found in section 11-9-5.3(b)(2).⁴⁶

The trial justice in *Sampson* attempted to wade through this forest by ruling that a second degree child abuse conviction did not require the prosecution to establish that Mr. Sampson had inflicted "serious" physical injury, but merely that he had inflicted "any injury, other than a serious bodily injury."⁴⁷ The Supreme Court found this ruling to be in error because section 11-9-5.3(b)(2) explicitly requires "serious physical injury."⁴⁸ However, in doing so, the Court gave no further guidance regarding how the trial justice, on remand, or future trial justices were to differentiate between the requirements for a first degree child abuse conviction and those needed for a second degree conviction.

42. R.I. GEN. LAWS § 11-9-5.3 (2002).

43. *Id.* § 11-9-5.3(b)(1), (b)(2) (emphasis added).

44. *Id.* § 11-9-5.3(d).

45. *See id.* § 11-9-5.3.

46. *Id.* §§ 11-9-5.3(d), (b)(2).

47. *Sampson*, 24 A.3d 1131, 1138 (R.I. 2011).

48. *Id.* at 1142.

The Court noted that the deletion of the word “serious” from the injury element for second degree child abuse was problematic because it would essentially mean that section 11-9-5.3(b)(2) made a felony of the same conduct that constitutes simple assault and battery, a misdemeanor.⁴⁹ The dissent rejected this concern by reminding the majority that simple assault and second degree child abuse would remain different given that misdemeanor simple assault does not require a showing of physical injury and that second degree child abuse requires a showing of excessive corporal punishment.⁵⁰ Regardless of the arguments on either side, the Court’s ruling in *Sampson* has made it no clearer how conduct constituting first degree child abuse is any different from conduct constituting second degree child abuse, despite the fact that the former carries a punishment twice as harsh as the latter. However, the Rhode Island General Assembly has subsequently alleviated the issue. The General Assembly amended Brendan’s Law by deleting the word “serious” from the second degree injury element so that it now reads the same way that the trial justice in *Sampson* originally interpreted it.⁵¹

CONCLUSION

The Rhode Island Supreme Court vacated the defendant’s second degree child abuse conviction after finding that his right to counsel had been violated and remanded the case for new trial.⁵² The Court’s *de novo* review of the proceedings commenced with their finding that, given the misstatement of law made by the defense counsel and affirmed by the trial justice, the defendant’s waiver of his right to counsel was not voluntary, knowing, and intelligent as required by the Sixth Amendment.⁵³

Nicholas L. Nybo

49. *Id.* at 1142 n.15.

50. *Id.* at 1157.

51. *See* R.I. GEN. LAWS § 11-9-5.3 (b)(2)(amended 2011).

52. *Id.*

53. *Id.* at 1141.

Criminal Law. *State v. Barros*, 24 A.3d 1158 (R.I. 2011). Neither the federal due process clause nor the Rhode Island criminal due process clause provides criminal suspects with a right to have their custodial interrogation electronically recorded *in toto*. The federal due process clause does not require electronic recording of custodial interrogations, and there is no basis under the Rhode Island criminal due process clause for holding that mandatory recording of custodial interrogations is constitutionally required.

FACTS AND TRAVEL

The body of Deivy Felipe was found in the driver's seat of a SUV parked in Providence at roughly 1:30 a.m. on April 27, 2005.¹ At the scene, it appeared that Mr. Felipe was struck by multiple gunshots.² After the vehicle was processed, detectives found nothing more than smudges on the outside of the vehicle.³ However, inside of the vehicle, detectives were able to locate one fingerprint on a drinking glass; but they were unable to establish whose fingerprint it was.⁴ The autopsy concluded that Mr. Felipe died as a result of bleeding from several wounds caused by a total of five gunshots.⁵ Yet, police were not able to establish a single eyewitness to the murder or even develop a list of suspects.⁶

Several months later, at about 11:30 p.m. on December 29, 2005, the defendant Tracey Barros was arrested by the Providence

1. *State v. Barros*, 24 A.3d 1158, 1162 (R.I. 2011).

2. *Id.*

3. *Id.* The State explained at Mr. Barros's trial the absence of complete fingerprints was a result from heavy rain at the crime scene.

4. *Id.*

5. *Id.*

6. *Id.* Providence Police Detective Daniel O'Connell was the lead detective assigned to the Felipe homicide investigation and was the detective who testified at Mr. Barros's trial about the lack of an eye witness and possible suspects.

police for gun possession without a license.⁷ Mr. Barros underwent two separate interrogations the following day at Providence police headquarters.⁸ The two interrogations finally led to a confession by Mr. Barros that he in fact murdered Deivy Felipe at the command of Tonea "Nutt" Sims.⁹ Even though the interrogations of Mr. Barros took place over the course of many hours, only the final twelve minutes of the interrogations were recorded by police.¹⁰ Mr. Barros may possibly be heard confessing to "(1) having shot Mr. Felipe with a gun provided by Mr. Sims and (2) having done so at Mr. Sims' direction."¹¹

Mr. Barros was arraigned on the firearms charge on December 31, 2005.¹² Afterwards, on January 3, 2006, he was also arraigned with respect to the murder of Mr. Felipe.¹³ On June 20, 2006, Mr. Barros was indicted by a Providence County grand jury; the indictment charged him with the following: "(1) the murder of Deivy Felipe, in violation of G.L. 1956 § 11-23-1; (2) conspiracy to commit murder, in violation of G.L. 1956 § 11-1-6; (3) carrying a pistol without a license, in violation of G.L. 1956 § 11-47-8(a); and (4) discharging a firearm during a crime of violence, causing the death of Deivy Felipe, in violation of G.L. 1956 § 11-47-3.2(b)(3)."¹⁴

On May 30 and 31, 2007, a hearing took place in the Rhode Island Superior Court on Mr. Barros's motion to suppress the inculpatory statements that he had made while at the Providence police station on December 30, 2005.¹⁵ That motion was denied on June 1, 2007.¹⁶ A jury trial proceeded on June 4, 2007, but on June 12, the jury reported they were unable to reach a verdict,

7. *Id.* The arrest of Mr. Barros was several months after the Deivy Felipe murder had been committed. Mr. Barros also contended the arrest actually occurred on December 28, rather than on December 29.

8. *Id.* The first interrogation of Mr. Barros took place very early in the morning of December 30. The second, longer interrogation began at approximately 8 a.m. on the same morning, after Mr. Barros had been allowed to sleep for several hours.

9. *Id.*

10. *Id.* at 1163.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

and a motion for a mistrial was granted.¹⁷ On January 4, 2008, before the start of the second trial, Mr. Barros once again renewed his motion to suppress the statements.¹⁸ The motion was again denied and the second trial began.¹⁹ After only three days of deliberations, the jury found Mr. Barros guilty on all four counts.²⁰ Subsequently, on March 10, 2008, a hearing was held on the defendant's motion for a new trial and that motion was denied.²¹ On June 2, 2008, Mr. Barros was sentenced to "(1) the statutorily mandated consecutive life terms for murder and for causing death by means of a firearm; (2) a concurrent ten-year term to serve for conspiracy to commit murder; and (3) a consecutive ten-year term to serve for unlawful possession of a firearm."²²

A notice of appeal was filed on June 4, 2008.²³ Mr. Barros contended on appeal that the "trial justice erred (1) in not suppressing his confession that he murdered Deivy Felipe and (2) in barring cross-examination of a prosecution witness concerning purported third-party perpetrator evidence."²⁴

ANALYSIS AND HOLDING

Mr. Barros's first contention on appeal to the Rhode Island Supreme Court was "custodial interrogations conducted in a place of detention should be electronically recorded from start to finish and that his confession should have been suppressed due to the fact that the interrogations that he underwent were not recorded *in toto*."²⁵ Mr. Barros argued that recording requirements should be "derived from the due process provisions of the United States and Rhode Island constitutions or from the exercise of this Court's supervisory authority."²⁶ Furthermore, Mr. Barros argued that the admissions of his statements found in the twelve-minute

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 1164.

26. *Id.*

recording should have included a cautionary instruction to the jury, making them aware that the police did not record the interrogations in its entirety.²⁷ The Court focused on the fact that neither the federal due process clause nor the Rhode Island criminal due process clause provides a criminal suspect with a right to have their interrogation electronically recorded *in toto*.²⁸ The Court also noted a criminal defendant in Rhode Island is provided with enough procedural safeguards even in the absence of a recording requirement.²⁹ The Court concluded the first contention on appeal by stating, "whether the failure of the police to create a record of the defendant's confession undermines its accuracy and detracts from the credibility of later testimony is an issue uniquely left to the sound discretion of the trier of fact."³⁰

Mr. Barros's second contention on appeal was "this Court, pursuant to its supervisory authority with respect to the administration of justice, should rule that the inculpatory statements were erroneously admitted into evidence."³¹ The Court declined to exercise its supervisory authority "so as to promulgate a mandatory recording requirement."³²

Mr. Barros's third contention was that "if his unrecorded custodial statements should not have been suppressed, they should have been accompanied by a cautionary instruction to the jury concerning the inferences which could be drawn from the police failure to fully record the interrogation."³³ Here, the Court also declined to require that a cautionary instruction be given whenever the prosecution uses an unrecorded or partially recorded interrogation because such a mandate would be conflicting with well-established Rhode Island principles.³⁴ The Court reasoned juries receive adequate instructions with the respect to the voluntariness of interrogations because of Rhode Island's Humane Practice Rule, a rule which provides important procedural safeguards with respect to the Constitutional rights of

27. *Id.*

28. *Id.*

29. *Id.* at 1165. (The Court reasoned these sufficient procedural safeguards are under R.I. Const. Art. I, § 10 (2011)).

30. *Id.* at 1166.

31. *Id.* at 1163-62.

32. *Id.*

33. *Id.* at 1166.

34. *Id.*

defendants.³⁵ Finally, the Court reasoned the defense attorney can always raise questions related to witness credibility on cross-examination and can also argue credibility during closing arguments.³⁶

Mr. Barros's fourth contention on appeal was "the trial justice also erred in denying the motion to suppress because, in defendant's view, the prosecution failed to prove by clear and convincing evidence that Mr. Barros's inculpatory statements were voluntary and were made after a knowing and intelligent waiver of his constitutional rights."³⁷ The Court pointed out "[w]hen ruling on a motion to suppress a confession, the trial justice should admit a confession or a statement against a defendant only if the state can first prove by clear and convincing evidence that the defendant knowingly, intelligently, and voluntarily waived his [or her] constitutional rights expressed in *Miranda v. Arizona*."³⁸ The Court stated Rhode Island's "review of a trial justice's ruling with respect to a motion to suppress a statement which a defendant has alleged was made involuntary requires a two-step analysis."³⁹ In the first step, the Court will review the trial justice's findings of historical fact in relation to the voluntariness of the confession.⁴⁰ The Court will give deference to the trial justice's fact findings unless those findings are clearly erroneous.⁴¹ The Court will move on to step two if they conclude that the trial justice's findings were not clearly erroneous.⁴² At the second step, the Court will "apply those historical facts and review *de novo* the trial justice's determination of the voluntariness of the statement."⁴³ Here, the Court held that Mr. Barros made a knowing and intelligent waiver of his *Miranda* rights and it was not an error for the trial justice to deny

35. *Id.* at 1167. (The Humane Practice Rule "requires that judge and jury make separate and independent determinations of voluntariness." Citing *State v. Dennis*, 893 A.2d 250, 261-62 (R.I. 2006)).

36. *Id.* at 1168.

37. *Id.*

38. *Id.* at 1179 (quoting *State v. Taoussi*, 973 A.2d 1142,1146 (R.I. 2009)).

39. *Id.* (citing *Taoussi*, 973 A.2d at 1146).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* (quoting *Taoussi*, 973 A.2d at 1146-47).

his motion to suppress.⁴⁴ The Court reasoned that after accepting both the factual findings and credibility determinations of the trial justice, there was nothing left to support Mr. Barros's argument that the statements made to Providence police were involuntary.⁴⁵

Mr. Barros's fifth contention was that it was an error to deny his motion to suppress his statements made to the Providence police because "his statements were the product of a failure to promptly present him before a judicial officer."⁴⁶ The Court held that Rule 5(a) of the Superior Court Rules of Criminal Procedure governs this exact argument made by Mr. Barros.⁴⁷ The Court noted "Rule 5(a) unambiguously indicates that a defendant who seeks to have an inculpatory statement suppressed because of an unnecessary delay in presentment must demonstrate *both*: (1) that the delay in presentment was unnecessary and (2) that such delay was 'causative' with respect to the making of the inculpatory statement."⁴⁸ The trial justice ruled that any delay in presentment was not effective in inducing Mr. Barros's confession; rather, he found that Mr. Barros "was very much overcome by the knowledge of his good friend Sim[s]'s death, and [this] state of upset clearly led to his desire to unburden himself."⁴⁹ The Court agreed with the trial justice's holding and also reasoned there was nothing in the record to suggest that any delay in presentment had any effect on Mr. Barros or his statements made to the Providence police.⁵⁰

Lastly, Mr. Barros contended the trial justice erred "when he ruled that the defense would not be permitted to cross-examine Detective O'Connell with respect to a statement made to the detective which suggested that one or more third parties may have had a motive to perpetrate the murder of Deivy Felipe."⁵¹ The Court explained that it is their duty to consider whether the evidence was erroneously excluded and if it was, whether the

44. *Id.* at 1181.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 1182 (quoting *State v. King*, 996 A.2d 613, 622 (R.I. 2010)).

49. *Id.*

50. *Id.*

51. *Id.* at 1183.

exclusion constituted reversible error.⁵² The majority stated that they have repeatedly indicated that “when a criminal defendant wishes to mount such a third-party-perpetrator defense, the defendant must make an offer of proof that is reasonably specific.”⁵³ The Court held that the trial justice did not err in granting the prosecution’s motion *in limine* to prevent the admission of the third party perpetrator evidence.⁵⁴ The Court reasoned that Mr. Barros offered absolutely no evidence “(1) to establish that the individuals to whom Ms. Roca⁵⁵ referred in her statement had an opportunity to commit the crime or (2) to establish a proximate connection between these individuals and the murder of Deivy Felipe.”⁵⁶

Justice Flaherty dissented in part and concurred in the result.⁵⁷ The dissent differed from the majority decision which declined to require that a cautionary instruction be given whenever the prosecution attempts to meet its evidentiary burden by relying on either an unrecorded or partially recorded interrogation.⁵⁸ Furthermore, Justice Flaherty explained that he would hold that “when a suspect is interrogated in a detention setting for a crime punishable by life, and law enforcement has the ability to video record the interrogation but declines to do so, the jury should be informed by instruction that this was so, if such an instruction is requested by the defendant.”⁵⁹ Nevertheless, Justice Flaherty stated that he would affirm the judgment of conviction in this particular case.⁶⁰ Justice Flaherty reasoned Mr. Barros was being questioned for a weapons offense, not a crime punishable by life imprisonment, and the police had no duty to end the interrogation to obtain a video recording before continuing with the interview.⁶¹

52. *Id.* at 1183 -84.

53. *Id.* (citing *State v. Scanlon*, 982 A.2d 1268, 1275 (R.I. 2009)).

54. *Id.*

55. Mr. Felipe and Ana Roca were living together at the time of Mr. Felipe’s death. It is unclear from the record whether Ms. Roca was Mr. Felipe’s girlfriend or wife. *Id.* at 1183.

56. *Id.*

57. *Id.* at 1185. (Flaherty, J., dissenting).

58. *Id.* (Flaherty, J., dissenting).

59. *Id.* (Flaherty, J., dissenting).

60. *Id.* at 1190-91. (Flaherty, J., dissenting).

61. *Id.* at 1191. (Flaherty, J., dissenting). Chief Justice Suttell

COMMENTARY

The Rhode Island Supreme Court clearly states that criminal suspects do not have a constitutional right to have their custodial interrogations electronically recorded *in toto*.⁶² The majority noted that Alaska is the only American jurisdiction to hold that its state constitution provides a defendant with a due process right to have his or her custodial interrogations recorded.⁶³ However, the dissent points out that several state Courts have held that recording confessions promotes or even assures accuracy.⁶⁴ The dissenting opinion notes that most Courts have contemplated this issue regarding electronic recording, and have concluded that adopting the practice significantly improves the criminal justice system.⁶⁵ The dissent's analysis on the benefits electronic recordings have in the criminal justice system is persuasive. The dissent discusses how many states across the country record such interviews not because of a constitutional requirement, but because of sound policy and best practice.⁶⁶ The majority does not contemplate this fact and instead attempts to show how limited the persuasive authority is on this issue by discussing how Alaska is the only state to hold that its state constitution provides a defendant with a due process right to have his or her custodial interrogations recorded.⁶⁷ The dissent acknowledges Alaska is the only state with this constitutional requirement; however, the dissent further discusses that even absent a constitutional requirement, many other states have routinely adopted the practice of recording interrogations.⁶⁸

Here, the Court's holding was accurate because it was unknown that Mr. Barros was going to confess to the murder of Mr. Felipe. On the other hand, Justice Flaherty departed from the majority by holding that "in cases which a confession to a

concluded, but wrote separately to point out his endorsement of Justice Flaherty's comments relating to the benefits resulting from electronic recordings of police interrogations. *Id.* at 1184.

62. *Id.* at 1164.

63. *Id.* at 1165.

64. *Id.* at 1186. (Flaherty, J., dissenting).

65. *Id.* (Flaherty, J., dissenting).

66. *See id.* at 1188. (Flaherty, J., dissenting).

67. *Id.* at 1164.

68. *See id.* at 1188. (Flaherty, J., dissenting).

crime punishable by imprisonment for life is garnered in a detention setting, justice is best served if the trial justice, upon request, instructs the jury that it may consider that the police had the opportunity to video record the confession but did not do so.”⁶⁹ It is again a persuasive argument that Justice Flaherty makes here. It is obvious that not every single interrogation can be recorded electronically. A standard like that would certainly be too much of a burden on the criminal justice system. However, as technology is improving and becoming more available, the recording of interrogations is becoming a more common practice. The majority’s decision not to incorporate the dissent’s view in this case may lead to further implications and more litigation in Rhode Island because confessions are many times important issues in murder cases. It seems logical to record a murder suspect’s interrogation when a confession could make the difference between guilty or not guilty. Here, the Court had an opportunity to perhaps implement a standard that when the crime at issue is punishable by life imprisonment, the Court should instruct the jury when the police had the opportunity to record the interrogation, but chose not to do so. This Court could have put this reasonable standard in place while still coming to the same conclusion and adhering to the federal due process clause and the Rhode Island criminal due process clause. Implementing this standard would surely provide the jury with a helpful general guideline in their responsibility of truth-seeking.⁷⁰

CONCLUSION

The Rhode Island Supreme Court held that neither the federal due process clause nor the Rhode Island criminal due process clause provides criminal suspects with a right to have their custodial interrogation electronically recorded *in toto*.⁷¹ The Court reasoned that the federal due process clause does not require electronic recording of custodial interrogations, and there is no basis under the Rhode Island criminal due process clause for holding that mandatory recording of custodial interrogations is

69. See *id.* at 1190. (Flaherty, J., dissenting).

70. See *id.* (Flaherty, J., dissenting).

71. *Id.* at 1164.

constitutionally required.⁷²

Andrew C. Covington

72. *Id.*

Family Law. *Tamayo v. Arroyo*, 15 A.3d 1031 (R.I. 2011). The Rhode Island Supreme Court promoted the financial needs of a child when it held that an order of child-support must be calculated with a parent's total income, including locality adjustment pay and actual income minus actual expenses for rental properties. The Court further held that any reasonable child-care costs must also be included when calculating child-support.

FACTS AND TRAVEL

Cesar Tamayo, plaintiff, and Paula Arroyo, defendant, are the unmarried parents of the minor child Samantha Tamayo.¹ In March 2007, plaintiff filed a miscellaneous action seeking to establish custody, visitation, and child support for the minor child.² Defendant filed a counterclaim seeking sole custody, child support, and medical insurance for the minor child.³

Plaintiff worked as a military technician and was also a member of the Rhode Island National Guard.⁴ During trial before the Family Court magistrate, Lieutenant Colonel Ricottilli, who was an accountant with the Rhode Island National Guard, testified that plaintiff received a one-time bonus from the National Guard in March 2007 and regularly received a "locality adjustment payment."⁵ Also, plaintiff's Family Court filings reported that he received \$1,350 per month in rental income, although his 2006 tax return reflected a loss of nearly \$18,000 from those properties.⁶

Defendant testified to the minor child's day-care expenses but

1. *Tamayo v. Arroyo*, 15 A.3d 1031, 1033 & n.1 (R.I. 2011).

2. *Id.* at 1033.

3. *Id.*

4. *Id.*

5. *Id.* "Locality adjustment pay" is "a cost of living benefit that any federal government employee may receive based on his or her geographical assignment." *Id.* at 1034 (citing 5 U.S.C. §§ 5301, 5304 (1990)).

6. *Id.* at 1033.

the magistrate refused to allow the day-care provider to testify after the plaintiff indicated the day-care provider might have been paid in cash and that she might have been in the United States illegally.⁷ The magistrate demanded that the day-care provider produce immigration documents and tax returns showing reported income in order to testify.⁸ When the day-care provider failed to return to court with the documents, the magistrate inferred that the day-care provider was “cheating the government.”⁹ Plaintiff also proposed free future day-care provided by his mother or wife, although no evidence was introduced to support this offer.¹⁰

The magistrate’s February 2008 bench decision excluded plaintiff’s BAQ military income,¹¹ which is not reportable to the Internal Revenue Service (IRS), from being calculated into the child-support order.¹² However, no evidence was presented to show the plaintiff received BAQ income, a term the magistrate seemed to use interchangeably with locality pay.¹³ The magistrate explained he was excluding “regulatory or locality pay,” or “other income that [plaintiff] receives which would be generally speaking for quarters, uniforms, et cetera”.¹⁴

The magistrate excluded from the child-support calculation any income plaintiff received from his rental properties because the properties generated at a loss, according to the plaintiff’s 2006 tax return.¹⁵ The magistrate also refused to include past payment of day-care costs because of the inference the day-care provider was “cheating the government.”¹⁶ Furthermore, the magistrate refused to include future payment for day-care costs because the plaintiff had offered free day-care.¹⁷ Finally, the magistrate did not order a specific dollar amount of child-support; instead he

7. *Id.*

8. *Id.*

9. *Id.* at 1034.

10. *Id.*

11. *Id.* “BAQ” is a colloquial term for “basic allowance for quarters” and “it refers to an allowance that members of the military receive for housing if they are not assigned to a military housing facility.” *Id.* (referencing 37 U.S.C. § 403(a)(1) (LexisNexis 2011)).

12. *Id.* at 1034.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

directed the parties' attorneys to "draft an agreed-upon order that simply reiterated his bench decision."¹⁸

Defendant sought review, and in November 2008 the Family Court affirmed all but one of the magistrate's findings.¹⁹ Defendant appealed to the Supreme Court of Rhode Island and plaintiff asked the Court to either affirm the Family Court's order or hold that the appeal was not properly before the Court since defendant failed to file a petition for writ of certiorari.²⁰ On December 1, 2010, the parties appeared before the Court to show cause as to why the Court should not summarily decide the issues raised on appeal.²¹

ANALYSIS AND HOLDING

The Rhode Island Supreme Court found that this case was properly raised on appeal because the child-support order was the result of the Family Court's final decision.²² The Court explained that the child-support guidelines, as outlined in the Rhode Island Family Court Administrative Order 87-2,²³ "are based on the incomes of both parents" and are intended to provide the child with the "greatest possible support."²⁴ Therefore, the Family Court should "consider every factor that would serve to reveal in totality the circumstances and conditions' bearing on the welfare of the children."²⁵

18. *Id.*

19. *Id.* at 1034-35. The magistrate also found that plaintiff was entitled to a credit for adding the minor child to his health insurance but the reviewing Family Court judge reversed and remanded for the magistrate to determine whether plaintiff incurred any costs to justify the credit. *Id.* at n.6.

20. *Id.* at 1035. The Rhode Island Supreme Court will hear a modification of child-support after a party files a petition for writ of certiorari and the discretionary writ is issued. *Id.* (citing R.I. GEN. LAWS § 14-1-52(b) (1956)).

21. *Id.* at 1033.

22. *Id.* 1035-36 (citing R.I. GEN. LAWS § 14-1-52(a) (1956) stating in relevant part: "From any final decree, judgment, order, decision, or verdict of the [F]amily [C]ourt, except as provided in subsection (b) of this section there shall be an appeal to the [S]upreme [C]ourt")(*Id.* at 1036 n.7).

23. *Id.* at n.8. The child support guidelines are revised every five years, but the 1987 instructions on how to use the guideline worksheet continue to be followed. *Id.*

24. *Id.* at 1036 (quoting the R.I. Fam. Ct. Admin. Order 87-2, I.).

25. *Id.* (quoting *Sullivan v. Sullivan*, 460 A.2d 1248, 1250 (R.I. 1983)).

The Court held that the magistrate erred in not including plaintiff's "other income" even though such income was not reportable to the IRS.²⁶ The magistrate further erred by not indicating whether the one-time bonus was included in the child-support order.²⁷ The Court relied on the child-support guidelines, which contains a non-exhaustive list of types of income to be included when calculating child-support, with the only exception being income from qualified public benefits programs.²⁸ Because the magistrate based plaintiff's income for the child-support order on whether the income was taxable, his decision was erroneous and "contrary to the inclusive definition of income set forth in the child-support guidelines."²⁹ Furthermore, the Court held that the locality adjustment should have been viewed as income since it is directly related to plaintiff's cost of living.³⁰ Furthermore, plaintiff's one-time bonus should have been included when calculating the child-support payments based upon plaintiff's income as set forth in his employment records.³¹

The Court ruled that the magistrate abused his discretion by confining his review to plaintiff's 2006 reported earnings when plaintiff's 2007 tax return was available for review.³² Also, the income and expenses of plaintiff's rental properties should have been carefully reviewed to determine "an appropriate level of gross income available to the parent to satisfy a child support obligation" because "taxable income does not always indicate one's ability to pay."³³

26. *Id.* at 1036.

27. *Id.*

28. *Id.* The definition set forth in the child-support guidelines ends by including "*all other forms of earned [or] unearned income*. Specifically excluded are benefits received from means-tested public assistance programs" *Id.* (alterations in original).

29. *Id.* at 1037.

30. *Id.* The Court relied on the R.I. Fam. Ct. Admin. Order 87-2, IV.B.1., which mandates "[e]xpense reimbursements or in-kind payments received [shall be considered income] ... if they are significant and reduce[] personal living expenses" when calculating child support. *Id.* (alterations in original).

31. *Id.*

32. *Id.*

33. *Id.* The Court cites the child-support guidelines that clearly mandate "income and expenses from self-employment or operation of a business should be *carefully reviewed* to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. *In some instances, this amount will differ from a determination of business income for*

The Court also held that the only requirement for day-care expenses to be included in a child-support order is that the cost be reasonable,³⁴ and that the magistrate abused his discretion when he based his decision on accusations of unreported income and the possibility of free day-care.³⁵ The Court held that defendant was entitled to a portion of day-care expenses, made retroactive to the date of the petition.³⁶ The case was remanded to Family Court for review and to make a specific finding for the amount of child-support available to the child.³⁷

COMMENTARY

The Rhode Island Supreme Court held that all income should be included when calculating a child-support order, as per the child-support guidelines.³⁸ The policy behind the guidelines is to ensure every child receives the maximum financial benefit a parent can afford.³⁹ The Court adhered to this policy when it held that the income and expenses of plaintiff's rental properties must be examined independent of the federal tax return, which may not reflect actual income correctly.⁴⁰ The Court was also acting in the best interests of the child in allowing defendant to recover for past child-care expenses as long as they were reasonable and including future child-care expenses, although other options might have been available.⁴¹ Should the Court have mandated that future child-care expenses were not permitted, then defendant would

income tax purposes." *Id.* (quoting R.I. Fam. Ct. Admin. Order 87-2, IV.B.1.)(emphasis in original).

34. *Id.* at 1038. "The guidelines allow for reimbursement of child-care expenses, conditioned on such costs being "reasonable; that is, such costs should not exceed the level required to provide quality care for the child(ren)." *Id.* at 1037-38 (quoting the R.I. Fam. Ct. Admin. Order 87-2, IV.B.7.a).

35. *Id.* at 1038. The Rhode Island Supreme Court noted that the day-care provider should have been allowed to testify as there is "no law or court rule that requires a witness to prove his or her legal status or compliance with federal tax laws as a condition precedent to testifying in our courts." *Id.* at n.4.

36. *Id.* at 1038.

37. *Id.*

38. *Id.* at 1037.

39. *Id.* at 1036.

40. *Id.*

41. *Id.* at 1038.

either have to pay for such expenses alone or rely on the only other option the court permitted: entrusting the minor child to plaintiff's wife or mother.

The Court correctly decided that defendant's locality pay should be included as income because it is money received each month in order to help pay for the cost of living. One concern with including locality pay is that if plaintiff should move, as is customary when working for the military, his locality pay may change, forcing him to return to court to adjust the child-support order. While this may be a burden on the courts, it is necessary to ensure that plaintiff's child is receiving the full benefit of his financial support.

CONCLUSION

The Rhode Island Supreme Court concluded that the amount plaintiff must pay in child-support is to be determined using the child-support guidelines laid out in Family Court Administrative Order 87-2, which include income, locality pay, and actual income minus actual expenses from rental properties, instead of the amount cited on past federal income tax returns. Furthermore, defendant was entitled to reimbursement for past child-care and future child-care, as long as expenses were reasonable.

Malorie R. Diaz

Family Law. *In re Steven D.*, 23 A.3d 1138 (R.I. 2011). The Department of Children, Youth, and Families (DCYF) is required to make “reasonable efforts” to reunify parent and child before petitioning to terminate parental rights. If DCYF believes that substance abuse issues bar reunification, it must refer a parent to treatment or counseling before terminating parental rights, even if that parent is in denial of their substance abuse problem.

FACTS AND TRAVEL

On September 14, 2007, the Rhode Island Department of Children, Youth and Families (DCYF) filed a petition to terminate the parental rights of Kathleen D. and Ronald D.¹ pursuant to Rhode Island General Law section 15-7-7(a)(3).² DCYF contends that there was no “substantial probability” that the children, Steven and Zachary, would be able to be reunified with their parents within a reasonable time, and therefore were in need of a permanent home.³ DCYF also contends that the children were in legal custody for almost 12 months and the parents were offered services in order to correct the situation that led to the children being displaced.⁴

The children were first removed from the home on July 21, 2005 when Kathleen was suffering from a viral infection and was in a medically induced coma.⁵ One of the nurses called DCYF because they were concerned that Ronald would be unable to care for the children due to his health problems, including epilepsy and rheumatoid arthritis.⁶ On July 22, 2005, DCYF filed *ex parte* neglect petitions with the Family Court in conjunction with a

1. *In re Steven D.*, 23 A.3d 1138, 1140 (R.I. 2011).

2. R.I. GEN. LAWS § 15-7-7(a)(3) (1956).

3. *In re Steven D.*, 23 A.3d at 1140.

4. *Id.*

5. *Id.* at 1141.

6. *Id.*

request for an order of detention, which were granted.⁷ The children were then placed with Ronald's sister and DCYF assigned Jennifer Jawharjian to work with Kathleen and Ronald.⁸

After an initial investigation, Ms. Jawharjian created a plan to reunify the children with their parents, which required Kathleen and Ronald to be cooperative with DCYF and to maintain a substance free lifestyle.⁹ Ms. Jawharjian recommended Kathleen for domestic violence and mental health counseling and referred Ronald to anger management counseling, and determined that neither Kathleen nor Ronald had a substance abuse problem at that time.¹⁰ Kathleen participated in counseling, however Ronald was unable to complete anger management counseling because of his difficulties traveling.¹¹ Ms. Jawharjian testified that the couple was affectionate with the children during the supervised visits, and that the family had a close bond, however, Kathleen and Ronald were not cooperative and had cursed at her.¹² Additionally, on one occasion, Kathleen "smelled of alcohol," and told Ms. Jawharjian that "she was of age" and had drunk "hours before" the visit.¹³ On November 17, Kathleen and Ronald "admitted to dependency", and the Family Court then ordered the children to be placed in DCYF's care.¹⁴ The Court then decreed that the children could return home provided that the respondents complied with certain services.¹⁵

7. *Id.*

8. *Id.*

9. *Id.* at 1141-42. Kathleen and Ronald were to "(1) develop and maintain a substance-free lifestyle; (2) prevent domestic disputes from affecting their children; and (3) cooperate with DCYF." In order to reach these goals, Kathleen and Robert were to "(1) refrain from using any illegal or intoxicating substances, including alcohol; (2) cooperate with a substance abuse evaluation and follow treatment recommendations; (3) submit to supervised urine screens, both random and scheduled; and (4) utilize a network of 'clean and sober supports such as church, AA/NA, and community providers.'" *Id.*

10. *Id.* at 1142.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* Respondents must comply with the following services: "(1) [engage] in 'outpatient counseling;' (2) [participate] in the CEDARR and CASSP programs; (3) [attend] Alcoholics Anonymous (AA) meetings; and [avail] themselves of parent aide services and anger management counseling." *Id.* at 1142-43.

The case was then transferred to Greg Iafrate, another case manager, who made a second case plan with the goal of “maintaining the children at home”, and required Kathleen and Robert to sustain a substance-free lifestyle, prevent domestic disputes from affecting their children, and to cooperate with DCYF.¹⁶ These plans did not mention any further substance abuse evaluations or treatment, and urine screens were no longer required.¹⁷ On January 20, “DCYF filed an emergency motion in the Family Court seeking a change of placement, and the children were briefly removed from respondents’ home.”¹⁸ An order was then entered on February 21, 2006 by the Family Court to return the children to the respondent’s home with the requirements that DCYF make weekly visits to the home and that Kathleen cooperate with services provided.¹⁹ The children were removed after it was determined that Kathleen was not cooperating with the services provided, and on April 26, 2006 the Family court ordered the children to again be placed with Ronald’s sister.²⁰

The family’s next caseworker, Erin Cuddy,²¹ testified that Kathleen swore at her during a supervised visit in front of the children and acted aggressively toward her.²² In her case plans, Ms. Cuddy noted that the children had been removed due to “alcohol abuse, mental health, and [the] physical health” of the parents.²³ After Kathleen exhibited aggressive behavior to Ms. Cuddy, the visits were moved to a DCYF office.²⁴ Ms. Cuddy referred the respondents for new substance abuse evaluations,

16. *Id.* at 1143.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* Ms. Cuddy became the couple’s caseworker after Mr. Iafrate left the department and after the couple had also worked with another caseworker, Marcie Baker. Ms. Cuddy testified that three of the four aids terminated their relationship with the family due to lack of cooperation. *Id.* at 1146.

22. *Id.* at 1143-44.

23. *Id.* at 1144. The respondents were not to have any alcohol in their home, must participate in parent-child evaluation, and must refrain from “swearing at or making threats towards DCYF workers or service providers.” *Id.*

24. *Id.* at 1145.

which concluded that Kathleen did not have a drinking problem.²⁵

The Family Court entered a decree which approved another set of case plans developed by Ms. Cuddy, in which respondents were also required to remain calm and cooperative during the visits.²⁶ On April 19, 2007, Ms. Cuddy requested that Kathleen's counselor, Ms. Harrower, attend a family visit after Ms. Cuddy smelled alcohol on Kathleen, to which Ms. Harrower agreed.²⁷ Kathleen, however, refused to submit to a Breathalyzer test and explained that Ronald had "had just as much to drink as she did prior to that visit."²⁸ Kathleen also explained that she only said she would not show up drinking, but "never said [she] wouldn't show up drunk."²⁹ Ms. Cuddy did testify to the fact that Kathleen was never offered formal substance abuse counseling, even though Ms. Cuddy had discussed the possibility of Kathleen's counselor, Ms. Harrower, incorporating substance abuse counseling with the anger management counseling Kathleen was already receiving.³⁰

On September 14, 2007, DCYF filed petitions to terminate Kathleen and Ronald's parental rights,³¹ pursuant to Rhode Island General Law section 15-7-7(a)(3).³² During the trial in Family Court, Kathleen was disruptive and was told she may be held in contempt of court, and therefore agreed to substance abuse testing.³³ On May 14, 2008, defense counsel submitted a motion to suppress the results of this test because there were no

25. *Id.* at 1144.

26. *Id.* at 1145. The Family Court decree stated that: "(1) Kathleen would cooperate with a psychiatric evaluation at Family Services; (2) that Kathleen and Ronald would cooperative with a parent aid during family visits; (3) that Kathleen would submit to an 'alcohol screen' if DCYF determined that it was warranted due to her behavior or if she appeared to be 'under the influence' and that, if she refused to submit to the screen, it would be considered positive and the visit would end; and (4) that Ronald would undergo a neurophysical evaluation." *Id.*

27. *Id.* at 1146.

28. *Id.*

29. *Id.*

30. *Id.* at 1148-49.

31. *Id.* at 1146.

32. R.I. GEN. LAWS § 15-7-7(a)(3).

33. *In re Steven D.*, 23 A.3d at 1146-47. During the April 4, 2008 trial date, the counsel for DCYF explained to the court that the Breathalyzer came back positive, which DCYF wanted to put on the record, to which the Defense counsel objected, however the trial judge allowed the test to go on the record because "the report was very clear that she was beyond the legal limits for alcohol." *Id.*

“foundational testimony” supporting the results, however the trial judge denied this motion.³⁴

During trial, the testimony of Dr. Brian Hayden was heard, after he had completed a psychological evaluation of Kathleen.³⁵ He found her to be “rather feisty, opinionated, somewhat confrontational, argumentative” and “somewhat paranoid.”³⁶ He also testified that Kathleen had told him “she had lost three children when she lived in Florida because ‘Ronald was accused of domestic violence and they were both accused of alcoholism,’” however she also explained that she was currently attending AA meetings.³⁷ During her evaluation, however, Kathleen insisted that “there was nothing wrong with her” and she never recognized whether or not alcohol was an issue.³⁸

Kathleen testified during the trial and admitted to swearing at Ms. Cuddy, but also testified that she thought that Ms. Cuddy “had a personal vendetta against her,” and that “she would do anything she could to make sure [Kathleen did not get her children back].”³⁹ She also testified that Ms. Cuddy believed that Kathleen had a drinking problem, and told her that she was in “denial of her problems.”⁴⁰

On July 2, 2008, the trial judge granted the petition to terminate the respondent’s parental rights, and found by clear and convincing evidence that (1) Steven and Zachary would not be able to return safely to Kathleen and Robert’s care within a reasonable period of time; (2) DCYF had made all “reasonable efforts” to reunify the family; and (3) it was in the children’s best interests for the parental rights to be terminated.⁴¹ The trial judge reasoned that for two years DCYF had been caring for the children, that the family had undergone four case plans, and “the matter of substance abuse in the form of alcohol has been a matter of great concern [as] has the matter of abuse and anger management.”⁴² With respect to Kathleen, the trial judge found

34. *Id.* at 1149.

35. *Id.* at 1147.

36. *Id.* at 1147.

37. *Id.* at 1147.

38. *Id.* at 1147-48.

39. *Id.* at 1152.

40. *Id.*

41. *Id.* at 1153.

42. *Id.*

that she had a substance abuse problem, and that she had "been offered services to correct the situation to no avail."⁴³ He noted that even on one of the days of the trial, she has been "highly intoxicated."⁴⁴ With respect to Ronald, the trial judge reasoned that he had severe physical limitations who "comes across as victim who cannot or will not change the situation, and that he "drank but not to the extent of his wife."⁴⁵

ANALYSIS AND HOLDING

When the Supreme Court reviews a decision to terminate parental rights, the Court "remain[s] keenly mindful that the natural parents have a 'fundamental liberty interest' in the care, custody, and management of their children."⁴⁶ Because of the "vital interest in preventing erroneous termination of . . . [the] natural relationship" between parent and child,⁴⁷ "the state must support its allegations *by clear and convincing evidence*."⁴⁸ The Supreme Court uses a three-step process in cases involving the termination of parental rights: "(1) examine the trial justice's finding of parental unfitness; (2) review the finding that reasonable efforts at reunification were made by the state agency charged with that duty; and (3) review the finding that termination is in the children's best interests."⁴⁹

On appeal before the Rhode Island Supreme Court, Kathleen argued that the trial justice erred in finding that DCYF had shown by clear and convincing evidence that they had made "reasonable efforts" to reunite the family.⁵⁰ She argued that DCYF believed she had alcohol problems and should have referred her to alcohol counseling before terminating her parental rights.⁵¹ The Rhode Island Supreme Court agreed, and reversed the decision of the trial court.⁵²

The Supreme Court stated that a "finding of parental

43. *Id.*

44. *Id.*

45. *Id.* at 1153-54.

46. *Id.* at 1154 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

47. *Id.* at 1154-55.

48. *Id.*; R.I. GEN. LAWS § 15-7-7(a).

49. *In re Steven D.*, 23 A.3d at 1155.

50. *Id.*

51. *Id.* at 1155-56.

52. *Id.* at 1156.

unfitness is insufficient in and of itself for the court to terminate parental rights: subsequent to presenting sufficient evidence to support such a finding, DCYF must additionally demonstrate to the Family Court *that it has made reasonable efforts* to strengthen the parent-child relationship in accordance with the provisions of § 15-7-7(b)(1).⁵³ The Court further explains that what is “reasonable” shall be resolved on a case-by-case basis, and will “vary with the differing capacities of the parents involved” and it is determined by looking at the totality of the circumstances in each case.”⁵⁴ DCYF need not “undertake extraordinary efforts to reunite parent and child,”⁵⁵ however; the department must ensure the services provided were offered “regardless of the unlikelihood of their success.”⁵⁶

Despite DCYF’s contentions that they made all reasonable efforts to address Kathleen’s alcoholism,⁵⁷ the Court found that she was neither offered nor received alcohol counseling.⁵⁸ The Court explained that Dr. Hayden’s testimony also makes clear that Kathleen would benefit from substance abuse counseling, and the court was “troubled” that DCYF did not refer her to counseling, especially after three of her caseworkers said they thought that Kathleen had a substance abuse problem, and continued to include in their case plans that she must maintain a “substance free lifestyle.”⁵⁹ Even though Kathleen was in denial about her alcohol abuse problems, the Court held DCYF “was required at the very least to offer services to” help her overcome her denial.”⁶⁰

With respect to the termination of Ronald’s parental rights, the Court held that the trial court was clearly erroneous in terminating his parental rights.⁶¹ The Supreme Court ruled the

53. *Id.* (quoting *In re Brooklyn M.*, 933 A.2d 1113, 1125 (R.I. 2007)); R.I. GEN. LAWS § 15-7-7(b)(1).

54. *In re Steven D.*, 23 A.3d at 1156 (quoting *In re Natayla C.*, 946 A.2d 198, 203 (R.I. 2008)).

55. *Id.* (quoting *In re Jose Luis R.H.*, 968 A.2d 875, 882 (R.I. 2009)).

56. *Id.* (quoting *In re Natayla C.*, 946 A.2d at 203).

57. *Id.* at 1157. DCYF contends that it referred her to substance abuse evaluations and that Kathleen also attended AA meetings.

58. *Id.* at 1157.

59. *Id.* at 1157-58.

60. *Id.* at 1160.

61. *Id.* at 1161.

trial court did not indicate how DCYF proved Ronald's parental unfitness by clear and convincing evidence.⁶² All that was noted was that Ronald had physical limitations; that he drank, although not to the same extent as Kathleen; and that he was a victim in his relationship with Kathleen.⁶³ The Court held that this was a violation of Ronald's due process rights since he has a right to have his parental unfitness proven by clear and convincing evidence.⁶⁴ Ronald was physically capable of walking into the courtroom, and nothing was made of the fact that Ronald was taking care of the children on his own while his wife worked full time, or the fact that he also had the support of family members to care for the children.⁶⁵ Therefore, the Supreme Court found the trial court was completely erroneous in their termination of Ronald's parental rights.

Kathleen also argued that the substance abuse test administered during the Family Court proceedings should not have been admitted because the person who performed the test did not offer the test results and there was no other foundation for admitting the test results.⁶⁶ DCYF merely told the court that the test results were positive and that they should be admitted.⁶⁷ The Court also concluded that the evidence cannot be included in the "catchall provision", because this provision is not intended to "confer a broad license on trial judges to admit hearsay statements that do not fall within one of the other exceptions."⁶⁸ Therefore, the Court found the admission of the substance abuse test administered during trial was in error.

Concurring in part and dissenting in part, Chief Justice Suttell and Justice Goldberg departed from the majority and concluded that there is enough evidence on the record to terminate Kathleen's parental rights, however both agreed that Ronald's parental rights were terminated erroneously.⁶⁹ They argued that in cases involving the termination of parental rights,

62. *Id.*

63. *Id.* at 1162.

64. *Id.*

65. *Id.*

66. *Id.* at 1164.

67. *Id.*

68. *Id.* at 1166. (quoting *Conoco, Inc. v. Dep't of Energy*, 99 F.3d 387, 392 (Fed. Cir. 1996)).

69. *Id.*

the findings of the trial court are given great weight and not overturned unless “clearly wrong or the trial justice misconceived or overlooked material evidence.”⁷⁰ The Justices found that DCYF made reasonable efforts to offer substance abuse services to Kathleen because she was referred to three different agencies for evaluations, Ms. Cuddy recommended to Ms. Harrower that alcohol abuse treatment should be incorporated into the treatment, and Kathleen was receiving services through AA.⁷¹ They therefore found that the efforts on behalf of DCYF were reasonable and the termination of Kathleen’s parental rights was valid.

COMMENTARY

It is surprising that despite the fact that several caseworkers described Kathleen’s alcohol abuse problem, DCYF did not take any substantial proactive steps to try and get her the necessary services to reunify the family. When DCYF has a belief that there is a barrier that may prevent reunification, they should take all appropriate measures to try and reunify the family, despite how uncooperative a couple may be. Unfortunately in this case, despite the substance abuse evaluations and that fact that she was visibly intoxicated in the presence of several caseworkers, no actual therapy or counseling was offered to rectify this problem.⁷²

It also appears that the Family Court based their decision to terminate Ronald’s parental rights based on the fact that they decided to terminate Kathleen’s parental rights. It is frightening that an adequate, separate determination was not made with respect to Ronald. Despite finding that Ronald had physical limitations and was in an unhealthy relationship with Kathleen,⁷³ the trial court did not provide any evidence as to why they thought that Ronald was an unfit parent. It seems that the trial court was relying solely on the recommendations of DCYF without making an appropriate determination as an unbiased body.

70. *Id.* at 1169. (quoting *In re David L.*, 877 A.2d 667, 671 (R.I. 2005)).

71. *Id.* at 1170.

72. *Id.* at 1157-58.

73. *Id.* at 1162.

CONCLUSION

The Rhode Island Supreme Court vacated the Family Court's decision to terminate Kathleen and Ronald's parental rights because DCYF did not make all "reasonable efforts" to reunite the family.⁷⁴ The case plans should have included alcohol treatment for Kathleen if DCYF determined that was a barrier to the reunification of the family. The Court also held that the trial court was completely erroneous in terminating Ronald's parental rights because virtually no evidence was offered to show his parental unfitness, clearly not meeting the "clear and convincing standard" necessary in these cases.

Alexandra C. Hudd

74. *Id.* at 1157.

Insurance Law. *DeMarco v. Travelers Ins. Co.*, 26 A.3d 585 (R.I. 2011). The Rhode Island Supreme Court held, as a matter of first impression, the rule espoused in *Asermely v. Allstate Ins. Co.*—that an insurer assumes the risk of judgment in excess of policy limits after declining to settle with a third party claimant—applies to cases involving multiple claimants. Whether an insurer is subject to *Asermely* liability in the multiple claimant context will depend upon a comprehensive factual analysis that considers circumstances such as the number of claimants, the relative extent of the damages each claimant suffered, amounts of claimants’ settlement demands, the wishes of the insured, the timing and character of the insurer’s attempt to settle, the likelihood of litigation, and the willingness of the claimants to settle. Furthermore, after a judgment in excess of the policy limits has been rendered, a subsequently executed general release of liability between the insured and claimant, which relieves the insured of the excess exposure, may not release an insurer from liability under *Asermely* if the claimant has been assigned the insured’s rights against the insurer.

FACTS AND TRAVEL

On September 10, 2003 Wayne DeMarco (“DeMarco” or “plaintiff”) was seriously injured when the vehicle he was traveling in, owned by Virginia Transportation Corporation and operated by the company’s owner, Leo H. Doire (“Doire”), veered off the road and struck two utility poles.¹ A second passenger, Paul Woscyna (“Woscyna”), was also seriously injured.² Travelers Insurance Company insured the vehicle under a policy that had a \$1 million limit of liability.³ After incurring extensive medical bills, DeMarco’s attorney submitted a demand letter to Travelers’ claim services director on February 2, 2004 that ignited a

1. *DeMarco v. Travelers Ins. Co.*, 26 A.3d 585, 587 (R.I. 2011).

2. *Id.*

3. *Id.*

prolonged series of correspondence between DeMarco and Travelers, which lasted for three years, and resulted in no resolution. The letter proposed to settle the claim for the \$1 million policy limit.⁴

On February 25, 2004 DeMarco's attorney sent a second letter to Travelers' claim services director informing him that plaintiff's claim would exceed the policy limits, and again requested that the claim be settled for the policy limit.⁵ Citing *Asermely*, the attorney noted that a settlement within the policy limit would be in Travelers' best interest.⁶ Travelers' claim services director replied via a letter dated February 27, 2004, and took the position that Travelers was unable to exhaust the policy limit on the plaintiff's claim at that point given that the accident involved two claims and that the bills attributed to the second claim could equal or exceed those of plaintiff's.⁷

Soon afterwards, on March 4, 2004, the plaintiff filed a personal injury action against Travelers' insureds—Virginia Transportation and Doire.⁸ Almost a year lapsed before any further correspondence was exchanged between plaintiff and Travelers. On February 7, 2005, DeMarco's attorney wrote to the attorney, which Travelers retained to represent its insureds (hereinafter the Travelers' retained attorney), that she was aware Woscyna's attorney had submitted a settlement demand totaling \$829,747.00, and DeMarco's claim was expected to be five times that amount.⁹ She asked the Travelers' retained attorney to "respond with his thoughts."¹⁰ The Travelers' retained attorney

4. The letter indicated that DeMarco had already sent hospital bills totaling \$190,932.56 to Travelers but that his attorney was still in the process of obtaining "voluminous medical records and bills." Also enclosed in the letter was a copy of the lawsuit the attorney intended to file for Travelers to "review and advise." *Id.* at 588.

5. *Id.*

6. *Id.*; see also *Asermely v. Allstate Ins. Co.*, 728 A.2d 461 (R.I. 1999) (holding that an insurer has a fiduciary duty to engage in timely and meaningful settlement negotiations on behalf of the insured and assumes the risk of a judgment if the judgment results in an amount that exceeds policy limits, regardless of whether the insurer acted in bad faith, unless the insured was unwilling to accept the third-party's settlement offer).

7. The second claim was Mr. Woscyna's, who was not a party to this suit. *DeMarco*, 26 A.3d at 589.

8. *Id.* at 589-90.

9. *Id.*

10. *Id.*

responded on February 23, 2005 with a notice of deposition and a letter stating that the best way to assess the injured parties' claims would be through deposition.¹¹

From April 19, 2005 to July 22, 2005, DeMarco's attorney sent Travelers' retained attorney four more letters requesting that the parties proceed to arbitration or mediation, and she attached records pertaining to DeMarco's medical records, tax returns, course of treatment and lost wages.¹² Travelers' retained attorney wrote to the attorneys representing DeMarco and Woscyna on July 11, 2006 and offered the remaining policy limit of \$995,000.00 to be shared between the parties.¹³ DeMarco's attorney rejected the offer as an "eleventh hour" attempt that could not cure Travelers' obligation under *Asermely* because Travelers had known about the severity of the accident since September 2003.¹⁴ Travelers' retained attorney responded that DeMarco had placed Travelers and its insureds in an "impossible situation" because his demand to settle for the policy limit was never a "reasonable offer to settle" given Travelers' fiduciary obligation to protect the assets of its insured from exposure to other claims.¹⁵

Approximately a month prior to the personal injury trial, Travelers commenced an interpleader action in the Superior Court for Providence County and filed a motion seeking leave to deposit

11. *Id.*

12. *Id.*

13. Between the letter that plaintiff's attorney sent on July 22, 2005, and the Travelers' retained attorney's response, almost a year later, the Travelers' retained attorney had been in contract with Travelers' claim services director over the evaluation of the two claims. Both plaintiffs' claims were estimated at \$885,000.000 including prejudgment interest. The Travelers' retained attorney opined, "[s]o long as we offer the policy for all claimants to share on a pro rata basis, there will be no 'Asermely' problem." This statement was premised on the belief that the combined demands of DeMarco and Woscyna exceeded the policy limit and *Asermely* would not apply in a multiple claimant context. *Id.* at 591.

14. *Id.* at 591-92; see also *Asermely*, 728 A.2d 461, 464 (creating a *per se* rule that "[i]f the insurer declines to settle the case within the policy limits, it does so at its peril in the event that a trial results in a judgment that exceeds the policy limits.").

15. Travelers' retained attorney mentioned to DeMarco's counsel, "Perhaps you should study *Asermely* a bit more closely." *DeMarco*, 26 A.3d at 592.

the policy proceeds with the court.¹⁶ Travelers simultaneously requested that it be allowed to deposit the policy limits in the registry of the court.¹⁷ After Travelers' motion was denied, DeMarco's attorney made one last, albeit unsuccessful, attempt to settle with Travelers for the policy limits.¹⁸ Following an unsuccessful mediation, Travelers' claim services director again wrote the attorneys for DeMarco and Woscyna on September 14, 2006 offering to pay \$550,000 to DeMarco and \$450,000 to Woscyna in exchange for a complete release from both claimants.¹⁹ This attempt at settlement was again denied as "another eleventh hour attempt by Travelers to avoid responsibility above and beyond [the] policy limits."²⁰

At the personal injury trial that followed, the jury returned a verdict in favor of DeMarco for \$2,801,939.07, a sum that included interest.²¹ Afterward, Doire's independent counsel wrote Travelers' claim services director to express that he believed Travelers was responsible for the entirety of the judgment entered against him under *Asermely*.²² Soon after, on September 29, 2006, DeMarco's attorney wrote a letter to Travelers' claim services director alleging that Travelers' failure to settle prior to the personal injury lawsuit stemmed from a company-wide policy of delaying potential settlements within multiple claimant contexts.²³ Travelers then retained a different attorney who responded by letter on October 30, 2006 and noted that the allegation that Travelers' conduct infringed the fiduciary duty it owed to its insureds was untenable—there was no factual basis upon which to base its assertion that Travelers had a company-

16. *Id.* at 593.

17. DeMarco's attorney objected to the motion in light of the fact that the personal injury trial against the insureds was set to begin in less than two weeks and that the plaintiff would like to pursue an *Asermely* claim. The hearing justice ruled that an interpleader was not warranted at the time and denied Travelers' motion seeking leave to deposit the policy proceeds into the court registry. *Id.* at 593-94.

18. Travelers' claim services director wrote to plaintiff's attorney, "As we have previously informed you, as a result of the duty owed to our insureds, we cannot pay the entire policy limit to your clients." *Id.* at 593.

19. *Id.*

20. *Id.* at 594-95.

21. *Id.*

22. *Id.* at 595-96; see also *Asermely*, 728 A.2d 461, 464.

23. *DeMarco*, 26 A.3d at 596.

wide policy of delaying claims.²⁴ The second Travelers' retained attorney cited DeMarco's attorney's letter of February 7, 2005, which suggested that Travelers should wait to settle until all the claims had been determined, as support that Travelers was not acting pursuant to any company policy.²⁵

Meanwhile, Virginia Transportation, which had problems securing financing from creditors because of the large judgment rendered against it in the personal injury suit, was on the brink of bankruptcy.²⁶ On November 7, 2006, corporate counsel for Virginia Transportation relayed these concerns to both Travelers' retained attorneys and expressed a willingness to attempt mediation again.²⁷ Virginia Transportation's counsel also informed Travelers that Woscyna had offered to settle his claim for \$500,000, and requested that Travelers immediately pay that amount and accept responsibility for the DeMarco judgment.²⁸ That same day, Travelers brought a declaratory judgment action in the United States District Court for the District of Rhode Island, naming Virginia Transportation, DeMarco, and Woscyna as defendants.²⁹

24. *Id.* at 596-97.

25. *Id.*

26. *Id.* at 597-98.

27. *Id.* at 598.

28. Counsel for Virginia Transportation also noted in the letter, "the DeMarco claimants appear willing to release your insured from the judgment in consideration of an assignment of the claims of your insured against Travelers;" and he stated that, unless Travelers was willing to accept responsibility for the entire judgment, the insureds "may have no . . . means of avoiding the need for chapter 11 protection [other than by] the assignment of those claims." *Id.* (internal quotation marks omitted).

29. The action sought a declaration that:

(1) . . . Travelers' duty to defend or settle the claims against its insureds would end when it exhausted the \$1 million policy limits; (2) that Travelers was entitled to exhaust the policy limits by paying \$1 million to Mr. DeMarco in partial payment of the judgment against Travelers' insureds; (3) that Travelers had not been required to pay the policy limits to Mr. DeMarco prior to entry of the judgment in the personal injury case; (4) that Travelers was not required to make any payment to Mr. Woscyna or National Grid (absent a judgment favorable to them) where such payment would reduce sums available to pay Mr. DeMarco's judgment; (5) that Travelers was not required to pay any interest that had accrued after the entry of the judgment in the personal injury case; (6) that Travelers was not required to make any payment to Mr. DeMarco,

Ten days later Travelers arranged a mediation involving counsel for Virginia Transportation, Doire, DeMarco and Woscyna.³⁰ At the mediation, Woscyna accepted a settlement of \$450,000 from Travelers and agreed to release Virginia Transportation, Doire and Travelers from liability.³¹ DeMarco also agreed to release Virginia Transportation and Doire from liability in exchange for payment of \$550,000 of the policy proceeds and an assignment of rights against Travelers for “any and all claims and causes of action that [the insureds] may have” against Travelers.³² The assignment gave DeMarco the right to pursue any claim against Travelers that related to Travelers’ conduct in the handling of DeMarco’s personal injury claim.³³ Subsequent to this assignment, Travelers filed an amended complaint in the then-pending federal district court declaratory judgment action.³⁴

On November 22, 2006 Demarco initiated a six-count civil suit against Travelers in Providence Superior Court naming Travelers, the Travelers’ retained attorney, and his law firm as defendants.³⁵ The suit demanded a declaratory judgment ordering Travelers to pay the entire judgment amount under *Asermely* as well as interest, attorney’s fees and costs.³⁶ On January 3, 2007, the trial

Mr. Woscyna, or National Grid in excess of the policy limits; and (7) that Travelers was not required to indemnify or pay its insureds for any amount in excess of the policy limits.

Id. at 598-99

30. *Id.* at 599.

31. *Id.*

32. *Id.* at 599-600.

33. *Id.* at 600.

34. “Travelers alleged in the amended federal court complaint that it had exhausted the policy limits in paying \$1 million to settle the claims of Mr. DeMarco and Mr. Woscyna, and it requested that the federal court enter the following judicial declarations: (1) that Travelers had satisfied its contractual duties to its insureds; (2) that Travelers had not been required to pay the entire policy limits to Mr. DeMarco where doing so would have left Virginia Transportation and Mr. Doire uninsured against other claims; (3) that Travelers was not required to pay any sums in excess of the policy limits; and (4) that Travelers was not required to indemnify or pay its insureds any sums that they might have agreed to pay Mr. DeMarco in connection with an assignment.” *Id.* at 601.

35. *Id.*

36. The other counts in the complaint alleged breach of contract, bad faith, breach of fiduciary duty, interest pursuant to Rhode Island General Laws § 27-7-2.2 (1956), that Travelers was liable to DeMarco “separate and

justice who presided over the personal injury litigation entered an order that the judgment was “satisfied in full.”³⁷ DeMarco filed a motion for summary judgment with respect to the allegations that Travelers was liable under *Asermely* and was required to pay interest on the entire amount under Rhode Island General Laws Section 27-7-2.2.³⁸ Travelers objected and filed a cross-motion for summary judgment with respect to all counts on grounds that neither *Asermely* nor Section 27-7-2.2 applied when there were multiple claimants, and that DeMarco had failed to establish that Travelers breached its duty under *Asermely*.³⁹ A hearing was held on the motions on October 16, 2007, and 11 months later the hearing justice issued a written decision granting DeMarco’s motion for summary judgment and denying Travelers’ cross motion.⁴⁰ Travelers subsequently appealed to the Rhode Island Supreme Court on grounds that the hearing justice committed reversible error because (1) the DeMarco release and the judgment-satisfied order of January 3, 2007 extinguished any claim against Travelers that might have been brought by its insureds; (2) *Asermely* did not apply in multiple claimant cases; and (3) there were facts in the record from which a finder of fact could conclude that Travelers acted in its insureds’ best interests.⁴¹

ANALYSIS AND HOLDING

Applicability of Asermely in Multiple Claimant Context

The applicability of the *Asermely* rule in a multiple claimant context was an issue of first impression for the Rhode Island Supreme Court when Travelers raised it on appeal.⁴² The Court

apart from [his] legal status” as assignee, and legal malpractice by the attorney and firm retained by Travelers. *DeMarco*, 26 A.3d at 601.

37. *Id.* at 601-2.

38. *Id.* at 602 (citation omitted).

39. *Id.* (citation omitted).

40. With respect to count one, the hearing justice noted, “[i]t is undisputed that Travelers did not attempt to negotiate any of the claims until days before the DeMarco trial was locked on to begin and, instead, refused to consider all of the three claimants’ settlement offers, relying on the claimants to negotiate their claims vis-à-vis each other and reach a global settlement within the policy limits.” *Id.* (internal quotation marks omitted).

41. *Id.* at 604.

42. *Id.* at 606.

first examined the reasoning in *Asermely v. Allstate* and noted that the general rule stemmed from the fiduciary obligation that the insurer has towards its insured, and those to whom insureds have assigned their rights.⁴³ One such fiduciary obligation is to make sure that the insured is protected from excess liability by refraining "from acts that demonstrate greater concern for the insurer's monetary interest than the financial risk" of the insured.⁴⁴ As such, the Court recognized that *Asermely* held that the question of whether an insurer acted in bad faith is irrelevant—if a judgment is rendered against an insured that exceeds the policy limits after an offer to settle within the policy limits has been rejected, the insurer is potentially liable for the amount of the judgment that exceeds the policy limits, absent a showing that the insured was unwilling to accept the initial settlement offer.⁴⁵

Travelers contended that a rejected settlement offer in and of itself should not determine that the insurer breached its fiduciary obligations in the multiple claimant context—rather, the proper inquiry should be a "reasonableness standard."⁴⁶ Travelers argued that a reasonableness standard would ensure that an inflexible rule requiring the insurer to pay the policy limits to one of numerous claimants, simply to avoid the *Asermely* liability, would not harm an insured by leaving them without coverage on the remaining claims as well, and with the burden of covering defense costs for those claims once the limits were exhausted.⁴⁷

Approaching the proper applicability of *Asermely* in the multiple claimant context, the court looked to *Peckham v. Continental Casualty Insurance Company* as well as the Fifth Circuit's decision in *Liberty Mutual Insurance Company v. Davis*.⁴⁸ In light of this precedent, the Court concluded that, in

43. *Id.* at 607.

44. *Id.* (quoting *Asermely*) (internal quotation marks omitted).

45. *Id.* at 607-608.

46. *Id.* at 609.

47. *Id.* at 610.

48. *Id.* at 611-13 (citation omitted); *see also* *Peckham v. Cont'l Cas. Ins. Co.*, 895 F.2d 830, 835 (1st Cir. 1990) (noting, "[t]he insurer has both the right and the duty to exercise its professional judgment in settling, or refusing to settle, such claims-but it must do so mindful of the insured's best interest and in good faith The insurer's goal should be to try to effect settlement of all or some of the multiple claims so as to relieve its insured of

the multiple claimant context where the claims in the aggregate exceed the policy limits, “the insurer has a fiduciary duty to engage in timely and meaningful settlement negotiations in a purposeful attempt to bring about settlement of as many claims as is possible” so as to “relieve its insured” from so much of “potential liability as is reasonably possible given the policy limits and surrounding circumstances.”⁴⁹ The Court came to this conclusion by recognizing that the insurer has an ongoing fiduciary duty to bring about settlement of as many claims as possible.⁵⁰ The Court also noted, however, that an insurer whose insured is faced with multiple claims may have to engage in a more complex assessment of those claims in order to protect the insured’s interests.⁵¹ This, combined with the language in *Asermely* that an insured need only show “that the insurer did not act reasonably and in its insured’s best interests in light of the surrounding circumstances” provided the relevant applicable standard for *Asermely* in the multiple claimant context.⁵²

The Court also concluded that the *Asermely* inquiry requires a comprehensive factual analysis that would include taking account circumstances such as the number of claimants, the relative extent of the damages each claimant suffered, the amounts of each claimants’ settlement demands, the wishes of the insured, the timing and character of the insurer’s attempt to settle, the likelihood of litigation, and the willingness of the claimants to settle.⁵³ Here, the Court found that the hearing justice erred in granting summary judgment because the record contained evidence upon which a trier of fact could conclude that Travelers acted reasonably and in the insured’s best interests.⁵⁴ Therefore,

so much of his potential liability as is reasonably possible, considering the paucity of the policy limits.”); *see also* *Liberty Mut. Ins. Co. v. Davis*, 412 F.2d 475,481 (5th Cir. 1969) (noting that in the multiple claimant context, “efforts to achieve a prorated, comprehensive settlement may excuse an insurer’s reluctance to settle with less than all of the claimants, but need not do so.”) (Also postulating that whether an insurer fulfills his fiduciary duty is determined by whether the insurer acted “in a manner reasonable calculated to protect the insured by minimizing his total liability”).

49. *DeMarco*, 26 A.3d at 613-14.

50. *Id.* at 613.

51. *Id.*

52. *Id.* at 614 (citing *Asermely*, 728 A.2d at 464).

53. *Id.* at 614.

54. *Id.* at 615.

with respect to Travelers' liability under *Asermely*, the court remanded the case back to the trial court.⁵⁵

Effect of Release and the Judgment Satisfied Order

Travelers next argued on appeal that, regardless of *Asermely*'s applicability, any claim DeMarco might otherwise have had under the assignment of rights was extinguished by virtue of the documents releasing Travelers' insureds and/or the trial justice's order that the judgment had been satisfied.⁵⁶ Travelers argued that the assignment between DeMarco and its insureds actually assigned nothing because the insureds suffered no harm that afforded a basis for legal relief.⁵⁷ Travelers argued the release between DeMarco and the insureds extinguished all liability in excess of the \$1 million policy limit and therefore the insureds were not liable for an excess judgment and suffered no harm.⁵⁸ Therefore, because the insureds suffered no harm, they had no legally cognizable claim against Travelers that could be assigned to DeMarco.⁵⁹ To this point, Travelers argued that DeMarco executed a "general release" as opposed to a covenant or promise not to execute upon the judgment against the insureds, which, in turn, relieved the insureds from any liability and extinguished the insured's rights against the insurer.⁶⁰

In response, DeMarco argued that the release was only a "part and parcel" of a larger settlement agreement that also included the assignment of rights against Travelers, and this settlement would have been reached regardless of the \$550,000 payment.⁶¹ DeMarco claimed the \$550,000 was not necessarily consideration for the general release because he would have released the insureds for nothing more than an assignment of

55. *Id.*

56. The "judgment satisfied order" argument was dismissed because it was not raised at the trial court level. *Id.* at 617.

57. *Id.* at 617-18.

58. *Id.*

59. *Id.*

60. Travelers argued that courts outside Rhode Island have held that a general release fully discharges an insured and therefore discharges any rights against the insurer. A covenant not to execute, on the other hand, does not discharge the insured's underlying liability and the insured still retains its rights against the insurer. *Id.* at 618.

61. *Id.* at 618-19.

rights against Travelers anyway.⁶² DeMarco also contended that Travelers' argument only promoted the technical legal distinctions between a general release and a covenant not to execute judgment over the intent of the parties executing the agreement.⁶³

The Court first noted that the "differential effect" of a general release as opposed to a covenant not to execute was irrelevant here, given the explicit language in the release that indicated Travelers was not released, as well as the simultaneous execution of the assignment and release.⁶⁴ As such, the Court proceeded to analyze the legal effects of the release and assignment.⁶⁵ The Court determined that the proper method for determining the legal effect of the release and assignment was to ascertain the intention of DeMarco and the insureds so as not to deprive the assignment document of meaningfulness.⁶⁶ In order to do so, it was necessary to examine the release and assignment, together, as part of the same settlement agreement; in the instant case the court determined the language of the release and assignment made it clear that the contracting parties sought to make it possible for DeMarco to pursue claims against Travelers.⁶⁷ This was further evidenced by the language in the assignment which stated it was executed, "in consideration of the General Release executed contemporaneously herewith . . ."⁶⁸ Furthermore, the intention of the parties was further solidified when Travelers' insureds explicitly promised to assist DeMarco pursue claims against Travelers as well as DeMarco's clear indication that he would not have released the insureds but for the right to pursue

62. *Id.* at 619.

63. In support of his argument, DeMarco claimed that Virginia Transportation needed the release so as to satisfy its lenders and save it from financial ruin. Furthermore if the assignment was held invalid, DeMarco would be forced to pursue litigation against the insureds because the settlement agreement would fail for lack of consideration. *Id.*

64. *Id.* at 619-20.

65. *Id.* at 620.

66. *Id.* at 624-26.

67. *Id.* at 624 (noting the language of the release, "This General Release shall not in any way be construed, *nor is it intended*, to release Travelers . . . from any and all claims that Releasors may have against Travelers in any way arising from the Litigation or any aspect thereof. The same are specifically reserved by Releasors.").

68. *Id.* at 624-25.

the claims assigned to him against Travelers.⁶⁹ In light of these facts, the Court determined that DeMarco was not barred from pursuing an *Asermely* claim and bad faith action against Travelers.⁷⁰ In so concluding, the Court recognized the value an assignment of rights has for an insured that wishes to seek protection from its insurance.⁷¹

COMMENTARY

A look at the insurance litigation over the past decade shows a growth in bad faith litigation against insurers as the judiciary and legislature have made it easier for plaintiffs to reach the deep pockets of an insurance company. Legislatures have accomplished this through the enactment of bad faith statutes, while *Asermely* and *DeMarco* are examples of judicial action. However, under *Asermely* and its progeny, i.e. *DeMarco*, a plaintiff need not even show bad faith. Rather than holding an insurance company from acting recklessly or wantonly, as is the usual language found in bad faith statutes, *Asermely*'s "reasonableness" standard, now extended to the multiple claimant context by *DeMarco*, holds an insurer to little more than a simple negligence standard. *DeMarco* makes this particularly troublesome for insurers faced with multiple claims. As Travelers' arguments point out, *DeMarco* creates the penultimate catch-22 for an insurer, a "darned if you do", "darned if you don't" situation. Unfortunately, such exposure for insurance companies will translate into higher premiums for insureds.

Finally, and even more troubling, the Court's decision to uphold the assignment of rights—despite the presence of the General Release—displays a conscious indifference towards the applicable standard of review. The General Release is considered a contract; as such, the general principles of contract interpretation apply.⁷² When a contract is clear and unambiguous the words are to be given their plain, ordinary and usual

69. *Id.* at 625.

70. *Id.* at 626.

71. *Id.*

72. *See id.* at 624 (citing *Young v. Warwick Rollermagic Skating Ctr., Inc.*, 973 A.2d 553, 558 (R.I. 2009) (holding that a release is a contractual agreement and the principles of contract interpretation apply)).

meaning.⁷³ The release signed by DeMarco between himself, Virginia Transportation, and Doire explicitly provided that DeMarco released Virginia Transportation and Doire from any causes of actions and claims, and further provided that it was not intended to release Travelers from any claims that the insureds may have against Travelers.⁷⁴ This language is not ambiguous; it proposes that Travelers is not released from any claims that the insureds may have against it. The release itself, however, disposed of the insureds' excess liability. *Asermely* only applies where there has been a judgment in excess of the policy limits—this was not the case here because the General Release extinguished the excess judgment. Therefore, the release disposed of any claims that Virginia Transportation or Doire would have had against Travelers. As such, there was no cognizable legal right that could be assigned to DeMarco.

Rather than treat the General Release as unambiguous, however, the Court, without expressly finding so in the opinion itself, considered it ambiguous and delved into an unnecessary analysis of the parties' intent. It was only after this needless foray that the Court determined that what was termed a General Release was, in fact, not one. The result is an otherwise unexplainable "mulligan" for DeMarco, and a rather confused legal community left wondering whether the Court's decision was influenced by well-settled legal principles or sympathy for DeMarco.

CONCLUSION

In *DeMarco v. Travelers Insurance Company*, the Rhode Island Supreme Court held that an insured may pursue an *Asermely* claim against its insurer, even in the multiple claimant context, if the insurer did not act reasonably and in the insured's best interests in settling a claim and which results in a judgment in excess of the policy limits. Further, the Court held that a third-party claimant is not barred from pursuing an *Asermely*, or other, claim against an insurer, which is assigned to it as part of a settlement agreement with an insured, simply because a

73. *Id.*

74. *DeMarco*, 26 A.3d at 624; see also, *supra* text accompanying note 69.

document may be termed a general release, as opposed to an agreement not to execute judgment.

J.H. Oliverio

Legal Malpractice. *Sharkey v. Prescott*, 19 A.3d 62 (R.I. 2011). The Rhode Island Supreme Court reversed in part and affirmed in part a trial justice's grant of summary judgment on two claims of legal malpractice that were filed after Rhode Island's three-year statute of limitations. The Court found that although one claim was excepted from the statute of limitations because it was not discoverable at the time of the instance of malpractice, the second claim was merely a drafting error that could be discovered with reasonable diligence at the time of the occurrence.

FACTS AND TRAVEL

In 1999, plaintiff Virginia Sharkey and her husband retained the defendant, George M. Prescott, to prepare their estate plan.¹ Pursuant to the Sharkeys' requests, Prescott established a trust indenture called "The Sharkey Family Trust" and prepared quitclaim deeds conveying the Sharkeys' two lots of land in Narragansett to the Sharkeys as trustees.² The title of one of the lots was in the names of both Mr. and Mrs. Sharkey and on which was located a vacation home (42), while the other lot's title was in Mrs. Sharkey's name alone and was vacant (43).³ Before conveyance to the trust, the Sharkeys intentionally kept the ownership of the two lots separate so that their titles would not merge.⁴ The trust included the two lots, a brokerage account, and the Sharkeys' home in Woonsocket, and upon the death of either Mr. or Mrs. Sharkey the trust estate would be divided into two trusts.⁵ The "Marital Trust" would contain the home and a small portion of the estate, and the "Residuary Trust" would contain the balance of the estate.⁶

1. *Sharkey v. Prescott*, 19 A.3d 62, 63 (R.I. 2011).

2. *Id.* at 63.

3. *Id.* n.3.

4. *Id.*

5. *Id.* at 64.

6. *Id.*

Prescott claimed that Mrs. Sharkey came to his office in July 2001 to ask why both lots were transferred to the trust, after which Prescott sent Mrs. Sharkey a letter to “memorialize the conversation” and ask the reason for her complaint.⁷ Mrs. Sharkey claimed she never received Prescott’s letter, and in an affidavit she stated that she never complained to Prescott about his preparation of the estate plan.⁸ Mr. Sharkey died in 2002⁹, and on October 8, 2003, Mrs. Sharkey met with a Narragansett zoning official to prepare to sell lot 43, where Mrs. Sharkey learned that the titles to lots 42 and 43 had merged when they were deeded to the trust and that lot 43 could not be sold separately.¹⁰ In December 2003, Mrs. Sharkey met with another attorney who told her that she could have kept separate ownership of lot 43 rather than put it into the trust.¹¹ In July 2006, Mrs. Sharkey met with a Citizens Bank representative, where she found that she could not access the principal of the brokerage account in the “Residuary Trust.”¹²

After her meetings with the Narragansett zoning official and the Citizens Bank representative, Mrs. Sharkey believed that Prescott had been negligent in preparing the estate plan.¹³ Because the purpose of the plan was to provide for the surviving spouse and Mrs. Sharkey was deprived of both the principal of the brokerage account and the value of lot 43, on October 3, 2006, Mrs. Sharkey filed a complaint in Providence County Superior Court against Prescott for legal malpractice.¹⁴ Mrs. Sharkey alleged that Prescott’s advice to convey both lots to the trust and his drafting resulting in her inability to access the principal of the trust “was a breach of [Prescott’s] duty of reasonable care, skill, and diligence.”¹⁵ Mrs. Sharkey requested relief in three forms: damages in the amount of \$400,000, the approximate fair-market value of lot 43; equitable modification of the terms of the trust, which would enable her maximum access to the principal with

7. *Id.* Prescott’s letter was dated July 19, 2001.

8. *Id.*

9. *Id.* at 65, n.1.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 64-65.

minimum tax liability; and equitable cancellation of the deed that conveyed lot 43 to the trust.¹⁶

On May 22, 2009, Prescott filed a motion for summary judgment,¹⁷ arguing that Mrs. Sharkey's claim was barred by the statute of limitations for legal malpractice.¹⁸ In opposition to the motion, Mrs. Sharkey argued that her claim fell under the "discovery" exception, which provided that for instances of malpractice not discoverable with "exercise of reasonable diligence" at the time of their occurrence, a plaintiff may file a claim within three years of discovery of an instance of malpractice when "reasonable diligence" had been exercised.¹⁹ The Superior Court justice granted Prescott's motion because Mrs. Sharkey had failed to prove that the discovery exception applied to her malpractice claim, and judgment was entered for Prescott on July 24, 2009.²⁰ On appeal to the Rhode Island Supreme Court, Mrs. Sharkey argued that the trial justice erred in finding that the discovery exception did not apply to Mrs. Sharkey's claims and that her affidavit and exhibits did not contain enough evidence to support genuine issues of material fact to survive summary judgment.²¹

16. *Id.*

17. *Id.* at 65.

18. *Id.* R.I. GEN. LAWS ANN. § 9-1-14.3 (West 2011):

Notwithstanding the provisions of §§ 9-1-13 and 9-1-14, an action for legal malpractice shall be commenced within three (3) years of the occurrence of the incident which gave rise to the action; provided, however, that:

(1) One who is under disability by reason of age, mental incompetence, or otherwise, and on whose behalf no action is brought within the period of three (3) years from the time of the occurrence of the incident, shall bring the action within three (3) years from the removal of the disability.

(2) In respect to those injuries due to acts of legal malpractice which could not in the exercise of reasonable diligence be discoverable at the time of the occurrence of the incident which gave rise to the action, suit shall be commenced within three (3) years of the time that the act or acts of legal malpractice should, in the exercise of reasonable diligence, have been discovered.

19. See R.I. GEN. LAWS ANN. § 9-1-14.3(2) (West 2011); *Sharkey*, 19 A.3d at 65.

20. *Sharkey*, 19 A.3d at 65.

21. *Id.*

ANALYSIS AND HOLDING

The two issues decided on appeal were whether it was proper for the trial justice to grant summary judgment to Prescott on Mrs. Sharkey's claims that Prescott committed malpractice when (1) he advised the Sharkeys to convey their separately owned lots into one trust and (2) he drafted the terms of the trust so that the surviving spouse could not access the principal of the "Residuary Trust."²² The Court reviewed the evidence *de novo*, noting that a grant of summary judgment is "an extreme remedy that should be applied cautiously"²³ and emphasizing that the purpose of the rule was to "identify disputed issues of fact necessitating trial, not to resolve such issues."²⁴

Advice to Convey Lot 43 to the Trust

The trial justice found that the discovery exception did not apply to Mrs. Sharkey's claim because both parties agreed that Mrs. Sharkey knew that the titles of lots 42 and 43 would merge when conveyed to the trust.²⁵ On appeal Mrs. Sharkey argued that her claim was based not on the merging of titles, but rather that Prescott was negligent in advising Mrs. Sharkey that she had to convey all of her assets to the trust, including the lot she owned separately from her husband, and that this negligence was not discoverable until she consulted with another attorney who advised that there may have been an alternative.²⁶

Examining the evidence in the light most favorable to Mrs. Sharkey, the Court agreed that Mrs. Sharkey, exercising reasonable diligence, could not have discovered Prescott's negligent advice until she consulted with another lawyer who would have offered different advice.²⁷ In finding that there was a genuine issue of material fact, the Court relied on the conflicting testimony that Mrs. Sharkey complained to Prescott in July of 2001 and that Prescott sent Mrs. Sharkey a letter as a record of

22. *Id.*

23. *Id.* at 66 (quoting *Plainfield Pike Gas & Convenience, LLC v. 1889 Plainfield Pike Realty Corp.*, 994 A.2d 54, 57 (R.I. 2010)).

24. *Id.*

25. *Id.*

26. *Id.* at 66-67.

27. *Id.* at 67.

their conversation.²⁸ Given the existence of a genuine issue of material fact, the Court found that the trial justice erred in granting summary judgment on the claim of legal malpractice in advising the conveyance of lot 43 to the trust.²⁹

Access to Principal of Residuary Trust

The trial court also granted summary judgment on Mrs. Sharkey's claim that Prescott negligently drafted the trust so that the surviving spouse could not access the principal of the "Residuary Trust" in contravention to the Sharkeys' intention for the estate plan to provide for the surviving spouse financially.³⁰ On appeal, Mrs. Sharkey argued that even with reasonable diligence, the drafting error was not discoverable until she consulted the Citizens Bank representative in July 2006 and found out she could not access the principal of the trust.³¹ On this claim the Court disagreed with Mrs. Sharkey that the error was not discoverable at the trust's execution.³² Instead, the Court relied on basic contract law, which states that "a party who signs an instrument manifests his assent to it and cannot later complain that he did not read the instrument or that he did not understand its contents."³³ Because the Sharkeys signed the document, manifesting assent to its terms that were allegedly in contravention to their plan, and because the Court found that "the provisions of the residuary trust were not beyond the apprehension of lay people," the Court agreed with the trial justice that there was no genuine issue of material fact that Prescott's drafting error was not discoverable at the time of the trust's execution.³⁴

Concurrence and Dissent

Justice Goldberg offered an opinion concurring in part and

28. *Id.*

29. *Id.* at 67-68.

30. *Id.* at 68.

31. *Id.*

32. *Id.*

33. *Id.* (quoting *Shappy v. Downcity Capital Partners, Ltd.*, 973 A.2d 40, 46 (R.I. 2009)).

34. *Id.* at 68-69 & n.7 (noting that the terms of the trust would put a reasonable person on notice for a potential malpractice claim).

dissenting in part; while concurring with the Court's grant of summary judgment on the discoverability of Prescott's drafting error at the time of the Sharkeys' manifested assent to the trust's terms, Justice Goldberg dissented from the Court's finding of a genuine issue of material fact and application of the discovery exception to Mrs. Sharkey's claim that Prescott's advice concerning the conveyance of lot 43 was negligent.³⁵ Justice Goldberg noted that Mrs. Sharkey's affidavit, while asserting that Prescott advised that "the [Sharkeys'] estate plan could not have been accomplished without placing lot 43 in the trust," fails to support this claim with either evidence of the Sharkeys' goals for their estate plan or evidence that shows that the plan could have been executed without conveying lot 43 to the trust.³⁶ Justice Goldberg also stated that her dissent especially relies on Mrs. Sharkey's failure to prove that she and her husband would have acted differently if they had known that they did not have to convey lot 43 to the trust in order to carry out their estate plan.³⁷

COMMENTARY

Although this case concerns a simple issue of civil procedure, imbedded in the Court's ruling are warnings to laypersons, admonitions against relaxing diligence and reasonable care in everyday transactions.³⁸ The big lessons are: *read* contracts before signing them and get a second opinion for legal questions. One would expect people to at least have considered the first admonition when clicking assent to a webpage's terms of use or signing a lease or even a credit card slip at the grocery store. Courts will not be sympathetic to the litigant who was too lazy or too impatient to read and understand the promises he made.

But who thinks of getting a second opinion, unless it concerns a medical diagnosis? No one would suppose that an attorney paid to set up a trust would make a mistake requiring continued, unresolved litigation eight years after the death of a spouse. And few people would be as willing to pay more than one attorney to set up a trust as they would be to pay more than one doctor to

35. *Id.* at 70.

36. *Id.*

37. *Id.*

38. *Id.* at 67-68.

diagnose an illness. And if one were to have two trusts set up, would this require a third attorney to determine which follows the intent and desires of the client?

If the Court had not found that Mrs. Sharkey exercised due diligence, she may have been left with no remedy, when all she did was rely on the advice of her attorney. The Court's implicit admonition suggests the legal community would just shuffle its feet, shrug its shoulders, and say "Too bad she didn't get a second opinion."

CONCLUSION

The Rhode Island Supreme Court held that a genuine issue of material fact exists when there is some conflict in evidence of whether an instance of legal malpractice was discoverable at the time of its occurrence, and that a genuine issue of material fact does not exist when a legal malpractice claim is based on a drafting error that was clear at the time of signing.

Tracy Harper

Municipal Law. *Moreau v. Flanders*, 15 A.3d 565 (R.I. 2011). The Rhode Island Supreme Court unanimously affirmed the constitutionality of a statute authorizing the state's Department of Revenue to appoint a receiver to a financially-distressed municipality. The Court held the statute does not violate a municipality's right to self-governance granted by the Home-Rule Amendment to the Rhode Island State Constitution, nor does it violate the separation of powers doctrine or the rights of the Mayor and City Council to due process and equal protection under the Rhode Island State Constitution.

FACTS AND TRAVEL

On May 18, 2010, the Mayor and City Council (collectively, Plaintiffs) petitioned under the then-current municipal receivership statute for a judicially-appointed receiver to assist with the financial management of the "financially distressed" City of Central Falls.¹ The next day, the Superior Court appointed a temporary receiver pending a final appointment no later than June 8, 2010.² On June 11, 2010 the General Assembly enacted an amendment to title 45, chapter 9 of the Rhode Island General Laws, namely chapter 27, section 1 of the Rhode Island Public Laws of 2010, new legislation prohibiting municipalities from petitioning for receivership and authorizing the Director of the Department of Revenue (DOR) to oversee rehabilitation of a financially distressed municipality, making the statute retroactive to May 15, 2010 (Act).³ On June 17, 2010, Plaintiffs sought

1. *Moreau v. Flanders*, 15 A.3d 565, 570 (R.I. 2011).

2. *Id.* Pfeiffer was replaced as receiver by Robert G. Flanders, Jr., Esq., before oral argument. *Id.* at 569 n.1.

3. *Id.* at 571. R.I. GEN. LAWS § 45-9-1 (2010):

It shall be the policy of the state to provide a mechanism for the state to work with cities and towns undergoing financial distress that threatens the fiscal well-being, public safety and welfare of such cities and towns, or other cities and towns or the state, with the state providing varying levels of support and control depending on

consent for dismissal of the May 18, 2010 petition, as it was now newly prohibited, and the Superior Court promptly entered its consent order permitting withdrawal of the petition, with prejudice.⁴

In accordance with the newly-enacted statute, on July 16, 2010, the director of the Department of Revenue appointed retired Superior Court Justice Mark A. Pfeiffer (Pfeiffer) as receiver to the City of Central Falls (City).⁵ Pursuant to his position as receiver, and with no notice or hearing, on July 19, 2010, Pfeiffer notified the Mayor of Pfeiffer's appointment as receiver of the City and "that [Pfeiffer had] assumed the duties and functions of the Office of Mayor . . . [and that as] a result of [Pfeiffer's] role, [the Mayor's] responsibility [would] be limited to serving in an advisory capacity . . . and [the Mayor's] compensation [would] be reduced."⁶ Despite the appointment of Pfeiffer as receiver, on September 20, 2010, the City Council passed a resolution to challenge the constitutionality of the state-appointed receivership.⁷ Two days later, Pfeiffer rescinded the City Council resolution and, without notice or hearing, informed the City Council that their new capacity was an advisory one only.⁸ On the same day, Pfeiffer filed a complaint in Superior Court seeking declaratory judgment and injunctive relief against Plaintiffs to prevent the City Council from pursuing the constitutionality claim.⁹ On September 27, 2010, Plaintiffs filed suit in Superior Court on grounds of unconstitutionality, naming the director of the Department of Revenue and Pfeiffer as defendants.¹⁰ Pfeiffer's and Plaintiffs' causes of action were consolidated and on October 21, 2010, the Superior Court ruled the Act

the circumstances. The powers delegated by the General Assembly in this chapter shall be carried out having due regard for the needs of the citizens of the state and of the city or town, and in such a manner as will best preserve the safety and welfare of citizens of the state and their property, and the access of the state and its municipalities to capital markets, all to the public benefit and good.

Id.

4. *Moreau*, 15 A.3d at 570.

5. *Id.* at 572.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 573.

constitutional.¹¹ On February 1, 2011, the parties appeared before the Rhode Island Supreme Court.¹²

ANALYSIS AND HOLDING

Arguments Raised

Plaintiffs raised several arguments supporting their claim that the Act violated the Rhode Island Constitution. First, Plaintiffs argued the Act violated the rights afforded to municipalities by the Home-Rule Amendment of the Rhode Island Constitution.¹³ Next, Plaintiffs presented their argument that the Act violated the separation of powers doctrine and the Substantive Due Process, Procedural Due Process, and Equal Protection Clauses of the Constitution.¹⁴ Finally, Plaintiffs argued that the Act produces absurd results.¹⁵

The Standard of Review

On appeal, the Rhode Island Supreme Court began with a discussion of the standard of review for challenges to the constitutionality of statutes enacted by the Rhode Island General Assembly.¹⁶ Any such statute is accorded a presumption of validity and constitutionality, any constitutional defect must be found beyond a reasonable doubt, and the challenger has the burden to prove any violation of “an identifiable aspect of the Rhode Island . . . Constitution” beyond a reasonable doubt.¹⁷

Standing

The Court addressed the question of whether the Plaintiffs have standing to bring this cause of action. In order to have standing, a plaintiff must allege that “the challenged act or action ‘has caused him or her injury in fact, economic or otherwise’” and the injury must be “concrete and particularized, and actual or

11. *Id.*

12. *Id.* at 569, 573, 589.

13. *Id.* at 574.

14. *Id.* at 579, 581, 586, 587.

15. *Id.* at 584.

16. *Id.* at 573.

17. *Id.* at 573-74 (quoting *Newport Court Club Assoc. v. Town Council of Middletown*, 800 A.2d 405, 409 (R.I. 2002)).

imminent, and not merely conjectural or hypothetical.”¹⁸ Here, the Court found that the Plaintiffs’ duties and authorities had been curtailed, and their reputations were vulnerable to adverse impacts as a result of the Act.¹⁹ The Court, therefore, found that the Plaintiffs had standing to bring this cause of action.²⁰

Home-Rule Amendment

The Court considered the Plaintiffs’ claim that the Act violated the rights afforded to municipalities by the Home-Rule Amendment, Section 1, article 13 of the Rhode Island Constitution.²¹ The Home-Rule Amendment grants the right of municipalities to self-government in all local matters, and the General Assembly has the power to act only “in relation to the property, affairs and government of any city or town by general laws which shall apply alike to all cities and towns, *but which shall not affect the form of government of any city or town.*”²² The Court undertook to determine whether the Act is an enactment of general application (whether the Act “applies alike” to all cities and towns) and whether the Act alters the form of government of a municipality.²³

General Application (“Applies Alike”)

In determining whether the Act is an enactment of general application, the Court reviewed and considered precedent.²⁴ The Court had previously held that a statute which by its terms and provisions did not apply to any specific town or city was clearly an enactment of general application.²⁵ In one such precedent, the Court noted that a statute which expressly and solely authorized a

18. *Id.* at 574 (quoting *Pontbriand v. Sundlun*, 699 A.2d 856, 862 (R.I. 1997)).

19. *Id.* at 574.

20. *Id.*

21. *Id.* Article 13, Section 1 of the Rhode Island State Constitution provides “[i]t is the intention of this article to grant and confirm to the people of every city and town in this state the right to self government in all local matters.” R.I. CONST. art. XIII, § 1.

22. *Id.* at 574-75 (quoting R.I. CONST. art. XIII, § 4) (emphasis in original).

23. *Moreau*, 15 A.3d at 574-76.

24. *Id.* at 575-76.

25. *Id.* at 575 (citing *Marran v. Baird*, 635 A.2d 1174 (R.I. 1994)).

suit against the City of Newport was found not to apply alike to all cities and towns and was, therefore, not an enactment of general application.²⁶ The Court found that the Act applies on its face to all cities and towns and does not refer to any municipality by name, and therefore the Court held that the Act is an enactment of general application that “applies alike” to all municipalities.²⁷

Alteration of Form of Government

In considering whether the Act alters the form of government of the municipality, the Court again referred to precedent, wherein the Court concluded that a statute “did not unconstitutionally alter a municipality’s form of government . . . where the impact ‘on a local government [was] contained, delineated, and temporary’” (the *Marran* standard).²⁸ Under the plain language of the Act, the receiver has the right to exercise all powers of elected officials under the law.²⁹ The Court found that the powers granted to the receiver are contained and channeled, resulting from the deliberate and progressive mechanism for state support of the municipality through the process, the ability of the Director of DOR may remove the receiver at any time, and the limitations on the powers of the receiver to actions with

[D]ue regard for the needs of the citizens of the state and of the city or town, . . . as will best preserve the safety and welfare of citizens of the state and their property, and the access of the state and its municipalities to capital markets, all to the public benefit and good.”³⁰

26. *Id.* at 575-76 (citing *McCarthy v. Johnson*, 574 A.2d 1229 (R.I. 1990)).

27. *Id.* at 576.

28. *Id.* at 577 (quoting *Marran*, 635 A.2d at 1178).

29. *Id.* at 576-77. Section 45-9-7(c) of the Rhode Island General Laws provides:

Upon the appointment of a receiver, the receiver shall have the right to exercise the powers of the elected officials under the general laws, special laws and the city or town charter and ordinances relating to or impacting the fiscal stability of the city or town including, without limitation, school and zoning matters; provided, further, that the powers of the receiver shall be superior to and supersede the powers of the elected officials . . .

R.I. GEN. LAWS § 45-9-7(c) (2010).

30. *Moreau*, 15 A.3d at 577 (quoting R.I. GEN. LAWS § 45-9-1 (2010)).

The Court held that the impact of the Act on local government was sufficiently contained and channeled.³¹

Plaintiffs contended that the *Marran* standard was no longer applicable, because the statute reviewed at that time limited the term of the receiver to the end of the municipality's fiscal year, clearly a temporary term, and the term of the receivership under the Act is not explicitly time-limited, and therefore could be permanent.³² The Court agreed that the absence of a "sunset provision" is a flaw, but found it not a fatal flaw, because the Act contains sufficient standards for objective measure of the end of the receiver's term.³³ The Act provides for conclusion of the receiver's term within a reasonable time after achieving financial stability, allows for judicial relief in the form of declaratory judgment or injunctive relief, and provides for the termination of the receiver when the fiscal health of the municipality is improved.³⁴ Notably, the Court pointed out that the Act provides that "elected officials 'shall continue to be elected in accordance with the city or town charter, and shall serve in an advisory capacity to the receiver.'"³⁵ Since the Act includes "express preservation of elected offices and the incumbents who hold those offices, even those serving under onerous impositions of state authority," the Court held that "the impact of the [A]ct on a town or city's form of government remains temporary" and the *Marran* standard continues to be applicable.³⁶ As a result, the Court held that because the Act is channeled, incidental and temporary, and does not permanently alter the form of government, it does not violate the rights afforded to municipalities by the Home-Rule Amendment to the State Constitution.³⁷

Separation of Powers

The Court next considered the Plaintiffs' claim that the Act violates the rights afforded to municipalities by the separation of

31. *Moreau*, 15 A.3d at 577.

32. *Id.* at 577-78 (citing R.I. GEN. LAWS § 45-9-3 (2009) (repealed 2010); *Marran*, 635 A.2d at 1178).

33. *Id.* at 578.

34. *Id.*

35. *Id.* at 578-79 (quoting R.I. GEN. LAWS § 45-9-7(c) (2010)).

36. *Id.* at 579.

37. *Id.*

powers doctrine of the Constitution by usurping the powers of the municipal executive and legislative branches and collapsing them into one entity, the state-appointed receiver.³⁸ The Court has previously held that "the separation of powers doctrine prohibits the usurpation of the power of one branch of government by a coordinate branch of government."³⁹

First, the Court promptly discarded the notion that the separation of powers doctrine applies at the municipal level, since "nothing in the Rhode Island Constitution or in our case law . . . guarantees, or even implicates, separation of powers considerations at the municipal level."⁴⁰ Next, the Court considered whether, if the separation of powers doctrine applied at the municipal level, the Act violated the municipality's rights under the doctrine. After considering the case law provided by the Plaintiffs, the Court came to two conclusions: 1) where a state legislature granted power to municipalities, state sovereignty remains intact and the state legislature may interfere with that grant, and 2) the "tension of power" is between a state agency and a municipal government, which are not two coordinate branches of government.⁴¹ The Court held that because 1) the doctrine does not apply at a municipal level, and (2) even if it did, the Act here does not promote the usurpation of power of one branch of government by a coordinate branch of government, the Act does not violate the rights afforded to municipalities by the separation of powers doctrine of the State Constitution.⁴²

Substantive Due Process

The Court considered Plaintiffs' claim that the Act violates a municipality's right to substantive due process under the Constitution because the power granted to the receiver via the Act "shocks the conscience because it permits the receiver to act

38. *Id.*

39. *Id.* at 579 (quoting *Town of East Greenwich v. O'Neil*, 617 A.2d 104, 107 (R.I. 1992)).

40. *Id.* at 579.

41. *Id.* at 580-81 (citing *State v. Holton*, 997 A.2d 828, 845 (Md. 2010); *Lynch v. King*, 391 A.2d 117, 122 (R.I. 1978); *Marro v. Gen. Treasurer of Cranston*, 273 A.2d 660, 662 (R.I. 1971); *State v. Krzak*, 196 A.2d 417, 421 (R.I. 1964); *City of Providence v. Moulton*, 160 A. 75, 79 (R.I. 1932)).

42. *Id.* at 581.

arbitrarily and capriciously.”⁴³ Rhode Island Case law provides that substantive due process “guards against arbitrary and capricious government action . . . having no substantial relation to the public health, safety, morals, or general welfare . . . [and] prevents the use of governmental power for purposes of oppression, or abuse of governmental power that is shocking to the conscience.”⁴⁴

The Court observed three ways that the Act affects matters of the entire state’s interest: the state consistently exercises oversight of municipal budgets and debt, the insolvency of one city or town affects the ability of all cities and towns in the state to obtain credit, and it is necessary and desirable to achieve the state government’s goal of fiscal stability.⁴⁵ As a result, the Court concluded that Plaintiffs did not meet their burden of proving the Act arbitrary, unreasonable, lacking substantial relation to the public health, safety, morals or general welfare, shocking to the conscience, or capricious.⁴⁶ Therefore, the Court held that the Act does not violate a municipality’s right to substantive due process under the Rhode Island Constitution.⁴⁷

Procedural Due Process

The Court considered Plaintiffs claims that the Act violates a municipality’s right to procedural due process due to its vagueness (effectively lack of notice and violation of the nondelegation doctrine) and its removal of elected city officials without notice or a hearing.⁴⁸

Vagueness and Nondelegation

Plaintiffs contended that the Act is unconstitutionally vague in its authorization of the appointment of a receiver after the director of the Department of Revenue has found that a “fiscal

43. *Id.*

44. *Id.* (quoting *Kaveny v. Town of Cumberland Zoning Bd. of Review*, 875 A.2d 1, 10 (R.I. 2005); *Brunelle v. Town of S. Kingstown*, 700 A.2d 1075, 1084 (R.I. 1997); *L.A. Ray Realty v. Town Council of Cumberland*, 698 A.2d 202, 211 (R.I. 1997)).

45. *Id.* at 581-82 (quoting *Marran*, 635 A.2d at 1178-79).

46. *Id.* at 582.

47. *Id.*

48. *Id.* at 582, 587.

emergency” exists, where “fiscal emergency” is not explicitly defined within the Act, and that the Act impermissibly delegates legislative power to an administrative agency without protecting citizens against discriminatory and arbitrary actions of public officials.⁴⁹

The standard regarding vagueness established in Rhode Island case law suggests that a statute is unconstitutionally vague where it “fails to delineate or to suggest any standards and contemporaneously fails to properly delegate rule making powers sufficient to provide the omitted standards,” allowing officials to act arbitrarily and with unchecked discretion.⁵⁰ The standard regarding delegation established in the case law is that a delegation is “reasonable, and thus constitutional, as long as . . . [there are] intelligible standards or principles to confine and guide the agency’s actions.”⁵¹

The Court observed that under the Act, the director of the Department of Revenue must consult with the auditor general to determine the existence of a fiscal emergency before appointing a receiver, and, therefore, may not act arbitrarily or with unchecked discretion.⁵² Further, the Act contains five factors the director of the Department of Revenue and the auditor general must consider when assessing the existence of a fiscal emergency: “projected deficits, missed audit filings, downgrading by recognized rating agency, inability to access credit market on reasonable terms, and . . . failure to respond timely to state requests for financial information.”⁵³ The Court found that the delegation of power to the director of the Department of Revenue is not unconstitutionally vague, because the five factors delineate clear standards, eliminating any need to guess or speculate about the meaning of fiscal emergency.⁵⁴ The Act specifies the policy by which the receiver or any official tasked by the director of the Department of Revenue with administering the Act are directed and constrained, and the deliberate triggering mechanisms of the

49. *Id.* at 582-83.

50. *Id.* at 582 (quoting *Fitzpatrick v. Pare*, 568 A.2d 1012, 1013 (R.I. 1990)).

51. *Id.* at 584 (citing *Marran*, 635 A.2d at 1179).

52. *Id.* at 583.

53. *Id.* at 583-84 (citing R.I. GEN. LAWS § 45-9-3(b)(1)-(5) (2010)).

54. *Id.* at 583-84.

Act provide for varying levels of support and control depending on the circumstance.⁵⁵ As a result, the Court found ample intelligible standards or principles to confine and guide agency actions.⁵⁶ The Court held that Plaintiffs' claim of vagueness without merit and the Act's delegation of power permissible.⁵⁷

Removal

The Court considered Plaintiff's claim that removal of the Mayor under the Act without notice or a hearing constitutes a violation of the due process clause of the Constitution, since the Mayor was deprived of his position without procedural due process.⁵⁸ Rhode Island case law provides that whether procedural due process is applicable depends on "the presence of a legitimate 'property' or 'liberty' interest."⁵⁹ Plaintiffs provided past Rhode Island case law wherein municipal appointees had been afforded a protected interest in their positions, and their removal was conditioned on due process.⁶⁰ The Court found that elected officials stand in a critically different position from appointed officials purely because they have been publicly elected rather than appointed, and, therefore, Plaintiffs' case law was not applicable and Plaintiffs had not shown the Mayor had a protected interest in his position to which the due process clause was applicable.⁶¹ The United States Supreme Court has historically held that "an officer elected by the general public does not have a property right in his elected office that is subject to due process" and "the nature of the relation of a public officer to the public is inconsistent with either a property [right] or a contract right," also supporting the Court's position.⁶²

Noting that even if the Mayor had a protected interest in his position, the Court found that the Mayor had not been removed from his office and was only temporarily impacted by the

55. *Id.* at 584 (citing R.I. GEN. LAWS § 45-9-1 (2010)).

56. *Id.* at 584.

57. *Id.*

58. *Id.* at 587-88.

59. *Id.* at 588 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 164 (1974)).

60. *Id.* at 588 (citing *Doris v. Heroux*, 494, 47 A.2d 633, 635 (R.I. 1945); *Brule v. Bd. of Aldermen of Central Falls*, 175 A. 478, 479 (R.I. 1934)).

61. *Id.* at 588-89.

62. *Id.* at 588 (quoting *Taylor v. Beckham*, 178 U.S. 548, 577 (1900)).

appointment of the receiver, and the Mayor's office had been preserved.⁶³ As a result, the Court held that the Mayor did not have a contract or property interest in his elected office that was subject to due process, and regardless the Mayor had not been removed from office.⁶⁴

Equal Protection

Plaintiffs argued that the Act violates the equal protection clause of the Rhode Island Constitution because the Act differentiates between union members and non-union members, treating union members more favorably.⁶⁵ The Court agreed with the receiver's contention that the Plaintiffs failed to raise this issue during trial, and only raised it in their post-decision motion for stay and relief, thereby procedurally waiving the right to raise it on appeal.⁶⁶

Lateness notwithstanding, the Court considered Plaintiffs' claim.⁶⁷ The Court noted that the Trial Judge considered and denied the post-decision motion for stay and reconsideration.⁶⁸ The Rhode Island case law provides that under the equal protection clause of the State Constitution, an unconstitutional classification "treats one class of people less favorably than others similarly situated."⁶⁹ Further, "where it has not been shown that a 'fundamental right' has been affected or that the legislation sets up a 'suspect classification,' a statute will be invalidated . . . only if the classification established bears no reasonable relationship to the public health, safety, or welfare."⁷⁰

Here, the Court found that union employees are not similarly situated to elected public officials, because union employees are not selected by vote, union employees do not develop or implement public policy, and union employees have a profoundly different

63. *Id.* at 588.

64. *Id.* at 588-89.

65. *Id.* at 586.

66. *Id.* at 586-87.

67. *Id.* at 587.

68. *Id.*

69. *Id.* at 587 (quoting *Perrotti v. Solomon*, 657 A.2d 1045, 1049 (R.I. 1995)).

70. *Id.* at 587 (quoting *Kaveny v. Town of Cumberland Zoning Bd. of Review*, 875 A.2d 1, 11 (R.I. 2005)).

relationship to the public trust.⁷¹ As a result, the Court held that because union members are not similarly situated to elected public officials, the distinction between union members and non-union members is permissible within the Act, and the Act may apply differently to union members and elected public officials and remain consistent with the equal protection clause.⁷²

Absurd Results

The Court considered Plaintiffs' claim that the Act produces absurd results, and determined that Plaintiffs provided only purely speculative examples of absurd results and a speculative and unpersuasive argument.⁷³ The case law requires that claims of unconstitutionality must be supported by real damages and may not be merely "conceivably" unconstitutional.⁷⁴ The Court found that under the Act, the receiver may exercise the powers of the authority or office to the limits inherent in that office and no further, therefore no absurd results can follow.⁷⁵

Additionally, the Court noted that since there is no person complaining of wrongful or abusive conduct by the receiver appointed under the Act, no judicial relief can follow.⁷⁶ Finally, the Court noted that the Act includes a severability clause, so that even if abuse or absurd results could be shown, the remainder of statute would still be constitutional.⁷⁷ The Court held that the Plaintiffs' claim that the Act produces absurd results is without merit.⁷⁸ On March 29, 2011, the Rhode Island Supreme Court unanimously affirmed the decision of the Superior Court and upheld the constitutionality of the Act.⁷⁹

COMMENTARY

The Rhode Island Supreme Court displayed great generosity

71. *Id.* at 587.

72. *Id.*

73. *Id.* at 584-85

74. *Id.* at 585 (citing *State v. Perry*, 372 A.2d 75, 81 (R.I. 1977))

75. *Id.* at 585.

76. *Id.*

77. *Id.* at 586.

78. *Id.*

79. *Id.* at 589.

in considering the many facets of Plaintiffs' arguments. Clearly, the issue of the constitutionality of the new receivership statute is a question of great importance, but unfortunately, Plaintiffs here presented relatively weak arguments on many sub-issues. The weak arguments presented by the Plaintiffs include the home-rule general application argument, where there was a clear precedent showing the statute was generally applicable, the absurd results argument, where Plaintiffs offered only speculative examples, and the removal question, where the Plaintiffs were clearly not removed from their offices and there was a United States Supreme Court case directly analogous. Procedural error on the part of the Plaintiffs was received with magnanimity by the Court – the equal protection argument never raised during trial was nonetheless considered carefully by the Court even though the Court was under no obligation to do so. Finally, the Plaintiffs appear slightly disingenuous, having petitioned for a receiver under the former law merely days before enactment of the current law, and subsequently complaining vehemently that the terms of the appointment of the receiver are unconstitutional.

The first central question of this case, whether it is appropriate for the Director of the Rhode Island Department of Revenue working in consultation with the Auditor General to appoint a receiver for a financially distressed municipality (rather than for the municipality to request a judicially appointed receiver), seems clearly answered in the Court's discussion of the Plaintiffs' Substantive Due Process claim.⁸⁰ Financial distress in one municipality of the state impacts all the municipalities of the state and the state itself, and therefore, it is entirely appropriate to take the decision as to whether or when to appoint a receiver out of the control of the municipality's government and place it squarely in the control of the state government.⁸¹

The other central question of this case, whether it is an infringement on a municipality's rights under the Home-Rule Amendment of the Rhode Island Constitution for the Director of the Rhode Island Department of Revenue working in consultation with the Auditor General to appoint a receiver for a financially distressed municipality (rather than for the municipality to

80. *Id.* at 581-82.

81. *Id.*

request a judicially appointed receiver), is addressed in the Court's discussion of the Home-Rule Amendment implications of the Act.⁸² Appointment of a receiver under the Act applies alike to all municipalities and does not permanently alter a municipality's form of government, and therefore is not inconsistent with the Home-Rule Amendment of the Rhode Island Constitution.⁸³

The case presented to the Court was not the ideal case for discussion of the various constitutional issues which could be raised, but the Court crafted a thoughtful and thorough analysis of all the threads of constitutionality questions which might be raised, creating a broad resource for future questions surrounding the constitutionality of the Act. Many future questions about municipal receivership will likely be resolved based on the Court's extensive analysis of the Act's constitutionality in *Moreau v. Flanders*.⁸⁴

CONCLUSION

The Rhode Island Supreme Court found that "An Act Relating to Cities and Towns – Providing Financial Stability" does not infringe on the rights of municipalities under the Home-Rule Amendment to the Rhode Island Constitution because it is generally applicable to all cities and towns and does not permanently alter the municipality's form of government.⁸⁵ The Court also determined that the Act does not violate the separation of powers doctrine because it does not provide for usurpation of power between coordinate branches of government and because the separation of powers doctrine does not apply at the municipal level.⁸⁶ The Court held that the Act does not violate the due process or equal protection clauses because it does not allow arbitrary and capricious government action unrelated to the public health, safety, morals, or general welfare, it is not unconstitutionally vague, it provides for permissible delegation of legislative power to an administrative agency, it does not effect a

82. *Id.* at 574-79.

83. *Id.*

84. *Id.* at 569.

85. *Id.* at 576, 579.

86. *Id.* at 581.

permanent removal of the Mayor from his office, and its different treatment of union members and non-union members is permissible.⁸⁷ Finally, the Court concluded that the Act does not lead to absurd results because of the inherent limits to the powers the receiver may exercise, and that Plaintiffs did not meet their burden by providing only speculative examples of possible absurd results.⁸⁸ The Court affirmed the decision of the Superior Court that the Act is not unconstitutional.⁸⁹

Karin S. Holst

87. *Id.* at 581-82, 587, 589.

88. *Id.* at 585-86.

89. *Id.* at 589.

Municipal Law. *N. End Realty, LLC v. Mattos*, 25 A.3d 527 (R.I. 2011). Cities and towns in Rhode Island cannot institute fees-in-lieu of construction of affordable housing. Although the Rhode Island Low and Moderate Income Housing Act requires cities and towns to ensure that greater than ten percent of its year-round housing is affordable housing, the statute does not authorize municipalities to assess fees against private developers who choose not to develop affordable housing units, unless the plan is specifically authorized by the Rhode Island General Assembly.

FACTS AND TRAVEL

In response to the shortage of affordable housing, the Rhode Island General Assembly enacted the Rhode Island Low and Moderate Income Housing Act (“LMIHA”) in 1991.¹ LMIHA requires that at least ten percent of each town’s year-round housing qualify as affordable housing.² A study by the Rhode Island Housing and Mortgage Finance Corporation revealed that as of 2004 the Town of East Greenwich (“the town”) did not meet the ten percent affordable housing requirement.³

On December 14, 2004, the town council adopted a comprehensive plan that would bring East Greenwich into compliance with LMIHA.⁴ This plan was a compilation of proposed strategies to bring the town into compliance, and it included a requirement that major residential developers dedicate at least fifteen percent of their developments to affordable housing or pay a “fee-in-lieu” to the town.⁵ The state director of

1. *N. End Realty, LLC v. Mattos*, 25 A.3d 527, 530 (R.I. 2011); *see* R.I. GEN. LAWS § 45-53 (2009).

2. *N. End*, 25 A.3d at 530-31 (citing R.I. GEN. LAWS § 45-53-3(4)(i), regarding LMIHA’s housing requirements).

3. *Id.* at 531. The study revealed that only 4.36% of East Greenwich’s housing qualified as affordable. *Id.*

4. *Id.*

5. *Id.*

administration approved this plan on September 26, 2005.⁶ On November 6, 2006, pursuant to the town's home rule charter,⁷ the town passed three ordinances to execute the plan.⁸ Ordinance 778 required that developers designate fifteen percent of development projects as affordable housing or else pay a fee-in-lieu to the town.⁹

On March 28, 2006, North End Realty, LLC ("North End") filed a pre-application with the town's planning board to develop a five-lot subdivision in the town.¹⁰ North End filed its preliminary plans with the town's planning board on February 20, 2007 and indicated that none of the developments would be affordable housing.¹¹ In response, the town refused to approve North End's project unless North End paid a \$200,000¹² fee-in-lieu pursuant to the ordinances.¹³

North End filed suit in Kent County Superior Court against the town finance director, the town planner, and the town council.¹⁴ The complaint alleged that the fee-in-lieu violated North End's due process rights and that the fee-in-lieu constituted an illegal taking and an illegal tax.¹⁵ North End later filed a

6. *Id.*

7. East Greenwich had adopted a home rule charter pursuant to the Rhode Island Constitution, which allows the town to "enact, amend or repeal ordinances for the preservation of the public peace, the health, safety, comfort and welfare of the inhabitants of the Town" *Id.* at 531 n.3 (quoting EAST GREENWICH, R.I., TOWN CHARTER, art. VIII, § C-67A (2000), available at <http://www.courts.ri.gov/Courts/SupremeCourt/StateLawLibrary/Pages/CityAndTownOrdinances.aspx>).

8. *N. End*, 25 A.3d at 531; see EAST GREENWICH, R.I. TOWN ORDINANCES, art. III, §§ 93-12 *et seq.* (2006); EAST GREENWICH, R.I., TOWN ORDINANCES, art. XVII, §§ 260-98 *et seq.* (2006); EAST GREENWICH, R.I., TOWN ORDINANCES, art. IX, §§ 34-31 *et seq.* (2006), *supra* note 7. The case provides the ordinance numbers as § 93-13C for Ordinance 778, and § 260-99B for Ordinance 779. Section numbers listed in this citation are based on the current town ordinances available on the state courts website.

9. *N. End*, 25 A.3d at 532.

10. *Id.* at 528.

11. *Id.* at 529.

12. Ordinance 778 indicates that the fee-in-lieu shall be \$200,000 for each affordable housing unit the developer builds that should qualify for affordable housing, but will not qualify. See EAST GREENWICH, R.I., TOWN ORDINANCES, art. III, § 93-13(B) (2006), *supra* note 7.

13. *N. End*, 25 A.3d at 529.

14. *Id.* at 528-29.

15. *Id.* at 529.

motion for injunctive relief preventing the town from enforcing the fee-in-lieu provision, and added to its arguments that the fee-in-lieu was improper because it had been imposed “without any explicit authority from the General Assembly.”¹⁶ The court denied North End’s motion and on September 8, 2008 entered final judgment for the town, holding that the fee-in-lieu was an “acceptable fee” and did not violate North End’s due process rights.¹⁷

ANALYSIS AND HOLDING

On appeal to the Rhode Island Supreme Court, North End raised four contentions: (1) the town did not have statutory authority to impose this fee-in-lieu; (2) the fee-in-lieu was an illegal tax; (3) the fee-in-lieu violated North End’s due process rights; and (4) the fee-in-lieu was equivalent to a regulatory taking without provision of compensation.¹⁸ North End argued that only the General Assembly can enact laws with statewide impact, and imposition of fees for failure to construct affordable housing is “an issue of statewide concern.”¹⁹ Therefore, because the General Assembly had not expressly authorized this fee-in-lieu through statute, North End argued that the town lacked authority to impose the fee.²⁰ In response, the town contended that it was authorized to impose the fee-in-lieu for two major reasons: (1) it adopted the fee-in-lieu in order to work towards compliance with a state law, LMIHA; and (2) the state director of administration approved the town’s comprehensive plan, which included references to charging a fee-in-lieu when developers did not develop affordable housing.²¹

The consideration of whether a town may institute a fee-in-lieu of constructing affordable housing was an issue of first

16. *Id.* (quoting North End’s motion for injunctive relief).

17. *Id.* The presiding justice held that the fee-in-lieu was a valid fee and not a tax, which would have required authorization by the Rhode Island General Assembly. *Id.* at 534.

18. *Id.* at 529-30. The Rhode Island Supreme Court did not reach the illegal tax, due process, or illegal takings issues because it held that the town did not have the statutory authority to impose the fee-in-lieu. *Id.* at 538 n.10.

19. *Id.* at 532.

20. *Id.*

21. *Id.* at 533.

impression to the Rhode Island Supreme Court.²² The Court first looked to the language of LMIHA in considering the validity of the town's fee-in-lieu provision.²³ LMIHA requires that towns develop comprehensive plans to establish compliance with the statute, and it additionally requires that these plans be submitted to the state director of administration for approval.²⁴ However, LMIHA is "completely silent" regarding a town's power to grant fees-in-lieu.²⁵

Given that the Court could not infer authority to impose fees from the language of LMIHA, it held that the only possible source for the grant of such authority would be the town's home rule charter.²⁶ However, the Court held, citing two previous Rhode Island Supreme Court cases,²⁷ that home rule charters only give towns the authority to legislate over local matters, not concerns that are statewide and therefore reserved to the General Assembly.²⁸ Three variables are to be considered in determining whether a matter is a state or local concern: (1) whether statewide, uniform regulation is necessary; (2) whether a matter is traditionally left for one body to decide; and (3) whether residents of other municipalities will be affected by the actions of one individual municipality.²⁹

The Court held that here, the need to regulate and provide affordable housing for Rhode Island residents was a statewide concern that would require legislation by the General Assembly before a municipality could choose to impose fees-in-lieu of development.³⁰ The General Assembly needed to consider all

22. *Id.* at 535.

23. *Id.* at 530-31.

24. *Id.* at 531 (citing R.I. GEN. LAWS § 45-53-4(c) (2009) and R.I. GEN. LAWS § 45-53-3(4)(ii) (2009)).

25. *Id.* at 533. The Court noted that LMIHA made only two references to fees. One reference was regarding a town's ability to charge permit application fees consistent with the fees charged for projects outside the scope of LMIHA. The second reference was permission for the State Housing Appeals Board to establish fee schedules in execution of its business. *Id.*

26. *Id.* at 534.

27. *Westerly Residents for Thoughtful Dev., Inc. v. Brancato*, 565 A.2d 1262, 1263-64 (R.I. 1989); *Newport Court Club Assoc. v. Town Council of Middletown*, 716 A.2d 787, 790 (R.I. 1998).

28. *N. End*, 25 A.3d at 535.

29. *Id.* (citing *Town of E. Greenwich v. O'Neil*, 617 A.2d 104, 111 (R.I. 1992)).

30. *Id.* at 538.

possible implications on statewide housing of imposition of such fees and provide guidelines for calculating and imposing them before municipalities could do so.³¹ The state director of administration's approval of the town's plan did not equate to approval by the state General Assembly.³²

COMMENTARY

To support its holding that specific authority to impose a fee-in-lieu is required from the General Assembly, the Court analogized this case to two similar situations in which the General Assembly did enact "specific enabling legislation" for imposition of fees.³³ However, the Court's analogy between LMIHA and the Rhode Island Development Impact Fee Act ("RIDIFA") is a bit of a stretch.³⁴

In the RIDIFA, the General Assembly made specific provisions for municipalities to impose fees against developers when the development projects would require the municipality to increase public facilities³⁵ in order to support the developments.³⁶ The Court noted that the General Assembly allowed imposition of fees in these situations because it was "in the public interest."³⁷ The statewide policy that the General Assembly sought to promote with RIDIFA was to "promote orderly growth and development" while still maintaining adequate public facilities.³⁸

The Court found similarities in this need for funds to increase public facilities necessitated by new development with the need for funds to ease the strain placed on a town by construction of non-affordable housing.³⁹ When a developer builds only non-affordable housing, the town's total housing units will increase, and therefore the percentage of affordable housing will decrease.⁴⁰

31. *Id.*

32. *Id.*

33. *Id.* at 535.

34. *See* R.I. GEN. LAWS § 45-22.4 (2009).

35. Public facilities included services such as water supply, waste removal, public schools, and road maintenance. R.I. GEN. LAWS § 45-22.4-3 (2009).

36. *N. End.*, 25 A.3d at 535 (citing R.I. GEN. LAWS § 45-22.4-2(a) (2009)).

37. *Id.* (citing R.I. GEN. LAWS § 45-22.4-2(b) (2009)).

38. *Id.* at 537.

39. *Id.*

40. *Id.*

The town will move even further away from compliance with LMIHA, and it will have to expend additional resources in order to meet this greater need.⁴¹ The Court here reasoned that because the General Assembly had provided specific provisions for fees in the RIDIFA, it would also need to have made such specific provisions in LMIHA in order to authorize East Greenwich to impose its fees-in-lieu.⁴²

Although the two Acts are similar in that they both represent situations where a municipality will face financial hardship as a result of development, these similarities are not so striking as to mandate a specific authorization of fee provisions under LMIHA.⁴³ Two major differences exist between the two Acts. First, RIDIFA allows municipalities to impose fees in order to support new *public* facilities that will be required as a result of the development projects.⁴⁴ In contrast, LMIHA requires municipalities to ensure that housing is available to low and moderate income residents with allowance for both public and private housing.⁴⁵ The General Assembly may have included the specific fee provision details in RIDIFA because municipalities would always have to find funding for public facilities to meet the needs of new developments.⁴⁶ However, municipalities have options in how to address the issue of providing affordable housing.⁴⁷ In LMIHA, the General Assembly left each municipality to develop its own comprehensive plan on how it would come into compliance.⁴⁸ Therefore, the General Assembly may have preferred to leave the decisions on methodology to each municipality rather than provide specific provisions in the language of the Act.

Second, towns are required to submit their comprehensive plan to the director of administration for approval under

41. *Id.*

42. *Id.*

43. *See id.*

44. R.I. GEN. LAWS § 45-22.4-2(a) (2009).

45. *Id.* at § 45-53-3(9).

46. *See id.* at § 45-22.4-2.

47. For example, a town could impose a fee-in-lieu similar to the one imposed by East Greenwich and use the funds to develop affordable housing on its own. Alternatively, a town could require all developers to build a certain percentage of affordable housing as a requirement of permit approval and developers would be left with the choice of building affordable housing or not building housing at all.

48. *See* R.I. GEN. LAWS § 45-53-4(c) (2009).

LMIHA.⁴⁹ The director must ensure that the plan meets the guidelines of the state planning council.⁵⁰ RIDIFA provides no similar provision for any review and approval of a town's responses to the Act.⁵¹ Therefore, the General Assembly likely wanted to ensure it provided substantial detail to municipalities on how to comply with RIDIFA because there would be no individual approval process.⁵² In contrast, the General Assembly may not have seen as great a need for specific provisions in LMIHA because the director of administration would have to give approval to any plan before it could be enacted.⁵³ Therefore, the Court's reliance on RIDIFA's fee provisions to support the idea that the General Assembly must always enact specific fee provisions to authorize towns to impose fees was tenuous at best.⁵⁴

CONCLUSION

Municipalities are not free to impose fees against developers unless the Rhode Island General Assembly has given specific statutory authorization of such fees.⁵⁵ Here, East Greenwich improperly enacted ordinances imposing fees-in-lieu of development of affordable housing.⁵⁶ The Rhode Island Supreme Court vacated the judgment of the Superior Court and remanded the case back to that court with instructions to issue an injunction to the town preventing it from imposing the fee-in-lieu provision of its ordinances.⁵⁷

Melissa R. Chalek

49. *Id.* at § 45-53-3(2).

50. *Id.*

51. *See id.* at § 45-22.4.

52. *See id.*

53. *See id.* at § 45-53-3(2).

54. *See N. End Realty, L.L.C. v. Mattos*, 25 A.3d 527, 537 (R.I. 2011).

55. *Id.* at 538.

56. *Id.*

57. *Id.*

Property Law. *Cullen v. Tarini*, 15 A.3d 968 (R.I. 2011). A party who knowingly violates a restrictive covenant is not entitled to the benefit of the doctrine of balancing the equities when a trial court justice evaluates whether or not to grant injunctive relief to the party benefitted by the restrictive covenant.

FACTS AND TRAVEL

This case is centered around two pieces of property: one located on Beacon Hill Road in Newport, Rhode Island, and another adjacent piece of property located on Hammersmith Road (Hammersmith lot).¹ The first piece of property has been owned by the plaintiff, Thomas D. Cullen, (Mr. Cullen) for 35 years.² Prior to 2002, Mr. Cullen was the owner of both the lot on Beacon Hill Road, on which his home was situated, and the Hammersmith lot, which was unimproved.³

In 2002, Mr. Cullen executed a declaration placing certain restrictive covenants upon the Hammersmith lot in favor of and for the benefit of his lot located on Beacon Hill Road.⁴ This declaration divided the Hammersmith lot into three areas, the “Homesite Building Area”, the “View Easement Area”, and the “Open Space Maintenance Area”, imposing restrictions on each area.⁵ The Homesite Building Area was the only area where construction was permitted, and any structure built within this area was limited to a building footprint of 3,500 square feet, with up to 1,000 additional square feet for other accessory structures, and no portion of any building could exceed thirty feet in height.⁶

1. *Cullen v. Tarini*, 15 A.3d 968, 971 (R.I. 2011). The Beacon Hill Road property offers a direct view of the ocean to the south. The protection of this view is the source of this litigation. *Id.*

2. *Id.*

3. *Id.*

4. *Id.* The purpose of this declaration was to preserve the ocean views of the Beacon Hill Road property. *Id.*

5. *Id.*

6. *Id.*

According to the declaration construction was prohibited within the Open Space Maintenance Area and the View Easement Area.⁷

Mr. Cullen sold the Hammersmith lot in or around 2003 to the Olingers who in turn sold the property to the defendants, Robert and Nellie Tarini (the Tarinis) in 2005.⁸ Prior to purchasing the Hammersmith lot from the Olingers, the Tarinis were notified of the restrictive covenants and sought clarifications about the restrictions within the declaration from the attorney who authored the declaration.⁹ After purchasing the Hammersmith lot the Tarinis hired Paul St. Amand (Mr. Amand) to design and build a home on the lot.¹⁰

It is at this point, immediately after Mr. Amand was hired that the record becomes less than clear.¹¹ Mr. Tarini claimed that Mr. Amand was given copies of the declaration while Mr. Amand claimed the only information he received regarding restrictions to the Hammersmith lot was a site plan depicting the boundaries of the Homesite Building Area which Mr. Amand was told were merely guidelines.¹² As early as February of 2007 the design plans prepared by Mr. Amand contained a building footprint that exceeded the allowable limits of the Homesite Building Area.¹³

At some point in the late summer or early autumn of 2007, Mr. Tarini attended a meeting at Mr. Cullen's home.¹⁴ The parties disputed exactly when the meeting took place and who other than the plaintiff and Mr. Tarini were in attendance.¹⁵ Mr. Cullen claimed that he told Mr. Tarini at this meeting that he had denied a request by the Olingers to build a home that had a footprint that did not conform to the limits of the declaration;

7. *Id.*

8. *Id.*

9. *Id.* at 971-72. The most pertinent clarification sought by the Tarinis was whether the 3,500 square foot building footprint could be combined with the 1,000 square foot accessory structure footprint to allow a home with an internal garage with a total footprint of 4,500 square feet. The attorney replied in the affirmative. *Id.*

10. *Id.* at 972.

11. *Id.*

12. *See id.*

13. *Id.* At this time the design provided for a ground floor with 4,256 square feet and a garage of 1,101 square feet. The resulting combined footprint was 5,357 square feet. *Id.*

14. *Id.*

15. *Id.*

however Mr. Tarini did not recall such a discussion taking place.¹⁶ At this meeting Mr. Tarini presented the building plans to Mr. Cullen.¹⁷ Though Mr. Tarini was aware at the time he presented the plans to Mr. Cullen that the building plans exceeded the declarations limitations, Mr. Tarini did not inform Mr. Cullen of this fact.¹⁸ Mr. Tarini claimed, however, that the building plans he presented to Mr. Cullen were sufficiently scaled to make Mr. Cullen aware that the size of the planned home was greater than the declaration allowed.¹⁹ Mr. Cullen claimed that the plans were not scaled in such a way as to make it apparent to him the size of the planned home.²⁰ Mr. Cullen did not review the plans again until December 1, 2008.²¹

Mr. Tarini encountered Mr. Cullen in Newport after the meeting at Mr. Cullen's home, but did not inform him about the proposed dimensions of the house.²² Mr. Tarini did inform Mr. Cullen that he was seeking a permit to develop the lot and invited Mr. Cullen to attend any meetings where the permit may be discussed.²³ In December of 2007, Mr. Tarini contended that Mr. Cullen was in attendance at a meeting where Mr. Tarini presented Mr. Cullen a three-dimensional scale model of the proposed home on the Hammersmith lot.²⁴ Mr. Cullen did not recall attending any meeting where Mr. Tarini presented a model of the home.²⁵

Excavation began in May of 2008 on the Hammersmith lot and construction began shortly thereafter.²⁶ In November of 2008 Mr. Cullen contacted Mr. Tarini and asked for a copy of the building plans because he was concerned that the building may

16. *Id.*

17. *Id.*

18. *See id.* at 972-73.

19. *Id.* at 973.

20. *Id.*

21. *Id.*

22. *Id.*

23. *See id.* Though the case does not indicate whether the Tarinis obtained the necessary permit, the fact that the Newport Zoning Board of Review later "stayed" the building permit necessarily implies that the permit was in fact issued. *Id.* at 974.

24. *Id.* at 973.

25. *Id.*

26. *See id.* at 973-74. At this point the proposed footprint had grown to 5,336 square feet. *Id.*

not be in compliance with the declaration.²⁷ After he did not receive the building plans, Mr. Cullen again requested them in early December, and also requested permission to conduct a land survey of the Hammersmith lot.²⁸ A survey completed at Mr. Cullen's request led the plaintiff to believe that the building under construction violated the terms of the declaration.²⁹

In late December 2008, Mr. Cullen successfully sought an appeal of the issuance of the Tarinis' building permit.³⁰ On February 11, 2009 Mr. Cullen filed a complaint in Superior Court seeking preliminary and mandatory injunctions prohibiting the Tarinis from continuing construction on their home, ordering them to remove all construction from the Open Space Maintenance Area and View Easement Area, and ordering them to reconstruct the home in accordance with the declaration.³¹ A preliminary injunction was issued on March 4, 2009 which limited the degree to which the Tarinis could continue construction and informed them that any further construction was at their own risk.³²

On June 26, 2009 the trial justice issued a bench decision in favor of Mr. Cullen permanently enjoining the Tarinis from any further violations of the declaration and enjoined them to remove all construction that was in violation of the declaration.³³ The Tarinis asseverated Mr. Cullen was guilty of laches, that the doctrine of estoppel barred the court from enforcing the restrictive covenant, and that the plaintiff's conduct amounted to a waiver of the restrictive covenant.³⁴ The Tarinis also asserted that the court must apply a balancing of the equities when considering whether to grant injunctive relief.³⁵ Mr. Tarini, Mr. Cullen, and others testified during the nonjury trial which began on May 11, 2009 and ended on May 28, 2009.³⁶

27. *Id.* at 974.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* The Tarinis had spent approximately \$1.25 million on construction at this point. *Id.*

33. *See id.* at 974-76.

34. *Id.* at 975.

35. *Id.*

36. *Id.* at 974. The parties did not dispute that the construction

Mr. Cullen and his associate Mr. Pell both testified that the meeting at Mr. Cullen's home took place in October.³⁷ Both men also testified that Mr. Cullen did inform Mr. Tarini that in the past Mr. Cullen had strictly enforced the declaration against the Olingers.³⁸ Mr. Cullen testified that the building plans he received at this meeting did not contain enough information to put him on notice that the Tarinis intended to violate the restrictive covenants.³⁹ Mr. Cullen also testified that he did not ever see the three dimensional model of the proposed home on the Hammersmith lot.⁴⁰

Mr. Tarini and his associate Mr. Craig testified that the meeting at Mr. Cullen's home took place in August.⁴¹ Mr. Tarini testified that Mr. Cullen was present at a meeting at the home of Mr. Pell where Mr. Tarini presented the three dimensional model.⁴² Mr. Tarini also testified that he presented Mr. Amand with copies of the declaration.⁴³ Mr. Amand testified that Mr. Cullen did not in any way inform him of the declaration's restrictions.⁴⁴ Additionally, Mr. Tarini admitted at the trial that he did not tell Mr. Cullen that the planned home violated the restrictions of the declaration.⁴⁵

After hearing testimony, the trial justice reviewed and weighed the evidence, considered the credibility of the witnesses, and issued the following factual findings and conclusions.⁴⁶ The trial justice concluded that Mr. Tarini was aware of the size of his proposed home and that Mr. Cullen had enforced the declaration's restrictions against the previous owners of the Hammersmith lot.⁴⁷ The trial justice determined that the drawings presented to Mr. Cullen at the October meeting were not sufficient to provide

footprint exceeded the square footage restriction of the declaration and the roof exceeded the height limitations of the declaration. *Id.*

37. *Id.* at 975.

38. *Id.*

39. *Id.* at 973.

40. *Id.* at 978.

41. *Id.* at 975.

42. *Id.* at 973.

43. *Id.* at 972.

44. *Id.*

45. *Id.* at 978.

46. *Id.* at 975.

47. *Id.*

him notice that the home would violate the declaration.⁴⁸ The trial justice found Mr. Cullen acted “promptly” once he became aware the building under construction may be in violation of the declaration.⁴⁹

The trial justice next determined that the language of the declaration was clear; the Tarinis had notice of the declaration, and willingly engaged in conduct in violation of the declaration.⁵⁰ Based on the above findings the trial judge rejected each of the affirmative defenses raised by the Tarinis.⁵¹ The trial justice then concluded that he was not required to balance the equities in determining whether to grant injunctive relief in this situation because the Tarinis had acted with actual notice in violation of the declaration and the only way the objective of the declaration could be achieved would be through injunctive relief.⁵²

The defendants filed a timely appeal to the Rhode Island Supreme Court, contending the trial court erred (1) in granting injunctive relief without balancing the equities or requiring a showing of irreparable harm and (2) in misconstruing the factual evidence.⁵³

ANALYSIS AND HOLDING

Trial justice’s factual findings

Addressing the defendants’ claim that the trial court erred by misinterpreting certain material facts, the Rhode Island Supreme Court stated that a trial justice’s factual findings are afforded great weight and will only be overturned if they are clearly wrong or if the “trial justice has overlooked or misconceived material evidence.”⁵⁴ The Court then turned to each of the defendants’ five assertions regarding the trial justice’s misinterpretations of material evidence.

The Court first rejected the defendant’s contention that the

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 975-76.

53. *Id.* at 976-77 (The Supreme Court granted a stay of the permanent injunction pending appeal).

54. *Id.* at 977 (quoting *S. Cnty. Sand & Gravel Co. v. Town of Charlestown*, 446 A.2d 1045, 1046 (R.I. 1982)).

trial justice erred by determining there was insufficient information to put Mr. Cullen on notice that the planned design was in violation of the declaration.⁵⁵ The Court first accepted the trial justice's reasoning that the building plans did not contain enough information to put Mr. Cullen on notice.⁵⁶ The Court noted that Mr. Tarini failed to inform Mr. Cullen that the planned home violated the declaration even though Mr. Tarini had the opportunity and "that Mr. Tarini was aware that plaintiff would refuse any request to waive the restrictive covenants."⁵⁷ The Court also rejected the Tarinis' argument that even if the building plans did not put Mr. Cullen on notice of the violation to the declaration, the three dimensional model did.⁵⁸ The Court concluded that even though the trial justice made no specific findings regarding the model, his other findings regarding the lack of significant information in the drawings precluded a finding that Mr. Cullen had actual notice of the violations.⁵⁹

The Tarinis' asseveration that the trial justice misconceived the evidence concerning Mr. Cullen's timely notice *vel non* of his intention to strictly enforce the restrictive covenants was also rejected by the Court.⁶⁰ The Court stated that the trial justice was entitled to determine that the plaintiff and his witnesses were more credible, and to believe that Mr. Cullen had made clear to the Tarinis that he had strictly enforced the covenants in the past.⁶¹ The Court found that the evidence indicated Mr. Cullen acted to enforce the covenant as soon as he became aware that the terms of the declaration were being violated, bolstering the trial justice's determinations.⁶² For these reasons the Court concluded the trial justice did not err in finding that Mr. Cullen did not delay enforcing the restrictive covenants and was neither guilty of laches, nor had he waived his right to enforce the restrictive covenants.⁶³

The Court also rejected the defendant's argument that the

55. *Id.*

56. *Id.*

57. *Id.* at 978.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 979.

trial justice erred by concluding that the Tarinis had come to the court with unclean hands.⁶⁴ Neither party disputed the fact that the Tarinis had actual notice of the restrictions prior to purchasing the property.⁶⁵ Additionally, the trial justice did not err in finding that Mr. Tarini knew the planned building violated the declarations and that Mr. Tarini failed to notify Mr. Cullen of the size of the planned building.⁶⁶ The Court analyzed the undisputed facts as well as the trial justice's factual findings and determined the trial justice did not err by concluding the Tarinis acted in bad faith and came to the court with unclean hands because the Tarinis knowingly violated the terms of the restrictive covenant.⁶⁷

The Court also declined to accept the Tarinis' final assertion that the trial justice failed to determine certain violations of the declaration actually occurred, which would have constituted a reversible error.⁶⁸ The defendants alleged that certain factual controversies regarding violations to the declaration in addition to the 4,500 square footage restriction and height restriction were not resolved by the trial justice.⁶⁹ The Court concluded that the trial justice was not required to resolve these controversies because the parties did not dispute that other restrictive covenants had been violated.⁷⁰

Irreparable Harm

While irreparable harm is necessary before a trial court may grant injunctive relief, money damages are not necessary for a showing of irreparable harm.⁷¹ The defendants argued that the trial justice erred by granting injunctive relief to the plaintiff because the plaintiff had not made a showing that he would suffer irreparable harm if the injunction were not granted.⁷² The Court noted that this issue and the remaining questions of law are

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 980.

72. *Id.* at 979.

reviewed *de novo*.⁷³ The Supreme Court recognized that “injunctive relief is an appropriate remedy so long as the purpose for which the restrictive covenant was created continues to exist.”⁷⁴ The Court then held that the trial justice did not err because the purpose of the restrictive covenant was to preserve Mr. Cullen’s unobstructed ocean view and that the only way to continue to fulfill the purpose of the covenant would be to grant injunctive relief.⁷⁵

Balancing the Equities

The Court disagreed with the defendant’s final contention, that the trial justice erred by failing to balance the equities between parties prior to granting injunctive relief.⁷⁶ The defendants asserted that the trial justice’s reliance on *Ridgewood Homeowners Association v. Mignacca* was inconsistent with the Court’s prior ruling in *Belliveau v. O’Coin*.⁷⁷ The Tarinis claimed that the Supreme Court’s holding in *Belliveau* required the trial justice to balance the equities before granting injunctive relief.⁷⁸ The Court, however, explained that this situation was similar to two other cases, *Martellini* and *Ridgewood*, where the court did not require a balancing of the equities prior to enforcing a restrictive covenant.⁷⁹ The Court explained that in *Belliveau* it held that although balancing the equities was appropriate in some situations, it is not always necessary to do so.⁸⁰ The Court made

73. See *id.* at 977 (citing R.I. Depositors Econ. Prot. Corp. v. Bowen Court Assocs., 763 A.2d 1005, 1007 (R.I. 2001)).

74. *Id.* at 980 (citing RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 8.3, cmt. b at 495-96 (2000)).

75. See *id.*

76. *Id.*

77. *Id.*; see also *Ridgewood Homeowners Ass’n v. Mignacca*, 813 A.2d 965 (R.I. 2003); *Belliveau v. O’Coin*, 557 A.2d 75 (R.I. 1989).

78. *Cullen*, 15 A.3d at 980.

79. *Id.* at 981. In *Martellini* the Rhode Island Supreme Court did not apply a balancing of the equities when requiring the operator of a home day-care center who violated an unambiguous restrictive covenant to close the business. In *Ridgewood* the Court also did not require a balancing of the equities and held that “proof of a violation of a restrictive covenant was sufficient of a court to grant injunctive relief. *Cullen*, 15 A.3d at 981 (citing *Martellini v. Little Angels Day Care, Inc.*, 847 A.2d 838, 845 (R.I. 2004) and *Ridgewood*, 813 A.2d at 975).

80. See *id.*

clear that balancing the equities was appropriate in *Belliveau* because of the unique facts of the case, which were easily distinguishable from those at hand.⁸¹ The Court then concluded that the trial justice was not required to balance the equities in this case.

Finally, even though the Court had determined the trial justice was not required to balance the equities, the Court evaluated whether the trial justice abused his discretion by failing to do so.⁸² The Tarinis asserted that injunctive relief was inequitable in this situation because of the substantial amount of money they had spent thus far in construction and because of the relatively little harm Mr. Cullen would suffer.⁸³ However the Supreme Court determined the trial justice did not abuse his discretion by deciding not to balance the equities.⁸⁴ Generally the benefit of balancing the equities is reserved for innocent parties, and this right does not extend to parties who knowingly and deliberately violate a restrictive covenant.⁸⁵

COMMENTARY

The Rhode Island Supreme Court held that a party who comes to court with unclean hands is not entitled to a balancing of the equities prior to determining whether to grant injunctive relief.⁸⁶ The case is significant because the Court made clear that a trial justice is not required to balance the equities in all circumstances prior to granting injunctive relief. The trial justice's decision not to balance the equities was appropriate because the defendants came to the court with unclean hands.

81. *Id.* at 980-81. In *Belliveau* the plaintiffs owned a burdened parcel upon which the defendants had the right of first refusal for any sale. The plaintiffs attempted to transfer the parcel to a corporation wholly owned by the plaintiffs and the defendants sought to enforce the right of first refusal, forcing the plaintiffs to sell the parcel to the defendants. The Rhode Island Supreme Court held it was appropriate to balance the equities in declining enforce the covenant because strictly enforcing the covenant would result in an "economic windfall" to the benefit of the defendants. *Id.* (quoting *Belliveau*, 557 A.2d at 76, 80).

82. *Id.* at 981.

83. *Id.*

84. *Id.* at 982.

85. *Id.*

86. *Id.* at 983.

Were the trial justice required to balance the equities between parties prior to granting injunctive relief, the result at the trial level may have been different given the amount of money spent by the defendants and the difficulty in quantifying the harm to the plaintiff.

The Supreme Court's decision here should encourage parties burdened by restrictive covenants to be honest and forthright when seeking to deviate from the terms of a declaration. By allowing a trial court to ignore the equities between parties when determining whether to grant injunctive relief, burdened parties are not encouraged to expend as much money as possible when violating a restrictive covenant, thus tipping the balance of equities in favor of their cause and allowing the burdened party to defeat the purpose of the restrictive covenant. This decision reinforces the principle that the enforcement of restrictive covenants is an equitable issue and a party who does not come to court with clean hands will not reap the benefits of equity.

CONCLUSION

The Rhode Island Supreme Court affirmed the trial court's decision which granted Mr. Cullen all requested injunctive relief and ordered the Tarinis to pay all of Mr. Cullen's fees and costs incurred by enforcing the declaration. The Court determined that the trial justice made reasonable factual findings which were free from material misconceptions of the evidence. The Court also determined that the trial justice did not err by declining to balance the equities between the parties before granting injunctive relief.

Andrew S. Tugan

Statutory Interpretation. *Ryan v. City of Providence*, 11 A.3d 68 (R.I. 2011). The Supreme Court of Rhode Island considered whether a former government employee must be convicted of a criminal offense related to his employment before the retirement board can begin hearings to reduce or revoke that former employee's pension benefits. The Honorable Service Ordinance ("HSO") allows the state to reduce or revoke a former employee's pension benefits if that former employee acts contrary to what is considered "honorable service." The Supreme Court of Rhode Island held that the criminal conviction of a crime related to that individual's public employment is necessary before the board can begin hearings.

FACTS AND TRAVEL

The appellant in this case was John J. Ryan, a retired captain of the Providence Police Department, who asked the Supreme Court of Rhode Island to vacate the judgment of the Superior Court.¹ In a recent investigation, "Operation Plunder Dome," into the corruption and scandal within the municipal government in Providence, numerous city officials were convicted in federal courts of "various acts of malfeasance."² Retired police Chief Urbano Prignano, Jr. stated during the investigation that "favored" applicants eligible for promotions within their police departments were given source materials for their written examinations.³ The appellant was implicated in this scheme by Mr. Prignano however was neither formally charged with criminal charges or wrongdoings, nor did he ever admit his involvement; the issue was put on the back burner but did not go away.⁴

Prior to the investigation which led to the case at bar, the appellant had begun receiving his monthly pension benefits after

1. *Ryan v. City of Providence*, 11 A.3d 68, 68-69 (R.I. 2011).

2. *Id.*

3. *Id.*

4. *Id.*

his retirement from the force on June 11, 2002.⁵ On October 21, 2008 appellant was served with a notice that the board was holding a hearing to determine whether to reduce or revoke his pension benefits.⁶ It was alleged that during his tenure appellant (1) was given free or underpriced vehicles and low cost maintenance from a city vendor in return for his supervising the vendor's contract with the city, (2) assisted officers whom he favored in obtaining source material prior to their promotional examinations, and (3) he himself had received source materials prior to his 1996 captain promotional examination.⁷ In response, the appellant filed suit in Superior Court seeking a declaratory judgment on November 18, 2008.⁸

In his suit, the appellant alleged that a conviction of a crime related to his employment, plea of guilty, or a plea of *nolo contendere* is a necessary prerequisite under the HSO⁹ before the board can convene a "reduction or revocation hearing."¹⁰ This case was consolidated with the cases of four other individuals because of common question of law to be decided.¹¹ The board hearings were stayed until three issues of first impression were resolved: "(1) Is a criminal conviction a prerequisite to action by the board in all cases?; (2) Does the Superior Court have jurisdiction to hear an action brought by the board to enforce its recommendations under the HSO?; (3) If that court does have jurisdiction, should it apply a deferential or a *de novo* standard of review when reviewing decisions made by the board?"¹² The trial judge held that a criminal conviction was not necessary and only a showing that an employee failed to give "honorable service" was

5. *Id.*

6. *Id.* The notice did not specifically state that he was in violation of the HSO but that was later made clear. *Id.* at 69 n.3.

7. *Id.* (The last two allegations were generally for participating in corrupting the Providence Police Department's promotional process).

8. *Id.*

9. PROVIDENCE, R.I., CODE OF ORDINANCES § 17-189.1 (1999).

10. *Id.* The appellant also asserted that the officer assigned to preside at his hearing had a conflict of interest and that the six year period was unreasonable, but neither issue was raised on appeal. *Id.* at 69 n.4

11. *Id.* at 70 (The four other individuals had already had their pensions reduced or revoked. Those individuals are Anthony Annarino, Frank Corrente, Kathleen Parsons, and Urbano Prignano).

12. *Id.*

required to reduce or revoke a pension under the HSO.¹³ Additionally, the trial judge found that the Superior Court had jurisdiction over any action brought under the HSO and that deference would be given to the board's decisions.¹⁴ The appellant appealed this decision to the Rhode Island Supreme Court.¹⁵

ANALYSIS AND HOLDING

The Supreme Court of Rhode Island is the final arbiter of statutory construction.¹⁶ Because the Court reviews cases of statutory interpretation *de novo*, the Court determined that the same rules shall apply when interpreting an ordinance.¹⁷ The goal is to construe an ordinance to give full effect to the legislative intent and enact the most consistent meaning.¹⁸ The ordinance's language will provide the intent of the legislature and when the ordinance is clear and unambiguous the Court will give the words their plain and ordinary meanings.¹⁹ An ordinance is clear and unambiguous when the Legislature has not qualified any words and the true import of the words will be determined with regard to the broader context of the ordinance.²⁰

A. *Providence's Honorable Service Ordinance*

The HSO²¹ allows for pension benefits to be paid only to employees who render honorable service.²² The ordinance defines four categories of crimes which are related to one's public employment which would allow the board to reduce or revoke that public employee's pension benefits.²³ Section 17-189.1(a)(4)²⁴

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 70-71.

19. *Id.* at 71.

20. *Id.* (Individual sections will be considered in the context of the entire statutory scheme and not independently).

21. PROVIDENCE, R.I., CODE OF ORDINANCES § 17-189.1 (1999).

22. *Ryan*, 11 A.3d at 71.

23. *Id.* at 71-72. Among these crimes are fraud, bribery, aiding or abetting an embezzlement of public funds, aiding or abetting a felonious theft by a public employee of his employer, and those who use their public position to gain or realize a profit or advantage for himself or other person. *See* § 17-

provides that reduction or revocation of a former public employee's pension benefits is authorized "if such employee is convicted of or pleads guilty or *nolo contendere* to any crime related to his or her public employment."²⁵ Pursuant to section 17-189.1(a)(5)²⁶, as soon as the conviction or plea occurs, the board may begin the reduction or revocation hearing.²⁷ If it is determined that a former public employee's pension benefits need to be reduced or revoked, the board shall file suit in Superior Court.²⁸ The last section of the ordinance, section 17-189.1(a)(6)²⁹, specifically states that the plea of guilty or *nolo contendere* must result in a conviction.³⁰

B. Arguments of the Parties

The appellant argued that the ordinance's provisions are unambiguous and that the provisions regarding the specific criminal convictions are instructions about when the honorable service requirement had not been met.³¹ He further contended that because the provisions of the ordinance determine what constitutes a failure to render honorable service, that condition is limited to those convictions delineated in the ordinance.³² Summarily, the "hearing process and subsequent civil action provided for in the ordinance are permitted only when there is a conviction."³³ The appellant also urged the Court to look at relevant legislative history but the Court determined this was unnecessary because the intent of the legislature is readily apparent from the plain meaning of the words.³⁴

The City attempted to make an argument which would break

189.1(a)(2).

24. § 17-189.1(a)(4).

25. § 17-189.1(a)(4); *Ryan*, 11 A.3d at 72.

26. § 17-189.1(a)(5).

27. *Ryan*, 11 A.3d at 76.

28. *Id.* at 72. The procedure here was determined pursuant to § 17-189.1(a)(5). PROVIDENCE, R.I., CODE OF ORDINANCES § 17-189.1(a)(5) (1999).

29. § 17-189.1(a)(6).

30. *Ryan*, 11 A.3d at 72.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 72-73. (The legislative history the appellant wishes the Court to consider is the record of the adoption of the HSO, prior common law, comparable state legislation, and debate preceding the HSO's adoption).

the ordinance down into pieces. The City argued that the ordinance should be read disjunctively so that action could be taken by the board if the retiree either failed to provide honorable service by engaging in conduct which is inappropriate and does not result in a conviction or is convicted of a crime related to his employment.³⁵ Drawing on the Rhode Island State Constitution³⁶, the city believed that the public employees must be held to the highest standards of ethical conduct and not use their public positions for private gain or advantage.³⁷ By using the Rhode Island Constitution, the Court concluded that this would force the Court to “engage in mental gymnastics” and be in conflict with principles of statutory interpretation.³⁸

In a prior Rhode Island Supreme Court case,³⁹ the Court held that there was a common law requirement of honorable service before drawing a pension.⁴⁰ The adoption of the honorable service requirement in the HSO is merely a codification of this long-held common law principle. Thus, when the Legislature adopted the HSO, it specifically intended to spell out the circumstances under which a former public employee would be in violation of the honorable service requirement and when the board would be required to initiate the reduction or revocation hearings.⁴¹ A hearing will only be pursued when there has been a criminal conviction related to the retiree’s employment.⁴²

C. Interpreting Providence’s Honorable Service Ordinance

While the Court only considered the plain and natural meaning of the words in interpreting the ordinance, the words were not looked at in isolation.⁴³ Rather, the Court considered the words in the context of the enactment as a whole.⁴⁴ Additionally, provisions were not interpreted independently; rather, they will be

35. *Id.* at 73.

36. R.I. Const. art. III, § 7.

37. *Id.*

38. *Ryan*, 11 A.3d at 73.

39. *See In re Almeida*, 611 A.2d 1375, 1377 (R.I. 1992).

40. *Ryan*, 11 A.3d at 73 (citing *Almeida*, 611 A.2d at 1377).

41. *Id.* at 74.

42. *Id.*

43. *Id.*

44. *Id.*

interpreted with regard to the entire ordinance.⁴⁵

The phrase “honorable service” is only found twice in the ordinance.⁴⁶ The Court realized that if they were to accept the government’s argument they would then have to separate both provisions where “honorable service” is mentioned and then disregard the rest as “surplusage.”⁴⁷ The Court found that it would be absurd to recognize that “honorable service” is not linked to the other provisions of the ordinance and is somehow independent of the other conduct which constitutes an HSO violation.⁴⁸ The Court determined that the criminal convictions mentioned in the ordinance failed to meet the definition of “honorable service.”⁴⁹ The ordinance must be construed as containing an exhaustive list of conduct which is considered a violation of one’s “honorable service.”⁵⁰ The Court reasons that the Legislature would not have gone through the trouble of delineating an exhaustive list if the ordinance was to be interpreted to include other conduct.⁵¹ Additionally, the Legislature expressly excluded pleas of guilty and *nolo contendere* which did not result in a conviction, meaning that only a conviction will trigger the hearing laid out in the ordinance.⁵² The board only has the authority to act when there has been a conviction.⁵³ Including only that which is specifically excluded in the ordinance would be absurd and illogical; such an interpretation is impermissible.⁵⁴ Furthermore, other state laws⁵⁵ specifically provide that those who enter a plea of guilty or *nolo contendere* and are sentenced to probation will not be considered as having been convicted upon completion of probation.⁵⁶

45. *Id.*

46. *Id.* (Specifically, the term is only found in the title and in § 17-189.1(a)(1)).

47. *Id.* at 74-75.

48. *Id.* at 75.

49. *Id.*

50. *Id.*

51. *Id.* (The Court states that they will be holding to the old maxim of interpretation “*expresio unius est exclusion alterius*” meaning “the expression of one thing is the exclusion of another”).

52. *Id.*

53. *Id.*

54. *Id.*

55. R.I. GEN. LAWS § 12-10-12 (1956); R.I. GEN. LAWS § 12-18-3 (1956).

56. *Ryan*, 11 A.3d at 76 (R.I. 2011).

The Court held that the HSO is clear and unambiguous.⁵⁷ Because of the clarity and unambiguity, the words in the ordinance are given their plain and ordinary meaning.⁵⁸ Furthermore, a conviction of a crime related to one's public employment is a necessary prerequisite to the board taking action.⁵⁹ Thus, mere allegations, a plea of guilty not resulting in a conviction, or a plea of *nolo contendere* not resulting in a conviction are insufficient under the HSO for the board to begin pension benefit reduction/revocation hearings.⁶⁰

COMMENTARY

The intent of the Legislature in enacting the HSO is clear: no more benefits for those who are corrupt. Seth Yurdin, the Majority Leader of the Providence City Council, stated in an interview that "the intent of the Honorable Service ordinance, has been to hold accountable individuals who commit a crime related to their public employment."⁶¹ Corruption has long been a problem in Providence.⁶² In the past, some Providence civil servants have realized extra-legal benefits and the city is tired of the poor image this portrays.

To fight this image, the Legislature took action in 1999. The initial enactment in 1999 of what is now the HSO got the ball rolling but it was all bark and no bite. Providence Finance Committee Chairman John J. Iglizzi recognized the failings of the 1999 ordinance as loopholes which allowed those who had acted dishonorably to escape without consequences.⁶³ While the Supreme Court of Rhode Island in this case⁶⁴ makes clear that a criminal conviction is a requirement for the board to initiate reduction or revocation hearings, the statute in its entirety has

57. *Id.* at 76.

58. *Id.*

59. *Id.*

60. *See id.*

61. *Council Passes New Honorable Service Ordinance*, Official Website of the Providence City Council (Mar. 18, 2011), <http://council.providenceri.com/council-passes-new-honorable-service-ordinance>.

62. The vast majority of public servants in Providence are engaging in "honorable service" but there are a few documented cases of individuals which give the rest of the Providence public servants a bad reputation.

63. *Id.*

64. *Ryan*, 11 A.3d at 76.

considerably broader reach. Not only is a conviction not necessary, but other sections of the ordinance have a much more lenient standard. Section 17-189.1(b)(2)(E)⁶⁵, not mentioned in the opinion, allows the board to weigh a plethora of factors in determining when one has acted "dishonorably" and not only when one has failed to perform within the "honorable service" standard.⁶⁶ Additionally, the ordinance permits the hearings to begin if the weighing of the Section 17-189.1(b)(2)(E)⁶⁷ factors are sufficient to support a finding by the board using a preponderance of the evidence standard that the employee has engaged in "dishonorable conduct." It was clearly the intent of the legislature to reach more conduct than merely convictions related to employment, guilty pleas, and pleas of *nolo contendere*.

Using the Court's own analysis, this section must be read together with all of the other sections. Each section is construed in light of the entire enactment and section 17-189.1(b)(2)(E)⁶⁸ suggests that a criminal conviction is not the only conduct which will satisfy the ordinance. In fact, the ordinance gives broad discretion to the board to determine what "dishonorable conduct" may include. The "dishonorable conduct" section nowhere states that a criminal conviction is required for a violation of the ordinance.⁶⁹ According to the text, it is clear that not only does a criminal conviction satisfy the ordinance, but there could be other conduct which would be sufficient. The legislature would not have gone through the trouble of putting in sections 17-189.1(b)(2)(E)⁷⁰ and 17-189.1(d)⁷¹ if it did not intend to include more conduct than criminal convictions relating to a former employee's public service. Therefore, a criminal conviction and any other conduct which the board deems "dishonorable" may result in the board taking action to reduce or revoke pension benefits.

While a criminal conviction may be necessary under a few

65. PROVIDENCE, R.I., CODE OF ORDINANCES § 17-189.1(b)(2)(E) (1999).

66. *Id.* (The factors to be weighed include the nature of the misconduct or crime and the quality of moral turpitude or the degree of guilt and culpability. This particular section of the ordinance is not one which the Supreme Court of Rhode Island addresses.).

67. § 17-189.1(d).

68. § 17-189.1(b)(2)(E).

69. *Id.*

70. *Id.*

71. § 17-189.1(d)

sections of the ordinance, the entire ordinance read as a whole explicitly allows for a hearing by the board if the conduct is only determined to be “dishonorable.” Section 17-189.1(b)(2)(E)⁷² does not state a conviction requirement and is an expressed departure from that requirement. In a town which has been riddled with corruption it is highly doubtful that the Legislature intended to crack down in only a strict sense on very specific conduct. To close all the loopholes and really give this piece of legislation some teeth, the HSO should have been interpreted to include more conduct. Bringing more conduct within the reach of the HSO would allow the board to initiate more hearings to reduce or revoke pension benefits. The result would be to ensure that civil servants would engage in “honorable service.” Any corruption within Providence would come to a grinding halt. Sections 17-189.1(b)(2)(E)⁷³ and 17-189.1(d)⁷⁴ crackdown on corruption by bringing more conduct within reach of the board and these sections need to be applied for the full force of the HSO to be felt.

CONCLUSION

In interpreting the HSO, the Supreme Court of Rhode Island applied principles of statutory interpretation and held that the ordinance was clear and unambiguous on its face.⁷⁵ Furthermore, the Court held that there must be a criminal conviction of a crime related to a retiree’s public employment for the board to take action to reduce or revoke that individual’s pension benefits.⁷⁶

Collin A. Weiss

72. § 17-189.1(b)(2)(E).

73. *Id.*

74. § 17-189.1(d)

75. *Ryan*, 11 A.3d at 76.

76. *Id.*

Tort Law. *DaPonte v. Ocean State Job Lot, Inc.*, 21 A.3d 248 (R.I. 2011). A plaintiff employee of a retail store does not establish a violation under Rhode Island General Law Section 9-1-28.1(a)(1) of her right to privacy through an unreasonable intrusion on her physical solitude or seclusion when a defendant member of high-level management demonstrates his displeasure by taking a misplaced price tag and putting it on the plaintiff's shoulder without warning.

FACTS AND TRAVEL

This case arose from an incident on October 25, 2001 at the North Kingstown Ocean State Job Lot (Ocean State) between defendant Mark Perlman, the corporation's president and CEO, and plaintiff Irene DaPonte, a former assistant manager of the store.¹ Prior to the store's opening that morning, it was Ms. DaPonte's duty to "walk the store" with Mr. Perlman. "Walk the store" refers to a customary practice wherein a visiting member of high-level management (Perlman) inspects, critiques, and evaluates the store with the store's senior on-duty employee (DaPonte).² During the inspection, Mr. Perlman became upset by the misplacement of a price tag on a rug.³ While the details of Mr. Perlman's subsequent actions were a matter of dispute between the parties, the parties did agree that Mr. Perlman took the misplaced price tag and put it on Ms. DaPonte's shoulder without warning.⁴ Subsequently, Ms. DaPonte filed a complaint alleging a

1. *DaPonte v. Ocean State Job Lot, Inc.*, 21 A.3d 248, 249 (R.I. 2011). Ocean State Job Lot is a retail store with several locations throughout Rhode Island. *Id.*

2. *Id.*

3. *Id.* The misplaced price tag concerned Mr. Perlman because it could easily be switched with a lower-priced tag in a process known in the retail industry as "tag-switching," wherein a customer switches the price tag of a higher-priced item with a lower-priced item prior to checkout. *Id.* at 249-50.

4. *Id.* at 250. Ms. DaPonte claimed Mr. Perlman "slammed" the price tag on her shoulder, while Mr. Perlman described his conduct as an

violation of her right to privacy under Rhode Island General Law Section 9-1-28.1(a)(1),⁵ and sought to extend liability from Mr. Perlman to Ocean State based on the legal theory of *respondeat superior*.⁶

In March 2008, the case was tried in the Superior Court without a jury, and final judgment was entered in March 2009, dismissing Ms. DaPonte's claim with prejudice.⁷ The Superior Court found that, "[n]otwithstanding the glaring inappropriateness of the Defendant's actions, which amount to criminal assault and battery, the [c]ourt finds that Perlman's conduct is not actionable under [Rhode Island General Law Section 9-1-28.1].⁸ This unfortunate incident is simply not an occurrence which falls under the language of [Rhode Island General Law Section 9-1-28.1], nor is it an occurrence which the right to privacy statute was intended to address."⁹ Ms. DaPonte timely appealed to the Rhode Island Supreme Court.¹⁰

"inconsequential touching." *Id.*

5. *Id.* This statute provides an individual with '[t]he right to be secure from unreasonable intrusion upon one's physical solitude or seclusion.' *Id.* (quoting R.I. GEN. LAWS § 9-1-28.1 (1997)). In its entirety, § 9-1-28.1(a)(1) provides:

(a) Right to privacy created. It is the policy of this state that every person in this state shall have a right to privacy which shall be defined to include any of the following rights individual:

(1) The right to be secure from unreasonable intrusion upon one's physical solitude or seclusion;

(i) In order to recover for violation of this right, it must be established that:

(A) It was an invasion of something that is entitled to be private or would be expected to be private;

(B) The invasion was or is offensive or objectionable to a reasonable man; although,

(ii) The person who discloses the information need not benefit from the disclosure.

R.I. GEN LAWS § 9-1-28.1(a).

6. *DaPonte*, 21 A.3d at 250. In addition, Ms. DaPonte filed a claim for negligent hiring and supervision, which was dismissed on the defendant's motion for summary judgment, and a claim for intentional infliction of emotional distress, which was dismissed by joint stipulation of the parties. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

ANALYSIS AND HOLDING

The Supreme Court of Rhode Island began its discussion by setting forth its standard of review, which is to give great deference to the trial justice's findings of fact, disturbing them only if they are clearly wrong, and to review questions of statutory interpretation *de novo*.¹¹ The Court then commenced its *de novo* review of Rhode Island General Law Section 9-1-28.1, which gives an individual the "right to be secure from unreasonable intrusion upon one's physical solitude or seclusion."¹² In its analysis, the Court relied heavily on *Swerdlick v. Koch*, wherein it held that a defendant had not violated this statute despite photographing and documenting his neighbor's activities over a period of several months.¹³ The Court emphasized the fact that that the defendant's surveillance was "not invading shielded activities" in reasoning that Section 9-1-28.1 "only protects against an invasion of one's physical solitude or seclusion, neither of which is present when one ventures outside his or her house into public view."¹⁴

The Court responded to the plaintiff's contention that *Swerdlick* should not be read to foreclose a cause of action under Section 9-1-28.1 for all incidents that occur in a public setting, with a further review of the statute.¹⁵ The Court observed that Section 9-1-28.1(a)(1)(i)(A) requires the plaintiff to establish that "[the alleged violation] was an invasion of something that is entitled to be private or would be expected to be private."¹⁶ The Court further relied on *Swerdlick* for the proposition that "once the person leaves the seclusion of the home and enters the public domain, the burden is upon the party alleging an unreasonable intrusion upon his or her physical solitude or seclusion to

11. *Id.*

12. *Id.* at 251. The Court noted that while other sections of the Rhode Island General Laws provide for additional rights to privacy, there were no such claims in this case. *Id.*

13. *See id.*; *Swerdlick v. Koch*, 721 A.2d 849, 856, 864 (R.I. 1998). In *Swerdlick*, the defendant's activities were part of an effort to show that his neighbor was operating a business in violation of a local ordinance. *DaPonte*, 21 A.3d at 251 (citing *Swerdlick*, 721 A.2d at 853-56).

14. *See DaPonte*, 21 A.3d at 251-52 (quoting *Swerdlick*, 721 A.2d at 857-58).

15. *Id.* at 252.

16. *Id.* (quoting R.I. GEN. LAWS §9-1-28.1(a)(1)(i) (1997)).

establish that ‘thrown about his [or her] person or affairs’ is an affirmative seclusion sufficient to merit an objective expectation of privacy.”¹⁷ After first declaring that a work area of a business is not inherently a place of seclusion, the Court concluded that, according to the record, Ms. DaPonte had not established that “she threw about her person a seclusion that would merit an expectation of privacy actionable under Section 9-1-28.1(a)(1).”¹⁸

Next, the Court dealt with the plaintiff’s contention that the United States District Court had interpreted Section 9-1-28.1(a)(1) to extend to an invasion of the body in *Liu v. Striuli*.¹⁹ However, the Court found the facts in *Liu* easily distinguishable because it involved the brutal rape of a college student by her professor in the privacy of her own apartment.²⁰ Unlike *Liu*, the Court noted that, “here the contact was in a public place of business, it was nonsexual in nature, fleeting, and the only touching was of an outer garment.”²¹

Before affirming the trial court’s dismissal of the plaintiff’s claim, the Court fulfilled its duty to consider the intent of the statute with respect to the underlying facts of the case. The Court shared the trial justice’s concern that characterizing the Ocean State Job Lot incident as a valid right-to-privacy action would “transform every non-permitted touching into a parallel right-to-privacy action under Section 9-1-28.1(a)(1).”²² In addition, the Court highlighted the trial justice’s observation that a holding in the plaintiff’s favor, “would render meaningless the statutory requirements of ‘physical solitude and seclusion’ and an intrusion of ‘something that is entitled to be private or would be expected to be private.’”²³ In closing, the Court declined to disrupt any factual

17. See *DaPonte* at 252 (citing *Swerdlick*, 721 A.2d at 857 n.11 (quoting RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977))). The Court included an example of a “private seclusion thrown about a person in a public place” from the Restatement: “[e]ven in a public place, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters.” *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977) (alteration in original).

18. *Id.* at 252-53.

19. See *id.* at 253; *Liu v. Striuli*, 36 F. Supp. 2d 452, 479 (D.R.I. 1999).

20. *DaPonte*, 21 A.3d at 253 (citing *Liu*, 36 F. Supp. 2d at 458-60).

21. *Id.*

22. *Id.*

23. *Id.* (internal quotation marks omitted).

or evidentiary findings, holding that the trial justice was not clearly wrong in her decision.²⁴

COMMENTARY

In affirming the dismissal of the plaintiff's action, the Rhode Island Supreme Court's decision was less than shocking, as the stipulated incident was not of the variety that courts are eager to entertain. While the Court made a concerted effort to condemn Mr. Perlman's actions,²⁵ Justice Flaherty's opinion was void of any indication that this was a difficult decision. Although the Court does not expressly foreclose the possibility of a cause of action under Section 9-1-28.1(a)(1) arising in a public setting, it suggests that such an occurrence would require a specific set of facts, such as the exposure of the plaintiff's underwear.²⁶ Nonetheless, the Court implies that if the touching is sexual in nature, it could interpret Section 9-1-28.1(a)(1) to extend to an invasion of the body, as the United States District Court did in *Liu*.²⁷ Therefore, the Rhode Island Supreme Court has clarified what is required to prevail in a right to privacy cause of action under Section 9-1-28.1(a)(1) when the incident occurs in a public place.

CONCLUSION

To prevail in a cause of action under Section 9-1-28.1(a)(1), a plaintiff must establish "an invasion of something that is entitled to be private or would be expected to be private."²⁸ Since an individual's expectation for privacy is logically reduced in a public setting, such a plaintiff faces the increased burden of establishing that he threw about his [or her] person a seclusion that warranted

24. *Id.*

25. The Court referred to Mr. Perlman's actions as "offensive," "inappropriate," and "boorish." *Id.*

26. The Court provided only one example of a situation where an incident in public would satisfy § 9-1-28.1(a)(1), which was borrowed from the Restatement: "A, a young woman, attends a 'Fun House,' a public place of amusement where various tricks are played upon visitors. While she is there a concealed jet of compressed air blows her skirts over her head, and reveals her underwear. B takes a photograph of her in that position. B has invaded A's privacy." *Id.* at 252 (quoting RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977)).

27. *Id.* at 253 (citing *Liu*, 36 F. Supp. 2d at 479).

28. R.I. GEN. LAWS § 9-1-28.1(a)(1)(i)(A) (1997).

an expectation of privacy. Here, the Court denied Ms. DaPonte's claim under Section 9-1-28.1(a)(1) because it did not consider Mr. Perlman's non-permitted touching to be an unreasonable intrusion upon her solitude or an invasion of something that is expected to be private.

William Yost

Tort Law. *Hill v. National Grid*, 11 A.3d 110 (R.I. 2011). In Rhode Island, in order to survive summary judgment on an attractive nuisance claim, the plaintiff is only required to show that the landowner knew or had reason to know that children are likely to trespass on the property, and that the defendant landowner knew or had reason to know of a potentially dangerous condition on the land.

FACTS AND TRAVEL

In October 2006, twelve-year-old Austin Hill was playing touch football with some friends on a grassy vacant lot owned by National Grid in a residential neighborhood of Pawtucket, Rhode Island.¹ During the game Austin tripped over a metal pole sticking out of the ground.² When Austin fell he cut his leg on a second metal pole.³ Bleeding profusely, Austin rode his bike home and his mother brought him to the emergency room of a local hospital.⁴ Although Austin's leg wound eventually healed, his leg is permanently scarred.⁵

Austin's parents filed suit in Superior Court alleging that National Grid negligently maintained its property, causing Austin's injuries.⁶ National Grid argued that it did not owe a duty to Austin because he had trespassed on the utility's lot.⁷ Plaintiffs argued that the defendant owed the plaintiff a duty under the attractive nuisance doctrine.⁸ The Superior Court granted summary judgment for the defendant because it determined that plaintiffs had failed to show that the defendant knew or had

1. *Hill v. National Grid*, 11 A.3d 110, 112 (R.I. 2011).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

reason to know that children were trespassing.⁹ Plaintiffs appealed to the Supreme Court of Rhode Island.¹⁰

ANALYSIS AND HOLDING

The Court reviews the granting of motions for summary judgment on a *de novo* basis and adheres to the same rules and criteria as the hearing justice.¹¹ Before proceeding to the merits, the Rhode Island Supreme Court noted that since plaintiffs were appealing a grant of defendant's motion for summary judgment, the Court reviews the facts in the light most favorable to the plaintiffs.¹² It is the burden of the nonmoving party to prove a disputed issue of material fact by competent evidence.¹³ The nonmoving party cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions to meet its burden.¹⁴

The Rhode Island Supreme Court explained that property owners owe trespassers no duty except a duty "to refrain from wanton or willful conduct," and this duty only applies when a property owner discovers a trespasser in a position of danger.¹⁵ An exception to this general rule is the attractive nuisance doctrine, which imposes in certain circumstances "a duty of care on landowners to trespassing children."¹⁶ The rationale of the attractive nuisance doctrine is that society's interest in protecting the life and limb of its young substantially outweighs the property owner's interest in "the unrestricted right to use his land."¹⁷

The Court applied the Restatement (Second) of Torts' version of the attractive nuisance doctrine, which it adopted in *Haddad v. First National Stores, Inc.*¹⁸ Rhode Island's attractive nuisance doctrine does not require that a possessor of land "know or have reason to know that children are trespassing on the property, but

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 113 (citing *Classic Entm't & Sports, Inc. v. Pemberton*, 988 A.2d 847, 849 (R.I. 2010)).

14. *Id.* (quoting *Classic Entm't & Sports, Inc.*, 988 A.2d at 849).

15. *Id.*

16. *Id.*

17. *Id.* (citing *Haddad v. First Nat'l Stores, Inc.*, 280 A.2d 93, 96 (R.I. 1971)).

18. 280 A.2d at 95; *Hill*, 11 A.3d at 113-15.

rather that children are *likely* to trespass on the premises.”¹⁹ In determining whether the facts were sufficient to survive summary judgment, the Court found that defendant’s employee looked “at the property five or six times a year,” the lot was in a residential neighborhood, and the defendant had a trespasser policy in place directing employees to call police if children were playing on the lot.²⁰ The Court concluded that together these facts created a genuine issue of material fact regarding whether National Grid knew or had reason to know that children were likely to trespass on its property.²¹

From the activities of National Grid agents on the vacant lot, the Court concluded that a jury could find that the defendant knew or had reason to know of the metal poles on the lot, which plaintiff asserted was a dangerous condition on National Grid’s land.²² Such activities included one agent that looked “at the property five or six times over two years” and “monthly maintenance by a grounds-keeping crew that mowed the grass and removed debris.”²³ In determining that the plaintiffs “raised

19. *Id.* at 115 (emphasis added). RESTATEMENT (SECOND) OF TORTS § 339 (1965) states:

“A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Id. at 113-14.

20. *Id.* at 115.

21. *Id.*

22. *Id.*

23. *Id.*

sufficient facts from which a reasonable jury could conclude that [the] defendant knew or had reason to know trespass was likely,” and that “defendant knew or had reason to know” of the metal poles in the ground, the Court held that the Superior Court’s entry of summary judgment for the defendant was erroneous.²⁴ The Rhode Island Supreme Court vacated the judgment and remanded to Superior Court.²⁵

COMMENTARY

The Rhode Island Supreme Court reaffirmed that in attractive nuisance cases, it follows Section 339 of the Restatement (Second) of Torts, which requires that the defendant knew or had reason to know that children are likely to trespass on the property and that a dangerous condition exists on the property.²⁶ All but seven or eight jurisdictions have adopted this section of the Restatement (Second) of Torts.²⁷ An early Minnesota case, *Keffe v. Milwaukee & St. Paul R. Co.*, decided in 1875, first advanced the theory that the child had been lured onto the premises by a condition on the defendant’s land.²⁸ The rule then became known as “attractive nuisance,” which is somewhat of a misnomer.²⁹ Under that rule, a child does not have to be attracted or lured onto the defendant’s land by a “nuisance” or dangerous condition.³⁰ The aim of the attractive nuisance doctrine is to shift liability from the trespassing child who lacked the capacity to appreciate the risk onto the landowner who has a dangerous condition on his land and whose burden of eliminating the danger is slight compared with the risk to children.³¹ Allocating potential liability to National Grid, a conscientious landowner by the Court’s own account, and away from the twelve-year-old plaintiff who likely understood that he was trespassing is

24. *Id.*

25. *Id.*

26. *Id.* at 113-15.

27. RESTATEMENT (SECOND) OF TORTS § 339 cmt. b (1965) (explaining that in the few jurisdictions which have not adopted the Restatement (Second) of Torts’ formulation of the attractive nuisance doctrine, landowners may be liable to child trespassers under other doctrines); *Haddad*, 280 A.2d at 95.

28. 18 Am. Rep. 393 (1875) (cited in RESTATEMENT (SECOND) OF TORTS § 339 cmt. b).

29. RESTATEMENT (SECOND) OF TORTS § 339 cmt. b.

30. *Id.* at cmt. e.

31. See RESTATEMENT (SECOND) OF TORTS § 339 generally and cmt. i.

inconsistent with the policy behind the attractive nuisance doctrine. In its cursory description of the facts, the Court explains that the plaintiff “suddenly tripped over an unseen metal pole.”³² If the metal poles were so hidden from view that a group of adolescent boys trampling over the grassy vacant lot did not become aware of the metal pole until the plaintiff tripped over it, a reasonable landowner might not realize that the poles were present or that they posed an unreasonable risk of death or serious bodily harm to children, as required under Rhode Island’s attractive nuisance doctrine.³³ If the boys were aware of the metal poles the defendant should not be liable under the attractive nuisance doctrine because the boys concluded that their desire to trespass on the lot to play football outweighed any danger presented by the metal poles.

In this case, the Court cited National Grid’s child trespasser policy as one of three facts from which a jury could determine that National Grid knew or had reason to know that children were likely to trespass.³⁴ Such a finding may encourage landowners to abandon current policy or refrain from creating a new policy regarding child trespassers. The same facts that the Court relied on to reach its holding in favor of the plaintiff demonstrate that the defendant was making efforts to maintain the lot in a safe condition. For example, the court found that the defendant’s regular monthly maintenance, which included mowing the grass and removing debris from the lot, was a factor in favor of imposing liability on the defendant.³⁵ The Court’s holding incentivizes property owners to be less attentive and dutiful in the maintenance and care of their land, which is undesirable for landowners and trespassing children. However, had National Grid neglected the lot, and its negligence caused a person to be injured, National Grid could be liable under a negligence or land occupier liability theory. Under the Court’s application of the attractive nuisance doctrine, landowners are left with a Hobson’s choice of incurring liability by acting as diligent caretakers who were not careful enough and who should have known of a dangerous condition through their attentiveness, or as careless

32. *Hill*, 11 A.3d at 112.

33. *Id.* at 113-14.

34. *Id.* at 115.

35. *Id.*

possessors whose lack of attentiveness and care resulted in the plaintiff's injuries.

CONCLUSION

The Rhode Island Supreme Court clarified the level of knowledge a defendant landowner must have in order for the defendant to acquire a duty to trespassing children under the attractive nuisance doctrine.³⁶ Based on various activities of National Grid's agents, the fact that the defendant had a trespassing policy specifically addressing children, and the lot's location in a residential neighborhood, the Court concluded that the plaintiffs had presented facts sufficient to survive summary judgment on the claims that National Grid knew or should have known that children were likely to trespass, and that the defendant knew or should have known of the presence of the metal stakes.³⁷

Marjorie Whalen

36. *Id.*

37. *Id.*

Workers' Compensation. *Duffy v. Powell*, 18 A.3d 487 (R.I. 2011). An employee that received a lump sum workers' compensation award is subsequently barred from receiving temporary disability insurance benefits for the same period of time pursuant to Rhode Island General Laws Section 28-41-6.¹

FACTS AND TRAVEL

On June 12, 2001, Susan Duffy (Duffy) hurt her right ankle in a workplace accident.² Duffy received approximately \$14,000 in her workers' compensation claim on October 27, 2006.³ During the following year, it became apparent that Duffy required additional surgery to remedy the injuries that she had sustained in the accident.⁴ Consequently, on October 17, 2007, Duffy applied for temporary disability insurance (TDI) benefits to cover the period of time estimated for her recovery due to her inability to work.⁵

The Rhode Island Department of Labor and Training (DLT) denied this request, concluding that pursuant to Rhode Island General Laws Section 28-41-6, Duffy's receipt of the lump sum workers' compensation settlement disqualified her from seeking TDI benefits for same period of time.⁶ Section 28-41-6 states that

[i]n the event that workers' compensation benefits are subsequently awarded to an individual, whether on a weekly basis or as a lump sum . . . with respect to which that individual has received . . . benefits . . . for the temporary disability insurance fund, shall be subrogated

1. *Duffy v. Powell*, 18 A.3d 487, 488 (R.I. 2011); R.I. GEN. LAWS § 28-41-6 (1956 & Supp. 2003). Powell is the director of the Rhode Island Department of Labor and Training.

2. *Duffy*, 18 A.3d at 488.

3. *Id.* \$14,000 is the amount Duffy recovered after paying her attorney's fees.

4. *Id.*

5. *Id.*

6. *Id.* at 488-89.

to that individual's rights in that award to the extent of the amount of benefits . . . paid to him or her under those chapters.⁷

Duffy appealed the DLT decision and was granted a hearing on January 29, 2008 before a referee of the DLT.⁸ However, the referee was not persuaded by Duffy's arguments, noting that she received a low workers' compensation award since she was not working full time and consequently echoed the denial of the TDI benefits she sought, reasoning that Section 28-41-6 applied pro rata and covered the same period of time she had received workers' compensation benefits for.⁹ The Board of Review denied Duffy's subsequent appeal.¹⁰

Duffy sought relief in the Sixth Division District Court.¹¹ At a hearing on April 23, 2008, the court ordered the Board of Review to calculate Duffy's TDI benefits considering the amount she was awarded in her workers' compensation settlement.¹² On September 11, 2008, the Board of Review considered Duffy's request on remand from the District Court and again issued a denial of her application for TDI benefits.¹³ Therefore, Duffy returned to the District Court, which ruled in her favor on March 6, 2009.¹⁴ The court held that "[t]he interests of justice require" Duffy's application for TDI benefits to be granted from October 16, 2007 until April 20, 2008 since her surgery prevented her from working.¹⁵ The court reasoned that \$139.17 should be deducted from her TDI benefits, "which represents future workers' compensation benefits she would have been entitled to [receive] when considering her October 27, 2006 lump sum workers' compensation settlement of \$14,000."¹⁶

7. R.I. GEN. LAWS § 28-41-6.

8. *Duffy*, 18 A.3d at 489.

9. *Id.*; § 28-41-6.

10. *Duffy*, 18 A.3d at 489.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

ANALYSIS AND HOLDING

The Rhode Island Supreme Court was petitioned by the DLT, which sought a determination of whether Section 28-41-6 prevents an applicant's eligibility to obtain TDI benefits if one received a lump sum workers' compensation award.¹⁷ The Court began by insisting that "legally competent evidence" must exist to affirm the District Court's ruling in Duffy's favor, and found none.¹⁸ The Court acknowledged deference is typically given to administrative agencies when interpreting a statute the agency is responsible for executing, absent a clearly erroneous interpretation.¹⁹

Furthermore, per Rhode Island General Laws Section 28-33-25(a)(1), parties are able to ask the workers' compensation court to approve a settlement of future liability for a payment that is a lump sum or structured payment.²⁰ Consequently, the Supreme Court concluded that Duffy's workers' compensation award applied from October 27, 2006 through October 6, 2008, and therefore disqualified Duffy from receiving TDI benefits per Rhode Island General Laws, Section 28-41-6(a).²¹ The Court found "it is abundantly clear that the General Assembly intended receipt of workers' compensation benefits to be a complete bar to receipt of TDI benefits."²² Therefore, the Court quashed the District Court's decision and remanded the case to the District Court.²³

COMMENTARY

The Rhode Island Supreme Court rejected Duffy's fairness argument as justification for her eligibility to receive workers' compensation funds and TDI benefits for the same period of time, and instead insisted in affirming the District Court's decision only if there was a solid legal standard to uphold it on.²⁴ This

17. *Id.*; R.I. GEN. LAWS § 28-41-6.

18. *Duffy*, 18 A.3d at 490.

19. *Id.* (quoting *State v. Swindell*, 895 A.2d 100, 104 (R.I. 2006)).

20. *Id.*; R.I. GEN. LAWS § 28-33-25(a)(1) (1956 & Supp. 2003).

21. *Duffy*, 18 A.3d at 490; *see also* R.I. GEN. LAWS § 28-41-6 (stating "[n]o individual shall be entitled to receive waiting period credit benefits or dependents' allowances with respect to which benefits are paid or payable to that individual under any workers' compensation law of this state").

22. *Duffy*, 18 A.3d at 490; *see also* R.I. GEN. LAWS § 28-41-6(d).

23. *Duffy*, 18 A.3d at 490.

24. *Id.*

conclusion reflects the Court's desire to make decisions not solely upon policy rationales, instead requiring solid legal standards to exist for such a decision. Since a number of state statutes seemed to expressly bar Duffy from receiving funds from both a lump sum workers' compensation award and TDI, the Supreme Court found that they must deny her relief.²⁵

The Court also engaged in a statutory analysis of multiple statutes²⁶ to draw the conclusion that the Legislature wished to make it "abundantly clear"²⁷ that an individual is not able to receive compensation from both TDI and workers' compensation for the same period of time. The Court reasoned that the Legislature's mention of the prohibition in multiple sources reflected a strong desire to prevent this opportunity.²⁸ Again, the Court was strictly adhering to a statutory interpretation to arrive at the determination in this case, whereas the District Court was compelled by policy concerns to justify Duffy's recovery.²⁹

The Supreme Court also exhibited a deferential standard to the DLT, noting that since the agency is charged with enforcing and interpreting these statutes in question, their judgment ought to be deferred to, unless evidence existed that their determinations were clearly erroneous.³⁰ This exhibits a recognition by the Court that the agency may be better equipped to make these decisions since it involves matters in which they primarily work in on a daily basis.

CONCLUSION

The Rhode Island Supreme Court held that pursuant to Rhode Island General Laws, one who has received a lump sum workers' compensation award is subsequently barred from seeking TDI benefits for the same period of coverage.³¹

Erica S. Pistorino

25. *Id.*

26. *See* R.I. GEN. LAWS §§ 28-41-6, 28-33-25(a)(1), 28-41-6(d).

27. *Duffy*, 18 A.3d at 490.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

Zoning Law. *Campbell v. Tiverton Zoning Bd.*, 15 A.3d 1015 (R.I. 2011). The Rhode Island Supreme Court held that an appeal was moot because plaintiffs urged that the Tiverton Yacht Club's proposed rebuilding plans were an unlawful expansion of its status as a legal nonconforming use, yet subsequent amendments to Tiverton zoning laws now allowed for the Club's usage on the lot. A marina across the street, operating on an appropriately zoned lot, was not prohibited from continuing such operations, regardless of affiliations with the Club. Plaintiffs in this action could not recover attorney fees under the Equal Access to Justice Act¹ because the issuance of the permit they were opposing was not an adjudicatory proceeding under the act.

FACTS AND TRAVEL

Tiverton Yacht Club (TYC) has been in operation at 58 Riverside Drive in Tiverton, R.I. since 1956.² When Tiverton adopted zoning in 1964, the clubhouse, located in a residential area, became a legal nonconforming use.³ By the late 1980's, the same owners also ran a marina on a lot across the street, located in a waterfront zoning district.⁴ In June 2003, a fire destroyed the main building of the clubhouse, and the owners (defendants) revised their draft of proposed building plans several times, until they received a permit to rebuild from the Town of Tiverton in 2006.⁵ This permit sparked five subsequent years of litigation.⁶

Plaintiffs in this action, neighbors of the TYC, immediately appealed this permit to the Tiverton Zoning Board (TZB).⁷ However, while the appeal was pending before the TZB, plaintiffs

1. R.I. GEN. LAWS § 42-92-2 (1956).

2. *Campbell v. Tiverton Zoning Bd.*, 15 A.3d 1015, 1018 (R.I. 2011).

3. *Id.*

4. *Id.*

5. *Id.* at 1019.

6. *Id.* at 1017.

7. *Id.* at 1017, 1019.

also filed an action in Newport County Superior Court seeking declaratory and injunctive relief.⁸ On April 13, 2007, plaintiffs requested the Superior Court justice to determine to what extent the new building plans indicated the “expansion and intensification of a non-conforming use in a residential zone.”⁹ The plaintiffs also sought an injunction.¹⁰

The matter was heard at a bench trial in May of 2007.¹¹ In November of the same year, the trial justice entered an order declaring that the plans on the building permit indicated that the rebuilding would produce an unlawful expansion of nonconforming use.¹² This order specifically named “the conversion of the clubhouse from seasonal to consistent daily, year- round use,” and any additional interior or exterior space created by the new plans as unlawful expansions of the TYC’s nonconforming use status.¹³ The justice ordered a further hearing to explore the plaintiffs’ allegations of “the addition of a marina.”¹⁴

In May 2009, following the hearing, the justice entered an order.¹⁵ Because the evidence demonstrated the marina had not existed when the TYC became a nonconforming use in 1964 and because the marina and the TYC operated “in tandem,” the justice determined that the marina “must be prohibited” as an “unlawful expansion of a nonconforming use.”¹⁶ The trial justice also denied the plaintiffs’ motion to recover “reasonable litigation expenses” under the Equal Access to Justice Act.¹⁷

The defendants (Tiverton Zoning Board, trustees of the TYC, the TYC, and the Tiverton Building Official) appealed the first two orders declaring the rebuilding of the TYC and the operation of

8. *Id.*

9. *Id.* at 1017. Among other things, plaintiffs cited “the addition of a marina, the addition of a swimming pool, the addition of interior space, an enlarged kitchen, an increased function capacity, an enlarged parking area and an intention to go from seasonal use to year-round use” as changes indicative of unlawful expansion. *Id.* at 1019.

10. *Id.* Plaintiffs wanted the Court to enjoin defendants from rebuilding according to the new plans.

11. *Id.*

12. *Id.*

13. *Id.* at 1019-20.

14. *Id.* at 1020.

15. *Id.*

16. *Id.*

17. *Id.*; R.I. Gen. Laws § 42-92-2.

the marina unlawful.¹⁸ The plaintiffs also appealed the denial of their motion to recover litigation expenses.¹⁹ While these appeals were pending, the Tiverton Town Council amended its zoning ordinance and map.²⁰ These amendments, which “created a ‘floating zone’ designated Waterfront-Related to be placed on the TYC clubhouse lot,” and became effective on October 26, 2010.²¹ As a result of the amendments, the TYC was no longer a nonconforming use.²² Plaintiffs moved to stay the appeal pending in Rhode Island Supreme Court so they could file an action opposing the amendments, but the motion was denied and the appeals were heard as scheduled.²³

ANALYSIS AND HOLDING

Though the defendants raised five issues on appeal, the Court only addressed two of them as well as the plaintiffs’ appeal pertaining to litigation expenses.²⁴ The Court quickly dismissed the defendants’ first appeal because the issue was rendered moot by changes in the Town’s zoning.²⁵ The amendments to Tiverton’s zoning laws “extinguished the TYC’s status as a legal, nonconforming use in a residential district,” thereby extinguishing the underlying controversy of the case, which was the “nature and extent of the TYC’s nonconforming use.”²⁶ The Court dismissed the issue because “as a general rule, [it] will ‘only consider cases involving issues in dispute; [it] shall not address moot...

18. *Campbell*, 15 A.3d at 1017 n.1, 1020.

19. *Id.* at 1020.

20. *Id.*

21. *Id.*

22. *Id.* at 1018.

23. *Id.* at 1020.

24. *Id.* at 1020-21. Defendants argued first that plaintiffs lacked standing; secondly, even if plaintiffs had standing, they were not eligible to seek relief in Superior Court because they had not exhausted their administrative remedy options; third, that the trial justice erred when she relied on the current version of the Tiverton zoning ordinance as opposed to the ordinance from 1964; fourth, even if the justice correctly relied on the current ordinance, it was error to find that the proposed building plans indicated an unlawful expansion of a nonconforming use; and lastly that the justice erred when she prohibited the marina from further operations, because the marina is located on waterfront property “zoned to permit such use as a matter of right.” *Id.*

25. *Id.* at 1021.

26. *Id.*

questions.”²⁷

The Court did address the prohibition of the marina operations, as this issue was not rendered moot by the Town’s subsequent zoning amendments.²⁸ Reviewing the issue “with great deference” to the trial justice’s decision, the Court nonetheless held that the trial justice abused her discretion in finding the marina was an unlawful expansion of a nonconforming use and exceeded the court’s authority by prohibiting its continued operation.²⁹ Despite the trial justice’s finding that the marina and the TYC operated “in tandem” because they share ownership and use of the marina is reserved exclusively for TYC members, the Court ruled that they were, in fact, “physically separate and exist[ed] independently” of one another.³⁰ The trial justice erred by merging the two “wholly distinct” operations into “essentially one lot, despite the presence of Riverside Drive between them,”³¹ since the marina operated on a lot appropriately zoned for such operations.³² Demonstrating great regard for the “sacred” right to possession of private property, the Court reasoned that the defendant owners of the TYC and the marina could sell the marina, and that the new owner, completely unaffiliated with the TYC, could then operate a marina its present lot without restriction.³³ The Court reasoned that zoning law attaches to the lot, not the property owner; if any other individual may legally operate a marina on that lot, then defendants have that same legal right, regardless of other enterprises they may own on the same street.³⁴ Therefore, the Court vacated the decision below, holding that the trial justice abused her discretion in holding the two operations out as one, and exceeded her authority when she “prohibited the TYC’s operation of the marina on a lot where it

27. *Id.* at 1022 (citing *H.V. Collins Co. v. Williams*, 990 A.2d 845, 847 (R.I. 2010)).

28. *Id.*

29. *Id.* at 1021, 1023 (citing *Fravala v. City of Cranston ex rel. Baron*, 996 A.2d 696, 704 (R.I. 2010)).

30. *Id.* at 1023.

31. *Id.*

32. *Id.* at 1022.

33. *Id.* at 1023; (citing *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam County*, 301 S.W.3d 196, 212 (Tenn. 2009)).

34. *See id.*

was legally permitted.”³⁵

Lastly, the Court affirmed the trial justice’s denial of the plaintiffs’ motion for litigation expenses, holding that “the building official’s issuance of the building permit simply was not an adjudicatory proceeding under the act.”³⁶ The plaintiffs argued that they are due “reasonable litigation expenses” pursuant to the Equal Access to Justice Act.³⁷ Despite many attempts on the part of the plaintiffs to bring their cause under this act, the Court held that the building official did not conduct any adjudicatory proceedings when he granted the TYC the rebuilding permit.³⁸ Generally, an adjudicatory hearing is one “in which the rights and duties of a particular person are decided after notice and an opportunity to be heard.”³⁹ In this case, because the building official simply reviewed an application to rebuild, he did not hold any proceeding “wherein the parties . . . were given an opportunity to be heard,” and this process did not constitute an “adjudicatory proceeding.”⁴⁰

COMMENTARY

The Court clearly disagreed with the lower court’s decision that the TYC and the marina were operating “in tandem” and that the marina, operating lawfully on its own physically distinct lot, could qualify as an unlawful extension of the nonconforming use of the lot across the street.⁴¹ The Court claimed to review decisions granting declaratory relief with “great deference,” yet, comes

35. *Id.*

36. *Id.* at 1025.

37. *Id.* at 1023. The act is codified in R.I. Gen. Laws § 42-92-1(a) (1956); the act’s goal is to “mitigate the burden placed upon individuals . . . by the arbitrary and capricious decisions of administrative agencies during adjudicatory proceedings.” *Campbell*, 15 A.3d at 1024.

38. *Id.* at 1024-25. Plaintiffs also argued the building official who granted the permit constituted an “agency” under the act, that plaintiffs were “prevailing parties” because they won at trial, and that court proceedings below should serve as the requisite “adjudicatory proceedings.” Because the Court held that plaintiffs did not establish that adjudicatory proceedings necessary under the act were held, it did not address the other contentions. *Id.* at 1025 n.7.

39. *Id.* at 1025 (citing Black’s Law Dictionary 725 (7th ed. 1999)).

40. *Id.*

41. *Id.* at 1023.

arguably close to mocking the very same.⁴² While this is not an argument against the Court's decision that the trial justice exceeded her authority by prohibiting further operations of the marina upon a lot which is quite appropriately zoned for such operations, one may still ponder why there was an abuse of discretion when the trial judge held that the marina and the TYC were operating "in tandem." Without questioning whether the Rhode Island Supreme Court was correct in holding that the operation of a marina on a lot zoned for waterfront and water related activities should not be prohibited simply because the marina is affiliated with a nonconforming use across the street, it seems a stretch to rebuff the idea that the two were working "in tandem." Finding that two enterprises are situated on two physically distinct lots is a very different from a finding that they are working "in tandem."

Arguably, the two entities did work in tandem. The two buildings shared ownership and enjoyed the same patrons.⁴³ Members of one were free to walk the across the street to enjoy the benefits of the other, while non-members were denied this privilege. It is fair to assume that financial and professional success of one correlates directly with success of the other. The error was not the finding that the two were working in tandem, an error occurred because two operations, working in tandem, were analyzed under the same zoning laws, even though they existed on physically distinct lots, each subject to their own allowances and limitations. In sum, while there is an argument in support of the trial justice's finding that the two worked "in tandem," her error was assuming that tandem entities must necessarily share and affect the other's zoning restrictions.

CONCLUSION

The Rhode Island Supreme Court held that the extent to which plans to rebuild the Tiverton Yacht Club constituted an unlawful extension of a nonconforming use was rendered moot by subsequent changes in Tiverton zoning laws that extinguished the

42. *Id.* at 1021, 1023. "The trial justice incorrectly treated the marina and clubhouse lots as essentially one lot, *despite the presence of Riverside Drive between them . . .*" *Id.* (emphasis added).

43. *Id.* at 1023.

Yacht Club's status as a nonconforming use. The Court further determined that the marina across the street, in an appropriately zoned area, did not operate "in tandem" with the Yacht Club, despite sharing owners and patrons, and could continue its operation as a marina on its own lot, where such operations were legally permitted. Lastly, the Court held that a building official who approved the permit to rebuild did not conduct an adjudicatory proceeding under the Equal Access to Justice Act, and therefore, the plaintiffs were not entitled to recover litigation expenses under the Act.

Carolyn M. Rankin

Zoning. *Generation Realty, LLC v. Catanzaro*, 21 A.3d 253 (R.I. 2011). In this case of first impression, the Rhode Island Supreme Court contemplated the meaning of the words ‘general’ and ‘specific’ as used in Rhode Island General Laws section 45-23-53, which governs the notice requirements for amendments to zoning ordinances. The Court, rejecting the requirement of a universal and uniform effect, held that general changes are those which affect a majority of districts and properties, and determined that, under the statute, general public notice sufficed for such general changes.

FACTS AND TRAVEL

In 1998, North Providence adopted a comprehensive plan, and later enacted Ordinance 99-127Z in 1999, in compliance with the Rhode Island Comprehensive Planning and Land Use Regulation Act¹ and the Zoning Enabling Act.² Ordinance 99-127Z’s amendments (the 1999 amendments) proposed several changes³ to many North Providence districts, including the district in which a property owned by Capital City was located.⁴ As a result, the

1. The purpose of the Comprehensive Planning and Land Use Regulation Act was to “totally rewrite the major land use enabling legislation in Rhode Island” and “provide[] for each municipality to enact a real comprehensive plan, with state government review of such plan, and carrot-and-stick incentives to make the municipalities comply.” *Generation Realty, LLC v. Catanzaro*, 21 A.3d 253, 256 (R.I. 2011) (citation omitted).

2. *Id.*

3. The 1999 amendments

eliminated one commercial zoning district and created seven new zoning districts; set new dimensional regulations for all of the new zoning districts; deleted the existing table of use codes and substituted a new table in its stead; changed zoning maps to reflect the locations of the new zoning districts; and ultimately placed about [fifty] percent of the land area of the town into a different zoning district.

Id.

4. The property was “designated as Assessor’s Plat No. 22, lot No. 852.” *Id.*

amendments rezoned this property from residential single family use to open space.⁵

Seven years after the adoption of the 1999 amendments, Capital City and Generation Realty entered into an agreement⁶ by which the latter would purchase the property from Capital City.⁷ A condition precedent to the agreement made the transaction expressly contingent upon Generation Realty's success in obtaining permits to build residential dwellings on the property.⁸

In April 2007, the plaintiffs submitted an application to amend the zoning ordinance and zoning map and requested to change the designation of the property from open space to residential general or residential multi-household.⁹ The North Providence Planning Board (the Board) held a public hearing regarding the plaintiffs' application on August 14, 2007.¹⁰ The hearing was then continued until September 11, 2007.¹¹ At the September hearing, the plaintiffs reiterated their argument that the town had failed to follow the statutory requirements and procedures when it rezoned Capital City's land in 1999.¹² The Board rejected this argument and voted to recommend that the North Providence Town Council deny the application.¹³ Although the town council scheduled a public hearing for September 27, 2007, it did not take place because the plaintiffs filed a verified complaint in Superior Court prior to the hearing.¹⁴

The plaintiffs sought a declaratory judgment that the 1999 rezoning was null and void, injunctive relief barring the

5. *Id.*

6. The Court noted that the Superior Court record did not include a copy of the agreement; however the appendix plaintiffs submitted to the Supreme Court contained an "Amended and Restated Purchase and Sale Agreement" from 2008. The Court reminded plaintiffs' counsel that "only documents that are part of the record are appropriately included in an appendix," pursuant to Article I, Rule 17 of the Supreme Court Rules of Appellate Procedure. *Id.* at 256 n.5.

7. *Id.* at 256.

8. *Id.* at 257.

9. The plaintiffs claimed that during this process they discovered that the town had not followed the proper procedures when it enacted Ordinance 99-127Z. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

defendants from proceeding with the hearing and from prohibiting plaintiffs from continuing with their development proposal, a writ of mandamus ordering the defendants to act upon the plaintiffs' proposal, and further relief under the court's discretion.¹⁵ The defendants denied the plaintiffs' asseverations and asserted several affirmative defenses in their answer.¹⁶ The owners of the property adjacent to the property in question, DePasquale Brothers, Inc., were added to the suit as an intervenor in support of the defendants.¹⁷

On October 15, 2008, the plaintiffs filed a motion for summary judgment, and the hearing justice held a hearing on the plaintiffs' motion for summary judgment on February 24, 2009.¹⁸ They argued that rezoning the property to open space was a "specific change in a zoning district map," which, according to Rhode Island General Laws section 45-24-53(c),¹⁹ required individual written notice.²⁰ The plaintiffs also claimed that the 1999 amendments were void because the defendants failed to include in their public notice a zoning map and the effective date of the enactment.²¹ At the hearing, the intervenor spoke on behalf of the

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 257-58.

19. Section 45-24-53(c) provides as follows:

where a proposed amendment to an existing ordinance includes a specific change in a zoning district map, but does not affect districts generally, public notice shall be given as required by subsection (a) of this section, with the additional requirements that: (1) Notice shall include a map showing the existing and proposed boundaries, zoning district boundaries, and existing streets and roads and their names, and city and town boundaries where appropriate; and (2) Written notice of the date, and place of the public hearing and the nature and purpose of the hearing shall be sent to all owners of real property whose property is located in or within not less than two hundred feet . . . of the perimeter of the area proposed for change, whether within the city or town or within an adjacent city or town. The notice shall be sent by registered or certified mail to the last known address of the owners, as shown on the current real estate tax assessment records of the city or town in which the property is located.

Id. at 261 (quoting R.I. GEN. LAWS § 45-24-53(c) (2009)).

20. *Id.* at 257.

21. *Id.* at 258.

defendants generally.²² The intervenor argued under the Zoning Enabling Act²³ not only that Ordinance 99-127Z included general changes because its provisions were so comprehensive, but also that defects in notice would not “render the ordinance or amendment invalid.”²⁴

At the hearing, the justice explained that although Ordinance 99-127Z “had elements of a general amendment,”²⁵ the changes had not “universally and uniformly affected all districts and properties of the same genre.”²⁶ She held that “[a]s a matter of law, the rezoning of plaintiffs’ property to open space was a specific, not general, change.”²⁷ The hearing justice further explained that “specific changes don’t become general changes because they’re surrounded by many other specific changes, and ‘widespread’ is not the same as ‘universal.’”²⁸ She held that the plaintiffs had been entitled to “additional notice,” which the defendants did not provide, and thus the plaintiffs’ property remained zoned as residential.²⁹ Accordingly, on April 6, 2009 an order granting the motion and a judgment on the order were entered.³⁰

Following this decision, the defendants and intervenor submitted a timely appeal.³¹ The defendants filed a motion to stay the judgment pending appeal, and this was granted on April 15, 2009.³²

22. *Id.*

23. Section 45-24-53(b) provides that “[w]here a proposed general amendment to an existing zoning ordinance includes changes in an existing zoning map, public notice shall be given as required by subsection (a) of this section.” Furthermore, section 45-24-53(f) states that “[n]o defect in the form of any notice under this section shall render any ordinance or amendment invalid, unless the defect is found to be intentional or misleading.” *Id.* at 261 (quoting R.I. GEN. LAWS § 45-24-53(b),(f)).

24. *Id.*

25. These elements included the fact that the ordinance had “established open space districts, ‘created new residential districts, two commercial districts, an institutional zone and a historic overlay zone,’ eliminated one commercial district, and adopted new dimensional requirements for various zoning districts.” *Id.*

26. *Id.*

27. *Id.* (brackets in original).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

ANALYSIS AND HOLDING

In its *de novo* review of the granting of the plaintiffs' motion for summary judgment, the Rhode Island Supreme Court considered whether the hearing justice erred in ruling that the 1999 amendments were "specific" under section 45-24-53 of the Zoning Enabling Act.³³ The Court stated that such a question is one of statutory construction,³⁴ which also receives a *de novo* review.³⁵

On appeal, the defendants argued that the lower court had erred because the 1999 amendments did not "target a specific parcel for change, leaving districts generally unaffected," but rather they were general and "effected a sea of change in the zoning scheme for the community at large,' with an impact not only on plaintiffs' property, but also on 'all North Providence parcels.'"³⁶ The defendants further argued that the lower court did not consider the 1999 amendments in their proper context by focusing only on the parts related to the open space changes.³⁷ They also asserted that the lower court's ruling had reinstated a notice requirement that had been abolished when the General Assembly repealed section 45-24-4³⁸ and replaced it with section 45-24-53.³⁹ Finally, the defendants argued that the lower court's statutory interpretation produced an absurd result, such that a hypothetical amendment that affected all but one property would

33. *Id.* at 260.

34. When construing a statute, courts have the "ultimate goal" of giving effect to the purpose of the act "as intended." *Id.* at 259 (citation omitted). Courts also determine and effectuate the "legislative intent" of the enactment and attribute to the enactment "the most consistent meaning" of the language used. *Id.* (citation omitted). As such, courts give the words of the enactment "their plain and ordinary meaning" when the statute's language is "clear and unambiguous," without resorting to "myopic literalism," and they consider the statute as a whole and consider individual sections "in context of the entire statutory scheme." *Id.* (citation omitted). Courts do not, however, "construe a statute to reach an absurd result." *Id.* at 259 (citation omitted).

35. *Id.* at 258.

36. *Id.* at 259.

37. *Id.*

38. Section 45-24-4 required individual written notice even for general ordinances when they included amendments that made changes to zoning maps. *Id.* at 259 n.6 (quoting *Quigley v. Town of Gloucester*, 520 A.2d 975, 977, 979 (R.I. 1987)).

39. *Id.* at 259 & n.6.

be considered specific.⁴⁰

In response, the plaintiffs argue that the 1999 amendments were "specific" because they "affected some lots' on the map, but 'did not affect the [residential single family] district generally.'"⁴¹ In their opinion, an amendment is general only when all properties in a zoning district are affected "in the same way."⁴² Accordingly, plaintiffs reassert that the defendants did not give proper notice and that the rezoning of the property in question is null and void.⁴³

In evaluating these arguments, the Court first looked to the statute in question. The Court looked to the dictionary definition of the word "general," which is used in subsections (b) and (c) of section 45-24-53.⁴⁴ Additionally, the Court relied on the Black's Law Dictionary definition of "specific."⁴⁵ In applying these definitions to the statute, the Court stated that it uses the same guidelines when interpreting ordinances and statutes such that the ordinance should be considered in its entirety.⁴⁶ The Rhode Island Supreme Court held that the 1999 amendments were general because they were extensive, affecting a wide range of properties in a variety of ways, and because they did not "contemplate[] a relatively narrow proposed change," and thus were not specific.⁴⁷

Next, the Court looked to the General Assembly's intent. The Court concluded that "the General Assembly, by replacing section 45-24-4 with section 45-24-53, intended to confine the requirement of individual notice to specific amendments that do not affect districts generally, and to allow public notice to suffice in cases of general amendments, even when such amendments 'include changes in an existing zoning map.'"⁴⁸ Therefore, the Court held that "although Ordinance 99-127Z made changes to North Providence's zoning maps, those changes were part of a general

40. *Id.* at 259-60.

41. *Id.* at 260 (brackets in original).

42. *Id.*

43. *Id.*

44. *Id.* at 261-62.

45. *Id.* at 261; BLACK'S LAW DICTIONARY 1130 (Abridged 7th ed. 2000).

46. *Generation Realty*, 21 A.3d at 262.

47. *Id.* at 262-63.

48. *Id.* at 263.

overhaul and thus required only public notice.”⁴⁹

Lastly, the Court dismissed the plaintiffs’ arguments that the rezoning is void because North Providence failed to include a proposed zoning map and failed to depict the changes to the map within ninety days of the authorized changes as required by section 45-24-55.⁵⁰ The Court stated that the plain language of section 45-24-53(a) does not require an included map, which is only required if there is a specific change under subsection (c).⁵¹ Additionally, the Court asserted that a defect in notice would not have rendered the 1999 amendments null and void because subsection (f) states that “[n]o defect in the form of any notice under this section shall render any ordinance or amendment invalid, unless the defect is found to be intentional or misleading.”⁵² Here there was no evidence that any defect was either intentional or misleading.

As a result, the Court vacated and reversed the lower court’s judgment. The record was remanded to the Superior Court for further proceedings.

COMMENTARY

Generation Realty sought to change the zoning of the land in question to facilitate its plan to build eighty-six condominiums on the fifteen-acre site on the Lincoln-North Providence line.⁵³ The land is located on the site of Camp Meehan, a summer camp, which has operated for over forty years.⁵⁴ Each summer, the camp provides swimming, canoeing, and games for eighty to one hundred children from Lincoln, Providence, and North Providence.⁵⁵ The Rhode Island Supreme Court, however, neither mentioned these details in its opinion, nor the significant reaction that this case, and Generation Realty’s development proposal,

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 264.

53. Daniel Barbarisi, *Developer Suing Town Over Zone Change - The Town Council Postpones the Hearing on the Camp Meehan Site Plan*, THE PROVIDENCE JOURNAL, Sept. 28, 2007, at D1.

54. Richard C. Dujardin, *Developer Sets Sights on Land Being Used by Camp Meehan*, THE PROVIDENCE JOURNAL, July 18, 2007, at D1.

55. *Id.*

drew from the North Providence Community.⁵⁶

Town officials and residents resisted the development project, citing a lack of open space, which is at a premium in a Rhode Island, and various financial burdens as concerns.⁵⁷ At the September 11, 2007 hearing, “of the 200 people at the hearing at North Providence High School, the only individuals who spoke in favor of the proposal were the lawyer, real estate expert and civil engineer who were hired by Generation Reality’s owner, John Petrarca.”⁵⁸ Concerned citizens were also angered by what was perceived as Generation Realty’s attempts to stall the Town Council’s meetings.⁵⁹ By deciding this case based on principles of statutory interpretation, however, the Court avoided much of the heated debate that occurred beyond the judicial system. The Court’s decision also allowed the town of North Providence a cheaper method of controlling land use, as opposed to the expensive alternative of acquisition through the exercise of eminent domain.

Although the Rhode Island Supreme Court wisely did not become directly involved with the surrounding controversy, the Court did not provide adequate guidance for the future by limiting the decision to the very specific legal issue of statutory interpretation. Readers conjure an entirely different interpretation of the decision upon reading the entire background facts, thus potentially leading readers to attribute different possible motives to the Court’s decision. If the Court mentioned some of the policy concerns, or explained its hesitancy to address such issues, this decision could have been more instructive or useful not only for the legal community, but also Rhode Island citizens, such as those who were concerned about Generation Realty’s development project.

CONCLUSION

The Court held that an amendment to a zoning ordinance was a general amendment because, when considered in its totality, the

56. Richard C. Dujardin, *Planners Will Tell Council to Reject Camp Meehan Plan*, THE PROVIDENCE JOURNAL, Sept. 12, 2007, at D1.

57. *Id.*

58. *Id.*

59. Barbarisi, *supra* note 53.

ordinance completely revamped the town's zoning landscape rather than single out and change a specific property. Therefore, the Court determined it was not a specific change, which would require personal notice to affected property owners, and so the town only needed to provide public notice.

Juliana McKittrick

Zoning Law. *West v. McDonald*, 18 A.3d 526 (R.I. 2011). The Rhode Island Supreme Court addressed whether a subdivision proposal was required to comply with both the area requirements of East Providence's zoning ordinance and the density limitations of its comprehensive plan. The Court held that the state and city land use statutes specifically require a subdivision proposal to comply with both the city's zoning ordinance and comprehensive plan. Furthermore, a petitioner's reliance on the city's zoning ordinance was an insufficient basis on which to state a claim under the doctrine of equitable estoppel.

FACTS AND TRAVEL

Plaintiff Michael West purchased two family homes in a residential neighborhood located between Lynn and Vineland Avenues in East Providence.¹ West had purchased the properties with the intent to construct three duplexes to create a total of six residential units.² Consistent with section 19-98 of East Providence's Zoning Ordinances,³ West's lots were located in a zoning district designated as "residential-4" (R-4) that "permits construction of two unit dwellings, provided that they are built on lots containing at least 8,750 square feet."⁴ Additionally, the lots were sited in an area designated as "Low Density Residential" in East Providence's Comprehensive Land Use Plan (comprehensive plan).⁵

In order to comply with the zoning ordinance, West needed to adjust the lot lines of his parcels of land "to achieve three lots of

1. *West v. McDonald*, 18 A.3d 526, 528 (R.I. 2011).

2. *Id.*

3. *Id.* at 537.

4. *Id.* at 528-29.

5. *Id.* at 530. "In November 2001, the city council amended East Providence's comprehensive plan to decrease the residential density of the Low Density Residential category from 8 dwelling units per acre to 5.8 dwelling units per acre." *Id.*

the minimum permissible size.”⁶ In February 2006, West petitioned East Providence’s city planner for approval of an administrative subdivision of his three parcels of land.⁷ Upon review, the city planner determined that West’s petition for an administrative subdivision should be reviewed as a minor subdivision, which required the approval of the city’s planning board.⁸ In March 2006, West resubmitted his application seeking a minor subdivision.⁹ In April 2006, the city’s zoning officer issued a certificate of completeness of the application and approved West’s application for a minor subdivision with respect to relevant zoning provisions.¹⁰ On May 3, 2006, the city’s planning department made a recommendation to the planning board to grant conditional approval for the subdivision.¹¹

However, during the planning board’s meeting on May 8, 2006, several neighbors objected to West’s proposed duplexes because the neighborhood was already “densely populated” and “would not be able to absorb the burden” of the additional units.¹² In response to the density concerns of the neighborhood, the planning board continued its investigation of West’s development proposal.¹³ On July 17, 2006, the city planning department recommended that the planning board reject West’s application for a minor subdivision because it failed to comply with the density requirements of the comprehensive plan.¹⁴ The planning department based its decision on the November 2001 amendment to the comprehensive plan, which effectively limited “the number of units that could be constructed on West’s combined properties to a maximum of 3.72 dwellings.”¹⁵

6. *Id.* at 529.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* The planning department determined that West’s proposal complied with both the city’s comprehensive land use plan and its zoning ordinance.

12. *Id.*

13. *Id.*

14. *Id.* at 529-30. Reversing its prior recommendation, the planning department concluded that West’s proposal was “contrary to many of the goals, policies, objectives, maps, and policy statements,” of the comprehensive plan. *Id.*

15. *Id.* at 530.

On July 20, 2006, the planning board unanimously rejected West's proposal and an equitable estoppel claim that he had raised.¹⁶ West then appealed the board's decision to the East Providence Zoning Board of Review (board of appeals), which in turn, denied his appeal.¹⁷ Pursuant to section 45-23-71 of the Rhode Island General Laws, West appealed the decision of the board of appeals to the Superior Court.¹⁸ On September 10, 2008, the trial justice of the Superior Court for Providence County affirmed the decision of the board of appeals and entered judgment in favor of the City of East Providence.¹⁹

ANALYSIS AND HOLDING

The Rhode Island Supreme Court reviewed the Superior Court's decision with deference to determine "whether the trial justice exceeded his or her authority under § 45-23-[71]."²⁰ However, the Court reviews "issues of statutory interpretation *de novo*."²¹ When the language of a statute is "clear and unambiguous," the Court will interpret the language literally.²² But when the language of a statute is "unclear and subject to more than one reasonable interpretation," the interpretation of an agency or board is entitled to deference, unless that interpretation is "clearly erroneous or unauthorized."²³

On appeal, West argued that the Superior Court erred by holding that: (1) "a municipality is not mandated to conform its zoning ordinance to the comprehensive plan within eighteen

16. *Id.*

17. *Id.* The Board of Review briefly concluded that the planning board properly interpreted and applied the comprehensive plan and subdivision regulations.

18. See R.I. GEN. LAWS § 45-23-71 (2006); *West*, 18 A.3d at 530-31.

19. *West*, 18 A.3d at 531.

20. *Id.* at 532. The Court "shall reverse a lower court judgment on appeal from a planning board of review if the trial justice 'misapplied the law, misconceived or overlooked material evidence, or made findings that were clearly wrong.'" (quoting *Munroe v. Town of East Greenwich*, 733 A.2d 703, 705 (R.I. 1995)).

21. *Id.* Determinations of law are "not binding on the reviewing court; they may be reviewed to determine what the law is and its applicability to the facts." *Id.* (citing *Pawtucket Transfer Operations v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008)).

22. *Id.* at 532.

23. *Id.*

months of adopting the comprehensive plan;" (2) a development proposal must comply with both the municipality's zoning ordinance and comprehensive plan; and (3) the doctrine of equitable estoppel did not bar the city from denying West's proposed subdivision.²⁴

First, the Court determined whether the time provisions contained in both the Rhode Island Comprehensive Planning and Land Use Regulation Act²⁵ (CPLURA) and the Zoning Enabling Act,²⁶ requiring municipalities to bring their zoning ordinances into conformance with their comprehensive plans within eighteen months, are directory or mandatory in nature.²⁷ The Court examined three factors to determine whether to construe the time provisions in the statutes as directory or mandatory.²⁸ First the court found that absence of sanctions within CPLURA and the Zoning Enabling Act, for failing to conform the zoning ordinances to the comprehensive plans within eighteen months, "bespeaks that the provisions are directory" and not mandatory.²⁹ Furthermore, the Court determined that the time-frame provisions were directory because they related to a matter of procedure as opposed to the essence of either CPLURA or the Zoning Enabling Act.³⁰ Finally, the Court found that the time provisions within the land use planning statutes are directed at public officials rather than private individuals and therefore directory.³¹ In conclusion, the Court held that the city's failure to amend its zoning code within eighteen months did "not eviscerate

24. *Id.*

25. See R.I. GEN. LAWS § 45-22.2-5(a)(3) (2006) ("Rhode Island's cities and towns . . . shall . . . [c]onform its zoning ordinance and map with its comprehensive plan within eighteen (18) months of plan adoption and approval[.]")

26. See R.I. GEN. LAWS § 45-24-34(b) (2010) ("The city or town shall bring the zoning ordinance or amendment into conformance with its comprehensive plan as approved . . . not more than eighteen (18) months after approval is given.")

27. *West*, 18 A.3d at 534.

28. *Id.* The three factors a court looks to when analyzing whether time provision are directory or mandatory, include: "(1) the presence or absence of a sanction, (2) whether the provision is the essence of the statute, and (3) whether the provision is aimed at public officers." (See *New England Dev., LLC v. Berg*, 913 A.2d 363, 372 (R.I. 2007)).

29. *Id.* at 534.

30. *Id.* at 534-35.

31. *Id.* at 535.

the goals, requirements, and mandates of a municipality's comprehensive plan."³²

The Court then determined whether a municipality could deny a development proposal that complied with the area requirements of the zoning ordinance but failed to comply with density requirements of the comprehensive plan.³³ The Court first found that East Providence's zoning ordinance and comprehensive plan "do not clearly contradict one another" because the two statutes further different purposes and the comprehensive plan sets forth area requirements while the zoning ordinance sets forth density limitations.³⁴ Subsequently, the Court held that a "subdivision proposal must comply with *both* the comprehensive plan and the zoning code"³⁵ under the Rhode Island Land Development and Subdivision Review Enabling Act³⁶ and East Providence's Development and Subdivision Review Regulations.³⁷ Furthermore, the Court found that "East

32. *Id.*

33. *Id.* at 536-37.

34. *Id.* at 536 & n.13.

35. *Id.* at 537.

36. See R.I. GEN. LAWS § 45-23-60 (2010). The statute states in pertinent part:

(a) All local regulations shall require that for all administrative, minor, and major development applications the approving authorities responsible for land development and subdivision review and approval shall address each of the general purposes stated in § 45-23-30 and make positive findings on the following standard provisions, as part of the proposed project's record prior to approval:

(1) The proposed development is consistent with the comprehensive community plan...

(2) The proposed development is in compliance with the standards and provisions of the municipality's zoning ordinance[.]

Id. & n.14 (emphasis removed).

37. "Article 5, sec. 5-4 of the Land Development and Subdivision Review Regulations of East Providence states in relevant part: [T]he Administrative Officer or Planning Board . . . shall make positive findings on all of the applicable standards listed below[:]

(a) Subdivision and land development project proposals shall be consistent with the East Providence Comprehensive Plan . . . ;

(b) All lots in a subdivision and all land development projects shall conform to the standards and provisions of [Chapter 19, Zoning] . . . "

West, 18 A.3d at 537.

Providence zoning code specifically addresses the issues that arise when two requirements are not wholly inconsistent with each other.”³⁸ Under sections 19-8³⁹ and 19-3⁴⁰ of the City of East Providence Revised Ordinances, “it was West’s burden” to comply with the city’s heightened density limitations of the comprehensive plan in addition to the area restrictions of the zoning ordinance.⁴¹

Finally, the Court determined whether the doctrine of equitable estoppel barred the city of East Providence from denying West’s subdivision proposal.⁴² West argued that “his reliance on the permissible uses outlined in the zoning ordinances was both substantial and detrimental to him” and the city’s “failure to amend the zoning ordinance to comport with the comprehensive plan renders any limitation on zoning uses unenforceable under equitable principles.”⁴³ The Court first found that “the city made no representations upon which West reasonably could rely” by merely enacting a zoning ordinance that set forth permissible uses.⁴⁴ Statutes and ordinances “do not constitute a continuing representation by the municipality upon which citizens can

38. *Id.* at 538.

39. *Id.* at 538-39. “Subsection (a) of § 19-8 provides: . . . ‘Wherever the provisions of any other statute, ordinance or regulation . . . impose other higher standards than are required in this chapter, the provisions of such statute, ordinance or regulation shall govern.’” *Id.* (emphasis removed).

40. *Id.* at 539. “§ 19-3 of the city’s zoning code says: ‘[i]n instances of uncertainty in the construction or application of any section of this chapter, the ordinance shall be construed in a manner that will further the implementation of and not be contrary, to the goals and policies and applicable elements of such comprehensive plan.’” *Id.*

41. *Id.* at 539-40.

42. *Id.* at 540. “There are four elements to equitable estoppel: (1) good faith reliance; (2) on an act or omission of a municipality; (3) which induces a party to incur substantial obligations; (4) making it highly inequitable to enforce the zoning [or planning] ordinance.” *Id.* (citing 4 Edward H. Ziegler, Jr. et al., RATHKOPF’S THE LAW OF ZONING & PLANNING, § 65:29 (4th ed. West 2010))

43. *Id.* The trial justice rejected West’s argument because he should have known that compliance with both the zoning ordinance and the comprehensive plan was required when his proposal was reclassified from an administrative to minor subdivision, the planning board had taken no action that he could reasonably rely upon, and that he failed to incur any substantial obligations that would require a remedy under equitable principles.

44. *Id.* at 541.

indefinitely rely" because they are constantly subject to change.⁴⁵

In addition, the Court rejected West's second reliance argument that "he relied on the fact that the zoning ordinances are required to conform to a municipality's comprehensive plan."⁴⁶ The Court reiterated their prior findings that there was no mandatory requirement that the comprehensive plan and the zoning ordinance be identical.⁴⁷ Furthermore, the Rhode Island Land Development and Subdivision Review Enabling Act and East Providence's Development and Subdivision Review Regulations require a development proposal to comply with both the zoning ordinance and the comprehensive plan.⁴⁸ In conclusion, West's equitable estoppel claim was insufficient because he "should have been aware that his proposal could be denied" if it failed to comply with both the ordinances and the comprehensive plan.⁴⁹

COMMENTARY

It is important to emphasize that the Supreme Court of Rhode Island unequivocally asserted that the "central issue" in the case involved "the subdivision of land and not zoning enforcement."⁵⁰ The comprehensive plan and its purpose "to encourage cities and towns to plan for orderly growth and development" thus became relevant in the Court's analysis.⁵¹ Therefore, the Court had a duty to address the city's comprehensive plan "in concert" with the zoning ordinance.⁵²

Another interesting aspect of the case was the participation of the East Providence neighborhood during the subdivision's approval process. This case highlights the valuable oversight power that members of the public wield during administrative land use proceedings. The density limitations mandated by the comprehensive plan might never have been brought to the

45. *Id.* (citing *Ocean Road Partners v. State*, 612 A.2d 1107, 1111 (R.I. 1992)).

46. *West*, 18 A.3d at 541.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 535.

51. *Id.* at 536.

52. *Id.*

attention of the planning board without the participation of the community. The Court even acknowledged that West's proposal "seemed to be moving seamlessly through the approval process" before the planning board meeting.⁵³ During West's approval process, two of the city's regulatory land use bodies failed to adequately consider the comprehensive plan in their assessments.⁵⁴ First, East Providence's zoning officer consulted only "the relevant zoning provisions" before approving West's subdivision proposal.⁵⁵

More significantly, the city's own planning department, responsible for consulting the comprehensive plan, granted conditional approval for the subdivision after specifically addressing the density requirements of the comprehensive plan.⁵⁶ The planning board would not have continued its investigation into West's proposal had it not been for "the concerns of the neighbors."⁵⁷ From this case, one takes the indelible impression that the planning board would have rubber stamped West's proposal without the active participation by the neighborhood. However, it is regrettable that the Court did not specify the neighborhood's density issues that would have been aggravated by West's duplexes.

CONCLUSION

The Supreme Court of Rhode Island affirmed the judgment of the Superior Court in favor of the City of East Providence. After reviewing *de novo* the applicable state and municipal land use statutes, the Court held that a minor subdivision proposal must comply with the municipality's area requirements of its zoning

53. *Id.*

54. *Id.* at 529.

55. *Id.* While I do not wish to imply that the specific provisions of the city's comprehensive plan are within the specific province of the zoning officer, a responsible civil servant should have at least a basic understanding or working knowledge of relevant density limitations such as the one adopted by the city council in 2001.

56. *Id.* The planning department asserted that "the proposed changes in the boundary lines and the construction of three two-family dwellings were in accordance with the comprehensive plan, including density requirements." *Id.*

57. *Id.*

ordinance and the density limitations of its comprehensive land use plan. The Court further held that a developer's reliance upon existing zoning ordinances and subdivision regulations is "a patently insufficient basis on which to invoke the doctrine of equitable estoppel" because the statutes, by their mutable nature, do not represent "a continuing representation by the municipality."⁵⁸

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58. *Id.* at 541.

2011 PUBLIC LAWS OF NOTE

2011 R.I. Pub. Laws ch. 043, 130. *An Act Relating to Criminal Procedure – Arrest.* Provides for the formation of a task force designed to investigate and develop policies for electronically recording custodial interrogations in their entirety. The task force is to be made up of a variety of people employed in both the legal and law enforcement professions, with the attorney general and public defender serving as co-chairpersons of the task force. The recommendations of this task force shall be submitted in a report to the governor, the chief justice of the Rhode Island Supreme Court, the speaker of the House of Representatives, the president of the Senate, and the chairpersons of the judiciary committees of both the House of Representatives and the Senate.

2011 R.I. Pub. Laws ch. 067, 079. *An Act Relating to Corporations, Associations, and Partnerships – Low Profit Limited Liability Companies.* Creates a new business designation under Rhode Island law for companies which are formed for charitable or educational purposes. The Act, referring to language found in 26 U.S.C. §170(c)(2)(B), defines a charitable or educational purpose as “organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involves the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals.” Finally, the Act also provides that any business originally organized as a low profit limited liability company will automatically revert to an ordinary limited liability company if their purpose ceases to satisfy the aforementioned requirement, as long as the company still satisfies all other requirements of an LLC.

2011 R.I. Pub. Laws ch. 068, 108. *An Act Relating to State Affairs and Government – Corrections.* “The Healthy Pregnancies for Incarcerated Women Act” is based on the assertion that restraining a pregnant woman can create unnecessary health risks to the woman or unborn child. If the department of corrections has “actual or constructive knowledge” that a prisoner or detainee is in her second or third trimester of pregnancy, the Act requires that the use of restraints be medically necessary and administered in the least restrictive manner possible. When restraints are used upon a pregnant prisoner or detainee the correctional officer must submit, within five days, a written explanation for using the restraints to the department of corrections. Any woman who has been restrained in violation of this law may pursue a civil action for damages.

2011 R.I. Pub. Laws ch. 073, 097. *An Act Relating To Criminal Procedure – Domestic Violence Prevention Act.* Expands upon the “Domestic Violence Prevention Act” by including the crimes of “cyberstalking” and “cyberharassment” to conduct prohibited under the Act. Section 11-52-4.2 of the Rhode Island General Laws defines the conduct of cyberstalking and cyberharassment to encompass transmitting communication “by computer or other electronic device to any person or caus[ing] any person to be contacted for the sole purpose of harassing that person or his or her family.” The course of harassing conduct prohibited must be of a kind that would cause a reasonable person to suffer substantial emotional distress or be in fear of bodily injury.

2011 R.I. Pub. Laws ch. 078, 083. *An Act Relating to Criminal Offenses – Jails and Prisons.* Prohibits prisoners from possessing any portable electronic communication device that is capable of transmitting or intercepting cellular or radio signals between providers and users of telecommunication and data services. The term prisoner includes all persons incarcerated at the adult correctional facility, in the custody of an officer outside the custodial unit, or in the custody of the state director of behavioral services, developmental disabilities, and hospitals.

2011 R.I. Pub. Laws ch. 080, 085. *An Act Relating to Court and Civil Procedure – Courts – District Court.* Amends the distribution of court business by consolidating Rhode Island's six divisions into four. The Act eliminates the first division and fifth division. The second division includes the city of Newport and towns of Jamestown, Little Compton, Middletown, Portsmouth and Tiverton. Appeals and transfers for this division shall be transmitted by the clerk of the Second Division District Court to the clerk of Newport County Superior Court. The third division includes city of Warwick and the towns of Coventry, East Greenwich, Foster, Glocester, Johnston, Lincoln, North Kingstown, North Providence, North Smithfield, Scituate, Smithfield, West Greenwich and West Warwick. Appeals and transfers for this division shall be transmitted by the clerk of the Third Division District Court to the clerk of Kent County Superior Court. The fourth division consists of the towns of Charlestown, Exeter, Hopkinton, Narragansett, New Shoreham, Richmond, South Kingstown and Westerly. Appeals and transfers shall be transmitted by the clerk of the Fourth Division District Court to the clerk of Washington County Superior Court. The sixth division consists of the cities of Central Falls, East Providence, Pawtucket, Woonsocket and the towns of Barrington, Bristol, Burrillville, Cumberland and Warren. Appeals and transfers shall be transmitted by the clerk of the Sixth Division District Court to the clerk of Providence County Superior Court.

2011 R.I. Pub. Laws ch. 159, 175. *An Act Relating to Insurance – Autism Spectrum Disorders.* Requires every group health insurance contract or every group hospital or medical expense insurance policy issued or renewed after January 1, 2012 to provide coverage for autism spectrum disorders. Benefits include coverage for applied behavioral analysis, physical therapy, speech therapy and occupational therapy services. Coverage only applies to services delivered within the state of Rhode Island, and continues only until the covered individual reaches age of fifteen.

2011 R.I. Pub. Laws ch. 162, 178. *An Act Relating to Education – Safe Schools.* The “Safe School Act” prohibits “any form or degree” of bullying in a school setting or where such behavior creates disruption of the education process or orderly operation of the school. The Act mandates that all Rhode Island schools adopt a statewide and unified anti-bullying policy promulgated by the Rhode Island Department of Education. The Act provides that all school districts, charter schools, career and technical schools, approved private day or residential schools and collaborative schools adhere to the Act and adopt the statewide anti-bullying policy by June 30, 2012.

2011 R.I. Pub. Laws ch. 176, 300. *An Act Relating to Criminals – Correctional Institutions – Medical Parole.* Amends the availability of medical parole to include persons deemed “severely ill,” where it would alleviate exorbitant medical expenses associated with inmates whose chronic and incurable illnesses render their incarceration non-punitive and non-rehabilitative. “Severely ill” is defined as suffering from a significant permanent or chronic physical and/or mental condition that requires extensive medical and/or psychiatric treatment with little or no possibility of recovery and precludes significant rehabilitation. Inmates will be considered for such release when the office of financial resources of the department of corrections determines the treatment causes the state to incur exorbitant expenses as a result of continued and frequent medical treatment during incarceration. An inmate granted medical parole shall be required by the parole board to undergo electronic monitoring, unless the health care plan mandates placement in a medical facility that cannot accommodate electronic monitoring.

2011 R.I. Pub. Laws ch. 185, 186. *An Act Relating to Motor and Other Vehicles – Safety Belt Use.* Amends Rhode Island law by providing that reasonable suspicion of a safety belt violation is required to stop, inspect, or detain a motor vehicle to determine whether the vehicle’s occupants are in violation of current safety belt law. The Act also prohibits any law enforcement officer from performing a search of a motor vehicle, its contents, the driver, or any passengers based solely on a violation of safety belt law.

2011 R.I. Pub. Laws ch. 196, 223. *An Act Relating to Public Utilities and Carriers – Internet Service Providers – Duty to Disclose Information.* Requires internet service providers, upon proper service of a search warrant or an administrative subpoena, to disclose subscriber account information consisting of the name, address, IP address, and telephone numbers associated with the account to the attorney general or the superintendent of the Rhode Island State police. Only the above information may be disclosed, and this information may only be disclosed when necessary for a criminal investigation or prosecution of offenses specifically delineated in the Act, such as child pornography and cyberstalking.

2011 R.I. Pub. Laws ch. 194, 207. *An Act Relating to Animals and Animal Husbandry – Animal Abuse Offenders.* The Act grants a sentencing judge the discretion to prohibit a person who enters a plea of *nolo contendere* or is convicted of any misdemeanor animal cruelty violation from possessing or residing with any animal for a period of up to five years. The Act also gives a sentencing judge the discretion to prohibit a person who enters a plea of *nolo contendere* or is convicted of a felony animal cruelty violation from possessing or residing with any animal for up to fifteen years. A violation of this Act is punishable by a fine up to \$1000, imprisonment for not more than one year, or both, and forfeiture of the animal(s).

2011 R.I. Pub. Laws ch. 198. *An Act Relating to Domestic Relations – Civil Unions.* Provides for civil unions between two individuals of the same sex. To be eligible to enter into a civil union, both parties must be at least eighteen years old, of the same sex, competent, not a party to another civil union or marriage, and not in a family relationship as stated in sections 15-1-1 and 15-1-2 of the Rhode Island General Laws. In order to establish a valid civil union, the parties must obtain a license from the town or city where one of the parties resides or, in the case of nonresidents, in the town or city where the proposed civil union is to be performed. Within three months of obtaining the civil union license, the parties must have the civil union certified by a qualified official and the certification must be held in the presence of two witnesses in addition to the qualified official. A party to a

lawful civil union is entitled to the same benefits, protections, and responsibilities as a party to a lawful marriage under section 15-3 of the Rhode Island General Laws, and a party to a civil union is included in the definition or use of any term that denotes the spousal relationship under Rhode Island law. The law provides that Rhode Island will recognize a civil union or registered domestic partnership lawfully entered into in another state, as long as the relationship meets the eligibility requirements of this Act; however the state will not recognize a civil union or registered domestic partnership that has the status of marriage. The Rhode Island Family Court has jurisdiction over the dissolution of civil unions and will follow the same procedures as those for the dissolution of marriage. Notwithstanding any provision of law to the contrary, no religious or denominational organization, organization operated for a charitable or educational purpose in connection with a religious organization, or individual will be subject to fines or penalties for refusing to provide, solemnize, certify, or treat as valid any civil union if doing such would cause the organization or individual to violate their sincerely held religious beliefs.

2011 R.I. Pub. Laws ch. 199, 201. *An Act Relating to Elections – Voter Identification.* Requires any person claiming to be a registered voter and wishing to vote in a primary, special, or general election to provide valid proof of identification. Valid types of proof of identification include documentation showing a photograph of the person, such as a Rhode Island driver's license or U.S. passport. Proof of identification not showing a photograph of the person, such as a birth certificate or social security card, is also allowed. If a person claiming to be a registered and eligible voter is unable to provide proof of identity, they will be allowed to vote by provisional ballot which the local board will later determine the validity of.

2011 R.I. Pub. Laws ch. 265. *An Act Relating to Education – School Committees and Superintendents.* The Act amends the general powers and duties granted to local school committees under Rhode Island law. The Act vests the chief executive officer of the respective city or town with the power and duty to enter into collective bargaining agreements with teachers and school

employees, rather than with the local school committee. The Act applies to all cities and towns where the school committee is appointed rather than elected, although it does not apply to any municipality in receivership. The Act does not otherwise affect the form of government of any city or town.

2011 R.I. Pub. Laws ch. 269, 277. *An Act Relating to Towns and Cities – Indebtedness of Towns and Cities.* Amends current law by prohibiting any Rhode Island city or town from selling a long-term bond to fund pension obligations or post-employment benefits without prior approval by the state auditor general and director of the state department of revenue.

2011 R.I. Pub. Laws ch. 270, 295. *An Act Relating to Criminal Offenses – Children.* Prohibits children under the age of eighteen from engaging in “sexting”—electronically transmitting a sexually indecent visual depiction of him or herself to another person. A violation of this law constitutes a status offense and shall be referred to the Family Court. A violation of this law does not subject the minor to sex offender registry requirements under applicable law.

2011 R.I. Pub. Laws ch. 271, 318. *An Act Relating to Criminal Offenses – Children.* Clarifies the distinction between the injury requirement for a first degree child abuse conviction, carrying a ten year mandatory prison sentence, and a second degree child abuse conviction, carrying a five year mandatory prison sentence. Prior to amendment, a first degree child abuse conviction required a showing that the defendant caused “serious bodily injury,” while a second degree child abuse conviction required a showing of “other serious physical injury.” The amendment eliminates the word “serious” from the elements of second degree child abuse, so that a second degree child abuse conviction now requires the state to prove that the defendant caused a physical injury other than what qualifies as “serious bodily injury” under the first degree child abuse.

2011 R.I. Pub. Laws ch. 338, 376. *An Act Relating to Education – Compulsory Attendance.* The Act increases the age of mandatory school attendance from sixteen (16) years old to eighteen (18) years old. Allows a school superintendent to waive this compulsory attendance requirement only upon proof that the pupil is sixteen (16) years of age or older and has been accepted into a postsecondary education program or has “an alternative learning plan” for obtaining either a high school diploma or its equivalent. The Act specifies that alternative learning plans must be of “age-appropriate academic rigor and [have] the flexibility to incorporate the pupil’s interests and manner of learning” and includes examples such as internships, online courses, and independent study. Waiver requests that are denied by the superintendent may be appealed to the school committee pursuant to Rhode Island General Law section 16-39-1.

2011 R.I. Pub. Laws ch. 339, 370. *An Act Relating to Insurance – Life Insurance Beneficiaries’ Bill of Rights.* The Act requires complete and proper disclosure, transparency, and accountability relating to the payment method of life insurance death benefits, and requires that beneficiaries be fully informed in bold type and in layman’s terms. Requires that a beneficiary be informed of his or her right to receive a lump-sum payment of life insurance proceeds, and prohibits an insurer from using a retained asset account unless the insurer discloses the beneficiary’s options to the beneficiary or the beneficiary’s legal representative. If a beneficiary does not receive a lump-sum payment of life insurance proceeds, then the insurer must provide a clear explanation of all life insurance proceeds payment options available to the beneficiary. Also, if an insurer uses a retained asset account, then the insurer must provide the beneficiary with a description and explanation of the items listed in this section. The law applies to death benefit claims under any life insurance policy submitted on or after September 1, 2011.

2011 R.I. Pub. Laws ch. 408, 409. *An Act Relating to Public Officers and Employees – Retirement System – Contribution and Benefits.* Amends section 36-1-8 of the Rhode Island General Laws by making significant changes to the state pension system to ensure stability and long terms sustainability. The Act alters the structure of the current state pension system by creating a defined benefit plan in which retirement savings are accumulated in individual member accounts. The Act also alters the current pension system by altering eligibility requirements, raising the retirement age, and temporarily suspending cost of living adjustments. The Act also establishes a commission to review municipal pension plans and make recommendations to improve the security and sustainability of those plans.

