


Summer 2017

2016 Survey of Rhode Island Law: Cases and Public Laws of Note

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Administrative Procedure. *Tarbox v. Zoning Bd. of Review of Jamestown*, 142 A.3d 191 (R.I. 2016). An appeal from a trial court's denial of reasonable litigation expenses under the Equal Access to Justice for Small Business and Individuals Act (EAJA) requires a petition for certiorari to the Supreme Court of Rhode Island. A municipal zoning board of review is an agency under the EAJA, and a variance hearing before the board is an adjudicatory proceeding under the same Act for purposes of seeking reasonable litigation expenses.

FACTS AND TRAVEL

In September 2010, Plaintiffs Henry and Mary Tarbox (Plaintiffs) sought to convert their single-family home in Jamestown into a duplex to allow Henry Tarbox's mother to live with them.¹ Even though the town's zoning ordinance allowed this kind of use in the zone where their house was located, the parcel of land that they owned did not have the required dimensions to accommodate a duplex in compliance with the zoning laws.² In response, the Plaintiffs filed an application for a dimensional variance with the zoning board of review of Jamestown (Zoning Board).³ At the hearing for the variance application, the Plaintiffs were represented by counsel, and Henry Tarbox testified on his own behalf; the Zoning Board questioned both Henry and his counsel extensively.⁴ No one came forward to oppose the variance application, and the Zoning Board heard no evidence in opposition to the variance application.⁵ Despite the apparent lack of opposition, only three of the five Zoning Board members voted to approve the application, resulting in the

1. *Tarbox v. Zoning Bd. of Review of Jamestown*, 142 A.3d 191,193 (R.I. 2016). Henry and Mary were attempting to build an apartment attachment, thus converting it into a duplex. *Id.*

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

variance's denial.⁶

The Plaintiffs promptly filed a complaint and appealed the Zoning Board's denial to the Newport County Superior Court.⁷ The trial justice issued a written opinion, which overturned the Zoning Board's decision and granted the plaintiffs relief in the form of a dimensional variance.⁸ After expending time and money on the appeal to finally get what they wanted, the Plaintiffs moved for reasonable litigation expenses under the EAJA.⁹ Reasoning that the Zoning Board was not an "agency" covered by the Act and a hearing before the board was not an "adjudicatory proceeding," a second superior court justice denied the plaintiffs' motion.¹⁰ The trial justice then entered final judgment, which included the order to overturn the Zoning Board's decision, as well as the denial of Plaintiffs' motion for reasonable litigation expenses.¹¹ The Plaintiffs subsequently filed a notice of appeal to the Rhode Island Supreme Court to challenge the denial of their post-trial motion.¹²

ANALYSIS AND HOLDING

Before the Court could get to the true issues under appeal,¹³ it first had to dispose of a tricky, procedural issue arising from the Plaintiffs' decision to file a notice of appeal rather than a writ of

6. *Id.* (citing R.I. GEN. LAWS ANN. § 45-24-57(2)(iii) (West, Westlaw through 2016 Legis. Sess.)) ("The concurring vote of four (4) of the five (5) members of the zoning board of review sitting at a hearing is required to decide in favor of an applicant on any matter within the discretion of the board upon which it is required to pass under the ordinance, including variances and special-use permits.").

7. *Id.* at 194 (citing R.I. GEN. LAWS ANN. § 45-24-69 (West, Westlaw through 2016 Legis. Sess.)) (allowing "an aggrieved party" to "appeal a decision of the zoning board of review to the superior court for the county in which the city or town is situated by filing a complaint.").

8. *Id.*

9. *Id.* Plaintiffs also amended their complaint to reflect the additional request. *Id.* n.4.

10. *Id.* at 194; *see also* R.I. GEN. LAWS ANN. § 42-92-3 (West, Westlaw through 2016 Legis. Sess.).

11. *Tarbox*, 142 A.3d at 194.

12. *Id.*

13. *Id.* The Court stated that "[o]n appeal, plaintiffs argue that the trial justice misinterpreted the act in concluding that the board is not an 'agency' and that the hearing on plaintiffs' variance application was not an 'adjudicatory proceeding' under the act." *Id.*

certiorari.¹⁴ The Court summarily disposed of the Zoning Board's argument that a writ of certiorari was required because the appeal fell under the auspices of the Administrative Procedure Act (APA)¹⁵ by noting that the APA "does not encompass zoning appeals."¹⁶ Despite this fact, the Court still held that a writ of certiorari was required for other reasons.¹⁷ The Court explained that this case first arose as a result of "an appeal from a decision of a zoning board in accordance with section 45-24-69," and the Plaintiffs were only eligible to request reasonable attorney's fees under the EAJA after their victory on the merits of that appeal.¹⁸ Thus, the Court reasoned that because the claims were connected, the proper procedure under well-established Rhode Island law was to file a petition for a writ of certiorari to the Supreme Court.¹⁹

In rejecting the Plaintiffs' construction of the EAJA, the Court explained that section 42-92-3 of the Act provides for two distinct procedural avenues through which a victorious plaintiff may appeal a decision for reasonable litigation expenses.²⁰ Under the Court's understanding of the statute's plain meaning, the first avenue is under section 42-92-3(a), which allows "an adjudicatory officer" to award reasonable litigation expenses to the party challenging an agency determination if that agency did not have "substantial justification" for its determination in an adjudicatory proceeding.²¹ The Court read this provision *in pari materia* with section 42-92-5, which states that "[a]ny party dissatisfied with

14. *Id.*

15. *Id.* "[T]he APA provides for review to this court by certiorari . . ."

Id.

16. *Id.* More specifically,

[t]he [APA] does not apply to review of administrative action by municipal agencies. An aggrieved party pursuant to . . . § 45-24-69 may appeal a decision of a Zoning Board of Review to the Superior Court sitting in the county in which the city or town is situated. Where municipal agency action is by statute reviewable in the Superior Court, again the [APA] does not apply.

Robert B. Kent et al., *Rhode Island Civil Procedure* § 80:1 at 639 (West 2015).

17. *Tarbox*, 142 A.3d at 195.

18. *Id.* "There is no indication that the act creates a cause of action independent of the proceedings before the agency and the judicial review thereof." *Id.* at 198.

19. *Id.* at 195; e.g., *N. Trust Co. v. Zoning Bd. of Review of Westerly*, 899 A.2d 517, 519 (R.I. 2006).

20. *See Tarbox*, 142 A.3d. at 196.

21. *Id.* at 198.

the fee determination by the adjudicatory officer may appeal to the court having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication.”²² The thrust of the Plaintiffs’ argument was that the trial justice was an adjudicatory officer, which allowed them to simply file a notice of appeal.²³ However, the Court found that the statute’s definition of adjudicatory officer was entirely inconsistent with this interpretation, and the proper procedure under this avenue is to appeal a decision of the adjudicatory officer to the superior court by filing a notice of appeal.²⁴

The Court then determined that because a trial justice should not be considered an adjudicatory officer, her determination of litigation expenses under section 42-92-3(b) should connect with section 45-24-69, as the underlying appeal came from a decision of the Zoning Board, which has no adjudicatory officer.²⁵ Thus, the Court stated that because the Plaintiffs “were not even entitled to seek reasonable litigation expenses until they received a favorable decision from the Superior Court,” the Supreme Court’s review encompassed both the underlying Zoning Board decision and the trial justice’s denial of litigation expenses.²⁶ Although the Court held that all plaintiffs proceeding by this procedural avenue must petition the Supreme Court for a writ of certiorari, the Court treated the Plaintiffs’ notice of appeal as if it were a writ of certiorari because this was an issue of first impression for the Court.²⁷

The Court then moved on to the merits of the case by interpreting the EAJA.²⁸ The Rhode Island Legislature made its intent clear in the statute that the EAJA would be a deterrent against abuses of power by state agencies that might seek to

22. *Id.* at 195–96.

23. *Id.* at 197.

24. *Id.*; see R.I. GEN. LAWS ANN. § 42-92-2(1) (West, Westlaw through 2016 Legis. Sess.) (“the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication.”).

25. *Tarbox*, 142 A.3d at 198–99.

26. *Id.* at 199.

27. *Id.* In doing so, the Court issued a stern warning to all those coming after that a writ of certiorari is absolutely required in all future cases of this kind. *See id.*

28. *Id.*

impose their will on citizens who have little to no chance to challenge the agency's decisions on their own.²⁹ The Court noted that in 1994 the legislature amended the definition of "agency" under section 42-92-2(3) to include municipal entities "authorized by law to make rules or to determine contested cases," and held that a municipal zoning board fell into this category.³⁰ Although the Zoning Board argued, among other things, that it should not be considered an agency because it could not bring an action in law or equity, the Court determined that, in general, the Zoning Board—and all state municipal zoning boards—are authorized by law to hear contested cases and make rules regarding zoning procedure,³¹ even if they do not meet some of the other disjunctive criteria for an agency.³²

Lastly, the Court addressed whether the Zoning Board hearing was an "adjudicatory proceeding" under the EAJA.³³ Because the variance hearing involved "notice and an opportunity to be heard," the Court determined that it crossed the first boundary, making it quasi-judicial in nature.³⁴ The Court next noted that the Plaintiffs were restricted from building a duplex on their lot not as a result of the board's decision, but because the city's zoning ordinance did not allow for this kind of use.³⁵ The Plaintiffs were then forced to seek a dimensional variance, which the Court likened to a permit to depart from the usual zoning requirements.³⁶ Reasoning that the Zoning Board's decision

29. *Id.* at 199–200.

30. *Id.* at 201.

31. *Id.*; *see also* R.I. GEN. LAWS ANN. § 45–24–56(a) (West, Westlaw through 2016 Legis. Sess.) ("The [zoning] board [of review] shall establish written rules of procedure . . .").

32. *See Tarbox*, 142, A.3d at 201. Other criteria for an agency includes the ability "(2) 'to bring any action at law or in equity, including, but not limited to, injunctive and other relief, or' (3) 'to initiate criminal proceedings.'" *Id.*

33. *Id.* An adjudicatory proceeding is defined as "any proceeding conducted by or on behalf of the state administratively or quasijudicially which may result in . . . the denial, suspension, or revocation of a license or permit or which may result in the compulsion or restriction of the activities of a party." R.I. GEN. LAWS ANN. § 42-92-2(2) (West, Westlaw through 2016 Legis. Sess.).

34. *Tarbox*, 142 A.3d at 202. (quoting *Campbell v. Tiverton Zoning Bd.*, 15 A.3d 1015, 1025 (R.I. 2011)).

35. *Id.*

36. *Id.*

concerning the Plaintiffs' application in the quasi-judicial variance hearing resulted in the denial of such a permit, which in turn restricted the Plaintiffs' activities, the Court held that the zoning variance hearing was an "adjudicatory proceeding" under the act.³⁷ In remanding the action to the to the superior court, the Supreme Court required the trial justice to make findings on whether the Zoning Board had "substantial justification" for the denial of plaintiffs' variance application, as none had been made.³⁸

COMMENTARY

Although the issues that the Rhode Island Supreme Court dealt with in this case were issues of first impression, it did not seem to struggle to find analogies within the laws of Rhode Island.³⁹ Because the Zoning Board does not have an "adjudicatory officer," all appeals of variance applications must necessarily come under the purview of section 45-24-69.⁴⁰ The responsibility of the trial justice then, is to determine whether or not the agency's decision was substantially justified, entitling the plaintiff to reasonable litigation expenses under section 42-92-3(b) of the EAJA.⁴¹ It is peculiar that the Rhode Island Legislature chose to remain silent on the appeal process required for all other agency determinations without an adjudicatory officer; however, as the Court noted, the Legislature did provide a clear procedural path for zoning appeals in section 45-24-69.⁴² Here, the Court seemed to be acting in the interest of equity and justice, as the law in this area was far from settled, and it would have been an injustice to prevent a homeowner from obtaining reasonable litigation expenses against the Zoning Board on account of a very technical procedural violation.

The spirit of equity and justice is embodied within the EAJA itself, as the Rhode Island Legislature so eloquently put it in the statute, "[i]t is declared that both the state and its municipalities and their respective various agencies possess a tremendous power

37. *Id.* at 202–03.

38. *Id.* at 203 (quoting *Krikorian v. R.I. Dep't of Human Servs.*, 606 A.2d 671, 676 (R.I. 1992)).

39. *E.g., id.* at 197–98 (citing *Campbell*, 15 A.3d. at 1025).

40. *See id.* at 199.

41. *See id.* at 198.

42. *Id.* at 199–200.

in their ability to affect the individuals and businesses they regulate or otherwise affect directly.”⁴³ Because of this inequality of power, the Legislature wished to guard against potential arbitrary and capricious decisions of powerful state agencies on the citizens of Rhode Island. While the EAJA certainly does have a punitive aspect, it was passed—and subsequently amended—to apply in a wide variety of cases where justice demanded that citizens and small businesses who are of meager means should be able to challenge agency decisions that arbitrarily limit their rights.⁴⁴

The Court certainly does not stretch the meanings of “agency” or “adjudicatory proceeding” as defined in the act by applying the plain meaning of the words, aided by the use of dictionaries and secondary sources, which are usually among the first sources drawn upon in judicial interpretation.⁴⁵ That the Rhode Island Supreme Court would use its role as the ultimate arbiter of justice in the state to imbue the statute with such a broad meaning is no surprise, especially in a case such as this, where there is no evidence on record of why the Plaintiffs’ variance application should be denied.⁴⁶ In separating and clarifying the procedural avenues to appeal under the EAJA, the Court ensured a statutory scheme that will cover a wide range of agency actions all over the state, which ensures that citizens are not left out in the open to fall prey to the whims of an overzealous agency. The superior courts may now be either reviewers or deciders of reasonable litigation expenses under the EAJA, but no more can they deny that the EAJA applies to decisions of municipal zoning boards.

CONCLUSION

The Rhode Island Supreme Court first held that a plaintiff proceeding from the procedural avenue of a zoning appeal must petition for a writ of certiorari to challenge a trial justice’s determination of reasonable litigation expenses under section 42-92-3(b) of the EAJA. Next, the Court determined that the clear legislative intent of the EAJA, as amended in 1994, was to include

43. R.I. GEN. LAWS ANN. § 42-92-1(a) (West, Westlaw through 2016 Legis. Sess.).

44. *See Tarbox*, 142 A.3d. at 200–01.

45. *Id.* at 201–02.

46. *See id.* at 193.

municipal agencies such as the zoning board of review in the definition of “agency” under the EAJA. Finally, the Court held that a variance application hearing is an “adjudicatory proceeding” under the act because it is a quasi-judicial hearing which may result in the denial of a permit to vary land from the usual town ordinance.

David M. Remillard

Arbitration. *Lemerise v. Commerce Ins. Co.*, 137 A.3d 696 (R.I. 2016). Trial courts may not supplement review—either through admission of testimony or other documentary evidence—when considering an applicant’s motion to modify an arbitration award pursuant to R.I. General Laws section 10-3-14. Reviewing courts shall deny effect to arguments not raised during arbitration and enter confirmation of an arbitration award unless modification is justified under the narrow grounds of section 10-3-14.

FACTS AND TRAVEL

This case involved a dispute between Joseph Lemerise (Plaintiff) and the Commerce Insurance Company (Defendant) regarding the superior court’s decision to modify an arbitration award to conform with the Plaintiff’s insurance policy limit.¹ The Plaintiff argued that the superior court erred by modifying the arbitration award because the Court had no grounds to do so pursuant to Rhode Island’s Arbitration Act.² Meanwhile, the Defendant sought affirmance of the superior court’s modification and claimed that the arbitrator exceeded his authority by granting an award in excess of the Plaintiff’s insurance policy limit.³

The parties stipulated largely to the underlying facts but disagreed on the extent of the Plaintiff’s injuries.⁴ In August of 2011, the Plaintiff was struck by an uninsured motorist while crossing the street in Newport, Rhode Island.⁵ Following the collision, the Plaintiff filed a claim for coverage under his automobile insurance policy.⁶ The parties attempted to negotiate

1. *Lemerise v. Commerce Ins. Co.*, 137 A.3d 696, 697 (R.I. 2016).

2. *Id.* (Rhode Island’s Arbitration Act is codified in G.L. 1956 chapter 3 of title 10).

3. *Id.*

4. *Id.*

5. *Id.* The Plaintiff sustained injuries to his foot and ankle. *Id.*

6. *Id.* The insurance policy was registered with the Plaintiff’s mother, although the Defendant did not dispute that the Plaintiff was entitled to compensation under the policy. *Id.*

appropriate compensation for the Plaintiff's injuries to no avail.⁷

After filing suit in the Newport County Superior Court, the Plaintiff eventually agreed to "participat[e] in Arbitration pursuant to the terms of the Plaintiff's [un]insured motorist policy."⁸ The arbitrator sought to determine the extent of the Plaintiff's injuries and award sufficient compensation.⁹ After deliberation, the arbitrator assessed the Plaintiff's injuries at \$150,000 and added prejudgment interest of \$47,550, which brought the total award to \$197,550.¹⁰

Following arbitration, the parties filed cross motions in the superior court.¹¹ The Plaintiff moved to confirm the arbitration award, while the defendant sought modification.¹² The superior court supplemented its review with a copy of the Plaintiff's insurance policy, took testimony from the arbitrator, and eventually granted the Defendant's motion to modify the award to conform with the insurance policy limit of \$100,000.¹³ The Plaintiff appealed to the Rhode Island Supreme Court in pursuit of a reversal and confirmation of the initial arbitration award.¹⁴

ANALYSIS AND HOLDING

The Rhode Island Supreme Court began its opinion by discussing the appropriate standard of review upon an applicant's motion to confirm an arbitration award by both emphasizing public policy in favor of deference to an arbitrator and the consequent narrow scope for modification.¹⁵ In particular, the Court explained that "[p]ublic policy favors the finality of arbitration awards, and such awards enjoy a presumption of finality."¹⁶ The Court further expressed a policy against allowing

7. *Id.*

8. *Id.* at 705 (stipulating to a stay of the underlying litigation).

9. *Id.* at 698.

10. *Id.*

11. *Id.*

12. *Id.*; see also R.I. GEN. LAWS ANN. §§ 10-3-11, 14 (West, Westlaw through Jan. 2016 Reg. Sess.).

13. *Lemerise*, 137 A.3d at 698–99. The trial justice stated that he would not "allow [plaintiff] to take advantage of some technicality to get more than he bargained for in this case." *Id.* at 699.

14. *Id.*

15. *Id.* at 699–700 (citing § 10-3-14).

16. *Id.* at 699 (internal citations omitted).

litigants to sidestep the binding effect of arbitration awards by moving for modification in the trial court.¹⁷ As such, courts reviewing a motion to confirm an arbitration award must grant confirmation unless (among a few other narrow exceptions)¹⁸ modification of the award is justified pursuant to section 10-3-14.¹⁹

Through precedent and a limiting construction of section 10-3-14, the Court rejected the Defendant's argument that the arbitrator overreached his authority by assessing prejudgment interest.²⁰ To the contrary, the Court relied on its holding in

*Sentry Insurance Co. v. Grenga*²¹ where it concluded that arbitrators "should" award prejudgment interest unless the parties specifically contract otherwise.²² In line with *Sentry*, the

Court explained that the arbitrator's award of prejudgment interest to the Plaintiff did not justify modification.²³ The Court implied that arbitrators possess a wide range of discretion.²⁴ As a product of its deference, the Court narrowly interpreted the trial court's latitude to modify the award pursuant to section 10-3-14.²⁵

The Court determined that the Defendant effectively waived certain defenses to the arbitration award—including arguments related to choice of law and insurance policy limits—by not raising such defenses in the arbitration proceedings.²⁶ The Court extrapolated that waiver analysis by referencing its holding in *Wheeler v. Encompass Insurance Co.*²⁷ where it concluded that

17. *Id.* (quoting Prudential Prop. and Cas. Ins. Co. v. Flynn, 687 A.2d 440, 441 (R.I. 1996)). "[P]arties who have contractually agreed to accept arbitration as binding are not allowed to circumvent an award by coming to the courts and arguing that the arbitrators misconstrued the contract or misapplied the law." *Id.*

18. R.I. GEN. LAWS ANN. §§ 10-3-12, 13 (West, Westlaw through Jan. 2016 Reg. Sess.) (detailing other grounds for modification not relevant here).

19. *Lemerise*, 137 A.3d at 700.

20. *Id.* at 700–02, 703–04.

21. 556 A.2d 998 (R.I. 1989).

22. *Lemerise*, 137 A.3d at 701 (quoting Paola v. Commercial Union Assurance Co., 461 A.2d 935, 937 (R.I. 1983) ("arbitrators *should* add prejudgment interest to their awards unless the parties specifically provide otherwise by agreement." (emphasis added))).

23. *Id.* at 704 (internal citations omitted).

24. *See id.* at 702.

25. *See id.* at 703–04.

26. *Id.* at 704.

27. 66 A.3d 477, 483 (R.I. 2013).

mistakes of law are not grounds for modification to an arbitration award.²⁸ Here, the Court decided that the Defendant's failure to submit a copy of the Plaintiff's insurance agreement during the arbitration proceedings constituted a waiver of a policy-limit defense, and, even if the arbitrator erred as a matter of law, that would not justify modification of the arbitration award.²⁹ For similar reasons, the Court rejected the Defendant's argument that Massachusetts law should have been applied.³⁰ The Court solely analyzed issues explicitly raised in arbitration and admonished the superior court for expanding its review beyond those boundaries.³¹

The Court ultimately found for the Plaintiff by vacating the superior court's order and remanding the case to the superior court with instructions to confirm the arbitrator's award of \$197,550.³² The Court's holding rested largely upon its position that the arbitrator did not err by awarding prejudgment interest, and that the Defendant waived its right to invoke the insurance policy limit as a defense by failing to raise the defense during arbitration.³³

COMMENTARY

Dissenting, Justice Robinson disagreed with the Court's finding of a waiver of insurance policy-based defenses and proposed a two-step approach to the confirmation of an arbitration award.³⁴ First, an arbitrator should evaluate the plaintiff's injuries and determine a "fair and reasonable compensation."³⁵ Second, the superior court should turn to the terms of the insurance policy and reduce the plaintiff's award to conform with

28. *Id.* at 698.

29. *Id.* at 704.

30. *Id.*

31. *Id.* at 702–03. The Supreme Court explained that the superior court erred by conducting a *de novo* review of the arbitration award. *Id.* at 702. Specifically, the Supreme Court took issue with the superior court justice's consideration of the insurance policy and the arbitrator's testimony in its review. *Id.*

32. *Id.* at 704–05.

33. *Id.* at 700–02, 703–04.

34. *Id.* at 705 (Robinson, J., dissenting); *see also* Wheeler v. Encompass Ins. Co., 66 A.3d 477, 484–89 (R.I. 2013) (Robinson, J., dissenting) (explaining the two-step approach in greater detail).

35. *Lemerise*, 137 A.3d at 705.

the policy's limitations.³⁶ Justice Robinson seemingly diverged from the Court in that he sought to simultaneously promote deference to the arbitration award and enforce the insurance policy.³⁷ Justice Robinson proposed that, in this case, such an analysis would yield an arbitration award equal to the Plaintiff's insurance policy cap of \$100,000.³⁸

The Defendant attempted to manipulate the arbitration system, and the Court committed itself to punishing the Defendant for doing so.³⁹ The Defendant evidently undervalued the Plaintiff's injuries.⁴⁰ As such, it wanted to divert the arbitrator's attention away from the insurance policy for fear that the large policy limit would yield an overvaluation of the Plaintiff's injuries.⁴¹ Upon dissatisfaction with the award, the Defendant sought modification of the arbitrator's valuation by reference to the policy the Defendant intentionally withheld from the arbitrator.⁴² The Court explained that the Defendant's approach was "fraught with danger[.]" and the Defendant now must accept the consequences of liability in excess of the policy limit.⁴³

While the Court was apparently motivated to encourage parties to enter future arbitration agreements, its decision might produce the opposite result.⁴⁴ Some people feel that arbitrators are less partial, inferior adjudicators when compared to trial justices. The legislature likely intended to quell those concerns by providing trial courts with a method to modify arbitration awards in accordance with section 10-3-14.⁴⁵ The Court's narrow

³⁶ *Id.*

³⁷ *See id.*

³⁸ *Id.*

³⁹ *See id.* at 704 (majority opinion) (referring to the Defendant's decision to withhold the Plaintiff's insurance policy limit as "tactical in nature" and explaining that it is "bound to suffer the consequences in the event that the arbitrator disagrees with [the Defendant's] valuation to such an extent that the policy limit is exceeded by the award.").

⁴⁰ *Id.*

⁴¹ *See id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *See id.* at 699. The Court likely assumed that by creating a sense of finality to arbitration awards, contracting parties would develop faith in the arbitration system. *See id.*

⁴⁵ Because § 10-3-14 confers an additional power upon the judiciary to check the arbitration system, one must read § 10-3-14 as affording protection

construction of the enumerated grounds for modification under section 10-3-14 has weakened the safeguards implemented by the Legislature.⁴⁶ Consequently, the Court's holding might discourage otherwise hesitant parties from entering future arbitration agreements in light of the decreased scope for review.

The Court's decision is also troubling because it fails to provide adequate guidance to lower courts, regarding waiver of defenses not raised in arbitration proceedings. At times, the Court seems to suggest a broad rule that would deny effect to all arguments not raised in arbitration, while, in other instances, it seems to narrowly carve a rule prohibiting the introduction of issues intentional withheld from an arbitrator.⁴⁷ It remains unclear whether the Court was persuaded by the Defendant's mere failure to introduce the insurance policy during the arbitration proceedings or the Defendant's bad-faith reservation. A broad reading of the Court's holding might produce injustice for parties denied the right to raise issues not specifically expounded in arbitration, whereas a narrow interpretation might hinder the Court's stated goal of adding finality to arbitration awards. Regardless of the lens of generality a lower court adopts, it might select the wrong scope, thus yielding an unintended result.

CONCLUSION

When considering a motion to modify an arbitration award pursuant to section 10-3-14, trial courts may not expand review beyond evidence presented during the arbitration proceedings. Trial courts shall ignore arguments not raised during arbitration and enter confirmation of an arbitration award absent a need to make modifications in accordance with the narrow grounds delineated in section 10-3-14.

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from mistaken arbitration awards.

46. *See id.* at 700–02, 703–04. The Court's narrow construction of section 10-3-14 must be viewed as a retraction of protection from errant arbitration awards because such construction inevitably limits a litigant's redress. *See id.*

47. *See id.* at 703–04.

Civil Procedure. *Albanese v. Town of Narragansett*, 135 A.3d 1179 (R.I. 2016). A Rhode Island Superior Court justice has broad discretion in regulating discovery, and their decisions not to reopen discovery and to deny a motion for continuance will only be disturbed when they have abused their discretion. Additionally, an attenuated spousal conflict of interest does not meet the personal bias requirement for recusal. Lastly, summary judgment should not be granted in cases where there is a genuine dispute of material fact despite the fact that the record contains little evidence.

FACTS AND TRAVEL

Sometime during 2006, Joanne Albanese (Albanese) brought suit against the Town of Narragansett, Rhode Island, the Town Treasurer, the Town police department and two law enforcement officers (collectively, Defendants), claiming assault and battery, negligence, misconduct, and false arrest following a physical altercation between herself and a maintenance worker employed by her apartment complex.¹ Albanese first claimed that the police officers responding to the physical-assault call, Sergeant Favreau and Lieutenant Sutton, used excessive force when retaining her at the scene when they allegedly “drag[ged] her [out] of her car . . . with her jacket over her head,” and second that the police officers falsely arrested her.² Albanese also claimed that the Defendants acted with gross negligence by failing to act in a professional manner in the ongoing landlord-tenant dispute over the mold issue Albanese was experiencing.³ In her fourth claim, Albanese alleged

1. *Albanese v. Town of Narragansett*, 135 A.3d 1179, 1182, 1183 (R.I. 2016). Albanese was charged with one count of simple assault and/or battery after attacking a maintenance worker employed by the apartment complex in which she lived. *State v. Albanese*, 970 A.2d 1215, 1217 (R.I. 2009). The dispute arose after the maintenance department failed to address Albanese’s mold issues, and Albanese allegedly body slammed the maintenance worker while he was bringing trash to the dumpster. *Id.*

2. *Albanese*, 135 A.3d at 1183 (alterations in original).

3. *Id.*

negligence per se, stating that the “[D]efendants had intimidated and harassed her,” attempting to dissuade her from making any further complaints about the mold issue, and that the Defendants failed to address any of her reports of mold.⁴ Albanese also included claims for intentional infliction of emotional distress and requested punitive damages in her prayer for relief.⁵

Though the suit was originally filed in 2006, the suit lied dormant for a number of years until 2013, when a Washington County Superior Court justice imposed a discovery-close deadline of July 17, 2013.⁶ A few months later, counsel for Albanese withdrew representation, stating that there had been “a breakdown in the attorney-client relationship,” and Albanese continued with her claims pro se.⁷ The trial justice required the Defendants to submit any dispositive motions by October 11, 2013, in preparation for a December 10, 2013, trial date and gave Albanese until November 8, 2013, to file any objections.⁸

On September 20, 2013, Albanese wrote a letter to the court, stating that she was undergoing surgery and requested to postpone the deadline to file an objection until after her surgery.⁹ One week later, a status hearing was held, where Albanese stated that surgery had not been scheduled yet.¹⁰ The trial justice denied the request to postpone the deadline.¹¹ On October 10, 2013, the Defendants filed a motion for summary judgment.¹² A status hearing followed eight days later, where Albanese announced there was still no scheduled date for surgery; the trial justice set another status hearing for November 15, 2013, and extended the deadline to file an objection to November 29.¹³

On November 15, 2013, Albanese notified the court that her surgery was complete and requested another extension, stating that she was “too ill to work on her objection” due to the recent

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 1183–84.

11. *Id.* at 1184.

12. *Id.*

13. *Id.*

surgery.¹⁴ The trial justice granted a new deadline of December 13 and warned Albanese that any further requests for continuances would be denied.¹⁵ On December 6, 2013, (one week before the deadline) Albanese filed her written objection to the motion for summary judgment and alerted the court that a memorandum and supporting documentation would soon be submitted.¹⁶ Additionally, Albanese filed a document entitled “Emergency Motion for an Extension of Time/Continuance in which to Complete [Plaintiff’s] Answer to Summary Judgment and Continuance for Hearing On Summary Judgment.”¹⁷ Albanese argued that she needed more time because her previous attorney had never asked for any kind of discovery.¹⁸ The trial justice refused to reopen discovery but granted another extension, contrary to her previous warning, and set a new deadline of January 17, 2014, for Albanese to file an objection.¹⁹ Over the next month, Albanese filed numerous motions requesting additional time, but at the hearing on January 31, 2014, the trial justice denied Albanese’s motions and proceeded with oral arguments on the issue of summary judgment.²⁰ Albanese was given the opportunity to provide oral response, and after she did so, the trial justice granted Defendants’ summary judgment on all counts.²¹ At some point during this time, Albanese had also moved for the trial justice to recuse herself from the case, stating first that the trial justice failed to take her seriously as a litigant acting pro se, and second that the trial justice had a conflict of interest that would have warranted recusal.²²

On appeal, Albanese claimed that the trial justice erred in denying the motion to reopen discovery, denying motions for continuance, denying the motion to recuse, and granting summary judgment.²³

14. *Id.*

15. *Id.*

16. *Id.*

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

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 1185.

22. *Id.* at 1186, 1187.

23. *Id.* at 1185.

ANALYSIS AND HOLDING

The Rhode Island Supreme Court considered four issues, the first of which was whether or not the trial justice erred in denying Albanese's motion to reopen discovery.²⁴ The Court established that a trial justice has broad discretion in regulating discovery for the sake of judicial economy, and that the parties are bound to comply with the timing of discovery set forth in the scheduling and other orders once they have been set by the court.²⁵ More than six years had passed between the time that Albanese first brought the suit and when the court imposed the discovery deadline, so she had plenty of time to request materials during that period.²⁶ Albanese's argument that her former attorney failed to seek important documents for the case was unsuccessful because Albanese did not move to reopen discovery until several months after her attorney withdrew representation.²⁷

For similar reasons, the Court determined that the trial justice had broad discretion in determining whether to grant or deny a continuance.²⁸ The Court acknowledged that managing the trial calendar is extremely difficult, and thus justices must be afforded wide discretion in denying continuances, and the Court will question such decisions only when there is a showing that the lower court abused its discretion.²⁹ Here, Albanese was granted an extension on October 18, 2013, and she had twenty-five days to work on the objection before her scheduled surgery, only three less days than were initially allotted.³⁰ Albanese also received two more continuances after surgery even though her case was stagnant for a number of years with no activity, and she further received several continuances thereafter.³¹ By the final due date, Albanese had 100 days to respond to the summary judgment motion.³² Thus, given the broad discretion the trial justice has in order to successfully

24. *Id.*

25. *Id.* (citing *Shelter Harbor Conservation Soc'y, Inc. v. Rogers*, 21 A.3d 337, 343 (R.I. 2011)).

26. *Id.*

27. *Id.*

28. *Id.* at 1186.

29. *Id.* (citing *Boucher v. Galvin*, 571 A.2d 35, 37 (R.I. 1990)).

30. *Id.*

31. *Id.*

32. *Id.*

manage the trial calendar and the amount of time Albanese had to submit the proper documents, the trial justice did not err in denying any of Albanese's motions for continuance.³³

Third, the Court addressed whether or not the trial justice erred in denying Albanese's motion to recuse.³⁴ Albanese argued that the trial justice failed to take Albanese seriously as a pro se litigant, encouraged the Defendants to move for summary judgment, even though they had not yet filed a motion to do so, and had a conflict of interest because the trial justice's husband was a law-enforcement officer who might have had contact with the officers in the underlying case during his course of employment.³⁵ The Rhode Island Supreme Court dismissed the first two contentions stating that Albanese was a "recalcitrant litigant," and that the "trial justice went to great lengths to make exceptions for Albanese's behavior . . . and help[ed] [her] clarify her arguments before the court," despite the fact that she once needed to be removed from the court room by a deputy sheriff.³⁶ Further, the Court found that Albanese failed to provide evidence showing that the trial justice encouraged the Defendants to move for summary judgment.³⁷ Lastly, the Court held that the spousal conflict is an "old rooted claim" and was mere conjecture, ultimately ruling that the trial justice did not err in denying the motion to recuse.³⁸

Finally, the Court considered whether or not the trial justice erred in granting summary judgment, taking each count separately.³⁹ On the false arrest, gross negligence and misconduct, and punitive damages claims, the Court concluded that the trial justice did not err in granting summary judgment.⁴⁰ However, on

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 1187.

37. *Id.* When the trial justice denied the motion to recuse, she stated on the record that she had not ordered the Defendants to move for summary judgment but instead had set a timeline for them in an effort to move the case along. *Id.*

38. *Id.* at 1188. The conflict of interest argument was not raised in time to be considered in oral argument. *Id.* at 1187–88 (citations omitted).

39. *Id.* at 1188.

40. *Id.* at 1189–91. The Court found that on the false arrest claim, summary judgment was appropriate because the officer had probable cause to arrest Albanese due to physical confrontation and failure to adhere to the officer's instructions. *Id.* at 1190. On the negligence and misconduct claims,

the assault and battery claim, the Court found that summary judgment was not appropriate.⁴¹ The Court reasoned that summary judgment is not appropriate when there is a genuine dispute of material fact, and that despite there being very little evidence on the record, the Defendants' story conflicted with Albanese's version of the events.⁴² Thus, a genuine dispute of material fact existed, and the trial justice erred in granting summary judgment on that count.⁴³

COMMENTARY

It is evident that the Rhode Island Supreme Court heavily considered the rationale behind affording trial justices a great deal of discretion when determining whether or not the trial justice erred in denying the motions to reopen discovery and grant a continuance.⁴⁴ Litigation is a time-intensive process in and of itself, and delaying the process further by reopening discovery and granting multiple extensions contributes to the development of a clog in the judicial stream. Further, granting continuances for any and all circumstances diminishes the importance of moving for a continuance in emergency situations. The Court reasoned the same way regarding recusal.⁴⁵ Recusal requires a judge to make a personal reflection and determine whether or not their conflict of interest is strong enough to interfere with their ability to make an unbiased judicial decision. Thus, this is inherently an area in which a judge should be afforded more discretion. Beyond that, it is important to allow such discretion in order to create a limit for recusal. If grounds for recusal extend to such attenuated circumstances as here, where the judge's spouse might have had some form of contact with the law enforcement officers in Albanese's case, recusal would occur in the majority of cases,

the Court found that there was no evidence on the record to support these claims. *Id.* at 1191. On the punitive damages claim, the Court found that punitive damages are only available "when a defendant's conduct requires deterrence and punishment," which was not necessary here. *Id.* (quoting *Pier House Inn, Inc. v. 421 Corp.*, 812 A.2d 799, 803 (R.I. 2002)).

41. *Id.* at 1190.

42. *Id.*

43. *Id.*

44. *Id.* at 1185.

45. *Id.* at 1187.

especially in smaller communities.⁴⁶

The Court also made a clear distinction that despite the relatively scant evidence on the record, regarding the assault and battery charges, summary judgment should not have been awarded to the Defendants because there was still a dispute of fact between the law enforcement officers' testimony and Albanese's testimony.⁴⁷ A strong motivating factor for granting summary judgment has been to weed out claims that do not actually contain a triable issue in order to promote judicial economy and place a limit on already costly and time-intensive litigation. Considering the Court was erring on the side of judicial economy when deciding the other issues in the case, reversing summary judgment when the evidence appears facially weak makes an important statement. It emphasizes that the amount of evidence is secondary to whether or not there is a genuine dispute within the evidence that does exist.

CONCLUSION

The Rhode Island Supreme Court held that a trial justice has broad discretion in regulating discovery and denying motions for continuance in order to help preserve judicial economy, and these decisions will only be disturbed when the trial justice has abused his or her discretion. Furthermore, the Court held that an attenuated spousal conflict does not meet the threshold of personal bias required for recusal, and summary judgment may be granted if there is a genuine dispute as to a material fact, despite an overwhelming lack of evidence.

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46. *See id.* at 1188.

47. *Id.* at 1190.

Civil Procedure. *Manning v. Bellafigiore*, 139 A.3d 505 (R.I. 2016). The Rhode Island Supreme Court, under its inherent power to fashion an appropriate remedy that serves the ends of justice, has the authority to award attorneys' fees against a party that acts in bad faith. A party acts in bad faith by either failing to directly answer questions during discovery or providing false testimony at trial. The Court can infer from a trial justice's findings that a party's conduct constituted bad faith.

FACTS AND TRAVEL

On March 4, 1998, Michael Manning (Manning), after falling unconscious at his home, was admitted to South County Hospital (SCH).¹ Doctor Peter J. Bellafigiore, who was responsible for Manning's care, wanted Manning to undergo a magnetic resonance imaging (MRI) test in order to determine whether Manning was suffering from a stroke.² Over the course of four days, Dr. Bellafigiore was unsuccessful in having Manning undergo an MRI test at least two times because Manning had a claustrophobic reaction, and the sedatives Dr. Bellafigiore administered to Manning failed to mitigate Manning's claustrophobia.³ On March 7, 1998, Manning suffered a stroke while at SCH and passed away two days later at Massachusetts General Hospital.⁴

On January 6, 2000, Manning's estate (Plaintiff) filed a negligence and wrongful death suit against Dr. Bellafigiore and two others.⁵ On January 5, 2004, after an extensive discovery period,

1. *Manning v. Bellafigiore (Manning IV)*, 139 A.3d 505, 507–08 (R.I. 2016).

2. *Id.* at 508.

3. *Id.*

4. *Id.*

5. *Id.* The claims against Dr. McNiece, Manning's primary care physician, and South County Hospital were subsequently dismissed. *Id.* at 507 n.1.

the trial commenced.⁶ The jury returned a verdict in favor of Dr. Bellafore.⁷ Plaintiff subsequently filed a motion for a new trial, and moved for sanctions against Dr. Bellafore and his attorneys, White & Kelly, P.C. (White).⁸ Plaintiff contended that during discovery, White failed to disclose conversations that Dr. Bellafore had with Manning on March 5 and March 6.⁹

On November 4, 2005, the trial justice granted Plaintiff's motion for a new trial against Dr. Bellafore on the grounds that the verdict was not supported by the evidence.¹⁰ Dr. Bellafore subsequently appealed the trial justice's decision.¹¹

On April 12, 2010, the Rhode Island Supreme Court affirmed the trial justice's decision to grant a new trial because "the trial justice conducted the appropriate analysis, did not overlook or misconceive material evidence, and was not otherwise clearly wrong."¹² As a result, Dr. Bellafore settled with Plaintiff, but expressly preserved the claims for sanctions against Dr. Bellafore and White.¹³

On September 10, 2012, the trial justice granted Plaintiff's motion to sanction both Dr. Bellafore and White and awarded Plaintiff \$152,998.57.¹⁴ The trial justice sanctioned Dr. Bellafore and White under Rule 11 of the Rhode Island Superior Court Rules of Civil Procedure,¹⁵ on the grounds that Dr. Bellafore

6. *Id.* at 511.

7. *Id.* at 512.

8. *Id.*

9. *Id.*

10. Manning v. Bellafore (*Manning I*), No. W.C.2000-63, 2005 WL 2981660, at *24 (R.I. Super. Ct. Nov. 4, 2005).

11. *Manning IV*, 139 A.3d 505, 512 (R.I. 2016).

12. Manning v. Bellafore (*Manning II*), 991 A.2d 399, 410–11 (R.I. 2010).

13. *Manning IV*, 139 A.3d at 513.

14. Manning v. Bellafore (*Manning III*), No. 2000-0063, 2012 WL 12796483, at *22 (R.I. Super. Ct. Sept. 10, 2012).

15. Rule 11 states in relevant part that:

[E]very pleading, written motion, and other paper of a party represented by an attorney shall be personally signed by at least one . . . attorney of record The signature of an attorney . . . or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper . . . and that the pleading, motion, or other paper is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation If a pleading, motion, or other paper is signed in violation of this rule, the court . . . may impose upon the

made five assertions at trial that were “drastically different” from his pretrial disclosures.¹⁶ Specifically, the trial justice found that Dr. Bellafore’s pretrial disclosures omitted the following: (1) the term “conscious sedation”; (2) a discussion with Manning about anesthesiology; (3) a drug called “[v]ersed”; (4) discussions with Manning about sedatives; and (5) an apology Manning made to Dr. Bellafore.¹⁷ The trial justice concluded that sanctions were appropriate against Dr. Bellafore because “[e]ither [he] was hiding the complete answers, or he opted to modify his version of the truth far into the trial.”¹⁸ The trial justice found that sanctions were appropriate against White because it failed to refer to a “board letter,”¹⁹ which detailed Manning’s refusal to undergo an MRI on March 5 with “maximum sedation,” when White responded to Plaintiff’s interrogatories.²⁰ Further, the trial justice explained that although no evidence showed “[White] knew that Dr. Bellafore had such a detailed recollection of the specific events of the key conversation[,]” White “was obligated but failed to determine the issues with . . . Manning’s anesthesia and . . . [his] concerns about the anesthesia.”²¹

However, the trial justice found that Dr. Bellafore was “primarily culpable” because “[h]e responded to his attorneys’ questions, drafted interrogatory answers, signed answers under oath, responded to deposition questions under oath, . . . and uncorked the surprise testimony deep into the marathon trial.”²² Accordingly, the trial justice held Dr. Bellafore eighty percent

person who signed the pleading, motion, or other paper, a represented party, or both, any appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney’s fee.

R.I. SUPER. CT. R. CIV. P. 11.

16. *Manning IV*, 139 A.3d at 513.

17. *Id.*

18. *Id.* at 513–14 (alterations in original).

19. *Id.* at 514. The trial justice found that Dr. Bellafore submitted to the Rhode Island Board of Medical Licensure a letter detailing conversations with Manning, and that Dr. Bellafore directed White to use the board letter to answer Plaintiff’s interrogatories. *Id.*

20. *Id.*

21. *Id.* (alterations in original).

22. *Id.*

responsible and White twenty percent responsible.²³ Both Dr. Bellafiore and White appealed the trial justice's decision.²⁴

ANALYSIS AND HOLDING

Upon review of the superior court's order, the Rhode Island Supreme Court sought to determine whether Rule 11 of the Rhode Island Superior Court Rules of Civil Procedure applies to discovery violations, and whether the superior court abused its discretion or was otherwise clearly wrong in imposing sanctions on Dr. Bellafiore and White.²⁵ Conducting a *de novo* review of the rule's language, the Court determined that Rule 11 was not applicable to the alleged discovery violations against Dr. Bellafiore.²⁶ Nevertheless, the Court determined that it "may award attorneys' fees as an exercise of its inherent power to fashion an appropriate remedy that would serve the ends of justice."²⁷ The Court explained that in order for it to impose sanctions, under its inherent power, the record must show that a defendant acted in "bad faith, vexatiously, wantonly, or for oppressive reasons."²⁸

First, the Court addressed the actions of Dr. Bellafiore.²⁹ From the outset of the Court's analysis, it explained that although two of the trial justice's five findings were actually part of discovery,³⁰ the trial justice did not overlook or misconceive material evidence regarding whether sanctioning Dr. Bellafiore was appropriate.³¹ Then, the Court focused on several statements that Dr. Bellafiore made at trial with significant new details but

23. *Id.*

24. *Id.* at 515.

25. *Id.*

26. *Id.* at 515–16.

27. *Id.* at 516 (quoting *Blue Cross & Blue Shield of R.I. v. Najarian*, 911 A.2d 706, 711 n.5 (R.I. 2006)).

28. *Id.* (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991)). The Court noted that under its inherent power, attorneys' fees are also appropriate when the award is "(1) pursuant to the common fund exception . . . [or] (2) as a sanction for the willful disobedience of a court order" *Id.* (alteration in original).

29. *Id.* at 516–17.

30. *Id.* at 517. The Court noted that Dr. Bellafiore's testimony regarding "[c]onversations with Manning about sedations on March 5 or March 6" and "Manning[s] apolog[y]" were disclosed during discovery. *Id.*

31. *Id.*

were not disclosed in discovery.³² For example, the Court took issue with the fact that at deposition, Dr. Bellafigore indicated that “he did not consider anesthesia . . . as a desirable treatment for Manning prior to [March 7] because [anesthesia] would pose too much of a risk”³³ However, at trial, Dr. Bellafigore testified that he offered “conscious sedation” with the help of an anesthesiologist on March 5 and March 6.³⁴

Additionally, the Court found that Dr. Bellafigore’s inconsistent statements in responding to interrogatories and deposition responses and trial testimony³⁵ supported the trial justice’s conclusion that Dr. Bellafigore “[e]ither . . . hid[] the complete answers, or he opted to modify his version of the truth far into the trial.”³⁶ As a result, the Court held that although the trial justice did not explicitly assign the terms “bad faith, vexatiously, wantonly, or for oppressive reasons”³⁷ to Dr. Bellafigore’s conduct, “a finding that Dr. Bellafigore acted in bad faith can be inferred by the trial justice’s decision and that such decision did not overlook or misconceive material evidence, and is not otherwise clearly wrong.”³⁸

Next, the Court addressed the actions of White.³⁹ Although the Court found that White had a duty to disclose requested facts, White’s conduct did not amount to acting in bad faith.⁴⁰ Thus, the

32. *Id.* at 518.

33. *Id.* (alterations in original).

34. *Id.*

35. Specifically, the Court stated that “[t]he record . . . is clear that, at a minimum, Dr. Bellafigore failed to answer questions posed in plaintiff’s interrogatories and at his deposition completely and that he added significant new details in his testimony at trial.” *Id.*

36. *Id.* (alterations in original). The Court also found that an inference of bad-faith could be drawn from “[t]he trial justice’s findings that Dr. Bellafigore was ‘motivated by improper purposes and lacking in good faith[]’ [and that he] ‘knew his sworn answers were indirect, evasive, significantly incomplete, and had little concern for the result.’” *Id.* at 519 (alterations in original).

37. *Id.* at 518.

38. *Id.* at 519.

39. *Id.*

40. *Id.* at 519–20. The Court noted that the White’s actions were more along the lines of negligence. *Id.* Furthermore, the Court explained that “[had] there been a finding that [White] acted in bad faith because White . . . knew that Dr. Bellafigore was providing false testimony, then [White] would be in violation of Article V, Rule 3.3 of the [Rhode Island] Supreme Court Rules of Professional Conduct.” *Id.* at 520 n.11 (alterations in original); *see*

Court vacated the judgment against White because the trial justice's decision neither showed a fact nor supported an inference that White acted in bad faith "as necessary when relying on the court's inherent powers to impose a sanction."⁴¹

Finally, the Court addressed the amount of the sanction award.⁴² While noting that "a trial justice [has] wide latitude to fashion an appropriate remedy for sanctionable conduct,"⁴³ the Court was troubled with the trial justice's assessment of the evidence in calculating the \$152,998.57 award.⁴⁴ The Court explained that the Plaintiff did not have to incur the additional costs of a second trial because the parties settled.⁴⁵ In addition, the Court found that the trial justice made an erroneous assessment by including the attorneys' fees for the hours spent on the claims against the two other defendants that were subsequently dismissed and the attorneys' fees incurred by the Plaintiff during the sanction proceeding.⁴⁶ The Court reasoned that, if it included Plaintiff's attorneys' fees incurred during the sanction hearing, "[i]n essence, the [C]ourt would be sanctioning Dr. Bellafiore for defending against a motion to impose a sanction on him, rather than for any sanctionable conduct."⁴⁷ Consequently, the Court vacated the \$152,998.57 award and directed the superior court to sanction Dr. Bellafiore in the amount of \$38,398.53.⁴⁸

COMMENTARY

The Rhode Island Supreme Court clearly acknowledged that it has the inherent power to award attorneys' fees as an appropriate remedy to serve the ends of justice and can refer to the Rhode Island Superior Court Rules of Civil Procedure by

R.I. SUP. CT. R. PROF'L CONDUCT 3.3(a)(3) ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false.").

41. *Id.* at 520.

42. *Id.*

43. *Id.* (alteration in original) (quoting *Pleasant Mgmt. LLC v. Carrasco*, 918 A.2d 213, 217 (R.I. 2007)).

44. *Id.*

45. *Id.* at 521.

46. *Id.* at 521–22.

47. *Id.* at 522.

48. *Id.*

analogy as a guide to review a trial justice's findings.⁴⁹ Here, the Court used the rationale of Rule 11, "to deter repetition of the harm, and to remedy the harm caused," to guide its decision.⁵⁰ In addition, the Court clarified that the trial justice must find, either explicitly or implicitly, that the party acted in bad faith in order for sanctions to be appropriate under a court's inherent power.⁵¹

Moreover, the Rhode Island Supreme Court sought to balance the purpose of imposing sanctions and the high standard of awarding attorneys' fees pursuant to its inherent power. The facts of this case support the Court's adherence to balancing these principles because Dr. Bellafigliore either willfully refused to directly answer questions during discovery or committed a fraud on the superior court by giving false testimony.⁵²

However, the dissent argues that the trial justice's decision contained several errors. Specifically, the dissent explains that the trial justice mistakenly applied Rule 11⁵³ and that two assertions Dr. Bellafigliore made at trial were disclosed in discovery.⁵⁴ While these were erroneous findings made by the trial justice, Dr. Bellafigliore's conduct allows the majority to underplay these errors and focus on his key inconsistencies. For instance, although two of the assertions Dr. Bellafigliore made at trial were disclosed during discovery, Dr. Bellafigliore still made three key assertions at trial that either were significantly changed or omitted in his responses during discovery.⁵⁵ In addition, even though the superior court applied the wrong rule when awarding Plaintiff's attorneys' fees, the Supreme Court undoubtedly has the discretion to use its inherent power to award attorneys' fees⁵⁶ and may use the Superior Court Rules of Civil Procedure by analogy to

49. *Id.* at 516.

50. *Id.* (quoting *Huntley v. State*, 109 A.3d 869, 873 (R.I. 2015)).

51. *Id.* at 519.

52. *See id.* at 518.

53. *Id.* at 523–24 (Robinson J., concurring in part and dissenting in part). Justice Robinson concurred with the majority on vacating the sanction against White. *Id.* at 522.

54. *Id.* at 523. Justice Robinson also argued that the trial justice erroneously found three inconsistent statements because, although Dr. Bellafigliore never used the word "[v]ersed," Dr. Bellafigliore implicitly mentioned the word "[v]ersed" in deposition testimony. *Id.*

55. *Id.* at 517–18 (majority opinion).

56. *Id.* at 516 (citing *Blue Cross & Blue Shield of R.I. v. Najarian*, 911 A.2d 706, 711 n.5 (R.I. 2006)).

guide its review.⁵⁷

CONCLUSION

The Rhode Island Supreme Court held that even though the trial justice applied Rule 11 of the Superior Court Rules of Civil Procedure, the superior court did not abuse its discretion in sanctioning Dr. Bellafiore because an inference of bad faith could be drawn from his conduct either during discovery or at trial.⁵⁸ In addition, the Court held that the sanctioning of White was an abuse of discretion because there was neither a fact nor inference that could be drawn to support a bad faith finding.⁵⁹ Finally, the Court reduced the original monetary sanction imposed to \$38,398.53 because the trial justice erroneously calculated the amount of the award.⁶⁰

Steven Davis

57. *Id.* (citing *Lett v. Providence Journal Co.*, 798 A.2d 355, 365 (R.I. 2002)).

58. *Id.* at 519.

59. *Id.* at 519–20.

60. *Id.* at 521–22.

Constitutional Law. *State v. Gonzalez*, 136 A.3d 1131 (R.I. 2016). The Rhode Island Supreme Court addressed whether a trial court erred in denying a defendant's motion to suppress evidence when officers entered into his home and arrested him without warrants, and whether that denial violated the defendant's constitutional right to be free from unreasonable searches and seizures. The Court clarified factors to consider when applying the analyses for warrant exceptions, the attenuation doctrine, and the harmless error principle.

FACTS AND TRAVEL

Shortly before midnight on January 21, 2012, Tony Gonzalez allegedly shot and caused the death of a man at the home of Gonzalez's ex-girlfriend, Patricia Dalomba, in Warwick, Rhode Island, in the presence of Dalomba and her current boyfriend; both Dalomba and her current boyfriend were unharmed.¹ Dalomba, the only eyewitness, called 911 to report the shooting and identified Tony Gonzalez as the shooter several times as well as provided his home address and physical description.²

Following the 911 call, Warwick police officers began to arrive at the station shortly after midnight on January 22, 2012, where they were immediately informed that Gonzalez was the shooter.³ In the early morning hours of January 22, 2012, officers attended briefings, interviewed Dalombra, discussed strategy, and determined Gonzalez's location.⁴ At approximately 7:00 a.m., six

1. *State v. Gonzalez*, 136 A.3d 1131, 1135-36 (R.I. 2016).

2. *Id.* at 1142. Dalomba's current boyfriend was taking shelter in the closet and unable to see the shooter. *Id.* at 1140.

3. *Id.* at 1152 (majority opinion), 1159 (Goldberg, J., concurring). The identification of Gonzalez as the shooter was based on Dalomba's eyewitness identification as well as testimony from Dalomba and her boyfriend, regarding a series of hostile and threatening text messages and phone calls exchanged among them and Gonzalez in the days leading up to the shooting. *Id.* at 1136, 1139, 1142-43, 1157 (majority opinion).

4. *Id.* at 1139, 1140 (majority opinion), 1159-60 (Goldberg, J., concurring).

Warwick police officers joined at least six Providence police officers at a Providence substation before they “departed in a ‘caravan’” for Gonzalez’s residence, which he shared with his mother Cira Gonzalez.⁵ Police officers were highly aware that Gonzalez was likely armed as both Dalomba and Gonzalez’s brother informed them that Gonzalez almost always carried a gun and “typically [slept] with a handgun under his pillow,” which could pose a threat to officers’ safety.⁶

At the Gonzalez residence, the police officers established a perimeter around the house, and three or six officers approached the front door.⁷ An officer carrying a tactical shield knocked on the door while officers with guns “displayed” stood directly behind him.⁸ Ms. Gonzalez opened the door and spoke to the lead officer for ten to fifteen seconds.⁹ When asked for information on Gonzalez’s location, Ms. Gonzalez, at most, gestured to the stairs and/or glanced at the stairs¹⁰—no verbal answer was given—and the police entered the Gonzalez residence.¹¹ The Warwick and Providence police officers arrested Gonzalez just after 7:00 a.m. on January 22, 2012.¹² While in the process of handcuffing Gonzalez, but before reading him his Miranda rights, the arresting officer repeatedly asked about the location of the gun, to which Gonzalez replied, “[the gun’s] not here. It’s not in the bedroom. I don’t have a gun.”¹³ Officers removed Gonzalez from the home, placed him in the back of a marked police car, and departed for the station.¹⁴

At 8:10 a.m. while still in her home, Ms. Gonzalez read and signed a written consent for the officers to search her home.¹⁵ At approximately the same time, the police officers transporting Gonzalez pulled into a parking lot, removed Gonzalez’s handcuffs, and Gonzalez read and signed a written consent to search his

5. *Id.* at 1160 (Goldberg, J., concurring).

6. *Id.* at 1137–38 (majority opinion) (alteration in original).

7. *Id.* at 1149, 1154.

8. *Id.* at 1149.

9. *Id.* at 1138, 1149.

10. *Id.* at 1139, 1149.

11. *Id.* at 1138, 1139, 1140–41, 1149.

12. *Id.* at 1152.

13. *Id.* at 1139. The gun used in the shooting was never located. *Id.* at 1143 n.6.

14. *Id.* at 1139.

15. *Id.* at 1150.

bedroom.¹⁶ The police officers subsequently searched Gonzalez's bedroom and seized evidence of gun paraphernalia and clothing that matched Dalomba's description of the shooter.¹⁷ The police did not have an arrest warrant or a search warrant.¹⁸

On May 22, 2012, a Kent County grand jury indicted Gonzalez on four charges: (1) first-degree murder, (2) assault with intent to commit murder, (3) discharging a firearm while committing murder, and (4) discharging a firearm while committing assault with intent to commit murder.¹⁹

Gonzalez filed motions to suppress evidence found in his bedroom as well as his comments regarding the gun made during his arrest based on his "contention that his arrest was unlawful because the police did not have a warrant to enter his home and arrest him."²⁰ The trial justice (1) denied the motion to suppress Gonzalez's statements made during the arrest and before he was advised of his Miranda rights, finding that the question asked by the police officers as to the location of the gun was "prudent" given the officers reasonably assumed Gonzalez was armed;²¹ (2) denied the motion to suppress evidence on the grounds of lack of consent to search, finding that both Gonzalez and his mother "freely and voluntarily" gave written consent to search;²² (3) denied the motion to suppress evidence on the grounds of lack of arrest or search warrants, finding that exigent circumstances justified the warrantless search;²³ and (4) denied the motion to suppress evidence from the arrest and search based on lack of consent to enter the house, finding that Ms. Gonzalez consented when she opened the door, nonverbally indicated that Gonzalez was upstairs, and allowed police officers to enter.²⁴

In February 2013, following a nine-day trial, the jury found

16. *Id.* at 1155–56.

17. *Id.* at 1140. Evidence seized included: an open black gun case, miscellaneous gun parts, a loaded magazine, and receipt from a gun store, identifying Gonzalez as the purchaser of a nine millimeter handgun, a black vest, a black scarf, a black jacket, and gray boots. *Id.*

18. *Id.* at 1136.

19. *Id.* at 1135.

20. *Id.* at 1135–36.

21. *Id.* at 1141.

22. *Id.*

23. *Id.* at 1141–42.

24. *Id.* at 1142.

Gonzalez guilty on all counts and sentenced him to two, consecutive, life sentences.²⁵ Gonzalez appealed this decision to the Rhode Island Supreme Court, which granted his petition to determine if the trial justice's denial of the motions to suppress were clearly erroneous and whether or not police violated Gonzalez's federal constitutional rights to be free from unreasonable searches and seizures.²⁶

ANALYSIS AND HOLDING

The Rhode Island Supreme Court deferred to the trial justice's factual findings, applied a "clearly erroneous standard,"²⁷ and conducted an independent, *de novo* review of the evidence in the record, in a light most favorable to the State, to determine if Gonzalez's Fourth Amendment constitutional rights were violated.²⁸ Therefore, the Court would reverse the trial justice's denial of the motion to suppress only if "(1) his or her findings concerning the challenged statements reveal clear error, and (2) [the Court's] independent review of the conclusions drawn from the historical facts establishes that the defendant's federal constitutional rights were denied."²⁹

The Court reviewed Fourth Amendment principles including federal and Rhode Island precedent on the issue of exceptions to the warrant requirement for searches and seizures.³⁰ The Fourth Amendment provides: "The right of the people to be secure in their . . . houses . . . shall not be violated, and no warrants shall issue, but upon probable cause . . ."³¹ The "Fourth Amendment has drawn a firm line at the entrance to the house. Absent [a recognized exception to the warrant requirement], that threshold

25. *Id.* at 1145.

26. *Id.* at 1135, 1145. Gonzalez also appealed the decision based on the contention that two of the jurors in his case were biased and either should have been dismissed or he should have been granted a mistrial, but the Court declined to address that issue in light of its ruling on the motions to suppress. *Id.* at 1159.

27. *Id.* at 1145 (citing *State v. Patino*, 93 A.3d 40, 50 (R.I. 2014), *cert. denied* 135 S. Ct. 947 (2015); *State v. Cosme*, 57 A.3d 295, 299 (R.I. 2012); *State v. Page*, 709 A.2d 1042, 1044 (R.I. 1998)).

28. *Id.* (citing *State v. Harrison*, 66 A.3d 432, 441 (R.I. 2013)).

29. *Id.* (quoting *State v. Grayhurst*, 852 A.2d 491, 513 (R.I. 2004)).

30. *Id.* at 1146–47.

31. U.S. CONST. amend. IV.

may not reasonably be crossed without a warrant.”³² This strong protection of privacy in the home creates a presumption that warrantless searches are unreasonable.³³ Exceptions to the warrant requirement include when the search is consented to, and when exigent circumstances justify a warrantless entry into the home.³⁴

A. Consent

First, the Court addressed the purported consent of Ms. Gonzalez for the police officers to enter her home, noting that the burden is on the State to prove by a “fair preponderance of the evidence”³⁵ that consent was “freely and voluntarily”³⁶ given when assessed under the totality of the circumstances.³⁷ Some of the factors to be considered under the totality of the circumstances include “the number of officers entering the home,’ ‘the apprehension of a family member,’ ‘the time of day,’ and a ‘display of weaponry.’”³⁸ The Court held that the trial justice’s determination that Ms. Gonzalez consented to police officers entering the home and resultant denial of the motion to suppress were erroneous, as she did not freely and voluntarily give consent.³⁹ The Court summarized the totality of the circumstances of when Ms. Gonzalez opened the door to the police officers: she faced at least three officers, several of whom had their weapons drawn and one held a tactical shield; it was 7:00 a.m. on a Sunday morning; and the officers demanded to know the

32. *Gonzalez*, 136 A.3d at 1146 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).

33. *Id.* at 1146 (citing *Payton*, 445 U.S. at 586). The Rhode Island Supreme Court has applied the prohibition of warrantless entry to a person’s home to purposes of both searches and arrests. *State v. Linde*, 876 A.2d 1115, 1124 (R.I. 2005) (citing *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990)).

34. *Gonzalez*, 136 A.3d at 1147 (citing *Duquette v. Godbout*, 471 A.2d 1359, 1362 (R.I. 1984)).

35. *Id.* (quoting *State v. O’Dell*, 576 A.2d 425, 427 (R.I. 1990)).

36. *Id.* (quoting *State v. Bailey*, 417 A.2d 915, 918 (R.I. 1980)).

37. *Id.* at 1147–48 (quoting *Palmigiano v. Mullen*, 377 A.2d 242, 246 (R.I. 1977) (stating that “the question of whether consent was ‘in fact voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.’”).

38. *Id.* at 1148–49 (quoting *State v. Beaumier*, 480 A.2d 1367, 1374 (R.I. 1984)).

39. *Id.* at 1149.

location of her son.⁴⁰ The Court then concluded that these were “hardly circumstances conducive to voluntary consent.”⁴¹ The Court continued that while nonverbal consent can be freely and voluntarily given, Ms. Gonzalez’s glancing and/or gesturing up the stairs—which could also be explained as reflexive after the officer first looked up the stairs when asking for the location of Gonzalez—further supported the lack of free and voluntary consent.⁴²

Secondly, the Court applied the analysis to determine whether Ms. Gonzalez’s written consent was freely and voluntarily given.⁴³ The Court held that Ms. Gonzalez did not freely and voluntarily give written consent and that the trial justice’s denial of the motion to suppress was erroneous.⁴⁴ The Court noted a lack of evidence in the record upon which to determine that the “state met its burden of proving that Ms. Gonzalez’s written consent was free and voluntary by a fair preponderance of the evidence.”⁴⁵ The Court emphasized that, upon examination of all the facts, a mere hour-and-ten-minutes passed between Ms. Gonzalez opening her door to armed police officers and signing the written consent.⁴⁶ In this amount of time, police officers repeatedly asked Ms. Gonzalez where her son was and she stood by as police officers sprinted up the stairs, arrested her son, and removed him from their home⁴⁷; furthermore, there were still several officers in her home, and she expressed a range of emotions from the time officers entered her home despite appearing calm at the exact time she read and signed the written consent agreement.⁴⁸

40. *Id.*

41. *Id.*

42. *Id.* (comparing *State v. O’Dell*, 576 A.2d 425, 427 (R.I. 1990) (holding that defendant’s mother’s valid consent to search home did not violate the Fourth Amendment)).

43. *Id.*

44. *Id.* at 1149–50.

45. *Id.* at 1150 (citing *O’Dell*, 576 A.2d at 427).

46. *Id.*

47. *Id.*

48. *Id.* Ms. Gonzalez appeared calm when she read and signed the written consent, but she had previously cried at several points. In addition, the detective who obtained her written consent testified that he prefaced her reading of the consent agreement with a hypothetical scenario that the officers would obtain a search warrant if she did not consent to the search

B. Exigent Circumstances

Next, the Court addressed the State's reliance on exigent circumstances for not obtaining a warrant, noting that the burden is on the State to overcome the presumption that all warrantless home searches are unreasonable by viewing the facts as known to the police at the time of the arrest.⁴⁹ The Court is extremely mindful that "[w]hen an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some *real immediate and serious consequences if he postponed an action to get a warrant*."⁵⁰ Immediate and serious consequences may be present where (1) there is a potential for evidence to be destroyed inside the home before a warrant could be obtained; (2) there is a risk that the suspect may escape; or (3) the suspect poses a threat to the lives or safety of the public, the police officers, or themselves.⁵¹

The Court held that exigent circumstances did not exist in this case, and thus the warrantless arrest was invalid.⁵² The Court detailed the difference between an "emergency situation" and a "planned arrest," stating that an emergency situation requires prompt police action where it is not practicable to obtain a warrant while, in contrast, a planned arrest does not stem from an ongoing investigation in the field and it is practicable to obtain a warrant.⁵³ The Court found that the facts present in this case were much more comparable to a planned arrest than an emergency situation,⁵⁴ and put strong emphasis on the seven hours between approximately midnight when the police had sufficient reason to suspect that Gonzalez was the shooter and 7:00 a.m. when the police arrested him in his home.⁵⁵ During these seven hours, police made no attempt to obtain a warrant.⁵⁶ The Court did not find evidence to support that swift action was

and presented consent simply as a second option. *Id.*

49. *Id.* at 1150–51.

50. *Id.* at 1151 (alteration in original) (emphasis added) (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 751(1984)).

51. *Id.* (citation omitted).

52. *Id.* at 1154.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 1153.

necessary during this entire seven-hour period,⁵⁷ and while law enforcement argues that “[t]o sit down at a desk and type out a warrant at that point in time . . . was a waste of resources,”⁵⁸ “the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.”⁵⁹

Furthermore, law enforcement indicated that it felt evidence, namely the gun, could be destroyed and that Gonzalez may be a threat to officer safety or himself; however, the Court found that assertion was based on generalized conjecture instead of specific facts of the investigation.⁶⁰ “[S]ubjective, generalized statements of the police—about their concern for destruction of evidence and the possibility that defendant could harm himself or others or escape arrest—are neither sufficient nor fact based” and cannot support a determination that exigent circumstances are present.⁶¹

C. *Attenuation Doctrine*

Finally, the Court determined whether Gonzalez’s written consent to search his bedroom was valid even though the underlying arrest was illegal.⁶² In general, the fruit-of-the-poisonous tree doctrine deems evidence derived from an illegal search or arrest as inadmissible because the evidence was tainted by the primary illegality;⁶³ however, the attenuation doctrine allows evidence obtained by illegal means to be admissible if the connection between the arrest and the consent to search is sufficiently remote so as to purge the evidence of the primary taint.⁶⁴ When assessing whether attenuation is sufficient to render consent valid, the Court considers “[t]emporal proximity of the arrest and the [consent to search], the presence of intervening

57. *Id.*

58. *Id.* at 1153, 1164 (Goldberg, J., concurring) (alteration in original).

59. *Id.* at 1153 (majority opinion) (quoting *Mincey v. Arizona*, 437 U.S. 385, 393 (1978)) (comparing *United States v. Adams*, 621 F.2d 41, 45 (1st Cir. 1980)).

60. *Id.* at 1164 (Goldberg, J., concurring).

61. *Id.* at 1165.

62. *Id.* at 1155 (majority opinion).

63. *Id.* (citing *State v. Bailey*, 417 A.2d 915, 919 (R.I. 1980)); *Fruit-of-the-poisonous-tree Doctrine*, BLACK’S LAW DICTIONARY (10th ed. 2014).

64. *Gonzalez*, 136 A.3d at 1155 (citing *State v. Casas*, 900 A.2d 1120, 1134 (R.I. 2006); *Attenuation Doctrine*, BLACK’S LAW DICTIONARY (10th ed. 2014).

circumstances . . . and, particularly, the purpose and flagrancy of the official misconduct”⁶⁵ The State bears the burden of proving that the primary taint has been purged from the evidence,⁶⁶ and “consent [that] is obtained during the course of an illegal detention is presumptively . . . invalid.”⁶⁷ Here, the Court held that the facts presented by the State were not sufficient to overcome the presumption that the evidence is invalid as fruit-of-the-poisonous-tree stemming from the illegal arrest.⁶⁸ The Court emphasized that only a short time passed between Gonzalez’s illegal arrest in his home and his signing the written consent to search his bedroom.⁶⁹ In addition, Gonzalez was handcuffed until just before he signed the written consent, was still in the back of a police car with two police officers standing nearby,⁷⁰ and was only one-half mile from his home.⁷¹ Under the totality of these circumstances, the Court could not discern any “intervening circumstances that would lead to the determination that [Gonzalez’s] consent was sufficiently attenuated from his illegal arrest so as to be untainted by the preceding illegal police activity,” and, therefore, the consent was not voluntary.⁷²

D. State’s Argument of Harmless Error

While the Court held erroneous the denial of all four motions to suppress, the State contended that even if the evidence was illegally obtained, admitting it was harmless due to the “truly overwhelming” evidence of [Gonzalez’s] guilt.”⁷³ The Court noted that “the United States Supreme Court has applied the harmless error principle to the admission of evidence obtained in violation of a defendant’s Fourth Amendment rights[,]”⁷⁴ but the State

65. *Gonzalez*, 136 A.3d at 1155 (quoting *Casas*, 900 A.2d at 1134–35).

66. *Id.* (citing *State v. Parra*, 941 A.2d 799, 805 (R.I. 2007)).

67. *Id.* (quoting *Parra*, 941 A.2d at 804).

68. *Id.* The concurrence highlights that officer testimony indicates that the handgun case was removed from the bedroom before Gonzalez was even presented with the written consent statement, further underscoring the appropriateness of it being suppressed. *Id.* at 1161 (Goldberg, J., concurring).

69. *Id.* at 1155 (majority opinion).

70. *Id.* at 1155–56.

71. *Id.* at 1162 (Goldberg, J., concurring).

72. *Id.* at 1156 (majority opinion) (citation omitted).

73. *Id.*; *Error, harmless error*, BLACK’S LAW DICTIONARY (10th ed. 2014).

74. *Id.* (citing *Chambers v. Maroney*, 399 U.S. 42, 53 (1970)).

must “prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”⁷⁵ When assessing whether the error to allow evidence is harmless, the Court looks at factors including, “the relative degree of importance of the witness testimony to the prosecution’s case, . . . the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, . . . and . . . the overall strength of the prosecution’s case.”⁷⁶

Here, the Court found that while there was substantial evidence of Gonzalez’s guilt presented at trial, it was not so overwhelming as to conclude beyond a reasonable doubt that the tainted evidence did not influence the verdict.⁷⁷ The Court emphasized that the evidence from Gonzalez’s bedroom, particularly the clothing he was wearing the night of the shooting, not only was direct evidence of his guilt but also served to directly corroborate the testimony of Dalomba, the sole eyewitness.⁷⁸ This lent credibility to Dalomba, which is critical in light of the fact that neither side considered her a palatable witness, and the State remarked in its closing arguments that she was a “horrible person;” therefore, the illegally obtained evidence potentially impacted a juror’s decision whether or not to believe Dalomba.⁷⁹

75. *Id.* at 1156–57 (emphasis omitted) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)) (citing *United States v. Sasso*, 695 F.3d 25, 29 (1st Cir. 2012); *State v. Mercurio*, 89 A.3d 813, 822 (R.I. 2014); *State v. Smith*, 446 A.2d 1035, 1036 (R.I. 1982)).

76. *Id.* at 1157 (quoting *State v. Bustamante*, 756 A.2d 758, 766 (R.I. 2000)). The Court noted that it will not apply the harmless error principle where there is an “overwhelming amount” of evidence indicative of a defendant’s guilt. *Id.* (quoting *State v. Perez*, 882 A.2d 574, 590 (R.I. 2005)).

77. *Id.* at 1157, 1158–59.

78. *Id.* at 1158. The Court also found that the receipt for Gonzalez’s purchase of a gun might have influenced a juror who was uncertain whether Gonzalez could have afforded a gun. *Id.*

79. *Id.* at 1157–58 (citing *Mercurio*, 89 A.3d at 822–23 (holding that error was not harmless where it effected witness credibility and credibility was “central to the case.”)). In this case, the prosecutor stated:

I told you all that at the beginning; you weren’t going to like [Dalomba], she’s going to be rude, obnoxious, defiant, and disrespectful. . . . But one thing she didn’t do was lie to you. . . . [T]he accounts of what happened, that she gave on th[e] stand [are] corroborated by the physical evidence that was obtained in this case.

Id. at 1157 (first alteration not in original). The defense counsel stated, “[Dalomba’s] the least credible person in this room right now . . . [i]f her mouth is moving, she’s lying.” *Id.* at 1157–58.

COMMENTARY

The Rhode Island Supreme Court further clarified the circumstances that will not support the determination that a warrantless entry into a home, a warrantless search, or a warrantless arrest was valid. It is well established that warrantless searches are unreasonable unless one of the limited exceptions to the warrant requirement is present, including a defendant's voluntary consent or exigent circumstances.⁸⁰ Searches conducted outside of these bounds are a violation of the defendant's Fourth Amendment right, and any evidence collected is inadmissible in court unless the harmless error principle applies.⁸¹

In holding that the motions to suppress at issue here were erroneously denied, the Court considered several factors, but heavily focused on elapsed time when deciding whether obtaining a warrant is reasonable, assessing whether exigent circumstances were present, and determining whether consent to a warrantless search is freely and voluntarily given.⁸² Here, the Court clarified that because law enforcement had seven hours before the arrest of Gonzalez, there was ample time to at least pursue an arrest warrant, and it could have been done in a manner that would not have distracted from the investigation.⁸³ Furthermore, the Court determined that lack of time between an illegal arrest and obtaining consent for a subsequent search can render consent coerced and invalid, especially where there are no intervening circumstances.⁸⁴ The Court also declined to hold this admission of illegally obtained evidence as a harmless error, even when the

80. *Id.* at 1147 (citing *State v. Beaumier*, 480 A.2d 1367, 1373 (R.I. 1984); *Duquette v. Godbout*, 471 A.2d 1359, 1362 (R.I. 1984)).

81. *Chapman v. California*, 386 U.S. 19, 22 (1967); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

82. *Id.* at 1149, 1152, 1155.

83. *Id.* at 1152.

84. *Id.* at 1156. The Court noted that officers needed only to obtain a warrant for Gonzalez's arrest for the subsequent search to be valid and the evidence admissible; when presented with a valid arrest warrant, it would have been reasonable to expect Gonzalez or Ms. Gonzalez to open the door to the officers, and if they did not then the officers would have been justified in entering under the circumstances present here. *Id.* at 1147 n.9 (citing *Payton v. New York*, 445 U.S. 573, 602–03 (1980); *State v. O'Dell*, 576 A.2d 425, 427 (R.I. 1990)).

evidence against Gonzalez was overwhelming, where it could have directly influenced jurors as they decided whether or not a key eyewitness was credible.⁸⁵

The application of these standards ensures that law enforcement does not violate a suspect's Fourth Amendment rights even when law enforcement is nearly certain that they have the proper suspect and that suspect is guilty of the crime of which he will be accused. Police are often in rapidly unfolding and dangerous situations where there is little to no time to consider options, and they need the flexibility to make decisions. In those cases, there are reasonable exceptions to the warrant requirement available to law enforcement, justifying a search or arrest, or to allow the judicial process to proceed when illegally obtained evidence would not have impacted jurors' decision. However, this was not one of those situations, and the Court's decision once again underscores the importance of the right to privacy—particularly privacy in one's own home.

CONCLUSION

The Rhode Island Supreme Court vacated the Superior Court's denials of the defendant's motions to suppress and remanded the case for a new trial.⁸⁶ The Court reaffirmed that consent to warrantless searches must be freely and voluntarily given when assessed under the totality of the circumstances;⁸⁷ exigent circumstances must be based on real, immediate, and serious consequences, as opposed to generalized conjecture; and must be grounded in an emergency situation and not a planned arrest.⁸⁸ Evidence that stems from an illegal arrest is not admissible if there are not intervening circumstances that would effectually attenuate the evidence obtained from the illegal arrest,⁸⁹ and admission of illegally obtained evidence is not a harmless error where it lends credibility to and corroborates the statements of a primary witness.⁹⁰

85. *Id.* at 1158–59.

86. *Id.* at 1159.

87. *Id.* at 1149–50.

88. *Id.* at 1154.

89. *Id.* at 1156.

90. *Id.* at 1158.

Nicole E. Rohr, Ph.D.

Contract Law. *S. Cty. Post & Beam, Inc. v. McMahon*, 116 A.3d 204 (R.I. 2015). Under the theory of quantum meruit, a subcontractor may recover the value of the services rendered to property owners, so long as the subcontractor proves each of the three elements of the claim. A subcontractor may not recover fees for its expert witness because such fees are not considered to be recoverable or taxable costs as a matter of law.

FACTS AND TRAVEL

In 2010, Defendants Brian and Karen McMahon (Defendants) purchased approximately eleven acres of forested property on Block Island with the intention of building a 2,500-square-foot house and a barn on the property.¹ The Defendants selected S. Heinz Construction & Design, Inc. (Heinz Construction) as the general contractor for the project.² Heinz Construction and the Defendants agreed that Plaintiff, South County Post & Beam, Inc. (Plaintiff), a subcontractor that specialized in “timber frame design, fabrication, and installation,” would build the roof for the house and also design and build the timber frame for the barn.³ In July 2010, Heinz Construction and Plaintiff signed work orders, which described the scope of the work that Plaintiff was to perform on the house and the barn.⁴ In the following months, Plaintiff also performed work that was outside the scope of the work orders, including the construction of a tower and a deck on the roof of the house, but this additional work was never recorded in a change order.⁵ In May 2011, a billing dispute arose between the parties, and Plaintiff brought a civil action seeking damages for breach of contract and unjust enrichment.⁶

In October 2013, a bench trial was held before Justice Kristen

1. *S. Cty. Post & Beam, Inc. v. McMahon*, 116 A.3d 204, 207 (R.I. 2015).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

E. Rodgers of the superior court.⁷ At trial, Plaintiff presented testimony from three witnesses: Kenneth Bouvier (Bouvier), Dennis Scott Heinz (Heinz), and Robert L. Brungraber, Ph.D. (Brungraber).⁸ Bouvier, Plaintiff's founder and president, testified that in October 2010, Plaintiff sent an invoice to Heinz Construction for the additional work performed on the roof of the house.⁹ After receiving two payments from Heinz Construction, Plaintiff was told that the Defendants would pay Plaintiff directly for its work in the future; however, Bouvier recalled receiving only one direct payment from the Defendants.¹⁰

Heinz, Heinz Construction's "principal," testified that he routinely sought the Defendants' review and approval of the work and change orders that Heinz Construction executed with Plaintiff throughout the construction process.¹¹ Heinz further testified that he was aware of only the two payments from Heinz Construction to Plaintiff for the work Plaintiff had performed on Defendants' property, and that he had asked the Defendants to directly pay Plaintiff on just one occasion.¹² Following Heinz's testimony, Plaintiff presented the testimony of its expert witness, Brungraber, a civil engineer in the field of heavy timber structures.¹³ Brungraber testified that he had "reviewed various engineering drawings by [P]laintiff as well as various work orders, change orders, purchase orders, and invoices."¹⁴ Upon review of these items, Brungraber concluded that the amounts Plaintiff charged for each part of its work were "very reasonable."¹⁵

7. *Id.* at 204, 208.

8. *Id.* at 208.

9. *Id.*

10. *Id.*

11. *Id.* From July-September 2010, "Heinz Construction and [P]laintiff executed five change orders relating to the scope of the work for the barn." *Id.* at 207.

12. *Id.* at 208. "In the agreed statement of the facts, the parties stated that [P]laintiff had received only two payments from Heinz Construction for the work it had performed on [the] [D]efendants' property: \$20,000 paid on July 29, 2010, and \$24,012.50 paid on August 28, 2010." *Id.*

13. *Id.* at 208, 209.

14. *Id.* at 209.

15. *Id.* Brungraber noted that the prices Plaintiff charged "while sometimes at the low end of the reasonable price range for each component, they were always within the range that he would have charged in the twenty years that he worked for a company that engaged in work similar to [P]laintiff's work." *Id.*

Defendant Brian McMahon (McMahon) testified on behalf of the Defendants.¹⁶ McMahon testified that Heinz requested that the Defendants directly pay Plaintiff \$60,100 in September 2010.¹⁷ McMahon added that this was the only time that he had directly paid Plaintiff, and that he believed that Heinz Construction would be responsible for payments to Plaintiff from that point onward.¹⁸ McMahon further testified that a few weeks after the payment, he was “shocked” when he received an “accounting” from Bouvier via email, which reflected over \$30,000 owed to Plaintiff.¹⁹ On November 22, 2010, Bouvier sent McMahon a direct request for final payment, provoking a billing dispute between the parties regarding the outstanding balance.²⁰

Following the bench trial, Justice Rodgers entered judgment for the Defendants on the breach of contract claim, and entered judgment for Plaintiff on the claim of unjust enrichment.²¹ The trial justice found that Plaintiff had established the three elements of an unjust enrichment claim: (1) that Plaintiff conferred a benefit on Defendants valued at \$41,549.45; (2) that Defendants had appreciated the benefit of Plaintiff’s work; and (3) that it would be unjust for Defendants to “retain the benefit without paying the value thereof.”²² On October 15, 2013, final judgment was entered for Plaintiffs in the amount of \$41,549.45 plus costs, and Defendants appealed.²³ Subsequently, Plaintiff filed an “Application for Taxation of Costs,” which the trial justice granted and Defendants appealed.²⁴ After consolidating the Defendants’ appeals, the Supreme Court of Rhode Island affirmed the superior court’s judgment on Plaintiff’s claim for unjust enrichment but vacated and remanded the superior court’s order

16. *Id.* at 208.

17. *Id.* at 209.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* “Before trial, the parties filed an agreed statement of facts, which included the parties’ agreement that [P]laintiff’s total unpaid invoices equaled \$41,549.45.” *Id.* at 208.

23. *Id.* at 209.

24. *Id.* at 210. This application for costs filed by Plaintiff “included the filing fee, the costs of four deposition transcripts, the service of one subpoena, and the fee for expert witness Brungraber.” *Id.*

to grant Plaintiff's application for costs in its entirety.²⁵

ANALYSIS AND HOLDING

Upon review of the superior court's judgment, the Supreme Court initially sought to determine whether Plaintiff was entitled to recovery under the theory of unjust enrichment.²⁶ However, before addressing the arguments of the parties on appeal, the Court briefly compared unjust enrichment to quantum meruit.²⁷ The Court declared that in Rhode Island, in order to recover for unjust enrichment or quantum meruit, a claimant must prove: "(1) that he or she conferred a benefit upon the party from whom relief is sought; (2) that the recipient appreciated the benefit; and (3) that the recipient accepted the benefit under such circumstances that it would be inequitable for [the recipient] to retain the benefit without paying the value thereof."²⁸ The Court determined that although Plaintiff brought an action for unjust enrichment, Plaintiff "actually [sought] to recover the value of the services rendered for which [the] [D]efendants have thus far declined to pay, i.e., to recover in quantum meruit."²⁹ While Plaintiff styled its cause of action as one for unjust enrichment, Plaintiff may recover under the theory of quantum meruit by proving the same three elements.³⁰

Following this discussion, the Court addressed the Defendants' challenge to the trial justice's judgment that Plaintiff was entitled to recovery under the theory of unjust enrichment.³¹ The Defendants argued that the third element of Plaintiff's unjust enrichment claim was not proven, "arguing both that the trial justice failed to make any findings of fact specific to this third element, and that the [P]laintiff failed to prove [D]efendants'

25. *Id.* at 210, 216.

26. *Id.* at 210. Unjust enrichment is defined as "[t]he retention of a benefit conferred by another, who offered no compensation, in circumstances where compensation is reasonably expected." *Id.* (quoting *Unjust Enrichment*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

27. *Id.* at 211. Quantum meruit is defined as "[a] claim or right of action for the reasonable value of services rendered." *Id.* (internal citation omitted).

28. *Id.* at 210–11 (internal citations omitted).

29. *Id.* at 211.

30. *Id.*

31. *Id.* at 212.

enrichment was unjust.”³² However, the Court rejected Defendants’ arguments and found that the trial justice rendered a “comprehensive decision from the bench,” in which the trial justice properly addressed each element of Plaintiff’s claim and supported her conclusions with sufficient factual evidence.³³ Specifically, the Court stated that “the timing and the content of the emails exchanged between the parties and McMahon’s testimony that he was aware that [P]laintiff continued to perform work . . . even as the parties were discussing account and billing questions,” supported the trial justice’s findings.³⁴ Accordingly, the Court held that there was “competent evidence . . . in the record to support the trial justice’s conclusion that ‘it would be unjust for the [Defendants] to retain the benefit conferred by [Plaintiff] without paying the value thereof.’”³⁵

The Court then addressed the Defendants’ additional challenges to the trial justice’s conclusion.³⁶ First, the Defendants argued that the trial justice erred in ruling that Plaintiff did not have to prove that it lacked an adequate remedy at law before finding that the Defendants were unjustly enriched.³⁷ However, the Court reaffirmed that unjust enrichment “can stand alone as a cause action in its own right,”³⁸ and when such an action stands alone, “the presence or absence of an adequate remedy at law is simply one of the factors considered in the third element’s balancing of the equities and is not determinative of whether [P]laintiff can or will prevail as a matter of law.”³⁹ Thus, the Court rejected the Defendants’ argument and declared that the elements of unjust enrichment and quantum meruit do not require that the Plaintiff prove that he or she lacks an adequate remedy at law.⁴⁰ Secondly, the Defendants urged the court to consider the possible public policy consequences of affirming the trial justice’s

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 213.

36. *Id.*

37. *Id.*

38. *Id.* (quoting *Dellagrotta v. Dellagrotta*, 873 A.2d 101, 113 (R.I. 2005)).

39. *Id.*

40. *Id.* at 214.

decision.⁴¹ Defendants argued that allowing the subcontractor to recover against the property owners here “would render every property owner a de facto party to subcontracts executed by the general.”⁴² The Court confirmed that it was aware of such policy considerations, but reemphasized that the third element requires a “fact-specific balancing process” to determine if a party is unjustly enriched.⁴³ Here, the Court noted that given the undisputed facts of the case and the parties’ direct communication throughout the construction process, this decision would not result in the public policy concern raised by the Defendants.⁴⁴ Accordingly, the Court affirmed the superior court’s judgment in favor of the Plaintiff in the amount of \$41,549.⁴⁵

Finally, the Court addressed the Defendants’ second appeal challenging the trial justice’s order that granted the Plaintiff’s application for costs.⁴⁶ Upon review of the superior court’s order, the Court sought to determine whether the Plaintiff’s expert witness fee was taxable as costs.⁴⁷ The Defendants argued that the trial justice erred when she ruled that Brungraber’s fee could be taxed as a cost of the cause of action because “the expert’s fee was precluded as a recoverable cost by G.L. 1956 § 9-17-22.”⁴⁸ The Plaintiff contended that its application for costs was based on “§§ 9-22-5 and 9-22-18 and that, pursuant to these statutes, the trial justice simply exercised her discretion in allowing Brungraber’s fee as a recoverable cost.”⁴⁹ The Court previously held that “[c]osts are normally considered the expenses of suing another party, including filing fees and fees to serve process. Fees to pay expert witnesses would not be included in this definition of costs.”⁵⁰ Conducting a *de novo* review of the statutory language, the Court ruled that pursuant to sections 9-22-5 and 9-22-18, the trial justice erred by including Brungraber’s expert fee as a

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 215 (internal citation omitted).

taxable cost.⁵¹ Accordingly, the Court vacated the superior court order granting the Plaintiff's application for costs and remanded the application to the trial justice with "an instruction to enter a new order awarding the Plaintiff all costs for which it applied, except Brungraber's expert witness fee."⁵²

COMMENTARY

The Rhode Island Supreme Court clearly recognized the importance of the third element of a claim for unjust enrichment. However, as the Court noted, this element cannot be proven merely by showing that a subcontractor has conferred a benefit upon a property owner.⁵³ Instead, a court "must look at the equities of each case and decide whether it would be unjust for a party to retain the benefit conferred upon it without paying the value of such benefit."⁵⁴ It is the primary role of the trial courts to examine the facts and balance the equities between the parties to determine what would be a just and unjust result.⁵⁵ The Court gives great deference to the trial court's determination and so long as there is competent evidence to support the trial court's findings, then the Court will not substitute its view of the evidence.⁵⁶

Here, the Court found that there was a proper balancing of the equities by the trial justice. However, the facts of this case reveal that the scale tipped in favor of the subcontractor. Through an examination of the facts, the trial court determined that it would be an unjust result if the property owners retained the benefit conferred to them without paying the subcontractor the value of the work performed.⁵⁷ By affirming the trial court's decision, the Court: (1) protected the Plaintiff from being taken advantage of; (2) provided a remedy for Plaintiff's damages by awarding the Plaintiff the value of its work performed; and (3) barred the Defendants from unjustly benefitting from Plaintiff's work. It is clear that through its conclusion, the Court seeks to

51. *Id.* at 216.

52. *Id.*

53. *Id.* at 212.

54. *Id.* (quoting *R&B Elec. Co. v. Amco Constr. Co.*, 471 A.2d 1351, 1356 (R.I.1984)).

55. *Id.*

56. *Id.* at 210.

57. *Id.* at 213.

(hopefully) deter future property owners in Rhode Island, from unjustly benefitting from a subcontractor's work without properly paying for the value of the services rendered to them.

The Court concluded that the Plaintiff was entitled to recovery because it proved each of the three elements of its unjust enrichment claim. However, the Court ultimately ruled that Plaintiff should instead recover under the theory of quantum meruit because Plaintiff sought the value of the services it rendered to Defendants. While the theories of unjust enrichment and quantum meruit differ slightly, they each require Plaintiff to prove the same three elements as the Plaintiff proved in this case. Using the "fact-specific balancing process" it is possible that the Court could have reached a different outcome.⁵⁸ Alternatively, the Court might have concluded that the facts of the case tipped the scale in favor of the property owners. Specifically, the Court noted that "the existence of a contract between Plaintiff and Heinz Construction is a factor that weigh[ed] against Plaintiff recovering the value of its work from Defendants."⁵⁹ Here, it seemed that the "only reason [P]laintiff [did] not attempt to collect the outstanding balance for its work on [D]efendants' property under its contract with Heinz Construction [was] the undisputed fact that [P]laintiff want[ed] to maintain a good business relationship with Heinz Construction."⁶⁰ Due to the contractual relationship, the Court could have rejected Plaintiff's claim, thereby leaving Plaintiff to seek the remaining balance from the general contractor.

CONCLUSION

The Rhode Island Supreme Court held that a subcontractor is entitled to recover the value of the work performed under the theory of quantum meruit only if the subcontractor proves each of the three elements of the claim. The Court determined that the third, and most important element, must be proven using a fact-specific balancing of the equities to determine if it would be unjust for a party to retain the benefit conferred upon it without paying

58. *Id.* at 214.

59. *Id.* at 212.

60. *Id.*

the value of such benefit.

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Contract Law. *Voccola v. Forte*, 139 A.3d 404 (R.I. 2016). A transfer of properties from a transferor to a transferee for the release of mortgages on the properties is null and void without adequate consideration if the transferee was already obligated to release the mortgages under a prior settlement agreement. Without a finding that donative intent was present, an argument that a transfer constitutes a gift must fail.

FACTS AND TRAVEL

In 2005, Edward E. Voccola¹ sued his son, Stephen Voccola (Stephen), and his daughter, Barbara Voccola (Barbara), in Providence County Superior Court, seeking to revoke a purported gift of stock in a corporation.² In March 2007, a Settlement Agreement was executed by Mr. Voccola and four of his children—Barbara, Stephen, Paul Voccola (Paul), and Patricia Forte (Patricia).³ The relevant part of the agreement stated: “[Patricia, Stephen, Paul, and Barbara] agree forthwith upon the signing of this agreement to discharge and/or release all mortgages and promissory notes which reference [Mr. Voccola], Jere Realty, Inc., Lakeview Realty, Inc., [CCI, WSI, and/or CVR].”⁴ On or about June 4, 2007, “three documents were signed purporting to be Waivers of Notice of Minutes of a Special Joint Meetings [sic] of

1. The two consolidated actions on appeal in this case were commenced by Edward E. Voccola, who passed away on June 25, 2010, during the pendency of the case. Marvin Homonoff was the temporary custodian of the estate, but was later substituted by Barbara Voccola and Edward R. Voccola in their representative capacities. *Voccola v. Forte*, 139 A.3d 404 n.1 (R.I. 2016).

2. *Id.* at 407. The stock in question was from Redbrook Investments, Inc. *Id.*

3. *Id.*

4. *Id.* (alterations in original). “Mr. Voccola was the sole shareholder of three Rhode Island corporations—Capital City Investments, Inc. (CCI), City View Realty, Inc. (CVR), and West Side Investments, Inc. (WSI). *Id.* Patricia was the President of all three corporations during the pendency of this case. *Id.*

the Stockholders and Board of Directors of [CCI, CVR, and WSI] respectively.”⁵ The waivers in question were allegedly sought to evidence that a meeting and vote took place on May 29, 2007, and were all purportedly signed by Mr. Voccola.⁶ In anticipation of the waivers to be signed, Patricia, as President of CCI, CVR, and WSI, signed warranty deeds conveying the real estate of those corporations to Red Fox Realty, LLC (Red Fox).⁷ The “signed” waivers indicated that the transfer of properties from Mr. Voccola’s companies to Red Fox was in exchange for Patricia assuming from Mr. Voccola two mortgages on the properties.⁸

In response to these conveyances, Mr. Voccola brought suit against Patricia and Red Fox (collectively, Defendants) in Superior Court, alleging that his signature on the WSI waiver was falsified and that Patricia wrongfully transferred his properties.⁹ Mr. Voccola also asserted that the transfer of the warranty deeds at issue in the case were void because they lacked adequate consideration.¹⁰ In July 2012, during a seven-day bench trial, the court heard from all five of Mr. Voccola’s children, two handwriting experts, and two additional witnesses who testified that they observed Mr. Voccola sign the property over to Patricia.¹¹ The trial justice found that the Settlement Agreement from the previous case was the “product of mutuality of assent and was supported by adequate consideration,” holding that “[t]he mortgages should have been discharged effective as of the date of the Settlement Agreement” and that “any subsequent conveyance of property to [Patricia], which was performed in exchange for

5. *Id.*

6. *Id.*

7. *Id.* Patricia was the owner of Red Fox Realty, Inc. *Id.* However, the Court noted that the Agreed Statement of Facts in the case indicated that “Red Fox was not officially organized as a corporation until June 1, 2007.” *Id.* n.3.

8. *Id.*

9. *Id.*

10. *Id.* at 407–08. In response, the Defendants filed a counterclaim for damages of \$82,000 for a mortgage Patricia took out to assist Mr. Voccola in paying for criminal fines he faced in a matter unrelated to this suit. *Id.* at 408.

11. *Id.* at 408–11. The Agreed Statement of Facts provided that testimony of “discussions by and between conversations between [Mr. Voccola] and any of his children . . . shall not be deemed to be hearsay but shall be accepted into evidence . . .” *Id.* at 408 (first alteration in original).

[Patricia's] release of mortgages on those properties, was done without consideration."¹²

The trial justice indicated that she gave little weight to Patricia's evidence regarding the Settlement Agreement and found that the two eye witnesses were "biased" due to the relationship they had with Patricia.¹³ The trial justice accepted some of Stephen's testimony about Mr. Voccola's intent to recover the properties; however, she gave little weight to the other siblings' testimony due to the "divisive nature" of their relationship.¹⁴ In regard to the handwriting specialists, the trial justice accepted the Plaintiff's expert's testimony and found that the Defendants' expert was not credible.¹⁵ After analyzing the information before her, the trial justice determined that the signatures were not Mr. Voccola's and held that the deeds, which transferred Mr. Voccola's properties, were void.¹⁶ The trial justice also concluded that Patricia breached her fiduciary duties to CCI, CVR, and WSI for self-dealing and rejected Patricia's argument that the conveyance of property was a gift because there was no evidence of donative intent.¹⁷ The Defendants then filed a timely notice of appeal.

ANALYSIS AND HOLDING

At the outset, the Rhode Island Supreme Court made clear that the factual findings of a trial justice sitting without a jury are given "*great weight*,"¹⁸ and a significant amount of deference is given to the "[trial justice's credibility] determinations"¹⁹ The Court first sought to determine the validity of the waivers

¹² *Id.* at 411 (alteration in original).

¹³ *Id.*

¹⁴ *Id.* at 412.

¹⁵ *Id.* The trial justice indicated that the Defendants' expert testimony was not credible because "he reached a conclusion on the validity of the signature before he prepared his report." *Id.*

¹⁶ *Id.*

¹⁷ *Id.* In regard to the Patricia's counterclaim, the trial justice found her testimony credible and that she was able to establish the damages she prayed for. *Id.* The Plaintiffs filed a motion for reconsideration on the decision of the counterclaim, which was later denied. *Id.*

¹⁸ *Id.* at 412–13 (emphasis in original) (quoting *Wellington Condo. Ass'n v. Wellington Cove Condo. Ass'n*, 68 A.3d 594, 599 (R.I.2013)).

¹⁹ *Id.* at 413 (alteration in original) (quoting *Banville v. Brennan*, 84 A.3d 424, 430 (R.I. 2014)).

and the validity of the transfer of property from Mr. Voccola's businesses to Red Fox.²⁰ In doing so, the Court recognized that the Defendants spent significant time arguing the signatures' authenticity in their appellate argument but concluded that it was unnecessary to decide the genuineness of the signatures on appeal because Patricia's agreement to release the mortgages for the conveyance of the properties was done without consideration.²¹

In describing the fundamental principles of contract law, the Court explained that to determine whether sufficient consideration exists, it "employ[s] the bargained-for exchange test,"²² and that "[a] promise to carry out a preexisting contractual obligation owed to the promisee, or the performance of such a contractual duty, generally is not sufficient consideration"²³ Looking to the 2007 Settlement Agreement, the Court found that it was clear that Patricia was obligated to release the mortgages she held on the properties.²⁴ The Court determined that because the Settlement Agreement was signed prior to the waivers, Patricia was already required to release the mortgages.²⁵ Thus, the Court found Patricia's subsequent transfer of property for releasing the mortgages lacked consideration because she was already legally obligated to release the mortgages under the Settlement Agreement.²⁶ The Court rejected Patricia's argument that because she was not a party in the 2005 lawsuit, she was "not bound" by the Settlement Agreement.²⁷ The Court explained that although Patricia was not a party in the 2005 suit, she did in fact sign the Settlement Agreement and had an "interest in the resolution of the 2005 suit" because of her shareholder status in a company with a dispute that was resolved in the Settlement Agreement.²⁸ The Court concluded that the Settlement Agreement was a "valid and enforceable" contract and that the

20. *Id.*

21. *Id.*

22. *Id.* at 414 (quoting *DeAngelis v. DeAngelis*, 923 A.2d 1274, 1279 (R.I. 2007)).

23. *Id.* (citing 17 C.J.S. *Contracts* § 153 at 533 (2011)).

24. *Id.* (citing *Rivera v. Gagnon*, 847 A.2d 280, 284 (R.I. 2004)).

25. *Id.*

26. *Id.* at 414–15 (citing *DeLuca v. City of Cranston*, 22 A.3d 382, 384 (R.I. 2011)).

27. *Id.* at 415.

28. *Id.*

three warranty deeds were null and void because they lacked adequate consideration.²⁹

Next, the Court considered the claim that Mr. Voccola's transfer of properties was a gift to Patricia.³⁰ Patricia argued that the trial justice improperly looked to Mr. Voccola's actions after the signing of the waivers instead of his present intent at the time of the alleged gift and that adequate consideration was not given to Mr. Voccola's statements prior to the signings.³¹ The Court explained that donative intent is essential to the existence of a gift and that it is proper to look at subsequent acts if it were unclear what the donor's intention was at the time of the alleged gift.³² The Court reasoned that the "gift" at issue did not resemble the typical gift that a parent gives a child; rather, the act resembled a business conveyance of properties from "three corporations to one corporation."³³ The Court reiterated that it gives great deference to the trial justice's determinations and concluded it was unclear what Mr. Voccola's donative intent was at the time he allegedly signed the waivers.³⁴ By looking at Mr. Voccola's subsequent acts, the Court determined that a gift was not intended.³⁵

COMMENTARY

The Rhode Island Supreme Court faced the challenge of settling a long-standing family dispute between Mr. Voccola and his five children.³⁶ In doing so, the Court was tasked with determining whether Mr. Voccola's corporations were rightfully transferred to the Defendants.³⁷ The Court had to examine the issue of whether the waivers and transfer of the properties were valid.³⁸ It was interesting that the Court spent significant time in its opinion recapping the testimony given by each witness at trial,

29. *Id.* (citing *DeLuca*, 22 A.3d at 384).

30. *Id.*

31. *Id.*

32. *Id.* at 416 (citing *Ferer v. Aaron Ferer & Sons Co.*, 732 N.W.2d 667, 674 (Neb. 2007)).

33. *Id.*

34. *Id.* at 417 (citing *Ferer*, 732 N.W.2d at 674).

35. *Id.* The Court then accepted the trial justice's findings for Patricia's counterclaim for \$82,000. *Id.* at 419.

36. *Id.* at 407.

37. *Id.*

38. *Id.* at 413.

but ultimately relied little on that testimony for its holding. The Court simply looked to see if Patricia was bound by the previous Settlement Agreement to determine whether there was adequate consideration for the subsequent transfer of properties.³⁹ Finding that Patricia was bound under the earlier Settlement Agreement to release Mr. Voccola from the mortgages on those properties, the Court persuasively resolved the issue by applying a basic principle of contract law: “when a party performs an obligation owed under a preexisting contract, the law ordinarily will regard a demand by that party for additional benefits as void for lack of consideration.”⁴⁰ Thus, the Court’s in depth overview of the testimony from trial seemed futile.

Moreover, the Court recapitulated the trial court’s decision by examining some of its important findings.⁴¹ In doing so, the Court stated that the “trial justice . . . found that Patricia, as President of CCI, CVR, and WSI, breached her fiduciary duties by engaging in self-dealing when she transferred the properties at issue to her own company for no consideration.”⁴² The Court, however, left the discussion of fiduciary duty at that. Being that the case involved the transfer of properties between corporations, it was conspicuous that the Court did not elaborate more on the trial justice’s finding that Patricia breached her fiduciary duty. The issue of the genuineness of the signatures and the lack of consideration seemed to be directly related to Patricia’s role as President of those companies. Arguably, the Court could have elaborated more on this finding to clarify whether a breach of a fiduciary duty occurred.

Lastly, the Court explored the Defendants’ claim that the transfer of properties was a gift from Mr. Voccola.⁴³ In resolving this issue, the Court focused on donative intent and the delivery requirement.⁴⁴ The Court recognized that Mr. Voccola’s valid signatures on the waivers would have helped support an argument for donative intent; however, the Court accepted the trial justice’s findings that the testimony was not credible and

39. *Id.* at 414.

40. *Id.* (citing 17 C.J.S. *Contracts* § 153 at 535 (2011)).

41. *Id.* at 408.

42. *Id.* at 412.

43. *Id.* at 415.

44. *Id.* at 416.

held that no donative intent was found.⁴⁵ Although it can be argued that the Court could have further examined the signature issue in regard to donative intent before coming to its conclusion, the Court reiterated its precedent in giving significant deference to the trial justice's findings.⁴⁶ To further demonstrate that deference, the Court accepted the trial justice's findings on Patricia's \$82,000 counterclaim.⁴⁷ The Court, in looking at both the findings and the evidence, consistently relied on the trial justice's determinations and found no error.⁴⁸

CONCLUSION

The Rhode Island Supreme Court upheld a trial justice's decision finding that the transfer of the three properties from the Plaintiff to the Defendants for the release of mortgages on the properties was executed without adequate consideration because one of the Defendants was already obligated to release the mortgages under a prior Settlement Agreement. The Court also found that sufficient evidence supported the trial court's determination that the transfer of the properties was not a gift because no clear donative intent was present. Lastly, the Court accepted the trial justice's findings that the Defendant's counterclaim for damages was proper.

Tyler Bischoff

45. *Id.* at 417.

46. *See id.* at 417–18.

47. *Id.* at 418.

48. *Id.* at 419.

Criminal Law. *State v. Breton*, 138 A.3d 800 (R.I. 2016). On a motion for a new trial, a trial court justice must analyze the evidence in front of him to determine if he would reach a different conclusion than the jury, and in doing so, the trial justice has the discretion to find that a witness is credible, even though a witness's testimony may be inconsistent at times.

FACTS AND TRAVEL

On October 25, 2011, a masked assailant stabbed Dilicia Lora (Lora) as she was leaving her apartment to go to work.¹ Lora suffered several lacerations, leaving her face permanently scarred.² Lora identified her attacker as the Defendant, Jose Breton (Breton), after pulling his mask up to his nose and recognizing the bottom half of his face.³ When she arrived at the hospital, Lora told her doctors about Breton's past abusive and threatening behavior toward her, and that she did not report this abuse to police out of fear of retaliation from Breton.⁴

The day after the attack, Lora explained to police that she identified Breton as the attacker because she was able to recognize a portion of the attacker's face and the particular ski mask worn by the attacker, which belonged to Breton, in addition to the fact that Breton was the only person who had threatened Lora prior to the attack.⁵ At that meeting, Lora also told police about the tumultuous, two-year relationship she shared with Breton.⁶

1. *State v. Breton*, 138 A.3d 800, 802 (R.I. 2016).

2. *Id.*

3. *Id.* Lora told her family that "Pappi" had attacked her immediately after the attack; Breton also went by the name "Pappi Valdez." *Id.* at 801, 802.

4. *Id.* at 802.

5. *Id.* Lora told police that Breton had told her that if she did not stay with him, Breton would "kill [her]", "take [her] eyes out," or "leave [her] paralyzed." *Id.* (alterations in original).

6. *Id.* at 801–02. At one point in the relationship, Lora left Rhode Island to stay with her mother in the Dominican Republic to get away from Breton. *Id.* at 801. When Breton traveled to the Dominican Republic as an attempt to win back her favor by offering to partake in counseling, Lora refused, and

In May 2010, police responded to a domestic incident between Breton, Lora, and Lora's daughter, Jani Tolentino (Tolentino), where Breton hit and pushed Tolentino after an argument.⁷ When police responded to this incident, Lora told police that she did not know Breton's real name and that they had only known each other for a few months, when in fact, the two had been dating for two years.⁸ At trial, Lora indicated that she was not truthful with the police on this particular occasion because she was afraid of Breton.⁹

The State charged Breton with one count of assault with a dangerous weapon and one count of simple assault on Lora.¹⁰ Breton was also charged with one count of simple assault on Tolentino, stemming from the May 2010 incident.¹¹

At trial, Breton offered two alibi witnesses who suggested that he was in New York City from 3:30 a.m. to 10:00 p.m. on the day of the attack.¹² Breton's mother, Ana Cruz, testified that she picked Breton up on the night of October 24, 2011, and dropped him off in Manhattan with another family member, Femije Tairi (Tairi), on her way to a family funeral in Virginia.¹³ Tairi testified that she met Breton in Manhattan around 3:30 a.m. on October 25, 2011, and traveled with him to her apartment in Brooklyn after Breton's mother left to continue driving to the funeral.¹⁴ Tairi said that she talked with Breton for about two hours, until 6:00 a.m., when another family member visited the apartment to grieve.¹⁵ Tairi testified that Breton stayed at her residence in Brooklyn until around 10:00 p.m. on October 25, 2011, when Cruz picked Breton up on the drive home from the funeral and returned him to Rhode Island.¹⁶

The jury convicted Breton on the two counts of assault against

Breton traveled back to Rhode Island. *Id.* Lora eventually moved back to Rhode Island in 2011, and though she worked with the mother of Breton's child, Lora attempted to avoid him. *Id.* at 801–02.

7. *Id.* at 801.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 802–03.

13. *Id.* at 802.

14. *Id.* at 802–03.

15. *Id.* at 803.

16. *Id.*

Lora but reached a verdict of acquittal for the third count of assault against Tolentino.¹⁷ Breton then moved for a new trial, challenging that the verdict was “against the weight of the evidence” because Lora’s testimony, specifically her statement that she could identify her attacker in a short period of time in a dimly lit stairway, was not credible.¹⁸ Breton also argued that the State was unable to demonstrate doubt of his alibi after the testimony of both of his alibi witnesses.¹⁹

After considering the testimony, the trial justice found both Lora and Tolentino to be credible witnesses, though there were some questions about Lora’s ability to identify Breton during the attack.²⁰ On the other hand, the trial justice had some doubts about the testimony of the alibi witnesses, leading him to question their credibility.²¹ After weighing the credibility of all of the witnesses and the relevant evidence, the trial justice determined that he could not come to a different conclusion than the jury, and therefore denied Breton’s motion for a new trial.²² On appeal, Breton argued that the trial justice “misconstrued” evidence when he found Lora to be more credible than either of Breton’s alibi witnesses.²³

ANALYSIS AND HOLDING

On appeal, the Rhode Island Supreme Court determined that it would overturn the trial justice’s decision to deny Defendant’s motion for a new trial only if the decision was clearly erroneous or “the trial justice overlooked or misconceived material and relevant evidence”²⁴ The Court took into account the role of the trial justice in determining if a new trial is appropriate, which was to act as a “superjuror” and “(1) consider the evidence in light of the jury charge, (2) independently assess the credibility of the witnesses and the weight of the evidence, and then (3) determine whether he or she would have reached a result different from that reached by the

17. *Id.* at 801.

18. *Id.* at 803.

19. *Id.*

20. *Id.* at 804.

21. *Id.* Specifically, the trial justice questioned the timing of a family gathering in New York at 6:00 a.m., and its relationship to the timing of the alleged attack. *Id.*

22. *Id.* at 801, 805.

23. *Id.* at 801.

24. *Id.* at 803–04 (quoting *Battle v. State*, 125 A.3d 130, 132 (R.I. 2015)).

jury.”²⁵

The Court focused its analysis on the trial justice’s examination of the witnesses’ credibility.²⁶ Specifically, the Court considered the fact that the trial justice took into account several issues with Lora’s identification of her attacker, including the poor lighting, short period of time, Lora’s inability to identify the weapon in the attack, Lora’s prior reluctance to identify the victim in the May 2010 incident, and the elapsed time since the October 2011 incident.²⁷ Additionally, the Court considered the trial justice’s assessment of Breton’s alibi witnesses.²⁸

After reviewing the analysis of the evidence by the trial justice, the Court determined that the trial justice “satisfied his obligations” in his role as a “superjuror” when he denied Breton’s motion for a new trial because he examined all of the evidence, made credibility determinations, and decided that he would not have come to a conclusion contrary to the jury’s conclusion.²⁹ Additionally, the Court concluded that even though there may have been some inconsistency in Lora and Tolentino’s testimony, the trial justice acted within his discretion to find these witnesses credible.³⁰

COMMENTARY

In this case, the Rhode Island Supreme Court affirmed the principle that when considering a motion for a new trial, a trial justice should examine all of the evidence, make credibility determinations about the witnesses, and grant a motion for a new trial only if after making these considerations, the trial justice would have come to a different conclusion than the jury about the verdict.³¹ Though there were some questions in this case about the credibility of the State’s main witness, Lora, the trial justice was within his discretion to determine her testimony to be credible.³²

Though the Court will overturn a decision on a motion for a

25. *Id.* at 803 (quoting *State v. Offley*, 131 A.3d 663, 674 (R.I.2016)).

26. *Id.* at 804.

27. *Id.*

28. *Id.*

29. *Id.* at 803, 805.

30. *Id.* at 805.

31. *Id.* at 803.

32. *Id.* at 805.

new trial if the trial justice misconstrued relevant evidence, the Court indicates that the trial justice's analysis of the credibility of witnesses is discretionary, and therefore a defendant faces a high bar to overturn the decision.³³ It is important that the Court gives the trial justice this broad range of discretion to make credibility determinations in criminal cases, and specifically motions for a new trial, because the trial justice has the opportunity to observe the witnesses live at trial. Indeed, the Court specifically noted that the trial justice considered the witnesses' attitudes, body language, and demeanor in his credibility determination.³⁴ If the Court were to follow a different standard of review, such as a *de novo* instead of "clearly erroneous," it would undermine the importance of the trial justice's observation of a live witness to assess body language as well as oral testimony. The trial justice is in a much better position than the appellate court to determine credibility, which, in this case, was essential to proving the State's case. Therefore, the Court will defer to the trial courts with these determinations unless there is clear error by the trial justice.³⁵

CONCLUSION

A trial justice has the discretion to make credibility determinations and may find a witness credible even though testimony may present some inconsistencies. The Court, on review of a motion for a new trial in a criminal case, will give broad discretion to these credibility determinations by the trial justice.

Kelsey A. Hayward

33. *Id.* at 803–04.

34. *Id.* at 804.

35. *Id.* at 803.

Criminal Law. *State v. Burgess*, 138 A.3d 195 (R.I. 2016). A first-time informant's tip that does not include a statement against interest, which serves as the basis for the informant's knowledge of criminal activity or predictive detail, is not sufficient to establish probable cause to arrest a suspect. If the informant's tip does not establish probable cause on its own, police must conduct an independent investigation to corroborate the tip to establish probable cause before making an arrest.

FACTS AND TRAVEL

On October 26, 2011, during a routine traffic stop, Officer Brian Macera realized the passenger in the vehicle had an outstanding warrant for his arrest.¹ To avoid arrest, the passenger told Macera that a "clean-shaven, African American male with short-cropped hair and a thin build was distributing crack cocaine in the vicinity of Providence and Cranston."² The passenger-now-informant also told the officer the man, nicknamed "CJ," drove a blue Mercury with Rhode Island license plates and that he would be at the Royal Buffet restaurant in Cranston around 4:00 p.m.³

After receiving this information and contacting the Rhode Island State Police High Intensity Drug Trafficking Area Task Force (task force), Macera and several members of the task force formed a police perimeter around the shopping plaza in which the Royal Buffet was located; the informant was also present to

1. *State v. Burgess*, 138 A.3d 195, 196 (R.I. 2016).

2. *Id.* at 197. The Court was troubled by the fact that police neither arrested the informant pursuant to the outstanding warrant for this arrest, nor charged him with any crime. *Id.* at 198 n.6.

3. *Id.* at 197. The evidence is unclear whether the informant told Macera that CJ was at the Royal Buffet or that CJ would arrive at the restaurant soon. During the suppression hearing, Macera testified that the informant told him CJ was presently at the restaurant; however, at trial, Macera testified that the informant called CJ around 3:00 p.m. and then told Macera CJ would be at the Royal Buffet close to 4:00 p.m. *Id.* n.3.

provide visual confirmation of the suspect.⁴ Neither Macera nor any member of the task force attempted to find a blue Mercury in the parking lot, claiming there were too many vehicles in the lot.⁵ The Defendant, who matched the informant's physical description, walked out of the restaurant, and the informant identified him as CJ.⁶ Macera and the team "surrounded" the Defendant, had him put his hands on a vehicle, and conducted a pat-down search.⁷ During the pat-down search, Macera felt an unidentifiable bulge in the Defendant's front pocket, removed the object, and discovered sixty-two dollars in cash.⁸ After Macera read the Defendant his *Miranda* rights and explained that the Defendant was suspected of selling drugs, the Defendant initially denied possessing any drugs.⁹ After Macera observed that the Defendant appeared nervous and smelled of burnt marijuana, the Defendant admitted to smoking marijuana earlier that day, and Macera told the Defendant a K-9 unit was on its way.¹⁰ In response, the Defendant said, "[i]t's in my pocket."¹¹ Macera then searched the Defendant and found two bags of crack cocaine in the waistband of Defendant's jacket.¹² After Macera discovered the crack cocaine, the Defendant identified his vehicle as a blue Chevrolet Impala with Rhode Island license plates.¹³

Charged with one count of possession of cocaine, the Defendant moved to suppress the two bags of crack cocaine as well as all statements made to Macera, arguing his arrest was invalid because Macera lacked probable cause at the time of arrest and the search of his jacket violated both the state and federal constitutions.¹⁴ The trial justice denied the Defendant's motion to suppress, finding police had probable cause to arrest the Defendant because Macera testified that the Defendant smelled of

4. *Id.* at 197.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 197–98.

9. *Id.* at 198.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

marijuana, appeared nervous, and stated, “[i]ts in my pocket.”¹⁵ The trial justice also relied on police “surveillance” of the Royal Buffet before the police apprehended the Defendant and the match between Defendant’s physical appearance and the informant’s description of CJ.¹⁶ At trial, a jury convicted the Defendant of the charged crime; thereafter, the Defendant appealed the trial justice’s denial of the motion to suppress.¹⁷

ANALYSIS AND HOLDING

Upon reviewing the denial of Defendant’s motion to suppress, the Rhode Island Supreme Court deferred to the trial justice’s findings of fact and reviewed the issue of probable cause *de novo*.¹⁸ The State conceded the Defendant was under arrest from the moment the police surrounded him outside the restaurant.¹⁹ The Court emphasized that “[a] valid arrest must be supported by probable cause at its inception[.]” and information obtained after an initial arrest cannot be used to show probable cause.²⁰ The Court looked to the evidence the trial justice relied upon to find probable cause and found the only pre-arrest evidence that could support probable cause was the informant’s tip, the “surveillance” of the shopping plaza, the Defendant leaving the Royal Buffet, and the similarity between the Defendant’s appearance and the informant’s description.²¹ The Court held these facts alone did not support probable cause for the Defendant’s arrest.²²

First, the Court stated probable cause exists when the officer’s knowledge of the circumstances is based on reasonably trustworthy information and is sufficient for a reasonably cautious person to believe the suspect has committed an offense.²³ The Court examined the reliability and potential bias of the tip based on the totality of the circumstances.²⁴ Here, the Court found the informant’s tip to be unreliable because the police were not

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* (citing *State v. Chum*, 54 A.3d 455, 460 (R.I. 2012)).

19. *Id.* at 199.

20. *Id.* (citing *State v. Ortiz*, 824 A.2d 473, 480 (R.I. 2003)).

21. *Id.*

22. *Id.*

23. *Id.* (citing *Chum*, 54 A.3d at 462).

24. *Id.* at 200 (citing *Illinois v. Gates*, 462 U.S. 213, 232 (1983)).

familiar with the informant, and the informant's tip did not include any statements against his interest or serve as the basis for his or her knowledge of the crime.²⁵ Although the existence of these factors increases the likelihood the informant is being truthful, the Court stated that these factors are not conclusive on the issue of reliability.²⁶ The State argued that the informant had an interest in being truthful because he was in police custody at the time he or she gave the tip.²⁷ However, the Court rejected this argument because the informant did not make any statements admitting involvement in a crime.²⁸ Additionally, the Court found the informant unreliable because he did not tell police the basis for his knowledge, which could have included facts such as him purchasing cocaine from the Defendant or his involvement in drug dealing with the Defendant.²⁹ Lastly, the Court found the informant's accurate description of the Defendant's physical appearance, vehicle, and location undercut the tip's reliability because it did not describe the illegal activity.³⁰ The State argued the tip contained predictive information that the Defendant would be at the Royal Buffet around 4:00 p.m.;³¹ however, the Court found that, even if this were true, knowledge about the Defendant's physical appearance and future location had no bearing on the informant's claim that the Defendant was in possession of crack cocaine.³²

25. *Id.* at 200, 201 (citing *State v. Read*, 416 A.2d 684, 689 (R.I. 1980)). The Court distinguished this informant from an informant who provided reliable information to police for six months. *Id.* at 200–01 (citing *Draper v. United States*, 358 U.S. 307, 309, 312–13, 313 (1959)).

26. *Id.* at 200 (citing *Draper*, 358 U.S. at 309, 312–13, 313).

27. *Id.* at 201.

28. *Id.* The Court distinguished this informant's statement from an informant's statement that admitted to police that the informant bought marijuana from a certain address. *Id.* (citing *Read*, 416 A.2d at 689).

29. *Id.* at 201–02 (citations omitted) (comparing this informant's tip to informants' statements in six other cases where the basis of those informants' knowledge was his or her involvement in the crime). The basis of knowledge can be derived from legal as well as illegal interaction with the suspect, but the Court highlights that the informant's statement against penal interest is closely tied to his basis of knowledge and provides case examples where the basis of knowledge stemmed from illegal involvement with the suspect. *Id.* at 201.

30. *Id.* at 202.

31. *Id.* at 203.

32. *Id.* (comparing *Draper v. United States*, 358 U.S. 307, 309–10 (1959), *United States v. Miller*, 925 F.2d 695, 697 (4th Cir. 1991), and *State v.*

Next, the Court analyzed whether, even if the informant's tip was unreliable on its own, independent police investigation corroborated the tip to establish probable cause.³³ The Court determined the police did not sufficiently corroborate the informant's tip to establish probable cause because the investigation only consisted of creating a perimeter around the shopping plaza and confirming the Defendant matched the informant's description.³⁴ The police failed to corroborate the informant's description of the Defendant's vehicle either by searching the parking lot, claiming that the parking lot was too large, or by conducting a records check.³⁵ Based on these findings, the Court found police efforts insufficient to corroborate the informant's tip to establish probable cause.³⁶

Finally, the Court concluded that the Defendant's arrest lacked probable cause because the circumstances were not sufficient to cause a reasonable person with Macera's knowledge at the time of arrest to believe Defendant committed a crime.³⁷ Therefore, the Court held the Defendant's arrest was invalid, and the trial court should have granted the Defendant's motion to suppress his statements to the police.³⁸

COMMENTARY

The Rhode Island Supreme Court set out a test to determine when an individual's right to be protected from unlawful arrest and subsequent seizure of evidence can be outweighed by law enforcement's interest in using information gathered from informants to find and arrest suspected criminals.³⁹ While an informant's tip can be helpful to police, the Court emphasized the importance of examining the totality of the circumstances to determine if the information is reliable and the basis for the informant's knowledge, as well as police efforts to corroborate the

Keohane, 814 A.2d 327, 330 (R.I. 2003)).

33. *Id.* (citations omitted).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 204–05 (examining *Draper*, 358 U.S. 309-13, *United States v. Tyler*, 238 F.3d 1036, 1038–39 (8th Cir. 2001), and *Miller*, 925 F.2d 699–700).

38. *Id.* at 205.

39. *Id.* at 200.

informant's tip, before making an arrest.⁴⁰ To maintain the fluidity of probable cause, the Court considered all relevant factors in determining the reliability of the informant's tip, stating no factor to be conclusive on its own.⁴¹

The Court expressed concern with allowing a first-time informant's physical description of another person in conjunction with a statement that the person is involved in unlawful activity, unconfirmed by independent police investigation, to establish probable cause.⁴² If the facts here were enough to establish probable cause, a person with minimal, easily obtained knowledge about another person could theoretically send police to arrest nearly anyone against whom they had a personal vendetta. The doctrine of probable cause aims to prevent this exact type of arrest by requiring a police officer's knowledge of the circumstances, prior to arrest, to be based on "reasonably trustworthy information" and "sufficient in themselves to warrant a man of reasonable caution" to believe the suspect committed a crime.⁴³

On the other hand, the Court also has an interest in allowing police officers to use an informant's tip to arrest suspected criminals so long as the tip is reasonably reliable. The Court discussed circumstances in which the informant's tip could be sufficiently reliable to establish probable cause, such as if the police are familiar with the informant, if the informant makes a statement against his or her interest or gives the basis for his or her knowledge, and if the description of the suspect is highly detailed.⁴⁴ In this case, the Court found the informant's tip lacked all of these factors, concluding that the police lacked probable cause at the time of the Defendant's arrest.⁴⁵

The Court's holding does not deny officers the ability to use a potentially unreliable tip, but provides police officers the opportunity to test the reliability of an informant's tip through

40. *Id.*

41. *Id.*

42. *Id.* at 204 (finding no other case where probable cause found in similar circumstances).

43. *Id.* at 199 (quoting *State v. Chum*, 54 A.3d 455, 462 (R.I. 2012)).

44. *Id.* at 200–03.

45. *Id.* at 200–03 (majority opinion), 205 (Robinson, J., concurring) (finding the key factor to be that the informant did not advise police of the basis of his or her assertion).

their own investigation before making an arrest.⁴⁶ In this case, the Court acknowledged that the State would have had a stronger argument that the informant's information was reliable had the officers taken further steps to verify the reliability of the informant's tip, such as, at a minimum, checking the parking lot for a vehicle matching the informant's description.⁴⁷ The Court's holding encourages police officers to do their due diligence before relying on an unreliable tip.

In sum, the Court's analysis and holding emphasized the importance of examining the reliability of an informant's tip under the totality of the circumstances to establish probable cause prior to arresting a suspect.⁴⁸

CONCLUSION

The Rhode Island Supreme Court held an informant's tip is not sufficiently reliable to establish probable cause if the informant is a first-time informer, gives no basis for his or her knowledge, makes no statements against interest, and gives insufficient detail of the Defendant's appearance and activities. However, an informant's tip can be corroborated with independent police investigation to test the accuracy of the informant's information.

Samantha Armstrong

46. *Id.* at 200, 203 (majority opinion).

47. *Id.* at 203. The Court appears generally unhappy with the police's behavior because the police also failed to execute the warrant for the informant's arrest in exchange for the tip. *Id.* at 198 n.6.

48. *Id.* at 205.

Criminal Law. *State v. Davis*, 131 A.3d 679 (R.I. 2016). An objection made in a conference with a trial justice may adequately preserve the record for appeal, even if no objection is made contemporaneously during the trial. An opening statement is not so prejudicial as to require a limiting instruction where the trial justice took steps to inform the jury during the trial that statements from counsel are not evidence. Giving a jury instruction regarding eyewitness testimony is within the trial justice's discretion and is only reviewable for abuse. Objections made during motions in limine must be renewed contemporaneously during the trial in order to be properly preserved for appeal.

FACTS AND TRAVEL

Dominique Gay was murdered while walking with two of his friends, Dean Robinson and Wilson Andujar, on March 20, 2009.¹ Gay had a child with Crystal Dutra, and after the end of their relationship, Dutra began a relationship with Miguel Davis (Defendant).² Gay began to harass the Defendant in various ways between 2007 and 2009, including challenging him to fights.³

On the day of the murder, Andujar testified that he was walking, with Robinson on his right and Gay on his left, to Robinson's house after eating at a restaurant.⁴ As the three walked towards an alley, Andujar heard the sound of gravel coming from his left.⁵ Andujar looked and saw the Defendant pointing a gun at the group.⁶ Andujar heard the first shot and attempted to run away, but he slipped and then heard a second

1. *State v. Davis*, 131 A.3d 679, 682 (R.I. 2016).

2. *Id.* at 682–83.

3. *Id.* at 683.

4. *Id.* at 684.

5. *Id.*

6. *Id.*

shot.⁷

Andujar testified that he saw the Defendant wielding a black handgun and wearing a hoodie with the hood pulled over part of his head and a bandana that covered his face “from the tip of his nose passed his chin.”⁸ Andujar had known the Defendant “for a couple of weeks” three years prior to the shooting when they were in school together.⁹ Andujar further testified that he did not immediately recognize the Defendant, but that it had later “clicked in [his] head who [he] just saw.”¹⁰ When questioned at the police station, Andujar told police he did not know who the shooter was, but he later testified he feared retaliation if he disclosed this knowledge.¹¹ Three years after the shooting, and after seeing a news video online of the Defendant being arraigned for Gay’s murder, Andujar identified the Defendant as Gay’s shooter to the police.¹²

In the State’s opening statement, the prosecutor informed the jurors that they would be hearing from Robinson, and that he would testify that: 1) he saw the Defendant and knew it was him from the moment he saw him, and 2) he informed Dutra that the Defendant was the shooter.¹³ Robinson was also expected to tell the jury that in November 2012, he ran into the Defendant who told him to stop talking to the police.¹⁴ The same day that Robinson was supposed to testify, his attorney informed the court that Robinson would invoke his Fifth Amendment rights.¹⁵ The Defendant did not move for a mistrial when this occurred.¹⁶

During the trial, the State called Kevin Santiago to testify regarding the Defendant’s access to guns based on what the Defendant had confided in him.¹⁷ Santiago testified that while

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 685.

11. *Id.*

12. *Id.*

13. *Id.* at 687–88.

14. *Id.* at 688.

15. *Id.* Robinson’s attorney advised him to invoke his rights, perhaps because Robinson was with Andujar and Gay that morning for the purpose of finding a way to smoke marijuana, and they even purchased a cigar for that purpose before going to the restaurant. *Id.* at 684.

16. *Id.* at 688.

17. *Id.* at 686.

the grandfather of the Defendant's girlfriend (Lisa) was out of town, Lisa and the Defendant had used his home for their "liaisons."¹⁸ While his girlfriend was in the bathroom, the Defendant discovered a few guns, including a 9 mm handgun.¹⁹ Santiago also testified that the Defendant confessed to him that he had murdered Gay.²⁰ The State offered testimony from Lisa's aunt that she had checked on the home while the grandfather was away and found no handgun under the mattress where it was kept.²¹

At the end of the State's case, the Defendant moved for a limiting instruction to be given to the jury that would require the jury to disregard anything the State said regarding Robinson in its opening statement, or in the alternative, that the Defendant be allowed to mention Robinson's absence from the State's case in his closing.²² "Because Robinson was unavailable as a matter of law," the trial justice denied both of these motions.²³ After jury instructions were given, both parties were called for a conference to express any concerns regarding the instructions given.²⁴ The Defendant did not renew his objection at this conference.²⁵

The Defendant filed an appeal alleging reversible error by the trial justice for not giving the jury a limiting instruction with regard to the State's opening statement or instructions regarding eyewitness testimony. The Defendant also argued his motion for a new trial should have been granted.

ANALYSIS AND HOLDING

As an initial matter, the Rhode Island Supreme Court sought to determine if the Defendant made an adequate objection to the State's opening argument.²⁶ The Court held that the Defendant adequately preserved the record when the Defendant requested the limiting instructions during a charging conference the day

18. *Id.*

19. *Id.* Forensic evidence showed that the Defendant had been shot with two 9 mm bullets. *Id.*

20. *Id.*

21. *Id.* at 687.

22. *Id.* at 690.

23. *Id.*

24. *Id.* at 691.

25. *Id.*

26. *Id.*

before the jury was instructed, reasoning that to deny this would be “elevating form over substance.”²⁷ Because the Defendant failed only to renew the objection after the trial justice had instructed the jury, the Court held that the record was adequately preserved.²⁸

The jury instructions “need only [to] adequately cover[] the law.”²⁹ “[A]n erroneous charge warrants reversal only if it can be shown that the jury ‘could have been misled’ to the resultant prejudice of the complaining party.”³⁰ Because the State made its opening statement in good faith, believing that Robinson would testify, the Court only addressed whether the opening statement was “so prejudicial that the trial justice was required to give specific limiting instructions.”³¹ The Court held that the limiting instruction was not needed because the trial justice repeatedly reminded the jury that anything the attorneys said was not to be considered evidence.³²

The Defendant also wanted the jury to be read a list of factors to consider when evaluating eyewitness testimony because of how unreliable the Defendant believed Andujar’s testimony was.³³ The Court noted that it had previously held that judges are not permitted to comment on evidence unless done so in an impartial way; however, it had approved jury instructions regarding the reliability of eyewitnesses in past cases.³⁴ Because of this, the Court held that whether to give a jury instruction regarding the reliability of eyewitness testimony remains within the discretion of the trial justice and will only be reviewed for an abuse of discretion.³⁵ Here, that discretion was not abused because the Defendant did not present evidence of the problematic nature of eyewitness testimony until appeal, and despite the problems with this particular witness’s testimony,³⁶ the witness knew the

27. *Id.*

28. *Id.*

29. *Id.* at 689 (second alteration in original) (quoting *State v. Long*, 61 A.3d 439, 445 (R.I. 2013)).

30. *Id.* (alteration in original) (quoting *Long*, 61 A.3d at 445).

31. *Id.* at 692–93.

32. *Id.* at 693.

33. *Id.*

34. *Id.* at 694.

35. *Id.* at 696.

36. The Court listed a variety of reasons why this witness’s testimony

Defendant before the night of the murder.³⁷ Despite not requiring trial justices to give specific jury instructions regarding eyewitness testimony, the Court noted that the “better practice” would be for courts to give “more comprehensive instructions when eyewitness testimony is an issue.”³⁸

Concerning the admittance of evidence regarding the Defendant’s access to guns, the Defendant filed pretrial motions to exclude this evidence because Lisa’s grandfather was no longer alive to testify as to what kind of guns he owned, and the weapon used in the murder was never found.³⁹ The trial justice admitted this evidence because access to guns is admissible evidence, even if it is not the exact gun that was used in the crime.⁴⁰ Because the Defendant did not contemporaneously object during the trial, and because the trial justice did not give a final ruling on the evidence, the Court held that the Defendant did not properly preserve the record for review.⁴¹ Similarly, the Defendant did not properly preserve the admittance of a photograph of Gay with his family because the Defendant did not contemporaneously object when the photograph was admitted into evidence, but rather only objected in his motion in limine.⁴²

Finally, the Court held that the trial justice did not err by denying the Defendant’s motion for a new trial because the Defendant met his burden to “(1) consider the evidence in light of the jury charge, (2) independently assess the credibility of the witnesses and the weight of the evidence, and then (3) determine

was “problematic,” including:

the assailant was in disguise, held a gun, the only eyewitness testified that he ran as soon as he saw the weapon and heard it discharge, the eyewitness did not identify this [D]efendant for more than three years, and the first identification was made just days after the only eyewitness saw a video of [D]efendant being arraigned for this crime.

Id. at 696–97.

37. *Id.* at 693, 697.

38. *Id.* at 697. For examples of what a “more comprehensive instruction” would be, the Court notes two cases: *State v. Austin*, 114 A.3d 87, 92–93 (R.I. 2015) and *State v. Figuereo*, 31 A.3d 1283, 1290–91 (R.I. 2011).

39. *Davis*, 131 A.3d at 697.

40. *Id.* The trial justice relied on *State v. Rios*, 996 A.2d 635, 639 (R.I. 2010).

41. *Id.* at 701, 702.

42. *Id.* at 703.

whether he or she would have reached a result different from that reached by the jury.”⁴³ The trial justice denied the motion based on the jury finding that Santiago’s testimony regarding the Defendant’s confession was believable.⁴⁴ The trial justice also found the witness credible and noted that the Defendant would not be able to avoid conviction based on this testimony.⁴⁵ Furthermore, Santiago’s testimony was corroborated by forensic evidence and Dutra’s testimony, which supplied the motive.⁴⁶

COMMENTARY

The Rhode Supreme Court seems to set forth two contrary standards regarding preserving evidence for appeal. On the one hand, the Court rejected favoring “form over substance” when it rejected the idea of requiring a contemporaneous objection in order to preserve the record after counsel had made his objection known during a conference. On the other hand, the Court would not review the Defendant’s motions that were made in limine without contemporaneous objection. In essence, the Court chose to elevate form over substance—a position it explicitly rejected earlier in its own decision. From the Court’s decision, it is not clear when lack of a renewed contemporaneous objection may be overcome. However, it does open the door for counsel to argue that giving weight to “form over substance” would have more of a detrimental effect than simply hearing the issue, in spite of the issue not being properly preserved.

Concerning giving instructions on eyewitness testimony, the Court merges its prior holdings in order to develop the rule that it is within the trial justice’s discretion to give a jury instruction on eyewitness testimony; however, the Court does not provide any guidance on when declining to give such an instruction may be deemed an abuse of discretion under review. This is particularly important in the case at bar where the eyewitness testimony was especially problematic, but the instruction was not given. It raises the question of when the giving of an instruction, or lack thereof, would ever be deemed an abuse of discretion. Unfortunately,

43. *Id.* at 704, 705.

44. *Id.* at 704.

45. *Id.*

46. *Id.*

there is no clear answer.

CONCLUSION

The Rhode Island Supreme Court held that an objection made in a conference with a trial justice may adequately preserve the record for appeal, even if no objection is made contemporaneously during the trial; however, objections made in motions in limine must be renewed contemporaneously during the trial in order to be properly preserved. An opening statement is not so prejudicial as to require a limiting instruction where the trial justice took steps to inform the jury during the trial that statements from counsel are not evidence. Giving a jury instruction regarding eyewitness testimony is within the trial justice's discretion and is reviewable only for abuse.

Katelyn E. Kalmbach

Criminal Law. *State v. Florez*, 138 A.3d 789 (R.I. 2016). A Rhode Island Superior Court justice has the authority to allow the State to impeach a witness with his prior statement and not to admit parts of the complainant's father's witness statement into evidence. Furthermore, a defendant who fails to challenge jury instructions and a verdict sheet at appeal will not fall within the raise-or-waive rule, and an untimely motion for a new trial should not be considered by a trial justice.

FACTS AND TRAVEL

On August 1, 2010, Ricardo Florez (Florez) engaged in sexual contact with a boy under the age of fourteen,¹ Joshua.² The assault occurred in a McDonalds restaurant in Pawtucket when Joshua, Joshua's nephew, and Joshua's father, Glenn, were on their way to a Red Sox Game.³ Florez approached Joshua when Joshua was alone at a table in McDonalds and started a "one-sided" conversation with him; Joshua was afraid of being rude by not responding.⁴ Once Glenn returned, Joshua stated that he was going to the bathroom.⁵ While Joshua was in the bathroom washing his hands, Florez came out of the stall with his pants down, walked over to Joshua, and grabbed Joshua's penis over his clothes.⁶ Florez then let Joshua walk out, and Joshua told Glenn what happened.⁷ Glenn called the police, but Florez had fled by the time the police arrived.⁸

On August 5, 2010, Joshua and Glenn went to the police

1. *State v. Florez*, 138 A.3d 789, 792 (R.I. 2016).

2. The superior court used pseudonyms to protect the complainant and his father. *Id.* at 792 n.3.

3. *Id.* at 792.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 793.

department to identify Florez and provide a statement.⁹ At this point, Joshua told the police that a second touching had occurred, when “[Florez] grabbed [his] hand and made [Joshua] touch his exposed penis.”¹⁰ Glenn also made a statement, which mainly contained what Joshua told him had happened.¹¹

On March 31, 2014, the superior court found Florez guilty of one count of second-degree child molestation sexual assault and later sentenced Florez to twenty years imprisonment, eight years to serve and the remaining as probation.¹² Florez appealed this decision on multiple issues; Florez asserted that the trial justice erred in denying his motion for a new trial, both the trial justice’s jury charge and verdict sheet were flawed, the trial justice erred when the State was allowed to improperly refresh Joshua’s recollection, and that the trial justice erred by not allowing certain parts of Glenn’s witness statement into evidence.¹³

ANALYSIS AND HOLDING

Upon review of the trial court’s denial of Florez’s motion for a new trial, the Rhode Island Supreme Court first turned to a procedural problem with the motion.¹⁴ Under Rule 33 of the Superior Court Rules of Criminal Procedure, a motion for a new trial “shall be made within ten (10) days after the verdict or finding of guilty or within such further time as the court may fix during the ten day period.”¹⁵ The jury returned a guilty verdict in Florez’s case on May 31, 2014; however, Florez did not file his motion until the date of the hearing,¹⁶ April 14, 2014, four days late.¹⁷ The Court considered the fact that during the hearing, the trial justice issued a warning to Florez that he “would suggest that [Florez] file it today,” because the State mistakenly

9. *Id.* at 792–93.

10. *Id.* at 793.

11. *Id.*

12. *Id.* at 791–792.

13. *Id.* at 792.

14. *Id.* at 794.

15. *Id.*; see also SUPER. CT. R. CRIM. P. 33 (2002).

16. After the jury returned its verdict on March 31, 2014, finding Florez guilty, Florez’s counsel scheduled a hearing in anticipation for filing a motion for a new trial. *Florez*, 138 A.3d at 794 n.5. The hearing was originally scheduled for April 7, 2014 but it did not occur until April 14, 2014. *Id.*

17. *Id.* at 794.

represented to Florez that the deadline was April 14, 2014.¹⁸ Although the justice issued the warning and Florez was misinformed, the Court reiterated its previous holding that “[t]he time limit set forth in Rule 33, is jurisdictional and cannot be waived.”¹⁹ Further, to decide if the warning would allow for Florez to file at that time, the Court looked again at Rule 33, which “specifically provides that any further time for filing a motion for a new trial must be fixed by the trial justice *within* the ten-day period.”²⁰ Therefore, the motion was untimely because it was filed past the date provide in Rule 33, and the trial justice could not fix a new date after that date had passed.²¹

The Court briefly considered the merits of Florez’s motion for a new trial and found that it was “devoid of any merit.”²² Florez argued that the trial justice erred in denying his motion for a new trial because of specific “shortcomings” of Joshua’s testimony that were acknowledged by the trial justice and because the footage from the surveillance tape showed Florez leaving the bathroom before Joshua, contradicting Joshua’s testimony.²³ However, Florez’s argument did not pass the Court’s standard of review for a motion for a new trial, which “accord[s] great weight to a trial justice’s ruling on [such a motion] if he or she has articulated sufficient reasoning in support of the ruling.”²⁴ The Court acknowledged that a trial justice “commits clear error when he or she completely overlooks testimony which is materially contradictory to the testimony on which the justice based his or her determination”²⁵ However, the Court found that clear error did not occur in Florez’s case because the trial justice recognized that Joshua’s testimony was neither “perfect nor crystal clear” but still found his testimony to be credible and trustworthy considering Joshua’s difficulties as a child

18. *Id.*

19. *Id.* (alteration in original) (quoting *State v. Champion*, 873 A.2d 92, 94 (R.I. 2005)).

20. *Id.* (emphasis in original).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 793 (alterations in original) (quoting *State v. Kizekai*, 19 A.3d 583, 589 (R.I. 2011)).

25. *Id.* at 795 (quoting *King v. Huntress, Inc.*, 94 A.3d 467, 495 (R.I. 2014)).

understanding what happened to him.²⁶

Next, the Court addressed Florez's claim that the jury instructions and verdict sheet, which returned a non-unanimous guilty verdict, went against the ruling in *State v. Saluter* when the trial justice failed to specifically state to the jury that it was required to unanimously find that Florez committed one, either, or both of the sexual contacts.²⁷ Florez contended that the trial justice made the verdict sheet unclear because there was a possibility that the jury found that Florez touched Joshua's penis over his pants, or Florez forced Joshua to touch Florez's penis, or both, or the jury was split over both.²⁸ The Court commented that Florez attempted to make a duplicity complaint,²⁹ but the Court has "consistently" held that the correct way to attack a duplicitous complaint is to file a motion to dismiss, which Florez failed to do.³⁰

Florez sought to establish his duplicity claim through asserting error in the jury instructions and verdict form; however, the Court concluded that his attempt failed because it was subject to the Court's "raise or waive rule."³¹ The Court concluded that Florez did not make an objection during trial either to the jury verdict or instructions, and further, that Florez agreed when the trial justice explained how he planned to deal with the potential *Saluter* problem.³² The Court further contended that the exceptions to the raise-or-waive rule would not apply to Florez because the exceptions do not apply unless "basic constitutional rights are concerned."³³ When examining the three-part test to the exception, the Court found that even if the asserted error was more than a harmless error, it was not a novel issue that "counsel could not reasonably have known during the trial."³⁴

26. *Id.*

27. *Id.* (citing *State v. Saluter*, 715 A.2d 1250, 1254–55 (R.I. 1998)).

28. *Id.*

29. Duplicity "refers to the joining of two or more offenses, however numerous, in a single count of an indictment." *Id.* (quoting *Saluter*, 715 A.2d at 1253).

30. *Id.* at 795–96 (citing SUPER. CT. R. CRIM. P. 12(b)(2), (3)).

31. *Id.* "[A] litigant cannot raise an objection or advance a new theory on appeal if it was not raised before the trial court." *Id.* (quoting *State v. Bido*, 941 A.2d 822, 829 (R.I. 2008)).

32. *Id.*

33. *Id.* at 796 (quoting *Bido*, 941 A.2d at 829).

34. *Id.* (quoting *Cronan ex rel. State v. Cronan*, 774 A.2d 866, 878 (R.I. 2001)).

Moreover, when reviewing the trial justice's evidentiary rulings, the Court stated that it would not overrule the trial justice's decisions on evidentiary rulings unless that decision was an abuse of discretion and prejudicial to Florez.³⁵ During the trial, when Joshua was asked if he had ever touched Florez or if there was any other touching besides Florez touching Joshua's penis over his pants, Joshua answered "[n]o."³⁶ Florez argued that the trial justice erred when he allowed the State to use Joshua's witness statement to "refresh [Joshua's] recollection" of the second touching.³⁷ However, due to the trial justice's ruling on Florez's objection, the Court contended that Joshua's statement was allowed under Rule 801(d)(1)(A) of the Rhode Island Rules of evidence as opposed to refreshing Joshua's recollection.³⁸ When the defense council objected to using Joshua's witness statement, the trial justice overruled, stating that "[i]f he says no then he could impeach him with his own statement assuming that . . . statement is inconsistent or if he says I'm not sure I don't remember why can't he refresh his recollection with his own statement about something that he just cant recall on the stand."³⁹ The Court found that this clearly allowed for the trial court to permit Joshua's prior witness statement because the State used these two inconsistent statements to impeach Joshua as a witness, which was permissible under Rule 801(d)(1)(A).⁴⁰ Further, it was within the trial justice's discretion to impeach Joshua with his prior statement, making Florez's argument fail.⁴¹

Finally, Florez argued that the trial justice erred when Glenn's witness statement about Joshua's interview with the police, "I then found out that the male tried to touch [Joshua's] penis and the male tried to have [Joshua] touch his penis," was improperly prevented from being used at trial.⁴² Florez argued that the fact that Glenn used the word "tried" would have cast

35. *Id.* at 793 (citing *State v. Pitts*, 990 A.2d 185, 189 (R.I. 2010)).

36. *Id.*

37. *Id.* at 797 (alteration in original).

38. Rule 801(d)(1)(A) allows a prior inconsistent statement to be admitted into evidence if the two statements are "sufficiently" inconsistent. *Id.* (citation omitted).

39. *Id.*

40. *Id.*

41. *Id.* at 798.

42. *Id.* (alterations in original) (emphases omitted).

doubt upon his guilt and that it was a contradictory statement to Glenn's testimony in trial.⁴³ Florez challenged that he was wrongly prevented from using Glenn's witness statement during the cross-examination of Glenn and during Officer Slack's testimony.⁴⁴ First, the Court found that Florez was not prevented from using Glenn's witness statement during cross-examination, but the trial justice merely "corrected defense counsel's form of the question."⁴⁵ The Court further found that Florez decided not to question Glenn about this statement and instead saved the question for Officer Slack.⁴⁶

In regards to the questioning of Officer Slack about Glenn's witness statement, after the State objected to its use during Officer Slack's testimony, defense counsel argued that "I'm not even offering it for the truth of the matter asserted[;] merely these words appear in this document."⁴⁷ The objection was sustained, and defense counsel reiterated his argument.⁴⁸ The Court could not find a basis for Florez's argument under any rule of law.⁴⁹ The Court suggested that Florez was possibly trying to advance an argument under 801(d)(1)(A), as a prior inconsistent statement, but the Court made clear that Florez did not make such an argument, and therefore that argument was waived.⁵⁰ Thus, the Court found that the trial justice did not err in prohibiting Glenn's witness statement from being used during trial.⁵¹

COMMENTARY

The Rhode Island Supreme Court gave great deference to the lower court and strong emphasis to the importance of adhering to statutory constraints when reviewing the issues asserted by Florez. The bulk of the issues were easily struck down by the procedural problems they encompassed. The motion for a new

43. *Id.* Glenn stated at trial that he did not learn much from Joshua's interview with the police. *Id.*

44. *Id.*

45. *Id.* at 799.

46. *Id.*

47. *Id.* (alteration in original).

48. *Id.*

49. *Id.*

50. *Id.* (citing *State v. Bido*, 941 A.2d 822, 828–29 (R.I. 2008)).

51. *Id.* at 800.

trial was “untimely” and “beyond [the Court’s] review.”⁵² Florez waived his claim of duplicity by failing to file a motion to dismiss and failing to comply with the raise-or-waive rule by not objecting to the jury instructions and the verdict form during trial.⁵³ Further, Florez was not prevented from using Glen’s prior statement when questioning him during trial, his counsel was simply asked to rephrase the question; when Florez was prevented from using Glen’s witness testimony when questioning Officer Slack it was because defense counsel did not raise an actual exception to hearsay under the Rhode Island Rules of Evidence.⁵⁴ Most of the issues raised by Florez on appeal were barred because they had not been properly dealt with during trial, and the Court took a strict stance with these deficiencies.

Further, the Court’s holding emphasized the great deference that is given to the lower courts’ decisions. It is important to maintain the finality of trial court decisions, but it is equally important that justice be properly administered and prejudicial or material mistakes not be made at trial. The Court sought to achieve an appropriate balance of finality and justice by being strict with the procedural issues but still addressing the merits of the claim even though it was not required to do so.

While in this case the Court may have seemed very firm and even harsh when upholding the trial justice’s decision, because of procedural standards and deference, it was partially attributable to the facts in this case. The facts of this case raised a perfect trifecta of factors that lead the Court to affirm the lower court’s decision. The issues consisted of procedural defects, meritless arguments, and trial court deference (partially due to the sensitive and complicated matter of child molestation). All of these factors created a situational stance of firmness by the Court. It does not appear that the Court will always approach these issues with the firmness that it did in this case, as the Court divulged into further analysis in order to determine if the claims had merit or if exceptions would apply to the claims. The Court correctly balanced both sides, but it was the facts of the case and actions, or lack thereof, taken at trial that lead to affirming the trial court’s

52. *Id.* at 794.

53. *Id.* at 796–97.

54. *Id.* at 799.

decision.

CONCLUSION

The Rhode Island Supreme Court held that a motion for a new trial that is filed fourteen days after a verdict is untimely, and therefore the trial justice should not have considered it. The Court also held that Florez's challenge that the jury instructions and verdict sheet were duplicitous did not fall within the exception of the raise-or-waive rule and that it was within the trial justice's discretion to impeach a witness with his prior statement.

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Criminal Law. *State v. Fry*, 130 A.3d 812 (R.I. 2016). The Rhode Island Supreme Court held that a reference to an off-the-record objection is insufficient to properly preserve the issue for appellate review. Second, an instruction explaining that second-degree murder must be committed willfully, prohibits the jury from concluding it could be committed accidentally. Third, it is not an abuse of discretion for the court to allow posing yes-or-no questions to a witness struggling to recall his or her memory. Fourth, a witness can discuss his or her testimony with the party calling that witness while under a general sequestration order unless under a specific instruction not to speak to an attorney. Finally, a video depicting a disturbing crime scene is not unfairly prejudicial as long as it is probative, even if there is a less prejudicial video available.

FACTS AND TRAVEL

Camden Fry was born to Kimberly and Timothy (Tim) Fry, on May 6, 2001.¹ Camden had behavioral issues when she was very young that continued when she started school.² On one occasion, while Tim was away on business Kimberly told Tim that Camden had a “really bad crying episode” and that Camden had “punch[ed] [Kimberly] and hit[] her and that [Kimberly] had to sit on her” to restrain her.³

Almost two years later, before Camden finished second grade, the Frys made a number of changes in an effort to alleviate Camden’s behavioral issues.⁴ The family began treatment with a therapist, Wendy Phillips (Phillips), and Camden was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and

1. *State v. Fry*, 130 A.3d 812, 816 (R.I. 2016).

2. *Id.* Her parents noticed that she often fussed when finishing one activity and then transitioning to another. Once Camden started school, she had a hard time academically, and continued to struggle when transitioning between activities. *Id.* Her behavior became an issue, especially for Kimberly. *See id.*

3. *Id.* (fourth alteration in original).

4. *Id.* at 816–17.

prescribed medication.⁵

However, Camden's behavior had taken a toll on Kimberly.⁶ In a session with their family therapist, Kimberly indicated she was suffering from mental health issues including "depression, insomnia, anxiety, and panic attacks."⁷ Kimberly began to feel like Camden's tirades "lasted longer for her than for Tim," forcing Kimberly to block the sound with her hands if the tantrum lasted longer than twenty minutes.⁸ During a therapy session on July 28, 2009, Kimberly told Phillips "she blamed Camden for her depression" and revealed that she felt inadequate and "hopeless."⁹ Phillips recommended that Kimberly see an individual therapist, but Kimberly never did.¹⁰

Less than two weeks later, on August 10, 2009, Tim reported that Kimberly told him she "wished that Camden wasn't around because it was so much easier when it was just the two of [them]."¹¹ At 5:50 that evening, Tim left Kimberly and Camden—who were sitting next to each other on the couch, watching television—to play hockey.¹² Later that night, Kimberly called Tim and told him that Camden had a "two-hour crying fit," but that Camden had gone to bed.¹³ Tim stated that Kimberly "sounded a little groggy," but that this was not unusual because she took Clonazepam or Benadryl to help her sleep at night.¹⁴

When Tim arrived home, he found Kimberly falling asleep on the couch and Camden in her bed under the covers.¹⁵ The next morning, Tim walked into Camden's bedroom to wake her.¹⁶ When he approached the bed, he noticed she was in the same position as the night before and her eyes were opened.¹⁷ Tim pulled back the covers, removed her stuffed animal, and turned her onto her back;

5. *Id.* at 817. The medication seemed to help with Camden's behavioral issues, but tended to wear off in the evening. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 818.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

Camden's body was "ice cold and stiff," and Tim knew she was dead.¹⁸ Tim cried out for Kimberly, who "crawled into the room on her hands and knees," still groggy from the night before.¹⁹

Tim called 911, and while being interviewed at their home, Kimberly told a responding officer that Camden gave her a hard time taking a bath.²⁰ Kimberly reported that Camden fell on the floor, and had to be pulled into her bedroom,²¹ but after that, they "watched television and read books . . . until . . . she put her to bed."²² However, Kimberly's "condition began to deteriorate," and it occurred to Tim that "she must have taken some kind of medication."²³ Upon the discovery of several empty bottles of prescription medication, an ambulance was called for Kimberly.²⁴

The next day, Tim was visiting Kimberly at the hospital when she told him that "she had a battle with Camden [and] that Camden had been kicking and punching her and biting her."²⁵ Kimberly told Tim that she sat on top of Camden and "put her hand over Camden's nose and mouth to make her stop screaming," and Kimberly told Tim, "I'm so sorry, I'm so sorry."²⁶ Kimberly's ICU nurse also reported hearing Kimberly say "I'm her mother. I was supposed to protect her but I couldn't protect her from me."²⁷

At the trial, the defense submitted proposed jury instructions that included an instruction on accident and voluntary manslaughter due to diminished capacity.²⁸ *In camera*, the trial justice rejected the defense's request for a diminished capacity instruction, but the conversation was not recorded and there was no record of an objection to the instruction ruling by the defense.²⁹ After the jury was charged, the defense counsel objected that accident was "just briefly" discussed but did not object to the lack of an instruction on voluntary manslaughter due to diminished

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 819.

27. *Id.*

28. *Id.*

29. *Id.*

capacity.³⁰

While the jury was deliberating, they asked the trial court, “[d]oes there have to be mental competency for there to be intent?”³¹ After conferring with prosecution and defense, the trial court responded, “[a] defendant’s competency to stand trial is a legal determination made before trial and is not an issue before you. Do not confuse ‘mental competency’ with the defendant’s state of mind or intent. Please refer to the jury instruction on DEFENDANT’S INTENT.”³² After this was submitted to the jury, the defense admitted he had not objected to the lack of a diminished capacity instruction when the jury was charged but requested that it be given at that time.³³ Before this could be considered further, the jury reached a verdict; it found Kimberly guilty of second-degree murder.³⁴

ANALYSIS AND HOLDING

The defense raised several issues on appeal. First, the defense argued that the jury instructions were deficient because there was no instruction given on voluntary manslaughter due to diminished capacity, and the trial justice’s accident instruction was inadequate.³⁵ Second, the State was allowed to incorrectly impeach a witness’s credibility and impermissibly used leading questions during the testimony of a witness.³⁶ Third, the State’s witness violated a sequestration order, and the remedial measures allowed by the trial court were insufficient.³⁷ Fourth, the defense argued that a video, which was over seven minutes long, was admitted even though it was unfairly prejudicial to the defense.³⁸

A. *Diminished Capacity*

The defense argued that there was sufficient evidence to support a verdict for voluntary manslaughter due to diminished

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 820.

36. *Id.*

37. *Id.*

38. *Id.*

capacity and that the trial justice's refusal was in error.³⁹ Rule 30 of the Superior Court Rules of Criminal Procedure "requires only that objections be made *before* the jury retires to deliberate."⁴⁰ Further, "an objection must be made on the record and in a manner that permits th[e] [Supreme] Court to conduct appropriate appellate review."⁴¹ Here, the defense uses sections of the transcript that indicate he requested a diminished capacity instruction in an off-the-record conference.⁴² Yet, at best, the Court found that the record was ambiguous to whether the defense objected to a refusal or simply requested the trial justice include a diminished capacity instruction in the jury charge.⁴³ Thus, the Court ruled that the defense's objection in an off-the-record conference was insufficient to properly preserve an issue for review.⁴⁴

B. Accident

Next, the defense contended that there was sufficient evidence presented at trial to allow an instruction on accident, and its omission was an error by the trial justice.⁴⁵ Dr. Elizabeth Laposata testified at trial for the defense, regarding Camden's death.⁴⁶ Dr. Laposata testified that Camden's injuries could have been caused by an attempted restraint; that once Camden lost consciousness, chest compressions alone could have deprived her of oxygen; and sometimes restraints are maintained after a loss of consciousness

39. *Id.* at 821. The State responded with two arguments. First, that the defense failed to object before the jury retired to deliberate. *Id.* Second, that there was insufficient evidence to support Kimberly's diminished capacity at the time of the murder, so a diminished capacity instruction was not justified. *Id.*

40. *Id.* (emphasis in original).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 822 (citing *State v. Anderson*, 752 A.2d 946, 951 (R.I. 2000)). Defense counsel also argued that an opportunity to object to the jury charge was renewed when the jury asked a question about the mental competency and intent of Kimberly during deliberation. *Id.* However, the Court rejected this argument as well, stating that while the trial justice has an obligation to clarify juror confusion with supplemental instructions, juror confusion does not allow "the addition of another instruction entirely." *Id.* (citing *State v. Gomes* 590 A.2d 391, 394 (R.I. 1991)).

45. *Id.* at 822–23.

46. *Id.* at 823.

to ensure the restraint has been effective.⁴⁷ Based on this information, the defense asked for an instruction on accident, but the trial justice refused that specific instruction and instead provided an alternate instruction on accident in two separate areas.⁴⁸

The Court found that these instructions properly explained to the jury that they could not find Kimberly guilty of second-degree murder if the death was an accident.⁴⁹ Specifically, the Court approved of the instructions that “second degree murder must be committed willfully and that, if the death were accidental, then it could not be willful.”⁵⁰ Further, the Court concluded that because little evidence existed upon which a jury conclude that Camden’s death was an accident, “a more elaborate instruction was [not] necessary.”⁵¹

C. *Improper Impeachment*

The next issue on appeal was the nine instances the defense claims the prosecutor was allowed to “dictate the testimony” of the family therapist, Phillips.⁵² However, the defense only objected to two of the nine instances of error, so the Court dismissed the appeal for seven of the nine unobjected-to-instances.⁵³ Of the two remaining objections, the Court ruled these were not objections based on improper impeachment of Phillips’s credibility.⁵⁴

In the first objection, the defense said, “I think it is inappropriate that the witness read from the transcript. I think she should be allowed to simply testify to her memory.”⁵⁵ The Court decided this objection was closer to an improper refreshment of the witness’s recollection than improper impeachment.⁵⁶

The second objection occurred after the State told Phillips to review her notes to which the defense said, “Judge, again, I’m simply going to have to object. I have no objection to this going in

47. *Id.*

48. *Id.*

49. *Id.* at 824.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 825.

54. *Id.*

55. *Id.*

56. *Id.*

full.”⁵⁷ However, the Court interpreted this as using the rule of completeness as grounds for the objection.⁵⁸ The Court ruled the objections failed to call forth the justice’s attention “with sufficient particularity”⁵⁹ to the issue at appeal, so the issues were “deemed waived and not preserved for our review.”⁶⁰

D. Leading Questions

Forty-five questions were listed by the defense as leading during the direct examination of Phillips, but the defense only objected to one such question at trial.⁶¹ Thus, the Court ruled the other forty-four objections were not preserved for appellate review.⁶² The only remaining objection arose when Phillips was referencing her therapy notes and the prosecutor asked, “[w]hy don’t you continue with the next seven typed lines. Do you ever reference Tim and a difficulty with Tim; yes or no?”⁶³ The defense objected, stating that this was a leading question; the State responded by asking the trial justice to consider the witness as hostile.⁶⁴ The trial justice overruled the objection, giving the State some flexibility to phrase yes-or-no questions but did not explicitly rule on whether or not he found the witness hostile.⁶⁵ Phillips testified to a lack of memory in some instances and needed correction from the prosecutor when her testimony strayed from her therapy notes on occasion.⁶⁶ So, the Court ruled it could not find that the trial justice abused his discretion in allowing flexibility to pose yes-or-no questions.⁶⁷

57. *Id.*

58. *Id.*

59. *Id.* (emphasis omitted) (citation omitted).

60. *Id.* (citation omitted).

61. *Id.*

62. *Id.* at 826. On appeal, defense counsel asserted that the cumulative effect of the leading questions made them prejudicial. *Id.* n.7. But, the Court stated that the defense’s argument was substantially undermined because the defense failed to object to the leading questions. *Id.* n.7. The Court’s view was the interest of judicial economy and promoting fairer and more efficient trial proceedings by giving opposing counsel a chance to respond. *Id.* n.7.

63. *Id.*

64. *Id.* at 826.

65. *Id.* at 826–27.

66. *Id.* at 827.

67. *Id.*

E. Violation of the Sequestration Order

The defense also contended that the trial justice's refusal to pass the case, after the prosecutor discussed testimony with Dr. William Cox, was in error, and that the remedial measures offered by the trial justice were deficient.⁶⁸

The parties jointly requested and were granted a general sequestration order prohibiting witnesses from hearing each other's testimony after opening statements.⁶⁹ At the conclusion of Dr. Cox's testimony, the trial justice told Dr. Cox, "[p]lease don't discuss the case with anyone else. All witnesses for this trial are sequestered."⁷⁰ During a lunch break, the prosecutor spoke with Dr. Cox about two issues: the first was to correct Dr. Cox's memory of viewing photographs of the murder scene, and the second was about potential cross-examination of Dr. Cox's failure to dissect the hyoid bone.⁷¹ While the trial justice did not consider the prosecutor's actions improper, he allowed the defense to question Dr. Cox and suggest that he "may have violated the [c]ourt's order."⁷² The defense was also allowed to ask a question that would imply that Dr. Cox altered his testimony after consulting the prosecutor.⁷³

The Court found the discussion between the State's attorney and Dr. Cox did not violate the sequestration order.⁷⁴ In coming to this conclusion, the Court stated that when a witness testifies over the course of several days, the witness and the party calling the witness frequently discuss testimony.⁷⁵ The Court also found that a specific instruction not to discuss testimony with the prosecutor "would only be granted in extraordinary circumstances," so the trial justice's order could not have meant to encompass more than typical

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* The trial justice conceded that he could have been clearer when instructing Dr. Cox of his sequestration order and could have specifically informed him not to speak to the State's attorney. *Id.*

72. *Id.* (alteration in original).

73. *Id.* However, the trial justice did not allow defense counsel to ask whether the discussion violated the Court's order because "he did not want the question to insinuate that there had been a violation of the sequestration order when he did not determine there had been one in the first instance" *Id.*

74. *Id.*

75. *Id.* at 829.

trial practices.⁷⁶ Accordingly, the Court held that the trial justice's remedial measure eliminated any potential prejudice from the communication with the prosecutor.⁷⁷

F. Admission of the Video

Finally, the defense argued that a seven-minute video, showing the police walking through the Fry's home and depicting Camden's body, was unfairly prejudicial to the jury.⁷⁸ The defense argued that the video was "minimally probative because the layout of the home was not contested," the video did not show anything that was not shown in other exhibits, and it "inflamed [the jury's] passions against [Kimberly]."⁷⁹

The video showed the bathroom, the bedroom, and a three-and-a-half-minute focus on Camden's body in her bed.⁸⁰ The Court ruled that the video should be included as evidence for several reasons.⁸¹ First, the video added additional probative value because it showed different perspectives than other photographs.⁸² Second, it showed the pathway of the struggle between Kimberly and Camden from the bathroom to the bedroom, "where the final struggle allegedly occurred".⁸³ Third, the video showed the stuffed animal close to Camden's body, which corroborated Tim's story.⁸⁴ Finally, the Court acknowledged that an image of a deceased eight-year-old is "disturbing," but "crime scene [portrayals] of murder victims . . . are unquestionably relevant" to the State's burden to prove each element of a crime beyond a reasonable doubt.⁸⁵ Despite the existence of a longer, less-prejudicial video, the Court ruled that the State has no obligation "to prove its case in the least prejudicial way possible," and it was up to the State to decide what video to use.⁸⁶ Because there was some probative value to the depiction of Camden's body and her home and because the evidence was not

76. *Id.*

77. *Id.*

78. *Id.* at 830.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 831.

84. *Id.*

85. *Id.*

86. *Id.*

offered, “solely to inflame the passions of the jury,” it was not an abuse of discretion to admit the video.⁸⁷

COMMENTARY

The admission of the seven-minute video was, understandably, a contentious issue for the Court on appeal.⁸⁸ Not only is the subject matter one that inherently stirs emotions, but the admission or rejection of the evidence is contingent on a sliding scale that weighs concepts like “probative value” and “unfair prejudice.”⁸⁹ While the dissent’s description of the video describes a chilling walkthrough of the Fry’s home and Camden’s body,⁹⁰ there is enormous leeway given to admitting evidence that might be unfairly prejudicial.⁹¹ The majority states that excluding evidence “must be exercised sparingly,”⁹² that “only evidence that is marginally relevant and enormously prejudicial . . . must be excluded,”⁹³ and the video must be offered “solely to inflame the passions of the jury[.]”⁹⁴ Given such a high bar to exclude evidence, the Court properly affirmed the admission of the video, even though there was a long focus on Camden’s body. Although reasonable minds could argue that this errs too far on the side of admitting questionable evidence, it is consistent with a liberal policy of allowing marginally pertinent information.

The affirmation of the accident instruction is also a source of disagreement.⁹⁵ The Court seems to weigh heavily the minimal evidence presented by the defense to establish accident.⁹⁶ Further, the Court indicates a correlation in the emphasis of an instruction based on how much evidence supported that conclusion at trial.⁹⁷ However, saying what an act is not, does not always adequately convey what the act is. A reasonable jury could have been confused

87. *Id.*

88. *See id.* at 832 (Flaherty, J., dissenting).

89. *Id.* at 830 (majority opinion).

90. *Id.* at 832–33 (Flaherty, J., dissenting).

91. *See id.* at 830 (majority opinion) (citing *State v. Hak*, 963 A.2d 921, 928 (R.I. 2009); *State v. Patel*, 949 A.2d 401, 412–13 (R.I. 2008); *State v. Carter*, 744 A.2d 839, 847 (R.I. 2000)).

92. *Id.* (quoting *Hak*, 963 A.2d at 928).

93. *Id.* (quoting *Patel*, 949 A.2d at 412–13).

94. *Id.* (emphasis omitted) (quoting *Carter*, 744 A.2d at 847).

95. *See id.* at 833 (Flaherty, J., dissenting).

96. *See id.* at 824 (majority opinion).

97. *See id.*

by that instruction or miss the implication. Based on the question submitted by the jury during deliberations, there was clearly some confusion about Kimberly's mentality.⁹⁸ Perhaps, as the dissent argues, a more specific instruction about accident would have assisted the jury.⁹⁹

Finally, the decision regarding the violation of the sequestration order seems like a liberal interpretation of the order. The witness was told by the trial justice, "[p]lease don't discuss the case with anyone else. All witnesses for this trial are sequestered."¹⁰⁰ It is understandable that a witness would wish to discuss their testimony with the party that called the witness, but the order from the Superior Court was unequivocal.¹⁰¹ The case should not have been discussed with anyone else. The Court's justification that this practice is commonplace does not excuse the prosecutor's action; it only weakens the Superior Court's order. Of course, people are entitled to a fair trial—not a perfect trial—but caution is merited when trial justices are put in the unenviable position of fashioning remedial measures for parties on the spot. Further, it puts the appellate court in the position of weighing how potentially unfair one decision was, and now must decide whether the countering, unfair decision was appropriately unfair. This is an area ripe for varying degrees of justice.

CONCLUSION

The Rhode Island Supreme Court held that a reference to an off-the-record objection is insufficient to preserve that issue for appeal.¹⁰² The Court also held that explaining that willful intent is required to commit an act shows that it cannot be committed by accident.¹⁰³ The Court established that when a witness has issues recalling information, some leeway in the form of yes-or-no questions is not an abuse of discretion.¹⁰⁴ The Court also held that it is not a violation of a general sequestration order for a witness to speak with the party calling him or her, unless specifically told not

98. *See id.* at 819.

99. *Id.* at 835 (Flaherty, J., dissenting).

100. *Id.* at 827 (majority opinion).

101. *See id.*

102. *Id.* at 822.

103. *Id.* at 824.

104. *Id.* at 827.

to by the trial justice.¹⁰⁵ The Court concluded that a disturbing video is not unfairly prejudicial as long as it has some probative value, even if there is another video available that is less disturbing.¹⁰⁶

Andrew Lentz

105. *Id.*

106. *Id.* at 831.

Criminal Law. *State v. Gaudreau*, 139 A.3d 433 (R.I. 2016). When deciding whether to introduce into evidence a police interrogation containing no inculpatory statements that is recorded on videotape, a Rhode Island trial justice must weigh the low probative value of the recorded comments from the officers against the prejudicial impact to the defendant. If the evidence is erroneously admitted, it is harmless error unless there is proof beyond a reasonable doubt that the error contributed to the verdict. On a motion for a new trial, the trial justice must determine that the evidence is sufficient to conclude guilt beyond a reasonable doubt.

FACTS AND TRAVEL

During a blizzard on March 2, 2009, Physique Gym in Pawtucket was consumed in flames in the early morning hours.¹ Upon arrival, the Pawtucket Fire Department reported that the fire was “code red, fully involved.”² The next day, after the fire was contained, “a scarf and fanny pack wrapped inside a charred ‘puffy type’ winter coat and a set of keys to the premises that was ‘still in the lock’” were found “[o]utside the building, near an entryway”³ That same day, a certified, accelerant-detection, canine handler assisted the investigation, whose canine alerted to four areas that contained traces of “flammable liquids”⁴ Upon excavation, two areas contained “burned paper towels and the melted remains of what appeared to be a thirty-gallon Rubbermaid-type barrel” with a strong gasoline-like odor, “one cap from a gas can, and rubber mats covering the floor.”⁵ Two other areas were found to have “irregular and ‘very significant burn

1. *State v. Gaudreau*, 139 A.3d 433, 436 (R.I. 2016).

2. *Id.* Code red means that it was “an actual confirmed fire” and “more progressed than you would normally expect” *Id.*

3. *Id.* at 439.

4. *Id.* The “flammable liquids . . . [were] carbon-based, gasolines, kerosenes, [and] diesel fuels.” *Id.*

5. *Id.*

pattern[s]' . . . consistent with 'flammable liquid being poured out of a container and then ignited.'"⁶ The fire inspector "later testified that it was his opinion that, to a reasonable degree of scientific certainty, there were four separate areas of origin for the fire and the cause was an intentional act of fire setting."⁷

Three witnesses were questioned about the fire.⁸ The property owner, George Gardinar, said that "he leased the property to [Gary] Gaudreau for use as a gym and that [Mr. Gardinar] had allowed his insurance policy on the building to lapse a few years earlier."⁹ Paul Richard, a snow-plow driver, reported that "he had seen Gaudreau at the Physique Gym . . . with his car backed up to an open door . . . with the trunk open, at approximately 1:45 a.m." and "that he was familiar with Gaudreau and with his car because he was a member of Physique Gym."¹⁰ "About [fifteen] minutes later, Mr. Richard recalled seeing Gaudreau in his car at the intersection of Newport and Columbus Avenues; indeed, he recalled flashing his lights for Gaudreau to go through the intersection."¹¹ "Karen Kane-Taylor, who worked for [Gaudreau] at the gym . . . identified the puffy jacket and scarf that were found at the scene as belonging to [Gaudreau]" and later testified that "in the weeks leading up to the fire, it seemed to her that products that were sold at the gym, such as protein bars, drinks, water, and magazines, were not being replenished."¹²

The gym's proprietor of twenty-three years, Gaudreau, called to report a breaking and entering at his home at 3:50 a.m. on March 2, 2009, a mere ten minutes after the Pawtucket Fire Department arrived to the scene of the fire at the Physique Gym.¹³ The officer who reported to Gaudreau's home noted "only one set of tire marks on the snow-covered driveway," footprints in the snow "leading from the garage to the back porch," "a broken Plexiglas window, with glass on the ground, both outside and inside the door" near the back door of the home, and that the hood

6. *Id.* (alteration in original).

7. *Id.* at 438–39.

8. *Id.* at 437, 438, 441.

9. *Id.* at 437.

10. *Id.* at 438.

11. *Id.*

12. *Id.* at 441.

13. *Id.* at 436, 441.

of Gaudreau's car was cold.¹⁴ Gaudreau reported to the officer that "he had left his house at approximately 1:30 a.m. and drove around for a couple of hours because he was unable to sleep" and that "he returned home at approximately 3:40 a.m. or 3:50 a.m. and called the police about the break-in."¹⁵ The only thing that was missing from the home was a fanny pack that contained, among other things, Gaudreau's keys to the gym.¹⁶ Gaudreau surmised that "whoever had broken in came through the rear window, became spooked by the alarm, and grabbed the fanny pack before leaving through the same window."¹⁷

The lead detective called Gaudreau later that morning around 7:00 a.m. and asked that Gaudreau report to the police station to talk about the fire and the breaking and entering.¹⁸ Gaudreau provided essentially the same story to the detective, and the detective released him.¹⁹ Following Mr. Richard's statement, which was given to the detective after Gaudreau's first visit to the police station, that he had seen Gaudreau when he was out plowing the snow, the detective called Gaudreau back in around noon.²⁰ This second interview, during which Gaudreau waived his *Miranda* rights, was videotaped, and Gaudreau's story explaining his whereabouts and actions remained consistent, notwithstanding the fact that the detective accused that "the jig [was] up," Gaudreau "set the building on fire, that there was a witness who knew him, . . . Gaudreau was lying" and was making "false statements to the police, that he made up the 'cockamamie' story about his house being broken into, and that they were sure they would find his fanny pack at the gym."²¹ The detectives told "Gaudreau that he would be charged with first-degree arson, a capital offense," and asked if Gaudreau had anything to say, to which Gaudreau replied that he did not; Gaudreau was placed under arrest.²²

14. *Id.* at 436–37.

15. *Id.* at 437.

16. *Id.*

17. *Id.*

18. *Id.* at 437, 438.

19. *Id.* at 438.

20. *Id.*

21. *Id.* At the time of this interrogation, the fire investigation had yet to turn up the charred remains of the jacket and fanny pack. *Id.* at 439.

22. *Id.* at 439.

"After Gaudreau was arrested, the detectives brought him to the cellblock to process him and to seize his clothing, so that they could be tested for accelerants" and found that Gaudreau had "large sores on his lower legs and slight injuries to his hands," which Gaudreau said was a rash.²³ Medical personnel informed the detectives after treating Gaudreau for these injuries that the sores were second-degree burns, and Gaudreau later testified that "he had burned his legs at home in the early morning hours of March 1, 2009, the night before the gym fire, when an oil lamp he was filling spilled and caught fire" and explained that he initially lied because he was concerned that if he said that he burned himself, the police would think that he set fire to his gym.²⁴ The only physical evidence linking Gaudreau to the gym-fire scene was "[b]urned matter and charred debris in tissues in a bathroom wastebasket . . . seized from Gaudreau's home."²⁵

Gaudreau's first trial²⁶ began on July 2, 2009 for charges of first-degree arson²⁷ and Gaudreau "sought, *in limine*, to suppress the videotaped interrogation on the grounds that comments by the detectives on the tape were irrelevant and highly prejudicial and constituted inadmissible testimony concerning witness credibility."²⁸ After an argument that lasted two days, "[t]he trial justice denied defendant's motion to suppress, but ordered that two lines at the end of the tape—about the veracity of the snowplow driver—be redacted," and cautionary instructions were given to the jury before the video was played.²⁹ Gaudreau's second trial began in September 2013, and "[t]he parties agreed that the evidentiary rulings from the first trial would constitute the law of the case and that the exhibits marked as full in the first trial would be admitted as full exhibits in the second trial";

23. *Id.*

24. *Id.* at 439, 441.

25. *Id.* at 439.

26. The "trial ended in a mistrial because the jury was unable to reach a verdict." *Id.* at 441.

27. Gaudreau was charged with two counts: first-degree arson and knowingly making a false statement of a crime in violation of R.I. GEN. LAWS ANN. § 11-32-2. *Id.* at 440. However, "[t]he trial justice severed the two counts for trial and proceeded on the arson charge to ensure that defendant was not prejudiced by the state's allegations that he made a false claim to the police when he reported the breaking and entering at his home." *Id.*

28. *Id.*

29. *Id.*

however, the defendant “did not reassert his request for a cautionary instruction.”³⁰ “[T]he jury returned a guilty verdict for first-degree arson,” and the defendant moved for a new trial, which was denied.³¹

Gaudreau timely appealed, raising two issues:

First, that the first trial justice abused his discretion when he refused to exclude or redact the video-taped interrogation . . . because the detectives’ statements expressing disbelief in his story were both irrelevant and inadmissible comments on defendant’s credibility . . . [and that] any possible relevance was substantially outweighed by its enormously prejudicial impact because the jury repeatedly heard the detectives call defendant a liar; second, that “the trial justice erred in denying [Gaudreau’s] motion for a new trial because there was no evidence linking him to the fire and, in particular, no evidence of an accelerant on his clothing, in his house, or in his car.”³²

ANALYSIS AND HOLDING

Upon review of the trial justice’s decision, the Supreme Court sought to determine whether the videotape evidence was improperly admitted and if it was, whether this was an abuse of discretion constituting reversible error.³³ The issue regarding how to analyze evidence of a videotape where the defendant does not challenge the statements that he made, but rather that the detectives’ comments were irrelevant and highly prejudicial was a novel issue to the Supreme Court.³⁴ Several organizations in Rhode Island have either adopted or recommended that police departments implement rules requiring that all police interrogations be audio or video recorded, and the Supreme Court was “faced with new issues that are associated with those recordings.”³⁵ The Supreme Court outlined a comprehensive

30. *Id.* at 441.

31. *Id.* at 442.

32. *Id.*

33. *Id.* at 443.

34. *Id.*

35. *Id.* at 443–44 (citing Task Force to Investigate & Develop Policies & Procedures for Electronically Recording Custodial Interrogations, Final

overview of various jurisdictions and how each handles evidence of this nature.³⁶ The opinions ranged from those that consider a detective's statements on credibility to be absolutely prohibited,³⁷ to those jurisdictions that do not allow it, but consider that it is not reversible error if there is a wealth of other evidence against the defendant,³⁸ and finally to those that consider that the "police officer's statements have probative value for providing context even where the defendant, as here, made no inculpatory statements and had not changed his story."³⁹

The Court opined that the appropriate approach for this type of evidence is to conduct "a balancing test and carefully weigh[] the low probative value of the recorded comments from the officers against the prejudicial impact to defendant."⁴⁰ In so doing, the Court determined that because

the majority of the video and transcript . . . [were] dominated by the comments of the two detectives, with defendant occasionally responding in the negative [and b]ecause of the paucity of relevant or useful responses to be gleaned from defendant's consistent explanation of events and assertion of innocence, those officers' comments cannot be said to have had any contextual value.⁴¹

Further, the Court held that the comments were prejudicial to Gaudreau and "[t]he fact that the jury viewed a videotape of the very detective sitting on the witness stand telling defendant that

Report (Feb. 1, 2012, *available at* http://www.innocenceproject.org/wp-content/uploads/2016/05/RI-Task-Force-Report_Recording.pdf).

36. *Id.* at 444–47.

37. *Id.* at 444–45 (citing *State v. Elnicki*, 105 P.3d 1222, 1229 (Kan. 2005)).

38. *Id.* at 446 (citing *State v. Demery*, 30 P.3d 1278, 1285 (Wash. 2001)).

39. *Id.* (citing *Dubria v. Smith*, 224 F.3d 995, 1001–03 (9th Cir. 2000) ("no violation to fundamental due process, even though California law would have required that the tapes be redacted, because not every trial error constitutes a failure to observe fundamental fairness and because trial judge gave two specific instructions that cured prejudice"); *State v. Willis*, 75 A.3d 1068, 1078 (N.H. 2013) ("finding that probative value was not outweighed by the danger of unfair prejudice because the officer's comments were in the form of questions rather than accusations, and provided context for the defendant's responses")).

40. *Id.* at 449.

41. *Id.* (footnote omitted).

he was a liar compounded the danger that the jury might have been prejudiced against defendant” and that it was “far more prejudicial to him than anything said by his interrogators.”⁴² However, in light of the “tapestry of factual evidence and bearing in mind the conduct, tone, and length of this particular interrogation,” the Court concluded “that the passions of the jury would [not] have been ‘so inflame[d] . . . as to prevent their calm and dispassionate examination of the evidence.’”⁴³ However, the Court cautioned “that there is a real concern that these types of interrogations have the potential to lead to substantial prejudice⁴⁴ . . . and trial justices should be alert to the danger of potential abuse, such as the introduction of manufactured evidence that would not be admitted at trial.”⁴⁵

On Gaudreau’s appeal of the dismissal of his motion for a new trial, the Court stated that “[a]s long as the trial justice has . . . articulated adequate reasons for denying the motion, his or her decision will be given great weight and left undisturbed unless the trial justice overlooked or misconceived material evidence or otherwise was clearly wrong.”⁴⁶ In making her decision to deny Gaudreau’s motion for a new trial, the trial justice found that though the police investigation was not perfect, the officers were credible and that Gaudreau’s “version of events leading up to the time when [the officer] arrived at [his] home ‘lacked believability’ and made no sense.”⁴⁷ Moreover, the eyewitness testimony of Mr. Richard, the snowplow driver, was credible, as were the testimonies from Mr. Gardinar, the lessor of the gym,⁴⁸ and Karen Kane-Taylor.⁴⁹ The trial justice also “found that the burns discovered on [Gaudreau’s] legs ‘and [his] ludicrous explanation of

42. *Id.*

43. *Id.* at 449, 450 (quoting *State v. Gomes*, 764 A.2d 125, 136 (R.I. 2001)).

44. *Id.* at 450 (citing *Lanham v. Commonwealth*, 171 S.W.3d 14, 28 (Ky. 2005)).

45. *Id.* (citing *Commonwealth v. Kitchen*, 730 A.2d 513, 521 n.5 (Pa. Super. Ct. 1999)).

46. *Id.* at 451 (quoting *State v. Phannavong*, 21 A.3d 321, 325 (R.I. 2011)).

47. *Id.*

48. Furthermore, the Court held that Mr. Gardinar “had no motive to burn his property because he had allowed the insurance on the building to lapse.” *Id.*

49. *Id.* at 452.

how he sustained them may have been some of the strongest items of evidence against [him].”⁵⁰ The Court held that “the trial justice more than met her obligations [when she] . . . consider[ed] the evidence in light of the jury charge, independently assess[ed] the credibility of the witnesses, . . . determine[d] that she agreed with the jury’s ultimate verdict,” and affirmed that decision by denying Gaudreau’s motion to dismiss.⁵¹

COMMENTARY

The Rhode Island Supreme Court clearly acknowledged that videotaped interrogations admitted against a defendant have potential to lead to substantial prejudice;⁵² however, it remains somewhat unclear if the Court made a bright line decision on a test for future, similar evidentiary issues. Because the Court held that the trial justice should have conducted a balancing test to weigh the probative value against the prejudicial impact, it seems that there is a possible scenario where videotaped interrogations containing no inculpatory evidence is admissible. The Court did place weight on the fact that Gaudreau’s explanations and assertions remained consistent in the face of the interrogation. Therefore, perhaps if another defendant’s story changed throughout the course of the interrogation, this could be grounds under the Court’s decision that such videotaped interrogations are admissible.

Additionally, the Court held that the trial justice did not commit reversible error by admitting this videotaped interrogation in light of the overwhelming evidence against Gaudreau.⁵³ However, it is arguable that the other evidence is not overwhelming. If Gaudreau’s story is taken as true, it explains his whereabouts and actions, and the only remaining evidence linking Gaudreau to the fire is the fact that he operates the gym. There is no physical evidence that definitively linked Gaudreau to the fire. According to the Court in its confirmation of the trial justice’s decision, the unreliableness and far-fetched aspects of Gaudreau’s story were too intertwined with the overwhelming

50. *Id.*

51. *Id.*

52. *Id.* at 450.

53. *Id.* at 448, 449, 450.

aspects of the other evidence that tipped the scale in favor of the fact that the impermissible evidence did not overbear the minds of the jurors.⁵⁴ However, it is also arguable that the videotaped recording may have helped Gaudreau because it showed that he remained consistent in his explanations, even in the face of continuous and pointed accusations and questions.

The Court, in upholding the trial justice's denial of Gaudreau's motion for a new trial, reaffirmed that a new trial will only be granted if evidence was overlooked or clearly wrong.⁵⁵ The trial justice listed at least seven reasons⁵⁶ why she agreed that the jury reached the correct verdict. Because this was the second, full jury trial for Gaudreau, and all the evidentiary issues had been settled during the first trial, it is reasonable that the verdict should not be disturbed.

CONCLUSION

The Rhode Island Supreme Court held that when deciding whether to introduce into evidence a police interrogation containing no inculpatory statements that is recorded on videotape, a trial justice must weigh the low probative value of the recorded comments from the officers against the prejudicial impact to the defendant. If the evidence is erroneously admitted, it is harmless error unless there is proof beyond a reasonable doubt that the error contributed to the verdict. The Court determined this based on an exhaustive review of jurisdictions' practices and reasoning alongside those with which it agreed.

Molly R. Hamlin

54. *Id.* at 449.

55. *Id.* at 451.

56. *Id.* at 451–52.

Criminal Law. *Tempest v. State*, 141 A.3d 677 (R.I. 2016). A twenty-two-year-old murder conviction is vacated based on evidence that the State withheld witness statements from the defense, constituting a *Brady* violation. The State’s decision to withhold the evidence was deliberate, which under Rhode Island law, guaranteed the defendant a new trial regardless of the materiality of the suppressed evidence. Although the lower court granted the new trial based on two *Brady* violations and a due process violation, the Court only addressed one *Brady* claim, concluding that affirming one ground was dispositive of the case.

FACTS AND TRAVEL

On April 22, 1992, a jury convicted Raymond “Beaver” Tempest, Jr. (Tempest) for the February 19, 1982 murder of Doreen Picard (Picard), and he was subsequently sentenced to eighty-five years in prison.¹ Picard and Susan Laferte (Laferte) were both found brutally beaten in the basement of their home, located at 409 Providence Street, Woonsocket, Rhode Island.² Tragically, twenty-two-year-old Picard succumbed to her injuries and was pronounced dead within an hour of being found.³ Although Laferte ultimately survived the attack, she was unable to recall any details of that day, and no one has ever been charged for her assault.⁴

Laferte and her husband owned the triplex apartment building in which the attack took place.⁵ Laferte and her husband lived on the first floor with their two young children, and Picard lived on the third floor with her boyfriend.⁶ Douglas Heath

1. *Tempest v. State (Tempest III)*, 141 A.3d 677, 679, 681 (R.I. 2016). See *State v. Tempest (Tempest I)*, 651 A.2d 1198 (R.I. 1995) for the affirmation of Tempest’s conviction.

2. *Tempest III*, 141 A.3d at 680.

3. *Id.*

4. *Id.* at 680 n.3.

5. *Tempest I*, 651 A.2d at 1203.

6. *Id.*

(“Heath”) and his wife lived on the second floor, along with Heath’s fifteen-year-old stepdaughter, Lisa LaDue (LaDue).⁷ On the day of the murder, LaDue returned home at approximately 3:20 p.m. and noticed a “big maroon car” in the driveway near the cellar bulkhead.⁸ After entering the apartment through the backdoor, LaDue encountered Laferte’s three-year-old daughter, Nicole, who was crying and said that her mother was “downstairs sick.”⁹ LaDue thought Nicole was merely seeking attention, so she went upstairs to wait for Heath to come home.¹⁰ Approximately ten minutes later, Heath returned home and also met a crying Nicole, who indicated that her mother was in the basement “lying down.”¹¹ When Heath entered the basement, he found the unrecognizable bodies of Picard and Laferte, one in a sitting position between the washer and dryer, and one face down in a “puddle of blood.”¹² Horrified, Heath called out for LaDue to make sure she was safe, and then called the police.¹³ LaDue later testified that the maroon car was no longer present when the victims were found and that an ambulance had parked in its place.¹⁴

Evidence presented in Tempest’s trial revealed that he knew Laferte prior to the attack and may have been having an extramarital relationship with her.¹⁵ Prior to the attack, Laferte and Tempest had arranged to mate their dogs, agreeing that Tempest would have his pick of the litter, and Laferte would keep the remaining puppies.¹⁶ Tempest promised his puppy to his friend, John Allard (Allard).¹⁷ On the day of the attack, Tempest and Allard went to Laferte’s apartment to retrieve the puppy and left “without incident” at approximately 1:45 p.m.¹⁸ Tempest’s

7. *Id.*

8. *Tempest III*, 141 A.3d at 679.

9. *Id.*

10. *Id.*

11. *Id.* at 680.

12. *Id.*

13. *Tempest I*, 651 A.2d 1198, 1203 (R.I. 1995).

14. *Id.*

15. *Id.* Laferte acknowledged that she was involved in an affair at the time of her attack, but due to her memory loss, was unable to verify that the affair was with Tempest. *Id.* at 1203 n.1.

16. *Id.* at 1204.

17. *Id.*

18. *Id.* Laferte’s sister, Carol Rivet, was present during the puppy

former sister-in-law, Sherri Richards, who lived with Allard and watched Tempest's children on the day of the murder, testified that Tempest returned to her house between 2:00 and 2:30 p.m., left shortly thereafter to meet his brother-in-law, Robert Monteiro ("Monteiro"), and subsequently returned to Richards's apartment between 4:30 and 4:45 p.m. with Monteiro.¹⁹

Donna Carrier (Carrier) was one of four witnesses who testified that Tempest confessed to killing Picard.²⁰ Carrier testified that Tempest was upset with Laferte because she "was going to tell [his wife] something and he and [his wife] had just gotten back together."²¹ Carrier also testified that Tempest explained that Picard "came down the stairs at the wrong time, saw him hitting [Laferte] and that '[h]e couldn't let her get away and had to do her, too.'"²² Carrier also gave numerous statements before trial indicating that she lived in the same apartment complex as Tempest on the day of the murder.²³ This was later proven false, as Tempest lived on Phoebe Street on the day of the murder, and only moved to Winter Street, where Carrier lived with her boyfriend, John Guarino (Guarino), the following year.²⁴

After his conviction, Tempest first filed for postconviction relief on April 8, 2004, with a request to test physical evidence.²⁵ From that time until 2015, Tempest continued his quest for postconviction relief, to no avail.²⁶ In April of 2015, Tempest filed a second petition for postconviction relief, which is the subject of

exchange. *Id.*

19. *Id.*

20. *Tempest III*, 141 A.3d 677, 680 (R.I. 2016). The three other witnesses were: John Guarino, Carrier's boyfriend; Ronald Vaz, an acquaintance with whom Tempest snorted cocaine; and Lorette Rivard, a prostitute that Tempest "part[ied] [with] one night in January, 1989." *Id.* (first alteration in original). The trial justice noted that these four witnesses were not "a parade of MDs or [s]umma [c]um [l]audes," but the court "must take the witnesses as they come." *Id.* at 681 (alterations in original) (quoting *Tempest I*, 651 A.2d at 1218).

21. *Id.* at 680 (alterations in original).

22. *Id.* (alterations in original).

23. *Id.*

24. *Id.* at 684.

25. *Id.* at 681. The physical evidence Tempest sought included "hair recovered from both victims of the attack, as well as fingernail clippings from Picard." *Id.*

26. *Id.*

this appeal.²⁷ In response to that petition, Tempest was granted a postconviction relief hearing (PCR hearing), which took place over several weeks.²⁸ The hearing justice ultimately vacated Tempest's conviction and granted a new trial, based on three distinct grounds: two *Brady*²⁹ violations and one due process violation.³⁰ The State opposed the hearing justice's opinion on all three grounds, and petitioned for a writ of certiorari, which the Rhode Island Supreme Court granted.³¹

The first *Brady* violation was based on the prosecution's suppression of Carrier's statements seventeen days before trial.³² Throughout pretrial interviews and hearings,³³ Carrier's testimony was that Tempest's brother, Gordon Tempest (Gordon), a detective in the Woonsocket Police Department, did not know about Tempest's involvement in the murder, and Gordon would not protect Tempest if he found out.³⁴ However, seventeen days

27. *Id.*

28. *Id.*

29. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of good faith or bad faith of the prosecution."). Later cases have expanded the *Brady* standard to include impeachment material in addition to exculpatory evidence. See *United States v. Bagley*, 473 U.S. 667, 676 (1985).

30. *Tempest III*, 141 A.3d at 681. See *Tempest v. State (Tempest II)*, No. PM20041896, 2015 WL 4389908 (R.I. Super. July 13, 2015) for the hearing justice's opinion.

31. *Tempest III*, 141 A.3d at 682.

32. *Id.* at 682. The second *Brady* violation was based on John McMann Jr.'s ("McMann") statements to the Woonsocket Police Department during Tempest's trial. *Id.* Richards testified that she saw Tempest in McMann's maroon car on the day of the murder. *Id.* at 689 (Suttell, C.J., concurring). When McMann learned of this testimony as the trial was ongoing, he went to the Woonsocket Police Department to inform the police that he never lent his car to anyone on the day of the murder, and, therefore, his car could not have been present at the murder scene. *Id.* at 690. Tempest argued, and the hearing justice agreed, that the prosecution's failure to inform the defense that McMann and Kevin had told the Woonsocket Police Department that they did not lend the car to Monteiro constituted a *Brady* violation. *Id.* at 690. The due process violation resulted from improper police practices and witness coaching during interviews with both Richards and LaDue. *Tempest II*, 2015 WL 4389908 at *21–22.

33. Carrier gave her first statement to Woonsocket police in February, 1987, and subsequently testified in a grand jury hearing on November 30, 1990, at Tempest's bail hearing in June, 1991, and at trial in April, 1992. *Tempest III*, 141 A.3d at 684.

34. *Id.*

before the trial began, Carrier made two novel statements to the former prosecutor:

(1) that [Gordon] . . . hid the murder weapon (a pipe) in a closet on the first floor at 409 Providence Street in an effort to conceal it so as to protect his brother; and (2) that, on the day of the murder, Tempest's children were "excited" about getting a puppy.³⁵

The former prosecutor did not reveal Carrier's statements to the defense but instead included a note in the file stating: "more new info re: GT [Gordon Tempest] putting pipe in closet + dog for the kids—too late—don't volunteer new info—will cause big problems."³⁶ Tempest argued, and the hearing justice agreed, that this failure to disclose violated both *Brady* and Rhode Island's *Wyche* standard, which guarantees a new trial when a prosecutor *deliberately* fails to disclose any evidence, even evidence that would not meet *Brady*'s material exculpatory requirement.³⁷

ANALYSIS AND HOLDING

The Court affirmed the hearing justice's grant of a new trial based on the Carrier statements *Brady* violation.³⁸ In reasoning that any one of the three grounds upon which the hearing justice granted a new trial would lead the Court to affirm its decision, the Court did not reach the other two grounds.³⁹ The Court affirmed the hearing justice's determination that the Carrier statements constituted a *Brady* violation, which was sufficient to affirm the hearing justice's ruling granting Tempest's new trial.⁴⁰

35. *Id.* at 682 (footnote omitted). Carrier had never before indicated that she had seen Tempest's children on the day of the murder, or that she knew about his arrangement to obtain a puppy from Laferte. *Id.*

36. *Id.* (alteration in original).

37. *Id.* at 683; *see also* State v. Wyche, 518 A.2d 907, 910 (R.I. 1986) ("When the failure to disclose is deliberate, this court will not concern itself with the degree of harm caused to the defendant by the prosecution's misconduct; we shall simply grant the defendant a new trial.").

38. *Tempest III*, 141 A.3d at 683. Justice Indeglia wrote for the Court, with Chief Justice Suttell concurring in part and dissenting in part, and Justice Goldberg dissenting. *Id.* at 679, 687 (Suttell, C.J., concurring), 698 (Goldberg, J., dissenting).

39. *Id.* at 683 (majority opinion).

40. *Id.*

Under *Brady*, a new trial must be granted if the prosecution withheld material exculpatory evidence from the defense.⁴¹ If the evidence was deliberately withheld, Rhode Island's *Wyche* standard provides that the defendant is entitled to a new trial, regardless of the materiality of the evidence.⁴² The prosecution's suppression is deliberate when "it makes 'a considered decision to suppress . . . for the purpose of obstructing' or where it fails 'to disclose evidence whose high value to the defense could not have escaped . . . [its] attention.'"⁴³

The Court held that the hearing justice applied the proper test for a *Brady* violation.⁴⁴ The hearing justice determined that the former prosecutor's rationale for suppressing the Carrier statements was that "it would lead to a continuance and to headaches."⁴⁵ The hearing justice found that this "considered decision to suppress" was a deliberate suppression, and under *Wyche*, it must result in a new trial.⁴⁶ The Court held that the hearing justice made no clear error in determining that the former prosecutor deliberately withheld the Carrier statements, and thus it affirmed the ruling granting a new trial.⁴⁷

The Court then conducted its own analysis of the evidence, and concluded that the "high value" of the Carrier statements "could not have escaped the former prosecutor's attention," thereby satisfying the *Wyche* test.⁴⁸

A. Carrier's Pretrial Statements About Gordon's Involvement

The State argued that the Carrier statements indicating that Gordon hid the murder weapon were not actually new evidence, but merely cumulative of other evidence that had already been given to the defense.⁴⁹ The Court easily dismissed this argument because the hearing justice found that the former prosecutor had

41. *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963); *see also* *DeCiantis v. State*, 24 A.3d 557, 570 (R.I. 2011).

42. *State v. Wyche*, 518 A.2d 907, 910 (R.I. 1986).

43. *Tempest III*, 141 A.3d at 683 (alterations in original) (quoting *United States v. Keough*, 391 F.2d 138, 146 (2nd Cir. 1968)).

44. *Id.* at 683.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 684.

identified the statements as “new” in his note, and the Court found no clear error in this finding.⁵⁰

In Carrier’s first statement to police in 1987, she stated that Gordon did not know about Tempest’s involvement in the murder, and Tempest told her that if Gordon ever found out, he would turn Tempest in to police.⁵¹ During her grand jury testimony in 1990, Carrier indicated that Tempest’s father, the High Sheriff of Providence, had knowledge and helped cover up Tempest’s involvement, but Gordon had no knowledge of Tempest’s role in the murder.⁵² At Tempest’s bail hearing in April, 1991, Carrier testified that “*if [Tempest] told his brother, Gord[on], Gord[on] would go to the police and tell them what they knew, and that the murder weapon was not there, it wasn’t available, and that all fingerprints were taken care of.*”⁵³ During a statement to police in August, 1991, Carrier stated that “[Tempest] said, ‘I won’t get caught, my father and brother won’t let me get caught. The weapon’s been all taken care of, he said.’”⁵⁴ The Court conceded that Carrier’s previous statements were “vague” with respect to Gordon’s involvement, but they never directly implicated Gordon in covering up Tempest’s crime.⁵⁵

The Court held that Carrier’s pretrial statement in March, 1992, was a “dramatic” change from her previous statements; Carrier flip-flopped from denying Gordon’s knowledge or involvement to directly implicating him in concealing the murder weapon.⁵⁶ At the PCR hearing, the former prosecutor recalled that “Carrier told him in March 1992—mere days before trial—that ‘Gordon Tempest had put the pipe in the closet’ at 409 Providence Street, where it was ultimately found by police.”⁵⁷ Given the significant change in her statement, the Court deemed Carrier’s pretrial statement about Gordon to be a “significant modification,” and thus, the Court disagreed with the State’s claim that it was not new information.⁵⁸

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 684–85.

54. *Id.* at 685.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

The State then argued that even if the statements were new evidence, they were not exculpatory evidence because they only further implicated Tempest in the crime, and therefore is not a *Brady* violation.⁵⁹ The Court dismissed this argument on the grounds that Carrier's inconsistent statements could have been used by the defense to impeach her credibility.⁶⁰ The Court held that "facially inculpatory evidence can be used to impeach a witness," and impeachment evidence constitutes *Brady* evidence.⁶¹ Thus, even absent a finding of deliberate failure to disclose under the *Wyche* standard, the State's suppression of the Carrier statements about Gordon's involvement establish a *Brady* violation warranting a new trial.⁶²

B. Carrier's Pretrial Statements About Tempest's Children

The Court similarly dismissed the State's argument that Carrier's statement about Tempest's children being excited about getting a puppy on the morning of the murder was not new information.⁶³ Carrier's grand-jury testimony indicated that Tempest planned to retrieve a puppy from "either Doreen Picard or Sue Laferte" on February 19, 1982, but she had never indicated that she had seen Tempest's children that day, or that they were excited about the puppy.⁶⁴ The Court held that this statement had "impeachment value" because it would further discredit Carrier's assertion that she saw Tempest on the day of the murder.⁶⁵ Carrier was under the false belief that she lived in the same apartment complex as Tempest on Winter Street on the day of the murder.⁶⁶ Additionally, it was "undisputed that John Allard, a friend of Tempest, was to be the recipient of the puppy," not Tempest's children.⁶⁷ Given that Carrier had never before mentioned seeing Tempest's children on that morning, this

59. *Id.*

60. *Id.*

61. *Id.* (quoting *Strickler v. Greene*, 527 U.S. 263, 282 n.21 (1999)); *see also* *United States v. Bagley*, 473 U.S. 667, 676 (1985).

62. *Tempest III*, 141 A.3d at 685.

63. *Id.* at 686.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

statement was new evidence.⁶⁸

The State next argued that the statement was not material, and does not amount to a *Brady* violation.⁶⁹ The Court reiterated its *Wyche* standard and held that the State's deliberate suppression of evidence entitled Tempest to a new trial, regardless of materiality.⁷⁰ Furthermore, the Court held that even absent a finding of deliberate failure to disclose under *Wyche*, this statement was material exculpatory evidence sufficient to establish a *Brady* violation.⁷¹ Much like Carrier's inconsistent statements about Gordon's involvement, this statement could have been used to "impeach Carrier's testimony even further."⁷² The Court held that because there was no physical evidence in the case, witness credibility was paramount to the State's case.⁷³ If the defense had the opportunity to further impeach Carrier, "there is, at the very least, a reasonable probability—one 'sufficient to undermine confidence in the outcome'—that the verdict against Tempest would have been different."⁷⁴ Even though the defense had already impeached Carrier's testimony by proving that Tempest did not live on Winter Street until 1983, the Court held that "whether the defense would have actually used the statements is not relevant to our analysis—the bottom line is that it should have been defense counsel's choice to make."⁷⁵

COMMENTARY

Doreen Picard's murder, which went unsolved for ten years and was the subject of a botched police investigation and probable cover-up, serves as a black mark in Rhode Island history.⁷⁶

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 687 (citing *Wearry v. Cain*, 136 S. Ct. 1002, 1006(2016)).

75. *Id.*

76. *See id.* at 680 ("[E]ven the state described [the case] as a 'chao[tic],' 'disorder[ly],' and 'disast[rous]' nine-year investigation by the Woonsocket police department[.]") (alteration in original). "[The case] ranks as one of the most infamous crimes committed in this state during the last century. The fact that no arrest was made for several years was a festering sore in the community, compounded by a cover-up by sworn police officers." *Id.* at 698 (Goldberg, J., dissenting).

Finding the Rhode Island Supreme Court divided on this decision is not surprising, given the extreme intricacies of the case, which have developed over the thirty-four years since Picard was murdered. While the majority was satisfied that the suppressed Carrier statements constituted a *Brady* violation,⁷⁷ the concurrence and dissent both disagreed with the standard employed; the dissent would have reversed the hearing justice's ruling altogether,⁷⁸ and the concurrence would have remanded on the Carrier issue, but ultimately agreed with the ruling based on the McMann statements *Brady* violation.⁷⁹

The concurrence, not satisfied by the Carrier statements, moved on to the other *Brady* violation: the McMann statements about the maroon car.⁸⁰ The Chief Justice found that this issue was indeed a *Brady* violation, and he would have affirmed the lower court's holding on that ground.⁸¹ However, Justice Goldberg held that the hearing justice abused his discretion in denying the State's laches defense, and she would have reversed on the McMann statements as well.⁸² The dissent then addressed the due process violation to complete the review of the issues on appeal.⁸³ While the dissent agreed that the majority need not consider the McMann evidence, given that it affirmed the decision below, the dissent believed that the majority should have considered the due process claim, so that the trial court would have instructions on that issue on retrial.⁸⁴ Justice Goldberg predicted that without the Supreme Court's instruction on the due process violation, the issue will likely be back before the Court when the case goes to trial once again.⁸⁵ Eschewing the inefficiency of this likely occurrence, Justice Goldberg addressed

77. *Id.* at 687 (majority opinion).

78. *Id.* at 717 (Goldberg, J., dissenting).

79. *Id.* at 688 (Suttell, C.J., concurring).

80. *Id.* at 689.

81. *Id.* at 698.

82. *Id.* at 717–18 (Goldberg, J., dissenting). Justice Goldberg believed that Tempest did not meet his burden of proving that his defense team did not know that Monteiro did not own or borrow the maroon car on the day of the murder. Furthermore, it seems that Tempest could have easily discovered this information and did not need to wait until 2013, twenty-one years after his conviction, to bring forth the claim. *Id.*

83. *Id.* at 730.

84. *Id.*

85. *Id.*

the due process violation and put forth her own opinion as to how to treat the testimony of the witnesses coached by the Woonsocket Police Department.⁸⁶

A. *Wyche* Standard

The concurrence and dissent agreed that the hearing justice and the majority omitted a vital part of the *Wyche* standard.⁸⁷ Under the *Wyche* standard for deliberate nondisclosure, the prosecution must have either (1) made “a considered decision to suppress . . . for the [very] purpose of obstructing,” or, alternatively, (2) “fail[ed] to disclose evidence whose high value to the defense could not have escaped . . . [its] attention.”⁸⁸ The concurrence concluded that the hearing justice made no determination of fact regarding the former prosecutor’s purpose for suppressing the evidence, and the case could be remanded for such a determination on that issue.⁸⁹ The dissent believed that the hearing justice made no factual determination as to why the former prosecutor withheld the Carrier statements and applied the wrong legal test (omitting “for the very purpose of obstructing” from the analysis), constituting clear error. Conducting her own analysis, Justice Goldberg found that the prosecution’s suppression satisfied neither prong of the *Wyche* standard, and thus, Carrier’s statements must be analyzed under the *Brady* material exculpatory standard.⁹⁰

B. *Materiality*

The striking difference between the Court’s and the dissent’s recitation of the facts leads one to question the objectivity of materiality. The Court reasoned that Carrier was “arguably the most credible” of the four witnesses who testified that Tempest confessed to killing Picard,⁹¹ while the dissent was

86. *Id.* at 732.

87. *Id.* at 688 (Suttell, C.J., concurring), 706 (Goldberg, J., dissenting).

88. *Id.* at 706 (Goldberg, J., dissenting) (alterations in original).

89. *Id.* at 688 (Suttell, C.J., concurring). Although the Chief Justice disagreed with the Court’s *Wyche* standard and would have remanded on that issue, he ultimately concurred in the opinion because he affirmed the hearing justice’s opinion based on the McMann statement *Brady* claim. *Id.*

90. *Id.* at 707, 710, 714 (Goldberg, J., dissenting).

91. *Id.* at 686–87 (majority opinion).

“convince[d] . . . that Carrier was the *least* credible witness offered by the state.”⁹² The Court compared Carrier to the other three witnesses, including a drug user and a prostitute, and found her to be more credible,⁹³ but the dissent reasoned that Carrier was the only witness “demonstrated to have fabricated prior testimony.”⁹⁴ Clearly, the Court and dissent viewed Carrier’s testimony very differently, making it impossible to agree on its materiality.

Whether the Court should make determinations of materiality was also at issue.⁹⁵ Justice Goldberg admonished the Court for making findings of credibility, but also put forth her own opinion that Carrier was the least credible witness, and asserted that the withheld statements were merely cumulative impeachment evidence.⁹⁶ The dissent pointed out that the trial justice “pressed Carrier to admit that, contrary to what she told the grand jury,” she could not have seen Tempest on the day of the murder, because “she and Tempest were not neighbors on the day of the murder[.]”⁹⁷ Ultimately, it is difficult to imagine the additional value of impeachment evidence for a witness who admitted on the stand that she was “mistaken” and did not see Tempest on the day of the murder.⁹⁸ Had the hearing justice made a determination of fact with respect to the materiality of Carrier’s statements, the Court would not have to speculate as it did.

C. Due Process Violation

The due process violation resulted from improper police practices and witness coaching during interviews with both Richards and LaDue.⁹⁹ The hearing justice found that “the police

92. *Id.* at 714 (Goldberg, J., dissenting).

93. *Id.* at 680 (majority opinion).

94. *Id.* at 714 (Goldberg, J., dissenting).

95. *Id.*

96. *Id.* (“For one thing, this type of credibility assessment is reserved for the hearing justice, not the members of this Court. The hearing justice made no such credibility determination in the relevant two-and-a-half pages of his decision, and the majority should not have ventured onto this forbidden terrain. In any event, my reading of the trial transcript convinces me that Carrier was the *least* credible witness offered by the state.”).

97. *Id.* at 703.

98. *See id.*

99. *Tempest II*, No. PM20041896, 2015 WL 4389908, at *21–22 (R.I. Super. July 13, 2015).

fed witnesses information in an effort to move the case against Mr. Tempest forward,” and employed a variety of “suggestive interview techniques.”¹⁰⁰ The hearing justice highlighted the police’s ten interviews with Richards, whose account “shifted in lockstep with the State’s theory of the case.”¹⁰¹ Throughout her interviews, and as the State learned more information, Richards would appear to “develop[] hypermnesia—suddenly remembering Mr. Tempest’s return and vividly recalling the sight of him standing by Mr. Monteiro’s car on the day of the murder.”¹⁰² Ultimately, the hearing justice determined that “[r]egardless of whether police intended to interfere with the witnesses’ recollection of events here, the taint of improper police procedure so poisoned the well that Mr. Tempest’s conviction cannot stand.”¹⁰³

“In refusing to address this claim, the majority leaves a gaping hole rather than a clear mandate on remand.”¹⁰⁴ There is no legal error in the Court’s decision not to address the witness coaching claim, but there is practical error. When Tempest’s new trial comes about, he will surely object to the admissibility of LaDue’s and Richards’s testimonies with respect to the maroon car, claiming that the police coached the witnesses. The PCR hearing justice found that “the presentation of this faulty testimony at trial prejudiced Mr. Tempest,” and resulted in a due process violation.¹⁰⁵ However, the dissent points out that the hearing justice’s ruling on the evidence has no bearing on the admissibility of the “faulty” evidence in Tempest’s upcoming new trial, and thus, the State may present the same evidence against Tempest once again.¹⁰⁶

Without addressing the admissibility of this evidence, the issue will arise in Tempest’s new trial, and quite possibly return before the Supreme Court. Unquestionably, there has been a miscarriage of justice in this case. Doreen Picard was mercilessly

100. *Id.* at *21, *24.

101. *Id.* at *26.

102. *Id.* at *54.

103. *Id.* at *58 (citing *Mesarosh v. United States*, 352 U.S. 1, 9(1956)).

104. *Tempest III*, 141 A.3d 677, 730 (R.I. 2016) (Goldberg, J., dissenting).

105. *Tempest II*, 2015 WL 4389908, at *59.

106. *Tempest III*, 141 A.3d at 731 (Goldberg, J., dissenting) (“A PCR hearing justice has no authority to address the admissibility of evidence in a retrial[.]”).

killed at a young age, and her family did not see justice until ten years later. The Woonsocket Police Department botched the crime scene investigation and coached witnesses. Tempest was not given a fair trial because the prosecutor failed to disclose evidence to the defense. From any angle, this case has lingered too long, and the Court should have seized any chance that it could to bring a resolution. Without answering the due process question, Tempest will either face another unfair trial, or else must wait for the Court to decide the question of admissibility on appeal.

The Court pointed out that it could affirm the hearing justice's opinion based on any one of the three issues on appeal.¹⁰⁷ Consequently, one is left to wonder why the Court chose to analyze the Carrier statements as its "one issue" instead of the McMann statements or the witness coaching. Given that the witness coaching claim is the only claim to have significance in the new trial, the Court could have killed the metaphorical two birds with one stone by addressing it: affirm the decision *and* give the new trial justice direction about the admissibility of the evidence. The Court missed an opportunity to help put an end to this case, and all but guaranteed that it would revisit this issue in near the future.

CONCLUSION

The Rhode Island Supreme Court affirmed the Superior Court justice's order to vacate Tempest's twenty-four-year-old murder conviction and granted a new trial. The Court held that the State deliberately suppressed Donna Carrier's statements, which were material evidence, violating both *Brady* and Rhode Island's more defendant-friendly *Wyche* standard.

Jennifer Lisi

107. *Id.* at 682 (majority opinion).

Family Law. *Hogan v. McAndrew*, 131 A.3d 717 (R.I. 2016). Under chapter 14.1 of title 15 of the Uniform Child Custody Jurisdiction and Enforcement Act, before the Family Court may decline jurisdiction on the grounds that Rhode Island is an inconvenient forum, the Family Court must engage in a two-step inquiry. First, the hearing justice must determine whether it would be appropriate for another state to exercise jurisdiction, and in making that determination, the court must allow the parties to submit evidence and weigh eight different factors set out in section 15-14.1-19. If the court determines that another appropriate forum exists, they must then consider whether the current state would be an inconvenient forum under the circumstances of that particular case.

FACTS AND TRAVEL

Valerie M. Hogan (Hogan) and Philip A. McAndrew (McAndrew) are parents to P., born in 1999, C., born in 2000, and E., born in 2004.¹ Both Hogan and McAndrew are dual citizens of Ireland and the United States and were granted a divorce in the Rhode Island Family Court in 2008.² A property settlement involving both parties established that Hogan and McAndrew agreed to share joint custody of their three children, but that Hogan was to have physical custody.³ The agreement included a forum-selection clause, consented to by both parties, in which all future custody disputes would fall under the jurisdiction of the Rhode Island Family Court and chapter 14.1 of title 15 of the

1. *Hogan v. McAndrew*, 131 A.3d 717, 719 (R.I. 2016). The Rhode Island Supreme Court honored McAndrew's request to keep the children's names private and to refer to them only by their first initials. *Id.* n.2.

2. *Id.*

3. *Id.* The property agreement stipulated that Hogan was allowed to move the children to Ireland in 2009 and that McAndrew was to exercise visitation with them both in Ireland and the U.S. *Id.* The agreement was transformed into a final judgment of divorce entered by consent of both parties. *Id.* at 720.

Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).⁴ In 2009, Hogan relocated the children to Ireland; McAndrew frequently visited the children in Ireland, and the children visited him for two weeks every summer in Rhode Island.⁵ During their visit to Rhode Island in the summer of 2014, the two oldest children alleged to McAndrew that Hogan had subjected them to physical and emotional abuse and that the Irish Child and Family Agency (TULSA) had become involved with the family after a report of abuse by P. to his school counselors.⁶

On July 9, 2014, McAndrew filed in the Rhode Island Family Court an “*ex parte*, emergency motion to modify the custody and placement [agreement][,]” “a motion for an *in-camera* interview of the children[,],” and a motion for an order that would require Hogan “to submit to a mental health evaluation[;]” the *ex parte*, emergency motion was granted.⁷ On July 16, Hogan sought to vacate the *ex parte* order⁸ and dismiss the case, claiming that the Family Court lacked subject matter jurisdiction given the fact that all three children had been living in Ireland for more than five years.⁹ At the hearing to vacate the *ex parte* order on July 17, the issues of subject matter jurisdiction and *forum non conveniens* were postponed for hearing until September 12.¹⁰ Prior to the September 12 Family Court date, Hogan attempted to maintain jurisdiction in the High Court of Ireland.¹¹ The High Court of Ireland granted McAndrew’s motion to stay the special summons on September 9, declaring that Hogan could continue her action only if Rhode Island rejected jurisdiction.¹²

At the hearings in the Family Court on September 12 and 15 of 2014, the parties were able to present evidence on the

4. *Id.* at 719–20.

5. *Id.* at 720.

6. *Id.*

7. *Id.* The motions alleged that P. and C. did not want to return to Ireland. *Id.*

8. The *ex parte* order was vacated on July 17. *Id.* at 720 n.3.

9. *Id.*

10. *Id.* at 720–21. At the hearing, the parties reached an agreement in which P. would stay in Rhode Island with McAndrew and attend school there in the fall, and C. was to extend her visit, subsequently returning to Ireland in late August. *Id.* at 720 n.3.

11. *Id.* at 721.

12. *Id.*

jurisdiction issue.¹³ Elicited from the testimony were the following facts: Except for visits to their father, the children resided in Ireland from January of 2009, until July of 2014 with their mother;¹⁴ McAndrew spent multiple weeks with his children each year, most of that time being in Ireland; the children attended Irish schools since their move to Ireland in 2009;¹⁵ the family received services from TULSA; and all of the family's then-current medical doctors, therapists, and social workers were from Ireland.¹⁶ McAndrew asserted in his testimony that he would not have agreed to allow the children to go to Ireland without the agreement, asserting that the Rhode Island Family Court would maintain jurisdiction because he believed that Ireland does not recognize the joint custody rights of a divorced father.¹⁷

Regarding the parties' financial situations, the court determined that McAndrew was a physician in a medical practice and received a biweekly stipend of \$5,500 regardless of whether or not he worked during those weeks.¹⁸ Hogan, on the other hand, is a per diem nurse at a local hospital and received wages eight times lower than those of McAndrew.¹⁹ Hogan receives no paid vacation time and is not paid unless she works, whereas McAndrew receives four weeks of vacation time each year and is paid regardless.²⁰ McAndrew also testified regarding the multiple witnesses in Rhode Island who could speak to the relationship he has with his children, that he would pay the travel expenses for "any witness who would travel to Rhode Island to testify in Family Court[.]" and that testimony could be provided via teleconference.²¹ Hogan asserted that she had difficulties securing childcare when she had to travel to Rhode Island for

13. *Id.*

14. *Id.*

15. With the exception of P. being enrolled in school in Rhode Island in August of 2014. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 721 (majority opinion), 730 (Suttell, C.J., dissenting).

19. *Id.* at 722. (majority opinion). McAndrew also testified to the fair market value of his home, the rental income he received every month, as well as the \$400,000 in his 401(k) and the \$25,000 in various investment accounts. *Id.* at 721 (majority opinion), 730 (Suttell, C.J., dissenting).

20. *Id.* at 721, 722 (majority opinion).

21. *Id.* at 721–22.

court dates.²² The hearing justice decided that the Family Court had exclusive jurisdiction under the UCCJEA but concluded that Ireland was a more appropriate forum on the ground of *forum non conveniens*.²³

ANALYSIS AND HOLDING

On appeal, “McAndrew argue[d] that the hearing justice abused her discretion by not giving proper weight to the mutually agreed upon forum-selection clause” and other additional factors that should be considered under the UCCJEA.²⁴ A trial justice has abused her discretion when “a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.”²⁵ To determine if any factors were ignored, improperly relied upon, or weighed incorrectly, the Court itself went through the two-part test laid out in section 15-14.1-19.²⁶ Under the UCCJEA, the lower court must first determine whether it would be “appropriate for a court of another state to exercise jurisdiction,” and is to analyze and weigh eight factors laid out in the statute in making that determination.²⁷ If the lower court concludes that a more appropriate forum exists, it then must consider whether the current forum would be inconvenient under the circumstances.²⁸

The Court discussed each of the eight factors and how the

22. *Id.* at 722.

23. *Id.*

24. *Id.*

25. *Id.* (quoting *Indep. Oil and Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co.*, 864 F.2d 927, 929 (1st Cir. 1988)).

26. *Id.* at 724.

27. *Id.* at 723; *see also* R.I. GEN. LAWS ANN. § 15-14.1-19 (West, Westlaw through Jan. 2016 Legis. Sess.). The eight factors include: (1) whether there has been domestic violence in the relationship and what state could best protect the parties from future domestic violence; (2) how long the child has been residing outside the state; (3) the distance between the current court and the court in the state that would assume jurisdiction; (4) the financial circumstances of the two parties; (5) “any agreement of the parties as to which state should assume jurisdiction”; (6) the nature of the relevant evidence and the location of that evidence, including the testimony of the child(ren); (7) each court’s ability to resolve the case quickly and the different procedures necessary to present the evidence; and (8) how familiar each court is to the facts and issues in the case. *Hogan*, 131 A.3d at 723–24.

28. *Id.* at 724.

hearing justice applied them before moving on to discuss the reasons why it believed certain factors should have been weighed differently.²⁹ The Court took issue with the way in which the fifth factor was applied and made a point to discuss the high value that is conferred upon final judgments entered into by consent.³⁰ This, coupled with the fact that McAndrew would not have reached an agreement with Hogan absent the forum-selection clause, left the Court to believe this factor was not weighed heavily enough in the hearing justice's analysis.³¹

The other factor that the Court thought was weighed incorrectly regarded the ability of the Irish courts to decide the issue expeditiously and the procedures necessary to present the evidence in the proposed forum.³² The lack of evidence presented both to the Family Court and the Rhode Island Supreme Court, regarding the procedures necessary to present evidence in Irish courts, as well as the parties' inability to provide a clear understanding to the courts about whether the Irish system would recognize an American, joint-custody agreement, led the Rhode Island Supreme Court to determine that the Family Court improperly determined that the seventh factor weighed equally in favor of Rhode Island and Ireland.³³ Finally, the Court also determined that the hearing justice did not consider the "interplay among the factors" or other "material evidence" that had bearing on the weight certain factors should have been given.³⁴

The Court made the determination that several factors were weighed incorrectly during the first step of the inquiry, but it also went on to explain that it is a two-part test, and to decline jurisdiction, the lower court needed to make a separate finding that Rhode Island was an inconvenient forum.³⁵ To properly have declined jurisdiction, the hearing justice would have had to make "an independent finding that Rhode Island was 'significantly inconvenient and [that] the ends of justice would be better served

29. *Id.* at 725, 726.

30. *Id.* at 726.

31. *Id.*

32. *Id.*

33. *Id.* at 727 (citing *Indep. Oil and Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co.*, 864 F.2d 927, 929 (1st Cir.1988)).

34. *Id.* at 728.

35. *Id.*

if the action were brought and tried in another forum.”³⁶ The Court did not go on to make the second analysis itself, but rather, held that the hearing justice abused her discretion in executing both steps of the two-part analysis.³⁷

COMMENTARY

The Court stated early in its opinion that abuse occurs only “when a material factor deserving significant weight is ignored, when an improper factor is relied upon,” or when the lower court makes a serious mistake in weighing the multiple factors.³⁸ While the Court did a wonderful job in explaining what the eight factors are and what evidence should be used in evaluating them, the Court seemed to do their own factor-by-factor analysis in reaching their decision. While this provided a better understanding of the factors and what they entail, the Court was not in the position to do their own factor analysis and make a decision based on that analysis. Chief Justice Suttell said it best when he stated, “the issue is not whether I would have reached a different result than [the trial justice] did; the issue is whether she abused her discretion in so doing.”³⁹

It seems as though the Court is opening up the floodgates to allow every parent whose case has been dismissed for *forum non conveniens* under the UCCJEA to appeal to the Rhode Island Supreme Court in hopes that the justices will do their own analysis, and if they decide differently, overturn the lower court’s decision because they believe the factors should be weighed differently. For a judge’s decision to be overturned for abuse of discretion there needs to be a *serious mistake* in the way in which the various factors were weighed,⁴⁰ and although the justices here may have weighed the various factors differently, the hearing justice considered all of the statutory factors and weighed them in a way in which was fair, reasonable, and well within her discretion.

36. *Id.* at 728–729 (alteration in original) (quoting *Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1178 (R.I. 2008)).

37. *Id.* at 729.

38. *Id.* at 722 (quoting *Procter & Gamble Mfg. Co.*, 864 F.2d at 929).

39. *Id.* at 732 (Suttell, C.J., dissenting) (citing *S. Cty. Post & Beam, Inc., v. McMahon*, 116 A.3d 204, 210 (R.I. 2015)).

40. *Id.* at 722 (majority opinion).

The Court did determine that the seventh factor was weighed improperly due to a lack of evidence, but this determination is different than the one required in the reviewing court's role. The determination that the factor was weighed incorrectly could have been a valid one, but that was not one of the determinations necessary in deciding whether or not there was an abuse of discretion. The mistake in weighing the seventh factor, while valid, was not a *serious* mistake that was "of such a magnitude as to constitute an abuse of discretion in her ultimate conclusion that Ireland was the more appropriate forum."⁴¹ Here, the factors weighed slightly in favor of maintaining jurisdiction in the Rhode Island Family Court, but that determination was the hearing justice's determination to make, not the Rhode Island Supreme Court justices'. "[W]e shall not substitute our view of the evidence for [that of the hearing justice] even though a contrary conclusion could have been reached."⁴²

Another problem that arises is the lack of direction given to the second reason for overturning the lower court's decision. The Court made the correct decision in enforcing the necessary, second step of the inquiry that the UCCJEA lays out: the requirement that the hearing justice determine that Rhode Island is an inconvenient forum.⁴³ However, in making that determination and sending the case back down to the Family Court, the Court failed to lay out what exactly it expected from the analysis and what they believed was necessary in making that determination. Chief Justice Suttell shed some light on that topic in his dissent,⁴⁴ but the Court failed to address that issue. This could seem unimportant, however, the Court has already done its own analysis for the first issue, and the gap in law left open in the Court's opinion leaves the opportunity for this case to again come before the Rhode Island Supreme Court. The justices should review decisions from the lower courts, not re-decide them based on their own factual opinions.

41. *See id.* at 731 (Suttell, C.J., dissenting).

42. *Id.* at 732 (alteration in original) (quoting JPL Livery Servs., Inc. v. R.I. Dept. of Admin., 88 A.3d 1134, 1142 (R.I.2014)).

43. *See id.* at 728 (majority opinion).

44. *Id.* at 732 (Suttell, C.J., dissenting).

CONCLUSION

The Rhode Island Supreme Court concluded that in order to dismiss a case and relinquish jurisdiction based on *forum non conveniens* the hearing justice must make two determinations. First, the lower court must determine whether there is a court in another jurisdiction that could be appropriate and use the eight factors laid out in section 15-14.1-19 to make that determination. If the court concludes that another jurisdiction could be appropriate, it must then make a second, independent determination that the current forum would be inconvenient under the circumstances of that case. Only if both of those determinations are made in the affirmative may the court choose to relinquish jurisdiction to that of another.

Kaylin M. Pelletier

Family Law. *In re B.H.*, 138 A.3d 774 (R.I. 2016). The Rhode Island Supreme Court reversed an adjudication of delinquency on two counts of first-degree child molestation because the complainants' testimony that their penises were "in" and "inside" the respondent's "butt" was insufficient to prove beyond a reasonable doubt that sexual penetration of the respondent's anal opening took place. An adjudication of delinquency on the lesser charge of second-degree child molestation was directed to be entered on remand because the trial justice's adjudication of delinquency on the greater offense necessarily included an adjudication of delinquency on the lesser-included offense.

FACTS AND TRAVEL

In August of 2011, B.H., then thirteen years old, sexually molested two of his friends, twin, eleven year old brothers Kevin and Henry, during a sleepover at the twins' grandparents' house.¹ In August of 2012, delinquency papers were filed with the family court, alleging that B.H. committed first and second-degree child molestation.² At trial, Kevin and Henry both testified that during the sleepover, B.H. asked both of them to put their penises "in [B.H.'s] butt," and the twins complied because B.H. had threatened to tell their grandmother that the twins were doing "something" or "trying to do something."³ Neither Kevin nor Henry could recall the specifics of the incident, but when asked whether or not their penises went "inside of [B.H.]," the twins answered in the affirmative.⁴ Kevin and Henry testified that B.H. had asked them to put his penis into their "butts" but they both refused.⁵ Henry testified that B.H. characterized the incident as "[a]n experiment to see if we wanted to be gay,"⁶ and that B.H.

1. *In re B.H.*, 138 A.3d 774, 777 (R.I. 2016).

2. *Id.*

3. *Id.* at 777, 778.

4. *Id.*

5. *Id.*

6. *Id.* at 778.

had placed his penis on Henry's body.⁷

After the State had closed its case, B.H. moved to dismiss the petitions arguing that, with respect to the first-degree child molestation charges, an essential element of the charged offense, sexual penetration, was not established because the testimony of the twins that they placed their penises "in" and "inside" B.H.'s "butt" was insufficient evidence that sexual penetration took place.⁸ B.H. also argued that if the State found that sexual penetration did take place, the State was required to prove that B.H. had "acted with the intent for sexual arousal or sexual gratification," and no such finding was made.⁹ The trial justice denied the motion, and concluded that the evidence was indeed sufficient to establish the element of sexual penetration and explained that, "[i]n or outside the butt is certainly where the anal opening is located. This Court does not expect a child . . . to describe a horrific act . . . with such specificity and adult language that it mirrors the language of the statute."¹⁰ The trial justice also rejected B.H.'s argument that the State was required to prove that B.H. had acted with the intent of sexual arousal or sexual gratification, but explained that even if the State was required to prove this, it had based on the testimony of the twins, which revealed that B.H. desired to penetrate the boys.¹¹ The trial justice concluded that the State had met its burden of proving that B.H. had committed first-degree child molestation upon the twins, and B.H. was adjudged delinquent on those charges, which he timely appealed.¹²

ANALYSIS AND HOLDING

Upon review, the Rhode Island Supreme Court had to determine "whether legally competent evidence exist[ed] therein to support the findings made by the family court trial justice,"¹³ and also whether "*any* rational trier of fact could have found the

7. *Id.* (alteration in original).

8. *Id.*

9. *Id.*

10. *Id.* at 779.

11. *Id.*

12. *Id.*

13. *Id.* (internal citation omitted).

essential elements of the crime beyond a reasonable doubt.”¹⁴ Ultimately, the Court agreed with B.H. that the testimony of both Kevin and Henry, which revealed that the twins put their penises “in” and “inside” B.H.’s “butt,” was insufficient evidence to show sexual penetration.¹⁵ In reaching that decision, the Court looked to the definition of “sexual penetration,” found in the statute,¹⁶ to determine whether or not the twins’ testimony that their penises were “inside [B.H.’s] butt” was sufficient to establish “anal intercourse or any other intrusion” under the meaning of the statute.¹⁷ Because the terms “sexual intercourse” and “anal intercourse” are not defined in the language of the statute, the court looked to various definitions for these terms.¹⁸ The Court also had to define the term “butt,” since this was the term used by the twins, and the term “anus” since this is the area subject to sexual penetration during anal intercourse.¹⁹ After considering those definitions, the Court determined that “[t]he words [buttocks and anus] are not synonyms as they describe entirely different parts of the anatomy.”²⁰

The Court explained that the General Assembly, when enacting the chapter of the general laws relating to sexual assault,

14. *Id.* (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

15. *Id.* at 780.

16. *Id.*; see also R.I. GEN LAWS ANN. § 11-37-1(8) (West, Westlaw through Jan. 2016 Legis. Sess.). The statute reads as follows:

Sexual penetration” means sexual intercourse, cunnilingus, fellatio, and anal intercourse, or any other intrusion, however slight, by any part of a person’s body or by any object into the genital or anal openings of another person’s body, or the victim’s own body upon the accused’s instruction, but emission of semen is not required.

§ 11-37-1(8).

17. *In re B.H.*, 138 A.3d at 780.

18. *Id.* The Court defined “sexual intercourse” as intercourse that “involves penetration of the vagina by the penis,” and anal intercourse was defined as “penetration of the anal opening by a penis.” *Id.* (internal citations omitted).

19. *Id.* The Court defined “butt” as “[t]he prominence formed by the gluteal muscles of either side,” and “anus” as “[t]he lower opening of the digestive tract. It is associated with the anal sphincter and lies in the cleft between the buttocks, through which fecal matter is extruded.” *Id.* (internal citations omitted).

20. *Id.* at 781 (quoting *Downey v. State*, 726 N.E.2d 794, 797 (Ind. Ct. App. 2000)).

distinguished the terms “buttocks” and “anus.”²¹ Under section 11-37-1(8), “sexual penetration” includes intrusions into the anal opening,²² while section 11-37-1(7) defines “sexual contact” as “the intentional touching of the victim’s or accused’s intimate parts, clothed or unclothed, if that intentional touching can be reasonably construed as intended by the accused to be for the purpose of sexual arousal, gratification or assault.”²³ After making that distinction, the Court looked at its decision in *State v. McDonald*, where it held that “precise and specific testimony is necessary to support [an act of sexual penetration] and that to infer penetration from the complainant’s testimony would be to draw an inference that could scarcely justify a finding of [sexual] penetration beyond a reasonable doubt.”²⁴ Based on the holding in *McDonald*, the Court held that the twins’ testimony was not precise and specific enough to support a finding of sexual penetration.²⁵ The State had the burden of proving beyond a reasonable doubt that sexual penetration had occurred, and the State failed to do so since it only elicited testimony concerning B.H.’s “butt.”²⁶ The use of the term “butt” rendered the twins’ testimony too imprecise and vague to determine whether or not sexual penetration had occurred.²⁷ Therefore, the State failed to prove the sexual penetration element of first-degree child molestation beyond a reasonable doubt.²⁸

Next, the Court had to decide whether or not the adjudications of delinquency should be reversed and the petitions dismissed.²⁹ In answering this question, the Court looked to a prior decision, *State v. Silvia*, where it held that “[a]s a matter of law, second-degree child molestation is a lesser-included offense of

21. *Id.*

22. *Id.*; see also R.I. GEN LAWS ANN. § 11-37-1(8) (West, Westlaw through Jan. 2016 Legis. Sess.).

23. *In re B.H.*, 138 A.3d at 781; see also § 11-37-1(7).

24. *In re B.H.*, 138 A.3d at 781 (quoting 602 A.2d 923, 925 (R.I. 1992)).

25. *Id.* at 782.

26. *Id.*

27. *Id.* The Court explained, “[a]n intrusion into the space between a person’s buttocks, while perhaps a necessary step on the path to intrusion of the anal opening, is not, in itself, an intrusion into the anal opening. *Id.* (quoting *Downey v. State*, 726 N.E.2d 794, 798 (Ind. Ct. App. 2000)).

28. *Id.* at 783.

29. *Id.*

first-degree child molestation.”³⁰ The Court also explained that this jurisdiction follows the common law rule that once a person has been charged with an offense that contains a lesser-included offense, the accused is put on notice that they are being charged with the lesser-included crime as well.³¹ Therefore, the Court reached the conclusion that the first-degree child molestation charge necessarily carried with it a charge of the lesser-included offense of second-degree child molestation.³² Since B.H. was found delinquent on the first-degree child molestation charge, the Court reasoned that the trial justice found all of the elements of second-degree child molestation had been met.³³ B.H. argued that the State had failed to prove the elements of second-degree child molestation because the State did not prove beyond a reasonable doubt that B.H. acted with the purpose of sexual arousal or gratification.³⁴ The Court disagreed and held that the evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that B.H. had acted with the requisite purpose.³⁵ The matter was then remanded to the family court with directions to enter an adjudication of delinquency on the lesser-included offense of second-degree child molestation and for resentencing since the State had already proved the elements of the lesser-included charge of second-degree child molestation—a

30. *Id.* (citing 798 A.2d 419, 424–25 (R.I. 2002)).

31. *Id.* at 784; *see also* R.I. GEN LAWS ANN. § 12-17-14 (West, Westlaw through Jan. 2016 Legis. Sess.). The statute reads as follows:

[w]henever any person is tried upon an indictment, information or complaint and the court or jury, as the case may be, shall not be satisfied that he or she is guilty of the whole offense, but shall be satisfied that he or she is guilty of so much of the offense as shall substantially amount to an offense of a lower nature, or that the defendant did not complete the offense charged, but that he or she was guilty only of an attempt to commit the offense as the case may be, and the court shall proceed to sentence the person for the offense of which he or she shall be so found guilty, notwithstanding that the court had to otherwise jurisdiction of the offense.

§ 12-17-14.

32. *In re B.H.*, 138 A.3d at 784.

33. *Id.* at 785.

34. *Id.*

35. *Id.* The evidence that the Court relied on was the twins' testimony that B.H. had asked them to penetrate his "butt," B.H.'s desire to switch roles with the twins, and the fact that B.H. touched the twins' private parts. *Id.* The Court also relied on the testimony of the twins' mother who said that B.H. seemed to enjoy the incident. *Id.*

charge that B.H. was put on notice of when he was charged with first-degree child molestation.³⁶

COMMENTARY

The Rhode Island Supreme Court departed from its own “well-settled law,” when it remanded this matter to the family court with directions to enter an adjudication of delinquency on the lesser-included offense of second-degree child molestation.³⁷ The Court relied on R.I. Gen. Laws sections 12-17-14 and 11-37-9 in holding that second-degree child molestation is a lesser-included offense of first-degree child molestation of which B.H. was put on notice.³⁸ The dissent concluded that although it agreed with the Court, it had no authority to direct an entry of delinquency charges on the lesser-included offense.³⁹ In drafting the language of sections 12-17-14 and 11-37-9, the dissent opined that the General Assembly was referring to the *trial court* and not this Court.⁴⁰

In reaching its decision, the Court also relied on a prior case, *State v. Eiseman*.⁴¹ There, the Court found that it had the power to reverse a conviction and order the entry of judgment on a lesser-included offense, but it had never “availed itself of the opportunity to adopt this practice.”⁴² Nevertheless, the Court determined that it would exercise that power in *Eiseman*, because the defendant had conceded that the State had proven beyond a reasonable doubt that he was guilty of the lesser-included offense, and therefore, there was no danger of prejudice to the defendant in ordering the Superior Court to enter judgment.⁴³ The dissent

36. *Id.* at 786.

37. *Id.* at 788–89 (Flaherty, J., concurring in part and dissenting in part).

38. *Id.* at 787.

39. *Id.* at 788.

40. *Id.* (emphasis added).

41. *Id.* *State v. Eiseman* addressed how the Court was going to resolve a similar predicament since the defendant had been convicted of the greater crime of possession with intent to distribute cocaine; the Court agreed that the defendant was actually guilty of the lesser-included crime of possession consistent with personal use. *Id.* (citing 461 A.2d 369, 372 (R.I. 1983)), *abrogated in part on other grounds* by *Horton v. California*, 496 U.S. 128 (1990).

42. *Id.* (citing *Eiseman*, 461 A.2d at 372).

43. *Id.*

pointed out, very persuasively, that the rationale in which the Court relied on in *Eiseman*, was limited to the particular facts of that case.⁴⁴ Here, B.H. has not admitted culpability and he would be prejudiced on remand.⁴⁵ The prejudice stems from the fact that the sole issue presented at trial was the issue of first-degree child molestation.⁴⁶ There were no arguments made during trial that the trial justice should make a finding of second-degree sexual assault,⁴⁷ and there were no arguments made on appeal that B.H. could be adjudicated as delinquent because he committed an act of second-degree child molestation.⁴⁸

The Court's decision here, as the dissent points out, "greatly expand[ed] the holding enunciated by this Court in *Eiseman*."⁴⁹ The dissent could not find another case in which this Court employed the *Eiseman* analysis, and moreover, none of the cases cited in *Eiseman* relied on the Court's ability to wield the power it did here, *sua sponte*.⁵⁰ There is no harm in remanding the case to the family court with instructions to dismiss because the State did not prove the necessary elements of the charge.⁵¹ After doing so, B.H. can then be charged with second-degree child molestation and the relevant inquiry would be on whether or not the necessary elements of second-degree child molestation had been satisfied. Because nothing was ever mentioned during the family court trial or during appeal about an adjudication of delinquency based on an act of second-degree child molestation, the Court did not have the authority to raise this issue *sua sponte* and order the family court to enter adjudications of delinquency on this lesser-included charge.

CONCLUSION

The Rhode Island Supreme Court held that the State had failed to prove beyond a reasonable doubt that B.H. had committed acts of first-degree child molestation because the twins'

44. *Id.*

45. *Id.*

46. *Id.* at 787.

47. *Id.*

48. *Id.*

49. *Id.* at 789.

50. *Id.*

51. *Id.*

testimony was too vague and imprecise to be considered a description of sexual penetration—an essential element of the charge. The Court further held that the first-degree child molestation charge carried with it the lesser-included charge of second-degree child molestation and the State presented sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that B.H. had acted with the purpose of sexual arousal or gratification—an essential element of the charge. The case was remanded to the family court with directions to enter adjudications of delinquency on the lesser-included charge of second-degree child molestation and for resentencing.

Matthew Gustaitis

Government. *Shine v. Moreau*, 119 A.3d 1 (R.I. 2015). The Rhode Island Supreme Court held the Mayor and the City Council of Central Falls were entitled to indemnification and attorneys' fees because they were acting within the scope of their official capacities when challenging the constitutionality of the Financial Stability Act. Though the Act was ultimately found to be constitutional, at the time of filing their suit, the Mayor and City Council were acting within the scope of their official duties, which included an oath to support the constitution and laws of Rhode Island and the Constitution of the United States.

FACTS AND TRAVEL

On May 18, 2010, Mayor Moreau and the City Council of Central Falls petitioned, under a municipal receivership statute, for a judicially-appointed receiver to assist with the city's financial problems.¹ As a result of this petition, Central Falls's credit rating was reduced to "junk-bond" status, and state officials were informed this would adversely impact how financial rating agencies would view debt financing to other Rhode Island municipalities.² Determining that a municipality's petition for judicial receivership threatened the financial well-being of other municipalities statewide, the General Assembly passed "An Act Relating to Cities and Towns-Providing Financial Stability" to amend section 45-9 in order to establish a state-controlled mechanism to address financial adversity in troubled municipalities.³ Prohibited from filing for a judicially-appointed receiver under this new legislation, the Mayor and City Council of Central Falls dismissed their previous motion and filed for the

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

2. *Id.* at 571.

3. *Id.* at 569, 571. Under the Financial Stability Act, the Director of Revenue has the authority to appoint a permanent Receiver to a municipality requesting aide in restoring financial stability. *Id.* at 569. Signed into law on June, 11, 2010, the Act was made retroactive to May 15, 2010. *Id.* at 571.

Receivership from the State Department of Revenue.⁴ On July 16, 2010, the Director of the Department of Revenue appointed retired Superior Court Justice, Mark A. Pfeiffer, as the first Receiver for the City of Central Falls.⁵

On July 19, 2010, pursuant to the Act,⁶ the Receiver wrote to the Mayor that he had assumed the duties and functions of the Office of Mayor, limiting the Mayor to serve in an advisory capacity.⁷ On August, 4, 2010, the City Council passed a resolution to authorize the hiring of legal counsel to provide guidance in addressing the Receiver's recent assumption of powers.⁸ The Receiver rescinded this resolution by letter, citing his authority to "[a]lter or rescind any action or decision of any municipal officer" under the Act.⁹ On September 20, 2010, the City Council passed a resolution to file a legal action to challenge the constitutionality of the Act.¹⁰ On September 22, 2010, that resolution was met with another rescission by the Receiver along with a letter declaring that the City Council was "directed to serve solely in an 'advisory' capacity."¹¹ The following day, the Receiver filed a verified complaint with the Providence County Superior Court, seeking a declaratory judgment and injunctive relief against the Mayor and City Council.¹² The Mayor and City Council responded by filing their own cause of action on September 27, and these cases were consolidated in superior court.¹³ Ultimately, the Rhode Island Supreme Court upheld the Act as constitutional and remanded this case for adjudication on the remaining issues that are now on appeal.¹⁴ Upon remand, the superior court held: the Receiver was entitled to reimbursement

4. *Id.*

5. Shine v. Moreau, 119 A.3d 1, 5 (R.I. 2015).

6. R.I. GEN. LAWS ANN. § 45-9-7(c) (Westlaw through Jan. 2016 Legis. Sess.) ("Upon the appointment of a receiver, the receiver shall have the right to exercise the powers of the elected officials under the general laws . . . the powers of the receiver shall be superior to and supersede the powers of the elected officials . . .").

7. *Flanders*, 15 A.3d at 572.

8. *Id.*

9. *Id.* (alteration in original).

10. *Id.*

11. *Id.*

12. Shine v. Moreau, 119 A.3d 1, 5 (R.I. 2015).

13. *Id.*

14. *Id.*

for his attorneys' fees under the Act;¹⁵ the Mayor was not entitled to indemnification by Central Falls as he was "acting beyond the narrow scope of his official or public duties" when he engaged in this litigation;¹⁶ and the City Council's attorney, Attorney Goldberg, was not entitled to attorneys' fees from Central Falls because his "representation of the City Council was in contravention of the Financial Stability Act."¹⁷ The Mayor and City Council appealed the Providence Superior Court's three holdings.

ANALYSIS AND HOLDING

A. *Reimbursement of the Receiver*

Upon review of the hearing justice's ruling to grant the Receiver's motion for reimbursement of attorneys' fees, the Court reversed and granted summary judgment in favor of the Mayor and City Council.¹⁸ The Mayor and City Council contended that the hearing justice erred in granting summary judgment for the Receiver under section 45-9-11.¹⁹ In the superior court, the hearing justice ruled "it [was] abundantly clear that the Receiver ha[d] satisfied the elements of his section 45-9-11 claims against Mayor Moreau and the City Council."²⁰ The hearing justice relied on evidence that the Mayor and City Council brought this suit after being put on notice by the Receiver that the municipality's budget lacked appropriations for the retention of outside counsel.²¹ By going forward with this litigation, despite knowing there were no funds, the hearing justice concluded that the Mayor and City Council acted "intentional[ly] and in derogation of the Receiver's superior and superseding authority," conduct prohibited by section 45-9-11.²² Thus, the hearing justice held that the Receiver was entitled to reimbursement for the unappropriated funds expended in pursuing the superior court action.²³

15. *Id.* at 6.

16. *Id.* at 7.

17. *Id.*

18. *Id.* at 11.

19. *Id.* at 8.

20. *Id.* at 6 (first alteration in original).

21. *Id.*

22. *Id.*

23. *Id.*

Prior to their *de novo* review of the superior court's ruling, the Court observed that in the absence of any statutory provision expressly providing for an award of attorney's fees, it would "adhere to the American Rule that . . . each litigant pay its own attorney's fees."²⁴ Upon a finding that section 45-9-11 was completely silent with respect to attorneys' fees, the Court stated that statutory interpretation precedent leaves "no room for implication by judicial construction."²⁵ Because the statute said nothing about attorneys' fees, the Court reversed and denied the Receiver reimbursement of his attorneys' fees.²⁶ The Court determined that "the hearing justice focused in error on whether the requirements of section 45-9-11 were met, rather than whether that statute actually provided for the payment of attorneys' fees."²⁷

B. Indemnification of the Mayor

Upon review of the hearing justice's ruling to deny the Mayor and City Council's motion seeking indemnification for the Mayor, the Court reversed because it found the Mayor was acting in his official capacity when he challenged the constitutionality of the Act, and therefore was entitled to indemnification.²⁸ The Mayor and City Council argued that the Mayor was entitled to indemnification for attorneys' fees and legal costs pursuant to Rhode Island General Law section 45-15-16 and Central Falls Code of Ordinances section 2-109.²⁹ The Receiver argued that he had the power of the Mayor and City Council when both were relegated to serve in solely advisory capacities, so the Mayor could not be entitled to indemnification because he could not have acted in that official capacity when bringing suit.³⁰ Referring to the language of Rhode Island General Law section 45-15-16 and Central Falls Code of Ordinances section 2-109, the Court determined the only condition upon which the City Council would

24. *Id.* at 8 (quoting *Moore v. Ballard*, 914 A.2d 487, 489 (R.I.2007)).

25. *Id.* at 10. (quoting *Eleazer v. Ted Reed Thermal Inc.*, 576 A.2d 1217, 1221 (R.I. 1990)).

26. *Id.* at 11.

27. *Id.*

28. *Id.* at 16.

29. *Id.* at 11.

30. *Id.*

have had the discretion to not indemnify the Mayor would be if the Mayor were not “acting within the scope of [his] official duties or employment”³¹ By challenging the constitutionality of the Act and defending himself against the Receiver’s action, the Court determined the Mayor was acting in his official capacity.³²

The Court referred to “a number of reasons” for coming to this conclusion.³³ The most significant of which pertained to the substance of the suit: a challenge to the constitutionality of the Act.³⁴ At the time of filing, this newly enacted statute had yet to be challenged, and it “removed a significant amount of power held by the elected officials.”³⁵ The Court noted that if “the constitutionality of the [Act had] already been established, then any acts by the Mayor which contravened the Act might well have been beyond the scope of his official duties”³⁶ The Court further supported this ruling by explaining the implications had it ruled that the Mayor was not acting in his official capacity.³⁷ Without indemnification, the Mayor would be left “financially responsible in his individual capacity for these lawsuits . . . which were undertaken on behalf of the people of Central Falls to determine the constitutionality (or lack thereof) of a new, broad, and far-reaching statutory scheme.”³⁸ Furthermore, the Court found that the oath taken by the mayor or any city council member of Central Falls “explicitly requires the person being sworn in to support the constitutions of Rhode Island and of the United States.”³⁹ The Court stated this oath arguably creates a “duty to challenge the constitutionality of the [Act] in his official capacity.”⁴⁰ Additionally, the Court referred to *Flanders*, where

31. *Id.* at 13 (alteration in original).

32. *Id.* at 14.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 15 (citing Central Falls Home Rule Charter Art. II, Chap. 1, § 2-105 (“The mayor and members of the city council, before entering upon the duties of their office, shall first be severally sworn or affirmed to the faithful discharge of the same, and to the support of the Constitution and laws of the state, and of the Constitution of the United States, in the form and manner provided for by law.”)).

40. *Id.* (emphasis omitted).

there was “little difficulty in concluding that the mayor and city council, in their individual *and official capacities*, ha[d] standing to challenge the constitutionality of the [Act].”⁴¹ The Court reversed, holding that the Mayor was acting in his official capacity when challenging the constitutionality of the Act, and was therefore entitled to indemnification “pursuant to section 45-15-16 and the City Ordinance.”⁴²

C. Attorneys’ Fees for Attorney Goldberg

Upon review of the hearing justice’s ruling that the City Council’s attorney for these actions was not entitled to attorneys’ fees, the Court reversed because the City Council “had standing, *in its official capacity*, to bring a constitutional challenge to the [Act].”⁴³ The Mayor and City Council argued that the City Council had acted in its official capacity when it passed resolutions to hire outside counsel for guidance and litigation because the City Council had a “duty to challenge the Receiver and the [Act] on behalf of its constituents.”⁴⁴ The Receiver retained the position that the Act gave him the sole authority to engage outside counsel, and by acting on their resolution to engage outside counsel after the Receiver rescinded it, the City Council “exceeded the scope of its duties.”⁴⁵ Again, the Court noted this decision’s unique and unprecedented circumstances.⁴⁶ Although the Court acknowledged the Act gave the Receiver the sole authority to rescind actions of the City Council, the Court stated that the City Council’s purpose in hiring legal counsel was to challenge the constitutionality of this Act.⁴⁷ The Court said the hearing justice’s reliance on the Act was misplaced.⁴⁸ Just like the Mayor, the oath the members of the City Council swore imposed a duty upon them to uphold “the constitution and laws of the state, and of the Constitution of the United States . . . ,” so the City Council’s challenge to the Act was consistent with its official

41. *Id.* (quoting *Moreau v. Flanders*, 15 A.3d 565, 574 (R.I. 2011)).

42. *Id.* at 16.

43. *Id.* at 18. (quoting *Flanders*, 15 A.3d at 574).

44. *Id.* at 17.

45. *Id.*

46. *Id.* at 18.

47. *Id.*

48. *Id.*

duties.⁴⁹ The Court once again referred to its unanimous decision in *Flanders* to find that the Mayor and City Council “had standing, in [their] official capacit[ies], to bring a constitutional challenge to the Financial Stability Act.”⁵⁰ The Court ruled that the City Council’s decision “to hire outside legal counsel was entirely consistent with an effort to comply with that oath,” and therefore reversed the lower court.⁵¹

COMMENTARY

In the Chief Justice’s dissent, he agreed with the Court to deny the Receiver reimbursement for his attorneys’ fees, but found that neither the Mayor nor the City Council were acting in their official capacities when filing suit to challenge the constitutionality of the Act.⁵² The Chief Justice reasoned that when the Receiver took office on July 16, 2010, to assume the duties and functions of the Mayor, who would only then serve in an advisory capacity, the Mayor could no longer have filed suit in an official capacity.⁵³ Additionally, when the Receiver assumed the functions and duties of the City Council, the decision to indemnify the Mayor under Central Falls Ordinance section 2-109 would no longer reside with the City Council, but within the Receiver’s discretion to deny said relief.⁵⁴ The constitutionality issue had no effect on the Chief Justice’s analysis, stating that the Mayor’s suit to challenge the Act was a risk that he should have bore in his individual capacity.⁵⁵ The Chief Justice reiterated this same reasoning for declining to award attorneys’ fees to the City Council. Like the Mayor, the City Council was stripped of its duties and functions by the Receiver and merely served in an advisory capacity.⁵⁶ In pursuing litigation to challenge the constitutionality of the Act, the City Council’s two resolutions were rescinded by the Receiver, yet it chose to move forward

49. *Id.*

50. *Id.* (emphasis omitted) (quoting *Moreau v. Flanders*, 15 A.3d 565, 574 (R.I. 2011)).

51. *Id.*

52. *Id.* at 19 (Suttell, C.J., concurring in part and dissenting in part).

53. *Id.* at 20.

54. *Id.*

55. *Id.*

56. *Id.* at 21.

anyway and should bear the costs as a result.⁵⁷

The Rhode Island Supreme Court made it clear that this decision turned on the unique circumstances presented by this constitutional challenge to a newly-enacted statute.⁵⁸ Where the dissent found that the Mayor and City Council should not be entitled to relief because they exceeded the scope of their advisory capacities by bringing suit,⁵⁹ the Court saw the challenge as a good-faith effort to assess the constitutionality of new legislation that stripped powers from elected officials.⁶⁰ After upholding the Act's constitutionality in giving the Receiver the authority to assume the duties and functions of officials, the Court still found the Mayor and City Council's actions justified because they exceeded the scope of their capacities only to challenge the constitutionality of the Act, which stripped them of their original duties and functions.⁶¹ The dissent did not find the constitutional substance of the suit to justify the Mayor and City Council acting outside of their advisory capacities because the Act was ultimately ruled to be constitutional.

The Court ruled in favor of the Mayor and City Council because their decision took more into account than just the Act. The dissenting approach appears to only determine whether one acted in their official capacity as established by the law. However, the Court does find some form of an exception to exist when considering the surrounding circumstances and an official's reason for exceeding the scope of their official capacity. When they filed suit, the Mayor and City Council acted inconsistently with the Act, but they did so under a good-faith belief that the Act was unconstitutional and challenging it was necessary as part of the oath to Central Falls to uphold the Rhode Island Constitution and United States Constitution.⁶² The Court relies on the fact that the Mayor and City Council could not have seen the ultimate outcome of *Flanders* at the time of filing.⁶³ *Flanders* held the

57. *Id.*

58. *See id.* at 14, 18 (majority opinion).

59. *Id.* at 20 (Suttell, C.J., concurring in part and dissenting in part).

60. *See id.* at 16, 18 (majority opinion).

61. *Id.*

62. *Id.* at 18.

63. *Id.* (emphasis omitted) (quoting *Moreau v. Flanders*, 15 A.3d 565, 574 (R.I. 2011)).

Mayor and City Council did have standing for this constitutional challenge,⁶⁴ but the dissent has them doing so only in their individual capacities.⁶⁵ The Court reasoned that officials make constitutional challenges on behalf of their constituents to determine the constitutionality of such laws.⁶⁶ Requiring those officials to risk bearing the cost of such litigation if they do not prevail may only prevent laws from ever receiving judicial review.

After *Shine*, officials of other municipalities challenging the constitutionality of the Financial Stability Act will not have as strong of a good-faith argument to recover their legal fees in the event that the law is upheld, but they may have that good-faith argument when challenging statutes, in analogous situations, that have yet to receive judicial review. The Court's decision advocates for a tentative exception when dealing with constitutional challenges made by well-intentioned municipal officials. The Court's explanation here relies on statutory interpretation as well as policy considerations, so the success of such arguments will rely on the substantive law and the challenging official's intentions at the time of filing. By not excusing an official's good-faith for pursuing a constitutional challenge, the dissenting position may have better ensured compliance from officials not willing to make such a constitutional challenge that could be potentially made out of pocket. Although the dissent's position may better prevent litigious conflicts between government officials because of the accompanied risk that an official would be responsible for fees in their individual capacity if a challenge fails, this could chip away at the tools available to voice constitutional concerns. The Court's decision does not endorse officials to challenge every law, but only in particular situations where a new law enacted has yet to be deemed constitutional.

CONCLUSION

The Rhode Island Supreme Court reversed the superior court in all respects. The Court found that although the Financial Stability Act was held to be constitutional in *Flanders*, the Mayor

64. *Flanders*, 15 A.3d at 574.

65. *Shine*, 119 A.3d at 20 (Suttell, C.J., concurring in part and dissenting in part).

66. *Id.* at 17 (majority opinion).

and the City Council were acting in their official capacities at the time they challenged this legislation and were therefore entitled to indemnification and attorneys' fees from Central Falls. Although the Mayor and City Council may have violated section 45-9-11 by requiring Central Falls to expend unappropriated funds on court proceedings, the statute was silent as to whether attorneys' fees could be recovered, and therefore the Court ruled that the Receiver was not entitled to be reimbursement by Mayor Moreau or the City Council.

Connor Mills

Labor and Employment Law. *Goddard v. APG Security-RI, LLC*, 134 A.3d 173 (R.I. 2016). A claim alleging the violation of the employer drug testing statute (R.I. Gen. Laws section 28-6.5- 1(a)) concerns “injuries to the person.” Subsequently, this determination invokes the three-year statute of limitations, as opposed to the ten-year statute of limitations for a civil action, which begins to run at the time the violating drug test was administered.

FACTS AND TRAVEL

Melissa Goddard (Plaintiff) was formerly employed by APG Security-RI, LLC as a security guard until her termination sometime in January 2010.¹ The cause for her termination was her failure of an employment drug test.² Plaintiff filed a claim on March 27, 2014 against APG Security-RI, LLC, Scott Hemingway, and Anna Vidiri (collectively Defendants).³ Plaintiff alleged Defendants violated R.I. Gen. Laws section 28-6.5-1, the employer drug testing statute (EDTS), because the Defendants did not have reasonable grounds to administer the drug test.⁴ Plaintiff sought damages under both EDTS and R.I. Gen. Laws section 9-1-2.⁵ The Defendants responded to the complaint by moving for a dismissal under Rule 12(b)(6) of the Superior Court Rules of Civil Procedure on the grounds that the complaint was not timely filed.⁶ A hearing was held on June 9, 2014 in the Superior Court, where each party argued the appropriate statute of limitations to be applied to the EDTS violation.⁷ The Plaintiff cited to the ten-year

1. *Goddard v. APG Security-RI, LLC*, 134 A.3d 173, 174 (R.I. 2016). The exact date of termination was not in the record, but suggests sometime close to January 2010.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

statute of limitations under R.I. Gen. Laws section 9-1-13(a).⁸ The Defendants, on the other hand, argued that the three-year statute of limitations under R.I. Gen. Laws section 9-1-14(b) was applicable.⁹ The hearing justice ruled for the Defendants and determined that the complaint was not timely filed by the Plaintiff.¹⁰ The hearing justice granted the Defendants' motion to dismiss, and thereafter, the Plaintiff appealed the decision.¹¹

ANALYSIS AND HOLDING

The Court first noted the applicable standard of review when addressing a motion to dismiss under Rule 12(b)(6) of the Superior Court Rules of Civil Procedure.¹² The Court established that its review was "confined to the four corners" of the complaint, and that the allegations and facts must be viewed in the light most favorable to the Plaintiff.¹³ Upon review, the Court must decide whether "beyond a reasonable doubt that the [P]laintiff would not be entitled to relief" against the Defendants, even accepting all facts as true.¹⁴

The Court simultaneously had to determine the appropriate statute of limitations to apply to the complaint, which proved essential to the Court's decision in the appeal as a whole. The Court examined the purpose of the EDTS, specifically that it serves to protect employees from unjustified drug testing.¹⁵ The Court then focused on the effects of a violation of the EDTS, which include criminal convictions, punitive damages, and injunctive relief.¹⁶ However, the Court noted that the statute does not indicate a statute of limitations to be applied in a civil action.¹⁷ When there is an absence of a statute of limitations clause within

8. *Id.* at 175.

9. *Id.* at 174.

10. *Id.* at 175. The hearing justice also determined the action accrued at the time the test was administered, and at that moment the statute of limitations began to run. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* (citations omitted).

14. *Id.*

15. *Id.* at 176.

16. *Id.*

17. *Id.*; see also R.I. GEN. LAWS ANN. § 28-6.5-1 (West, Westlaw through Jan. 2016 Legis. Sess.).

the text of a statute itself, the Court must decide between either a three-year or ten-year statute of limitations.¹⁸ Section 9-1-14(b) states that when there are “injuries to the person,” the cause of action must be filed within a three-year window from the time the event occurred.¹⁹ The Court noted that “injuries to the person” extend to injuries other than physical injuries.²⁰ Subsequently, the Court examined the purpose of “injuries to the person” under *Commerce Oil Refining Corp. v. Miner*, which identified that the phrase, “injuries to the person,” must be applied to the statute of limitations concerning “invasions of rights that inhere in a man as a rational being.”²¹

The Court has historically relied on *Commerce Oil*, in determining the appropriate statute of limitations for causes of actions.²² As a result of the Court’s interpretation of *Commerce Oil*, as applied to the case at hand, the Court found the Plaintiff’s ability to utilize the ten-year statute of limitations was based on whether the Plaintiff’s “claim that her right to recovery for a violation of the EDTS accrue[d] to her ‘by reason of some peculiar status’”²³ The “peculiar status” arose from the fact that the Plaintiff was an employee.²⁴ The Court noted it had not yet had the opportunity to consider the concept of an employee-based peculiar status claim against the backdrop of *Commerce Oil*, but also stressed it is more important to focus on the right violated and not the “elements of damage.”²⁵ Subsequently, the Court determined “the nature of the right created by the EDTS is analogous to an invasion of privacy,” and therefore the Plaintiff’s right is not of a “peculiar status,” but one “entitled by reason of being a person in the eyes of the law”²⁶ The Court then reasoned that violations stemming from the EDTS are “injuries to

18. *Goddard*, 134 A.3d at 176 (citation omitted).

19. *Id.*; see also R.I. GEN. LAWS ANN. § 9-1-14(b) (West, Westlaw through Jan. 2016 Legis. Sess.).

20. *Goddard*, 134 A.3d at 176 (quoting *Commerce Oil Ref. Corp. v. Miner*, 199 A.2d 606, 610 (R.I. 1964)).

21. *Id.* (quoting *Commerce Oil*, 199 A.2d at 610).

22. *Id.* at 177.

23. *Id.*; see also R.I. GEN. LAWS ANN. § 9-1-13(a) (West, Westlaw through Jan. 2016 Legis. Sess.).

24. *Goddard*, 134 A.3d at 177.

25. *Id.*

26. *Id.* (quoting *Commerce Oil*, 199 A.2d at 610).

the person” and thus subject to the three-year statute of limitations.²⁷

To further support its position, the Court explained that its decision was consistent with the statute of limitations applied by the General Assembly to other employment causes of actions.²⁸ The Court noted the intent of the General Assembly was to apply a similar time period to the EDTS.²⁹ Additionally, the Court found that under section 9-1-2, the correct statute of limitations was the three-year time frame.³⁰ Therefore, the Court found the Plaintiff filed her complaint outside of the three-year statute of limitations and affirmed the Superior Court’s decision to grant the motion to dismiss.³¹

COMMENTARY

The Court was faced with a relatively straightforward appeal on the motion to dismiss. The Court needed to address one question: Which statute of limitations applied? Although, the Court seemed to be dealing with a relatively simple issue, it certainly proved more in-depth than not.

The cause of action stemmed from a violation of the EDTS and a subsequent termination following the failed drug test. When drug tests are illegally administered, severe consequences can result. This is a more important issue as of late with the rise of medicinal and recreational marijuana laws. Although, this case does not disclose what caused the failed drug test, one can see the potential issue arising out of new medical marijuana laws, where qualified individuals legally use a traditionally illegal substance, and how employers may react if there is any miscommunication resulting from a failed drug test induced by medical marijuana usage. Thus, it was paramount that the Court articulate a clear and precise decision on which statute of limitations applies in a EDTS violation context.

The Court certainly made such an effort by analyzing the facts against *Commerce Oil*, which is the standard when

27. *Id.*

28. *Id.* at 177–78.

29. *Id.* at 178.

30. *Id.*

31. *Id.*

determining the appropriate statute of limitations, and did not depart from its precedent regarding statutes that remain silent as to the applicable statute of limitations.³² The Court evenly worked through the Plaintiff's arguments against the backdrop of *Commerce Oil*, until it reached a conclusion. However, the Court did not stop there, as it wanted to ensure the correct outcome. The Court additionally considered the legislative intent of which statute of limitations to apply and examined other similar employment causes of actions for further support.³³ The Court's observations in these extra areas led to the same statute of limitations outcome. If the Court were to find that other similar employment causes of actions invoked the ten-year statute of limitations, the Court's decision here would certainly appear much weaker. It was important for the Court to maintain the same consistency in applying which statute of limitations in these specific employment matters. Lastly, the Court also noted how the Plaintiff sought damages under section 9-1-2, and how that section applies a three-year statute of limitations.³⁴ Overall, the Court went through many steps to ensure the correct statute of limitations was applied.

However, there is one minor point worth noting. In addition to concluding which statute of limitations applies, the Court also found that the cause of action accrued at the time the violating drug test was administered. Therefore, the Plaintiff had three years to file a complaint starting from the day she took her drug test. Therein lies a potential problem. It does not seem outside the realm of possibilities that following a failed drug test, a company would give an employee a second chance. If the failed drug test played a role in a subsequent termination, the employee's potential cause of action would have already begun running on the drug test date. This could severely impact a potential plaintiff with a limited, legal time window. Therefore, the cause of action should begin to accrue at the time the violation adversely affects the employee.³⁵

32. *Id.* at 177-78.

33. *Id.*

34. *Id.* at 178.

35. The potential plaintiff would of course have to sufficiently establish that the earlier drug test played a role in his or her subsequent firing. However, this very well could prove to be difficult depending on the amount

CONCLUSION

The Rhode Island Supreme Court held that an action under section 28-6.5-1(a) invokes the three-year statute of limitations under section 9-1-14(b) because the right violated consisted of “injuries to the person.” Additionally, the Court found that the three-year statute of limitations was consistent with the legislative intent behind the statute and other employment causes of actions. Lastly, the Court identified that the cause of action under section 28-6.5-1(a) begins to accrue at the time the drug test is administered.

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of time elapsed between the drug test and termination.

Medical Malpractice. *Ribeiro v. R.I. Eye Inst.*, 138 A.3d 761 (R.I. 2016). An expert's testimony in a medical malpractice case should have been admitted because it would have assisted the jury in establishing that it was more probable that the misdiagnosis and passage of time led to the patient's permanent vision loss. Thus, an expert's testimony is admitted if its probative value is not immensely outweighed by the risk of jury confusion. A motion for judgment as a matter of law must be renewed at the close of all evidence. The motion is thereby waived and cannot be renewed once a verdict is returned.

FACTS AND TRAVEL

On August 24, 2004, Antonio Ribeiro (Ribeiro) attended an eye appointment with Dr. Newman, an optometrist at the Rhode Island Eye Institute, LLC (Eye Institute).¹ Ribeiro presented symptoms of blurred vision in his right eye.² Dr. Newman diagnosed Ribeiro with central serous retinopathy (CSR).³ On August 25, 2004, Dr. Newman confirmed the diagnosis based on an Optical Coherence Tomography (OCT) scan, and on October 25, 2004, Ribeiro returned to Dr. Newman because his vision had worsened.⁴ Dr. Newman again diagnosed Ribeiro with CSR and referred Ribeiro to a retinal specialist, Dr. You.⁵ On November 1, 2004, Dr. You diagnosed Ribeiro with a retinal detachment, which is a tear in the back of the eye.⁶ Despite Dr. You's efforts to surgically repair the tear, Ribeiro permanently lost central vision

1. *Ribeiro v. R.I. Eye Inst.*, 138 A.3d 761, 764 (R.I. 2016).

2. *Id.*

3. *Id.* at 765. CSR is a "blister" on the back of the eye that causes fluid to accumulate behind the retina. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 765–66. A detached retina is a tear that develops behind the eye, and like CFR, it involves fluid accumulation; however, it is more serious than CFR because when the tear fills with fluid, the retina pulls away from the eye and loses its blood supply, thus rendering it functionless. *Id.*

in his right eye.⁷

Ribeiro brought a medical malpractice action against Dr. Newman and the Eye Institute (collectively, Defendants), asserting a negligence claim against Dr. Newman, and that the Eye Institute was vicariously liable.⁸ During pretrial communications, Ribeiro disclosed that it would call expert witness Dr. Greenstein, O.D.—an optometrist—to testify that on August 24, 2004, Dr. Newman breached the standard of care by failing to diagnose a detached retina, as well as expert witness Dr. Bressler, M.D.—an ophthalmologist—to testify that the untreated fluid buildup was the proximate cause of Ribeiro’s permanent vision loss in November 2004.⁹

On November 1, 2011, there was a motion *in limine* hearing to determine whether Dr. Bressler’s testimony could include the October 2004 OCT.¹⁰ On November 10, there was a similar hearing concerning Dr. Bressler’s testimony about Dr. You’s report.¹¹ The Defendants contended that the jury would confusedly rely on Dr. Bressler’s opinion, as an ophthalmologist, to determine if Dr. Newman, an optometrist, breached the standard of care.¹² Ribeiro submitted an offer of proof that Dr. Bressler’s testimony was limited to causation and damages.¹³ As such, the trial justice decided to let the parties limit Dr. Bressler’s testimony themselves through “usual means,” questioning and objections.¹⁴

On November 10, 2011, another motion *in limine* was held.¹⁵

7. *Id.* at 766.

8. *Id.* at 763.

9. *Id.* at 766.

10. *Id.* at 766.

11. *Id.* at 768.

12. *Id.* at 766. Ophthalmologists can diagnose and treat all forms of eye disease and can perform eye surgery; however, optometrists provide vision care by testing and correcting vision using corrective lenses as well as detecting certain eye abnormalities. *Id.* at 766 n.5 (internal citation omitted).

13. *See id.* at 766–67. Ribeiro explained that it was necessary for Dr. Bressler to compare the August 2004 OCT to the October 2004 OCT to show that in August 2004 Ribeiro’s macula was detached, but could have been reattached, as compared to the October 2004 OCT, which showed that by this time, the macula was completely detached, and therefore Ribeiro’s vision was permanently damaged. *Id.*

14. *Id.* at 767.

15. *Id.*

The Defendants, still concerned about jury confusion, moved to limit Dr. Bressler's testimony about the August and October OCTs to "hypothetical questions."¹⁶ The trial justice permitted Ribeiro to question Dr. Bressler about the August OCT, but limited October OCT questions to hypotheticals.¹⁷ Ribeiro asserted that this was prejudicial because it barred Dr. Bressler's opinion about Ribeiro's worsened vision from August to November, which was the basis of her causation theory.¹⁸

Next, the Defendants argued that Dr. Bressler's testimony should be limited exclusively to the August 2004 appointment because, given that Dr. Newman was allegedly negligent only during the August 2004 appointment, Dr. Bressler's testimony regarding Ribeiro's eye condition in October was irrelevant.¹⁹ In response, the trial justice "modif[ied] or change[d] its earlier ruling" and agreed to instruct the jury that Dr. Bressler's testimony was limited to causation, but also permitted Ribeiro to question Dr. Bressler about both the August and October OCT results.²⁰

Thereafter, the Defendants argued that Dr. Bressler could not testify about the duration of Ribeiro's detached retina because neither her deposition nor expert disclosure provided her opinion on this.²¹ The trial justice finally called an end to the arguments and ambiguously held that depending on Dr. Bressler's cross-examination, "the [c]ourt may permit [Ribeiro]on redirect examination to further opine as to the chronicity of Mr. Ribeiro's eye in her opinion."²²

At trial, Ribeiro attempted to question Dr. Bressler about the October OCT, to which the Defendants immediately objected.²³ At sidebar, the parties tried to decipher exactly what the trial justice previously held regarding the scope of Dr. Bressler's testimony.²⁴

16. *Id.*

17. *Id.*

18. *See id.*

19. *Id.* at 768.

20. *Id.*

21. *Id.*

22. *Id.* at 769 (first alteration in original).

23. *Id.*

24. *Id.* Ribeiro contended that the trial justice previously granted permission to ask about both the August and October OCTs, and that Dr. Bressler needed to discuss the eye's condition on both dates to support her

The trial justice, adopting the Defendant's view, held that unless the Defendants brought the October OCT scan into evidence, neither the witness nor Ribeiro's counsel could refer to it.²⁵

Trial recommenced, and Ribeiro asked Dr. Bressler a question about Dr. You's medical notes regarding Ribeiro's appointment on November 1, 2004.²⁶ The Defendants objected, and the trial justice held that unless the Defendants brought Dr. Young's notes into evidence on cross-examination, Ribeiro was barred from such inquiry.²⁷

On cross-examination, Dr. Bressler was neither asked about the October OCT nor Dr. You's treatment.²⁸ Thus, Dr. Bressler was prevented from discussing Ribeiro's worsening eye condition from August to November, which precluded her opinion as to how Ribeiro's undiagnosed condition eventually caused his permanent vision loss.²⁹ The Defendants moved for judgment as a matter of law, which the trial justice reserved ruling on.³⁰ The Defendants proceeded, calling only Dr. Newman to question him exclusively about Ribeiro's eye condition from August to October 2004.³¹ Accordingly, the jury returned a verdict in favor of the Defendants, finding that although Dr. Newman breached the standard of care, his deviation was not the proximate cause of Ribeiro's injury.³²

Ribeiro moved for a new trial, contesting that the trial justice erred when he precluded Dr. Bressler's causation testimony.³³

opinion regarding Ribeiro's eventual vision loss. *Id.*

25. *Id.*

26. *Id.* The Defendants objected, based on the presupposition that because Ribeiro was barred from asking Dr. Bressler about the October OCT, Ribeiro was also barred from questions relating to Dr. You's notes. *Id.* Ribeiro asserted that Dr. Bressler relied on Dr. You's notes because they formed her conclusion that, given Ribeiro's eye condition in October, his retina was incurable. *Id.*

27. *Id.* at 770.

28. *Id.*

29. *Id.*

30. *Id.* Pursuant to Rule 50 of the Superior Court Rules of Civil Procedure, the Defendants moved for judgment as a matter of law based on the assertion that Ribeiro failed to prove: that the standard of care was breached, proximate cause, and damages. *Id.* at 763–64; *see also* SUPER. CT. R. CIV. P. 50.

31. *Id.* at 770.

32. *Id.*

33. *Id.*

The Defendants sought to renew the Rule 50 motion, and in the alternative, moved for a new trial on the standard of care.³⁴ The trial justice denied Ribeiro's motion, reasoning that because the negligence claim was limited to August 24, 2004, causation evidence was appropriately limited to that date.³⁵ The trial justice also reasoned that the risk that the jury would rely on Dr. Bressler's testimony, as an ophthalmologist, to determine the standard of care of an optometrist outweighed its probative value.³⁶ Lastly, the trial justice held that any alleged error was harmless because Dr. Bressler's testimony was limited "only to the extent that she intended to talk about Mr. Ribeiro's condition in October, two months after anything could have been done to prevent his permanent vision loss."³⁷ The Defendants' motions for judgment as a matter of law and for a new trial were denied.³⁸

ANALYSIS AND HOLDING

Upon review, the Rhode Island Supreme Court sought to determine whether the trial justice's decision to preclude Dr. Bressler's testimony regarding the October OCT scan was an "abuse of discretion."³⁹ The Court explained that within the medical malpractice context, an expert witness's opinion is only admitted if it has met "the requisite degree of positiveness."⁴⁰ However, given that "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it," the admittance of expert testimony warrants greater oversight.⁴¹ For this reason, the Court explained that a trial justice must act as a gatekeeper, weighing the expert testimony's probative value against the danger of unfair prejudice.⁴²

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 771 (citing *Franco v. Latina*, 916 A.2d 1251, 1258 (R.I. 2007)).

40. *Id.* (quoting *Riley v. Stone*, 900 A.2d 1087, 1092 (R.I. 2006)). Expert opinion must "rise to the level of reasonable medical certainty, that is, some degree of positiveness or probability and not possibility." *Id.* (quoting *Riley*, 900 A.2d at 1092).

41. *Id.* (alteration in original) (quoting *DiPetrillo v. Dow Chemical Co.*, 729 A.2d 677, 688 (R.I. 1999)).

42. *See id.* (citing *Owens v. Silvia*, 838 A.2d 881, 891 (R.I. 2003)); *see also* R.I. R. EVID. 403.

The Court began its analysis by addressing the relevancy of Dr. Bressler's testimony regarding the October OCT scan.⁴³ According to the Court, not only did Ribeiro have to establish that Dr. Newman breached the standard of care on August 24, 2004, but also that this deviation was the proximate cause of Ribeiro's permanent vision loss.⁴⁴ The Court simply explained that this required Ribeiro to "prove what actually did happen as a result of that deviation."⁴⁵ As such, Ribeiro had to form "links" showing that the deviation "set in motion the 'natural, unbroken and continuous sequence,'" which led to the outcome.⁴⁶ Therefore, Dr. Bressler inevitably had to testify about Ribeiro's eye condition between August and October to illustrate the "natural [and] unbroken" deterioration of the retina, which led to Ribeiro's permanent vision loss in November 2004.⁴⁷

The Court then considered whether the probative value of Dr. Bressler's testimony outweighed any prejudicial effect.⁴⁸ In regards to the "balancing test," the Court shed light on the notion that "[h]elpfulness to the trier of fact is the most critical consideration for the trial justice in determining whether to admit proposed expert testimony."⁴⁹ Taking this into account, the Court found that the expert's opinion about the August OCT—unlike the October OCT—would have benefited the jury because it would have helped them conceptualize that it was "more probable" that

43. See *Ribeiro*, 138 A.3d at 771. The Court analyzed the testimony's relevancy under Rule 401 and Rule 402 of the Rhode Island Rules of Evidence. *Id.* Under Rule 401, to be "relevant," the evidence must "hav[e] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." R.I. R. EVID. 401. Rule 402 provides that "[a]ll relevant evidence is admissible, except as otherwise provided by law." *Ribeiro*, 138 A.3d at 771 (alteration in original) (quoting *Boscia v. Sharples*, 860 A.2d 674, 678 (R.I. 2004)).

44. *Id.* at 772 (citation omitted).

45. *Id.*

46. *Id.* (quoting *DiPetrillo*, 729 A.2d at 692).

47. *Id.*; see also *DiPetrillo*, 729 A.2d at 692.

48. *Id.* Rule 403 provides that according to a justice's discretion, evidence is excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." R.I. R. EVID. 403.

49. *Ribeiro*, 138 A.3d at 772 (alteration in original) (quoting *Owens v. Silvia*, 838 A.2d 881, 891 (R.I. 2003)).

Dr. Newman's misdiagnosis, along with the passage of time, caused Ribeiro's eventual loss of vision in November.⁵⁰

The Court then analyzed the probative value of Dr. Bressler's testimony against a risk of jury confusion, regarding the difference between the standard of care and causation.⁵¹ Another postulate the Court relied on was that "[u]nless evidence is of limited or marginal relevance and enormously prejudicial, the trial justice should not act to exclude it."⁵² Accordingly, the Court held that, in regards to Dr. Bressler's testimony about the October OCT, the potential for jury confusion did not outweigh the testimony's probative value.⁵³ Furthermore, the Court reasoned that such concerns would have been eradicated with the justice's "cautionary instruction," which specifically advised the jury that Dr. Bressler's testimony could not be used to determine whether Dr. Newman breached the standard of care.⁵⁴ Therefore, the Court held that, Dr. Bressler's testimony was not "enormously prejudicial, . . . [and] the trial justice strayed beyond the bounds of his discretion"⁵⁵ Moreover, the Court held that Dr. Bressler's preclusion from testifying about the October OCT and Dr. You's notes were not harmless error.⁵⁶ As the Court explained, the expert's credibility and opinion depended on this evidence because her inability to compare the August OCT against both the October OCT and Dr. You's notes, prevented the jury from theorizing why it would have been more probable for the eye to be cured in August, but not in November.⁵⁷ The Court concluded that the trial justice's preclusion was an "unsustainable exercise of his discretion," and a new trial on all issues was granted.⁵⁸

Lastly, the Court addressed the Defendants' motion for judgment as a matter of law.⁵⁹ Despite the Defendants'

50. *See id.* at 772; *see also* R.I. R. EVID. 401.

51. *Ribeiro*, 138 A.3d at 772.

52. *Id.* at 772, 773 (quoting *Wells v. Uvex Winter Optical, Inc.*, 635 A.2d 1188, 1193 (R.I. 1994)).

53. *Id.* at 772.

54. *Id.* at 772–73; *State v. Clark*, 754 A.2d 73, 80 (R.I. 2000) (noting that "the members of the jury are presumed to follow the trial justice's instructions.").

55. *Id.* at 773 (citing *Wells*, 635 A.2d at 1193).

56. *Id.*

57. *Id.* at 773–74.

58. *Id.* at 774.

59. *Id.*

contentions, the Court reaffirmed “[its] established rule that if one party makes a motion for judgment as matter of law at the close of the opponent’s case and then presents evidence on his . . . own behalf, the motion must be renewed at the close of all [the] evidence.”⁶⁰ As such, because the Defendants did not renew their motion at the close of their evidence, the Defendants’ earlier motion was waived and could not be appealed.⁶¹ The Court also held that because Ribeiro was granted a new trial on all issues, the Defendants’ motion for a new trial was denied.⁶²

COMMENTARY

The Rhode Island Supreme Court discussed how a trial justice abused his or her discretion when admitting expert testimony into trial.⁶³ The Court brought to light the challenge posed by potential jury confusion as well as the prejudicial effect that such evidence may have upon jury members.⁶⁴ However, consistent with the adversarial search for the truth, the Court set forth the importance of precluding expert testimony only when “enormously” prejudicial.⁶⁵ For this reason, the Court provided mechanisms upon which a trial justice may rely when making this complicated decision. The Court emphasized the power of “crisp and succinct cautionary” jury instructions in order to prevent such confusion.⁶⁶ Moreover, the Court presented fundamental questions for trial justices to consider, such as how “helpful” the testimony might be to the jury, as well as, whether admitting the testimony would be “enormously” prejudicial.⁶⁷ The Court was also empathetic to the importance of ensuring that the parties had a fair opportunity to fully present their case. As for the jury, the Court had a keen eye to ensure that the jury had sufficient information to reach a fair determination. Through its opinion, the Court stressed how imperative it is for the jury to know these

60. *Id.* (second alteration in original) (quoting *Skaling v. Aetna Ins. Co.*, 742 A.2d 282, 287 (R.I. 1999)).

61. *Id.*

62. *Id.*

63. See *id.* at 771–74.

64. See *id.* at 772–74.

65. *Id.* at 773; see also *Wells v. Uvex Winter Optical, Inc.*, 635 A.2d 1188, 1193 (R.I. 1994).

66. *Id.*

67. See *id.*

relative facts in order to fully understand the case at hand as well as the legalities involved. For this reason, it is imperative for the trial justice to heavily weigh the more attenuated implications that an exclusion may have.

Consistent with the search for the truth, there is also a need to foster ideals of conflict resolution. For this reason, a trial justice's inconsistent decisions pose the risk that this will enable a case to become more complicated and confrontational than necessary. When opposing counsel partakes in multiple hearings on the same issues this may cause the parties to become distracted from the principle issue of the case as well as their role within the system of justice. The golden rule is that a client is entitled to a "just, speedy, and inexpensive" trial. As such, when there are multiple cases within a case, this inevitably requires additional time, costs, and court resources. Nonetheless, the greatest concern presented by this attenuation is the risk of jury confusion as well as a misconstruction of the law. For this reason, the Court's decision and analysis serve as a model for applying fundamental discretionary tests in order to ensure that the truth is attained, the conflict is resolved, and the purpose for which the case was brought remains the priority.

CONCLUSION

The Rhode Island Supreme Court held that the Superior Court abused its discretion when it excluded a causation expert's testimony as to a patient's scans and medical record because this information was relevant to the expert's causation theory. Furthermore, this testimony would have assisted the jury in conceptualizing that it was more probable that the misdiagnosis was the proximate cause of the patient's irreparable injury, and thus its probative value outweighed any prejudicial effect. The Court also held that a motion for judgments as a matter of law must be renewed at the close of all evidence, and once the verdict is returned, the motion is thereby waived and cannot be renewed.

Alexandra Rawson

Mortgage Law. *Twenty Eleven, LLC v. Botelho*, 127 A.3d 897 (R.I. 2015). A prior recorded mortgage on a condominium held by a bank is extinguished when a super-priority lien is created by statute and the condominium sold at auction does not generate enough funds to cover both liens.

FACTS AND TRAVEL

In December of 2004, Michael Botelho purchased a condominium unit in Warwick, RI.¹ As part of the process, Botelho executed a promissory note in favor of First Franklin Financial Corp. in the amount of \$114,400.² The loan amount was then secured by a mortgage on the condominium unit.³ After a period of years, Botelho became delinquent on the associated monthly condominium association fees.⁴ This delinquency created a statutory lien under the Rhode Island Condominium Act (RICA), and the condominium association (Association) eventually sold the condominium unit in a lien foreclosure sale to the Plaintiff, Twenty Eleven, LLC, on July 19, 2011.⁵ Subsequent to that sale, the original mortgagee⁶ tried to foreclose on its mortgage on the property on January 18, 2013.⁷ Plaintiff brought an action in the Rhode Island Superior Court, seeking to quiet title to the condominium unit in its favor.⁸ The Superior Court decision relied heavily on a strict reading of the statute, which does not include any reference to extinguishment of prior recorded mortgages.⁹ Therefore, the hearing justice dismissed the action as

1. *Twenty Eleven, LLC v. Botelho*, 127 A.3d 897, 898–99 (R.I. 2015).

2. *Id.* at 899.

3. *Id.*

4. *Id.*

5. *Id.*

6. The original mortgage holder was PNC Bank, National Association. *Id.* at 898.

7. *Id.* at 899.

8. *Id.*

9. *Id.*

of August 28, 2013.¹⁰ The Plaintiff then appealed to the Rhode Island Supreme Court.

ANALYSIS AND HOLDING

The Court began its discussion by stating that the question at bar required a statutory interpretation, which the Court reviews *de novo*.¹¹ The Court immediately turned to RICA, section 34-36.1-3.16(b).¹² The Court read section 34-36.1-3.16(b)(1)(ii) as stating that a lien under this section is prior to all other liens except a first mortgage on the condominium unit recorded prior to the date on which assessment is sought.¹³ If that was all the statute stated, the lender's original mortgage would be the highest priority lien with the Association's lien having a lower priority.¹⁴ The Court then moved to section 34-36.1-3.16(b)(2),¹⁵ which created a "super-priority lien," consisting of all "common expense assessments."¹⁶

The Court considered section 34-36.1-3.16 in its entirety and found that it created a bifurcated lien, in which one part had a higher priority than all other mortgages,¹⁷ and a remaining part of the lien¹⁸ would be of a lower priority than previously recorded mortgages. Here, once the Association foreclosed on the "super-priority lien," the question became what happened to the interest of the first mortgage holder? The Court, following section 34–

10. *Id.*

11. *Id.* at 900.

12. *Id.* at 901; *see also* R.I. GEN. LAWS ANN. § 34-36.1-3.16(b) (West, Westlaw through Jan. 2016 Legis. Sess.).

13. *Botelho*, 127 A.3d at 901.

14. *Id.*

15. The operative provision the Court addressed is quite unusual ("[t]he lien is also prior to any mortgage or deed of trust described in subdivision (b)(1)(ii) of this section to the extent of the common expense assessments based on the periodic budget adopted by the [condominium] association . . . which would have become due in the absence of acceleration during the six (6) months immediately preceding the foreclosure of the interest of the unit owner including any costs and reasonable attorney's fees . . ."). § 34-36.1-3.16(b)(2).

16. *Id.*; *see also* § 34-36.1-3.16(b)(1).

17. *Botelho*, 127 A.3d at 901 (the first part of the bifurcated lien equates the "super-priority lien" to the last six months of "common expense assessments" by the condominium association).

18. *Id.* (the second part of the bifurcated lien regards all other liens held against the condominium unit).

36.1–1.08 of RICA, looked to “[t]he principles of law and equity” to “supplement the provisions of this chapter.”¹⁹ There, the Court found a common rule: When a higher priority lien is foreclosed on, and the property is subject to lower priority liens, the “junior liens” are extinguished in favor of satisfying the higher priority lien.²⁰ The Court suggested multiple safeguards lenders could employ in order to prevent the extinguishment of their security interest, including simply paying the six months of outstanding fees to prevent the foreclosure stemming from the “super-priority lien,” and then adding the amount to the principal balance of the mortgage.²¹

The Court then discussed the right of redemption provision, added to RICA in 2008.²² The right of redemption provision allows the holder of the first mortgage or deed of trust to redeem its security interest in the condominium unit by:

[T]endering payment to the association in full of all assessments due on the unit together with all attorney’s fees and costs incurred by the association in connection with the collection and foreclosure process within thirty (30) days of the date of the post foreclosure sale notice sent by the association²³

The Court pointed out that this provision evidenced the Legislature’s intent to have the “super-priority lien” extinguish the first mortgage because “one cannot redeem what it has not lost.”²⁴ In its conclusion, the Court pointed out that the bifurcated lien is indeed a unique scheme.²⁵ However, the Court also gave heavy weight to the consideration of both the drafters of the Uniform Condominium Act,²⁶ as well as the Legislature in

19. *Botelho*, 127 A.3d at 902; *see also* R.I. GEN. LAWS ANN. § 34-36.1-1.08 (West, Westlaw through Jan. 2016 Legis. Sess.).

20. *Botelho*, 127 A.3d at 902.

21. *Id.* at 904.

22. *Id.* at 905; *see also* R.I. GEN. LAWS ANN. § 34-36.1-3.21 (West, Westlaw through Jan. 2016 Legis. Sess.).

23. *Botelho*, 127 A.3d at 905; *see also* § 34-36.1-3.21.

24. *Botelho*, 127 A.3d at 905.

25. *Id.* at 903.

26. *Id.* (specifically, the “Commissioners’ Comments to the act describe the split-lien as ‘[a] significant departure from existing practice’ . . . created to ‘strike[] an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of

adopting and adapting the scheme with notice and redemption procedures.²⁷

COMMENTARY

The Dissent argued that the statute itself is devoid of any language regarding extinguishment of the security interest of the first mortgage holder, which was in accord with the trial justice's view.²⁸ Justice Robinson expounded on this point by noting that the term the Court used to describe the Association's lien for the last six months of common assessments, "super-priority," is also not found anywhere in the text of the statute.²⁹ The dissent critiqued what language *is* in the statute, pointing out that the Legislature needed to be "clear, precise, and broad" with its use of language when drafting a provision with such drastic repercussions.³⁰

The Court's decision to unsecure a loan through a judicial interpretation of such an unusual provision in the statute was, by the Court's own admission, a hard ruling for mortgage companies.³¹ Even though the debt still existed, the mortgagee here lost its security interest—essentially all it had—because the mortgagor was most likely judgment proof. The fact that the Legislature went back to this statute to add in the notice provision does suggest that it is aware of the "draconian" effects possible under the statutory scheme as written. However, the law does create a cap on the amount of money that can exist under the "super-priority lien,"³² and any additional proceeds from the foreclosure of the condominium unit can go to the subordinate priority lenders.³³ This strikes an "equitable balance" and functionally splits the losses among the parties, as the

the security interests of mortgage lenders."'). *Id.* (internal citation omitted) (alterations in original).

27. *Id.* at 906.

28. *Id.* at 906–07, 906 n.2 (Robinson, J., dissenting).

29. *Id.* at 906–07.

30. *Id.* at 907 (specifically Justice Robinson noted "I do not believe that any objective speaker of English would be inclined to use those adjectives to describe the statutory scheme presently before us.>").

31. *See id.* at 908.

32. *Id.* at 904 (majority opinion).

33. *Id.* \$13,501.57 was sent to the Defendant as a surplus of the foreclosure sale, which the Defendant did not accept. *Id.* at 903 n.7.

Commissioner's Comment from the UCA drafters suggested was their goal.³⁴ It is important to note that the Court based much of its decision on a similar case decided by the District of Columbia Court of Appeals; however, that case did not include the additional twist of the right of redemption provision found in RICA.³⁵ Viewing the decision of that case, the conclusion the Court reached here is not as outlandish as it might otherwise appear.

As a practical matter, it would seem that the Association, consisting of all the other condominium unit owners, should bear some cost. The outstanding fees were all for improvements made to the condominium property as a whole, meaning all of the condominium owners received some benefit. In the event of an individual owner not paying the fees associated with that unit, the security interest in a condominium unit should not be extinguished to satisfy the outstanding condominium fees. The value of the foreclosure sale should be proportionately spread to the secured parties, both the mortgage company and the condominium association.

From a policy perspective, the decision the Court reached is a well-reasoned solution to a confusing statute. The Court seems to suggest that in using the right of redemption, a bank can pay off the outstanding association fees, thus removing the "super-priority" portion of the condominium association's lien, returning the bank mortgage to the highest priority lien.³⁶ At that point, the bank could foreclose against the property without the impediment of the Association's liens. If the bank did not generate enough proceeds from the foreclosure sale, all other lower priority liens would be extinguished, just as the first mortgage was extinguished in this case, and whoever bought the condominium would own it free of any encumbrances. This is also a sound policy because it prevents the existence of multiple liens against the same condominium unit, which would severely impact the marketability of the unit. Through this process, the condominium association would have its "super-priority lien" paid off, and the bank would salvage whatever it could from the

34. *See id.* at 903.

35. *See Chase Plaza Condo. Ass'n, Inc. v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166 (D.C. 2014).

36. *Botelho*, 127 A.3d at 905 (the Court essentially refers to this process as a "conditional foreclosure").

property.

However, the use of the phrase “all assessments due on the unit” in the right of redemption provision would suggest that in order to redeem its security interest, a holder of a first mortgage would be required to pay not just the “super-priority” portion of outstanding fees but also the junior priority lien of any fees owed to the association that fall outside of the “super-priority” section.³⁷ If the intention of the Legislature was to give some protection against the harshness of the “super-priority lien,” it would be prudent to insert a specific, right-of-redemption provision in which only that section of the outstanding fees, which constitute the “super-priority,” should be paid by the holder of the first mortgage, in order to redeem its security interest. The Court seemed to send a message to lenders and the Legislature—that this is the practical effect of the law as written, and lenders should learn it and adapt to it. The dissent shined a spotlight on the ambiguous and confusing language of the statute, presumably in an effort to drive the Legislature to clarify certain aspects. Either way, the Legislature should scrutinize the RICA series of statutes after this ruling, as other parties have noted.³⁸

CONCLUSION

The Court ruled that the mortgage holder’s security interest in a condominium unit was extinguished when the valid foreclosure by the condominium association on its statutorily created “super-priority lien” failed to yield enough proceeds to satisfy the association’s lien. In doing so, the Court navigated a confusing section of the RICA to a well-reasoned and practical ruling.

James Caleb Bass

37. R.I. GEN. LAWS ANN. § 34-36.1-3.21 (West, Westlaw through Jan. 2016 Legis. Sess.).

38. See Cale P. Keable and Santiago H. Posas, *Rhode Island Supreme Court Rules That Condominium Assessment Liens Could Extinguish First-Priority Mortgages*, Partridge Snow & Hahn LLP (Jan. 2016), <http://www.psh.com/?t=40&an=52377&anc=742&format=xml>.

Premise Liability. *Roy v. State*, 139 A.3d 480 (R.I. 2016). The Rhode Island Recreational Use Statute provides limited liability protection to landowners who either “directly or indirectly invite[] or permit[] without charge any person to use that property for recreational purposes.” In addition, the danger of diving is an “open and obvious” danger.

FACTS AND TRAVEL

On July 10, 2008, Brett A. Roy (Roy) walked from his car to a pond at the World War II Veterans Memorial Park in Woonsocket, Rhode Island, and dove into the water.¹ Due to the shallowness of the pond, Roy became paralyzed from the neck down; the injuries sustained by Roy were damaging to Roy, his wife, Dawn K. Roy (collectively, Plaintiffs), and the Plaintiffs’ two children.² The Plaintiffs filed an action alleging several counts of negligence and premise liability against the Department of Environmental Management (DEM) and two individuals in their official capacities as DEM employees (collectively, State).³ During the trial, the director of DEM at the time of the incident, W. Michael Sullivan (Sullivan), testified that he made the decision to have the pond filled in June 2008, and that DEM operated the facility with the “expect[ation] that there would be people . . . using the [pond]” even when DEM prohibited swimming-at-your-own-risk.⁴ The Associate Director of Natural Resources for DEM, Larry Mouradjian (Mouradjian), testified that the pond has a “designated lap pool, a swim area, and a diving platform.”⁵ Mouradjian also described that “diving near the wall into the lap

1. *Roy v. State*, 139 A.3d 480, 482, 485 (R.I. 2016).

2. *Id.* at 482.

3. *Id.*

4. *Id.* at 483. DEM operated the pond with the assumption that when there were “no[] lifeguards present at [the] swimming facility, that the swimming facility was closed.” *Id.*

5. *Id.*

pool would be dangerous because it was too shallow”⁶ and believed that the pond should be drained or left empty due to lack of preparation needed for the pond.⁷ The DEM Deputy Chief of the Rhode Island Division of Parks and Recreation, John Faltus (Faltus), also testified at trial.⁸ Faltus stated that diving is generally not allowed; however, “[p]eople [were] allowed to possibly do some shallow entry dives.”⁹

Seasonal laborer for DEM Kenneth Henderson testified that on the day of July 10, 2008, he “saw ‘about half a dozen’ people swimming in the pond.”¹⁰ Some of the people present on the day of the incident testified differently as to what took place that day. One witness described Roy’s dive into the pond as that of a “belly flop kind of dive; not a complete dive.”¹¹ Another witness described Roy’s movement before the incident as if he was “r[unning], like you run when you bowl,” followed by a shallow dive.¹² The witness who accompanied Roy to the pond on that day testified that Roy jogged from the car to the pond and as Roy was diving “t[old] him not to dive over there . . . because it was shallow water.”¹³ Roy stated in a deposition that he “never saw a sign that said ‘[n]o [s]wimming.’”¹⁴ Prior to jumping in, Roy stated that he checked the depth of the water by looking at the water, which he described as being “murky,” and that he “definitely couldn’t see the bottom.”¹⁵ Roy also described his dive to be a shallow dive and that no one said anything to him when he conducted a dive in the same spot the previous year.¹⁶ Roy admitted that “the way that [he] check[ed] the depth of the water . . . was probably irresponsible . . .”¹⁷

The trial justice denied both parties’ motions for judgment as

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* (alterations in original).

10. *Id.* at 484.

11. *Id.* at 485.

12. *Id.*

13. *Id.*

14. *Id.* (alterations in original).

15. *Id.* Roy believed that if the water were too shallow he would be able to see the bottom. *See id.*

16. *Id.*

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

a matter of law after all evidence was presented.¹⁸ After an extensive trial, a jury returned a verdict for the State on question one, finding “that the [S]tate had not ‘willfully or maliciously failed to guard or warn against a dangerous condition, use, structure or activity’ or against a ‘non-obvious, latent dangerous condition’ at the pond.”¹⁹ As a result, both parties made renewed motions for judgment as a matter of law.²⁰ The State supported its motion by arguing that the Plaintiffs did not meet their standards to find that the State was liable under the Recreational Use Statute and that, as a matter of law, Roy’s conduct was “‘highly dangerous’ and ‘no duty was owed to him.’”²¹ The Plaintiffs argued that the “[S]tate’s witnesses admitted sufficient facts at trial to establish the [S]tate’s liability as a matter of law under the Recreational Use Statute.”²² However, the Plaintiffs also moved for a “new trial on damages, or, in the alternative, a new trial on all the issues.”²³ The trial justice denied both parties’ motions for judgment as a matter of law and granted the Plaintiffs’ motion for a new trial on all the issues, but the State timely appealed this decision, and Plaintiffs filed a cross-appeal.²⁴

ANALYSIS AND HOLDING

In reviewing the appeals, The Rhode Island Supreme Court limited its review to the State’s renewed motion for judgment as a matter of law because the Court concluded that the State owed no duty to Roy.²⁵ Furthermore, in order for the Court to review the trial justice’s decision on the motion, the Court was bound to follow “the same rules and legal standards [that] govern the trial justice.”²⁶ Essentially, the Court “must examine ‘the evidence in the light most favorable to the nonmoving party, without weighing the evidence or evaluating the credibility of witnesses, and draw[] from the record all reasonable inferences that support the position

18. *Id.*

19. *Id.* at 486, 487.

20. *Id.* at 487.

21. *Id.* The State also argued that Roy assumed the risk of injury by failing to check the pond’s depth before diving into the murky water. *See id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 488.

26. *Id.* (quoting *Hough v. McKiernan*, 108 A.3d 1030, 1035 (R.I. 2015)).

of the nonmoving party.”²⁷ After the Court reviewed the evidence, it should enter a judgment as a matter of law “when the evidence permits only one legitimate conclusion in regard to the outcome.”²⁸

Upon review, the Court initially sought to determine whether the State was liable under the Recreational Use Statute.²⁹ The Court recounted that the purpose of the statute was to provide limited liability to owners of land and water areas made available to the public for recreational use.³⁰ The Court noted that the 1996 Amendment to the statute clearly showed that the “[L]egislature intended to include the state and municipalities among owners entitled to immunity under the statute.”³¹ The Court determined that the statute only provides limited liability and not that of absolute.³² The statute does not extend its liability limitations towards willful or malicious conduct.³³ The State further argued that the Plaintiffs’ evidence did not establish that the State “willfully and/or maliciously failed to warn against a dangerous condition.”³⁴ The Plaintiffs cited *Berman v. Sitrin*;³⁵ there the defendants were found to have specific knowledge regarding “multiple incidents of death and grievous injury” that could occur with any individual that uses their property, such as the plaintiff.³⁶ The Plaintiffs argued that the case at hand is comparable to *Berman* because the “shallow water and dangers of diving [into the pond] at this particular facility were not obvious to users . . . yet were in fact known to [the State].”³⁷ However, in the case at hand, when it comes to the pond, only “relatively minor injur[ies] [had been] reported several days before Roy’s catastrophic injuries.”³⁸ The Court concluded that this case is

27. *Id.* (alteration in original) (quoting *Perry v. Alessi*, 890 A.2d 463, 467 (R.I. 2006)).

28. *Id.* (quoting *Long v. Atlantic PBS, Inc.*, 681 A.2d 249, 252 (R.I. 1996)).

29. *See id.*

30. *Id.*

31. *Id.* (alteration in original) (citations omitted).

32. *Id.*

33. *Id.* at 488–89.

34. *Id.* at 489.

35. *Id.*

36. *Id.* (quoting *Berman v. Sitrin*, 991 A.2d 1038, 1051 (R.I. 2010)).

37. *Id.*

38. *Id.* at 490.

distinguishable from *Berman*, and found that the Plaintiffs did not show the State to have “willful[ly] or malicious[ly] fail[ed] to guard or warn against a dangerous condition, use, structure, or activity after discovering [a] user’s peril.”³⁹ Thus, the Court concluded that the State’s motion for judgment as a matter of law should have been granted.⁴⁰

However, even if the Recreational Use Statute did not apply, the Court found that it is of common knowledge that the “danger of diving in and of itself is an ‘open and obvious’ danger,” as to preclude liability.⁴¹ Lastly, to support its finding, the Court recounted the evidence that Roy “admit[ted] he was aware of” the dangers of diving into shallow water.⁴² The Court concluded that Roy must have had knowledge and an appreciation of the risk because “[u]ltimately, it was [Roy’s] own behavior that caused his injuries.”⁴³

COMMENTARY

The Rhode Island Supreme Court definitively analyzed the purpose of the Recreational Use Statute and its authority to limit the liability of landowners with land or water areas for public recreational usage, ultimately concluding that the State was protected by the statute and owed no duty to Roy.⁴⁴ The Court correctly bound themselves to the same standard as those of the trial justice because the Court explained that in reviewing a trial justice’s decision on a motion for judgment as a matter of law, it is bound to follow the “same rules and legal standards as govern the trial justice.”⁴⁵ The Court’s ruling continues to make the immunity granted by the Recreational Use Statute possible for landowners of property used for recreational purposes, but that immunity should not be mistaken as absolute immunity. If the Recreational Use Statute were to be read as an absolute limitation, it would render any injury sustained by the public to be unrecoverable, even if such injuries were caused willfully or

39. *Id.* (alterations in original) (citation omitted).

40. *Id.*

41. *Id.* (quoting *Bucki v. Hawkins*, 914 A.2d 491, 496 (R.I.2007)).

42. *Id.* (alteration in original).

43. *Id.* (first alteration in original).

44. *Id.* at 488.

45. *Id.*

maliciously by the State. This standard not only protects the rights of the public to still have standing, but also still allows owners such as the State to provide its land for recreation purposes to the public.

The Court's ruling also upheld the requirements that need to be taken by the nonmoving parties to make a reasonable effort during its presentation of evidence in order to readdress their injuries as a matter of law. It would be unreasonable for the Court to redress an injury just because a party has such daunting injuries and to exclude the rights granted by the Legislature for owners of land. The Court correctly noted that the State did "admit knowledge of the unique features of the pond," but that Roy also admitted knowledge of the dangers and continued to dive in to the pond.⁴⁶

CONCLUSION

The Rhode Island Supreme Court upheld that landowners have limited liability protection under Recreational Use Statute with regards to their property used for recreational purposes. Furthermore, the Court held that the dangers of diving are an open and obvious danger.

Jonathan L. Pierre

46. *Id.* at 489.

Property Law. *Am. Condo. Ass'n, Inc., v. Mardo*, 140 A.3d 106 (R.I. 2016). The Rhode Island Supreme Court held that in a case that presents exceptional and unique circumstances, a balancing of the equities can justify a deviation, in the exercise of sound discretion, from their general rule regarding the remedy for a continuing trespass if it can be shown that undue hardship will burden one of the parties.

FACTS AND TRAVEL

Goat Island South Condominium (GIS) is a 154-unit residency that consists of Harbor Houses Condominium (Harbor House), America Condominium (America), and Capella Condominium (Capella)—three residential sub-condominium areas.¹ GIS is comprised of nineteen, stand-alone, townhouse, residence units located in Harbor House; forty-six, single-residence units located in America; and eighty-nine residence units in Capella.² Each sub-condominium within GIS is subject to separate association governance and declarations; however, residents must also adhere to the provisions of GIS's master declaration.³

On April 19, 2011, Plaintiffs, America and Capella, initiated the instant action against Defendants, Stefania M. Mardo, as Trustee of the Constellation Trust–2011 (the Trust), and Harbor House, seeking injunctive relief to prevent the expansion of Unit 18 located in Harbor House.⁴ Plaintiffs' original complaint alleged that Defendants breached the GIS Second Amended and Restated Declaration of Condominium (SAR), violated restrictive covenants, committed a common law trespass, and violated Rhode Island's Condominium Act (the Act).⁵

1. *Am. Condo. Ass'n, Inc. v. Mardo*, 140 A.3d 106, 109 (R.I. 2016).

2. *Id.*

3. *Id.* All four of these associations and declarations must adhere to Rhode Island's Condominium Act, R.I. GEN. LAWS ANN. § 34-36.1. *Id.*

4. *Id.* at 110. Bernie Sisto, the father of trustee Stefania Mardo, was entered into the suit as "an additional trustee." *Id.*

5. *Id.*

A bench trial was held on various days between May and September of 2011.⁶ During the trial, Bernie Sisto testified regarding the expansion of Unit 18.⁷ During his testimony, Mr. Sisto stated that although the Trust had expanded the walls of Unit 18; the walls were built on an existing foundation that the previous owners had constructed as a part of their expansion project on the property in 2000 and 2001.⁸ Mr. Sisto testified that when he purchased Unit 18, he had built on the foundation that the previous owners had laid out, which they had used as a patio and back deck.⁹ Mr. Sisto further testified that the foundation had not been intended as a patio or back deck, but was in fact intended to be a part of a “proposed building expansion” by the prior owners.¹⁰ Mr. Sisto testified that it was his belief that a prior court had ordered the foundation to be put into the ground, but that the parties agreed not to continue construction until that case was entirely resolved.¹¹ Mr. Sisto further testified that “ten (10) of the nineteen (19) Harbor House unit owners ha[d] expanded over the years, including most recently in 2008.”¹² Finally, Mr. Sisto testified that he had communicated via e-mail with the President of the GIS Board, Natalie Volpe, in which she requested that he not take further action in his expansion without the unanimous consent of all 154 unit owners.¹³ Mr. Sisto believed this email to be the “personal opinion of Ms. Volpe, not the opinion of the GIS Board, since [t]hey did not vote on [it].”¹⁴ The president and the owner of America testified that they had not provided consent for the expansion of Harbor House Unit 18, although the president testified that she knew of at least one Harbor House expansion in the past.¹⁵

On August 22, 2012, the trial justice rendered her decision, finding that the Defendants had acted in violation of the Act,

6. *Id.*

7. *Id.*

8. *Id.* The “expansion was confined to the existing foundation, which was on the property when he purchased it.” *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 111.

13. *Id.*

14. *Id.* (alterations in original).

15. *Id.*

whose statutory provisions require a unanimous vote from all unit owners.¹⁶ Moreover, the trial justice found that since the GIS SAR was subject to the Act, Defendants had also violated its requirements.¹⁷ The trial justice further granted Plaintiffs' request for injunctive relief to preclude Unit 18 from further expansion but did not grant Plaintiffs' request that she issue a mandatory injunction requiring the Trust to remove all construction beyond its "pre-expansion footprint."¹⁸ Plaintiffs' attorneys' fees and further costs were not awarded.¹⁹

The trial justice entered final judgment on February 25, 2014, and held that: (1) the expansion provisions as provided in the GIS SAR violated the Act and were unenforceable; (2) defendants had breached sections 2.3(a)(i)(A)&(M) and 11.1(b) of the GIS SAR; (3) count three of Plaintiffs' complaint alleging a violation of restrictive covenants was moot; and (4) that the Trust had committed a common law trespass.²⁰

The Plaintiffs appealed three issues: (1) that the trial justice had erroneously "failed to issue a mandatory permanent injunction" to remove the trespass despite properly finding that there had been one; (2) the trial justice erred in ruling Plaintiffs' count three as moot; and (3) that the trial justice had committed an error of law when she failed to recognize a contractual basis for awarding attorneys' fees as was provided by GIS SAR.²¹ The Trust brought a cross-appeal arguing that: (1) the trial justice erred as a matter of law in her ruling that the Trust breached the GIS SAR; and (2) the trial justice committed error when she ruled that the Trust committed a trespass.²²

ANALYSIS AND HOLDING

Upon review of the trial justice's decision, the Rhode Island Supreme Court conducted a *de novo* review, applying the laws of contract construction in evaluating the condominium

16. *Id.* at 111, 112.

17. *Id.* at 112.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 113.

declaration.²³ The Court stated that it would read all clear and unambiguous terms as they are written.²⁴ Further, when examining a judgment in a non-jury trial, the Court will reverse the judgment only if it can be shown that “the trial justice misapplied the law, misconceived or overlooked material evidence[,] or made factual findings that were clearly wrong.”²⁵ The Court held that the trial justice did not commit error when she determined that the Trust had breached the GIS SAR or when she ruled that the Plaintiffs’ count three alleging restrictive covenants violation was moot.²⁶ However, the Court did find error in the trial justice’s failure to award attorneys’ fees and other costs to the Plaintiffs based on the Trust’s violation of the GIS SAR.²⁷ Further, the Court held that the trial justice had not abused her discretion in issuing an injunctive order to halt further expansion of Unit 18 despite not issuing an injunctive order requiring the removal of the expanded part of Unit 18 (“the trespass”).²⁸

A. *The GIS SAR*

The Court first addressed the Trust’s cross-appeal contention that the trial court erred in ruling that they had violated the GIS SAR by expanding Unit 18.²⁹ The Trust argued that since the trial justice had ruled that section 2.3 of the GIS SAR, which prohibits the expansion, violated the Act, its provisions are therefore “unenforceable and cannot form the basis of a breach of contract.”³⁰ The Court stated that the Act required unanimous

23. *Id.* “The contract must be viewed in its entirety, and the contract terms must be assigned their plain and ordinary language.” *Id.* (quoting *Rivera v. Gagnon*, 847 A.2d 280, 284 (R.I. 2004)).

24. *Id.* “The Court will refrain from engaging in mental gymnastics or from stretching the imagination to read ambiguity into a [contract] where none is present.” *Id.* (alterations in original) (quoting *Bliss Mine Road Condo. Ass’n v. Nationwide Prop. and Cas. Ins. Co.*, 11 A.3d 1078, 1083 (R.I. 2010)).

25. *Id.* at 117 (alteration in original) (quoting *Rose Nulman Park Found. ex rel. Nulman v. Four Twenty Corp.*, 93 A.3d 25, 28 (R.I. 2014)).

26. *Id.*

27. *Id.*

28. *Id.* at 120.

29. *Id.* at 113.

30. *Id.* The Trust further argued that §11.1(b) of the GIS SAR was not applicable. The language in §11.1(b) is as follows: “Consistent with

consent of all 154 unit owners before any expansion or changes in boundaries of any unit could be made, and section 11.1(b) of the GIS SAR “clearly and unambiguously echoes that requirement”³¹ Relying on Mr. Sisto’s testimony at trial where he conceded to lacking unanimous consent from all 154 unit owners, the Court held that the Trust had violated section 11.1(b) of the GIS SAR.³²

The Court then addressed the Plaintiffs’ appeal regarding the mootness of count three in their complaint.³³ In count three of their complaint, the Plaintiffs alleged that the Trust had violated the “restrictive covenants that lie with the land” when it expanded Unit 18 and changed the boundaries of the Unit without obtaining the required amendment.³⁴ The Court stated that since the trial justice had found that there was a breach of contract and a common law trespass, she had awarded what she considered to be appropriate damages based on Plaintiffs’ complaint and their relief sought.³⁵ The Court further acknowledged that the Plaintiffs requested the same relief in count two (breach of GIS SAR) and in count three.³⁶ As it follows, the Court stated that deciding the breach of contract claim and awarding damages was within the discretion of the trial justice, and that she did not commit an error in declining to “contend with the restrictive covenants claim since it was not necessary for her to do so.”³⁷

The third issue the Court addressed was Plaintiffs’ contention that the trial justice had committed an error of law when she

subsection 34-36.1-2.17(d) of the Act, except to the extent expressly permitted or required by the Act, *no amendment may . . . change the boundaries of any Unit . . . in the absence of unanimous consent of the Unit Owners.*” *Id.* at 114 (emphasis added).

31. *Id.*

32. *Id.* The Trust then argued that it could not have breached §11.1(b) of the GIS SAR because that section specifically applies to amendment of the GIS SAR, and in this case the Trust had not sought an amendment to the GIS SAR. *Id.* The Court held that the fact that the Trust did not seek an amendment “does not change the fact that the Act requires the Trust to seek such an amendment before expanding boundaries of the unit and that the GIS SAR incorporates that requirement in §11.1(b).” *Id.* Accordingly, the court held that §11.1(b) clearly applies to this case. *Id.*

33. *Id.* at 114–15.

34. *Id.* at 115.

35. *Id.*

36. *Id.*

37. *Id.*

failed to award them attorneys' fees and costs.³⁸ The Court indicated that it has long adhered to the "American rule"³⁹ in determining whether to award attorneys' fees and other costs.⁴⁰ The Court looked at section 11.3 of the GIS SAR, which it believed to be relevant pertaining to Plaintiffs' claims for attorneys' fees and other costs.⁴¹ The Court found that the plain language of section 11.3 of the GIS SAR clearly did provide a basis for an award of attorneys' fees and costs in the present case.⁴² Having found a valid basis for awarding attorneys' fees and other costs, the Court then turned to the issue of whether the trial justice had abused her discretion in not awarding such damages.⁴³ The Court read section 11.3 of the GIS SAR to specifically focus on the word "shall" in the sentence that dictates the mandatory award of attorneys' fees and other costs stemming from a breach of the GIS SAR.⁴⁴ Reading the terms of the contract and applying them as they are written, the Court held that there was a valid basis for an award of attorneys' fees and costs to exist, and that the trial justice had abused her discretion in not awarding them to Plaintiffs.⁴⁵

B. Trespass

In its cross-appeal, the Trust argued that the trial justice had committed an error as a matter of law when she ruled that the expansion of Unit 18 created a common law trespass because "the area over which the expansion was made is property that the Trust owns [as a tenant in common] and had the exclusive right to use" and because the "the Trust had the consent of GIS and Harbor Houses."⁴⁶ The Trust relied on the established fact that

38. *Id.* The Trust argued that because the expansion provisions of §2.3 in the GIS SAR were found to be unenforceable, a breach of that section would not be a valid basis for awarding attorney's fees and other costs under the GIS SAR. *Id.*

39. The American rule requires that each litigant pays his or her own attorneys' fees absent a statutory authority or finding of contractual liability. *Id.*

40. *Id.* (citation omitted).

41. *Id.* at 115–16.

42. *Id.* at 116.

43. *Id.* (citing *Dauray v. Mee*, 109 A.3d 832, 845 (R.I. 2015)).

44. *Id.*

45. *Id.* at 117.

46. *Id.* (alteration in original).

the original expansion of Harbor House Unit 18 had begun back in 2000–2001 by the previous owners, and that his construction of the expanded walls on Unit 18 merely completed what the previous owners had started.⁴⁷ The Trust further relied on the fact that the previous owners had been given express authorization by the Superior Court to expand Unit 18.⁴⁸ The Court reviewed the trial justice’s finding that the expansion of Unit 18 created an encroachment upon a common area, which caused “a de facto alteration of the percentage of the undivided interest which each owner has in the common areas”⁴⁹ The Court ruled that despite the Trust building on the previous owner’s foundation, it had still committed a trespass by appropriating the limited common area for their own use, and therefore the trial justice had not committed error in finding that a trespass had occurred.⁵⁰

The final issue the Court addressed was the Plaintiffs’ contention that because the trial justice had found a “continuing trespass” she had committed error when she failed to mandate an injunction to remove the trespass.⁵¹ The Plaintiffs argued that the removal of a trespass is required by law unless an “exceptional circumstance” is present, which they argued was not applicable.⁵² Plaintiffs further contended that the injunction they sought to remove the trespass would not “operate oppressively or inequitably.”⁵³ In addressing these arguments, the Court cited *Rose Nulman Park Foundation ex rel. Nulman v. Four Twenty Corp.* in which it stated a general rule for injunctions as they relate to a continuing trespass.⁵⁴ The rule states that a

47. *Id.* at 110.

48. *Id.*

49. *Id.* at 117 (quoting *Strauss v. Oyster River Condo. Trust*, No. 114843, 1992 WL 12153337, at *23 (Mass. Land Ct. Oct. 27, 1992)).

50. *Id.*

51. *Id.*

52. *Id.* at 117–18. The Plaintiffs pointed to the record and argued that the trial justice did not cite to any exceptional circumstances in this case, therefore removal of the trespass is required by law. *Id.* at 118. The Plaintiffs also argued that the Trust had notice and a warning from Ms. Volpe that their expansion violated the GIS SAR and the Act, so no exceptional circumstances existed here and balancing of the equities should not be considered in this case. *Id.*

53. *Id.*

54. *Id.* In another notable case, the Court stated:

continuing trespass “wrongfully interferes with the legal rights of the owner, and in the usual case those rights cannot be adequately protected except by an injunction which will eliminate the trespass.”⁵⁵ However, exceptional circumstances exist when a substantial right of the landowner may be properly protected without ordering an injunction, which would otherwise operate oppressively and inequitably.⁵⁶ If, after balancing the equities, a court finds that there would be an undue hardship to one of the parties, then an exceptional circumstance exists.⁵⁷

However, this Court noted that when an intentional trespass occurs where the defendant continues to proceed with the trespass despite notice or warning, it will not consider exceptional circumstances.⁵⁸ Plaintiffs argue that the Trust was put on notice and given warning by the e-mail from Mr. Sisto.⁵⁹ However, the Court agreed with the Trust that the e-mail merely reflected Ms. Volpe’s own opinion and that it was not an official notice or warning after a vote was taken by the GIS.⁶⁰ The Court agreed that the Trust, through Mr. Sisto, could not be certain that when Unit 18 was being expanded that they had to do any more than comply with the terms of the GIS SAR as they understood them.⁶¹ The Superior Court decisions at issue here were still pending on appeal to the Supreme Court, and the issue as to whether or not unanimous approval of the other condominium owners was required for expansion had not been concretely decided when Ms.

[T]he owner of land is entitled to a mandatory injunction to require the removal of a structure that has been unlawfully placed upon his land, and the fact that such owner has suffered little or no damage because of the offending structure, or that it was erected in good faith, or that the cost of its removal would be greatly disproportionate to the benefit accruing to the plaintiff from its removal, is not a bar to the granting of [injunctive] relief. However, the existence of such circumstances may in exceptional cases move the court to withhold the [injunctive] relief contemplated by the general rule.

Id. (alterations in original) (quoting *Santilli v. Morelli*, 230 A.2d 860, 863 (R.I. 1967)).

55. *Id.* at 118.

56. *Id.* (citation omitted).

57. *See id.*

58. *Id.* (citation omitted).

59. *Id.* at 119.

60. *Id.*

61. *Id.*

Volpe e-mailed Mr. Sisto.⁶² The Court considered this to be an exceptional circumstance, which justified balancing the equities.⁶³

In addition to the exceptional circumstance mentioned above, the Court emphasized the important fact then when the Trust bought Unit 18, the previous owners had already constructed a foundation in anticipation of an approved expansion.⁶⁴ The Trust was made aware that the Superior Court had specifically ordered that the previous owners be allowed to proceed with their construction and that the GIS Board had approved the expansion as no resident had objected to it.⁶⁵ The Court stated that the Trust had acted in good faith when it had reasonably believed that it was able to expand on the existing foundation laid out by the previous owners.⁶⁶ Further, the Court reminded itself that the Plaintiffs had originally sought a preliminary injunction against the Trust but had “failed to litigate vigorously in pursuit of such an injunction,” and had allowed their motion to be advanced to trial on the merits.⁶⁷ During that time, the expansion on Unit 18 was completed. The Court concluded that requiring the removal of the now-completed expansion on Unit 18, thus removing the trespass, would be “enormously oppressive, both logistically and financially.”⁶⁸

The Court concluded that the trial justice did not abuse her discretion in issuing an injunctive order against the expansion of Unit 18 while not issuing an injunctive order to remove the trespass.⁶⁹

COMMENTARY

The Rhode Island Supreme Court clearly stated that when a

62. *Id.*

63. *Id.* (citation omitted).

64. *Id.*

65. *Id.*

66. *Id.* The Court also considered the important facts that the Trust’s expansion was actually smaller than the intended expansion by the previous owners, and that other Harbor Houses units had expanded in the past. *Id.*

67. *Id.* at 120.

68. *Id.* at 119. The Plaintiffs are not affected by the Court’s decision not to remove the expansion. *Id.* “The expansion is on land designated for the exclusive use of Unit 18, and there is no allegation that the expansion is affecting the water views of any resident or is otherwise a material inconvenience for the other residents.” *Id.*

69. *Id.* at 120.

trespass occurs an injunction mandating the removal of that trespass is required by law; however, exceptional circumstances may exist where it must balance the equities before issuing the injunction.⁷⁰ Where a substantial right of a landowner may be safeguarded without resorting to an injunction, to order that injunction would be oppressive and inequitable.⁷¹ However, when adequate notice and warning are given to a potential trespasser and are not heeded, the Court will not balance the equities to consider a hardship to the wrongful party.⁷²

As such, the Court correctly took into account that not all trespasses are the same, and therefore application of remedies will also differ. Clearly, requiring the Defendants in this case to remove the trespass would qualify as an immense hardship on their behalf. Although not specifically mentioned by the Court, the Defendants would be faced with both economic and environmental hardship had they been required to remove the expansion from Unit 18. In recognizing this hardship, the Court properly decided that removing the trespass was a justified deviation to their general rule.

However, despite the Court's exception to their general rule, they correctly held that the trial judge did err in not awarding attorney's fees to the Plaintiffs. In his concurrence, Justice Flaherty agreed with the Court's opinion that the trial justice's discretion did not permit her to decline to award attorney's fees by stating that "the parties have a right to the benefit of their bargain."⁷³ When parties enter into a contractual agreement part of that bargain is agreeing to certain terms, such as awarding of attorney's fees should litigation result from any breach of the contract. Both parties are free to agree or disagree to those terms. The trial justice erred when she disregarded that agreement between the parties and declined to award attorney's fees. Had she been correct in that decision, bargaining between parties when coming to an agreement would essentially be counter-productive.

70. *Id.* at 118 (citation omitted).

71. *Id.* at 118 (citation omitted).

72. *Id.* (citation omitted).

73. *Id.* at 121 (Flaherty, J., concurring).

CONCLUSION

The Rhode Island Supreme Court held that the trial justice did not abuse her discretion in finding that the Trust had committed a trespass.⁷⁴ However, conflictingly, the Court found that the trial justice did not err in failing to issue a mandatory injunction required by the law to remove the continuing trespass that is Unit 18.⁷⁵ Further, the Court held that the trial justice did not err in ruling Plaintiffs' count three as moot and did not err in determining that the Trust breached the GIS SAR.⁷⁶ However, the Court held that the trial justice did abuse her discretion in failing to award attorneys' fees and other costs to Plaintiffs based on the terms of the GIS SAR.⁷⁷

Sophie Bellacosa

74. *Id.* at 120.

75. *Id.*

76. *Id.*

77. *Id.*

Public Records. *Providence Journal Co. v. R.I. Dep't of Pub. Safety*, 136 A.3d 1168 (R.I. 2016). Records that could reasonably be expected to constitute an unwarranted invasion of personal privacy do not have to be disclosed by a governmental agency under the Access to Public Records Act (APRA) if the records would otherwise be in the public interest. A citizen seeking to compel disclosure of records for the public interest, over the privacy interest, to uncover government negligence or impropriety must provide evidence of government negligence or impropriety, not just mere speculation or suspicion.

FACTS AND TRAVEL

On May 28, 2012, Caleb Chafee (Caleb), the son of then-Governor Lincoln Chafee, hosted a party on property owned by the then-Governor where alcohol was consumed by some underage attendees, resulting in an underage, female attendee being taken to the hospital for an alcohol-related illness after leaving the party.¹ Following this, the Rhode Island State Police² went to the property to conduct an investigation, which yielded 186 pages of investigative documents.³ Caleb was charged with furnishing or procurement of alcoholic beverages for underage persons.⁴ On August 22, 2012, Caleb pled *nolo contendere* in Rhode Island District Court, receiving a \$500 civil penalty, and on March 13, 2013, Caleb's motion to expunge his record was granted by the District Court judge.⁵

1. *Providence Journal Co. v. R.I. Dep't of Pub. Safety*, 136 A.3d 1168, 1170 (R.I. 2016).

2. The property is located in the town of Exeter, which does not have a local police force, so the State Police responded to the incident. *Id.* n.1.

3. *Id.* at 1170–71.

4. *Id.* at 1171. The 186-page report included witness lists, witness statements, land evidence records, and narrative reports written by various officers. *Id.* The investigation led to Caleb being charged under R.I. GEN. LAWS ANN. § 3-8-11.1 (2010), the Social Host Law. *Id.*

5. *Id.*

Seeking information, on June 21, 2012, a Providence Journal Company (Journal) reporter requested by email for the state police to provide copies of the reports of Caleb's incident.⁶ The reason given for the request was that it would be "in the public interest to know how the situation was handled regarding the governor's son—especially since the state police answer directly to the governor."⁷ The Rhode Island Department of Public Safety denied the request because the records were part of an ongoing criminal investigation, and the records could reasonably be expected to be an unwarranted invasion of personal privacy.⁸ The reporter sent another request on August 21, 2012, which was denied for similar privacy concerns.⁹ The Journal made a similar request on September 5, 2012, which was denied for the same reason.¹⁰

Unable to get the information by request, the Journal filed a complaint in Providence County Superior Court, alleging violation of the APRA, the United States Constitution, and the Rhode Island Constitution.¹¹ Both parties filed motions for summary judgment, and after the hearing justice reviewed the documents and the parties' memoranda and heard oral arguments, summary judgment was granted in favor of the defendants.¹² The hearing justice determined that the Journal had failed to demonstrate "a belief by a reasonable person that alleged government impropriety might have occurred," that "disclosure would not advance the public interest," and that even if the documents were to be redacted, it would be clear that it would be Caleb's event that was being investigated.¹³ The Journal appealed the decision.¹⁴

ANALYSIS AND HOLDING

Upon review, the Rhode Island Supreme Court considered the grant of summary judgment and the interpretation of APRA *de*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 1171–72.

11. *Id.* at 1172.

12. *Id.*

13. *Id.*

14. *Id.*

novo.¹⁵ Furthermore, when public interests and privacy interests are balanced for disclosure purposes by a trial justice, the Court gives the same amount of deference as it would to a trial justice's finding of fact, overturning the decision only if the trial justice "overlooked or misconceived material evidence or was otherwise clearly wrong."¹⁶

The Court then turned to the function of the APRA and found that its purpose is to provide the public access to public records, but to also protect against an unwarranted invasion of personal privacy.¹⁷ To effectuate this purpose, APRA was drafted with a general rule of disclosure that provides that all records kept by a public body are public records, which every person has the right to, subject to exception.¹⁸ "Public records" include

all documents, paper, letters, maps, books, tapes, photographs, films, sound recordings, magnetic or other tapes, electronic data processing records, computer stored data . . . or other material . . . made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.¹⁹

Furthermore, the APRA categorizes certain records as non-public records that include those "maintained by law enforcement agencies for criminal law enforcement and all records relating to the detection and investigation of crime, including those maintained on any individual or compiled in the course of a criminal investigation by any law enforcement agency."²⁰ However, these records are considered to be non-public only "to

15. *Id.* When conducting a *de novo* review of a grant of a motion for summary judgment, the Court applies the "same standards and rules as did the motion justice," and the Court views the evidence "in the light most favorable to the nonmoving party." *Id.* at 1172–73. Likewise, when conducting a *de novo* review of a trial justice's ruling concerning the interpretation of a statute, the Court strives to "to give effect to the purpose of the act as intended by the Legislature." *Id.* at 1173 (citation omitted). Furthermore, the statute "may not be construed in a way that would . . . defeat the underlying purpose of the enactment." *Id.* (citation omitted).

16. *Id.* at 1173 (citation omitted).

17. *Id.* at 1173; *see also* R.I. GEN. LAWS ANN. § 38-2-1 (West, Westlaw through Jan. 2016 Legis. Sess.).

18. *Providence Journal Co.*, 136 A.3d at 1173–74; *see also* R.I. GEN. LAWS ANN. § 38-2-3(a) (West, Westlaw through Jan. 2016 Legis. Sess.).

19. *Providence Journal Co.*, 136 A.3d at 1174.

20. *Id.* at 1174; *see also* R.I. GEN. LAWS ANN. 38-2-2(4)(D)(c) (West, Westlaw through Jan. 2016 Legis. Sess.).

the extent that disclosure of the records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.”²¹

Because the APRA is similar to the Freedom of Information Act and contains a similar privacy exemption for law enforcement records,²² the Court looked to federal case law to aid in its interpretation of APRA and found the United States Supreme Court’s framework in *National Archives and Records Administration v. Favish*²³ worthy of adoption.²⁴ The U.S. Supreme Court found that the term “unwarranted” requires a balancing of the privacy interest against the public interest in disclosure, and the method of balancing requires a two-step test that the citizen must use to prove that he or she is entitled to the records at issue.²⁵ The test requires that the citizen first show that “the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake,” and secondly, that the citizen show that “the information is likely to advance that interest.”²⁶ Before proceeding with the *Favish* test, the Court first dispensed with the APRA rule that the requesting citizen has no duty to provide a reason for desiring the requested records because the *Favish* test requires that such a rule be inapplicable in order to balance the competing interests.²⁷

Taking up the *Favish* test, the Court concluded that the Journal’s reason for seeking the records, i.e., to potentially uncover government negligence or impropriety, lacked an evidentiary basis that showed any government negligence or impropriety.²⁸ The Court held that the Journal sought the records under a suspicion or speculation that responsible government

21. *Providence Journal Co.*, 136 A.3d at 1174; *see also* § 38-2-2(4)(D)(c). It is this exemption that is the basis of the appeal.

22. *Providence Journal Co.*, 136 A.3d at 1174; *see also* 5 U.S.C. § 552 (West, Westlaw through Pub. L. No. 114-254).

23. 541 U.S. 157 (2004) (considering the applicability of this exemption to certain photographs of a decedent’s body at the scene of death).

24. *Providence Journal Co.*, 136 A.3d at 1175.

25. *Id.* (quoting *Favish*, 541 U.S. at 171).

26. *Id.* (quoting *Favish*, 541 U.S. at 172). Normally, only the public body has to provide a reason for withholding a requested record, and this APRA rule is similar to a rule in the Freedom of Information Act. *Id.*

27. *Id.* (quoting *Favish*, 541 U.S. at 172).

28. *Id.* at 1175, 1177.

officials acted improperly in the performance of their duties, but that this is not enough, and that the requester “must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.”²⁹ The Court determined that the *Favish* standard may be inapplicable in cases where a party has another reason, other than government impropriety, for requesting the records, but that the Journal had not offered such an additional reason.³⁰ The Court afforded a “presumption of legitimacy accorded to the Government’s official conduct . . . and where the presumption is applicable, clear evidence is needed to displace it.”³¹ The Court found that the State Police had performed a comprehensive investigation of Caleb’s violation of the Social Host Law, given by its compilation of 186 pages of documents, which resulted in Caleb being charged, and that the Journal provided no evidence that any government official acted negligently or improperly in doing so.³² The Journal’s mere speculation that there was some impropriety due to the then-Governor’s position was not enough, and thus the Journal failed the *Favish* test.³³

While the Journal had failed the *Favish* test, the Court continued its analysis in order to evaluate the privacy interests at stake.³⁴ The Court held that Caleb’s privacy interest was not diminished because the incident received media attention, as the media coverage revealed none of the intimate details of the incident, except the charge against Caleb.³⁵ The Court further held that Caleb’s privacy interest was not diminished by his *nolo contendere* plea because that only applies to the fact that he was convicted, not to the facts underlying such a conviction.³⁶

The Court ultimately concluded that Caleb’s privacy interest

29. *Id.* at 1175 (quoting *Favish*, 541 U.S. at 174).

30. *Id.* at 1176.

31. *Id.* at 1176 (quoting *Favish*, 541 U.S. at 174).

32. *Id.* at 1176–77.

33. *Id.* at 1177.

34. *Id.* The Court did so for completeness and future guidance. *Id.* However, the Court did not consider the privacy interests of third parties. *Id.* at 1177 n.7.

35. *Id.* “The privacy interest at stake flows not from the widespread knowledge of the fact that Caleb was charged, but, instead, from the information and personal details that may have been discovered in the police investigation.” *Id.*

36. *Id.* at 1178.

was significant,³⁷ the Journal's unsubstantiated assertion of possible government impropriety due to the then-Governor's position did not permit disclosure, the trial justice did not err or overlook evidence, and under the APRA records need not be disclosed where such disclosure could create an unwarranted invasion of privacy.³⁸

COMMENTARY

With regards to both public and private interests, the Court struck a sensible balance between the competing interests, and interpreted the APRA to give it its intended purpose. Naturally, citizens have an interest in public institutions, and that interest requires citizens be granted access to information contained in those institutions; however, those institutions contain sensitive, personal information that should sometimes be prohibited from members of the general public. If all information given to public institutions were available to every member of the public, then no information would remain private. The Court and the APRA appropriately address this concern by protecting against unwarranted invasions of privacy in the disclosure of records.

Law enforcement agencies are but one of these public institutions that acquire personal information for its own function. If law enforcement agencies could not investigate personal, intimate details, then its investigative abilities would be so diminished as to render the enforcement of crime immensely difficult. As the Court notes, for "documents developed by law enforcement in the investigation of a private individual, the privacy interest is considerable and should not be easily displaced absent a particularly noteworthy public interest."³⁹ Furthermore, this information is not likely made available to the public by the suspect without the investigation, and it should not automatically become public information by virtue of its inclusion in an investigative police report. The information in the report is likely to include personal information that was not voluntarily given by the suspect, or was voluntarily given under the notion that it will

37. The Court considered only Caleb's privacy interest, not that of the then-Governor. *Id.* at 1178 n.9.

38. *Id.* at 1178, 1179.

39. *Id.* at 1178.

be used for an investigation and be kept private.

While the Court does provide a framework for one's privacy interests to be overcome by the public interest, it is perhaps difficult for a member of the public to overcome that privacy interest. The evidence needed to meet the standard is not easily uncovered and is likely to be closely guarded. Therefore, there likely would never be more than suspicion or speculation for situations where the evidence to meet the standard is difficult to obtain. Here, a suspicion is perhaps justly warranted by the public when the law enforcement agency, accountable to the Governor, is investigating a member of the Governor's family to ensure that the investigation is conducted fairly. The Court says that the investigative report was comprehensive, but stays silent on what constitutes a comprehensive report. While it might be impossible to have a standard for a comprehensive report given the varying nature of every investigation, the lack thereof leaves little direction for assessing a report and possibly leaves the door open for impropriety to be concealed this way. Moreover, the Court pointed to Caleb's charge as a reason for lack of impropriety. This seemingly suggests that not being charged might be evidence of impropriety, but the Court leaves unclear whether this is so. This also suggests that charging a suspect may be enough *per se* to always protect information in police reports from becoming public, which leaves open the possibility of subjects of a police investigation simply being charged in order to protect the information in investigative police reports from being made available to the public. Therefore, the Court might have left open possibilities that could allow law enforcement records that could show government impropriety from ever being accessed by the public.

Yet, it is unlikely that these possible routes around the standard to always protect information from the public will be successful. The person requesting the records could always bring a suit to compel the disclosure of records, at which point a trial judge would assess those records and make a determination whether or not they should be disclosed. It is extremely unlikely that government impropriety would reach the reviewing trial judge.

Furthermore, the privacy interests are likely to be strong enough to outweigh the public interest. As mentioned,

investigative reports are likely to be highly detailed and rife with personal information, which would normally not be disclosed to the public. This normally undisclosed information should not automatically be disclosed because it happens to be in the records of a public institution, or else the exceptions to the disclosure law and general notions of personal privacy would be defeated. The privacy concerns are exactly why the need to provide evidence of impropriety to access records is necessary, so that private information is not easily discoverable on mere speculation or suspicion of some wrongdoing. Therefore, the Court's holding enforces the safeguards against the disclosure of private information while keeping with the spirit of making records accessible to the public for the public interest.

CONCLUSION

The Rhode Island Supreme Court held that a citizen seeking to compel a public institution to disclose records for the public interest, under the APRA, to uncover government negligence or impropriety must provide evidence of such negligence or impropriety, not just speculation. The Court determined that this standard is necessary in order to protect individual privacy interests and give the statute its proper effect of limiting disclosure of public records in order to prevent an unwarranted invasion of privacy.

Andrew D. Senerchia

Tort Law. *Hyde v. Roman Catholic Bishop of Providence*, 139 A.3d 452 (R.I. 2016). Repressed recollection, on its own, does not qualify as an “unsound mind” disability, and therefore does not toll the statute of limitations in cases of childhood, sexual abuse against non-perpetrator defendants.

FACTS AND TRAVEL

Helen Hyde and Jeffrey Thomas (Plaintiffs), former students of Our Lady of Mercy in East Greenwich, Rhode Island, filed suit in Providence County Superior Court, seeking damages from the Roman Catholic Bishop of Providence (Defendant) for the sexual abuse they experienced while under Defendant’s supervision.¹ The sexual perpetrator, Father Brendan Smyth (Smyth), an agent and employee of Defendant, passed away prior to the commencement of this suit.²

Ms. Hyde’s abuse began in 1967, when she was six years old and a student at Our Lady of Mercy.³ Ms. Hyde states that the abuse took place in a classroom, schoolyard, church, her home, and in the woods outside of her house.⁴ Mr. Thomas claimed that not long after Smyth began to abuse Ms. Hyde, Smyth raped and molested him in the church’s rectory and in Hyde’s backyard.⁵

In their complaints, the Plaintiffs claim that the Defendant and his predecessors knew about Smyth’s sexual abuse of children by the 1940s, yet continued to allow him to serve as priest under his supervision.⁶ The Plaintiffs also claimed that due to the amount of sexual abuse inflicted, Smyth was sent away for treatment before he was allowed to return to Our Lady of Mercy.⁷ The Plaintiffs

1. *Hyde v. Roman Catholic Bishop of Providence*, 139 A.3d 452, 454–55 (R.I. 2016).

2. *Id.* at 455.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

alleged “numerous counts of negligence, negligent supervision, vicarious liability, fraud, intentional nondisclosure, and intentional failure to supervise,” against the Defendant.⁸ The Plaintiffs also asserted that each of them had repressed recollection of the abuse that was committed against them and did not recover these memories until within three years of the filing of the lawsuit.⁹

In response to the Plaintiffs’ complaints, the Defendant filed motions to dismiss the complaints on the grounds that repressed memory only applied in cases where the perpetrator is the defendant, so the action was barred by the statute of limitations, and the Plaintiffs had failed to allege facts sufficient to support the tolling of the statute under the “unsound mind” provision of Rhode Island General Laws section 9-1-19.¹⁰ The Plaintiffs opposed, arguing that repressed memory by itself can be a tolling mechanism under the “unsound mind” provision, an evidentiary hearing was in order pursuant to precedent, and their fraud claims were timely because they could not have known about the Defendant’s fraudulent conduct until they remembered the sexual abuse.¹¹

At the motion to dismiss hearing, the Defendant argued that the Rhode Island Supreme Court had never held that repressed memories alone could constitute an unsound mind.¹² The Defendant also argued that the statute did not apply to non-perpetrator defendants, so there was no need for an evidentiary hearing.¹³ The trial court denied the Defendant’s motion to dismiss, without prejudice, pending an evidentiary hearing to be held to determine if the Plaintiffs could demonstrate that repressed

8. *Id.*

9. *Id.*

10. *Id.* R.I. GEN. LAWS ANN. § 9-1-19 provides:

If any person at the time any such abuse of action shall accrue to him or her shall be under the age of eighteen years, or of unsound mind, or beyond the limits of the United States, the person may bring the cause of action, within the time limited under this chapter, after the impediment is removed.

(West, Westlaw through Jan. 2016 Legis. Sess.).

11. *Id.* Plaintiffs’ claimed that according to the Court’s decision in *Kelly v. Marcantano*, 678 A.2d 873, 879 (R.I. 1996), they deserved an evidentiary hearing on repressed memory. *Id.*

12. *Id.*

13. *Id.*

memories would qualify as an unsound mind.¹⁴ However, the trial court did agree that prior decisions definitively held that non-perpetrator defendants could not be tolled under the statute.¹⁵

More than a year later, the Defendant filed a motion for entry of a scheduling order and attached a proposed schedule.¹⁶ Plaintiffs objected to the proposed order because they asserted their right to conduct discovery on an intentional concealment toll pursuant to section 9-1-20.¹⁷ The Defendant argued that the Plaintiffs had waived their right to present a fraudulent concealment theory.¹⁸ The trial justice held that she would not allow discovery on fraudulent concealment, but she would allow the Plaintiffs to file a motion to reargue the motion to dismiss and raise this issue.¹⁹

Following the justice's suggestion, the Plaintiffs moved to reargue their opposition to the Defendant's motion to dismiss.²⁰ A hearing was held, and the trial justice determined that none of Ms. Hyde's allegations constituted fraudulent concealment.²¹ The trial judge also held that she would not allow Plaintiffs to combine the claims of fraudulent concealment and repressed memory to extend the statute of limitations.²² At a later continuation of the hearing, the trial court found that there was no evidence of actual misrepresentations by the Defendant, and any misrepresentations that were made to Ms. Hyde's mother were only applicable until Ms. Hyde reached eighteen.²³ The trial court also denied the Plaintiffs' motion for discovery regarding fraudulent concealment.²⁴

Finally, the trial court held that the Plaintiffs did not meet the

14. *Id.* at 456.

15. *Id.*

16. *Id.*

17. *Id.* R.I GEN. LAWS ANN. § 9-1-20 provides that

If any person, liable to an action by another, shall fraudulently, by actual misrepresentation, conceal from him or her the existence of the cause of action, the cause of action shall be deemed to accrue against the person so liable at the time when the person entitled to sue thereon shall first discover its existence. (West, Westlaw through Jan. 2016 Legis. Sess.).

18. *Id.*

19. *Id.* at 457.

20. *Id.*

21. *Id.*

22. *Id.* at 457-58.

23. *Id.* at 458.

24. *Id.*

definition of “unsound mind,” and therefore the statute of limitations began at the time of the offense, not when the Plaintiffs became aware through a recovered memory.²⁵ Accordingly, the trial court granted the Defendant’s motion for summary judgment, and Plaintiffs timely appealed.²⁶

ANALYSIS AND HOLDING

Upon review, the Rhode Island Supreme Court sought to interpret Rhode Island General Laws section 9-1-19 to address the dispute between the parties.²⁷ The Court first looked to see if Plaintiffs’ repressed recollection, by itself, satisfied the “unsound mind” requirement necessary for the statute of limitations to toll under Rhode Island General Laws section 9-1-19.²⁸ The Court relied on its prior holding in *Kelly v. Marcantanio* and *Roe v. Gelineau*, which held that an “unsound mind” meant the inability to manage one’s day-to-day affairs; however, there was ambiguity as to whether this applied to repressed recollection.²⁹ Looking to resolve whether not being able to manage one’s day to day activities was required under repressed recollections, the Court looked at the General Assembly’s enactment of section 9-1-51.³⁰ The Court focused on the Assembly’s decision to phrase the statute as limiting the provision to actual abusers.³¹ The Assembly stated that this

25. *Id.* at 459.

26. *Id.* at 460.

27. *Id.* The Court conducted a *de novo* review to see whether the trial court should have granted summary judgment. *Id.* at 460 (citing *Woodruff v. Gitlow*, 91 A.3d 805, 809 (R.I. 2014)). Whether a statute of limitations has run against a plaintiff’s claim is a question of law that is also reviewed *de novo*. *Ho-Rath v. R.I. Hosp.*, 115 A.3d 938, 942–43 (R.I. 2015)).

28. *Id.*

29. *Id.* at 463 (quoting *Roe*, 794 A.2d 476, 486 (R.I. 2002)).

30. R.I. GEN. LAWS ANN. §9-1-51 provides that:

(a) All claims or causes of action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within seven years of the act alleged to have abused the injury or condition, or seven years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by the act, whichever period expires later.

(West, Westlaw through Jan. 2016 Legis. Sess.).

31. *Id.* at 465 (quoting *Kelly v. Marcantanio*, 678 A.2d 873, 878 (R.I. 1996)).

was because of the causal connection between the abuser, who is responsible for the “. . . [victim’s] psychological defense mechanism leading to repression,” and the victim.³² Accordingly, the Court held that under section 9-1-19, repressed recollection, standing alone, does not toll the statute of limitations when dealing with non-perpetrator defendants.³³

The Court then went on to discuss the Plaintiffs’ contention that the trial court erred in denying them the opportunity to seek discovery on fraudulent concealment claims.³⁴ On this issue, the Court was required to give considerable deference to the trial court’s decision concerning discovery, reversing only for abuse of discretion.³⁵ Relying on their decision in *Ryan v. Roman Catholic Bishop of Providence*, the Court stated that the Plaintiffs, to prove fraudulent concealment, must show: “(1) that the defendant made an actual misrepresentation of fact; and (2) that, in making that misrepresentation, the defendant fraudulently concealed the existence of plaintiff’s causes of action.”³⁶

Here, the Plaintiffs alleged that Defendant made many misrepresentations, such that the Defendant knew of Smyth’s abuse and failed to report it; the parish held Smyth out in good standing to the community; that when Ms. Hyde’s mother went to the church to complain about the abuse, they threatened to excommunicate her; that a prior Providence bishop, in an unrelated case, made a sworn statement that it was his job to protect priests accused of abuse; and finally, when Ms. Hyde recovered her memories in 2005 and confronted the Defendant, the Defendant attempted to conceal and deflect Smyth’s abuse.³⁷ However true or false these allegations were, the Court held that none of the conduct could have led the Plaintiffs to believe that the abuse did not occur, therefore leaving the statute of limitations intact.³⁸ Hence, the

32. *Id.* (quoting *Kelly*, 678 A.2d. at 878.)

33. *Id.* The Court said that reading §§ 9-1-19 and 9-1-51 together made it clear that § 9-1-51 set the exclusive means with which repressed recollection could toll the statute of limitations. *Id.*

34. *Id.*

35. *Id.* at 460 (citing *Shelter Harbor Conservation Soc’y, Inc. v. Rogers*, 21 A.3d 337, 343 (R.I. 2011)).

36. *Id.* at 465–66 (quoting 941 A.2d 174, 182 (R.I. 2008)).

37. *Id.* at 466.

38. *Id.* The Court stated that mere silence is not enough to be actual misrepresentation; just because the Defendant may have known about Smyth

Court stated that the trial justice did not err when denying the Plaintiffs' request to seek discovery on the fraudulent concealment claim.³⁹

COMMENTARY

The Rhode Island Supreme Court relied mainly on the Rhode Island General Assembly's enactment of section 9-1-51 after the Court chose not to integrate a discovery rule into that provision in their holding in *Kelly*.⁴⁰ However, if you read into what the General Assembly enacted after the Court refused to include a discovery rule in that statute, it could be reasonably argued that there does not have to be a discovery rule for section 9-1-19, since they are both dealing with the type of sexual abuse that happened to the Plaintiffs here. Also, in section 9-1-51, the General Assembly completely left out unsound mind and let the discovery rule apply by itself.⁴¹ If the Court read the sections together under this light, it would seem that repressed recollections, by themselves, could toll the statute of limitations.

However, it seems the Plaintiffs could not sue under section 9-1-51 because the Court previously held that it did not apply to non-perpetrator defendants, and the Plaintiffs were suing the Bishop, who was a non-perpetrator defendant.⁴² Alternatively, the Court left open just what evidence a plaintiff is required to show, other than just repressed recollections, to toll the statute of limitations under section 9-1-19. This seems to be an important aspect that the Court left out, which makes it almost an unattainable standard to meet when trying to sue non-perpetrator defendants.

When dealing with the fraudulent concealment argument, the Court stated the elements that the Plaintiffs had to show to

abusing children, does not mean it was specific to these plaintiffs; just because the Defendant threatened excommunication does not establish that he misled the Plaintiffs to believe that no cause of action existed; and Plaintiff was actively investigating Smyth as an abuser, so the fact that the Defendant tried to deflect could not have led her to believe the abuse did not occur; finally, holding Smyth out in good standing to the community is not a misrepresentation to the Plaintiffs themselves required to toll the statute of limitations. *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 464.

⁴¹ *Id.* at 465 (quoting *Kelly v. Marcantano*, 678 A.2d 873, 878 (R.I. 1996).

⁴² *Id.* (quoting *Kelly*, 678 A. 2d at 878–79.)

demonstrate that there was fraudulent concealment as stated above, and held that the Plaintiffs' allegations failed to meet this demonstration. However, the Plaintiffs were asking for discovery on this claim to uncover what other misrepresentations were made so that they could satisfy the rule. When the Court denied them this opportunity, it cut off their only other alternative to hold the Defendant accountable for the abuse that they endured under his supervision.

While under these facts, the Court was completely justified in its holding under the repressed recollections, it left no standard to decide what evidence, combined with repressed recollections, could toll the statute of limitations. The Court also could have interpreted the General Assembly's action or inaction in a different light that would have been more favorable to the Plaintiffs in this case. Finally, the Plaintiffs' fraudulent concealment claim should have been allowed discovery before the Court decided whether or not they had enough proof of actual misrepresentation to permit denying or granting summary judgment.

CONCLUSION

The Rhode Island Supreme Court affirmed the trial court's grant of summary judgment. The Court held that the statute of limitations under the "unsound mind" provision is not tolled by repressed recollections in and of themselves against a non-perpetrator defendant because of the causal connection reasoning behind the General Assembly's enactment of section 9-1-19. Finally, the Court held that the Plaintiffs did not meet the burden of showing actual misrepresentation of the Defendant to toll the statute of limitations under the theory of fraudulent concealment.

Tara Gunn

2016 RHODE ISLAND PUBLIC LAWS OF NOTE

2016 R.I. Pub. Laws ch. 007, 008. An Act Relating to Elections—Registration of Voters. This Act allows Rhode Island citizens the ability to complete voter registration through an online portal, so long as their information is verifiable. The Secretary of State shall maintain the electronic voter registration system, and may request any state agency, quasi-public agency, or municipality to furnish information that the Secretary of State deems necessary to cross-reference and verify information that registrants submit. Any information collected by the Secretary of State or submitted by a registrant can be shared or disclosed with any governmental or non-governmental entity for any reason except for voter registration purposes or pursuant to a court order. However, the secretary of state may enter into an agreement and exchange registrant data with any other state for the purposes of updating the statewide central voter register, provided that the Secretary of State enters into an agreement to protect the confidentiality of such registrants' data.

2016 R.I. Pub. Laws ch. 039, 041. An Act Relating to Criminal Offenses—Electronic Tracking of Motor Vehicles. This Act makes illegal the act of knowingly installing, concealing, or placing an electronic tracking device in or on a motor vehicle without the consent of the operator and all occupants of the vehicle for the purpose of monitoring or following the operator, or any of the occupants of the vehicle. However, such installing, placing, or concealing of an electronic tracking device on a motor vehicle is not an offense if done by a law enforcement officer in furtherance of an investigation and carried out in accordance with applicable state and federal law. Similarly, if an electronic tracking device is placed on a motor vehicle by a parent or legal guardian who owns or leases a car for the purpose of monitoring a minor child when the child is an occupant in the vehicle, then the parent or legal guardian need not obtain consent. Furthermore,

this Act does not apply to electronic tracking devices installed in or on goods located within a motor vehicle for the purpose of tracking such goods; electronic tracking devices used remotely to disable the starter of a motor vehicle if used by a motor vehicle dealer with the express written consent of the vehicle's purchaser, lessor, or lessee; if a electronic tracking device is used by a business for the purpose of tracking vehicles that are owned by the business, its affiliates, or contractors. A violation of this Act is a misdemeanor and carries with it a penalty of up to one year in prison, a \$1,000 fine, or both.

2016 R.I. Pub. Laws ch. 092, 104. An Act Relating to Education—Holocaust and Genocide Education. This Act specifically defined “Holocaust” to mean the “systematic, bureaucratic, state-sponsored, persecution and murder of approximately six million (6,000,000) Jews and five million (5,000,000) other individuals by the Nazi regime and its collaborators. Under this Act, the state is required to collect and disseminate to every school district, private school, mayoral academy, and charter school materials on holocaust and genocide awareness and education. Furthermore, every school district is required to include in its curriculum a unit on holocaust and genocide, not limited to the materials furnished by the state. The required unit on holocaust and genocide education must be utilized during appropriate times in middle school and/or high school curricula, as determined by the local authority, and all students should have received instruction on holocaust and genocide awareness materials by the time they have graduated from high school.

2016 R.I. Pub. Laws ch. 131, 135. An Act Relating to Criminal Procedure—Domestic Violence Prevention Act. This Act established the Domestic Violence Prevention Fund used to support and promote evidence-based programs aimed at preventing domestic violence and dating violence throughout the state, and the fund shall be administered by the Rhode Island Coalition Against Domestic Violence. The Coalition shall create a committee, which will be responsible for the implementation of programs to prevent domestic violence by developing a plan for the distribution of funds, develop criteria for awarding for funds,

issue requests for proposals to organizations that will provide services to the committee, review proposals for funds, and monitor and account for funds. The Coalition shall submit an annual report detailing the expenditure of funds to the senate and house finance committee on or before February 28 of each year.

2016 R.I. Pub. Laws ch. 202, 204. An Act Relating to Criminal Procedure—Identification and Apprehension of Criminals. This Act allows a person to file a motion for the expungement of records relating to a deferred sentence ten (10) years after the completion of the sentence. After filing such a motion, the court will hold a hearing on the motion. In order for said motion to be granted, the individual must: comply with all terms of the deferred sentencing agreement, have paid any and all court-ordered fines, fees, costs, assessments, and restitution, have no criminal proceedings pending against them, and establish that he or she has good moral character.

2016 R.I. Pub. Laws ch. 352, 373. An Act Relating to Human Services—Abused and Neglected Children. This Act establishes the duty of individuals to report the sexual abuse of children in an educational program. The Act requires that anyone who has reason to know or suspect that any child has been subjected to sexual abuse by an employee, agent, contractor, or volunteer of an educational program, as defined in R.I. Gen. Laws § 40-11-2, to notify, within twenty-four hours, the Department of Children Youth and Families (DCYF). The Act then mandates that DCYF forward the report to state police or local authorities to initiate an investigation.

2016 R.I. Pub. Laws ch. 377, 499. An Act Relating to Human Services—Public Assistance Act. This Act limits the use of an electronic-benefit-transfer card. Under this Act, holders of an electronic-benefit-transfer card may not use said card at any liquor store, casino or other gambling facility, retail establishment that provides adult-oriented entertainment. An individual that receives direct-cash assistance on said card and uses such cash assistance for any prohibited use shall, for the first offense, have their cash assistance reduced for one month by the portion of the family's benefit attributable to one parent. For a second offense,

the individual's cash assistance shall be reduced by three months by the portion of the family's benefit attributable to one parent. For a third offense, an individual who receives cash assistance shall be disqualified from the direct-cash assistance program. Reciprocally, an establishment listed in this Act that accepts payment from an individual using funds from the direct-cash assistance program. Any establishment that violates this prohibition shall be guilty of a misdemeanor punishable by a fine no more than five hundred dollars (\$500); for a second offense, no less than five hundred dollars (\$500) and no more than two thousand five hundred dollars (\$2,500); and for a third, or subsequent offense a fine of not less than two thousand five hundred dollars (\$2,500). In addition to these fines, an establishment's license to conduct business may be revoked.

2016 R.I. Pub. Laws ch. 411, 412. An Act Relating to Criminal Procedure—Cell Phone Tracking. This Act forbids any agent of the state to obtain location information without a warrant unless a warrant requirement exception applies. The Act has specific notice requirements that an agent of the state must complete when he or she wishes to obtain location information. The agent or political subdivision of the state shall notify the customer no later than five (5) days after the agent or political subdivision of the state receives location information. By registered, first-class, or electronic mail, the agent or political subdivision of the state must provide the customer notice, which includes: a copy of the warrant, if applicable, a statement of the law enforcement inquiry, a statement that location information maintained by a service provider was supplied to a law enforcement, a number associated with the electronic device, and the dates for which the location information was obtained. Under the Act, an agent or a political subdivision of the state may obtain location information without a warrant under the following circumstances: in order to respond to a call for emergency services; if an agent of the state believes that an emergency involving immediate danger of death or serious physical injury to any person requires the obtaining of information relating to the emergency without delay; if the location information was generated by electronic device used as a condition of release from a penal institution or other sentencing order; with the express

consent of the owner or user of the electronic device concerned; with the express, informed consent of a parent or foster parent of a minor who is the owner or user of the electronic device; if the electronic device is lost or stolen; or if the electronic device is a government-owned device issued to an employee. An acquisition of location information shall immediately terminate when the location information sought is obtained. An agent or political subdivision may obtain, without court order, location information when that information, including metadata attached to images and videos, is otherwise publicly available on social media. By January 31 of each year, each law enforcement agency that collects location information must submit a report for the previous year, identifying the number of warrants issued for location information for an electronic device that were approved and denied. Said report must include: the agency making the application; the offense specified in the warrant are application thereof; the number of warrants granted, in full or in part, and the number denied; and the number and duration of any extensions of the warrant.