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2003 Survey of Rhode Island Law: Cases and 2003 Public Laws of Note

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Administrative Law. Interstate Navigation Co. v. Division of Public Utilities & Carriers, 824 A.2d 1282 (R.I. 2003). The standard to determine whether a commercial entity's planning amounts to a practice, act or service subject to the authority of the Division of Public Utilities and Carriers of the State of Rhode Island is based on whether a substantial step towards the completion of the said entity's goal has been taken. Secondly, the grandfather clause in section 39–3–4 does not allow an entity carte blanche to provide any new service. Rather, material changes that substantially alter the service provided for in the original certificate require a new Certificate of Public Convenience and Necessity.

Facts and Travel

Interstate Navigation Co. d/b/a The Block Island Ferry ("Interstate") and Island Hi-Speed Ferry, LLC ("Hi-Speed") are two competing ferry services that provide transportation between Galilee and Block Island.1 On February 20, 1998, Hi-Speed filed for a Certificate of Public Convenience and Necessity ("CPCN") from the Division of Public Utilities and Carriers of the State of Rhode Island ("Division") to commence high-speed ferry service to and from Block Island.2 This new high-speed service would provide a smoother ride in half the time.3

Interstate and the Town of New Shoreham ("Town") intervened at the CPCN hearing.4 During the hearing, Interstate's President, Susan Linda, refused to answer several inquiries about Interstate's future plans to provide high-speed service to Block Island, citing confidentiality and Fifth Amendment privileges.5 Ultimately, the Division approved High-Speed's application for the CPCN.6 Interstate and the Town appealed to the Superior Court. The superior court upheld the issuance of the CPCN, but re-

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2. Id.
3. Id.
4. Id.
5. Id.
6. Id. at 1284-85.
manded with instructions to set a reasonable effective period for the certificate.  

On April 2, 1999, while the appeal was pending, the Division began an investigation of Interstate for acting “deceptively when it denied its interest in entering the high-speed ferry market during Hi-Speed’s initial CPCN hearing.” The Division determined that Mrs. Linda’s assertion of the Fifth Amendment privilege and her claim of confidentiality were unfounded. The Division concluded that Interstate, through the actions of Mrs. Linda, “obstructed the regulatory process of the Division in violation of G.L. 1956 § 39–2–8.” The Division imposed a $22,000 civil penalty – $1,000 for each question Mrs. Linda refused to answer. Inferring from Mrs. Linda’s failure to respond, the Division found that Interstate “had engaged in the act of planning an entrance into the high speed-ferry market” and banned Interstate from doing so for three years. After this three-year moratorium, Interstate would be required to apply for a CPCN if it still desired to provide high-speed ferry service.

Interstate and the town appealed to the superior court pursuant to the statute. The superior court overturned the Division’s order, concluding that “the Division exceeded its statutory authority when it imposed the three-year moratorium” and required Interstate to apply for a CPCN for entry into the high-speed ferry business. Further, the court reduced the $22,000 fine to $1,000. The Division and Hi-Speed filed separate appeals and were both granted certiorari by the Rhode Island Supreme Court on April 19, 2002.

7. Id. at 1285.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
The Rhode Island Supreme Court focused on three areas: 1) the civil penalty of $22,000; 2) whether the Division had statutory authority to require Interstate to apply for a CPCN despite a statutory grandfather clause; and 3) whether Interstate's actions of engaging in planning a high-speed ferry service amounts to a "practice, act, or service," and warrants a three year prohibition by the Division. The supreme court upheld the trial court on the first issue and overturned on the second and third.

As stated, Interstate was fined $22,000 - $1,000 for each of twenty-two questions Mrs. Linda refused to answer at Hi-Speed's CPCN hearing. The Division, according to section 39-2-8, is allowed to fine up to $1,000 for failure to perform a legal duty. The supreme court agreed with the Division stating, "Mrs. Linda's failure to candidly answer the questions posed to her constituted chicanery of the most deceptive sort." However, the court held that the Division "overstepped its statutory authority in imposing a $1,000 fine for each question." The court determined that each question was of a similar nature and refused to "read slight variations of the same basic question" as separate breaches of Interstate's legal duty. The court affirmed the superior court's imposition of a $1,000 fine.

On the issue of whether the Division had authority to require Interstate to apply for a new CPCN to provide high-speed ferry service, the supreme court overturned the superior court based on statutory interpretation. "Section 39-3-3 states that 'no common carrier of persons and/or property operating upon water between termini in this state shall hereafter furnish or sell its services unless the common carrier shall first have made application to and obtained from the division certifying that public convenience and necessity required the services.'" Section 39-3-4, however, contains a grandfather clause which states that if a common carrier was incorporated before April 30, 1954, then "it is entitled to a

19. Interstate, 824 A.2d at 1287.
20. Id.
21. Id.
22. Id. (citing R.I. GEN. LAWS § 39-3-3 (2002)).
CPCN as a matter of right without participating in a public hearing."  

Interstate was incorporated prior to April 30, 1954. The superior court broadly interpreted this grandfather clause as "giving Interstate carte blanche to provide any new kind of ferry service because the carrier was operating before April 30, 1954." The supreme court, however, took a narrow approach, holding that the grandfather clause in section 39-3-4 only provided the benefit of not requiring a public hearing for the initial granting of a CPCN. The court decided that "material changes . . . that substantially alter the service provided for in the original certificate" require a new CPCN, and that providing high-speed ferry service was such a substantial change. Therefore, Interstate would need to petition for a new CPCN before it could enter into this new service.

The last issue was whether Interstate's actions of "engaging in planning," followed by Mrs. Linda's bad faith refusal to answer questions at the hearing, amounted to a "practice, act, or service" subject to sanction by the Division. The superior court held that Interstate's action did not meet such a threshold and, therefore, the Division had overstepped its jurisdiction. The supreme court agreed with the trial court's interpretation of section 39-4-10, which authorizes the Division to regulate carriers "if it finds that 'any . . . practice, act or service . . . is unjust, unreasonable, insufficient, preferential, unjustly, [or] discriminatory.'" The court held, however, that the superior court judge erred in his application of the statute and reversed.

The court analyzed whether "planning" falls within the scope of section 39-4-10. The court turned to criminal law for assistance, and looked at the standard used to determine criminal attempt. For a person to be found guilty of attempt by planning or preparation of an unlawful act that is never actually committed, that person must take a "substantial step" toward the completion of their goal. The court found that Interstate's test riding of Hi-Speed's ferry, along with several inquiries into the price and specifications of that service, was "a substantial step toward deciding

23. Id. (citing R.I. Gen. Laws § 39-3-4 (2002)).
24. Id. at 1288.
25. Id.
26. Id. at 1289 (citing R.I. Gen. Laws § 39-4-10 (2002)).
27. Id. at 1289-90 (citing State v. Ferreira, 463 A.2d 129, 132 (R.I. 1983)).
whether to ultimately acquire ... high-speed service." Because Interstate's planning was a "substantial step" and should be considered a "practice, act, or service" the Division had the "authority under section 39-4-10 to impose the three-year moratorium on Interstate." 

COMMENTARY

The court correctly decided one of the issues, but with its other two holdings it created some uncertainty and revealed an underlying flaw in the administrative hearing process. The affirmation of the lower court's fee reduction to $1,000 makes sense. Because the questions to Mrs. Linda were posed at the same hearing, on the same day, and were substantially the same, imposing a per-question fine is unfair. The Division would be in a position to ask an unlimited amount of questions for the purpose of increasing the amount of any fines. The court correctly decided that refusal to answer all twenty-two questions fell under the same legal duty and warranted a single fine.

The next issue involved the Division's authority to require Interstate to apply for a new CPCN to provide high-speed ferry service. The court correctly held that if there is a material change to the existing CPCN, regardless of the date of incorporation, the carrier must apply for a new CPCN. As the court states, if the grandfather clause is construed broadly, a carrier such as Interstate will have "carte blanche" to create any new types of services it wants. The court's narrow interpretation is therefore an accurate interpretation of the legislature's intent in regulating these services. Giving free reign to certain companies would frustrate this intent to regulate services through a CPCN.

However, applying the court's own rule to Interstate's service raises another question: Is the creation of high-speed service a material change? The court asserted that "Interstate's original CPCN did not and could not have contemplated the new, high-speed technology" and that "Interstate's use of such a substantially different service naturally would be a material alteration."
Whether high-speed service is a material change is a question for a fact-finder, so the court relied on the determination of the Division. Interstate is not altering its service to accommodate a different location; it is simply increasing the delivery speed of its existing service through technology. If Interstate decided to operate its existing ferries at a slower speed, would this be a material change?

The holding that Interstate's actions of "engaging in planning" high-speed service subject it to the authority of the Division, creates two issues: 1) whether the "substantial step" standard applied by the court is appropriate; and 2) whether the facts of the case actually arise to a "substantial step." The court uses a criminal attempt standard to judge the business planning actions of a company. Treating a criminal and a company similarly may result in unintended consequences. Under this standard, a company could be brought before an agency and sanctioned for simply planning a new venture. As a result a chill in business planning could occur.

Even in a criminal context, "to establish the exact placement of the dividing line where preparation ends and attempt begins" has been described as a "quagmire." In fact, the term "substantial step" differs depending on the nature and the type of crime being committed. As Justice Kelleher explained in State v. Latraverse, "[L]iability for a relatively remote preparatory act is precluded, but at the same time dangerous individuals may be lawfully apprehended at an earlier stage of their nefarious enterprises than would be possible under the [other] approaches." Here, the court applies the standard outside the realm of criminal law. Certainly society wishes to discourage the actions of criminals to prevent unlawful acts, even if the crime does not actually

32. There is a fundamental flaw in the administrative hearing process in Rhode Island. See generally Daniel W. Majcher, Administrative Injustice: The Rhode Island State Agency Hearing Process and a Recommendation for Change, 9 ROGER WILLIAMS U. L. REV 735 (2004). The question of materiality should be decided by a neutral fact-finder. The Division is not neutral and is a party in the current dispute. Reliance on the Division's findings, therefore, creates the appearance of impropriety and possible inequity.


34. Id. at 895.

35. Id. (citing MODEL PENAL CODE § 5.01, comment at 47 & 48, (Tent. Draft No. 101960)).
occur. However, should a capitalist society discourage a company from business planning in the same manner it discourages a criminal from committing a crime? Applying this standard in a non-criminal, commercial setting is harsh and may chill a company’s ability to plan for future business needs. This application therefore seems inappropriate.

Even if this is the correct standard, the question of whether Interstate’s actions constitute a “substantial step” is an issue of fact. The court again relies on the findings of fact by the Division, when it asserts that taking multiple trips and inquiring about prices and specifications rises to this level. The court ignores the fact that Interstate, having taken these actions, may ultimately decide that it has no interest in pursuing a high-speed ferry service. Even if Interstate does decide to pursue high-speed services, these actions may still easily fall under a category of garden-variety business planning. By relying on the Division’s finding that these actions constitute planning, the court creates law that could potentially impact the Rhode Island business community.

The problem may lie far deeper than the court’s decision. The Rhode Island administrative hearing process is inherently flawed, creating difficulty for the courts. In fact, the court is caught in a situation which can only be described as a “Catch-22.” The court may either follow the standard used in agency appeals by not substituting its own judgment for that of the agency, and end up with inequity, or it may inappropriately use its own judgment (as the superior court did here) and deliver presumed justice.

36. The superior court overturned the Division’s findings of fact. On appeal from an agency, the superior court judge “shall not substitute [his or her] judgment for that of the agency as to the weight of the evidence on questions of fact.” Interstate, 824 A.2d at 1286 (citing Rocha v. State Pub. Util. Comm’n, 694 A.2d 722, 725 (R.I. 1997)). The decision of the agency must be upheld if it is supported by “legally competent evidence on the record.” Id. (citing Rocha, 694 A.2d at 725). The superior court may only reverse an agency decision if “substantial rights . . . have been prejudiced because the administrative findings . . . are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error or law;

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or,
The hearing officer making factual determinations during a hearing is an employee of the Division.\textsuperscript{37} The superior court and later the supreme court are put in a position of relying on the findings of fact from a potentially biased source: the Division's employee—one who is writing a decision that must be approved by his or her superior. Moreover, if a material issue of fact arises (as it did in determining whether the new high-speed ferry is a material change, and whether Interstate's planning constituted a "substantial step"), the court would be forced to remand the issue back to the agency—in essence, the court would require one of the parties in a lawsuit to decide the outcome. Such a hearing process is flawed and gives rise to issues of bias and the appearance of impropriety, which undermine the administrative hearing process.\textsuperscript{38} One solution is to create a new process, as other states have done, using an independent state agency with the sole responsibility of providing neutral hearing officers.\textsuperscript{39}

\textbf{CONCLUSION}

While the holdings here only apply to the specific statutes involving the Division, there are several undercurrents which may have a broader impact. The court found that: 1) the Division overstepped its authority by imposing a $22,000 fine; 2) the Division was within its statutory jurisdiction in requiring Interstate to apply for a new CPCN despite a grandfather clause; and 3) the Division appropriately sanctioned Interstate through a three-year moratorium. The two major resulting rules are that any material alteration to an existing CPCN requires a public hearing, and that

\begin{itemize}
\item \textsuperscript{37} R.I. GEN. LAWS § 42–35–15(g) (2002).
\item \textsuperscript{38} In reviewing the trial court's decision on certiorari, the supreme court applies "the 'some' or 'any' evidence test and reviews the record to determine if there is some or any evidence in the record to support its findings." Interstate, 824 A.2d at 1286 (citing Rocha, 694 A.2d at 726 (quotation omitted)).
\item \textsuperscript{39} For a complete discussion of the administrative adjudication process in Rhode Island and its inherent issues see generally Majcher, supra note 33.
\end{itemize}
planning falls under the Division's authority, if a carrier takes a "substantial step" towards the completion of its goal. If the "substantial step" is applied in other agency issues, a company may find itself facing fines and sanctions for making simple observations for planning purposes. More troubling is that in both situations the court relied on factual findings supplied by the Division, made during a potentially biased and flawed hearing process.

Daniel W. Majcher

FACTS AND TRAVEL

On May 11, 2001, Joseph H. Hagan was pulled over and arrested by the Portsmouth police department for suspected driving under the influence of liquor. Hagan consented to a Breathalyzer test after being taken to the Portsmouth police station, but that department’s Breathalyzer machine was not functioning properly. When the machine operator informed his supervisor of the malfunction, Hagan was transported to Middletown, a town adjacent to Portsmouth. Using that town’s Breathalyzer machine, Hagan’s blood alcohol concentration (BAC) results exceeded 0.15, and he was charged for driving under the influence of liquor.

Prior to trial in Rhode Island District Court, Hagan filed a motion to suppress the results of the Breathalyzer test taken outside of the town of Portsmouth. The gravamen of his motion was that the town of Portsmouth police possessed no authority to detain him while in Middletown, and that the Breathalyzer test results should be suppressed as “fruits of an unlawful custodial detention.” The trial judge agreed. He held that the Portsmouth police exceeded their lawful authority by transporting Hagan out of the town of Portsmouth. Thus, the results of the Breathalyzer test from Middletown were inadmissible. In addition, the trial judge held that, even though the Portsmouth police officers acted in good faith, they failed to exhaust other alternatives for obtaining Hagan’s BAC prior to taking him outside the town limits. In this decision, the trial judge closely followed the reasoning in *State v. Marran*, a Rhode Island Superior Court case.

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2. *Id.*
3. *Id.*
4. *Id.* Driving under influence of liquor is codified at R.I. GEN LAWS § 31-27-2 (2002). The legal BAC limit is 0.08. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 1258.
facts substantially tantamount to the facts in Hagan, the trial judge suppressed the evidence of the defendant's Breathalyzer test on the basis that the local police failed to pursue the alternative of taking a blood or urine sample in a hospital in the same town. Similarly, the trial judge in Hagan also looked to the police's failure to look to other reasonable alternatives for determining Hagan's BAC. For example, the Portsmouth police could have stopped at a state police barracks located in the town of Portsmouth. Thus, the judge ruled to suppress the Breathalyzer evidence prior to trial, and the town of Portsmouth appealed the ruling. The Rhode Island Supreme Court granted a petition for a writ of certiorari.

BACKGROUND

In the 1881 case, Page v. Staples, the Rhode Island Supreme Court recognized that the power of a municipal police department does not extend beyond the municipality's borders. However, the court also discussed the power of the police to pursue a criminal formerly in custody beyond the town border, capture the criminal, and return to the town. Outside of this limited scenario, the supreme court noted that there must be a statutory exception to grant a local police department authority outside of its own town boundaries.

One such statutory exception was challenged in the 2002 case, State v. Ceraso. The exception challenged in that case was the emergency police power exception, which allows a police chief to

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10. Id. at *11.
12. Id. at 1260.
13. Id. at 1258.
14. Id. at 1256-57.
15. 13 R.I. 306 (1881).
16. In Page, a Providence sheriff transported a suspect in custody through Kent County. Id. at 307-08.
17. Id. at 308. This power has been expanded by allowing police to pursue suspected violators of the motor vehicle code beyond town boundaries when the police are in "close pursuit" of the suspect. R.I. GEN. LAWS § 12-7-19 (2002). The authority of police officers to engage in close pursuit was most recently affirmed by the court in State ex rel. Town of Middletown v. Kinder, 769 A.2d 614 (R.I. 2001).
request emergency assistance from another police department.\textsuperscript{20} When the assisting officers arrive on scene, they operate under the authority granted to the requesting police chief.\textsuperscript{21} This power is sustained until the requesting police chief releases the assisting officers.\textsuperscript{22} Furthermore, the power extends beyond the reason for the request, thereby authorizing all responding officers to enforce all applicable laws in the police chief's jurisdiction.\textsuperscript{23} In Ceraso, while assisting the Jamestown police with a rollover accident on the Newport Bridge, a Newport police officer stopped a motorist who was suspected of driving under the influence of alcohol.\textsuperscript{24} The conviction was affirmed by the Rhode Island Supreme Court on the basis of the statutory exception to the limits of lawful authority.\textsuperscript{25}

In addition to this statutory exception, the Rhode Island Supreme Court has created a judicial exception. In Cioci v. Santos,\textsuperscript{26} a police officer transported a suspect in custody to a hospital outside of the town limits for treatment after a suicide attempt.\textsuperscript{27} The court upheld the officer's decision to seek treatment and noted that police officers should act in the interest of the suspect's well-being without concern for lost opportunity to prosecute the suspect.\textsuperscript{28}

In State v. Locke,\textsuperscript{29} a case that closely mirrors the facts of Hagan, the Rhode Island Supreme Court upheld a police officer's decision to transport a DUI suspect from Charlestown to Westerly for a Breathalyzer test.\textsuperscript{30} Unlike in Hagan, the reason for the transport in Locke was that the town of Charlestown had not yet purchased a Breathalyzer machine.\textsuperscript{31} The court noted that the police officer was acting in "emergency circumstances, in the interest of protecting the driver from harming himself or the public at

\textsuperscript{20} R.I. GEN LAWS § 45-42-1 (2002).
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Ceraso, 812 A.2d at 832.
\textsuperscript{25} Id. at 836.
\textsuperscript{26} 207 A.2d 300 (R.I. 1965).
\textsuperscript{27} Id. at 301.
\textsuperscript{28} Id. at 304.
\textsuperscript{29} 418 A.2d 843 (R.I. 1980).
\textsuperscript{30} Id. at 848.
\textsuperscript{31} Id.
large and the need to obtain an accurate blood alcohol level without undue delay.” The court distinguished Page v. Staples by noting that the officer in Locke transported the arrestee outside of the municipality while executing “his official duties,” not just for “mere convenience.” Thus, even though no statutory exception granted the Charlestown police authority to transport the arrestee into Westerly for the Breathalyzer test, the court created a judicial exception based on the exigent conditions of the situation.

THE COURT’S ANALYSIS AND HOLDING

Without concluding that the Portsmouth police department acted under exigent circumstances, the Rhode Island Supreme Court unanimously reversed the district court judge’s decision to suppress the Breathalyzer test results.

In State v. Locke, the court recognized that the transportation of a properly detained suspect beyond town boundaries while in pursuit of official duties was distinct from similar transportation for mere convenience. Thus, the Hagan court moved away from the rule of law established in Page v. Staples by distinguishing the arrest of a suspect outside of an officer’s jurisdiction and the transport of an arrestee beyond the town’s borders in pursuit of “legitimate law enforcement duties.” Here, the court defined the police department supervisor’s decision to send Hagan to Mont-eval for a Breathalyzer test as the pursuit of “gather[ing] and preserv[ing] evidence for use at trial.” Furthermore, the court concluded that this purpose constituted a legitimate law enforcement duty and reversed the district court’s decision to suppress the Breathalyzer test results.

32. Hagan, 819 A.2d at 1259. In Marran, the Rhode Island Superior Court interpreted Locke as limiting a police officer’s authority to transport an arrestee outside of the municipality only when these emergent circumstances are present. No. 94-0525A, 1996 WL 937019, at *8 (R.I. Super. Ct. Dec. 6, 1996).
34. Id. at 1261.
35. Locke, 418 A.2d at 848.
37. Id.
38. Other legitimate law enforcement duties enumerated by the court include transportation of a suspect to court for a bail hearing or preliminary
COMMENTARY

While the logic behind Hagan is a reasonable extension of Rhode Island law, its expansion of the extraterritorial authority of local police departments does not comport with the conditions in the neighboring states of Connecticut and Massachusetts. In Massachusetts, only statutory exceptions provide police officers with legitimate extraterritorial authority, and only two exceptions presently exist: fresh pursuit and specially sworn officers. Like Rhode Island, Connecticut recognizes a judicially created exception to the statutory limit of extraterritorial police authority, but requires a finding of emergent circumstances before the exception applies. In State v. Stevens, which cited to Locke for persuasive authority, the Connecticut Supreme Court affirmed the admission of blood test results in a DUI case where the blood test was taken at a hospital in Rhode Island rather than Connecticut. In its holding, however, the court explicitly limited the exception to situations where the police must travel out of the jurisdiction to "accommodate the medical needs" of the suspect.

Conversely, Hagan abandoned the requirement for emergent circumstances from Locke with little explanation. This result should be remedied by either legislative action or imposed limits in future cases. Clever municipalities, police officers, and prosecutors might focus on key phrases of the case to greatly expand the extraterritorial authority granted. The court concluded that the "duty to gather and preserve evidence for use at trial" constitutes a "legitimate law enforcement duty" and can serve as foundation to transport a lawfully detained suspect outside of the municipality's boundaries. Broad interpretation of this law enforcement

41. 620 A.2d 789 (Conn. 1993).
42. See generally id.
43. Id. at 796.
duty could include evidence for impeachment and collateral issues, in addition to non-collateral issues.\textsuperscript{45}

For example, under a strict interpretation of \textit{Hagan}, police officers could transport an intoxicated driver to an out-of-town tavern where the driver was imbibing earlier to determine the veracity of any statement made by the driver. The information obtained during the trip to the tavern could eventually be admitted in court to impeach the driver on his story about how long he was at the tavern, how many drinks he drank, and what types of drinks he drank. If the driver denied any aspects of the evening's events, this could also be admitted in court. Such abuses of extraterritorial authority violate the “strong public policy of jurisdictional integrity”\textsuperscript{46} and can only be curbed by requiring a finding of exigent circumstances before the exception applies.

\textbf{CONCLUSION}

After \textit{Hagan}, a police officer can lawfully transport an arrestee outside of the officer's municipality when pursuing legitimate law enforcement duties. Unless changed by future case law or legislation, there is no need to show emergent conditions before the exception applies. However, the rule of law from \textit{Hagan} could be limited by a narrow reading of the holding coupled with the inherent urgency of obtaining an accurate blood alcohol concentration from a suspected drunk driver.

Wayne Helge

\textsuperscript{45} However, the rule of law established in \textit{Hagan} is not without its limits. The court did expressly limit its holding to situations where the suspect is already in lawful custody.

Criminal Procedure/Evidence. State v. Werner, 831 A.2d 183 (R.I. 2003). The Rhode Island Supreme Court found, inter alia, that the Interstate Agreement on Detainers Act and the constitutional right to a speedy trial had not been violated; that the police had probable cause to arrest the defendant based on exigent circumstances even if constructive entry had been employed; that nondisclosure of expert testimony was not a discovery violation; that the defendant's right to cross-examine was not improperly limited; and that the denial of the defendant's four motions for mistrial was proper.

FACTS AND TRAVEL

A criminal information was filed in the State of Rhode Island Providence County Superior Court charging the defendant, Keith Werner, with six felony counts.¹ On May 24, 1994, a trial on the first five counts was held in the State of Rhode Island Kent County Superior Court.² The jury found the defendant guilty on Counts 1 and 2 of the lesser charge of assault with a dangerous weapon and guilty on Counts 3, 4, and 5.³ The defendant filed a motion for new trial which was denied.⁴

On May 15, 1988, Michael McConigle ("McConigle") stopped at Johnny Ray's Beef & Brew ("the bar") in West Warwick, to check on his sister who was bartending that night.⁵ Upon leaving the bar, McConigle fought with a man driving a vehicle which looked like a Grenada.⁶ While the driver was pulling a sawed off

¹. State v. Werner, 831 A.2d 183, 187 (R.I. 2003). The defendant was charged with the following: 1) intent to murder Loran Stoddard; 2) assault with intent to murder Frank Burton; 3) assault with a dangerous weapon on Michael McConigle; 4) possession of a loaded weapon in a vehicle; 5) possession of a sawed-off shotgun; and 6) a felon in possession of a firearm. Id.
². Id. Count 6 had been severed prior to trial.
³. Id. On August 4, 1994, the defendant was sentenced to 10 years imprisonment on the three counts of assault with a dangerous weapon, to be served concurrently; to 10 years imprisonment on Count 4, possession of a loaded weapon; and to 5 years imprisonment on Count 5, possession of a sawed off shotgun. The sentences on Counts 4 and 5 were to be served concurrently but consecutively to the sentence imposed on Counts 1, 2, and 3. Id.
⁴. Id.
⁵. Id.
⁶. Id.
shotgun from a garbage bag, McConigle ran back into the bar and told his sister to call the police.7

Loran Stoddard ("Stoddard"), who lived in the apartment above the bar, entered the bar at 11:30 p.m.8 After hearing the commotion, Stoddard attempted to end the argument.9 The driver, who Stoddard later identified as the defendant, told Stoddard to mind his own business.10 When Stoddard failed to do so, the defendant shot Stoddard in both knees.11

Frank Burton ("Burton") was inside the bar on the night in question and heard McConigle shouting about a man outside with a gun.12 When Burton saw the defendant aiming the shotgun at Stoddard, he quickly closed the bar door.13 He then stood at the door listening.14 Hearing silence and believing the gunman had left, Burton open the door.15 Burton saw Stoddard lying on the ground.16 The gunman then fired at Burton, and the pellets ricocheted off the sidewalk striking Burton’s arm and legs.17

Soon after, a West Warwick policeman arrived and was given a description of the gunman by McGonigle – a white male approximately six feet tall with dirty blond hair.18 The officer was also given a description of the gunman’s vehicle – a 1978 or 1979 gray Ford Grenada or Mercury Monarch with license plates numbered IF-536.19 The described vehicle was located on St. John Street later that night by another officer.20

Sergeant Appollonio of the West Warwick Police Department ascertained that the vehicle was empty and unlocked.21 Inside the car, Sergeant Appollino found a Rhode Island registration listing

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7. Id.
8. Id.
9. Id.
10. Id. at 188.
11. Id. At the hospital on May 15, 1988, Stoddard was shown a photo array, and Stoddard identified the defendant as the gunman. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id.
Dennina Prefontaine ("Prefontaine") as the owner of a 1976 blue Plymouth Fury, a bill of sale from a Diane Levy to Prefontaine, describing the subject vehicle as a 1979 gray and black Mercury Monarch, and two magazine subscriptions listing the defendant's address as 200 Lockwood Street, West Warwick. The police brought McConigle to the vehicle, and he identified it as the one used by the gunman.

The police then responded to 200 Lockwood Street and were greeted by a Cynthia Mackabee ("Mackabee"), who identified herself as the defendant's sister. Mackabee said she believed her brother lived with Prefontaine and told them the vicinity of their apartment. After checking with the Traffic Division, the police discovered that the defendant's listed address was 14B Brookside Avenue.

On May 15, 1988, the police went to the apartment, banged on the door, and announced their presence. Prefontaine exited the apartment with a Norman Ducharme, whom she said she met at a bar the night before. A detective positioned at the rear of the house saw the defendant attempting to exit through a window. After the detective yelled halt, the defendant ducked back inside, and shortly thereafter, appeared at the front door. As the defendant emerged, he was handcuffed and taken into custody.

After obtaining a warrant, the police conducted a search of the apartment. From Apartment 14B, the detectives seized photographs depicting the defendant with a gun; a shotgun shell box containing one shotgun shell; six more shotgun shells, five live and one spent; and a shotgun cleaning kit. The detectives then

22. Id. at 189.
23. Id.
24. Id.
25. Id.
26. Id. It was later discovered that the defendant had moved in with Prefontaine but that the relationship had deteriorated and he was then living in a different apartment in the same building. Id.
27. Id.
28. Id. at 190.
29. Id.
30. Id.
31. Id.
32. Id.
33. Id.
went to Apartment 14A, a vacant apartment. Through a partially open door, the detectives saw a plastic bag similar to the one described by the witnesses at the shooting. Inside the ceiling, the detectives found a Mossberg pump-action shotgun. Although no identification could be obtained from the single, partial print on the gun, McCongile identified the gun as the one pointed at him outside the bar. Kenneth Gammon, another witness, also identified the gun as the one depicted in the photographs seized from Apartment 14B.

At trial, Prefontaine testified that she and the defendant used a silver and red Mercury Monarch, bearing license plate number IF-536, although the vehicle was not officially registered. She also testified that she argued with the defendant on the evening of May 14, 1988, and the defendant took the keys to the Monarch and left.

**THE COURT'S ANALYSIS AND HOLDING**

Many issues were presented on appeal. This survey, however, focuses solely on the court's denial of the defendant's motion for a new trial.

The defendant alleged that on four separate occasions the jury heard improper evidence regarding the defendant's prior criminal activity. First, McConigle testified that when he first encountered the defendant, the defendant asked him for drugs. Defense counsel objected and moved for a mistrial alleging that the reference was "highly prejudicial." The trial court found that this was an "integral part of the testimony" and any prejudice would be dispelled with a curative instruction.

In affirming the trial court, the Rhode Island Supreme Court stated that for bad conduct evidence to qualify as a basis for a

34. Id.
35. Id.
36. Id.
37. Id.
38. Id.
39. Id.
40. Id.
41. Id. at 206.
42. Id.
43. Id.
44. Id.
mistrial, the “comment must not only be prejudicial but also irrelevant.” 45 The court agreed with the trial court that the conversation was “an integral part of the witness’s testimony.” 46 The court held that a defendant does not have to be shielded from relevant evidence just because it is prejudicial. 47 The court believed the trial justice was able to minimize the prejudice by his long curative instruction to the jury. 48

Second, the defendant argued that he was entitled to a mistrial as a result of Stoddard’s testimony stating that he identified the defendant at the hospital from “a bunch of mug shots.” 49 No objection was made to this first comment, but Stoddard again stated he identified the defendant from a mug shot. 50 Defense counsel then objected and moved for a mistrial claiming this testimony, combined with the reference to drugs, was highly prejudicial. 51 The trial court denied the motion but issued a lengthy cautionary instruction. 52 With relatively no discussion, the Rhode Island Supreme Court affirmed the denial of the motion for new trial and found that the jury instruction cured any possible prejudice from the testimony. 53

Third, the defendant argued that he was entitled to a mistrial when Prefontaine testified she lived with the defendant’s sister when the defendant was in jail. 54 The trial court denied the motion and gave another lengthy cautionary instruction. 55 Again, the Rhode Island Supreme Court affirmed the denial of the motion for mistrial based on this testimony. 56 The court, in viewing a totality of the testimony, reasoned that one reference to jail did not preju-

45. Id. (citing State v. Cline, 405 A.2d 1192, 1210 (R.I. 1979)).
46. Id.
47. Id.
48. Id. at 207.
49. Id.
50. Id.
51. Id.
52. Id.
53. Id.
54. Id.
55. Id. The instruction to the jurors stated the court did not know whether the defendant had been in jail as Ms. Prefontaine testified, and even if he was, it was of no concern to them. The judge further instructed the jurors to decide the case on its merits, or lack thereof, and to disregard any notion of whether or not the defendant had been in jail.
56. Id.
dice or inflame the jury to such an extent that it could not be impartial.57

Fourth, the defendant argued that a mistrial should have been granted during the testimony of Gammon.58 Gammon sought to change his trial testimony from the testimony given at voir dire examination regarding the shotgun in the photograph seized from Apartment 14B.59 At trial, Gammon testified the gun introduced into evidence was not the same gun depicted in the photograph.60 The prosecutor asked Gammon about his prior testimony and asked whether he received threats regarding his testimony.61 Gammon replied in the negative, and at this point, the defense counsel again moved for a mistrial based on significant prejudice.62 The trial justice, while noting that the prosecutor's question was "imprudent," denied the motion and gave another cautionary instruction.63 The Rhode Island Supreme Court affirmed the trial court's denial of the motion for mistrial because, in accordance with Brown, a mistrial should be granted for improper prosecutorial questions only if the statement is "inexpiable."64 The court found the question presented by the prosecutor did not create "incurable prejudice", and the curative instruction was effective.65 Additionally, the court did note that the witness's answer was in the negative.66

Lastly, the defendant argued that these four instances described above, when viewed in the cumulative, created fundamental unfairness requiring reversal.67 The Rhode Island Supreme Court held the trial court's decision to deny a mistrial should be afforded great weight and should not be disturbed unless the trial

57. Id. at 208 (citing State v. Brown, 522 A.2d 208, 210-11 (R.I. 1987)).
58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
63. Id. The cautionary instruction stated that no evidence of threats or coercion had been introduced in his case so the jury was to disregard the question. The court also pointed out to the jury that the answer to the question was "no" anyway.
64. Id.
65. Id.
66. Id.
67. Id.
judge committed an abuse of discretion. The court concluded the trial judge did not abuse her discretion on the four motions for mistrial and, as a result, the cumulative effect of these rulings did not deprive the defendant of a "fundamentally fair trial." 

**COMMENTARY**

Why should great deference be given to the trial judge's determination regarding how improper evidence affects the jury? The answer is the trial judge is in the best position to make such a decision. As best stated by the court in *State v. Tempest*, "The trial justice possesses a 'front-row seat' at the trial and can best determine the effect of the improvident remarks upon the jury." Without allowing the trial justice such great discretionary power, every case in which an improper question or answer arises would result in a mistrial. The effectiveness of the judicial system would seriously be undermined.

While individual errors are often curable by a judicial instruction, cumulative errors may prejudice the jury to the point where the defendant should be granted a new trial. As guided by precedent, new trials should be granted when the "cumulative effect of improper evidence is of such a character that the defendant was prejudiced thereby to such an extent that only a new trial can cure it." However, the number of errors needed to reach this prejudicial point cannot, and should not, be set at a specific number. As stated in *State v. Yelland*, "Determination of whether a challenged remark is harmful or prejudicial cannot be decided by any fixed rule of law." Rather, the trial justice, who is in the best position to make such evaluations, must assess the effect of the statement by placing the remark in its "factual context."

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68. *Id.* (citing *State v. Aponte*, 800 A.2d 420, 427 (R.I. 2002)).
69. *Id.*
70. 651 A.2d 1198, 1207 (R.I. 1995).
71. *State v. Pepper*, 237 A.2d 330, 385 (R.I. 1968) (evidence was admitted on four separate occasions which was clearly not relevant to the issue at trial - the defendant's state of mind; therefore, the defendant should have been granted a new trial).
CONCLUSION

The above reasoning is well-settled law in Rhode Island. While, at times, it may appear unfair to a defendant to allow a jury to deliberate on a case in which they heard evidence which could prejudice the most reasonable person, we must believe that jurors will follow the judge’s instructions – not only curative instructions but the instructions on the law given before deliberation. Without such a belief, the judicial system would be overburdened with mistrials. Moreover, the trial justice is in the best position to evaluate whether prejudicial evidence can be remedied by a curative instruction. The trial justice is the one person in the courtroom who is truly impartial, understands the law, and is there to guarantee a fair trial to all parties.

Michelle L. Colson
Corporations. National Hotel Associates v. O. Ahlborg & Sons, Inc. 827 A.2d 646 (R.I. 2003). A related entity and president were found liable for an arbitration verdict rendered against an affiliated corporate entity because the totality of the circumstances indicated that the affiliate corporation was not an independent entity, but rather an instrument of the president and related entity.

FACTS AND TRAVEL

Construction Services, Inc (CSI), a non-union construction company, bid to complete a construction project for the plaintiff, National Hotel Associates (NHA).¹ CSI was solely owned by Richard Ahlborg (Richard) who owned and ran both CSI and a similar construction entity, O. Ahlborg & Sons, Inc. (O. Ahlborg).² NHA awarded CSI the construction bid based on representations made by Richard that O. Ahlborg and Richard, personally, were the same entities as CSI.³ Renovations on the hotel began in the fall of 1983.⁴ The project was delayed in December because of problems with CSI's cash flow.⁵ Further delays resulted and eventually Richard and O. Ahlborg assumed control of the project.⁶ CSI's construction manager was replaced with O. Ahlborg's construction manager.⁷ CSI was able to continue the project only because of Ahlborg's financial backing, since CSI was otherwise unable to borrow money itself.⁸

CSI commenced arbitration proceedings to obtain approximately $500,000 from NHA for the added expenses of the project.⁹ NHA counterclaimed based on CSI's poor performance, which resulted in delay and lost profit for NHA.¹⁰ The arbitration resulted

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2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id. at 649.
10. Id.
in favor of NHA, rendering an award of $230,687.20. On July 19, 1986, the Superior Court of Rhode Island affirmed the judgment but the execution was returned unsatisfied. The failure to comply with the judgment was apparently due to efforts on behalf of Richard and O. Ahlborg, including preferential payments and the formation of an additional company, Critical Path Construction Co. (CPC), which was used to funnel remaining assets out of CSI.

In response to CSI's failure to satisfy the arbitration judgment, NHA filed suit against O. Ahlborg and Richard on four distinct counts, leading to the case at hand. Count one alleged that CSI's corporate entity should be disregarded, allowing NHA to satisfy the judgment against both Richard and O. Ahlborg because the companies were mere instrumentalities of Richard. Count three alleged that Richard violated his fiduciary duty to CSI's creditors when he made transfers in a preferential fashion. CSI subsequently stipulated to summary judgment on count three, but upon newly discovered evidence, requested the motion be vacated. The trial court judge refused to vacate the motion despite the new evidence. Count four alleged the companies had violated the Uniform Fraudulent Transfer Act. Ultimately, the trial judge refused to disregard CSI's corporate entity or find that the defendants should be liable for CSI's judgment on other grounds.

On appeal, the Rhode Island Supreme Court overturned the lower court in favor of the plaintiff on both counts three and four.

11. Id.
12. Id.
13. Id.
14. Id. The appellate court declined to address count two, which claimed that O. Ahlborg and Richard were liable as guarantors. Id. at 651.
15. Id. at 650.
16. Id.
17. Id. at 650-51. The evidence was that of the post-arbitration behavior, such as forming a company to channel assets out of CSI and making preferential payments. Id. at 651.
18. Id.
19. Count four was added by amendment after the defendant released previously suppressed incriminating evidence regarding CPC, CSI, Richard, and O. Ahlborg. Id.
22. Id. The Supreme Court of Rhode Island did not address count one, which argued that the defendants should be directly liable for the corporation, because the plaintiffs did not raise that issue on appeal.
BACKGROUND

In evaluating whether the corporate veil should be pierced, Rhode Island observes separation between two corporations with common stock “unless the totality of the circumstances surrounding their relationship indicates that one of the corporations ‘is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality, agency, conduit or adjunct of the other.’”23 Further, Rhode Island recognizes that when a corporation becomes insolvent “directors should be regarded as trustees of the creditors to whom the property of the corporations must go.”24 Additionally, Rhode Island has adopted the Uniform Fraudulent Transfer Act, which in part deals with preferential payments and corporate duties.25

THE COURT’S ANALYSIS AND HOLDING

Piercing the corporate veil

The Rhode Island Supreme Court held that the trial justice overlooked and misconceived the supporting evidence that CSI was not a separate entity from O. Ahlborg.26 The court ruled that the trial justice’s decision was incorrectly based on the time period of CSI’s inception rather than on their actions with respect to this project and as a corporation as a whole.27 Although factors that the trial court considered were relevant (such as separate annual reporting, tax returns, financial records, bank accounts, and articles of incorporation), the factors do not overcome the fact that the entities were functionally identical.28 Factors in this case, in the totality of circumstances, overwhelmingly demonstrated that CSI was not a separate entity from O. Ahlborg.29 Richard dominated O. Ahlborg and CSI, resulting in no distinction between the com-

27. Id.
28. Id.
29. Id. at 652.
The two companies had the same employees, officers, business contacts, and materials. Further, CSI was initially inadequately funded and could not borrow money independently of O. Ahlborg. Additionally, Richard held the companies out to be the same company, making statements such as CSI was the "Siamese twin" of O. Ahlborg and that he, personally, "was O. Ahlborg." These factors led the Rhode Island Supreme Court to conclude that the plaintiff may pierce the corporate veil and recover from the parent, related entities, and president of CSI.

**Fiduciary Duty**

Richard breached his fiduciary duty to the creditors of CSI. The court ruled the actions subsequent to the arbitration ruling were voluminous and demonstrated the entire scheme to defraud CSI's creditors, therefore necessitating summary judgment be vacated. Two weeks after the judgment was entered, Richard formed CPC, which operated out of the same facility as CSI and O. Ahlborg, performing CSI's previous duties. Richard was the majority stockholder and self-appointed treasurer of CPC. All of CSI's contracts and jobs were transferred to CPC. Approximately $920,573 passed through CSI to CPC. Additionally, CSI repaid a $50,000 loan to the Mayfield Associates for which Richard was also personally liable. CSI made a $20,000 repayment of a loan directly to Richard for a loan he had taken from Citizens Bank to

30. *Id.* at 653-54.
31. *Id.* at 654.
32. *Id.* at 648 n.3.
33. *Id.*
34. *Id.* at 654-55.
35. *Id.* at 657. As indicated previously, NHA had stipulated to summary judgment on this claim because the defendants purposely concealed evidence, including the formation of CPC, for nine years. *Id.* at 650. The court held that due diligence in discovery could not have overcome the trial counsel's intentional misconduct that violated not only discovery rules but also Article V of the Supreme Court Rules of Professional Conduct. *Id.* at 657.
36. *Id.* at 647.
37. *Id.* at 649.
38. *Id.*
39. *Id.*
40. *Id.* at 649-50.
41. *Id.* at 650.
keep CSI afloat. These actions were concealed from the plaintiff when the defendants repeatedly denied discovery requests, including deposition notices and a subpoena for documents that would have revealed the transfers and CPC’s very existence.

When the evidence finally became available, the trial court allowed the plaintiff to amend its complaint but ultimately denied and dismissed the claim. The trial court justice concluded that the evidence of CSI’s asset transfer, including the creation of CPC, was not relevant to recovering the arbitration award because the transfers occurred after the arbitration award. Since the directors of the corporation are the trustees for the stockholders until a company becomes insolvent, the trial court held that Richard had an interest in representing stockholders, not a fiduciary duty to CSI’s creditors.

On appeal, the Rhode Island Supreme Court first held that the evidence was substantial that Richard made payments on loans and used CPC to the advantage of O. Ahlborg and himself, personally. Then the court explained that because the company was facing a judgment that rendered it insolvent, Richard did owe a fiduciary duty to the creditors and could not make preferential treatment for his own interest. The court did not choose to adopt the minority position raised by the defendants, which allows an insolvent corporation to prefer one creditor over another creditor, even if he or she is an officer of the corporation, because of the obvious conflict of interest involved in this position. Such a position is unfair to the other creditors because it allows for the director to foster insolvency and protect their own interest to the detriment of the remaining creditors. Therefore, the court came to the conclu-

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42. Id.
43. Id.
44. Id. at 655.
45. Id. at 656.
46. Id.
47. Id.
48. Id. ("It is inequitable to allow directors who control the affairs of the corporation to act in such a way that corporate insolvency is inevitable or to place themselves in a favorable position by protecting their own interest to the detriment of the remaining creditors.")
49. Id. at 656-57. Case law in Indiana, Michigan, and Missouri support this position. 19 C.J.S. Corporations § 753 (2003).
50. Nat’l Hotel Assoc., 827 A.2d at 656.
sion that Richard had a fiduciary duty to the creditors of CSI which was breached by the transactions.\textsuperscript{51}

\textit{Fraudulent Transfers}

The court further held that because Richard engaged in behavior that amounted to preferential treatment and insider dealing, he was liable under the Uniform Fraudulent Transfer Act (UFTA).\textsuperscript{52} As discussed above, the evidence that the trial court failed to properly consider demonstrated preferential treatment and concealment.\textsuperscript{53} The trial court ruled that this claim could not be allowed because the plaintiff's request for relief was not available in the UFTA.\textsuperscript{54} Although the plaintiff did not seek the value for the transferred contracts, the Rhode Island Supreme Court found that the arbitration award could be considered relief available pursuant to Section 6–16–7(a)(3)(iii), which allows for "[a]ny other relief."\textsuperscript{55} The Rhode Island Supreme Court considered this statute broad enough to cover the imposition of personal liability on Richard.\textsuperscript{56}

\textbf{COMMENTARY}

Upholding the corporate veil of a limited liability company encourages economic investment and new ventures by limiting liability of the investors.\textsuperscript{57} Additionally, when a court decides to pierce the veil, it breaks the legitimate expectations of the investors, which is contrary to the American system's deference to the ability to freely contract.\textsuperscript{58} On the other hand, the corporate form can be seen as a privilege not to be abused.\textsuperscript{59} Most states have, however, imposed a strong presumption that a parent corporation is not li-

\begin{footnotesize}
\begin{enumerate}
\item Id. at 657.
\item Id.
\item Id. at 656.
\item Id. at 657.
\item Id.; see R.I. GEN. LAWS § 6–16–7 (2001).
\item Nat'l Hotel Assoc., 827 A.2d at 657-58.
\item John P. Glode, General Law Division: Piercing the Corporate Veil in Wyoming—An Update, 3 WY0. L. REV. 133, 134 (2003).
\item Id. at 135.
\item Id.
\end{enumerate}
\end{footnotesize}
able for the acts of its subsidiaries. Rhode Island, like other states, considers a variety of factors in determining whether the entities are distinct, including circumstantial evidence. Richard's exclusive control of both O. Ahlborg and CSI, as well as the deception evident in the facts, seems to be what persuaded the court to pierce the veil of CSI to reach not only Richard but also to reach O. Ahlborg.

An interesting aspect of this case is the way the Supreme Court of Rhode Island discusses insolvency and the fiduciary duty to creditors. CSI was solvent at the time of the arbitration judgment, but when they refused to pay the arbitration judgment, this action rendered them effectively insolvent, since solvency depends on one's ability to pay creditors. The trial judge, although recognizing the judgment would render CSI functionally insolvent, thought the property interest and the contracts, in various stages of business, were enough to retain the director's status as trustee for the stockholder as opposed to a fiduciary duty to the creditors. Originally, the insolvency exception to shareholder interest did not attach until formal statutory proceedings (e.g. bankruptcy). Courts then extended this to situations like the one at hand, moving further in advance of the actual statutory insolvency of the company. Rhode Island is in the increasing number of states that attach the fiduciary duty to creditors upon functional insolvency, before the formal proceedings have commenced. The overall assessment of the relationship between insolvency and creditor's interest seems to be correct, especially in the case in hand. In Richard's case, it is clear that he was acting for the benefit of himself, not making good business decisions for CSI to remain an active entity. Therefore, it is logical to treat the company as insolvent with a duty to creditors, not to the shareholders (in this case solely Richard).

What is also interesting is the broad reading of the generic remedy provision in the UFTA, which allows "[a]ny other relief"
rather than the amount of the fraudulent transfers, which is typically what is sought by plaintiffs relying on the UFTA. Although the court does not discuss this aspect of the decision, the interpretation of this section potentially creates a broader scope of available damages.

CONCLUSION

The Rhode Island Supreme Court held that when a corporation is simply an instrumentality of another corporation and its president, the corporate veil can be broken to pay an arbitration award rendered against the dependent affiliate entity. Furthermore, when preferential payments amounting to fraudulent conveyances breach the fiduciary duty of an insolvent company to its creditors, relief under the UFTA includes such an arbitration award.

Alicia J. Byrd
Evidence. State v. Lassiter, 836 A.2d 1096 (R.I. 2003). Testimony by one witness opining as to the truthfulness or accuracy of another witness's testimony is prohibited as bolstering or vouching. Furthermore, testimony that addresses credibility or has the same substantive import is also inadmissible.

FACTS AND TRAVEL

On the night of July 18, 1996, David Andrews (Andrews) was killed when he was shot in the chest while walking in downtown Providence with his cousin Andre "Bucky" Williams.1 At the scene of the shooting, Williams told Detective Glen Cassidy that the gunmen were driving a "maroon-colored" vehicle, but he was unable to identify any of its occupants.2 Two hours later, Williams gave a formal statement to Detective Stephen Springer, describing the car as cranberry in color.3 He further stated that the vehicle had four occupants but again was unable to identify anyone.4

Four days later, Williams recanted his inability to identify the assailants and told Detective Robert Muir that three of the subjects were Troy Lassiter (Lassiter), Derick Hazard (Hazard) and David Roberts (Roberts).5 Williams further stated that Lassiter and Hazard fired the guns.6 Subsequently, Williams later confirmed the identities of the three men from a photo array provided by Detective Muir.7

Lassiter was arrested and tried for murder, conspiracy and assault.8 Due to his inconsistent statements, Williams's credibility became the central issue during the trial where Lassiter maintained he was mistakenly identified.9 After a jury failed to reach a verdict in the first trial, Lassiter was retried.10 The second jury, however, found Lassiter guilty of murder, conspiracy and assault with intent to murder and sentenced him to life in prison.11 Fail-

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2. Id.
3. Id.
4. Id.
5. Id. at 1099, 1100.
6. Id. at 1100.
7. Id.
8. Id.
9. Id. at 1101.
10. Id.
11. Id.
ing to secure another trial based on newly discovered evidence, Lassiter appealed.\textsuperscript{12}

**THE COURT'S ANALYSIS AND HOLDING**

On appeal, Lassiter argued that the trial judge erred in admitting the testimony of Detective Springer.\textsuperscript{13} Springer, an experienced detective, testified that he felt Williams was being untruthful when he claimed he could not identify the occupants of the vehicle.\textsuperscript{14} The trial judge also allowed Detective Springer to explain the basis of his opinion, stating that Springer was entitled to convey his state of mind at the time he took Williams's formal statement.\textsuperscript{15}

Lassiter argued that Detective Springer's opinion impermissibly bolstered Williams's testimony by implying that Williams indeed knew the identity of the assailants but was simply withholding the information during his initial statements.\textsuperscript{16} Lassiter maintained that this testimony was extremely prejudicial as it vouched for the credibility of the state's only eyewitness who made prior inconsistent statements on the dispositive issue of identification.\textsuperscript{17} The court agreed.

Relying on prior decisions, the court stated that it is the jury's exclusive obligation to determine the credibility or truthfulness of a witness.\textsuperscript{18} Therefore, any opinion offered to bolster or vouch for the truthfulness of another witness's testimony is inadmissible.\textsuperscript{19} Even testimony not directly intended to bolster, but having the same "substantive import," will likewise be deemed inadmissible.\textsuperscript{20}

The court found that while Detective Springer's opinion did not literally bolster the truthfulness of Williams's testimony, it did bolster his initial veracity. Springer's testimony implied to the

\textsuperscript{12} Id.
\textsuperscript{13} Lassiter also objected to two portions of Andrews's girlfriend Wraina's testimony that the trial judge admitted. On one portion, the court found in Lassiter's favor, and the other portion was a minor issue for which the trial judge issued a curative instruction.
\textsuperscript{14} Id. at 1106.
\textsuperscript{15} Id. at 1107.
\textsuperscript{16} Id. at 1106-107.
\textsuperscript{17} Id. at 1106.
\textsuperscript{18} Id. at 1108.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
jury "that Detective Springer believed that Williams could identify his assailants and, therefore, that Williams's subsequent statement disclosing their identity was, in fact, worthy of belief." The court also held that Detective Springer's testimony was offered for the sole purpose of "explain[ing] away" Williams's contradictory statements and that his testimony was likely given great weight by the jury. As a result, Lassiter's conviction was reversed and his case remanded for a new trial.

**Justice Flanders's Dissenting Opinion**

Justice Flanders made five separate arguments in his dissent from the Court's holding that Detective Springer's testimony constituted impermissible bolstering.

First, Justice Flanders believed that an opinion by a witness that another is not being honest does not bolster the testimony of a person who "later testifies at trial to a contrary version of the same events." Second, the dissent found that Detective Springer never testified as to the truthfulness of Williams's statement identifying Lassiter. Furthermore, the dissent contended that Springer's opinion that Williams was not being honest when he stated he could not identify any of the gunmen does not imply that Williams was being honest when he later identified Lassiter. Third, the dissent found that due to the fact that the police charged Lassiter despite Williams's inconsistent statements shows that "the jury would have known that the police chose to believe Williams's later statement to them, rather than his first one." Fourth, the dissent argued that Detective Springer's testimony was not offered to bolster Williams's testimony but to show that "he intended to pursue further questioning of Williams ... to counter the anticipated defense that the police had coerced [him] into changing his story." Finally, Justice Flanders believed that if Detective Springer's testimony had any effect, "it would have underscored the fact that Williams was quite capable of lying to the police when he wanted to do so."

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21. *Id.*
22. *Id.* at 1109.
23. *Id.* at 1111.
24. *Id.*
25. *Id.* at 1112.
26. *Id.*
In Justice Flanders's view, "the 'bolstering' doctrine has become the "third rail" of Rhode Island criminal law: if a prosecution witness so much as touches on what he or she thinks about another witness's out-of-court statements or credibility, it becomes a fatal reversible error, requiring the conviction to be vacated and warranting a new trial."27

COMMENTARY

The Rhode Island Supreme Court has made previous findings of improper bolstering.28 In State v. Miller,29 defendant appealed his conviction of first-degree sexual assault, claiming the charges were fabricated.30 In support of his contention, the defendant offered the testimony of Donna Carroll, a Providence police detective.31 The detective testified that she had spoken to the victim's mother who never said anything about a rape, even though the victim made prior statements to the Providence Police and the grand jury that she had informed her mother she had been raped.32 On cross-examination, the detective was allowed to testify that "it was not uncommon for people to neglect fully to elucidate the details of an incident in a report to a police officer."33 The defendant claimed that the detective's testimony "amounted to vouching for [the victim's] mother in that it suggested to the jury that the failure of [the victim's] mother to mention the . . . conversation with her daughter to the detective should not be viewed as adversely affecting her credibility."34 Agreeing with the defendant, the court held that because "credibility was of paramount importance, the admission of the detective's testimony on this issue would be construed by the jury as endorsement of the mother's credibility."35

27. Id. at 1112-13.
29. 679 A.2d 867.
30. Id. at 872.
31. Id.
32. Id.
33. Id.
34. Id.
35. Id. at 873.
For similar reasons, the Rhode Island Supreme Court has also cited approvingly the Massachusetts case of Commonwealth v. Montanino. In Montanino, the alleged victim and sole eyewitness claimed that while a Boy Scout, his scoutmaster twice engaged in unnatural sexual intercourse with him over a four-month period. However, the alleged victim did not report these incidents until four years later when he met with a Cambridge police officer.

At trial, defense counsel elicited from the officer that the boy made several inconsistent statements regarding the timing and specific conduct of the first incident during their conversations. The officer also testified, over defense counsel’s objection, that having investigated approximately 300 sexual assault cases, it was his opinion that “most” victims eventually provided more details regarding the assault than they initially revealed. On appeal, the defendant claimed that the officer’s testimony amounted to impermissible vouching or bolstering of the alleged victim’s testimony and should have been excluded.

Noting that the boy’s credibility was “a crucial issue,” the court held that the officer’s testimony constituted impermissible bolstering. In reaching this conclusion, the court stated, “We think there is little doubt that [the officer’s] comments relating to the credibility of ‘most’ sexual assault victims would be taken by the jury as [the officer’s] endorsement of [the victim’s] credibility.”

Like the defendants in Miller and Montanino, what separated Lassiter’s freedom from a lifetime of incarceration was arguably the credibility of the sole eyewitness; credibility that was seriously damaged by prior inconsistent statements to the police regarding the identity of the assailants. Given this weakened credibility and the high standard of proof required in criminal cases, it is very plausible that the jury would have found, without the testimony of

37. Id. at 1213.
38. Id.
39. Id.
40. Id.
41. Id. at 1214. The defendant claimed that the officer’s opinion testimony illustrated “that [the victim] was credible on the theory that the irregularities in [the victim’s] statements were consistent with the manner in which truthful victims of sexual assault relate their experiences.” Id.
42. Id.
43. Id.
Detective Springer, that the prosecution failed to prove beyond a reasonable doubt that it was Lassiter who shot and killed David Andrews. However, the fact that Lassiter was convicted on all counts indicates strongly that the jury gave sufficient deference to Detective Springer's testimony, despite Williams's obvious credibility problems.

The fact is one will never know what weight, if any, the jury assigned to Detective Springer's testimony. However, that is precisely the point. Because one cannot know, the admissibility of the evidence in this case means the difference between freedom and a life behind bars. Much of Justice Flanders's dissent relies upon his own interpretation and belief of how the jury would construe Detective Springer's testimony, but the ability to easily suggest alternative theories of how the jury may interpret a piece of evidence does not negate the plausibility of contrary interpretations. Instead, it is merely illustrative of its debateability.

Given the extraordinary human costs at stake balanced against the paucity of credible evidence, it appears prudent for the court to hold that the testimony of Detective Springer was improper bolstering and remand the case for a new trial.

CONCLUSION

The Rhode Island Supreme Court held that the testimony by one witness opining as to the truthfulness or accuracy of another witness's testimony is prohibited as bolstering or vouching, and that testimony that addresses credibility or has the same substantive import is also inadmissible.
Family Law. Hogan v. Hogan, 822 A.2d 925 (R.I. 2003). Plaintiff husband appealed the Family Court's alimony, child support and visitation decisions pursuant to the final decree of divorce from his wife, challenging the validity of Family Court discretion in divorce decisions.

FACTS AND TRAVEL

The Rhode Island Supreme Court heard this appeal from a family court magistrate judge's divorce judgment. The Supreme Court in part sustained and in part denied the appeal. Michael and Diane Hogan married on August 15, 1987; during their marriage, two children were born: Eric (in 1991) and Mikayla (in 1994). Also, Diane Hogan ("Diane") was diagnosed with multiple sclerosis (MS), a degenerative disorder of the central nervous system. The couple sought a divorce decree in the Rhode Island Family Court. In response to the Family Court's decision, Michael Hogan ("Michael") appealed the alimony and child-support award, the visitation decision, the court order to repay Diane a $2,000 credit card charge, and the court's award of Diane's counsel and deposition fees. While Michael is employed, Diane's ability to work is compromised by her MS. Diane was awarded full custody of the children and monthly alimony and child support payments as calculated by the legislatively mandated formula plus twenty percent added to the base of the child support via a wage garnishment.

THE COURT'S HOLDING AND ANALYSIS

When deciding the divorce terms, the Family Court found no compensable fault and determined that Michael and Diane would each receive fifty percent of the marital estate. In his discretion, the judge awarded the family's new truck to Michael, in turn re-
quiring him to pay $2,000 in truck-related expenses charged on Diane’s Visa. The Supreme Court found no abuse of discretion in the Family Court’s apportioning of the marital assets and thus upheld the assets portion of the Family Court decision.

Additionally, the Magistrate used his discretion to award Diane counsel and deposition costs. The Court determined that Rhode Island General Law, section 15–5–16(b)(2)(ii)(G), governed this discretionary award and that the Family Court evaluated the parties’ respective abilities to pay the costs, a legitimate finding despite the Magistrate’s punitive language towards Michael’s attitude and insensitivity throughout the proceedings.

Furthermore, the Supreme Court validated the Magistrate’s discretionary considerations of the appropriate factors, such as Diane’s debilitating illness and her compromised ability to work. The Court upheld the alimony award of one half of all net wages above $517 per week from the husband’s primary employment, granting Diane the alimony for an indefinite period.

The Supreme Court disagreed with two portions of the Magistrate’s decision, however. The Court first disagreed with the Magistrate’s discretionary decision to add an additional twenty percent to the court’s child-support guidelines to be garnished from Michael’s wages. The Court reversed and remanded this portion of the divorce decree.

The Magistrate stated it was his uniform practice to add twenty percent to the prescribed child support guidelines in an attempt to allow a person working a forty-hour week to retain his or her overtime. Pursuant to Mattera v. Mattera, the Family Court is permitted to deviate from the statutory support guidelines if supported by a finding that inequity would otherwise result to the child or one of the parents. In Mattera, the Supreme Court decided not to disturb discretionary child-support awards unless they could ascertain clear abuse of the lower court’s discretion.

10. Id.
11. Id. at 929.
12. Id.
13. Id. at 928.
14. Id.
15. Id. at 927.
Though the decision was made in the Magistrate's discretion, the Supreme Court held that he should have made appropriate findings of fact to support a child-support award exceeding the Legislature-determined statutory guidelines outlined in Rhode Island General Laws, section 15-5-16.2.17 While a Family Court Magistrate is permitted to deviate from the recommended amount if he or she finds that the calculated amount would be inequitable to the child or to either parent, here the Magistrate did not support his decision to increase the amount with specific findings or concerns.18 Accordingly, the child-support portion of the award is remanded for a new hearing, new findings, and a new order as to the appropriate amount to be paid.19

Second, the Court disagreed with the Magistrate's order that Michael (the non-custodial parent) pay for a babysitter should he not be able to accommodate his children's overnight visits. The Court reversed this decision.

The Family Court noted this element of the divorce judgment would provide respite for Diane who would otherwise have full custody of the Hogan children.20 Because Michael lived in one room of his brother's home and could not accommodate the overnight visitation request, he argued the Family Court order akin to indentured servitude.21

Though the Supreme Court all but ignored the validity of Michael's indentured servitude claim, they nonetheless acknowledged that the Magistrate had abused his discretion in ordering the visitation or babysitter compensation scheme.22 The Court remanded the visitation portion of the decree for a new hearing with instruction to "focus on and advert to the best interests of the children when establishing the visitation arrangements."23

COMMENTARY

Whether the Magistrate's visitation-or-pay-a-babysitter scheme was for the first time ordered or for the first time chal-
lenged in the matter of *Hogan v. Hogan* is unclear. However, deciding the validity of the scheme was one of first impression in Rhode Island. Rather than establishing a steadfast rule regarding babysitting orders, the Supreme Court remanded this visitation issue of the divorce decree for a new hearing and further findings. While the Rhode Island courts universally accept that in custody and visitation matters the welfare and needs of the children expectedly are given paramount consideration, exactly how the use of the visitation-or-babysitter scheme affects the interest of the child is a fairly new determination.

With *Dana v. Dana*, the Utah Court of Appeals predated the Rhode Island Supreme Court’s sentiments that a visitation or babysitter compensation order is not in the child’s or the non-custodial parent’s best interest. In *Dana*, the appellate court overturned the Utah Family Court’s demand that the father visit his child or pay extra support. The Utah court held that to encourage a non-custodial parent to visit by threatening to increase child support payments was not in the best interest of the child. The court was not persuaded by the custodial mother’s argument that she lacked free time or would incur the additional expense of babysitting, and overturned the order. The *Hogan* Court did not follow *Dana*, but rather remanded for clarification of findings.

A similar ruling in favor of the non-custodial parent was made in *Elkin v. Sabo*. Here, the New Jersey Superior Court held the Family Court abused its discretion by increasing a non-custodial father’s child-support obligations for failure to exercise more visitation. In *Elkin*, the father blamed his inability to accommodate his children’s overnight visits on his small apartment.

While the respective *Elkin* and *Hogan* father’s housing situations are similar, the *Elkin* court’s holding was grounded not in the father’s living situation but rather in the original divorce de-

26. *Id.*
27. *Id.*
28. *Id.* at 730.
30. *Id.* at 1227.
31. *Id.*
cree's lack of a mandated visitation requirement. Therefore, no direct, Hogan-like scheme was examined in Elkin, but rather the post-decree addition of terms, and is thus distinguishable from Hogan.

While the Hogan scheme of overnight visitation or babysitter compensation is a rarely seen approach, Family Court alimony and child-support orders that include babysitting costs are not novel terms. Indeed, appellate level courts repeatedly uphold these orders. Various approaches are taken to ensure the non-custodial parent pays for babysitting. Often, babysitting expenses are added to child-support payments. Alternatively, parties decide that in lieu of direct child support payments, the non-custodial parent will provide babysitters for the children.

Courts recognize the independent nature of a decree’s babysitting terms; accordingly, the payment of babysitting fees when the non-custodial parent is unable to exercise visitation rights is not a substitute for support otherwise due. Effectually, by introducing a scheme of overnight visitation or forced payment of a babysitter, the Hogan court increased the child-support payments above the already discretionary and unsupported twenty percent addition.

With Hogan, the Rhode Island Supreme Court aligned itself with the scant case law discussing babysitting and visitation exchanges. Perhaps the Court ignored the implicit logic to the Magistrate’s order: full-time, single parents need time for themselves, too.

Magistrate Judge O’Brien heard both parties. At length Michael and Diane discussed their financial status, the immediate and lasting effects of Diane’s disease on their marriage, and her ability to work. They discussed their respective living situations. In addition to the statutory guidelines for calculating support

32. Id. at 1228.
33. Id.
37. Grant, 265 A.D.2d at 22.
payments, the Magistrate is afforded discretion to determine additional payments or regulating conditions of the decree.

Much of a child's welfare is determined by the love, support, and guidance provided by a nurturing parent, parents, or legal guardian. It is only logical that a degeneratively ill single parent who is charged with the daily care of two children would benefit from an evening's reprieve. Fear of over-penalizing a non-custodial father may be, ironically, punitive to the overworked mother.

CONCLUSION

The Rhode Island Supreme Court remanded two portions of the divorce decree and ordered a hearing for further findings. With this ruling, they displayed skepticism for a Magistrate's discretionary judgments made without correlating, non-punitive findings of fact. By overturning the award of babysitting costs, Rhode Island aligned itself with the prevailing, national view in modern family law.

Amanda B. Mertens
Health Care Law. Jalowy v. The Friendly Home, Inc., 818 A.2d 698 (R.I. 2003). The Abuse in Health Care Facilities Act protects an individual from retaliation at the hands of a health care facility after such individual files a complaint alleging abuse on the part of the facility. The individual is entitled to sue for relief from retaliation with the benefit of a rebuttable presumption that the action of the facility was in fact retaliatory in response to the complaint. Residents in assisted-living homes have a conditional statutory right to receive visitors of their choice so long as those visitors do not pose health or safety risks to residents, staff, other visitors, or property.

FACTS AND TRAVEL

The plaintiff, John Jalowy, first became familiar with The Friendly Home in 1992 when his mother, Stacia Jalowy, became a resident.1 Jalowy visited his mother at the home regularly, where he observed certain members of the nursing staff acting in what he described as an “unprofessional” manner.2 On May 5, 1992, Jalowy wrote a letter to the management of the nursing facility, alleging that two nurses, Joan Thibault and Maureen Stone, were regularly “smoking and socializing,” endangering the elderly residents.3 Jalowy then met with the administrator of the facility, Angelo Rotella, and discussed the concerns that he had voiced in the letter. That same day, Jalowy claims to have witnessed the same two nurses ignoring residents who were “begging for help.”4 Jalowy then telephoned the State Department of Health and the Department of Elderly Affairs to report the incidents.5 On August 28, 1992, Jalowy sent a letter to the Department of Elderly Affairs detailing the behavior of the two nurses as doing “literally nothing except socializing and smoking cigarettes . . . while . . . residents were begging for help and were ignored.”6

In December of 1992, Jalowy was leaving the home after a visit to his mother, and he encountered the two nurses he had

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2. Id.
3. Id. at 702-03.
4. Id. at 703.
5. Id.
complained about. \(^7\) Jalowy claimed that these nurses followed him around the facility taunting him. \(^8\) Jalowy then confronted the nurses, swore at one, and waved his fist in the face of the other. \(^9\) The following day, administrator Rotella told Jalowy that he was no longer welcome at the home, that it was no longer safe to allow him to visit, that he could arrange outside visits with his mother, and that he could take the matter to court if he wished. \(^10\)

On February 2, 1993, Jalowy filed an action in Superior Court seeking injunctive relief and damages. \(^11\) He alleged that Rotella and the home violated section 23–17.8–5 of the Rhode Island Abuse in Health Care Facilities Act by banishing him from the home in retaliation for filing complaints with the home, the Department of Health, and the Department of Elderly Affairs. \(^12\) He also alleged a constitutional violation of his freedom of association. \(^13\) The Superior Court issued an order temporarily enjoining defendants from preventing Jalowy from visiting his mother at the home, and constructed a visitation schedule allowing Jalowy to meet with his mother in the lobby of the home for one hour, three days per week. \(^14\)

In 1995, the superior court entered summary judgment in favor of the defendant nursing home on the constitutional claim, and in 1999, Jalowy amended his complaint to include claims for intentional and negligent infliction of emotional distress. \(^15\) At the conclusion of trial, the jury found for the defendants on the retaliation charge, but decided in favor of Jalowy on the emotional distress claims, awarding Jalowy no compensatory damages, but granting punitive damages in the amount of $50,001 against Rotella and the home. \(^16\) Jalowy moved for judgment notwithstanding the verdict or for a new trial on the retaliation claim, and for

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7. Jalowy, 818 A.2d at 703.
8. Id. The matter of whether the nurses had followed or antagonized Jalowy was disputed at trial. Id.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id. Jalowy continued to abide by these visitation guidelines until the death of his mother in 1997. Id.
15. Id.
16. Id.
an additur and a new trial on the emotional distress claims.\textsuperscript{17} The defendants filed a motion for judgment as a matter of law on the intentional infliction claim.\textsuperscript{18} The trial justice granted the defendants' motion entering a judgment "that plaintiff take nothing, [and] that the action be dismissed on the merits," and Jalowy appealed.\textsuperscript{19}

**BACKGROUND**

The Rhode Island Abuse in Health Care Facilities Act\textsuperscript{20} (the Act) imposes a duty upon health care workers, emergency personnel, other professionals, or any person to report witnessed acts of elder abuse, neglect, or mistreatment,\textsuperscript{21} under penalty of fine and possible imprisonment.\textsuperscript{22} Falling under the category of "any person," Jalowy was protected from retaliation by the facility for reporting such acts, with a right to file a civil action seeking injunctive relief and damages.\textsuperscript{23}

**THE COURT'S ANALYSIS AND HOLDING**

*The Rhode Island Abuse in Health Care Facilities Act*

The trial justice denied Jalowy's motion for judgment notwithstanding the verdict of the retaliation claim because: 1) the report of complaint that Jalowy filed was insufficient according to statutory guidelines; and 2) a reasonable jury could have concluded that the home had imposed the banishment on Jalowy for reasons other than retaliation.\textsuperscript{24} Jalowy contended that he was not required to file a report under the provisions of the Act to warrant protection, and further, that he was entitled to a rebuttable presumption that the actions of the defendant home were indeed retaliatory.\textsuperscript{25} The Rhode Island Supreme Court agreed that Jalowy was entitled to protection from retaliation under the Act regard-

\begin{enumerate}
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id. at 703-04.
\item \textsuperscript{19} Id. at 704.
\item \textsuperscript{20} R.I. GEN. LAWS § 23–17.8–1 (1992).
\item \textsuperscript{21} Id. § 23–17.8–2.
\item \textsuperscript{22} Id. § 23–17.8–3.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Jalowy, 818 A.2d at 704.
\item \textsuperscript{25} Id.
\end{enumerate}
less of the form of his complaint, inferring that the wording of the statute, in which “a person who is about to make a complaint” is used to describe those protected from retaliation, includes those who had not met all of the formalities of an official report of abuse.\(^\text{26}\) The court reasoned that the letters to Rotello and to state regulatory agencies were sufficient to constitute a “report” under the Act.\(^\text{27}\) Further, the court also agreed that Jalowy was entitled to the “rebuttable presumption” of retaliation, having shown evidence of his complaints and subsequent treatment.\(^\text{28}\) However, Jalowy’s attorney failed to request a jury instruction regarding the presumption, and the court determined that this failure to request or object amounted to a waiver of the presumption, thus leaving the burden to prove retaliatory motive of the defendants on Jalowy.\(^\text{29}\) The court held that the home’s interest in the health and safety of its residents and staff was sufficient to show a legitimate, non-retaliatory motive, and the claim of retaliation ultimately failed.\(^\text{30}\)

**Intentional Infliction of Emotional Distress**

In analyzing the claim of intentional infliction of emotional distress, the trial court held that Jalowy did not present evidence that the acts of the defendants were so “extreme and outrageous” as to warrant a finding for Jalowy.\(^\text{31}\) The Rhode Island Supreme Court agreed that the actions and demeanor of administrator Rotella, and the resulting six weeks Jalowy endured without visiting his mother, were not actions of the kind that would be “utterly intolerable in a civilized community.”\(^\text{32}\) Specifically, with regard to the missed visitation, the court recognized that visitors to nursing homes do not have an absolute right to visit relatives, but rather those rights are conditioned upon considerations of the health and

\(^{26}\) Id.

\(^{27}\) Id.

\(^{28}\) Id.

\(^{29}\) Id. at 705. The court stated that even if the proper jury instruction had been requested and given, the defendants presented sufficient evidence to show that their motives were borne of safety concerns, and Jalowy’s claim would nevertheless have failed. Id.

\(^{30}\) Id.

\(^{31}\) Id. at 706.

\(^{32}\) Id. at 707-08 (quoting RESTATEMENT (SECOND) OF TORTS § 46 (1965)).
safety of residents, staff, and other visitors, and the welfare of the facility itself. Thus, the court denied Jalowy relief for intentional infliction of emotional distress.

Finally, and briefly, the court denied Jalowy's motion for additurof new trial on the claim for negligent infliction of emotional distress. The court held that Jalowy did not fall into the two classes of individuals who are eligible to recover for negligent infliction: 1) those within the zone of danger, who are physically endangered by the actions of the defendant; or 2) bystanders who witness the defendant injuring a family member. Because the behavior complained of by Jalowy effected himself, and not a relative, and also because the behavior was not physically dangerous, Jalowy did not satisfy either eligible category. The court denied all of Jalowy's claims, and the defendant nursing home left victorious.

COMMENTARY

Although not expressly mentioned in the opinion, Jalowy was a case of first impression with regard to the enforcement of the Abuse in Health Care Facility Act (the Act). With cases of elder abuse, nursing home neglect, and violence against seniors being publicized in the media on an increasingly regular basis, the importance of the Jalowy decision is clear: the welfare of Rhode Island's elderly population is a growing concern. In Jalowy, the court sets a precedent for utilizing the Act, reinforcing the "duty" of professionals and private citizens to report witnessed cases of abuse and neglect, and providing a remedy for those who are retaliated against for reporting an offending facility. The Act itself provides this remedy, however, Jalowy establishes an important procedural element to the remedy. Through the rule of Jalowy, the

33. Id. at 709 (referring to R.I. GEN. LAWS § 23-17.4-16(a)(2)(viii)(1992)).
34. Id.
35. Id. at 710.
36. Id.
37. Id.
38. Id. at 710-11.
39. See State v. Scott, 617 A.2d 1362 (1992) (featuring the only other case discussing the Act). It was deliberated during the time period in which amendments to the legislation were being made, and holds that certain amendments were contradictory to the initial statutory language. Thus, there was no real adjudication involving violations of the Act. Id.
Supreme Court of Rhode Island has provided an incentive for citizens to fulfill their "duty" in the form of a "rebuttable presumption," giving the plaintiff the benefit of the doubt, and placing the burden to prove a legitimate, non-retaliatory motive upon the defendant.\footnote{Jalowy, 818 A.2d at 704.} Even though the court found that the home had overcome this presumption in Jalowy, the court established a precedent indicating the importance of reporting abusive incidents for the sake of Rhode Island's senior citizens.

Interestingly, while the court denied Jalowy's claim of negligent infliction of emotional distress in his treatment at the hands of the facility of the staff, the court left open an avenue to a possibly successful negligent infliction claim with regard to nursing home abuse. Although not explicitly stated, it is possible that the negligent infliction claim could be brought in cases where the relative had witnessed such abuse \textit{being acted upon his or her relative}, thus fulfilling the second category of persons eligible to bring the negligent infliction claim. Jalowy was denied his claim because he argued that the facility had acted against him when causing distress. Had Jalowy argued that the staff had abused or neglected his mother in his presence, he may have had a viable claim. Whatever the circumstances, the court has established a precedent that will likely be revisited in the future.

\textbf{CONCLUSION}

The Rhode Island Supreme Court held that an individual who reports an abusive incident is protected from retaliation at the hands of the offending health care facility via a statutory remedy and a "rebuttable presumption," placing the burden of persuasion on the defendant facility to prove a non-retaliatory motive for its actions against the complainant. In order to bring a claim that such retaliatory actions amounted to negligent infliction of emotional distress, the plaintiff must fall within two categories: 1) one at risk in the "zone of danger," or 2) a relative who witnesses the injury of a family member. Plaintiff John Jalowy was denied his claim of retaliation due to failure to request appropriate jury instruction and evidence of legitimate health and safety concerns of the defendant facility. Additionally, claims of infliction of emo-
tional distress were denied (both intentional and negligent) as not alleging sufficiently outrageous behavior, and not falling into the categories of those eligible to bring a claim of negligent infliction.

Mary H. Hayes
Labor. DiGuilio v. R.I. Board of Corrections Officers, 819 A.2d 1271 (R.I. 2003). An employee must demonstrate that a union’s failure to arbitrate a grievance amounted to unfair representation before the employee can sue an employer in court. An employee does not have standing to contest the merits of a contract claim in court, unless the employee demonstrates that the union breached its duty of fair representation.

FACTS AND TRAVEL

Rosemary DiGuilio (DiGuilio) worked for the Department of Corrections (DOC) as a licensed practical nurse (LPN) and was a member of the Rhode Island Brotherhood of Correctional Officers union. In January 2001, DiGuilio obtained a provisional registered nurse (RN) license and, as a result, received a promotion from the DOC. In her new capacity at the DOC, DiGuilio was assigned to work a different shift from what she had previously worked in her position as an LPN. In March 2001, DiGuilio obtained her professional RN license. Subsequently, she bid on a RN position on the shift that she had formerly worked when she was a LPN. DiGuilio lost her attempt for this bid to another union member whom the DOC determined to have more contractual seniority than DiGuilio. DiGuilio objected to the DOC’s interpretation of “seniority” and filed a grievance with the union. The union responded that it would not take DiGuilio’s case to arbitration. The DOC and union’s collective bargaining agreement stated that only the union, not individual employees, had the ability to take a grievance to arbitration.

Subsequently, DiGuilio brought an action in superior court. The union and the DOC responded by filing a motion to dismiss.

2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
Their motion was based on the argument that the union had valid reasons not to get involved, such as internal discipline and morale and the potential conflict that could arise with two union members pitted against one another.\textsuperscript{12} However, the superior court justice held that DiGuilio had standing to sue if she could demonstrate that the contract was not administered according to its terms.\textsuperscript{13} The justice denied the union and the DOC's motion to dismiss and granted DiGuilio declaratory relief under the collective bargaining agreement.\textsuperscript{14} The justice then left it to the parties to work out a suitable agreement to the dispute.\textsuperscript{15} The justice later found that the parties were unable to reach a mutually acceptable remedy to the situation.\textsuperscript{16} Thereafter, he placed DiGuilio in her desired position, appointing her to the RN shift for which she had unsuccessfully bid.\textsuperscript{17}

\textbf{BACKGROUND}

There is a considerable amount of federal law in this area.\textsuperscript{18} The key federal case that the Rhode Island Supreme Court would rely upon was \textit{Hines v. Anchor Motor Freight, Inc.}\textsuperscript{19} In that case, truck drivers who had been fired for alleged dishonest conduct filed a claim of wrongful discharge against their employer and their labor union claiming that the falsity of the charges against them could have been established through minimal investigation and that the union breached its duty of fair representation.\textsuperscript{20} The United States Supreme Court held that a union's breach of its duty of fair representation relieves an employee from adhering to the procedures dictated by a collective bargaining agreement.\textsuperscript{21}

\begin{itemize}
  \item \textsuperscript{12} Id.
  \item \textsuperscript{13} Id.
  \item \textsuperscript{14} Id.
  \item \textsuperscript{15} Id.
  \item \textsuperscript{16} Id.
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} Id.
  \item \textsuperscript{19} 424 U.S. 554 (1976).
  \item \textsuperscript{20} Id. at 556.
  \item \textsuperscript{21} Id. at 570-71.
\end{itemize}
**THE COURT'S ANALYSIS AND HOLDING**

The issue of "whether an employee, who has unsuccessfully petitioned her union to arbitrate her grievance, has the right to seek a judicial remedy under a collective bargaining agreement in the absence of a claim that the union's actions amounted to unfair representation" is a question of first impression in Rhode Island.\(^{22}\) The court relied heavily on federal labor law to reach its holding that for an employee to succeed with a breach of contract claim against his employer when his union refuses to arbitrate his grievance, the employee must show: (1) that the employer breached the contract and (2) that the union breached its duty of fair representation to the employee.\(^{23}\) In citing *Hines* in support of its position, the court stated that the U.S. Supreme Court explicitly rejected the argument that "where the union refused to process a grievance, the employee should be allowed his suit in court without proof of the union's breach of duty."\(^{24}\) Instead, an employee must prove that the union breached its duty of fair representation for the employee to have standing in court to bring a claim against the employer.\(^{25}\) Using this well-accepted principle of federal labor law, the court applied the rule to the facts of DiGuilio's case. In her case, DiGuilio failed to allege, much less prove, that the union breached its duty of fair representation when it refused to pursue arbitration of her grievance.\(^{26}\) Therefore, DiGuilio could not succeed with her contract claim because she did not have standing under the collective bargaining agreement to seek a remedy in court.\(^{27}\)

The court discussed its reasoning behind the holding, stating that a union has no duty to arbitrate a meritless grievance and "must balance and consider the legitimate interests of all its members."\(^{28}\) When one member of a union challenges a decision of

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23. *Id.* (citing *Hines* v. Anchor Motor Freight, Inc., 424 U.S. 554, 570-71 (1976); Ayala v. Union de Tronquistas de Puerto Rico, Local 901, 74 F.3d 344, 346 (1st Cir. 1996)).
26. *Id.*
27. *Id.* at 1274.
28. *Id.* at 1273 (citing Ayala v. Union de Tronquistas de Puerto Rico, Local 901, 913 F.Supp. 74, 79 (D.P.R. 1995)).
the union, it has the potential to affect other members of the union whose situation may be altered by such a decision.\textsuperscript{29} Thus, if the court adopted DiGulio's argument that she be permitted to pursue her claim in court, the court would take decisions affecting the rights and status of other union employees out of the hands of unions and arbitrators and into the court system.\textsuperscript{30} Therefore, the court reasoned that it was better to embrace the federal rule that, before an employee can sue his or her employer in court, the employee must demonstrate that the union's failure to arbitrate his or her grievance amounted to unfair representation.\textsuperscript{31}

**COMMENTARY**

The question presented to the court in this case was one of first impression in Rhode Island. The holding in the case represents a triumph for unionized employers whose collective bargaining agreements provide that the union may bring a grievance to arbitration but do not furnish an individual employee with a similar right.\textsuperscript{32} However, employees who are not satisfied with a union’s action, or inaction, have no recourse under such collective bargaining agreements unless the employee can show that the union breached its duty.\textsuperscript{33} The court deals with this by holding that unions have a duty to fairly represent their members. This ruling allows unions to determine what is best for their membership as a whole, while permitting individual union members to bring a claim in court only if the employee has been inadequately represented by his or her union.

**CONCLUSION**

The ruling in this case dictates that to sue an employer in court despite the contrary language of a collective bargaining agreement, an employee must first prove that a union's failure to arbitrate a grievance amounted to unfair representation. If the employee does not show that the union breached its duty of fair

\textsuperscript{29}. Id.
\textsuperscript{30}. Id. at 1274.
\textsuperscript{31}. Id.
\textsuperscript{33}. Id.
representation, the employee does not have standing to contest the merits of a claim in court.

Timothy G. Healy
Mental Health Law/Constitutional Law. In re Stephanie B., 826 A.2d 985 (R.I. 2003). The Rhode Island Family Court lacks the statutory authority to enjoin a private, non-party mental health care facility from refusing to treat a mentally-ill juvenile. Furthermore, all orders issued by the family court must comply with the minimum requirements of due process.

FACTS AND TRAVEL

This case is the consolidation of three separate cases arising from the hospitalization of three mentally ill juveniles, Stephanie B., Amanda A., and Thomas J. (hereinafter Stephanie, Amanda, and Thomas), all of whom were under the temporary custody of the Department of Children, Youth, and Families (DCYF). The facts underlying all three cases occurred during a two week span in the summer of 2002. Prior to the litigation in question, DCYF had Amanda and Thomas hospitalized for inpatient psychiatric treatment at Butler Hospital (Butler), a private mental health care facility. During an off-the-record status conference meeting involving DCYF and Thomas' representatives, a meeting to which Butler was not a party, the family court issued an order enjoining Butler from discharging Thomas. Moreover, the family court issued its order against Butler in the absence of any expert medical testimony indicating that Thomas was still in need of hospitalization.

In response, Butler filed an emergency motion to vacate the non-discharge order, along with two medical affidavits attesting

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2. Id.
3. Id. at 988.
4. Id.
5. Id. at 992. In response to the family court's actions, Butler produced several doctors who were willing to testify that continued hospitalization was no longer medically appropriate. After waiting outside the courtroom, the doctors were informed that the order had simply been continued after a bench conference, and that the court had no time to conduct a formal hearing or to hear any testimony. Alarmed by the lack of formality in the family court's procedures, the Rhode Island Supreme Court criticized the family court as follows: "This procedure, including allowing busy professionals to languish in the corridor only to be informed that the court had no time to hear from them, in no way furthers the goal of increasing public confidence in our courts." Id.
that hospitalization was no longer medically appropriate.\(^6\) Although the family court was initially persuaded to allow Butler to discharge Thomas, Butler agreed to continue hospitalization when Thomas’ condition deteriorated as he discovered that he would be released to a homeless shelter due to the unavailability of an alternative residential placement.\(^7\) However, once Thomas had again become ready for discharge, the family court again enjoined Butler from discharging him because DCYF could not provide him with an alternative residential placement.\(^8\) Similarly, the family court enjoined Butler from discharging Amanda during the course of a separate proceeding to which Butler was not a party.\(^9\) Although that non-discharge order was “lacking in formality,” Butler complied with the order without further contest.\(^10\)

Unlike Thomas and Amanda, Stephanie was hospitalized pursuant to a civil commitment order at Bradley Hospital (Bradley), a private facility specializing in the psychiatric treatment of juveniles.\(^11\) When Stephanie attained the age of eighteen, however, Bradley sought to have her transferred to Butler.\(^12\) Consequently, while reviewing Stephanie’s treatment plan, the family court ordered Bradley to notify Butler concerning its desire to transfer Stephanie.\(^13\) The family court’s order further stipulated that if Butler refused to agree to Bradley’s request, “Butler Hospital and/or its agents will be subpoenaed...and Butler Hospital will be expected to show cause why they are unable to assist Bradley Hospital with its plan.”\(^14\)

Here again, Butler was not a party to the proceeding from which the order was issued, nor was Butler notified of the family court’s order until after it had been issued.\(^15\) In response, Butler sought to vacate the show cause order on the following grounds: 1)
the order was issued without service of process; 2) Butler was denied the opportunity to be heard; and 3) the order exceeded the family court's jurisdictional authority. In light of testimony given by Stephanie's attending psychiatrist that transfer to Butler would be inappropriate, the family court excused Butler from any further participation in Stephanie's treatment plan. Despite becoming moot, however, the show cause order against Butler was never vacated. On May 7, 2003, Butler filed three petitions for certiorari to the Rhode Island Supreme Court alleging that the family court had not only exceeded the scope of its statutory authority, but had also violated Butler's due process rights. The court agreed to decide the issues raised by Butler despite the fact that all three juveniles had since been released from Butler. In recognizing that the issues raised on appeal were "capable of repetition while evading review," the court granted Butler's request for a hearing under the exception to the mootness doctrine.

THE COURT'S ANALYSIS AND HOLDING

The Rhode Island Supreme Court ultimately held that the family court exceeded both its statutory and constitutional authority when it issued a series of ex parte orders compelling Butler to provide inpatient psychiatric care to Amanda, Thomas, and Stephanie. The Court noted that the family court has the plenary authority "to hear and determine cases pertaining to wayward or dependant children who need custodial care or treatment." Moreover, the family court has the sole authority to review all civil commitment petitions concerning minors under the age of eighteen. However, because the family court "has no general equitable power," its powers are limited to those expressly granted by the legislature. Therefore, the family court derives its

16. Id.
17. Id.
18. Id.
19. Id. at 987.
20. Id. at 988-89.
21. Id. at 989.
22. Id. at 995.
23. Id. at 992 (citing R.I. Gen. Laws § 8–10–3 (1997)).
24. Id. at 992 (citing R.I. Gen. Laws § 40.1–5–8 (1997)).
25. Id. at 993 (citing Waldeck v. Piner, 488 A.2d 1218, 1220 (R.I. 1985)).
26. Id. at 992 (citing Rubano v. DiCenzo, 759 A.2d 959, 963 (R.I. 2000)).
authority to order inpatient psychiatric treatment exclusively from the Mental Health Law.\textsuperscript{27}

Hence, the family court may exercise its authority under the Mental Health Law to impose inpatient psychiatric treatment upon a juvenile under a civil commitment order if all of the statutorily mandated procedural requirements have been met.\textsuperscript{28} Therefore, since neither Thomas nor Amanda had been admitted to Butler under a civil commitment order, the court concluded that there was no statutory authority under which the family court could order further inpatient treatment.\textsuperscript{29} Moreover, although Stephanie had been admitted to Bradley under a civil commitment order, the family court’s show cause order against Butler did not comport with the procedural requirements for transferring a civilly committed patient from one facility to another.\textsuperscript{30} In each case, therefore, the court concluded that the family court failed to comply with the procedural dictates of the Mental Health Law.\textsuperscript{31}

In addition to exceeding its statutory authority, the family court failed to comply with the minimum constitutional requirements of due process. Under both the United States and Rhode Island Constitutions, a court order is invalid unless the issuing court has obtained personal jurisdiction over the party against whom the order has been issued.\textsuperscript{32} A court obtains personal jurisdiction only if the party has been served with process, and has been given an opportunity to make an appearance in court either

\begin{itemize}
\item \textsuperscript{27} See generally R.I. GEN. LAWS § 40.1–5–1 (1997).
\item \textsuperscript{28} In re Stephanie B., 826 A.2d at 993. Under the procedural requirements of the Mental Health Law, the civil commitment process must begin with the filing of a petition attesting that the individual in question “is in need of care and treatment and that a likelihood of serious harm by reason of mental disability exists.” R.I. GEN. LAWS § 40.1–5–8(b). After a preliminary hearing, the individual in question is entitled to a full evidentiary hearing, whereby the court must determine “by clear and convincing evidence” whether the individual “is in need of care and treatment in a facility, and...whose continued unsupervised presence in the community would, by reason of mental disability, create a likelihood of serious harm.” § 40.1–5(i)–(j).
\item \textsuperscript{29} In re Stephanie B., 826 A.2d at 993.
\item \textsuperscript{30} A patient who has been certified for treatment in one facility may be transferred to another facility only “when deemed in the interest of the patient and approved by the transferring and receiving facilities.” R.I. GEN. LAWS § 40.1–5–32 (1997).
\item \textsuperscript{31} In re Stephanie B., 826 A.2d at 993.
\item \textsuperscript{32} Id.
\end{itemize}
to contest the merits of the claim or to contest jurisdiction. Although a court may issue a temporary restraining order without notice to the adverse party under certain exigent circumstances, such an order is merely "a temporary stopgap measure" that must "expire by its terms." In sum, a court violates due process when it indefinitely enjoins a party in the absence of prior notice and the opportunity to be heard.

The family court properly exercised jurisdiction over Amanda, Thomas, and Stephanie, thereby having the authority to review the progress of their respective treatment plans. However, because Butler was not a party to any of the treatment hearings, the family court could not exercise jurisdiction over Butler without service of process and an opportunity to be heard. Since Butler was not properly served with process, the family court violated Butler's due process rights by indefinitely enjoining Butler from refusing to treat Amanda, Thomas, and Stephanie. Moreover, the court questioned whether a private inpatient facility could ever be compelled to treat a patient, even if all the requirements of due process have been satisfied.

COMMENTARY

In sum, the Court declared all the orders issued against Butler to be null and void because they were procedurally deficient on due process grounds, and they exceeded the scope of the family court's limited statutory authority. In prior case law, the court has limited the scope of the family court's jurisdictional powers "over matters that the Legislature has expressly designated." Al-

33. Id.
34. A temporary restraining order may be issued in order "to prevent immediate and irreparable injury, loss, or damage," but must expire by its terms. Id. at 994.
35. Id.
36. Id. at 992.
37. Id. at 994.
38. Id.
39. "In the context of outpatient treatment, we have opined that a private facility ought not be ordered to accept a patient unless willing to do so. By implication, a private inpatient facility should be afforded the same protection." Id. at 995.
though the family court is not a court of "general equitable power," it may exercise its equitable authority within matters "arising out of the family relationship." Of particular significance is the court's insistence that the family court's equitable jurisdiction is procedurally restricted to matters arising from "a petition for divorce, bed and board, or separate maintenance." The issuance of an ex parte injunction against a non-party is "equitable in nature." Therefore, the family court may issue an ex parte order against a non-party only in matters arising from, or relating to, a divorce proceeding.

Despite the fact that the legislature has declared that the statute from which the family court was created should be "liberally construed," the Court has chosen to restrict, rather than to expand, the scope of the family court's equitable authority under its organic statute in matters not arising from a divorce proceeding.

The repeated act of issuing ex parte injunctions against Butler in matters relating not to divorce, but rather to the mental health of three juveniles, indicates a failure on the part of the family court to comprehend the limits placed upon its equitable powers by the Rhode Island Supreme Court's prior case law. Moreover, the family court failed to comprehend the limits of its authority to act under the Mental Health law, especially pertaining to the conditions of Stephanie's civil commitment. A patient who has been certified to receive treatment at one facility may be transferred to another facility only with the approval of the receiv-

41. In re Stephanie B., 826 A.2d at 993.
42. R.I. GEN. LAWS § 8–10–3(a).
43. Rubano, 759 A.2d at 965 (quoting R.I. GEN. LAWS § 8–10–3(a)).
44. In re Stephanie B., 826 A.2d at 994.
45. See Rhode Island Central Credit Union v. Pazienza, 572 A.2d 296, 297 (R.I. 1990) (holding that the family court properly exercised its equitable jurisdiction in issuing an ex parte order temporarily enjoining a non-party mortgagee from foreclosing on a home to which full title was awarded to the wife pursuant to a valid divorce decree).
46. R.I. GEN. LAWS § 8–10–2. The legislature has declared in full that the statute "shall be liberally construed to the end that families whose unity or well-being is threatened shall be assisted and protected, and restored, if possible, as secure units of law-abiding members." Id.
ing facility.\textsuperscript{48} Hence, the family court clearly violated the Mental Health Law by issuing an order compelling Butler to show cause as to why it refused to accept Stephanie's transfer from Bradley because the Mental Health Law confers no authority under which a court could compel a mental health facility to accept a patient.\textsuperscript{49}

Furthermore, the court was justified in reaching the merits of Butler's appeal despite the fact that Thomas, Stephanie, and Amanda had since been discharged from Butler. The foundational premise underlying the Mental Health Law is that the state's inpatient psychiatric facilities should be reserved for those patients who are in need of inpatient treatment.\textsuperscript{50} However, the family court issued the non-discharge injunctions against Butler in response to the failure of DCYF to provide three mentally-ill juveniles under its custody with an adequate residential facility, while giving no consideration to whether the juveniles were in need of continued inpatient care.\textsuperscript{51} As such, the essence of Butler's complaint was that DCYF had conspired with the family court to transform Butler's psychiatric facilities into a warehouse for mentally-ill juveniles, while affording Butler with no opportunity to preserve its interest in reserving its limited resources for patients who were in actual need of inpatient treatment. In recognizing that the inability of DCYF to provide these mentally-ill juveniles with adequate residential placements involved issues "of extreme public importance, which are capable of repetition but which evade review,"\textsuperscript{52} the court wisely concluded that the mootness doctrine should not pose a barrier to the court's responsibility in pre-

\begin{itemize}
\item \textsuperscript{48} R.I. GEN. LAWS § 40.1-5-32(b) (1997).
\item \textsuperscript{49} \textit{See} R.I. Dep't of Mental Health, Retardation and Hosps. v. R.B., 549 A.2d 1028, 1032 (R.I. 1988) ("No community mental health center should be ordered to accept a patient suffering from [a] mental disability unless its officials are willing to do so.").
\item \textsuperscript{50} \textit{See} R.I. Dep't of Mental Health, 549 A.2d at 1030-31 (holding that a district court judge presiding over a civil commitment hearing may impose out-patient treatment at one of the state's community mental health centers in lieu of confinement to an in-patient facility whenever out-patient treatment is found to be the least restrictive alternative in accordance with "the care and treatment necessary and appropriate to [the patient's] condition" (quoting R.I. GEN. LAWS § 40.1-5-8(10))).
\item \textsuperscript{51} \textit{In re} Stephanie B., 826 A.2d at 989.
\item \textsuperscript{52} \textit{Id.} (quoting Morris v. D'Amario, 416 A.2d 137, 139 (R.I. 1980)).
\end{itemize}
venting the family court from continuing to exceed the limited scope of its judicial authority.53

CONCLUSION

This case essentially reaffirms the court's prior holdings that the family court's equitable powers are strictly limited to matters arising out of petitions for divorce and other similar proceedings. The family court, therefore, may not extend its equitable authority into matters relating to the psychiatric treatment of juveniles, but must instead act in strict accordance with the procedural dictates of the Mental Health Law. Moreover, in matters relating to the inpatient care of mentally-ill juveniles, the family court must adhere to the basic requirements of due process by affording all affected parties with prior notice and an opportunity to be heard. Hence, the family court may not compel a private, non-party mental health facility to treat a mentally-ill juvenile.

Cameron J. Jones

53. See id. at 995 ("Finally, it has not escaped our attention that the need for appropriate residential placements for children in DCYF custody who no longer require acute mental health treatment should be addressed; however, the ultimate solution lies not with the judiciary, but with the other two branches of state government.").

FACTS AND TRAVEL

Payne's New Harbor Dock (Payne's) and Champlin's Marina (Champlin's) own and operate docking facilities in the New Harbor section of the Great Salt Pond.¹ The Pond is a tidal water body on Block Island that is connected to the Atlantic Ocean by way of a man-made breachway.² Both docks were scheduled to be the primary loading and unloading points for ferry service to the island as provided by the Hi-Speed ferry (Hi-Speed) and Viking Quest's ferry, the Montauk (Montauk).³

After the Montauk began ferrying visitors into Champlin's Marina, the Block Island building official, Marc Tillson, notified Champlin's that the commercially zoned district encompassing its wharf did not permit such ferry terminals.⁴ On October 18, 2000, the Town of New Shoreham (Block Island) issued a cease and desist order prohibiting the Montauk from docking at Champlin's.⁵ Soon thereafter, on February 26, 2001, the town presented Payne's with a similar cease and desist order prohibiting Hi-Speed's ferry from docking at their facility.⁶

Champlin's, Hi-Speed, and Viking Quest sought declaratory and injunctive relief in superior court to block the town's enforcement of the orders.⁷ The superior court concluded, by virtue of the docks' location below the mean high-water mark, that the Coastal Resources Management Council (CRMC) retained exclusive jurisdiction over the matter, not the Town of New Shoreham.⁸

². Id.
³. Id.
⁴. Id.
⁵. Id.
⁶. Id.
⁷. Id.
⁸. Id.
The town asserted that it had regulatory authority over the docking activities taking place in the Great Salt Pond pursuant to an 1887 legislative grant of ownership from the state to the Town of New Shoreham. The town asserted that by transferring ownership of the pond to the town, the state relinquished all rights to regulate within the pond in favor of the town's exclusive jurisdiction. Alternatively, the town asserted that it had concurrent jurisdiction to prohibit the docking activities by virtue of its zoning authority over the land appurtenant to the docks.

THE COURT'S ANALYSIS AND HOLDING

The sole issue on appeal was whether the Town of New Shoreham possessed jurisdiction over commercial ferry operations occurring in the Great Salt Pond. After concluding that the town possessed neither exclusive nor concurrent jurisdiction, the court indicated that any regulatory authority the town may have possessed over ferry operations had since been revoked and preempted by clear delegations to the CRMC. The town presented alternate arguments based on exclusive jurisdiction and concurrent jurisdiction.

First, the town contended that it possessed exclusive authority to regulate ferry operations within the Great Salt Pond by virtue of the 1887 legislative act which granted and ceded all the "right, title and interest of the state" in the pond to Block Island. Because this interpretation purports to grant rights in tidal lands to the town, the court considered the grant's legal effect in light of the public trust doctrine. The public trust doctrine dictates that the state holds title to all land below the high-water mark in a proprietary capacity for the public benefit. The court traced the development of the doctrine from its foundation in Greek philosophy, to its application in British common law, and its eventual codification in the Rhode Island colonial charter and subsequent

9. *Id.* at 1164-65.
10. *Id.* at 1165.
11. *Id.*
12. *Id.*
13. *Id.* at 1169-70.
14. *Id.* at 1165.
15. *Id.*
16. *Id.*
Rhode Island Constitution. As applied in the context of a land grant encompassing tidal lands, the court opined that state transfer of ownership in land to a municipality, is merely a transfer of title to the land, the *jus privatum*. Moreover, the state cannot divest itself of its obligation to preserve the public right to access and enjoy tidal lands, the *jus publicum*, without an explicit delegation of such regulatory authority. Because the 1887 legislative grant did not explicitly confer such authority upon the Town of New Shoreham, the state only transferred the *jus privatum* in the instant case. Therefore, the court concluded that the state did not confer exclusive regulatory authority to the town through the 1887 grant.

Second, the town alternatively claimed concurrent jurisdiction over the pond. The town’s rationale was premised on the belief that, as an indirect consequence of its power to regulate the dry land appurtenant to the dock through its zoning ordinances, it had the power to enjoin the use of the dock itself. The court disagreed, noting that while the town may regulate the activities of the upland area around a wharf, that power falls well short of the power to veto a commercial ferry operation. The court stressed that the CRMC is the exclusive regulatory body for commercial ferry operations. In light of the court’s earlier finding that the *jus publicum* remained with the state and that the authority to regulate upland does not translate into the authority to regulate the use of appurtenant tidal lands, the court determined that the Town of New Shoreham lacked any regulatory power to disallow commercial ferry operations.

17. *Id.* at 1166.
18. *Id.* at 1166-67.
19. *Id.*
20. *Id.*
21. *Id.* at 1167.
22. *Id.* at 1165.
23. *Id.* at 1167-68.
24. *Id.* at 1168.
25. See *id.*
26. See *id.* at 1168-69.
In Warren v. Thornton-Whitehouse, a case decided by the Rhode Island Supreme Court four years earlier, the court held that the CRMC has “exclusive jurisdiction over residential, non-commercial boat wharves that are constructed on tidal land." The Thornton-Whitehouse decision was narrow in scope, and did not hold that the CRMC has exclusive jurisdiction over all recreational boating facilities, irrespective of where they are constructed or the nature of their use. In Champlin's, however, the court was forced to evaluate how this convergence of municipal zoning power and the CRMC's regulatory authority would operate in the context of commercial docking activities.

Contrary to the court's holding in Thornton-Whitehouse, the Champlin's decision stands for a broad reading of the CRMC's regulatory authority. In extending the Thorton-Whitehouse decision, the Champlin's court holds that, in addition to regulating residential, noncommercial boat wharves, the CRMC is the only regulatory body with jurisdiction over commercial docking activities as well. If the Thorton-Whitehouse decision presented only a minor setback to municipal zoning authority over tidal lands, the Champlin's decision represents the proverbial knockout punch. Both cases strongly indicate that the CRMC possesses jurisdiction over all docking activities in tidal lands generally, barring an explicit delegation state delegation of authority to the municipality.

The public trust doctrine holds that the state retains title to all land below the high-water mark in a proprietary capacity for the benefit of the public. In other words, the state is entrusted with the duty of preserving the public's right to enjoy the tidal lands. While the Champlin's holding relies upon the public trust doctrine to justify why a state regulatory agency, the CRMC, and not the Town of New Shoreham, has jurisdiction over commercial docking activities in the Great Salt Pond, it unknowingly employs the doctrine to preserve a private commercial enterprise against the will of the people. As utilized here, the doctrine is not preserving the general public's ability to access or use tidal lands, rather,

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28. Id. at 1262.
29. Id.
it is justifying the maintenance of a private commercial enterprise unwanted by local residents.

At the very least, the town should be granted concurrent jurisdiction over the tidal lands appurtenant to the upland region they control. Any other regulatory scheme hampers a municipality’s ability to properly regulate their sovereign coastal domain because the town is functionally unable to respond to most situations arising out of the tidal lands. While the state, in the form of the CRMC, is empowered to allow a commercial ferry service to dock in the Great Salt Pond, the town is powerless to defend itself against such a decision and potential upland repercussions. True tests to the court’s holding in Champlin’s may come when more repugnant activities such as gas pumping or dock expansion are proposed on tidal lands. These questions will undoubtedly be presented in the near and future, and the municipalities will certainly not accede jurisdiction without a fight.

CONCLUSION

The CRMC enjoys exclusive jurisdiction over commercial ferry operations. The extent of a municipality’s power over commercial ferry operations is limited to regulating construction of buildings, landscaping, lighting, and any other use of the upland.

Allen G. Bowman
Municipal Law/Constitutional Law. Gardner v. Cumberland Town Council, 826 A.2d 972 (R.I. 2003). This case involved the constitutionality of a city council’s decision to abandon a street. The Supreme Court of Rhode Island ruled that it did not have jurisdiction to review the merits of the city council’s decision and that the plaintiffs’ procedural rights, the opportunity to be heard and notice, afforded in the enabling statute, had not been violated.

FACTS AND TRAVEL

The Millers, who owned property on both sides of an unnamed street, petitioned the Cumberland Town Council to abandon the street.1 The Gardners, who owned a flower and gardening center that abutted the unnamed street, objected.2 After the town council continued the petition several times, it finally notified the Gardners and other abutting property owners that it would hold a hearing on the petition.3 In two town meetings, the town council heard evidence to determine whether or not the street had ceased to be useful to the public.4

The council met to vote on the Millers’ petition with the Millers, the Gardners, and their respective lawyers present.5 At the meeting, both lawyers voiced their concern that the newly elected town council members would be voting on the petition without hearing the evidence.6 The town solicitor and the Gardners’ attorney asked the new council members if they felt comfortable voting on the matter and they all responded in the affirmative.7 The town council then voted unanimously to abandon the street.8 Although section 24–6–1(a) of the Rhode Island General Laws provides that personal notice shall be served upon every owner of land abutting a street which has been abandoned, the plaintiffs never received such notice.9 The town council also failed to assess whether aban-

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2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id. at 974-75.
8. Id. at 975.
9. Id. at 980. R.I. Gen. Laws § 24-6-1(a) provides “personal notice shall be served upon every owner of land abutting upon that part of the highway or
The Gardners appealed the council’s decision to the superior court, which dismissed the appeal for lack of jurisdiction. The superior court found that section 24-6-1 of the Rhode Island General Laws, which addresses the abandonment of highways or driftways by towns, did not provide a right of appeal. The Gardners appealed the superior court’s decision to dismiss and also petitioned for a writ of certiorari to review the council’s order. The Supreme Court of Rhode Island issued the writ and granted the appeal. The court then granted a joint motion to dismiss the Gardners’ appeal. The Supreme Court of Rhode Island ruled only on the writ.

The court’s analysis and holding

The first issue addressed by the court was whether the court could review the council’s abandonment order. The Court ruled that the town council was acting prospectively and thus “whether it is expedient to discontinue a highway is a question for legislative decision.” As a result, the Court did not have the jurisdiction to review the merits of the town council’s decision. Justice Goldberg, who dissented, concluded that although the ultimate decision was legislative, the procedure that surrounded the decision was part judicial and part legislative.

The majority then ruled on whether the plaintiffs were given an opportunity to be heard. The enabling statute that allows a town council to declare a street abandoned includes several proce-
dural protections such as the requirement of actual notice to an abutter, and an opportunity to appear and be heard for or against the abandonment.\textsuperscript{21} In addition, the town council must, at the same time, appraise and award damages.\textsuperscript{22} The plaintiffs argued that they were denied an opportunity to be heard because at the time of the vote the city council did not have a quorum since only three of the city council members attended the prior hearings in which evidence on this matter was heard.\textsuperscript{23} Section 408 of the Code of Ordinances of Cumberland, Rhode Island, indicates that "four members of the Town Council shall constitute a quorum for the transaction of business, but a smaller number may adjourn from time to time."\textsuperscript{24} The majority ruled that it is enough if those who decide on a matter have "considered and appraised the evidence."\textsuperscript{25} The court held that the council's decision was valid because all seven council members voted after "educating themselves" about the evidence.\textsuperscript{26} The Court relied on the fact that written minutes and videotapes of the previous hearings were available for review by the council members.\textsuperscript{27}

The dissent disagreed with the majority and argued that the plaintiffs were denied an opportunity to be heard.\textsuperscript{28} The dissent relied on the Court's previous decision in \textit{D'Agostino v. Doorley} which held that the statutory processes surrounding abandonment "must be scrupulously followed."\textsuperscript{29} Justice Goldberg concluded that the process was not scrupulously followed because no meaningful opportunity to be heard occurred since the majority of the council had not been present at the prior hearing.\textsuperscript{30} The dissent found the

\begin{enumerate}
\item Id. at 977.
\item Id.
\item Id. at 978.
\item Id. at 978-979 (quoting \textit{CUMBERLAND CODE} § 408).
\item Id. at 979 (quoting Younkin v. Boltz, 216 A.2d 714, 715 (Md. 1966)).
\item Id. The Court relied on the presumption that "regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." Id. (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926)).
\item Id.
\item Id. at 983.
\item Id. at 982 (quoting \textit{D'Agostino v. Doorley}, 375 A.2d 948, 950-51 (R.I. 1977)).
\item Id.
\end{enumerate}
council members’ comfort level concerning the decision was irrelevant.\textsuperscript{31}

Finally, the majority found that although section 24–6–1(a) of the Rhode Island General Laws provides for personal notice when a street is abandoned the fact that the plaintiffs were not given notice was of no legal consequence since both were present at the town council meeting.\textsuperscript{32} The court ruled that attendance at the process was considered a waiver of the right to object to a defect concerning notice of any proceedings that occurred at the meeting unless “the person who raises the issue of the defect in notices be in some way disadvantaged or aggrieved by such defect.”\textsuperscript{33} The Court found that no such disadvantage had taken place in this case.

The dissent stated that the town council’s failure to comply with the enabling statute also invalidated the council’s decision.\textsuperscript{34} Justice Goldberg concluded that the plaintiffs were entitled to know whether or not they would be compensated.\textsuperscript{35} Since the town council failed to address the issue of damages at the December meeting, Justice Goldberg argued that the lack of notice should render the council’s decision invalid.\textsuperscript{36} Justice Goldberg also expressed concern that under section 24–6–4 of the Rhode Island General Laws a property owner may, within one year after the making of the award, petition the superior court for a jury determination of damages against the town.\textsuperscript{37} Since the plaintiffs were never given notice of the council’s decision to award damages (or in this case the lack thereof) the one year limitations period began to run even before the plaintiffs knew of the council’s determination.\textsuperscript{38}

\textsuperscript{31} Id. at 984.
\textsuperscript{32} Id. at 980.
\textsuperscript{33} Id. at 980-81 (quoting Graziano v. Rhode Island State Lottery Comm’n, 810 A.2d 215, 222 (R.I. 2002)).
\textsuperscript{34} Id. at 985.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
CURIOUSLY, the court found the council's duty to assess damages to abutting land owners quasi-judicial, but allowed the council members to determine the damages without ever hearing the evidence. In judicial proceedings, judges hear evidence, make certain determinations about the credibility of witnesses, and ultimately render decisions. Applying the majority's ruling to this scenario, the court would allow a judge to be absent from a trial but still render a decision about damages after reading the trial transcript. Of course such a situation offends our basic understanding of fairness. It does not seem to make sense to excuse the actions of a city council because the damages assessment occurred in a quasi-judicial setting. Rather, the court should be more willing to safeguard the rights of those being affected in order to promote legislative accountability, fairness and effectiveness.

The dissent concluded that the plaintiffs were not given an effective opportunity to be heard because three of the city council members were not present during the previous hearing. Although the dissent admonished the council's conduct, Justice Goldberg never explained why such an absence would constitute a lack of an opportunity to be heard. Such a determination was a perfect opportunity to discuss the policy issues that the majority neglected to consider. In congressional as well as presidential debates the issue of attendance is considered important. Absence from the House or Senate during voting implies an unwillingness to be an active member of that particular legislative body. At the local level, promoting effective and active council members is equally important. By ruling that a city council member may not vote if he or she is not present at the prior fact finding hearing ensures that such members will actively participate in the legislative process from the fact finding phase to the decision. Moreover, requiring attendance at the fact finding phase increases accountability. Instead of relying on second hand information that has been filtered, the elected member must use his or her experiences and observations from previous hearings.

39. Id. at 983.
40. Justice Goldberg stated that "at best, this case represents sloppy and uninformed practices by a newly elected town council." Id. at 985.
CONCLUSION

The Supreme Court of Rhode Island held that it could not review a city council's decision to abandon a street because such a determination is legislative. In addition, the court found that the Gardners' rights had not been violated even though the enabling statute was not "scrupulously followed." The court ruled that the town council did give the Gardners a meaningful opportunity to be heard despite the fact that three of the council members had not been present at the previous hearing and the council failed to provide the Gardners with actual notice of the abandonment. This case is an important contribution to the now existing law in that it emphasizes that attending a hearing generally constitutes a waiver of any defect in notice and that legislative discretion may overcome some procedural deficiencies.

Dena Rinetti

**FACTS AND TRAVEL**

This case involved two separate mechanics' liens that Petitioners placed on the property of the Respondents, Robert and Lisa Rossi; by agreement the two cases were consolidated into this one action. Respondents owned property in Smithfield, Rhode Island and entered into a contract with Petitioner Sells/Greene Building Company for construction of an office building and other improvements to the property. Petitioner Gem Plumbing and Heating Company also entered into a contract with the Rossis to provide and install water and sewer lines on the property. Both Petitioners properly recorded their notices of intention to claim a mechanics' lien in accordance with sections 34-28-4 and -5 of the Rhode Island General Laws. Consistent with section 34-28-10, within 120 days of filing its notice of intent, Sells filed both a petition to enforce the mechanics' lien and a notice of lis pendens in the amount of $129,807.78, for unpaid labor and materials. Similarly, 120 days after filing its notice of intent, Petitioner Gem

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1. Sells/Greene Bldg. Co. v. Rossi, PB 02-1019, 2003 R.I. Super. LEXIS 66, at *5-6 (Apr. 23, 2003). The court has already granted Respondents' motions to dissolve the mechanics' liens and notices of lis pendens because the amount paid by Respondents into the court registry was substituted to secure any valid mechanics' lien claim of the Petitioners. This case here is the Respondents' challenge to the constitutionality of Rhode Island's Mechanics' Lien Law. *Id.* at *4-5.
2. *Id.* at *2.*
3. *Id.* at *3.*
4. R.I. GEN. LAWS § 34–28–4 (1995) provides both the substantive requirements for notices of intention as well as the time periods and locations in which they must be filed. R.I. GEN. LAWS § 34-28-5 (1995) instructs the town clerk to maintain a record of the notices of intention to claim a lien.
also filed a notice of lis pendens and a petition to enforce the mechanics' lien for unpaid labor and materials in the amount of $35,500.00.\textsuperscript{6}

Prior to any form of hearing, the Respondents paid into the court registry $166,264.66 in order to dissolve the liens.\textsuperscript{7} Along with the payment, Respondents filed a motion to dissolve, release, and discharge the mechanics' liens in accordance with section 34–28–17 of the statute.\textsuperscript{8} The court granted the motion, noting that the deposited funds in the registry were sufficient to secure the Petitioners' mechanics' lien claims.\textsuperscript{9} Thereafter, Respondents challenged the constitutionality of the Mechanics' Lien Law and sought a release of funds from the court registry.\textsuperscript{10} At oral argument, Respondents argued this statute resulted in an unconstitutional taking of property without due process,\textsuperscript{11} because the only way a property owner could remove the lien before a hearing was either to file a bond or provide the court registry with sufficient cash to cover the amount claimed in the lien.\textsuperscript{12} The court did not decide that issue at that time; rather, it invited the Attorney General and various construction and trade associations to file amicus curiae briefs.\textsuperscript{13} The Attorney General thereafter filed a brief, arguing that the statute did not violate due process.\textsuperscript{14} On February 6, 2003, the Superior Court of Rhode Island heard full arguments from both sides on the issue regarding the constitutionality of the Mechanics' Lien Law.\textsuperscript{15} The court

\textsuperscript{6} Id. at *3-4.
\textsuperscript{7} Id. at *4. $130,404.66 was paid for the Sells/Greene claim (including filing costs, etc.) and $35,860.00 was paid toward the Gem claim. Id.
\textsuperscript{8} Id.
\textsuperscript{9} Id.
\textsuperscript{10} Id. at *5.
\textsuperscript{11} Id. at *7.
\textsuperscript{12} Id. at *5-6.
\textsuperscript{13} Id. at *5.
\textsuperscript{14} Id. at *7-8. Court rules require that when the constitutionality of a state statute is challenged, notification of such a challenge must be given to the state's Attorney General. R.I. R. App. P., art. 1, Rule 32(b).
\textsuperscript{15} Sells, 2003 R.I. Super. LEXIS 66, at *6. This action took place in front of Judge Silverstein on the business calendar. This court was designed to be more flexible than the Bankruptcy Court and is intended to expedite resolutions of business disputes. See Judith Kelliher, \textit{He's All Business}, R.I. Law Trib., Jan. 30-Feb. 5, 2002, at 9.
subsequently held that the statute in its current form was indeed unconstitutional.\textsuperscript{16}

\textbf{THE COURT'S ANALYSIS AND HOLDING}

When the law authorizes the "taking of a significant property interest [that is] protected by the Fifth Amendment,"\textsuperscript{17} an individual is entitled to the rights of due process. Petitioners here claimed that a mechanics' lien does not constitute a significant taking of property\textsuperscript{18} and even if it does, then the law provides adequate due process protections.\textsuperscript{19} In rejecting both these assertions, the court relied on \textit{Connecticut v. Doehr},\textsuperscript{20} in which the United States Supreme Court held that an attachment was the taking of a significant property interest because it "clouds title; impairs the ability to sell or otherwise alienate property; taints any credit rating; reduces the chance of obtaining a home equity loan . . . ; and can even place an existing mortgage in technical default. . . ."\textsuperscript{21} The court reasoned the mechanics' lien in question here likewise forces the property owner to either lose his ability to transfer the property, or in the alternative, lose access to the cash that is required to release the lien.\textsuperscript{22} Additionally, the lien clouds the property owner's title and also creates the possibility of default on mortgage provisions.\textsuperscript{23} Therefore, the mechanics' lien constitutes a taking of a significant property interest requiring due process protections.\textsuperscript{24}

The court next held that, contrary to Petitioners' assertions, the Rhode Island Mechanics' Lien Law does not provide adequate safeguards to guarantee sufficient due process protections.\textsuperscript{25} A

\begin{flushleft}
16. \textit{Id.} at \textsuperscript{*47}.
17. \textit{Id.} at \textsuperscript{*32} (citing Reardon v. United States, 947 F.2d 1509, 1517 (1st Cir. 1991)).
18. \textit{Id.} at \textsuperscript{*34}.
19. \textit{Id.} at \textsuperscript{*7-8}.
21. \textit{Sells}, 2003 R.I. Super. LEXIS 66, at \textsuperscript{*28} (citing \textit{Doehr}, 501 U.S. at 11). Unlike this case, \textit{Doehr} dealt with prejudgment attachment of real estate. However, the court here concluded that such attachment has the same effects as a mechanics' lien.
23. \textit{Id.} at \textsuperscript{*39-40}.
24. \textit{Id.} at \textsuperscript{*37}.
25. \textit{Id.} at \textsuperscript{*45}.
\end{flushleft}
lack of due process exists because the property owner is deprived of a significant property interest before he or she has the opportunity for a hearing.\textsuperscript{26} Secondly, the lien is unconstitutional because it becomes enforceable over the property without the claimant having to demonstrate that it is valid, or if the underlying debt even exists.\textsuperscript{27} While it is true that Petitioners may be subject to perjury for lying on the claim petition, this was held to be an insufficient protection for what might be an erroneous deprivation of property.\textsuperscript{28} Further due process protections are required because serious "repercussions flow before the property owner has any opportunity to challenge the truth, accuracy, or validity of the amounts claimed under the lien."\textsuperscript{29} The court found that requiring a hearing before the issuance of the lien would not unduly burden the courts of the State and would satisfy the requirements of procedural due process.\textsuperscript{30}

\textbf{COMMENTARY}

This decision constitutes an arguably long-overdue interpretation of the Mechanics’ Lien Law in Rhode Island. Interestingly, this case does not represent the first time a court has stricken down a Rhode Island lien or attachment law on due process grounds.\textsuperscript{31} For instance, in response to the United States Supreme Court’s decision in \textit{Fuentes v. Shelvin},\textsuperscript{32} the United States District Court for the District of Rhode Island held that Rhode Island’s procedure for prejudgment attachments was unconstitutional\textsuperscript{33} because the attachment allowed property to be taken without judicial notice or a hearing.\textsuperscript{34} In deciding that case, the court specially noted that to be effective, section 10-5-2, only required the writ of attachment to be stamped by the clerk and

\begin{itemize}
\item \textsuperscript{26} \textit{Id.} at *43.
\item \textsuperscript{27} \textit{Id.} at *42-43.
\item \textsuperscript{28} \textit{Id.} at *44-45.
\item \textsuperscript{29} \textit{Id.} at *43.
\item \textsuperscript{30} \textit{Id.} at *47.
\item \textsuperscript{31} \textit{See, e.g., infra} notes 32, 33 and 40.
\item \textsuperscript{32} 407 U.S. 67 (1972).
\item \textsuperscript{33} \textit{See} McClellan v. Commercial Credit Corp., 350 F.Supp. 1013 (D.R.I. 1972).
\item \textsuperscript{34} In that case, a woman who failed to make payments on her furniture had her car repossessed before any complaint or writ of attachment was served on her. \textit{Id.} at 1014.
\end{itemize}
delivered to the sheriff with a summons and a complaint. Like the Mechanics' Lien Law, property was taken without any due process protections whatsoever.

McClellan sparked numerous changes in Rhode Island laws on the procedures for liens and attachments. For example, the Rhode Island Superior Court amended Rule 4(j) of the Superior Court Rules of Civil Procedure to require a hearing before attachment to property, at which the claimant has the burden of establishing his claim will be successful. To further satisfy the requirements of McClellan, the Rhode Island General Assembly amended section 10–5–2 to require notice and a hearing before attachment to property can occur. As Justice Silverstein opined in Sells, "These responses recognized that constitutional due process requires an opportunity to be heard before property interests can be interfered with by the mechanism of a writ of attachment."

In 1994, the Rhode Island government continued to amend its laws to provide the appropriate level of due process required for attachments. In Shawmut Bank of Rhode Island v. Costello, the Supreme Court of Rhode Island held unconstitutional section 10–5–5 of the Rhode Island General Laws, which had allowed judges to grant writs of attachment after a party filed a complaint, even though it provided for a post deprivation hearing after the attachment was granted. Despite the post-attachment hearing, the statute violated due process because "the right to be notified and the opportunity to be heard must be granted 'at a meaningful time and in a meaningful manner.'" Similarly here, the court correctly overruled the Mechanics' Lien Law because while the property owner is given his day in court, such a day comes only after the property interest is lost, which is too late to satisfy due process.

35. Id.
39. Id. at *31.
41. Id. at 202.
42. Id. at 198 (quoting Fuentes v. Shelvin, 407 U.S. 67, 80 (1992)).
There is relatively little discrepancy between the property interests affected by an attachment or through a mechanics' lien. Both deny the property owner the full use and benefits of his or her property by virtue of clouding the title, or in the case of the mechanics' lien, through the loss of the availability of the cash for the bond that is required to release the lien. Therefore, in light of these similarities, Rhode Island law must require the same guarantees of due process for both attachment and mechanics' liens proceedings. The Sells decision simply represents another step in Rhode Island's evolution to bring its laws in line with the guarantees of due process its citizens are entitled to enjoy.

CONCLUSION

Rhode Island's Mechanics' Lien Law is unconstitutional because it denies the property owner his guaranteed right to procedural due process under the Fourteenth Amendment of the U.S. Constitution and article 1, section 2 of the Rhode Island Constitution. When the lien becomes effective, a significant property interest is lost, for which the mechanics' lien law provides no protection. Because the lien can become effective prior to any hearing or determination on the validity of the claim on which the lien is based, it fails to provide adequate due process. Therefore, the procedures in the General Laws of Rhode Island, Title 34, Chapter 28 are unconstitutional.

Jesse Nason
Property Law/Zoning Law. Coventry Zoning Board of Review v. Omni Development Corp., 814 A.2d 889 (R.I. 2003). Only individuals whose land use is affected, or a city or town solicitor acting on the public's behalf, are aggrieved parties who may appeal a local municipal zoning board decision that approves a special exception for low and moderate income housing. The Rhode Island Low and Moderate Income Housing Act applies to residential subdivision applications and is not limited to proposals for development of multifamily housing. A State Housing Appeals Board decision will be reversed unless it is supported by specific findings, takes into account existing regulations, and uses the correct standard of review as unambiguously provided for in the Act itself.

FACTS AND TRAVEL

On February 22, 2001, Omni Development Corporation (Omni) submitted an application to the Town of Coventry Zoning Board of Review (zoning board) for special exceptions to certain provisions of the Rhode Island Low and Moderate Income Housing Act (Act). The Act was designed to promote the development of low and moderate income housing in the state. Although the Act is silent with respect to residential subdivision proposals, and is most frequently applied to proposals for adapting or developing multifamily housing, Omni sought approval under the Act to construct a forty-three-lot residential subdivision for an undeveloped parcel of land. This project involved the construction of twenty single-family homes for families with low and moderate income, as well as twenty-three market-rate dwellings priced in accordance with Rhode Island Housing and Mortgage Finance Corporation guidelines.

Omni requested relief from several provisions of Coventry's subdivision and zoning ordinances. As part of its application, Omni argued that the proposed project would not be economically

2. Coventry Zoning Bd. of Review, 814 A.2d at 893.
5. Id. at 894.
6. Id. at 893-94.
viable unless the exemptions were granted. In particular, Omni wanted exemption from five construction regulations and the fair-share development fee ordinance requiring payment of impact fees upon each new dwelling unit constructed in the town. After hearings, the zoning board approved the application, but only granted some of the special exemptions requested by Omni. The zoning board denied relief from subdivision regulations for vertical face curbing and a secondary access road into the development, requiring Omni to expand the width of an existing bridge to provide for secondary access. In addition, the zoning board relieved Omni of the development impact fees on each low and moderate-income unit, but refused to exempt Omni from paying fees for the market-rate dwellings.

Omni appealed the zoning board’s decision to the State Housing Appeals Board (SHAB), arguing that the conditions imposed rendered the project economically infeasible and that the decision was inconsistent with local needs. SHAB reviewed the decision and granted relief from the conditions, deciding that they were not necessary for the protection of the environment, were inconsistent with local needs, and that the costs created an “unnecessary restriction on affordability.”

The zoning board appealed to the Rhode Island Supreme Court.

BACKGROUND

Section 45–53–5 of Rhode Island General Laws indicates that SHAB’s decisions “may be appealed in the [S]upreme Court,” but sets forth no standing requirement. However, section 45–53–4 states that an appeal to the Supreme Court of a zoning board decision granting special exception for low and moderate income housing may be undertaken by “[a]ny person aggrieved by the issuance of an approval . . . .”

7. Id. at 895.
8. Id.
9. Id. at 894.
10. Id. at 895.
11. Id.
12. Id.
13. Id. at 895-96.
14. Id.
16. Id. § 45–53–4.
As a standard of review, the Act provides that in hearing an appeal of a local zoning board, SHAB must determine whether the decision was “reasonable and consistent with local needs.” If conditions are imposed, it must also consider “whether these conditions and requirements make the construction or operation of the housing infeasible.” SHAB must examine the regulation or ordinance in light of these criteria and set forth the evidence it relied upon to reach its conclusion, resolving any disputed issues of fact. In towns like Coventry that do not have the minimum number of low and moderate income housing units established by the Act,

[a] zoning or land use requirement or regulation may be found to be consistent with local needs if it is reasonable in light of the state’s need for low and moderate income housing and of the number of low income persons in the community, and if it relates to the health and safety, better building design, or preservation of open space.

A project is “infeasible” when the conditions attached by the zoning board render it “impossible . . . to proceed in building or operating the low or moderate income housing without financial loss.”

THE COURT’S ANALYSIS AND HOLDING

This was a case of first impression. Although the issue of standing was not raised by Omni, the court raised the issue *sua sponte*, holding that the zoning board lacked standing to appeal SHAB’s decision. Noting that appeals can only be undertaken by aggrieved persons who have an actual stake in the outcome of the controversy, the court held that “challenges . . . must be made by those whose land use will be affected by the decision or by a city or

17. Id. § 45–53–6(a).
18. Id.
20. Id. at 899-900; see R.I. GEN. LAWS § 45–53–3(2) (1998).
22. Coventry Zoning Bd. of Review, 814 A.2d at 894.
23. Id. at 896.
town solicitor acting on the city's behalf." 24 Regardless, the court proceeded to decide the important issues of the case, remanding the case to SHAB for further findings only upon the condition that the town solicitor intervene as a party before the court within thirty days of the date of the decision to avoid dismissal of the appeal. 25

Contrary to the zoning board's argument, the court held that the Act applied to residential subdivision applications and is not limited to proposals for development of multifamily housing. 26 Although the Act and SHAB's own regulations were drafted so as to apply most clearly to multifamily housing, nothing in the statute or regulations precludes their applicability to residential subdivisions as affordable housing. 27 The Legislature contemplated expedited review and approval of multifamily housing when enacting the Act. 28

The court also held that SHAB could not modify, vacate, or reverse the zoning board's decision or remove the conditions attached to the approval so long as the zoning board's decision was consistent with local needs. 29 SHAB also failed to make specific findings, failed to take into account existing subdivision regulations, and failed to use the correct standard of review as explicitly laid out in the Act. 30 SHAB declared each of the conditions imposed by Coventry to be "an unnecessary restriction on affordability." 31 However, the appropriate standard of review under the Act is whether the conditions make it "impossible" to carry out the proposal without suffering financial loss. 32 Thus, the court remanded the decision to SHAB for further fact-finding. 33 Regarding the impact fees, the court noted that SHAB retained the authority to decide whether placing such fees on low and moderate income initiatives will have a harmful effect on the development of afford-

24. Id. at 897 (quoting Kirby v. Planning Bd. of Review, 634 A.2d 285, 288 n.3 (R.I. 1993)).
25. Id.
26. Id. at 902-03.
27. Id. at 902.
28. Id. at 901-02.
29. Id. at 906.
30. Id. at 904-06; see R.I. Gen. Laws § 45-53-6(c) (1991).
32. Id. at 904; see R.I. Gen. Laws § 45-53-3(3) (1998).
33. Coventry Zoning Bd. of Review, 814 A.2d at 905.
able housing. Accordingly, that issue was also remanded to further examination by SHAB in accordance with the Act.  

**COMMENTARY**

This case adds to Rhode Island's understanding of the Low and Moderate Income Housing Act in three distinct ways. First, the court declares a clear rule on who will have standing to appeal SHAB decisions. The Act is somewhat ambiguous on the standing issue. However, this decision to allow standing only for those whose land use will ultimately be affected by the proposed construction (or those acting in their behalf) is in accordance with general standing doctrine requiring there to be an injury before asserting a claim. Rhode Island law has complied with this standard for quite some time.

Second, the court clarified another ambiguity of the Act. The court decided that the Act is applicable to residential subdivision applications and is not limited to proposals for development of multifamily housing. This holding is supported by the plain language of the Act, which neither precludes nor specifically rejects its applicability to residential subdivision proposals. The language of the Act also contemplates such applicability by giving "equal consideration [to] . . . retrofitting existing dwellings and assimilating" new low and moderate income housing into existing neighborhoods. This language implies that there is no real limit on what type of housing may be facilitated under the Act, so long as the construction or rehabilitation furthers and promotes the objective of the Act to provide affordable housing to low and moderate income citizens in the state.

The one problem with the Act's applicability to subdivision proposals is their complicated process of review as compared with other proposals. As the court noted, however, a recent amendment to the Act specifically addresses this problem with subdivision proposals and clearly delineates a strict process of review to be

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34. Id.
37. Coventry Zoning Bd. of Review, 814 A.2d at 901.
conducted in accordance with regulations promulgated by SHAB. This amendment declaring SHAB's jurisdiction over such reviews also indicates a legislative intent to include residential subdivisions within the purview of the Act. Moreover, including residential subdivisions within the Act's purview is logically related to furthering the purpose of the Act, because it encourages construction of a wider range of low and moderate income housing units than would be facilitated if residential subdivisions were excepted from the statute.

Finally, the court declares that SHAB's failure to state findings of fact to support its decision, along with its application of an incorrect standard of review, presented a reason for remand. This holding may reflect a general disdain on the part of the court regarding the amount of power that SHAB has had in Rhode Island in the past, and may serve as a future check on that power. In addition, a failure to clearly support findings is a widely accepted reason to reverse a board of review's decision in this context. Moreover, the court's statement of the correct standard of review with respect to whether conditions attached to a zoning board approval make that project infeasible is a clear and unequivocal re-statement of the unambiguous language of the Act itself. There can be no clearer statement of statutory law than when a legislative enactment provides the standard of review in the statute itself.

CONCLUSION

With this decision, the Rhode Island Supreme Court has made clear who will be considered aggrieved parties with standing to appeal SHAB decisions, that the Rhode Island Low and Moderate Income Housing Act applies to residential subdivision applications, and that a SHAB decision will be reversed unless it is

41. See Coventry Zoning Bd. of Review, 814 A.2d at 900.
supported by specific findings, takes into account existing regulations, and uses the correct standard of review as unambiguously provided for in the Act itself.

Nicole M. Labonte
Real Property. Tavares v. Beck, 814 A.2d 346 (R.I. 2003). A claim of right to own or use real property through adverse possession arises from the petitioner's objective acts to so own or use the property in a manner hostile to the record owner. Petitioner's mistaken belief, or lack thereof, concerning the true record owner of the property does not affect this claim of right.

FACTS AND TRAVEL

Lawrence Tavares (purchaser) brought this suit against the record owner to quiet title to three parcels of land.\(^1\) Tavares bought two parcels of land from James Amarantes (predecessor) in 1991 and two years later he purchased a third parcel positioned between the first two.\(^2\) The predecessor acquired his title in 1977 from the Almys.\(^3\) Upon obtaining his title, seller mistakenly believed the three parcels in question were part of his property.\(^4\) However, between 1978 and 1979, he surveyed his property and learned he was not the true owner of the three parcels.\(^5\) Notwithstanding this clarification, he continued to use and possess the parcels as if he had true title.\(^6\) Subsequently, predecessor may have even subdivided the three parcels from his original purchase and deeded the subdivision to himself and his wife.\(^7\) Additionally, predecessor posted no-trespassing signs, dug drainage ditches, and built a stone wall around the property in question.\(^8\)

Purchaser asserted he is the rightful owner of the property as he and his predecessors “had been in 'open, adverse, exclusive and uninterrupted possession and enjoyment' of the property for more than seventy years.”\(^9\) The trial court determined that purchaser could not establish ownership by adverse possession.\(^10\) The court reasoned that purchaser had not possessed the property for the statutory ten-year period and that purchaser could not tack on predecessor’s use and possession, as it was neither under a claim

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2. Id.
3. Id.
4. Id. at 349.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id. at 348.
10. Id. at 349.
of right or adverse to the true owner's interest. The court determined predecessor's activities were not open or notorious because they were not visible from the street or the property line. Further, the court opined that the predecessor in interest could not assert a claim of right to the property for he was on notice as to the true owner. Purchaser appealed to the Rhode Island Supreme Court arguing that the trial court wrongly found that predecessor's use was not under a claim of right, hostile, and open and notorious.

THE COURT'S ANALYSIS AND HOLDING

Pursuant to Sherman v. Goloskie, in order to successfully establish adverse possession, possession must be "actual, open, notorious, hostile, under a claim of right, continuous, and exclusive" for a requisite ten-year period. The issue presented to the Court was whether purchaser proved that his predecessor satisfied these elements. If so, purchaser could tack on predecessor's use and possession to his own, thus satisfying the requisite ten-year period.

The Court determined that the trial justice erred in considering the record owner's absentee ownership of the property as a factor. This, the Court declared, should not influence predecessor's claim of right in regards to open and notorious use. The record owner's failure to visit the property from his Vermont residence will have no bearing on the claimant's open, notorious, and hostile use. Moreover, the Court found that predecessor's want of colorable legal title also should have no bearing on a claim of right. The Court held that it is not a mistaken belief concerning rightful ownership that gives rise to a claim of right rather, such a claim is established through objective acts manifesting intent to use the property in a method hostile to the record owner.

11. Id.
12. Id.
13. Id.
14. Id.
15. Id. (quoting Sherman v. Goloskie, 188 A.2d 79, 83 (1963)).
16. Id.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id. at 351.
A claimant can seek to quiet title even when claimant knows he is not the record owner so long as he engages in acts openly, notoriously, and hostile to the true owner's rights. Here, predecessor posted no-trespass signs, erected stone walls, dug drainage ditches, and cut wood on the property. These objective acts, not his subjective knowledge of ownership, should have been evaluated to determine if the acts sufficiently satisfied the requisite elements to establish a claim of right.

In addition to objective acts, the Court deemed it necessary to evaluate the nature of the property. In evaluating whether predecessor's objective acts were sufficiently open and notorious, it is crucial to consider the location and type of the property. The Court confirmed that, when land is rural and unimproved, use and possession need not be complex in order to establish adverse possession. Rather, the Court ascertained, use and possession need only be consistent with similarly situated property. Such use and possession is adequate to put the record owner on notice.

In this case, predecessor testified at trial concerning the extent of his open and hostile use. Predecessor described the stone wall he had erected on the property as well as the no-trespassing signs. Both, predecessor claimed, were visible from the road. Predecessor was not cross-examined, his testimony was not impeached, nor did the record owner present conflicting testimony. However, the trial court failed to consider this uncontested testimony in determining whether the use of the land was sufficiently open. Notwithstanding this testimony, a claimant need not show that use was visible from the nearest road. As previously discussed, the suitable question is whether the claimant used the land similar to owners of corresponding property. The Court

22. Id. at 352.
23. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id. at 353.
30. Id.
31. Id.
32. Id. at 353-54.
33. Id. at 354.
34. Id. at 352.
noted that constructing and maintaining a physical structure for the requisite ten-year period may be sufficient to demonstrate adverse possession.\textsuperscript{35} The trial court, therefore, should have ruled whether predecessor’s stone wall had been constantly maintained for ten years.\textsuperscript{36}

Finally, the Court held that predecessor’s subjective intent to adversely possess the land in question does not preclude a claim of right.\textsuperscript{37} Conversely, intentional actions undertaken to acquire such property are the crux of adverse possession.\textsuperscript{38} Predecessor had already engaged in activity hostile to the true owner for a statutory period before deeding the property to himself.\textsuperscript{39} If predecessor had met the elements necessary for a claim of right, purchaser may tack on predecessor’s use of the property when seeking to quiet title.\textsuperscript{40} Considering the aforementioned factors, the Court vacated the trial court’s judgment and remanded the case to the trial court.\textsuperscript{41} On remand, the trial court must consider the elements of adverse possession without regard to record owner’s absenteeism or predecessor’s subjective knowledge of ownership.\textsuperscript{42}

\textbf{COMMENTARY}

As the court indicates, the components of adverse possession have remained constant in Rhode Island case law. Possession must be “actual, open, notorious, hostile, under a claim of right, continuous, and exclusive” for a ten-year period.\textsuperscript{43} The claimant may tack on predecessor’s possession provided the predecessor satisfied the requisite elements.\textsuperscript{44} If open acts occur on the land, the true owner is charged with knowledge of such acts.\textsuperscript{45} Further, the Court noted, the hostile component does not refer to an emo-

\begin{footnotes}
\footnote{35. Id.}
\footnote{36. Id.}
\footnote{37. Id. at 355.}
\footnote{38. Id.}
\footnote{39. Id.}
\footnote{40. Id.}
\footnote{41. Id.}
\footnote{42. Id.}
\footnote{43. Sherman v. Goloskie, 188 A.2d 79, 83 (R.I. 1963).}
\footnote{44. Taffinder v. Tiffany, 381 A.2d 519, 521 (R.I. 1977).}
\footnote{45. Id. at 523.}
\end{footnotes}
tional state but rather acts inconsistent with the true owner's rights.\textsuperscript{46}

Recently, the Court distinguished a "claim of right" from "color of title."\textsuperscript{47} The latter requires either a written instrument conveying title or at a minimum a subjective belief that the claimant holds title to land.\textsuperscript{48} This, the Court declares, is not necessary for establishing a claim under adverse possession.\textsuperscript{49} Thus, \textit{Tavares} is consistent with the unequivocal elements of adverse possession established through precedent. The decision summarizes two common issues arising in adverse possession claims, notice and colorable legal title. The Court holds fast to the stable doctrine determining that adverse possession is obtained through objective acts, not subjective beliefs. Moreover, the true owner is charged with notice once objective acts take place on the property. This decision, as well as prior decisions, will encourage landowners to use and enjoy their land rather than let it remain fruitless and unproductive.

The Court's decision is also consistent with the laws of neighboring states. Massachusetts' high court held that the claimant's subjective knowledge of ownership has no bearing on the claim and pronounced, "the inner workings of his mind are irrelevant."\textsuperscript{50} The Connecticut Supreme Court also held that color of title is not an element of adverse possession.\textsuperscript{51} Both states, like Rhode Island, have determined that open use yields constructive notice to true owner.\textsuperscript{52} Therefore, once a claimant commences open use of another's land, true owner beware, for continuous use may result in an involuntary title shift.

Speculation and absenteeism cannot be tolerated in the land-scarce enclaves of southern New England. If one fails to notice open, notorious, and hostile use of one's land for a ten-year period, the land may be put to better use in the hands of another. Arguably, one has the right to dispose of his land as he so pleases. However, perhaps this practice is better suited for a less populated

\begin{itemize}
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Carnevale v. Dupee, 783 A.2d 404, 412 (R.I. 2001).
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Id.
\item \textsuperscript{50} Lawrence v. Town of Concord, 788 N.E.2d 546, 552 (Mass. 2003).
\item \textsuperscript{51} Ruick v. Twarkinns, 367 A.2d 1380, 1384 (Conn. 1976).
\item \textsuperscript{52} See generally supra notes 50 and 51.
\end{itemize}
location. New England, in all of its social, political and economic glory, would cease to thrive if its land were permitted to rest idly in the hands of a few.

CONCLUSION

A claimant need not hold a subjective belief that he holds true title to land in order to establish a claim under adverse possession. Rather, such a claim is fulfilled through the objective acts conducted upon the property demonstrating open use inconsistent with the true owner's rights. In Rhode Island, one can enter another's land with intent to establish ownership through adverse possession.

Matthew R. Plain
Taxation. White v. Clark, 823 A.2d 1125 (R.I. 2003). A taxpayer who appealed a decision of the tax administrator was exempt from the prepayment requirement under section 8–8–26 of the General Laws of Rhode Island because he proved a reasonable probability of success by a preponderance of the evidence. Therefore, petitioner was entitled to de novo review of the tax administrator’s final order with a full evidentiary hearing.

FACTS AND TRAVEL

Petitioner White owned and operated a business that offered videotaping services of depositions for use in litigation. The Division of Taxation conducted an audit of petitioner’s business and concluded that White owed sales and use tax on the sale of the videotaped depositions, assessing a deficiency of $31,787.97 including penalties and interest. The auditor based his determination upon the finding that the sale of videotaped depositions constituted a sale of tangible personal property; thus, the sales were subject to the Rhode Island Sales and Use Tax.

Upon appeal at an administrative hearing, the hearing officer affirmed the deficiency assessment against the petitioner. The tax administrator’s final decision and order reduced the deficiency assessment to $30,910.08.

White appealed the tax administrator’s final order to the District Court seeking de novo review and filed a motion for exemption from the prepayment requirement under section 8–8–26 of the General Laws of Rhode Island. Section 8–8–26 provides that a petitioner’s appeal of the tax administrator’s final order “shall be conditional upon prepayment of all taxes, interest, and penalties set forth in the assessment, deficiency, or otherwise.” An appellant can avoid the prepayment requirement only upon a showing “(1) that the taxpayer has a reasonable probability of success on the merits; and (2) that the taxpayer is unable to prepay all taxes, interest, and penalties set forth in the assessment, deficiency, or
otherwise." Both parties stipulated that White was unable to prepay the tax administrator's assessment, thus the only issue before the District Court was whether petitioner "had a reasonable probability of success on the merits." Applying the "real object test," the District Court found that petitioner's sale of videotapes was the real object of his business and that the service he provided was incidental to those sales. Thus, the transactions were taxable and White's motion for exemption from the prepayment requirement was denied. White petitioned the Rhode Island Supreme Court for a writ of certiorari.

THE COURT'S HOLDING AND ANALYSIS

The Rhode Island Supreme Court held that a party appealing a final order of the tax administrator must prove a "reasonable probability of success" by a preponderance of the evidence. Noting that the burden of proof for this prong of the prepayment exemption under section 8-8-26 is less than that required to reach a determination on the merits, the court concluded that the issue on appeal to the District Court is whether the petitioner has "shown at least a reasonable probability, rather than a certainty, of ultimate success on a final hearing."

White raised two allegations of error in his petition for a writ of certiorari. First, that the District Court erred in summarily deciding that he did not have a reasonable probability of success instead of affording him de novo review with a full evidentiary hearing. Second, that the District Court erred in concluding that,

8. Id.
9. Id.
10. The Rhode Island Supreme Court adopted the "real object test" for ascertaining the tax consequences of sales that involve a mixture of tangible products and services in Statewide Multiple Listing Service, Inc. v. Norberg, 392 A.2d 371 (R.I. 1978). White, 823 A.2d at 1127. The Norberg court summarized the test as follows: "Where the real object of the transaction is the service rendered and the transfer of personal property is merely incident to the service the transaction is not taxable." Id. (quoting Norberg, 392 A.2d at 374).
11. White, 823 A.2d at 1128.
12. Id.
13. Id. at 1126.
14. Id. at 1127.
15. Id.
16. Id. at 1128.
under the “real object test,” the videotapes were tangible personal property subject to Rhode Island Sales and Use Tax.\textsuperscript{17}

The court held that the District Court was wrong to deny White’s motion for prepayment exemption and to summarily decide his claim that his videotaped depositions were not taxable.\textsuperscript{18}

The court began by noting that whether videotaped depositions were subject to sales tax was an issue of first impression in Rhode Island.\textsuperscript{19} The supreme court concluded that White had proved a reasonable probability of success by a preponderance of the evidence and thus should have been exempt from prepayment as a condition precedent to de novo review of the tax administrator’s final order.\textsuperscript{20} In addition, because the issue raised was novel and “fair ground for litigation,” combined with the great potential for injury due to petitioner’s inability to prepay, the District Court erred by failing to afford White de novo review by summarily deciding the reasonable probability of success issue.\textsuperscript{21} The court held that, under the circumstances, petitioner should have had an opportunity to develop a record for appeal through a full evidentiary hearing.\textsuperscript{22} Because the District Court summarily decided the issue, the supreme court did not directly address petitioner’s claim that the videotaped depositions were merely incidental to the service he was providing.\textsuperscript{23}

**COMMENTARY**

The court’s decision to require proof of a “reasonable probability of success” by a preponderance of the evidence is commendable in this instance, but perpetuating this as the default burden of proof for every challenge to a tax administrator’s final order may frustrate the purpose of prepayment under section 8–8–26. Certainly the primary goal of the prepayment requirement is to establish a rebuttable presumption in favor of the tax administrator – that an appellant is unable to prove a “reasonable probability of

\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id. (quoting Palmigiano v. Travisono, 317 F.Supp. 776, 787 (D.R.I. 1970)).
\textsuperscript{22} Id.
\textsuperscript{23} See id.
success" – thereby deterring challenges and, consequently, de novo appeals and docket congestion. With this in mind, the court did well to disguise a general statement of policy within the specific holding of this case. At first blush, this decision seems to fix the burden of proving a "reasonable probability of success" at a preponderance of the evidence under section 8-8-26; however, a closer reading suggests that the court actually limited its holding to requiring application of the preponderance burden only when a novel underlying substantive claim is presented. Since whether the sale of videotaped depositions is subject to sales tax was an issue of first impression, a lower burden of proof was appropriate to ensure de novo review and thus an evidentiary record for subsequent appeal of the novel issue. However, had the underlying substantive issue already been decided (i.e., that the sale of videotaped depositions were subject to sales tax), the court hints that a summary decision may have been appropriate.

The court’s distinction between novel and settled substantive claims as a basis for varying the burden of proving a "reasonable probability of success" is appropriate. Application of a more stringent burden of proof under section 8-8-26 upon presentation of a settled substantive claim is in accord with the apparent purpose of the prepayment condition precedent – to deter challenges to deficiency assessments. Relaxing a challenger’s burden of proving a "reasonable probability of success" in the absence of a novel substantive issue would frustrate this purpose by permitting more appeals and subsequently encouraging dispute with a tax administrator’s final order. This could have the further effect of undermining the tax administrator’s role as a final arbiter in deficiency and assessment proceedings, as well as making de novo appeal commonplace as opposed to the rare privilege it was intended to be.

CONCLUSION

In Rhode Island, the burden of proving a "reasonable probability of success" in a motion for exemption from prepayment under section 8-8-26 of the General Laws of Rhode Island is by a

24. See id. at 1127-28.
25. See id. at 1128.
preponderance of the evidence, at least where the underlying substantive claim on appeal is novel. If an appellant meets the burden of proof she may appeal the final order of the tax administrator de novo, and be afforded a full evidentiary hearing.

Todd Barton
Tort Law. Bourque v. Stop & Shop Co., Inc., 814 A.2d 320 (R.I. 2003). Merchant/Shopkeeper may request a person detained for shoplifting to sign a statement waiving his or her right to bring a civil action against the merchant based upon the detention in return for the merchant agreeing not to bring criminal action against the customer. The waiver, however, may not contain an admission of guilt nor may the customer's release from detention be conditioned upon signing the waiver. A licensed social worker is qualified to testify about a psychological diagnosis if he or she has "present sufficient qualifications," such as working along with a psychologist or being licensed to diagnose mental health matters.

FACTS AND TRAVEL

Defendant supermarket's store security detained plaintiff Lois Bourque, accusing her of shoplifting. After a store detective had gone through her purse and Bourque was preparing to leave the interrogation room, a security guard stopped her and allegedly told her that she could not leave until she had signed a waiver form. The waiver contained an acknowledgement of taking merchandise from the store without paying and without intending to pay. Bourque signed the statement because she reasonably believed that she could not leave until she did.

Thereafter, Bourque brought a civil action against Stop & Shop Companies, Inc. (Stop & Shop) for false imprisonment, false arrest and extortion with a demand for punitive damages. After a Superior Court jury verdict in favor of the plaintiff finding the defendant liable for damages, Stop & Shop filed motions for judgment as a matter of law and for a new trial. The trial justice denied these motions, and the defendant filed a timely appeal.

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2. Id. at 324.
3. Id. at 322. The statement read "I have acknowledged appropriating certain merchandise for my own use without paying for it or intending to pay for the merchandise." Id. at 323.
4. Id. at 324.
5. Id. at 322.
6. Id. at 322, 324.
7. Id.
BACKGROUND

Section 11–41–21(b) of the Rhode Island General Laws requires that any person stopped by a merchant promptly identify herself or himself by name and address.8 A merchant may not elicit any other information from the suspected shoplifter except for requesting a waiver statement until the police have placed the person into custody.9 The detention must be reasonable and not accomplished by unreasonable restraint or excessive force.10 The detention period must not exceed one hour.11 Furthermore, section 11–41–21(c)(1) provides in part: "A merchant may request a person detained for shoplifting to sign a statement waiving his or her right to bring a civil action arising from the detention in return for a signed statement from the merchant waiving the right to bring criminal charges based upon the alleged shoplifting. . . ."12

THE COURT'S ANALYSIS AND HOLDING

On appeal, Stop & Shop presented numerous issues for the court's review. First, Stop & Shop argued that the trial justice erred in denying its motion for judgment as a matter of law because the plaintiff signed the statement waiving her right to bring civil charges against Stop & Shop based on the detention.13 Next, Stop & Shop argued that the trial justice should have granted its motion for judgment as a matter of law and motion for a new trial because there was no evidence of extortion or coercion on its part.14 Third, Stop & Shop maintained that the trial judge incorrectly instructed the jury on the shopkeeper's privilege.15 Stop & Shop also argued that the trial justice erred in deciding that a licensed social worker was qualified to diagnose post traumatic dis-

9. Id.
10. Id.
11. Id.
12. Id. (c)(1).
14. Id. at 324.
15. Id. at 325.
stress disorder. Finally, Stop & Shop questioned the appropriateness of punitive damages in this case.

The Supreme Court affirmed the Superior Court decision in all respects as discussed below.

First, Stop & Shop argued that its motion for judgment as a matter of law should have been granted because the plaintiff signed the waiver form preventing her from bringing the suit. In reviewing "the evidence in the light most favorable to the nonmov- ing party," the court held that the trial justice was correct in his assessment that Stop & Shop's waiver form exceeded the bounds of section 11-41-21(c)(1). Stop & Shop's waiver included an acknowledgement of guilt, which was not allowed by the statute. Furthermore, the court reasoned that the plain language of section 11-41-21(b) prohibited the merchant from eliciting anything but the name and address of the detainee until the police placed the person into custody; the acknowledgement of guilt included in the waiver was clearly an elicitation of something other than the person's name and address. The court also agreed with the trial justice that a jury could reasonably find that the plaintiff's signature was coerced and, therefore, invalid. The court that the defendant's security personnel pressured the plaintiff into signing the document because the plaintiff reasonably believed she could not leave the interrogation room until she had signed the waiver.

Stop & Shop argued next that because there was no evidence of coercion or extortion on its part, the trial justice erred in denying its motion for judgment as a matter of law and motion for a new trial. In denying Stop & Shop's motion, the trial justice considered the credibility of the witnesses and found that while the plaintiff was a credible witness, the two security guards were not. The trial justice also explained that Bourque was a victim of

16. Id.
17. Id. at 326.
18. Id. at 322.
19. Id. at 323.
20. Id.
21. Id.
22. Id.
23. Id. at 324.
24. Id.
25. Id.
26. Id. at 324-25.
extortion because “Stop & Shop . . . applied improper force or used improper threats to get her to do something she didn’t want to do . . . .”27 The court held that the trial justice did not overlook or misconceive any material evidence and correctly denied the motion for a new trial.28

Stop & Shop’s third challenge was to the trial justice’s jury instructions on the shopkeeper’s privilege.29 Stop & Shop argued that the trial judge did not properly state the law, but the court held that the jury instructions did not draw any conclusions for the jury and properly defined what the law would allow or not allow.30 Even if the charge was erroneous, the court explained that it would not reverse because Stop & Shop did not make an objection to the jury instructions specific enough to alert the trial justice of any error as required by Rule 51(b) of the Superior Court Rules of Civil Procedure.31

The defendant’s next issue on appeal concerned the trial justice’s decision that a social worker was qualified to diagnose Post Traumatic Stress Disorder (PTSD) and to allow that social worker

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27. Id. at 324.
28. Id. at 325.
29. Id. The jury instructions were as follows:
   
   So, the so-called deal or trade-off and the only one that is permitted of a merchant is to say, “Look, you can sign this paper and you won’t sue us and we’ll sign it, also, and we won’t prosecute you as being a shoplifter.” The law does not permit or authorize a merchant to say, ‘You must sign this paper and then we’ll let you leave the room.’ So, that is not authorized by our Legislature. It is unlawful to continue to detain a person even if the initial stop was all right and even if the initial detention was done lawfully. The merchant may not continue to detain a person unless and until they sign a paper admitting shoplifting or saying that, “You can only leave the room if you sign this document.” That is not a fair trade-off or not a question of fairness. It's not the law. The law does not permit that kind of a trade-off, so to speak.
   
   Id. at 324.
30. Id. at 325.
31. Id. Rule 51(b) of Rhode Island Superior Court Rules of Civil Procedure states in part:
   
   No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the party’s objection. Opportunity shall be given to make the objection out of the hearing of the jury.
   
to give her professional opinion about the diagnosis. Stop & Shop argued that the court in Vallinoto v. DiSandro held that "absent a close working relationship between the social worker . . . and the physician[,] . . . the social worker could not have been able to testify concerning the psychotherapy sessions . . . ." While this was the holding in Vallinoto, the court also looked at its instructions for remand in that same case which stated "if the social worker had 'present sufficient qualifications' she would be able to testify." In the present case, the court found that the social worker was a licensed social worker who provided mental health diagnosis to her patients; she worked along with a psychologist; and insurance did not require diagnosis from someone with a higher medical degree that what she had; therefore, she was qualified to testify about her diagnosis of PTSD. The court also noted that the social worker's testimony was cumulative because of collabo-
rating medical evidence, so even if the social worker was not quali-

fied to testify on this matter, there would be no reversible error.

Finally, Stop & Shop argued that punitive damages were not appropriate in this case. In Rhode Island, the standard for imposing punitive damages is "a rigorous one." The plaintiff seeking punitive damages must produce evidence "of such willfulness, recklessness or wickedness, on the part of the party at fault, as amount[s] to criminality." The court held that in this case the demand for damages was properly pled, and because the defense failed to object to the trial justice's instructions on punitive damages, the award would stand.

COMMENTARY

The court in Bourque based most of its opinion on the plain meaning of Rhode Island General Laws section 11-41-21. The

32. Id. at 325.
34. Id. (quoting Vallinoto, 688 A.2d at 840).
35. Id. at 325-26.
36. Id. at 326.
37. Id.
38. Id. (citing Mark v. Congregation Mishkon Tefiloh, 745 A.2d 777, 779 (R.I. 2000)).
39. Id. (quoting Mark, 745 A.2d at 779).
40. Id.
statute clearly states the requirements for detaining a suspected shoplifter and obtaining a waiver. The waiver is narrowly limited but equally protects both the suspected individual and the merchant. False imprisonment can only be charged if the merchant exceeds the limits set by the statute. Most jurisdictions have "shopkeeper privilege" statutes that allow a merchant to detain a suspected shoplifter for a short period of time. Rhode Island appears to be the only state that also includes the option of obtaining a statement of waiver of future rights to bring civil or criminal action.42

41. See, e.g., Ala. Code § 15-10-14 (1975); Ind. Code § 35-33-6-2 (1981); Neb. Rev. Stat. § 29-402.1 (1943); S.C. Code Ann. 16-13-140 (1976); see also 17 Am. Jur. 2d False Imprisonment § 76 (noting that many state legislatures have enacted statutes that allow merchants to detain shoplifters if detention is for a reasonable time and in a reasonable manner, and if there is probable cause).

42. The author has been able to find no other state statute that provides for a disclaimer similar to that of Rhode Island's statute. Some states do have statutes that provide for a civil agreement between the merchant and the shoplifter for the recovery of damages to the merchant. For example, New Hampshire's statute provides in part:

IV. A merchant and a person accused of shoplifting by such merchant may agree to execute a civil settlement agreement for $200 in civil damages, plus the return of the merchandise or the replacement value of the merchandise within 60 days of the date the agreement is signed. The form of the settlement agreement shall be as follows:

Settlement of Claim for Taking Merchandise Without Payment

The undersigned, __________, having failed to pay for certain merchandise, more specifically described as follows __________, hereby agrees to pay, within 60 days of the date this agreement is signed, civil damages in the amount of $200, plus the merchandise or the replacement value of the merchandise. The parties agree that this payment shall constitute full and complete payment of damages to the following establishment __________. The following establishment __________ agrees to waive any and all claims it may have for civil damages.

Nothing in this agreement shall constitute an admission of guilt for purposes of criminal law. If this agreement is signed and payment is made in full within 60 days, no police report or criminal complaint will be filed by the merchant relative to this incident. However, nothing in this agreement can or will bar the state of New Hampshire from instituting such criminal prosecutions as it deems necessary.

N.H. Rev. Stat. § 544-C:1 (1992). This type of disclaimer differs from the disclaimer provided in Rhode Island General Laws section 11-41-21 because Rhode Island allows a merchant and suspected shoplifter to waive future rights to bring both civil and criminal actions against the other.
The court's decision that the social worker was qualified to testify about her diagnosis of PTSD seems to be the first application of the "present sufficient qualifications" test adopted by the court in Vallinoto v. DiSandro. In 2001, the court decided that a trial justice properly excluded a registered nurse from testifying as an expert citing the holding in Vallinoto. The court in that case, Torrado v. Santilli, noted that the nurse was neither a social worker nor a psychologist even though she worked full time as a psychotherapist. Another factor that distinguishes that case from Bourque is that the nurse in Torrado did not work along with a medical doctor or psychiatrist in diagnosing patients. According to the decision in Bourque, some factors for the courts to consider in determining whether a social worker can be an expert witness qualified in mental health diagnosis are: 1) whether or not the social worker worked along with a psychologist; 2) whether the social worker is licensed to provide mental health diagnosis; and 3) whether insurance required a diagnosis and treatment services to be rendered from someone with a higher medical degree that the social worker.

CONCLUSION

The Rhode Island Supreme Court held that the plain language of section 11–41–21(c)(1) of the Rhode Island General Laws does not allow a merchant to include an acknowledgment of guilt in the waiver provided to an individual suspected of shoplifting, nor may release from detention be conditioned upon signing the waiver. The court also held that a licensed social worker was qualified to testify about a psychological diagnosis if the social worker had present sufficient qualifications, such as working along with a psychologist and being licensed to diagnose mental health matters.

Kathryn Surline Windsor

44. Id. at 1060.
45. Id.
Tort Law. Lieberman v. Bliss-Doris Realty Associates, L.P., 819 A.2d 666 (R.I. 2003). A landowner has the duty to provide adequate illumination in common areas; however, the plaintiff in a negligence suit has the burden of proving that the defendant had or should have had notice of the dangerous condition, that the condition existed for a long enough time so that the owner should have taken corrective steps, and that the dangerous condition was the proximate cause of the plaintiff's injuries. The act of turning off adequately working lights is not necessarily presumed to create a dangerous condition.

FACTS AND TRAVEL

Terry Lieberman, the plaintiff, was an independent contractor employed part-time for Roberta Segal and Associates on the fourth floor of the Doris Building. On February 11, 1997, plaintiff worked late and began to leave the building at approximately 6:45 p.m. As the plaintiff left, she noticed that the hall lights were off which she then turned on herself. When the plaintiff entered the stairwell, which she routinely used to access the parking lot, the plaintiff noticed that the lights on the fourth-floor landing were off. However, the stairwell was lit by the lights at a lower-floor landing. Plaintiff did not turn the lights at the fourth-floor landing on and began walking down the stairs. Midway between the floors, the lights went off without warning. The plaintiff did not call out because she thought the lights were mechanically controlled. The plaintiff paused attempting to adjust her eyes to the light and continued down the stairs in the complete darkness. Unfortunately, the plaintiff lost her footing and fell down the remaining stairs to the third-floor landing. At that time, the plaintiff cried out and an unidentified man appeared in the stairwell to

2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
assist her down the remaining stairs.\textsuperscript{11} The plaintiff drove herself home that evening and returned to work the next day.\textsuperscript{12}

The following day, the plaintiff reported the incident to both her boss and the defendant, Bliss-Doris Reality Associates.\textsuperscript{13} She explained that someone had turned the lights out on her.\textsuperscript{14} One month later, the defendant installed motion sensors in the stairwell and other common areas.\textsuperscript{15} Furthermore, the defendants were aware that the cleaning crew typically turned the lights off at approximately 7 p.m. each night even though the lease agreement with Roberta Segal and Associates required the defendant to provide lighting until 10 p.m. each night.\textsuperscript{16} Additionally, the parking lot lights remained lit until 10 p.m. and according to the defendant's agent, the parking lot lights were visible through the windows in the stairwell where plaintiff had fallen.\textsuperscript{17}

Plaintiff brought a negligence action against the commercial landlords of the building. At trial, the jury returned a verdict for the defendants.\textsuperscript{18} The plaintiff filed a motion for a new trial claiming that the verdict was against the weight of the evidence and that the judge erred in his instruction to the jury.\textsuperscript{19} Plaintiff's motion for a new trial was granted.\textsuperscript{20} The trial judge determined that the evidence did not support the jury's verdict that the defendants were not negligent and that the court had committed an error by charging the jury on notice separately from its other negligence instructions.\textsuperscript{21} The defendants appealed the granting of a new trial.\textsuperscript{22}

\begin{itemize}
  \item \textsuperscript{11} Id.
  \item \textsuperscript{12} Id. at 669.
  \item \textsuperscript{13} Id.
  \item \textsuperscript{14} Id.
  \item \textsuperscript{15} Id. Evidence of subsequent remedial measures is admissible in Rhode Island to show liability while not admissible in a federal court. Compare R.I. R. EVID. 407, with FED. R. EVID. 407.
  \item \textsuperscript{16} Id.
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} Id.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} Id.
\end{itemize}
THE COURT'S ANALYSIS AND HOLDING

In reversing the trial court's grant of a new trial, the Rhode Island Supreme Court determined that reasonable minds could differ as to whether the defendant was negligent; therefore, the jury verdict should have been undisturbed. In reviewing a grant for a new trial, the trial court decision "will not be disturbed unless he has overlooked or misconceived material and relevant evidence or was otherwise clearly wrong." The Rhode Island Supreme Court determined that the jury could have found that the defendant was providing adequate light because there was a light switch available to the plaintiff on the fourth floor landing. Furthermore, the court acknowledged that the act of turning out a light is not per se a dangerous condition on the property. Additionally, the Court weighed the fact that the plaintiff chose to continue down the unlit stairwell without calling for help. Therefore, the evidence could have supported a verdict for either the plaintiff or the defendant. Thus, the court held that the new trial should not have been granted.

In addition, the court rejected the trial court finding that it had erred in the jury instructions. The court reviewed the jury instructions as a whole instead of simply looking at the challenged portion. The court found no evidence that the jury had placed any undue emphasis on the instruction concerning notice even though it was given separately from the other instructions. Justice Flanders dissented, reasoning that the trial court could have easily concluded that the fair preponderance of the evidence supported a verdict for the plaintiff because the plaintiff was injured due to the defendant's breach in a duty to safeguard the lighting. Furthermore, Justice Flanders criticized the court

23. Id. at 671.
25. Id. at 672.
26. Id.
27. Id.
28. Id.
29. Id.
30. Id.
31. Id.
32. Id. at 673.
33. Id.
for applying a type of de novo review to the trial court's findings as opposed to the usual deferential standard.\textsuperscript{34}

\textbf{COMMENTARY}

As Justice Flanders pointed out, the court did not appear to follow the established standard of review when reviewing a trial judge's ruling on a motion for a new trial. When ruling on a motion for a new trial, the trial judge sits as a "superjuror" substituting his or her own findings despite the jury's verdict.\textsuperscript{35} The trial judge must "review[] the evidence, comment[] on the weight of the evidence and the credibility of the witnesses, and exercise[] his independent judgment[]."\textsuperscript{36} If the trial judge completes that process, then the ruling on the motion will not be disturbed unless evidence has been overlooked or misconstrued or the ruling was just clearly wrong.\textsuperscript{37} Therefore, the reviewing court generally should give deference to the trial court ruling so long as the ruling is supported by the trial judge's assessment of the evidence and findings of fact.\textsuperscript{38}

The court in \textit{Lieberman} clearly stated the appropriate reviewing standard, yet went on to examine the evidence independently of the trial court's conclusions.\textsuperscript{39} Although the trial judge determined that the defendants created a dangerous condition by leaving the light switch unprotected, the court did not accept that finding and weighed the plaintiff's own actions heavily against her.\textsuperscript{40} As Justice Flanders pointed out, the jury in the case never considered the plaintiff's own contributing negligence because after answering the interrogatory concerning the defendants' negligence in the negative, the jury was instructed not to decide the remaining questions of proximate cause and comparative negligence.\textsuperscript{41} The trial judge was considering the motion for a new trial

\begin{footnotes}
\item[34] \textit{Id.} at 674.
\item[36] \textit{Id.}
\item[37] \textit{Id.}
\item[39] \textit{Lieberman,} 819 A.2d at 670.
\item[40] \textit{Id.} at 672.
\item[41] \textit{Id.} at 675.
\end{footnotes}
in light of the one issue the jury ruled on — the defendants' own negligence. Therefore, the trial judge correctly viewed the evidence of defendants' negligence as opposed to examining the actions of the plaintiff and whether those actions amounted to comparative negligence. Yet, the court reversed the grant for a new trial. The court made no findings concerning what evidence the trial judge misconceived or overlooked. In contrast, the court, upon review, closely evaluated all the evidence presented at trial and based on its own findings held that reasonable minds could differ on the issue of the defendants' negligence. The court engaged in a type of review that more closely resembles de novo review than the deferential review the court is supposed to use.

CONCLUSION

A landowner does have a duty to provide adequate lighting of common areas, yet the act of turning off adequate lighting does not in and of itself create a dangerous condition. The plaintiff has the burden of proving that the defendant had notice of the condition and that the dangerous condition was the proximate cause of the plaintiff's injuries.

Sarah A. Potter

42. Id.
Tort Law. Volpe v. Gallagher, 821 A.2d 699 (R.I. 2003). Property owners have a legal duty to exercise reasonable care to control the conduct of licensees to prevent intentional harm to others or to prevent licensees from conducting themselves in a manner that creates an unreasonable risk of harm to others. This duty arises only if two conditions are met: (1) the property owner must know, or have reason to know, that he or she has the ability to control the licensee, and (2) the property owner must know, or should have known, of the necessity and opportunity to exercise such control.

FACTS AND TRAVEL

In 1994, James Gallagher was thirty-four years old and had lived all of his life in a North Providence home owned and occupied by his mother, defendant Sara Gallagher.\(^1\) James Gallagher had a history of mental illness, suffering hallucinations and delusions.\(^2\) On July 3, 1994, James Gallagher left the defendant's home with a loaded shotgun and walked to the hedge between the home and that of his neighbor, Ronald Volpe.\(^3\) As Volpe trimmed the hedge, James Gallagher shot him three times, killing him.\(^4\)

Plaintiffs, the decedent's family, brought a wrongful death action against Sara Gallagher.\(^5\) Plaintiffs alleged that the defendant was negligent in allowing her mentally ill son to keep and store guns and ammunition on her property.\(^6\) The trial jury returned a verdict for the plaintiffs.\(^7\) Defendant filed a motion for a new trial.\(^8\) The trial justice granted the motion, overturning the jury verdict.\(^9\) The trial justice believed she had made an error of law by allowing the case to go to the jury because it was not foreseeable

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2. Id. at 702. Gallagher's sister, a psychologist, believed he was a paranoid schizophrenic. Id. at 703.
3. Id.
4. Id.
5. Id. The plaintiffs attempted to sue James Gallagher (in prison for second-degree murder), but he did not participate in the civil trial. Plaintiffs settled claims against defendant's adult daughters prior to the civil trial. Id.
6. Id.
7. Id. at 704.
8. Id.
9. Id. The trial justice did so even though she had denied the defendant's motions for judgment as a matter of law on three occasions. Id.
that James Gallagher would use the guns and ammunition maintained on defendant's property in a violent and deadly manner. Plaintiffs appealed.

**THE COURT'S ANALYSIS AND HOLDING**

The Rhode Island Supreme Court reversed the order for a new trial, concluding that the trial justice had not erred in instructing the jury as to property owner liability under section 318 of the Restatement (Second) of Torts, which the supreme court adopted.

The court first established that the defendant was "present" according to section 318 because she lived in the house where her son stored guns and ammunition. Defendant's son was a licensee under the Restatement because she consented to him living on her land. Consequently, the defendant had the requisite control over her son's use of the property because he lived there only with her permission. Defendant also testified that if she knew he had guns she would have taken them away, "virtually conced[ing]" knowledge that she could control her son, according to the court.

Defendant's ability to control her licensee-son and her knowledge that her mentally ill son possessed and stored guns and ammunition on her property established a legal duty to exercise

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10. *Id.*
11. *Id.*
12. *Id.* at 704-05. "Duty of Possessor of Land or Chattels to Control Conduct of Licensee":

> If the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor (a) knows or has reason to know that he has the ability to control the third person, and (b) knows or should know of the necessity and opportunity for exercising such control.

*RESTATEMENT (SECOND) OF TORTS § 318 (1964).*

14. *Id.* at 707.
15. *Id.*
16. The jury concluded, and the court agreed, that defendant knew her son kept guns on the property. *Id.*
17. *Id.* If the evidence suggested that defendant's son dominated her by physically or psychologically abusing or threatening her then the jury reasonably could conclude that the defendant did not know, or have reason to know, that she could control her son's conduct. *Id.* at 707-08.
reasonable care in controlling her son’s conduct in order to prevent him from intentionally harming others or from creating an unreasonable risk of harm to others.\textsuperscript{18} By allowing such a condition to exist on her property the defendant “created an unreasonable risk of bodily harm to the victim and to others on and outside her property who foreseeably might have come within the zone of danger that her son’s deadly arsenal posed for all those in the vicinity[.]\textsuperscript{19}"

The court further held that the absence of evidence indicating that defendant’s son had exhibited violent behavior in the past did not render the shooting an unforeseeable incident.\textsuperscript{20} Defendant knew her son suffered from mental illness and allowed him to maintain dangerous weapons on her property; this was enough to establish that the “property owner is taking a foreseeable risk that a third party in close proximity of that dangerous activity will be hurt or killed as a result of allowing such an unstable individual to use her property in this careless manner.”\textsuperscript{21} As a result, the absence of similar violent incidents in the past by defendant’s son does not negate her negligence.\textsuperscript{22}

The dissenting opinion criticized the majority for assuming that the defendant was liable for her adult son because she allowed him to stay on her property—that this automatically granted her the ability to control his conduct.\textsuperscript{23} The dissent argued “the majority effectively has created a new cause of action allowing tort liability for parents who fail to control the conduct of their adult offspring.”\textsuperscript{24} Additionally, the dissent expressed concern about the societal consequences of holding parents liable for mentally ill children—fearing that such a holding would dissuade par-

\begin{itemize}
\item \textsuperscript{18} Id. at 709.
\item \textsuperscript{19} Id. at 709-10.
\item \textsuperscript{20} Id. at 710.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Id. at 716. “When negligence occurs, we are simply unwilling to sacrifice the first victims’ rights to life and liberty upon the altar of an inflexible prior-similar-incidents rule.” Id.
\item \textsuperscript{23} Id. at 718 (Shea, J. (ret.), dissenting).
\item \textsuperscript{24} Id. at 720. The dissent established that only the Legislature can create new causes of action. Id. (citing Ferreira v. Strack, 652 A.2d 965, 968 (R.I. 1995)).
\end{itemize}
ents from helping or housing these troubled children who have few options in life.25

COMMENTARY

The majority opinion perpetuates a rule of personal responsibility beyond simple responsibility for one's own actions and requires responsibility for conduct of others known to be dangerous. The court specifically restricts the holding to the particular facts presented in the case,26 understanding that such a holding could have extensive implications.27 Consequently, the case turns on the mental illness of the licensee-murderer and the court's finding that the jury could conclude that the defendant both knew she had, and actually had, control over licensee's conduct. By limiting the holding to a relationship of property owner and licensee, the court avoids possible extension to find general liability of parents for their children, whether minors or adults.

The most important aspect of Volpe v. Gallagher is the supreme court's adoption of section 318 of the Restatement (Second) of Torts, holding a landowner civilly liable for negligence regarding the criminal conduct of a licensee. As the dissenting opinion indicates, holding a property owner liable for the conduct of a third party under a theory of general landowner liability or a duty to control a third party's conduct is inconsistent with the history of the common law in the United States.28 However, courts in the region have relied upon section 318 to find landowners liable for the conduct of others. In Irons v. Cole,29 a Connecticut court held parents liable in a wrongful death action for a murder committed by their adult son, a licensee upon their property, based in part on section 318.30 The court found that the parents were negligent in failing to remove or request the removal of guns that their son

25. Id. at 723.
26. Id. at 718.
27. Especially in modern times where school-shootings are persistent problems, liability based on parent-child relationship would be a dangerous conclusion from this case.
28. Id. at 718.
30. Id. at 1055.
possessed on their property, in light of their knowledge that he abused alcohol and was violent.\textsuperscript{31}

Although the dissent relies on inconsistencies between cases in two neighboring jurisdictions and this case, there are significant factual differences that account for these disparities.\textsuperscript{32} In addition, both the majority and the dissent discuss the Massachusetts case of \textit{Andrade v. Baptiste}, in which the court declined to find a wife liable for her husband's shooting of a store clerk.\textsuperscript{33} The \textit{Volpe} dissent relies upon \textit{Andrade} to establish that section 318 presupposes a landowner's liability to control the conduct of a third person.\textsuperscript{34} The dissent further argues that there was no liability because there was no legal ability or duty to control the husband's misuse of his own personal property.\textsuperscript{35} However, the court in \textit{Andrade} determined section 318 to be inapplicable to the facts because there was no misuse of the wife's real property.\textsuperscript{36} Therefore, the majority in \textit{Volpe} correctly distinguishes \textit{Andrade} because \textit{Volpe} did involve misuse of the defendant's property—she allowed a mentally ill individual to maintain guns and ammunition on her property.

James Gallagher was known to be mentally ill, but was allowed to maintain dangerous weapons on the property where he was permitted to live. According to the findings of the jury and the supreme court, the defendant knew her son kept guns on the property, knew that he was mentally ill, and knew she could control him—holding her liable fosters personal responsibility in

\textsuperscript{31} Id. at 1056.

\textsuperscript{32} See McDonald v. Lavery, 534 N.E.2d 1190 (Mass. App. Ct. 1989) (defendants not liable for son's violence during intoxication because it was not foreseeable); Kaminski v. Town of Fairfield, 578 A.2d 1048 (Conn. 1990) (defendants not liable for adult son's assault with an axe on a police officer escorting a crisis team to their home to evaluate the son, the court relied on \textit{RESTATEMENT (SECOND) TORTS} § 319 (1965)). The dissent also looked at four other jurisdictions establishing a trend of finding that parents have no duty to control their mentally ill adult children. \textit{Volpe}, 821 A.2d at 719 (citing Wise v. Superior Court, 272 Cal. Rptr. 222 (Cal. Ct. App. 1990); Barmore v. Elmore, 403 N.E.2d 1355 (Ill. App. Ct. 1980); Whitesides v. Wheeler, 164 S.W. 335 (Ky. 1914); Youngblood v. Schireman, 765 P.2d 1312 (Wash. Ct. App. 1988)).


\textsuperscript{34} \textit{Volpe}, 821 A.2d at 719.

\textsuperscript{35} \textit{Id.} at 719.

\textsuperscript{36} \textit{Andrade}, 583 N.E.2d at 839.

\textsuperscript{37} \textit{Volpe}, 821 A.2d at 713.
landowners necessary to avoid violent results. The dissent's strongest argument rests on the impact such a holding has on parents with mentally ill children. The impact of this decision on such parents may be that fewer parents will allow mentally ill adult children to live with them. However, the lesson from this case is not that parents should not allow their children to live on their property, but that they have a duty to prevent the children from conducting themselves in a manner that could hurt others. The court did not propose a strict liability standard, but limited liability to situations where control of licensees can be exercised.

CONCLUSION

The Rhode Island Supreme Court adopted section 318 of the Restatement (Second) of Torts holding a property owner civilly liable for the conduct of her mentally ill adult son (a licensee on the property) who maintained guns and ammunition on her property. The court declared that such conduct was an unreasonably risky activity that the property owner could have controlled and knew could be controlled, which ultimately resulted in violence.

Bethany M. Whitmarsh

38. Id. at 723.
39. See Advocates Decry State Court Decision Holding Parent Liable, MENTAL HEALTH WKLY., June 2, 2003, at 1 (reporting that mental health advocates believe Volpe perpetuates a stigma against mentally ill and discourages family members from allowing mentally ill relatives to live in their homes, negatively affecting the housing shortage for mentally ill people).
Trial Practice. Kurczy v. St. Joseph Veterans Ass'n., Inc., 820 A.2d 929 (R.I. 2003). The Rhode Island Supreme Court denied a defendant property owner's petition to reverse a decision of the superior court finding liability for injuries suffered due to an unlit stairwell. Kurczy addressed several areas of Rhode Island trial practice law, but it most notably expanded the permissible scope of a supplemental instruction to a deadlocked jury.

FACTS AND TRAVEL

A child was injured when he fell down a stairwell at a wedding reception in 1990. His mother sued the owner of the premises, alleging negligent maintenance of property. Plaintiff's theory of liability was simply that the defendant failed to properly light a dangerous stairwell, which in turn caused the injury to her child. A jury trial resulted in a verdict for the defendant property owner, and the plaintiff appealed. On remand, a second jury trial resulted in a verdict for the plaintiff. The defendant property owner appealed, raising seventeen separate reasons why the court should vacate the judgment returned in the plaintiff's favor.

THE COURT'S ANALYSIS AND HOLDING

The court rejected each of the defendant property owner's arguments, and affirmed the judgment in favor of the plaintiff. These arguments included an improper denial of a Judgment as a Matter of Law, an improper denial of a Rule 59 motion, an improper exclusion of opinion testimony proffered by an expert witness, an improper admission of opinion testimony proffered by an expert witness, an improper admission of opinion testimony by a teacher, an improper jury instruction regarding a duty of care, an improper jury instruction regarding spoilation, and an improper

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2. Id.
3. Id.
4. Id.
5. Id.
6. Id. ("[D]efendant apparently decided to throw up against our appellate wall as many possible arguments as it could squeeze into the fifty pages of briefing allowed by this Court, hoping that one or more of them might stick").
Allen type jury instruction. An Allen charge, named for the Supreme Court case Allen v. United States, is an instruction given to a deadlocked jury that urges the jurors to reach a verdict.

Regarding the Allen charge, the judge asked the jurors to return to the courtroom with a fresh approach, to respect each others opinions, and not to abandon any firmly held convictions. When the jurors did return, the following Monday, the trial judge gave a second Allen charge which was the subject of defendant’s appeal. This second charge urged jurors in the minority to reexamine their position in light of the majority view, to resolve personality differences, and reflected on the rarity of hung juries. The Rhode Island Supreme Court held that this charge was proper under the circumstances, and because the trial judge told jurors that they were not to change their vote at the expense of a firmly held conviction the Allen charge was not coercive. The Court reiterated that the propriety of an Allen charge “should be decided upon the particular facts and circumstances of the individual situation.” The charge should be examined using the ordinary meaning of the language in light of the surrounding circumstances and the subject matter being discussed. The court addressed the concerns of those who feel that instructing the minority jurors to reexamine their beliefs about the case, but not instructing the majority jurors to do the same, is unduly coercive. The court pointed out that Rhode Island has long recommended “the use of a modified Allen charge that refrains from singling out the minority jurors.” However, the United States Supreme Court upheld the validity of addressing minority jurors, and the court in this case

7. Id. at 938-48.
8. 164 U.S. 492 (1896).
9. The charge is controversial because the option of a hung jury is a long standing tradition in American civil and criminal trials. The fear of the Allen charge is that when a judge expresses disappointment (or worse), the jury is unfairly coerced into reaching a verdict that is not representative of their logical decision-making skills.
10. Kurczy, 820 A.2d at 948.
11. Id.
12. Id.
13. Id.
14. Id. at 949 (quoting State v. Souza, 425 A.2d 893 (R.I. 1981)).
15. Id. (derived from Smith v. Campbell, 107 A.2d 338 (R.I. 1954)).
16. Id. at 950.
points out that "the mere direction of a supplemental charge at minority jurors is not, in itself coercion- provided that jurors are still instructed to retain any firmly held convictions they may have about the evidence."

COMMENTARY

Once deemed the high water mark, asking the minority jurors to reexamine their views is now an appropriate element of the Allen charge. In State v. Patriarca, the Court upheld an Allen charge because the trial judge "made no reference whatever to the minority but simply encouraged all jurors to make an effort to reach unanimity." The Court determined that because the trial judge did not single out the minority, he "exercised an abundance of caution in advising the jurors not to abandon conscientiously held views simply to accommodate others." In State v. Souza, the Court upheld an Allen charge by finding that "it was not coercive and that it did not contain any admonition to minority jurors to give up their convictions in deference to the majority." In Bookbinder v. Rotondo, the Court upheld an Allen charge that addressed the minority jurors, but that charge merely asked that "the minority, if there is a minority... listen to others, and to exchange views and arguments in an honest effort to come to a decision in this case." According to the Rhode Island Supreme Court, that Allen charge did not urge the minority jurors to reexamine their views.

Asking the minority jurors to reexamine their views is a controversial element of the already controversial Allen charge if not addressed to the majority jurors as well. The Rhode Island Supreme Court cites to an article in the Virginia Law Review, but that article clearly states that "it seems clear that when the ma-

22. Id.
26. Id. at 391.
jestic weight of the court is thrown behind an argument directed primarily at minority jurors... there is created a situation fraught with potential coercion and prejudice."27 The controversy lay in the "clear implication of the charge--that minority jurors are responsible for the jury's inability to reach a unanimous verdict."28 The Allen charge at issue in Kurczy exacerbated this coercive effect by giving reference to the rarity of hung juries, when in fact a jury is "at perfect liberty to hang."29 This appeal to the jury's pride, however, has long been deemed proper in Rhode Island. The question then, is what new potency do these "proper" Allen charge phrases have now that they may be directed to the minority jurors?

References to the costs and time of litigation, while proper, are now falling on the shoulders of the minority jurors. This added pressure adds to the coercion, but it may also seem suggestive of the opinion of the judge. For example, by instructing the jury that the costs of litigation mandate a verdict now, it is the logical conclusion of the jury members that the cost will fall on the shoulders of the plaintiff. It could seem, then, that the judge is asking the jury to find for the plaintiff now or force the plaintiff to re-try a possibly valid claim. The same results from instructing the jury that another jury will not be better suited to decide this case.

Referring to the issue as being "very simple," while proper, now sends a message that the judge expected a decision quickly, and clearly the minority has failed to see the simplicity of the issue. If the majority of the jurors agree, then surely that is the simple, "correct" answer that the judge expected.

In State v. Rodriguez, decided just one month after Kurczy, the Court made reference to the fact that they had long criticized "an Allen charge that simply urged the minority to consider the opinion of the majority."30 However, in Rodriguez, the Court upheld an Allen charge directed to one dissenting juror.31 This swift

31. Id. at 904.
departure from a longstanding criticism has been given no explanation.

CONCLUSION

The Supreme Court of Rhode Island has expanded its scope of permissible *Allen* charges. They have done so consistent with the United States Supreme Court, but inconsistent with several prior Rhode Island decisions. The United States Supreme Court has set the ceiling for permissible *Allen* charges, but Rhode Island has long resisted against pushing the *Allen* charge to this extent. With the decision in *Kurczy*, the Court has abruptly shifted the trial practice in Rhode Island.

Kara M. Hoopis
Trusts and Estates. Filippi v. Filippi, 818 A.2d 608 (R.I. 2003). An internal partnership property transfer is subject to the statute of frauds and must be committed to writing to be enforceable. Evidence to support the substitution of the will of the dominant party for the free will of the subservient party is necessary to show undue influence.

FACTS AND TRAVEL

Before divorcing in 1968, Paul and Elizabeth Filippi had three children, Peter, Carolyn and Paula. In 1973, Paul married Marion and they also had three children. During his marriage to Elizabeth, Paul wholly acquired Shoreham, Inc., a corporation that owned all of the physical assets of Ballards Inn and Restaurant (Ballards) on Block Island. During the last twelve years of his life, Paul executed fifteen documents relating to his estate.

Peter, Carolyn, and Paula formed a limited partnership and bought a property known as Ocean View, upon which Ballards partially encroached. Peter, Carolyn and Paula allege that they discussed the fate of Ocean View with their father, and he orally agreed to accept the conveyance of Ocean View to his real estate corporation, Block Island Realty, pay the outstanding mortgage on the property, and retain the portion of land upon which Ballards encroached. Peter, Carolyn and Paula agreed to reimburse their father for expenses associated with the sale or development of Ocean View and would equally divide the net proceeds of the sale of Ocean View between them.

In 1986, Ballards was destroyed by fire. Paul, Marion, Peter, Carolyn, Paula and other family members decided to sell Ocean View to rebuild Ballards, as the restaurant was uninsured. In September of that year, Paul sold two small parcels of Ocean View, receiving cash and promissory notes. In December, Paul sold the remaining Ocean View property to developers for cash

2. Id.
3. Id. at 613.
4. Id.
5. Id.
6. Id.
7. Id. at 614.
8. Id.
and a promissory note. After the Ocean View sales, Paul liquidated Block Island Realty and personally became the holder of the notes. To obtain cash to rebuild Ballards, Paul agreed to subordinate his priority position on the Ocean View mortgage so that the developers to whom he sold Ocean View could sell the property to a third party, and in return he received a portion of the mortgage in cash, along with other payoffs, and an easement on the property on which Ballards encroaches.

In April of 1993, Peter, Carolyn and Paula (plaintiffs) brought an action against Marion (defendant) as executrix of the estate for breach of contract with Paula when Paul failed to leave Ballards Inn and Restaurant on Block Island to her upon his death, and against Citizen's Trust Company (defendant), the institutional trustee, alleging that a trust amendment, substantially decreasing the amount to the plaintiffs, was a product of undue influence exerted by Marion shortly before Paul's death. In 1999, on plaintiff's motion, the actions were consolidated.

The trial justice denied Marion's motions in limine to exclude evidence of the oral agreement relating to Ocean View and the alleged agreement between Paul and Paula to leave Ballards to her upon his death if she worked for him. The jury trial began in June 2000. At the close of plaintiff's case, at the close of all the evidence, and after the verdict, the defendants moved for judgment as a matter of law. The jury returned a verdict for the plaintiffs. However, the trial justice then determined that the undue influence claim was equitable in nature and the jury verdict was merely advisory.

9. Id.
10. Id.
11. Id.
12. Id. at 615.
13. Id.
14. The evidence of the Ocean View transaction included only a Purchase and Sale Agreement between the partnership and Block Island Realty and the resulting deed, naming Block Island Realty as the sole owner of Ocean View; neither document referenced the alleged oral agreement between the four. Id. at 616.
15. Id. at 615.
16. Id.
17. Id.
18. Id.
In December, defendants renewed their motion for judgment as a matter of law and filed a motion for a new trial concerning liability. Both were denied, but a new trial was granted on the issue of damages unless the plaintiffs accepted a remittitur reducing the jury's award. Plaintiffs accepted the remittitur and judgments in December, and in January, 2001, plaintiffs and defendant both appealed.

The trial justice issued his written decision on the undue influence claim in February, finding, contrary to the jury verdict, in favor of the defendants. He determined plaintiffs to be biased, noted their failure to present any unbiased, corroborating witnesses and their lack of any evidence that Marion was able to override Paul's wishes unless Paul wanted to let her. The trial justice did not lightly disregard the jury verdict, but found it did not deserve deference because it probably resulted from the jury's frustration with Paul's near constant amendments to the agreements and Marion's impeachment at trial. The trial justice determined that the verdict would not stand a motion for new trial, and concluded that the jury disregarded his instruction that "[i]t is not undue influence if Paul was influenced only by his affection and love for Marion and his three younger children." The cases were consolidated on appeal.

**THE COURT'S ANALYSIS AND HOLDING**

Because Marion acknowledged the existence of the oral agreement, the only outstanding issues were the trial justice's determination of whether the Ocean View agreement between plaintiffs and Paul was a partnership or joint venture agreement and his ruling that the agreement was not subject to the parol evidence rule. Since the Ocean View agreement between Paul and the plaintiffs was for two or more persons to carry on a business

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19. *Id.*
20. *Id.*
21. *Id.* at 616.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 612.
27. *Id.* at 617.
for profit, it was a partnership. The transaction in question involved a transfer of land between the plaintiff's partnership and Paul or Block Island Realty, and was a transfer of land between partners. Under the Moran rule, the statute of frauds applies to this partnership agreement.

The oral agreement between Paul and plaintiffs described a term that was within the statute of frauds: the Ocean View transfer. As such, under Kinden, the remaining terms of the agreement become subject to the statute of frauds and must be in writing to be enforceable. The trial justice incorrectly applied Moran, ignoring the "internal partnership property transfer" exception and finding that the agreement was not subject to the statute of frauds. Under Kinden, all terms of the agreement would be subject to the statute of frauds when at least one term is within the statute of frauds. The Ocean View purchase and sale agreement, signed by Peter and Paul, contained no reference to the previous oral agreement and explicitly stated that it was an integrated agreement subject to no other understandings, conditions or representations. Likewise, the deed indicated Block Island Realty as the only owner. No agreement subsequent to the purchase and sales agreement provided the terms of a contract indicating that Paul agreed to share the proceeds with the plaintiffs as part of a business venture. "The power of the written word must remain

28. Id. at 618.
29. Id.
30. Moran v. McDevitt, 83 A. 1013, 1013, 1015 (R.I. 1912) (finding that a transfer of property between partners must be committed to writing to be enforceable, but that agreements of co-partnership can be proven by parol evidence and are not in violation of the statute of frauds if the agreement does not contemplate a transfer of land between the parties or create any interest or estate therein or affect the title of the land between the parties in any way, but is concerned rather with the profits and losses to be derived from the sale of the land).
31. Kinden v. Foster, 197 A. 100, 102 (R.I. 1938) (concluding that when a promise is entire and indivisible even terms that may not in themselves be within the statute of frauds are subject to the statute of frauds and must be in writing to be enforceable).
32. Id.
33. Id.
34. Id.
35. Id.
36. Id.
The trial justice erred by not excluding evidence of the oral agreement under the parol evidence rule.\textsuperscript{38}

Determining whether undue influence has been exerted is a fact-intensive inquiry.\textsuperscript{39} The Rhode Island Supreme Court has previously defined undue influence as "the substitution of the will of the dominant party for the free will and choice of the subservient party."\textsuperscript{40} The trial justice examined the totality of circumstances: the relationship between the parties, Paul's physical and mental condition, the opportunity and disposition of Marion to exert her influence, and Paul's acts and declarations.\textsuperscript{41} The court determined that Marion did not exert undue influence over Paul, finding no evidence that Marion substituted her will for Paul's free will.\textsuperscript{42}

\textbf{COMMENTARY}

The Rhode Island Supreme Court, in \textit{Filippi v. Filippi}, reaffirmed its earlier holdings of \textit{Moran} and \textit{Kinden}. \textit{Moran} established an explicit exception to the rule that otherwise permits an agreement between co-partners that does not contemplate a transfer of land between the parties, or create any interest or estate therein, or affect the title of land between the parties in any way, but is rather concerned with the division of profits and losses that may be derived from the sale of land purchased for partnership purposes, to be established and enforceable by oral testimony alone.\textsuperscript{43} Under \textit{Moran}, an agreement to transfer property between partners must be in writing to be enforceable.\textsuperscript{44} The \textit{Kinden} rule – that an agreement that is entire and indivisible is within the statute of frauds and must be in writing to be enforceable as long as one of the promises made in the agreement is within the terms of the statute – survives and is inapplicable in \textit{Filippi} since the partnership agreement involved an "internal partnership property transfer".\textsuperscript{45}

\begin{itemize}
\item \textsuperscript{37} \textit{Id.} at 622.
\item \textsuperscript{38} \textit{Id.} at 621.
\item \textsuperscript{39} \textit{Id.} at 630 (relying on \textit{Tinney v. Tinney}, 770 A.2d 420, 438 (R.I. 2001)).
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{Id.}
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} \textit{Moran}, 83 A. at 1015-16.
\item \textsuperscript{44} \textit{Id.}
\item \textsuperscript{45} \textit{Kinden}, 197 A. at 102.
\end{itemize}
The Rhode Island Supreme Court also reaffirmed its position that it will not adopt a per se rule to establish what is or is not undue influence, and will continue to use a totality of the circumstances approach. A preponderance of the evidence must show that the will of the dominant party has been substituted for the free will of the testator for undue influence to be established. "Mere suspicion, surmise or conjecture" that undue influence has been exercised is not sufficient to support a claim or defense of undue influence. The effect of undue influence is upon the mind of the testator: undue influence "overcomes the free and unrestrained will of the testator," so that the testator is not acting as a "free agent" but rather is under the control of another. Absent a showing that the testator's desires have been supplanted by the desires of the dominant party, a claim or defense of undue influence is unsupportable.

CONCLUSION

A transfer of property from one partner to another, i.e., an "internal partnership property transfer", is subject to the statute of frauds, and an agreement to share in the profits and losses derived from the sale of land between partners must be committed to writing to be enforceable. Parol or extrinsic evidence is not admissible to vary, alter or contradict a complete written agreement.

A wife does not exert undue influence on her husband merely because he amends testamentary documents to provide for her and their children. Proof of the mere exercise of familial influence does not alone make a claim of undue influence supportable. Evidence to support the substitution of the will of the dominant party

46. See id. To determine what constitutes undue influence, the totality of circumstances must be examined. Id; see also Tinney, 770 A.2d at 438. The trial justice must weigh many factors to assess a claim or defense of undue influence. Id; see also Caranci v. Howard, 708 A.2d 1321 (R.I. 1998). The totality of the circumstances approach produces a "better reasoned analysis." Id. at 1326.

47. Id. at 1324 (citing Murphy v. O'Neill, 454 A.2d 248, 250 (R.I. 1983)).


for the free will of the subservient party is necessary to show undue influence.

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