Spring 2006

2005 Survey of Rhode Island Law: Cases and 2005 Public Laws of Note

Law Review Staff
Roger Williams University School of Law

Follow this and additional works at: http://docs.rwu.edu/rwu_LR

Recommended Citation
Available at: http://docs.rwu.edu/rwu_LR/vol11/iss3/5

This Survey of Rhode Island Law is brought to you for free and open access by the Journals at DOCS@RWU. It has been accepted for inclusion in Roger Williams University Law Review by an authorized administrator of DOCS@RWU. For more information, please contact mwu@rwu.edu.
2005 Survey of Rhode Island Law

CASES

Civil Procedure
  *Gliottone v. Ethier*,
  870 A.2d 1022 (R.I. 2005).................................................................759

Constitutional Law
  *Gem Plumbing & Heating Co., Inc. v. Rossi*,
  867 A.2d 796 (R.I. 2005)........................................................................765
  *In re Advisory Opinion to the House of Representatives (Casino II)*,
  885 A.2d 698 (R.I. 2005)........................................................................775
  *McKenna v. Williams*,
  874 A.2d 217 (R.I. 2005)........................................................................787
  *Young v. City of Providence*,
  396 F. Supp. 2d 125 (D.R.I. 2005).........................................................801

Contract Law
  *D'Amico v. Johnston Partners*,
  866 A.2d 1222 (R.I. 2005)........................................................................807

Contract/Insurance Law
  *Sanzi v. Shetty*,
  864 A.2d 614 (R.I. 2005)........................................................................815

Criminal Law
  *State v. Luanglath*,
  863 A.2d 631 (R.I. 2005)........................................................................823
  *State v. Perez*,
  882 A.2d 574 (R.I. 2005)........................................................................833

Criminal Law/Procedure
  *In re Tavares*,
  885 A.2d 139 (R.I. 2005)........................................................................843

Criminal Procedure
  *Raso v. Wall*,
  884 A.2d 391 (R.I. 2005)........................................................................853

757
Disability/Insurance Law
Marques v. Harvard Pilgrim Healthcare of New England,
883 A.2d 742 (R.I. 2005) ........................................................ 857

Employment Law
DeCamp v. Dollar Tree Stores,
875 A.2d 13 (R.I. 2005) ........................................................ 867

Family Law
Gorman v. Gorman,
883 A.2d 732 (R.I. 2005) ........................................................ 877
In re Mackenzie C.,
877 A.2d 674 (R.I. 2005) ........................................................ 883

Property Law
Palazzolo v. State,

State Affairs and Government
Tanner v. Town Council of East Greenwich,
880 A.2d 784 (R.I. 2005) ........................................................ 901

Tort Law
Esposito v. O'Hair,
886 A.2d 1197 (R.I. 2005) ........................................................ 913
Perrotti v. Gonicberg,
877 A.2d 631 (R.I. 2005) ........................................................ 921
Seide v. State,
875 A.2d 1259 (R.I. 2005) ........................................................ 929
Tedesco v. Connors,
871 A.2d 920 (R.I. 2005) ........................................................ 941

Tort/Property
Lucier v. Impact Recreation, Ltd.,
864 A.2d 635 (R.I. 2005) ........................................................ 949

LEGISLATION

2005 Public Laws of Note ..................................................... 957
Civil Procedure. Gliottone v. Ethier, 870 A.2d 1022 (R.I. 2005). Motions for summary judgment may be argued before the expiration of the ten-day waiting period delineated in Rule 56(c) of the Superior Court Rules of Civil Procedure if the non-moving party fails to raise an objection to the timing of the motion hearing. Additionally, under Rhode Island’s comparative negligence system, a plaintiff, notwithstanding his own negligence, is entitled to survive summary disposition if he or she can provide any evidence suggesting a genuine issue of material fact as to the defendant’s negligence.

FACTS AND TRAVEL

Silvestro Gliottone filed a negligence action against Jeff Ethier following a motor vehicle accident. Gliottone was driving northbound on Dyer Avenue in Cranston when he attempted to turn left into a service station; while crossing the southbound lane of the road, he struck the Ethier’s vehicle. Connie Martone was traveling behind the car driven by the defendant, Jeff Ethier, and in her deposition she stated that she saw the plaintiff’s vehicle cross the center of the roadway and strike the defendant’s car head-on. Furthermore, Martone stated that Gliottone’s vehicle was not displaying a directional signal, and she estimated that Ethier’s vehicle was traveling between twenty-five and twenty-eight miles per hour at the time of the collision. Martone “emphasized...that plaintiff crossed into oncoming traffic so suddenly that defendant could not have avoided the accident.”

Gliottone acknowledged in his deposition that he had no recollection of the accident “other than seeing a ‘white blur’ just before striking his head on his windshield.” Additionally, Gliottone stated that he had not seen Ethier’s vehicle prior to

2. Id.
3. Id. at 1024.
4. Id.
5. Id.
6. Id. at 1023.

759
impact. Moreover, he could not recall whether he was wearing a seatbelt at the time of impact, nor whether his foot was on the accelerator or the brake. Discovery revealed that plaintiff had no remaining vision in his left eye.

At the encouragement of the Superior Court trial justice, Ethier filed a motion for summary judgment, alleging an absence of any issues of material fact to be submitted to the jury. That same afternoon, Ethier argued his motion, asserting that Gliottone had failed to raise evidence sufficient to create a genuine issue of material fact as to defendant's negligence. Gliottone argued in response that photographs depicting damage to the vehicles at the scene of the accident created an issue of material fact as to the comparative negligence of the defendant; Gliottone did not, however, challenge the timing of the court's consideration of the motion. The hearing justice granted the motion for summary judgment and Gliottone filed a timely notice of appeal.

**ANALYSIS AND HOLDING**

On appeal, Gliottone alleged that the hearing justice committed both substantive and procedural errors. First, Gliottone asserted that the hearing justice abused his discretion by hearing the summary judgment motion without a showing that plaintiff had received ten days notice of the motion in accordance with Superior Court Rule of Civil Procedure 56(c), which states, *inter alia*, that motions for summary judgment "shall be served at least 10 days before the time fixed for the hearing." The plaintiff alleged that this language in Rule 56(c) established a ten-day waiting period that may not be waived under the "raise or waive" rule.

The court acknowledged that the application of the "raise or

---

7. *Id.* at 1024.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 1024-25 (quoting R.I. R. Civ. P. 56(c)).
16. *Id.* at 1025.
waive" rule to Rule 56(c) was a novel question in Rhode Island.\textsuperscript{17} As a result, the court reviewed precedent from other federal jurisdictions.\textsuperscript{18} Noting that Rhode Island Rule 56 is "substantially similar" to its federal counterpart, the court found it appropriate to consider federal authority,\textsuperscript{19} which states that "in the absence of an objection, the defect of untimely service under Rule 56 will be deemed waived."\textsuperscript{20} Additionally, the court looked to other state jurisdictions that have considered the application of the "raise or waive" rule to Federal Rule 56(c) and found that those states "likewise have held that failure to object to noncompliance with Rule 56(c)'s ten-day requirement results in a waiver of the argument on appeal."\textsuperscript{21} Since the court could "discern no reason to deviate from the weight of authority from around the country," it held that if a party fails to object to the timing of the court's hearing on a summary judgment motion, "the defect in compliance with the ten-day requirement is waived and the court's consideration of the motion will not constitute reversible error."\textsuperscript{22} In further support of the holding, the court determined that the plaintiff here was not prejudiced by the prompt consideration of the summary judgment motion because, as plaintiff's counsel admitted, both parties had knowledge of the facts intended to be argued in support of the summary judgment motion at least ten days prior to the hearing.\textsuperscript{23}

On the substantive issues, the plaintiff asserted that the

\begin{itemize}
\item \textsuperscript{17} \textit{Id.} at 1025 n.2.
\item \textsuperscript{18} \textit{Id.} at 1025.
\item \textsuperscript{19} \textit{Id.} (citing Kelvey v. Coughlin, 625 A.2d 775 (R.I. 1993); Heal v. Heal, 762 A.2d 463 (R.I. 2000)).
\item \textsuperscript{20} \textit{Id.} (citing 10A CHARLES ALAN WRIGHT ET AL., \textit{FEDERAL PRACTICE AND PROCEDURE} § 2719 (3d ed. 1998); 11 JAMES WM. MOORE ET AL., \textit{MOORE'S FEDERAL PRACTICE} § 56.10[2][a] at 56-49 (3d ed. 2004)).
\item \textsuperscript{21} \textit{Id.} at 1025-26 (citing McKenzie v. Killian, 887 So. 2d 861 (Ala. 2004); Wahle v. Med. Ctr. of Del., Inc., 559 A.2d 1228 (Del. 1989); Richardson v. Citizens Gas & Coke Util., 422 N.E.2d 704 (Ind. Ct. App. 1981)).
\item \textsuperscript{22} \textit{Id.} at 1026. The court also noted that "Rhode Island is not completely without local guidance" on this issue. \textit{Id.} at 1026 n.4. The court noted that in Professor Robert Kent's "influential treatise," he wrote: "[f]ailure to serve the motion [for summary judgment] 10 days before the hearing does not necessarily void the motion. If it is in fact heard on the designated date, and the opposing party does not raise the timeliness of notice, the defect is waived." \textit{Id.} (quoting 1 KENT, RHODE ISLAND CIVIL PRACTICE § 56.3 at 417-18 (1969)).
\item \textsuperscript{23} \textit{Id.} at 1026-27.
\end{itemize}
granting of summary judgment was reversible error because the photographs of the damaged vehicles were sufficient to create a material issue about the defendant's speed at the time of the crash.\textsuperscript{24} After reviewing the record \textit{de novo}, the court vacated the grant of summary judgment to the defendant and held that, despite strong evidence of plaintiff's negligence, a "jury reasonably could infer from the evidence presented . . . that defendant may too have been negligent."\textsuperscript{25} Indeed, the court noted that in a comparative negligence jurisdiction such as Rhode Island, the plaintiff is entitled to avoid summary disposition of the action if he presents evidence creating a genuine issue of material fact as to the negligence of the defendant.\textsuperscript{26} Previously, the court had held that accident scene photographs are admissible to prove causation of injuries even without expert testimony.\textsuperscript{27} Thus, in this case, the court determined that summary judgment was improperly granted because the photographs offered into evidence by Gliottone depicted vehicular damage of sufficient degree that a jury could reasonably infer that Ethier may have been speeding at the time of the accident.\textsuperscript{28} Therefore, a potential material issue of fact was created, making summary disposition inappropriate.\textsuperscript{29}

\textbf{COMMENTARY}

This case articulates a frustration of the underlying principles and policies of comparative negligence and summary judgment when it declares negligence cases, no matter how weak, immune from summary adjudication.\textsuperscript{30} Under the rules of summary judgment, as codified in Rule 56, cases in which "no issues of material fact appear" allow the trial justice to enter an order dismissing the case in favor of the moving party.\textsuperscript{31} This rule serves a vital role in maintaining the efficiency of the court system by providing a mechanism by which cases lacking merit are not

\begin{itemize}
\item \textsuperscript{24} Id. at 1027.
\item \textsuperscript{25} Id. at 1028.
\item \textsuperscript{26} Id. at 1028-29.
\item \textsuperscript{27} Id. at 1028 (citing Boscia v. Sharples, 860 A.2d 674 (R.I. 2004)).
\item \textsuperscript{28} Id.
\item \textsuperscript{29} See id.
\item \textsuperscript{30} See id. at 1028-29.
\item \textsuperscript{31} Id. at 1027 (quoting Steinberg v. State, 427 A.2d 338, 340 (R.I. 1981)).
\end{itemize}
allowed to advance to trial.\textsuperscript{32} Without such a rule the court system would be even more bogged down than it currently is because the court would be required to adjudicate every minor negligence claim, regardless of whether any substantial evidence supports the charges alleged.

The Rhode Island Supreme Court, however, potentially frustrates the efficient administration of justice by the Superior and District Courts when it states that "issues of negligence are ordinarily not susceptible of summary adjudication, but should be resolved by trial in the ordinary manner."\textsuperscript{33} In adopting such a rule, the court abandons its doctrine of efficiency and instead catapults negligence actions to a position of superiority above all other civil wrongs in contravention of the policy of fairness that underlies comparative negligence. Indeed, the principle of comparative negligence is meant to eliminate the arbitrary and unfair results of contributory negligence, not to provide the plaintiff with a sure-fire avenue to trial.\textsuperscript{34} Such a system as the Rhode Island Supreme Court has now created in \textit{Gliottone} could have a disastrous effect on the efficient administration of justice because the courts in Rhode Island may now be required to hear any negligence case in which a mere potential material issue of fact is presented. No longer must a plaintiff in a negligence case provide a concrete issue of material fact; a scant offer of proof may now be sufficient to overcome a motion for summary judgment. Such a standard means that, regardless of the strength (or weakness) of the evidence, all negligence actions must be resolved at trial as a matter of right.

\textbf{CONCLUSION}

The Rhode Island Supreme Court held that when a party fails to challenge a hearing justice's consideration of a summary judgment motion before the expiration of the ten-day period for service of the motion, as prescribed by Rule 56(c) of the Rhode Island Rules of Civil Procedure, the defect in compliance with the ten-day requirement is waived and will not constitute reversible

\begin{itemize}
\item \textsuperscript{32} See \textit{id.} at 1027-28.
\item \textsuperscript{33} \textit{Id.} at 1028 (quoting Rogers v. Peabody Coal Co., 342 F.2d 749, 751 (6th Cir. 1965)).
\item \textsuperscript{34} See \textit{id.} at 1028-29 & n.6.
\end{itemize}
error.\textsuperscript{35} Secondly, the court held that as issues of negligence are not ordinarily susceptible to summary adjudication, the order of summary judgment dismissing plaintiff's claim was inappropriate.\textsuperscript{36} Therefore, the court ordered that the case be remanded for further consideration.\textsuperscript{37}

Russell E. Farbiarz

\textsuperscript{35} Id. at 1026-27.
\textsuperscript{36} Id. at 1028-29.
\textsuperscript{37} Id. at 1029.
Constitutional Law. Gem Plumbing & Heating Co., Inc. v. Rossi, 867 A.2d 796 (R.I. 2005). The Mechanics' Lien Law, as amended by Rhode Island General Law § 34-28-17.1 (the Statute), does not violate procedural due process. A claimant has a pre-existing interest in any property improved upon by him or her due to labor and materials expended by the claimant. The deprivation of a property owner's interest under the Statute does not amount to a temporary total deprivation as a property owner has access to a prompt post-deprivation hearing, as well as other procedural safeguards, under the Fourteenth Amendment of the Constitution and under Article 1, section 2, of the Rhode Island Constitution.

FACTS AND TRAVEL

In October, 2000, Robert V. Rossi and Lynda A. Rossi contracted with Gem Plumbing & Heating Co., Inc. (Gem) to provide the raw materials and labor required for water and sewer lines necessary for an office building the Rossis were building in Smithfield, Rhode Island (the Property).¹ On January 28, 2002, Gem sent the Rossis notice of its intention to do work and furnish materials in connection with the construction on the Property, and then recorded a copy of this notice in the Land Evidence Records office of Smithfield, Rhode Island, as required by the Statute.² Four months later, on May 28, 2002, Gem filed a petition to enforce its mechanic's lien, claiming that it was owed $35,500.00 in unpaid labor and materials.³ Gem also recorded a notice of lis pendens on that same day.⁴

Subsequently, as prescribed by the Statute, the Rossis paid $35,860.00, the total amount of Gem's lien claim, plus costs, into the court registry.⁵ The Rossis then filed an ex parte motion to dissolve and discharge the mechanics' lien and the lis pendens,

---

2. Id. at 800 (citing R.I. GEN. LAWS § 34-28-4 (1995)).
3. Id.
4. Id.
5. Id.
which the court granted on June 4, 2002. On August 29, 2000, the Rossis filed a motion to dismiss, charging that the Statute was unconstitutional, in that it deprived them of their property without due process.

The Rossis informed the Rhode Island Attorney General of the constitutional claim (as required by Rule 24 (d) of the Superior Court Rules of Civil Procedure), but the state refused to intervene. After a hearing on October 23, 2002, the motion justice entered an order that invited the Attorney General and any other interested party to file amicus briefs, requiring that notice of this invitation be given also to major building and construction associations. After the Attorney General and several other amici curiae submitted their briefs, the court heard the arguments as to the constitutionality of the Statute. Afterwards, the motion justice then issued a written decision declaring the Statute unconstitutional. The Statute, however, has since been amended, and it was the amended Statute that was ultimately reviewed by the Rhode Island Supreme Court.

In his decision analyzing the pre-amendment Statute, the motion justice drew heavily upon the United States Supreme Court's most current procedural due process decision that addressed pre-judgment remedies, Connecticut v. Doehr. The motion justice in this instance found that a mechanic's lien clouds title (similar to the clouding the Supreme Court found with attachment in Doehr) and that it impairs the owner's ability to sell property; additionally, he found that it taints credit ratings, reduces the likelihood of obtaining a home equity loan, and can

---

6. Id. In its order, the Superior Court stated that "the amount deposited with the court registry was substituted forthwith for the mechanic's lien and lis pendens in the event that Gem eventually succeeded on the merits." Id. at 800-01.

7. Id. at 801. The court clarified that the claim invoked was not "one of procedural due process, which is manifestly different from a ‘taking.’ The former prevents the ‘deprivation’ of life, liberty or property without due process. The latter provides protection from the government’s power of eminent domain . . . [t]his is not a ‘ takings’ case." Id. at 801 n.4.

8. Id. at 801.

9. Id.

10. Id.

11. Id.

12. Id.

13. Id. (citing Connecticut v. Doehr, 501 U.S. 1 (1991)).
also place an owner's current mortgage in technical default.\textsuperscript{14} The motion justice held that the "tremendous significance" of the property interest (along with the statutorily required sworn affidavit of the claimant) was inadequately safeguarded against the possibility of erroneous depravation; thus this interest considerably outweighed both the claimant's interest in any prejudgment remedy, as well as the potential burden on the government, if additional safeguards were imposed.\textsuperscript{15}

The motion justice entered judgment in favor of the Rossis on May 30, 2003, and dismissed the action, ordering that the $35,860.99 be released from the court registry, with accrued interest added.\textsuperscript{16} The motion justice also issued an order staying the judgment for thirty days.\textsuperscript{17} Gem subsequently appealed.\textsuperscript{18}

\textbf{ANALYSIS AND HOLDING}

The Rhode Island Supreme Court focused on two major issues on appeal: (1) whether the enactment of an amendment to the Statute, which provided retroactive effect to all mechanics' liens pending the day of the amendment's enactment (July 17, 2003), or the pre-amendment statute would be controlling;\textsuperscript{19} and (2) whether the amendment\textsuperscript{20} provided the Rossis with adequate procedural due process protections under both the United States and the Rhode Island Constitutions.\textsuperscript{21} The court held that the Statute as amended was constitutional.\textsuperscript{22} The court noted that after the motion justice had declared the Statute unconstitutional,\textsuperscript{23} the Rhode Island Legislature amended the Statute on July 17, 2003 by adding § 34-28-17.1.\textsuperscript{23} The court commented that "[g]enerally, if the Legislature amends or adds a statute relevant to a case that is pending appeal, this Court will

\begin{itemize}
\item \textsuperscript{14} \textit{Id.}
\item \textsuperscript{15} \textit{Id.}
\item \textsuperscript{16} \textit{Id.}
\item \textsuperscript{17} \textit{Id.} at 801-02.
\item \textsuperscript{18} \textit{Id.} at 802. Subsequently, the motion justice declined to make the stay indefinite, instead extending it to July 10, 2003. The court later stayed the judgment pending further order. \textit{Id.}
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} R.I. Gen. Laws § 34-28-17.1.
\item \textsuperscript{21} 867 A.2d at 810-12.
\item \textsuperscript{22} \textit{Id.} at 818.
\item \textsuperscript{23} \textit{Id.} at 802.
\end{itemize}
apply 'the law and effect at the time of the appeal,’ even when the Statute was not in effect when judgment was entered in the trial court.”

The court stated that:

Statutes are given retroactive effect only when the Legislature clearly expresses such an application... Section 34-28-17.1 applies, not only to all future mechanics' liens, but also to all pending "mechanics' liens, petitions or lien substitutions" as of July 17, 2003... This language clearly intends to apply §34-28-17.1 both prospectively to future mechanics' liens and retrospectively to pending mechanics' liens. Based on the clear language of the statute and our case law, we are required to apply the Mechanics' Lien Law as amended by §34-28-17.1 to this appeal.

Having concluded that the propriety of the motion justice's ruling would be analyzed using the amended statute, the court then turned its attention to ascertaining the nature of the Rossis' property interest. The court stated:

At the time of the motion justice's judgment on May 30, 2003, and before the amendment to the statute, the Rossis had precious few avenues for relief from a perfected lien. Pursuant to § 34-28-17, property owners could deposit a bond (or cash) equivalent to the total amount of the notice of intention (plus associated costs) into the court registry and then petition the Superior Court ex parte to discharge the notice of intention and lis pendens, thereby clearing title to the property. Under § 34-28-17, this option is available to the property owner at any time after the recording of the notice of intention or, alternatively, after the filing of a petition to enforce. Of course, the property owner, as respondent to the petition in Superior Court, may contest both the lien itself and the amount claimed on their merits, although the statute is unclear as to exactly when that contest shall be heard.

24. Id. (citing O'Reilly v. Town of Gloucester, 621 A.2d 697, 704-05 (R.I. 1993)).
25. Id.
26. Id. at 804.
34-28-20. Finally, a property owner prevailing on the merits may be entitled to costs, and, in the court's discretion, attorneys' fees.\(^2\)

The enactment of the amendment to the Statute changed the "playing field" of the lien holder and the owner of the property.\(^2\)

The court noted:

However, P.L. 2003, ch. 269, section 1 (codified as §34-28-17.1) enacted on July 17, 2003, significantly enhanced the rights of a property owner facing mechanics' lien. In relevant part, § 34-28-17.1(a) provides that any owner, contractor, or other interested party who alleges:

"(1) that any person who has provided labor, materials or equipment or has agreed to provide funding, financing or payment for labor or materials or equipment refuses to continue to provide such funding, financing or payment for labor materials [sic] solely because of the filing or recording of a notice of intention; or (2) it appears from the notice of intention that the claimant has no valid lien by reason of the character of or the contract for the labor, materials or equipment and for which a lien is claimed; or (3) that a notice or other instrument has not been filed or recorded in accordance with the applicable provisions of § 34-28-1 et seq.; or (4) that for any other reason a claimed lien is invalid by reason or [sic] failure to comply with the provisions of § 34-28-1 et seq., then in such event, such person may apply forthwith to the superior court for the county where the land lies for an order to show cause why the lien in question is invalid, or otherwise void, or the basis of the lien is without probability of a judgment rendered in favor of the lienor." Section 34-28-17.1(b) provides that such a show-cause order "shall be served upon the necessary parties no later than one week prior to the date of the scheduled hearing."\(^2\)

The court then reviewed the United States Supreme Court's most recent analysis and treatment of procedural due process considerations as applied to prejudgment remedies.\(^3\) In those cases, the United States Supreme Court deemed that the lack of an immediate post-deprivation property rights hearing rendered

---

27. Id. at 805.
28. See id.
29. Id.
the particular statutes at issue unconstitutional.\textsuperscript{31}

The court then examined the Supreme Court's most recent procedural due process case addressing prejudgment remedies, \textit{Connecticut v. Doehr}.\textsuperscript{32} In \textit{Doehr}, the claimant, who was the plaintiff in an assault and battery civil action, sought to attach the defendant's home to secure the potential judgment.\textsuperscript{33} The Connecticut attachment statute in \textit{Doehr} permitted the attachment of another's real property without prior notice or hearing, after judicial review of an affidavit demonstrating probable cause to believe the plaintiff would win the underlying civil action\textsuperscript{34} The \textit{Doehr} court, while recognizing the effect of the attachment of real property was not a "complete, physical, or permanent deprivation of real property," and therefore, was "less than the perhaps temporary total deprivation" found in earlier cases, nonetheless held that the effects of the attachment, primarily the clouding of title, deprived the property owner of a "significant" property interest.\textsuperscript{35} The \textit{Doehr} court then applied a balancing test and concluded that the \textit{ex parte} judicial review of the affidavit, along with the post-deprivation hearing, were insufficient to offset the property owner's significant property interest.\textsuperscript{36} As such, the Supreme Court held that the Connecticut attachment statute was unconstitutional as it violated the Due Process Clause.\textsuperscript{37}

The Rhode Island Supreme Court applied the \textit{Doehr} analysis to Gem's argument that mechanics' liens do not involve state action and are therefore not subject to the Fourteenth Amendment.\textsuperscript{38} The court concluded that:

Government officials provide "overt, significant assistance" in almost every step of the mechanics' lien process. A town official records the notice of intention perfecting the lien. A town official records the notice of lis

\textsuperscript{31} \textit{Id.}
\textsuperscript{33} See \textit{id.}
\textsuperscript{34} \textit{Id.} at 5-7. "Though the claimant was not required to post a bond, the property owner could avail himself of a post-deprivation hearing to challenge the attachment." \textit{Id.}
\textsuperscript{35} \textit{Id.} at 11.
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.} at 24.
\textsuperscript{38} 867 A.2d at 808-09.
pendens. Prior to the show-cause hearing to determine whether the lien should be enforced for the amount claimed, a superior court clerk has a newspaper advertisement published giving notice to "all persons having a lien, by virtue of this chapter, or any title, claim, lease, mortgage, attachment, or other lien or encumbrance, or any unrecorded claim on all or any part of the same property" and issues direct citations to each person listed on the petition to enforce the lien. Finally, the court registry holds the cash payment or bond in the event that the property owner wishes to discharge the lien. Thus, the operation of our Mechanics' Lien Law qualifies as state action within the broad sweep of Doehr.\footnote{Id. at 809 (internal citations omitted).}

Having concluded that a mechanics' lien involves state action, the court then turned to whether the amendment to the Statute violated the Rossis' procedural due process rights.\footnote{Id. at 809-18. The Fourteenth Amendment to the United States Constitution prevents states from depriving "any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Article 1, section 2 of the Rhode Island Constitution similarly provides "[n]o person shall be deprived of life, liberty or property without due process of law." R.I. CONST. art 1, § 2.} It stated that:

To determine whether a particular state statute complies with due process, we apply a balancing test first announced in\textit{Matthews v. Eldridge}... We balance: (1) the "consideration of the private interest that will be affected by the prejudgment measure"; (2) "an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards"; and (3) giving "principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or foregoing the added burden of providing greater protections."\footnote{Id. at 809 (quoting Doehr, 501 U.S. at 11).}

As to the first prong in the\textit{Matthews-Doehr} analysis, the
court concluded that the effect of the filing of the mechanics’ lien was to cloud the Rossis’ title to their property. As to the second prong in the Matthews-Doehr analysis, the court analyzed the risk of erroneous deprivation under the amended statute and found that, as amended, the Statute offers several procedures to limit the risk of erroneous deprivations including: “a prompt post-deprivation hearing; a detailed sworn affidavit; the property owner’s ability to pay cash or post a bond to clear title; and the payment of costs and fees to the prevailing party.”

The court stated that a swift post-deprivation hearing is an important factor in determining whether the procedural safeguards in place adequately limit the possibility of erroneous deprivation in that it allows the property owner to immediately challenge the deprivation. The court found that “the language of § 34-28-17.1 clearly affords a property owner a hearing “for an order to show cause why the lien in question is invalid, or otherwise void, or the basis of the lien is without probability of a judgment rendered in favor of the lienor.” The court continued that “[t]he question of when that hearing is to take place is critical in limiting the risk of erroneous deprivation: the more prompt the hearing, the less the risk of erroneous deprivation.” The court concluded that even if and when the notice of intention is both mailed and recorded in the town’s land evidence records on the very same day, a property owner’s right to a prompt post-deprivation hearing, as under § 34-28-17.1, provides him or her with adequate due process protection.

As to the third prong of the Matthews-Doehr analysis, the court examined Gem’s interest, accounting for any ancillary interest the government may have in providing or choosing to forego additional protections. The court stated that the Rhode Island Mechanics’ Lien Law does recognize a preexisting interest for claimants whose work and materials have increased the value of an owner’s property. “§ 34-28-1(a) makes any improvement

42. Id. at 810.
43. Id.
44. Id. at 810-11.
45. Id. at 811.
46. Id.
47. Id. at 812.
48. Id. at 815.
49. Id. at 816.
and the land upon which the improvement sits 'liable and... subject to liens for all the work done by any person... [as well as] for the materials used' in the doing of any such improvement." The court also discussed the state's additional interest in "putting potential purchasers on notice of all claims to prevent the type of complex third-party disputes that inevitably would result from transfers of such property."

Finally, the court indicated that the state also had to consider the propriety of other statutory prejudgment liens. The court noted that the state also has an interest in the constitutionality of the Mechanics' Lien Law to the extent that a "holding to the contrary would render other statutory prejudgment liens constitutionally suspect – a situation that arguably might lead to chaos in the market place."

**COMMENTARY**

In *Gem Plumbing*, the Rhode Island Supreme Court has articulated three major points that address constitutional, debtor-creditor and property law. First, the court followed precedent in holding that retroactive provisions of statutes are enforceable. Second, under *Gem*, property owners have now been accorded enhanced due process rights previously unavailable to them. Third, the court determined that § 34-28-17.1, which provides a post-deprivation hearing to the owner of real estate, is constitutional and follows the prevailing law in the area; it provides the owner adequate procedural due process rights. While the court did suggest that the legislature amend § 34-28-17.1 to provide a specific timeframe for the scheduling of the post-deprivation hearing, nevertheless, the court deemed that the amendment to the Statute was sufficient in providing the owner the necessary constitutional safeguards.

50. *Id.*
51. *Id.* at 817.
52. *Id.* at 817 n.32.
53. *Id.* at 818.
54. *Id.*
Conclusion

The Legislature's enactment of § 34-28-17.1 of the Rhode Island Mechanics' Lien Law is constitutional under the Fourteenth Amendment to the U.S. Constitution and Article 1, section 2 of the Rhode Island Constitution in that it establishes adequate procedural due process safeguards for property owners.

William J. Delaney*

* Adjunct Professor of Law, Roger William University School of Law. A.B. University of Notre Dame, 1976; M.B.A. Rensselaer Polytechnic Institute, 1979; J.D. Albany Law School of Union University, 1983; L.L.M. American Banking Law Studies, Morin Center for Banking and Financial Law, Boston University School of Law, 1991. I would like to acknowledge my appreciation to my spring semester, 2005 Bankruptcy Class, and the opportunity to participate in this Survey of Rhode Island Law through the invitation of Mary H. Hayes. Finally, the Author wishes to acknowledge his colleagues at Tillinghast Licht LLP for their collective assistance provided to him in preparing this project, especially the work of Muriel Morrison, Debbie DeSisto and Jeanine Mathieu.
Constitutional Law. In re Advisory Opinion to the House of Representatives (Casino II), 885 A.2d 698 (R.I. 2005). At the request of the House of Representatives of the State of Rhode Island, the Rhode Island Supreme Court issued an advisory opinion regarding the constitutionality of pending legislation, titled “Establishment and Extension of Gambling Activities and Other Facilities” (the proposed Casino Act). The court found that the important constitutional questions posed by the House of Representatives warranted consideration. After examining Rhode Island’s constitutional requirement that the state must operate all casino gaming facilities, the court indicated that the proposed Casino Act did not comport with the constitutional provision. However, the court found that the proposed Casino Act complied with the state constitutional mandate requiring a statewide and municipal referendum. Finally, the court declined to answer the remaining two questions concerning the constitutionality of the proposed legislation on either federal or state constitutional equal protection grounds.

FACTS AND TRAVEL

The Rhode Island Supreme Court delivered this advisory opinion during an ongoing political tug-of-war. In 2004, both houses of the General Assembly passed a bill entitled The Rhode Island Gaming Control and Revenue Act (Casino Act).1 However, Donald L. Carcieri, the Governor of Rhode Island, vetoed the legislation.2 Governor Carcieri subsequently sent a request to the Rhode Island Supreme Court, seeking an advisory opinion concerning the constitutionality of the 2004 Casino Act.3 Meanwhile, three-fifths of the legislature voted to override the Governor’s veto.4 The court then issued an advisory opinion,5

2. Id.
3. Id.
4. Id.
5. In re Advisory Opinion to the Governor (Casino I), 856 A.2d 320 (R.I.
which determined that the 2004 Casino Act violated the state constitution, because the casino would not be abiding by article VI, section 15.6 In 2005, the House of Representatives introduced legislation which sought to revise chapter 9.1 of title 41, the proposed Casino Act.7 The enactment, entitled “Establishment and Extension of Gambling Activities and Other Facilities” would have amended the 2004 Casino Act.8 Rather than vote on this newly proposed Casino Act, the House of Representatives submitted the following four questions to the Rhode Island Supreme Court for an advisory opinion:9

(1) Would the proposed act, if duly enacted into law and approved by the electors of the state and town of West Warwick, comply with the requirement of Article VI, Section 15 of the Constitution of the State of Rhode Island and Providence Plantations that all lotteries permitted in Rhode Island be operated by the state?

(2) Would the proposed act, if duly enacted into law and approved by the majority of the electors of the state and the majority of the electors of the town of West Warwick at the special election provided for by the proposed act, comply with the provisions of Article VI, Section 22 of the Constitution of the State of Rhode Island and Providence Plantations requiring a statewide and municipal referendum to become effective?

(3) Would the proposed act, if duly enacted into law and approved by the electors of the state and the town of West Warwick, violate the equal protection clause of Article I, Section 2 of the Constitution of the State of Rhode Island and Providence Plantations, in (a) granting to the Narragansett Indian Tribe and its chosen partner the right to enter into an exclusive contract as casino service provider; or (b) in providing that the state retain a share

---

7. Casino II, 885 A.2d at 700.
8. Id. at 699-700.
9. Chief Justice Williams, Justice Suttell, and Justice Robinson signed the advisory opinion, while Justices Goldberg and Flaherty did not participate. Id. at 715.
of net casino gaming income that is different from the share of net income that the state retains from other gambling facilities in the state?

(4) Would the proposed act, if duly enacted into law and approved by the electors of the state and the town of West Warwick, be violative of the equal protection clause of Amendment XIV, Section 1 of the Constitution of the United States, in (a) granting to the Narragansett Indian Tribe and its chosen partner the right to enter into an exclusive contract as casino service provider; or (b) in providing that the state receive a share of net casino gaming income that is different from the share of net income that the state receives from other gambling facilities in the state[?]

After the House of Representatives submitted these questions, the court issued In re Request for Advisory Opinion from the House of Representatives, which created an expedited briefing and oral argument period. The House of Representatives, Governor Carcieri, and the Attorney General submitted briefs explaining their positions. Lincoln Park, Inc. (Lincoln Park), Newport Grand Jai Alai, LLC (Newport Grand), the Town of West Warwick, and, jointly, Harrah's Entertainment, Inc. (Harrah's), and the Narragansett Indian Tribe (Tribe) each filed amicus curiae briefs.

ANALYSIS AND HOLDING

Before issuing this advisory opinion, the court explained that when a court issues an advisory opinion, the justices are speaking in their “individual capacities as legal experts” rather than as justices of the court. Because of this distinct role, the justices shall not exercise any fact-finding power. As such, the court established that the advisory opinion had no force of law and was

10. Id. at 700.
13. Id.
14. Id.
15. Id. at 701 (quoting Casino I, 856 A.2d at 323).
16. Id. (citing Casino I, 856 A.2d at 323).
Prior to discussing the constitutionality of the proposed Casino Act, the court initially determined whether to issue an advisory opinion in response to the House of Representatives' questions. Article X, section 3 of the Rhode Island Constitution obligates the Supreme Court judges to issue a written opinion "upon any question of law whenever requested by the governor or by either house of the general assembly." In other words, if the General Assembly has a question concerning the constitutionality of pending legislation, or if the Governor has a question concerning the constitutionality of existing statutes, the Supreme Court must issue an advisory opinion on the matter.

The court acknowledged its obligation to render an advisory opinion, but also expressed concern about issuing the opinion. The court evinced hesitation because of the legislation's "largely undeveloped and inchoate state" and noted several concerns. One necessary technical revision for the proposed Casino Act was that the Lottery Commission, the original entity designated to operate the proposed casino, had been abolished and subsequently replaced by the State Lottery Division of the Department of Administration (Division). While this technicality did not change the court's analysis, the court nonetheless suggested this modification to the House of Representatives. A second complication involved a sunset clause, contained in the proposed legislation, which nullified the entire statute on November 8, 2005, if there was no "majority statewide and local approval of the statute at a special election." Given the approaching deadline, the court acknowledged its late receipt of this request as well as the court's timely response. Furthermore, the proposed Casino Act directed the Division to enter into a master casino service

17. Id. (citing Casino I, 856 A.2d at 323).
18. Id. at 701-02.
19. Id. at 701.
20. See id. at 701-02.
21. Id.
22. Id.
23. Id. at 701.
24. Id. at 701-02.
25. Id. at 702.
26. Id.
contract with the casino provider. Therefore, the proposed Casino Act would not be the final statement of the rights and responsibilities of the parties. Yet, despite the proposed Casino Act’s flaws and ambiguities, the Supreme Court adhered to its constitutional obligation to issue the advisory opinion.

**Question One: State Operation**

The Rhode Island Constitution prohibits all lotteries except those operated by the state. The first question under review was whether the proposed Casino Act complied with this mandate. While the General Assembly has plenary power to legislate on all matters relating to gambling, the Supreme Court interprets the statutes which determine the constitutionality of the legislation. Thus, the court would uphold proposed legislation that vested operational control of the casino in the Division.

The court first examined the issue of non-slot games, or table games. The proposed Casino Act appeared to grant the Division total control in determining and approving the type of table games. However, the Division’s powers were overcome by the requirement that the Division “shall permit the casino service provider to conduct...any [table game] that is regularly conducted at any other casino gaming facility.” The court opined that as a result, the Division would have no control over what table games would be played at the casino. The court found that this was inconsistent with the constitutional requirement that the state have all decision-making power concerning the functioning of the casino.

27. Id.
28. Id.
29. See id.
30. Id. at 703 (citing R.I. Const. art. 6 § 15).
31. Id. at 700.
32. Id. at 703 (citing Payne & Butler v. Providence Gas Co., 77 A. 145 (R.I. 1910)).
33. See id.
34. Id. at 703-04.
35. Id.
37. Id.
38. Id. (citing Casino I, 856 A.2d at 331).
Second, the court examined the extension of credit to patrons of the proposed casino.\textsuperscript{39} The proposed Casino Act permitted the casino service provider to tender credit to patrons as a cash advance, in return for a “negotiable instrument of the same value.”\textsuperscript{40} The plain language of the provision did not extend any control over credit to the Division.\textsuperscript{41} Rather, control of credit would belong strictly to the casino service provider.\textsuperscript{42} As such, the court decided that the extension-of-credit provision did not satisfy the constitutional requirement that every aspect of the casino’s operation must be vested in the state.\textsuperscript{43}

Moreover, the enforceability of the proposed agreement between the Division and the casino service provider troubled the court.\textsuperscript{44} Tribes are generally immune from suits on contracts, regardless of whether they involve governmental activity.\textsuperscript{45} Thus, sovereign immunity threatened to undermine all state operational control of the proposed casino.\textsuperscript{46} Although the Tribe expressly stated at oral argument that the Tribe would be willing to waive sovereign immunity from the master casino service contract, the court noted that it was uncertain whether this waiver would become part of the written contract.\textsuperscript{47} The court highlighted, in a footnote, that this uncertainty served as an additional example of the inchoate nature of the legislation.\textsuperscript{48} Hence, the issue of sovereign immunity threatened to undermine every aspect of the state’s control of the casino.\textsuperscript{49}

Fourth, the proposed Casino Act directed the Division to enter into a master casino contract with the casino provider, and therein defined the casino service provider as “an entity composed of the Narragansett Indian Tribe and its chosen partner.”\textsuperscript{50} The court

\begin{itemize}
\item \textsuperscript{39} Id. at 704-05.
\item \textsuperscript{40} Id. at 704 (quoting H.R. 41-9.2-3(5), 119th Gen. Assem., Reg. Sess. (R.I. 2005) (proposed)).
\item \textsuperscript{41} Id.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id. at 704-05.
\item \textsuperscript{44} Id. at 705.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id. (citing Kiowa Tribe of Ok. v. Mfg. Tech., Inc., 523 U.S. 751 (1998)).
\item \textsuperscript{47} Id.
\item \textsuperscript{48} Id. at 705 n.6.
\item \textsuperscript{49} Id. at 706.
\item \textsuperscript{50} Id. (quoting H.R. 41-9.2-2(1), 119th Gen. Assem., Reg. Sess. (R.I. 2005) (proposed) (emphasis added)).
\end{itemize}
reasoned that this provision bestowed only regulatory power, rather than operational power, over the most fundamental aspects of the casino, namely choosing the casino service provider.\textsuperscript{51} Thus, the Division would retain the equivalent of a veto power over the Tribe.\textsuperscript{52} This veto power amounted to significantly less than complete operational control of all aspects of the casino, and, in turn, was violative of the state constitution.\textsuperscript{53}

Furthermore, the court discussed the relationship of the operational issues to the nondelegation doctrine, as the issues were inexorably intertwined.\textsuperscript{54} The nondelegation doctrine serves two purposes: it ensures that the public is protected from discriminatory and arbitrary actions of public officials, and it assures that politically accountable officials make fundamental policy decisions.\textsuperscript{55} In this instance, particularly concerning the table games issue, the proposed Casino Act would violate the nondelegation doctrine.\textsuperscript{56} The court reasoned that the standard to approve any table game that already exists in another casino amounted to no standard at all, and consequently, lacked all protection against potentially arbitrary or discriminatory actions by the casino provider.\textsuperscript{57}

In addition, the court found it important to highlight that the proposed Casino Act would impart greater control to the Division than the 2004 Casino Act would have.\textsuperscript{58} The court acknowledged express grants of authority: for example, that the casino would collect money on behalf of the Division, which would then be transferred into the state's bank account, whereupon the state would distribute the funds accordingly.\textsuperscript{59} The court also acknowledged a catch-all provision, in which the proposed Casino Act bestowed all other necessary and proper powers to the Division for effective administration of the casino.\textsuperscript{60} However, this

\textsuperscript{51} Id. at 706-07.
\textsuperscript{52} Id. at 706.
\textsuperscript{53} Id. at 706-07.
\textsuperscript{54} Id. at 707.
\textsuperscript{55} Id. at 708 (citing Kaveny v. Cumberland Zoning Bd. of Review, 875 A.2d 1, 11 (R.I. 2005) (citing R.I. CONST. art 6, § 15)).
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 708-09.
\textsuperscript{59} Id. at 709.
\textsuperscript{60} Id. at 711.
broad necessary and proper provision could not override the express limitations contained in the proposed Casino Act that restricted the Division's power.\textsuperscript{61} Thus, the court concluded that the necessary and proper clause could not cure all of the constitutional defects discussed above.\textsuperscript{62}

Finally, the court recognized the arguments in the briefs that distinguished the proposed Casino Act from Lincoln Park and Newport Grand, two constitutionally operated casino gaming facilities in Rhode Island.\textsuperscript{63} Accordingly, the court expressly stated that any prior reference by the court regarding Lincoln Park or Newport Grand was not intended to establish a “constitutional baseline.”\textsuperscript{64} In other words, newly proposed casinos need not imitate these two contemporary casinos in order to achieve constitutionality.\textsuperscript{65}

Therefore, in response to the House’s first question, and while giving a reasonable presumption of constitutionality to the proposed legislation, the court ultimately found that the state could not completely operate a casino gaming facility if it could not control the type of non-slot table games, control or deny the extension of credit, choose a casino service contract provider, and protect its contractual rights by requiring the Tribe’s absolute waiver of sovereign immunity.\textsuperscript{66}

\textit{Question Two: The Referendum}

The court then reviewed the second question, concerning the constitutionality of the proposed referendum.\textsuperscript{67} Article VI, section 22 of the state constitution prohibits gambling within a state or municipality unless the gambling activity has been approved by the “majority of those electors voting in a statewide referendum and by the majority of those electors voting in a referendum in the municipality in which the proposed gambling would be allowed.”\textsuperscript{68} The proposed Casino Act had two requirements: It would require a

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{61} \textit{Id.}
\item \textsuperscript{62} \textit{Id.}
\item \textsuperscript{63} \textit{Id.} at 711-12.
\item \textsuperscript{64} \textit{Id.} at 711.
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{Id.} at 712.
\item \textsuperscript{67} \textit{Id.}
\item \textsuperscript{68} \textit{Id.} (quoting R.I. CONST. art. 6, § 22).
\end{itemize}
\end{footnotesize}
statewide special election of a referendum that would ask whether the state should operate a casino gaming facility in West Warwick and it would require that, prior to this statewide referendum, the Lottery Division would certify to the Secretary of State a “statement of intent” filed by the casino service provider, stating, in essence, that the West Warwick Town Council had agreed to place the question on the special election ballot. The court answered that if both requirements were carried out, and both statewide and local approval was gained, then article VI, section 22 of the state constitution would be satisfied.

Additionally, the court responded in the affirmative to the question of whether the requirement may be met by a referendum at a special election instead of a general election. The court concluded that it was of no constitutional significance whether the question was posed in a special election or as part of a general election.

Questions Three and Four: Equal Protection

The court declined to answer the third and fourth questions in the context of an advisory opinion. First, the proposed statute failed to comport with the constitutional requirement that the casino must be operated by the state. Second, to properly analyze the equal protection issues, the court requires a factual record, which is unavailable in an advisory opinion. As a result, the court respectfully declined to answer the constitutionality of the proposed Casino Act in either the federal or state equal protection constitutional frameworks. The court remarked that it was not violating its constitutional duty to issue an advisory opinion when asked, but instead was acquiescing to the reality that sometimes issues cannot be properly answered without

69. Id.
70. Id.
71. Id.
72. Id. at 713.
73. Id.
74. Id. at 713-14.
75. Id. at 713.
76. Id. at 713-14.
77. Id. at 714.
accompanying facts. 78

COMMENTARY

The proposed legislation in question contained a series of flaws due to its largely undeveloped state. Before proceeding, the court noted several of these oversights to provide guidance to the legislature. Yet, notwithstanding the imperfect condition of the legislation, the court heeded its constitutional duty and properly issued an advisory opinion. Some may consider the court's action an unjust interference with the population's right to vote on an important statewide issue. However, had the court allowed the legislation to be placed before the voters in a statewide referendum, a constitutional emergency may have ensued.

The majority of the voters could have voted in favor of an unconstitutional casino. Had they voted in this manner, opponents of the casino would have ultimately challenged the constitutionality of the "yes" vote. At this point, the court would be faced with the same questions presented initially during the House of Representatives' request for an advisory opinion. Had the court waited, it not only would have had to decide the constitutional merits of the proposed Casino Act, it also would have been faced with overturning a decision made by the people of Rhode Island in their election booths. At this later date, the court would be forced to finally determine that the proposed Casino Act violated the constitutional mandate that all lotteries, including casino gaming facilities, be operated fully by the state. It is fair to assume that if the legislation had made it to the voting booths, both opponents and proponents of the proposed Casino Act would be up in arms, because each group would likely have devoted significant time and money toward the casino campaign in vain.

Furthermore, although the resultant advisory opinion may seem like a victory for Governor Carcieri and other casino opponents, the court's ruling has little practical effect on the casino effort. Regardless of the court's decision, the legislature would have had to redraft the legislation in any case. For instance, any chance of having a special election in November, 2005, was lost when the House waited until May to seek an

78. Id.
advisory opinion, and the court could not hear arguments until August. Nonetheless, the court understood its judicial responsibility to respond to constitutional questions posed by the House of Representatives, as well as to prevent any ensuing equivocation that the state might have otherwise experienced, and properly issued an advisory opinion explaining how the legislature failed to meet constitutional requirements.

CONCLUSION

Despite the emergent state of the proposed legislation, as well as the court's initial hesitance upon taking up these issues in the form of an advisory opinion, the proposed Casino Act and the debate surrounding its constitutionality called for judicial intervention. For the second time in two years, the Rhode Island Supreme Court found the General Assembly's effort to construct a bill enabling a casino referendum to go before voters unconstitutional. After noting, in 2004, that the word "operate" means the power to make decisions about all aspects of the casino gaming facility, the court found that the 2005 legislation failed to meet this constitutional requirement. Under the proposed Casino Act, the new legislation left too much power with the casino service provider, and did not grant the state exclusive operating authority over the casino. However, the court found that a special election would meet the constitutional requirement for a referendum. Finally, the court declined to answer two other questions, regarding whether it was permissible to treat a casino different from slot machine parlors already in place in the state, because these questions would require fact-finding, which is an impermissible court function during an advisory opinion.

Margreta Vellucci

79. See id. at 700-01.
80. Id. at 703-04.
81. Id. at 703-10.
82. Id. at 712-13.
83. Id. at 713-14.
State Constitutional Law. *McKenna v. Williams*, 874 A.2d 217 (R.I. 2005). An attorney and his law practice lacked standing to maintain an action to remove a public official from office. An action to remove a public official from office was a petition in equity in the nature of quo warranto over which the Superior Court lacked subject matter jurisdiction without the intervention of the Attorney General. Rhode Island's constitutional prohibition against state officials holding dual offices did not apply to an appointed member of the Rhode Island Supreme Court.

**FACTS AND TRAVEL**

On September 21, 2004, Chief Justice Frank Williams, of the Rhode Island Supreme Court, was sworn in as a member of a military review panel, a federal position with the United States Department of Defense. Attorney Keven A. McKenna and his law practice, Keven A. McKenna, P.C., filed suit in the Providence County Superior Court under the Uniform Declaratory Judgments Act (R.I. Gen. Laws § 9-30-1 et seq.), (1) alleging that the Chief Justice had vacated his seat on the Rhode Island Supreme Court by accepting appointment to the military review panel; (2) seeking a declaratory judgment to that effect; and (3) requesting preliminary and permanent injunctions restraining the Chief Justice from occupying his seat on the court. Additionally, the plaintiffs sought injunctions restraining the Governor “from not notifying the R.I. Judicial Nominating Commission of the vacancy in the Office of the Chief Justice,” restraining the Chair of the Rhode Island Judicial Nominating Commission “from not submitting eligible names of nominees to the office of the Chief Justice of the Supreme Court to the Governor of the State of Rhode Island,” and restraining the State Treasurer “from issuing salary checks to [the Chief Justice].”

2. *Id.* at 220-21.
3. *Id.* at 221.
On April 26, 2005, the Presiding Justice of the Superior Court, pursuant to the provisions of Rhode Island General Laws §§ 8-2-4 and 8-2-23, appointed three members of that court "to be a quorum for the purpose of presiding over the preliminary motions and trial" of the case. The defendants moved to dismiss pursuant to the Rhode Island Superior Court Rule of Civil Procedure 12(b)(6). Additionally, the defendants sought a stay of all proceedings pending a determination by the Superior Court that the plaintiffs had standing to bring their claims.

On May 11, 2005, the three-justice panel of the Superior Court reasoned that the Uniform Declaratory Judgments Act "provides that the Superior Court, upon petition, shall have power to declare rights, status and other legal relations, whether or not further relief is or could be claimed," and that "[f]urther, § 9-30-12 declares the act to be remedial and to be liberally construed and administered in order to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." Based on this reasoning, the panel found that the plaintiffs did, indeed, have standing.

The defendants petitioned the Rhode Island Supreme Court for certiorari, which the court granted on May 13, 2005. The defendants argued: (1) that the plaintiffs lacked standing to bring their claims; (2) that the Superior Court lacked subject-matter jurisdiction over the plaintiffs' claims; and (3) that article 3, section 6 of the state constitution did not apply to the Chief Justice.

ANALYSIS AND HOLDING

The court held: (1) that the plaintiffs lacked standing to maintain an action to remove the Chief Justice from office; (2) that the plaintiffs' action to remove the Chief Justice was a petition in equity in the nature of quo warranto over which the Superior Court lacked subject-matter jurisdiction without the intervention

---

4. Id. at 221-22.
5. Id. at 222 (citing R.I. Sup. R. Civ. P. 12(b)(6)).
6. Id.
7. Id. at 223-24.
8. Id.
9. Id. at 224.
10. Id. at 224-25.
of the Attorney General; and (3) that Rhode Island's constitutional prohibition against state officials holding dual offices did not apply to the Chief Justice, an appointed member of the Rhode Island Supreme Court.\textsuperscript{11}

A. Standing

The court held that the plaintiffs, Keven A. McKenna, Esq. and his law practice, Keven A. McKenna, P.C., lacked the requisite standing to bring an action to remove the Chief Justice from office.\textsuperscript{12} An analysis of standing should focus on the claimant, not the claim.\textsuperscript{13} Thus, the court focused on the plaintiffs, not on the issues sought to be determined.\textsuperscript{14} In \textit{Rhode Island Ophthalmological Society v. Cannon},\textsuperscript{15} the court articulated the notion that standing requires a plaintiff to allege that "the challenged action has caused him injury in fact, economic or otherwise."\textsuperscript{16} In \textit{Pontbriand v. Sundlun},\textsuperscript{17} the Court explained that the injury in fact must be "concrete and particularized... actual or imminent, not 'conjectural' or 'hypothetical'.”\textsuperscript{18} Furthermore, "[t]he line is not between a substantial injury and an insubstantial injury. The line is between injury and no injury."\textsuperscript{19}

Standing is a prerequisite for actions at law, actions in equity, and claims for declaratory relief.\textsuperscript{20} The Superior Court "is without jurisdiction under the Uniform Declaratory Judgments Act unless it is confronted with an actual justiciable controversy,"\textsuperscript{21} which requires a plaintiff to have (1) standing and (2) an entitlement to real and articulable relief.\textsuperscript{22} The court held that the plaintiffs

\begin{itemize}
\item[11.] \textit{Id.} at 238-39.
\item[12.] \textit{Id.} at 228.
\item[13.] \textit{Id.} at 225-26.
\item[14.] \textit{Id.}
\item[15.] 317 A.2d 124 (R.I. 1974).
\item[16.] \textit{Id.} at 128.
\item[17.] 699 A.2d 856 (R.I. 1997).
\item[18.] \textit{Id.} at 862.
\item[19.] \textit{Id.} (quoting Matunuck Beach Hotel, Inc. v. Sheldon, 399 A.2d 489, 494 (1979)).
\item[20.] \textit{McKenna}, 874 A.2d at 226.
\item[21.] \textit{Id.}
\item[22.] \textit{Id.}
\end{itemize}
failed to meet either element of justiciability. The court held that the plaintiffs had failed to “articulate[] a stake in the outcome of this controversy . . . distinguishable from that of other members of the bar or the public.” The court reasoned:

[The Plaintiffs’] subjective enthusiasm does not overcome the glaring jurisdictional deficiencies in this case. Nor are we persuaded that plaintiffs’ stated fear of an entirely speculative and hypothetical malpractice claim that might be brought if he did not pursue this action supplied the standing component of justiciability. Unfounded anxiety or a vague fear based on utterly speculative hypothesis is simply not enough.

The court concluded by citing several cases for the proposition that the Attorney General is the appropriate party to bring an action to remove a public official from office. The court continued: McKenna “is neither a roving prosecutor nor an Attorney General without portfolio, but a lawyer engaged in the private practice of law . . . .” Consequently, the court held, the plaintiffs were without standing to maintain an action to remove the Chief Justice from office.

B. Subject Matter Jurisdiction

The court next addressed the Superior Court’s subject matter jurisdiction, holding that the Superior Court had lacked the requisite subject matter jurisdiction to entertain the plaintiffs’ action “[b]ecause an action to test one’s title to office is an action in quo warranto and the Superior Court’s jurisdiction to entertain the claim is limited. . . . The Superior Court’s jurisdiction to entertain an action in quo warranto is strictly limited to actions brought by the Attorney General . . . .”

23. Id.
24. Id.
25. Id. at 227.
27. Id. at 228.
28. Id.
29. Id.
Rhode Island General Law § 8-2-16 vests the Superior Court with concurrent jurisdiction with the Supreme Court "to hear any proceeding upon a writ of quo warranto or an information in the nature of quo warranto"; however, because "such claims seek to enforce a public right and the relief it affords is the ouster of the incumbent from office[...], those claims may only be brought by the Attorney General on behalf of the state..." The court explained:

A private citizen who questions the right of an incumbent to hold office may employ only a petition in equity in the nature of quo warranto, and jurisdiction over such petitions is exclusively vested in the Supreme Court.... A petition in equity in the nature of quo warranto may be brought by a private individual who asserts that he or she has a right to the office at issue; and pursuant to G.L. 1956 § 10-14-1, the Supreme Court has exclusive jurisdiction to entertain such a claim.

Thus, only a plaintiff claiming title to the challenged office may proceed without intervention from the Attorney General, and only in the Supreme Court.

In order to reach its result, the court reclassified the plaintiffs' petition for a declaratory judgment as a petition in equity in the nature of quo warranto "over which the Superior Court has no subject matter jurisdiction." The court reasoned that it "has consistently rejected claims that sounded in quo warranto but were otherwise disguised." The court concluded by holding that the plaintiffs could not maintain their action in the Superior Court without the Attorney General's intervention; nor could the plaintiffs bring a petition in equity in the nature of quo

30. *Id.* at 229.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 229-30.
warranto in the Supreme Court because neither plaintiff claimed a right to the office of the Chief Justice.\textsuperscript{36}

C. Article 3, Section 6 of the State Constitution

Although noting that its holdings as to standing and subject-matter jurisdiction were determinative of the case, the court stated that the public importance of "a direct challenge to an official's title to office" compelled it to address the merits of the case.\textsuperscript{37} The court framed the issue before it as "whether, in the context of this case, as an appointed (and not elected) member of this court, Chief Justice Williams falls within"\textsuperscript{38} the provisions of the state constitution providing that "if any . . . judge [shall,] after . . . election and engagement, [have] accepted any appointment under any other government, then his office shall be immediately vacated."\textsuperscript{39}

Giving the words of the constitution their ordinary meaning, the court concluded that "article 3, section 6, no longer applies to the justices of [the] court because [they] are no longer elected to [their] positions. . . . [B]y its clear language, article 3, section 6, is restricted to those enumerated state officials who, 'after election and engagement, accept any appointment under any other government . . . ."\textsuperscript{40}

In 1994, article 10, section 4 of the Rhode Island Constitution was amended so that, rather than being elected, the justices of the Supreme Court would be appointed.\textsuperscript{41} The court found "[t]he contrast between the former election provision and the current appointment provision of the state constitution . . . determinative of the issue before [the] Court."\textsuperscript{42} The court reached the "inescapable conclusion that, as appointed justices to the Supreme Court, the prohibition against dual office holding in article 3, section 6, no longer applies to the members of [the Supreme] Court."\textsuperscript{43}

\textsuperscript{36} \textit{Id.} at 230.
\textsuperscript{37} \textit{Id.} at 230-31.
\textsuperscript{38} \textit{Id.} at 231.
\textsuperscript{39} R.I. \textit{Const.} art. 3, § 6.
\textsuperscript{40} \textit{McKenna}, 874 A.2d at 232.
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.} at 232-33.
\textsuperscript{43} \textit{Id.} at 235.
COMMENTARY

Although acknowledging that its holding regarding the plaintiffs' standing and the Superior Court's subject-matter jurisdiction were determinative of the plaintiffs' case, the court chose to address the merits of the plaintiffs' claim as well, because of the "public importance that attaches to such a direct challenge to an official's title to office."\(^4\) Although twice stating the "public importance"\(^4\) of the issue presented, the court did not detail the reasons for addressing the merits of the plaintiffs' claim beyond agreeing with the \textit{amici curiae} that it should do so "for reasons of equity and judicial efficiency."\(^4\) Beyond settling any doubt as to the office of the Chief Justice, there are two likely reasons for the court addressing the merits of the plaintiffs' claim: first, the possibility that the court would have to address the issue in the future; and second, a failure of the court to adjudicate the matter could have left determination of the issue to the military commission.\(^4\)

The court's holdings as to standing and subject matter jurisdiction, without addressing the merits of the plaintiffs' claim, would have left open the possibility, albeit limited, of a future attack on the office of the Chief Justice. After the court's holdings as to standing and subject-matter jurisdiction, even a private individual with the requisite standing would be unable to bring a claim in the Superior Court for want of that court's subject matter jurisdiction. The only way for a private individual to challenge the office of the Chief Justice would be to bring a claim in the Rhode Island Supreme Court by claiming a right to that office. Thus, the ability of the state's "approximately 6,500 attorneys who can bring cases before the R.I. Supreme Court involving the same constitutional and ethical dilemma facing the Plaintiffs,"\(^4\) even

\(^4\) \textit{Id.} at 230.
\(^5\) \textit{Id.} 230-31.
\(^6\) \textit{Id.} at 231 n.12.
\(^7\) Brief for Salim Ahmed Hamden, et al. as Amici Curiae Supporting Respondents at 4-7, McKenna v. Williams, 874 A.2d 217 (R.I. 2005) (No. 05-144).
\(^8\) Memo in Support of Preliminary Injunction at 3, McKenna v.
those suffering an adverse decision from Chief Justice Williams, would be severely limited, but not impossible. The court's decision to address the merits of the plaintiffs' claims thus eliminated any possibility of having to do so in the future, and at the same time, eliminated any doubt as to the status of the office of the Chief Justice.

The court did not address whether its failure to adjudicate the matter could have left determination of the issue to the military commission. The amici curiae did, however, address this issue in their brief, stating that "[a]n adjudication of whether Chief Justice Williams violated the Rhode Island dual officeholding ban is inevitable. . . . A challenge to Chief Justice Williams' fitness to serve could be filed by any of the military commission defendants as a pre-trial motion." Such a pre-trial motion would place the military commission, of which two of three commissioners are not lawyers, in the position of "consider[ing] the Rhode Island dual-officeholding question" whether Chief Justice Williams was properly "qualified" and whether Chief Justice Williams violated the Rhode Island Constitution. The court's failure to address the merits of plaintiffs' claim would, in such circumstances, leave the military commission in Cuba to decide this issue of Rhode Island constitutional law without guidance because "[u]nfortunately, no certification procedure is available from a military commission" to the Rhode Island Supreme Court, "the body with the greatest expertise and ability to answer it."

The court's treatment of the merits rests on the statutory construction of state constitutions, a topic which has received varying degrees of academic and judicial treatment over the years, from Justice Brennan's impassioned plea for independent

Williams, 874 A.2d 217 (R.I. 2005) (No. 05-144).


50. Id. at 4-5.

51. Id. at 5.

52. Id.

53. Id.

54. Id. at 6 (citing MODEL CODE OF JUDICIAL CONDUCT Cannon 2 (2004); R.I. CODE OF JUDICIAL CONDUCT Canon 2.A. (2000)).

55. Id. at 7 (citing R.I. SUP. R. 6 (limiting certification to requests from the U.S. Supreme Court, U.S. Courts of Appeal, and U.S. District Courts)).

56. Id.
construction, through interceding years when many state courts generally marched in lockstep with the United States Supreme Court, to a relatively recent resurgence in individual state identity and more individualized interpretations by state courts.

The Rhode Island Supreme Court has had a number of opportunities to interpret various provisions of the Rhode Island Constitution, but to date no clear pattern of interpretation has emerged. In McKenna, the Rhode Island Supreme Court dealt with the Rhode Island Constitution's dual office holding provision.

The court's holding that the two provisions at issue in its analysis, article 3, section 6 (the dual office holding provision) and article 10, section 4 (changing the selection method of judges from election to appointment), could be harmonized is accurate; the manner in which the court did harmonize them is arguably inaccurate. The "inescapable" conclusion to which the court comes – namely, that justices of the state's Supreme Court are no longer held to the constitutional prohibition against dual office holding, is entirely escapable, and tends to violate a fairly entrenched rule.

60. There are three generally accepted methods of state constitutional interpretation. The first is lockstep, in which a state court generally interprets the provisions in its constitution to be coterminous with its federal counterparts. An interstitial approach favors looking first at the federal constitution unless some reason, such as a particularly unique provision or state culture or history, demands an independent look. Finally, a primacy approach favors looking first to the state constitution and looking only to the federal constitution for persuasive authority in interpreting issues of state law. See Bender, supra note 59, at 628-32.
61. The dual office holding provision of article 3, section 6 is not unique to Rhode Island. While the provision does not appear in the United States Constitution, it has counterparts in forty-one other state constitutions. Steven G. Calabresi and Joan L. Larsen, One Person, One Office: Separation of Powers or Separation of Personnel?, 79 CORNELL L. REV. 1045, 1151-52 (1994).
62. McKenna, 874 A.2d at 235.
of statutory construction – that repeals by implication are disfavored.\textsuperscript{63} Retired Associate Justice Robert Flanders, in an interview given after the court issued its opinion, stated that "'[t]he general rule is that repeals by implication are disfavored. The notion that when the legislature changed the way of selecting judges it intended to change the dual office holding ban is, in my judgment, a real stretch.'"\textsuperscript{64} McKenna does not, however, mark the first time that such a repeal by implication has been effected, nor is the practice unique to the judicial branch of Rhode Island’s government.

During the latter months of 2003, an apparent state constitutional inconsistency faced Rhode Island’s legislature. Operation Clean Government filed an ethics complaint against House Majority Leader Gordon Fox after he voted on legislation affecting a company with which Fox’s law firm did business.\textsuperscript{65} At issue was article 6, section 4, a provision of the Rhode Island state constitution which provides: "No member of the General Assembly shall take any fee, or be of counsel in any case pending before either house of the General Assembly under penalty of forfeiture of seat, upon proof thereof to the satisfaction of the house in which the member sits."\textsuperscript{66} Because Fox had billed hours as a private attorney in a matter pending before the General Assembly, the ethics complaint alleged that Fox had forfeited his seat in the House of Representatives.\textsuperscript{67} House Speaker William Murphy opposed seeking an advisory opinion from the Supreme Court on the constitutional question,\textsuperscript{68} though he had sought just such an opinion when controversy had erupted during the reign of the previous speaker.\textsuperscript{69} Instead, he sought the opinion of local

\begin{itemize}
\item \textsuperscript{63} \textit{Id.} at 241-42 (citing Berthiaume v. School Comm. of Woonsocket, 397 A.2d 889, 893 (R.I. 1979).
\item \textsuperscript{66} R.I. CONST. art 6, § 4.
\item \textsuperscript{67} See Gregg, \textit{supra} note 65.
\item \textsuperscript{69} See Katherine Gregg and Edward Fitzpatrick, \textit{At the Assembly}:
constitutional scholar and academic Patrick Conley.\textsuperscript{70}

In his written opinion to the General Assembly, Professor Conley opined that the plain meaning of the word "case" in article 6, section 4 was also its constitutional meaning.\textsuperscript{71} In discerning the plain meaning, Professor Conley looked no further than Black's Law Dictionary, which defines the word "case" as, in relevant part, "a question contested before a court of justice."\textsuperscript{72} Because the General Assembly did, at one point, have the power to exercise appellate judicial review, the use of the word has a loaded meaning.\textsuperscript{73} In Professor Conley's opinion, the word "case" was dispositive in deciding the controversy: Because the General Assembly no longer sat in a judicial role, and because article 6, section 4 had been considered, but remained unchanged in succeeding Rhode Island constitutional conventions, the provision had slid into obsolescence and had no applicability to the situation in which Representative Fox found himself.\textsuperscript{74}

In his response to Professor Conley's opinion to the General Assembly, James Marusak raised the issue of constitutional construction, suggesting that well-worn methods of construction had been left to the wayside by Professor Conley in the course of his opinion.\textsuperscript{75} He made the oft-repeated point that considering


\textsuperscript{72} Id. (citing BLACK'S LAW DICTIONARY 206 (7th ed. 1999)). James Marusak suggests that this was the wrong place to look for the plain meaning of a word, and that a regular dictionary should have been consulted rather then a legal one.

"Plain and common meanings should be ascertained by consulting Webster's Dictionary of the American Language, rather than Black's Dictionary of the Lawyer's Language. Using a legal dictionary to primarily define the word ‘case’ dictates the answer. One probably should not use Dorland's Medical Dictionary to define ‘seizures’ in its constitutional context either.” Marusak, supra note 70, at 11.

\textsuperscript{73} See Conley, supra note 71. Professor Conley goes on to provide an historical analysis of article 6, section 4, concluding that, “[t]he use of the word ‘case’ in all three versions of this section was clearly intended to apply only to court cases in which a lawyer/legislator might use the existing petition process to win a legislative verdict for his client.” Id. at 9-10.

\textsuperscript{74} Id. at 11.

\textsuperscript{75} Marusak, supra note 70, at 11.
constitutional provisions overruled by implication is disfavored.\footnote{Id.} Despite Marusak's analysis of the use of the word "case" in Rhode Island's constitutional history, an analysis which suggests that a more expansive meaning might have been appropriate, Speaker Murphy chose to accept Professor Conley's opinion, never calling for an advisory opinion from the Supreme Court.\footnote{Id. See also Gregg, supra note 69.}

While the fact that "[n]o word or phrase in the Constitution may be construed a nullity if any other construction can give it meaning,"\footnote{McKenna, supra note 70, at 11 (quoting City of Pawtucket v. Sundlun, 662 A.2d 40, 45 (R.I. 1995)).} the legislature allowed the entire section of article 6 dealing with lawyer-legislators to be read right out of the state constitution. If Professor Conley's interpretation is to be accepted, there is an absolutely meaningless provision in the state constitution, one to which \textit{no construction can give meaning}. Similarly, in \textit{McKenna}, the Rhode Island Supreme Court interpreted a provision of the Rhode Island Constitution dealing with dual office holding, despite its reference to judges, as not applying to justices of the Rhode Island Supreme Court,\footnote{Marusak, supra note 70, at 11 (quoting Bandoni v. State, 715 A.2d 580, 590 (R.I. 1998)).} thereby violating the maxim that "no word or section can be assumed to be unnecessarily used, needlessly added or unnecessarily omitted."\footnote{McKenna, 874 A.2d at 232.}

By applying the plain meaning of the words of the provision, the Rhode Island Supreme Court held that the provision no longer applied to judges, as they were no longer elected, but instead appointed on the basis of merit.\footnote{McKenna, 874 A.2d at 231.} Because, at one point, judges did take office after being elected, as opposed to just being engaged, the court ascribed to both of those words a loaded meaning, precluding continued application of article 3, section 6 to the judiciary. \textit{McKenna} renders article 3, section 6, as it applies to the Rhode Island judiciary, like article 6, section 4, before it, obsolete and meaningless.

\textbf{CONCLUSION}

The foregoing provides two recent examples of the Rhode
Island Constitution being overruled by implication, despite the fact that doing so is disfavored. After *McKenna*, not only do an attorney and his law practice lack standing to maintain an action to remove a public official from office, but any action to remove a public official from office is a petition in equity in the nature of quo warranto, over which the Superior Court lacks subject matter jurisdiction without the intervention of the Attorney General. Furthermore, Rhode Island's constitutional prohibition against state officials holding dual offices does not apply to appointed members of the Rhode Island judiciary.

Aaron R. Baker & Bridget N. Longridge
Constitutional Law. Young v. City of Providence, 396 F.Supp. 2d 125 (D. R.I. 2005). The Federal District Court for the District of Rhode Island denied all of the City of Providence Officers’ motions for summary judgment as put forth based on the defense of qualified immunity, finding that for all three of the defendants, under a three-prong qualified immunity analysis, there existed material factual disputes as to supervisory liability.

FACTS AND TRAVEL

On January 28, 2000, Cornell Young Jr., an off-duty Providence police officer, was shot and killed by two fellow on-duty Providence police officers, Carlos Saraiva and Michael Solitro. Young was shot by the other Providence officers responding while off duty to an altercation occurring within city limits, and as such, was in plainclothes and not in uniform. Providence police regulations at the time of the incident required that off-duty officers be armed at all times and prepared to act in their official capacity, despite being off duty. In addition, Young had his gun out while shot at the scene of the altercation. Complicating this already complex tragedy was the fact that Young was African-American and both of the other officers were not.

Young’s mother, Leisa Young, subsequently brought suit in Rhode Island Federal District Court against both the individual officers involved in the tragedy, on Fourth Amendment unreasonable use of force grounds, and against the City of Providence, for its alleged “failure to properly screen, hire, train, discipline and supervise the City’s police officers.” In 2003, Judge Mary Lisi presided over a bifurcated trial in which the jury was

2. Id. at 166.
See also Edward Fitzpatrick, Young Drops Appeal to End Five-Year Battle, PROVIDENCE J., Feb. 4, 2006 at A3-4.
5. Young, 301 F. Supp. 2d at 168.
6. Id. at 166.

801
first asked to determine if the two on-duty officers had violated Young's Fourth Amendment rights; the jury found that one officer had violated Young's rights, but that the other officer had not. At that time, Judge Lisi granted summary judgment on all other grounds and appeals soon followed.

On April 25, 2005, the First Circuit Court of Appeals issued its decision, affirming the jury's finding that one officer violated Young's rights and also affirming Judge Lisi's summary judgment as to one charge against the City, but reversing Lisi's summary judgment for the City "on a claim that it is responsible for inadequately training [Officer] Solitro on how to avoid on-duty/off-duty misidentification in light of the department's policy that officers are always armed and always on-duty." The District Court's grant of summary judgment for the City on supervisory claims was also vacated and remanded, as it had been based on the grant of summary judgment for the City on the other municipal claims.

The issues as remanded for trial before the District Court for resolution were based on the supervisory and training claims. On remand, the relevant supervisory officials (Urbano Prignano, the then Providence Chief of Police; John Ryan; and Kenneth Cohen) moved for summary judgment on qualified immunity grounds.

ANALYSIS AND HOLDING

In this case, the plaintiff, Leisa Young, sought to hold the defendants (Prignano as the then Chief of the Providence Police, and Ryan and Cohen for their roles in training Officer Solitro) as liable for her son's death in their supervisory capacities. All of these three officials moved for summary judgment as to Young's claims based on the defense of qualified immunity.

In addressing the city officials' motion for summary judgment based on the status of qualified immunity, District Court Judge

7. Young, 396 F. Supp. 2d at 129 (citing Young, 301 F. Supp. 2d at 169).
8. Id. at 129-30.
9. Young, 404 F.3d 4, 9-10 (1st Cir. 2005).
10. Id. at 10.
11. See Young, 396 F. Supp. 2d at 130.
12. Id.
13. Id. at 131-41.
14. Id. at 130.
Smith utilized a three-prong approach, in which each prong must be analyzed in a specific order: first, in the light most favorable to the plaintiff, if the facts alleged show that the official's conduct violated a constitutional right; second, if the first prong is answered in the affirmative, whether the right claimed to have been violated can be said to have been "clearly established" by law at the time of the alleged violation; third, if the right was established at the time of the violation, whether "a reasonable official, situated similarly to the defendant(s), would have understood that the conduct at issue contravened the clearly established law." As to the first prong of the inquiry, the District Court found that Young had easily exceeded her burden in showing these officers violated the decedent's constitutional rights. As in phase one of the first trial, the jury returned a verdict saying that Cornell Young's rights had been violated by Officer Solitro, a verdict which the First Circuit subsequently upheld.

As to the second prong of whether or not the law creating the constitutional right was clearly established at the time of the alleged violation of Young's rights, the District Court cited the case of Tennessee v. Garner, in which the United States Supreme Court stated that "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person . . . [T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment," and as such Young's rights were violated in this instance.

The District Court next inquired whether these defendants would be liable in their supervisory capacities for the violations

15. Id. at 131. (citing Savard v. R.I., 338 F.3d 23, 27 (1st Cir. 2003)).
16. Id. (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)).
17. Id. (citing Brosseau v. Haugen, 543 U.S. 194 (2004)).
18. Id. (quoting Saucier, 533 U.S. at 205).
19. Id. at 132-33 (citing Young, 301 F. Supp. 2d at 169; Young, 404 F.3d at 25).
21. Young, 396 F. Supp. 2d at 134 (citing Garner, 471 U.S. at 1 (quoting Fernandez v. Leonard, 784 F.2d 1209, 1217 (1st Cir. 1986) (internal citations omitted))).
22. See id.
perpetrated by the subordinate officer, Solitro. Here again, the court answered its own inquiry in the affirmative by finding that police supervisors may be held liable for the actions of their subordinates, as well as for the failure to properly train subordinates, in circumstances involving friendly fire. In denying the defendants' arguments as to this prong, the District Court cited the Circuit Court's finding that "[a]lthough there was no evidence of a prior friendly fire shooting, a jury could find . . . that the department knew there was a high risk . . . that friendly fire shootings were likely to occur" as support for a finding of supervisory liability and as "clearly establish[ing] that supervisors may be held liable for fail[ure] to adequately train officers."

As to the third and final prong of the qualified immunity analysis, the District Court stated that the plaintiff "face[d] a fairly tall order: she must demonstrate that there are material factual disputes regarding whether each individual defendant was deliberately indifferent to the risk" of harm that might result from their failure to provide constitutionally adequate training of the subordinate officers and that these actions were objectively unreasonable.

Here, the court found that there were material factual disputes as to each of the three defendants. In the case of Prignano, the defendant himself acknowledged that he was "ultimately responsible for ensuring proper training of the PPD [and that as to the "always armed, always on duty" policy,] . . . that failure to follow it could lead to someone being killed." The court found that there were numerous factual disputes surrounding training and that "[a]lthough Prignano did not provide direct instruction to Solitro, he may nevertheless be liable as a supervisor." As to the defendant Ryan, the court found that not only was he responsible as Director of Administration for the Providence Police Department at the time of Young's death for officer training, but also noting that the plaintiff claimed that he

23. Id. at 134-35.
24. Id. at 135.
25. Young, 404 F.3d at 28-29.
27. Id. at 137.
28. Id. at 137-41.
29. Id. at 137.
30. Id. at 138.
"actually conducted training that was inconsistent with . . . PPD policy," and that there existed disputed issues of material fact as to Ryan's involvement in the officers' training.\textsuperscript{31} As to the defendant Cohen, who was the Director of the Training Academy that Solitro attended, the court similarly found that there existed issues of material fact as to whether Cohen was "deliberately indifferent to the known risks associated with the always armed/always on-duty policy by failing to provide training" around this policy.\textsuperscript{32} As such, the court found that there were sufficient factual disputes as to each defendant so as to deny summary judgment based on supervisory qualified immunity in all three instances.\textsuperscript{33}

Additionally, the court denied two other motions for summary judgment put forth: Prignano moved for summary judgment as to the plaintiff Leisa Young's Monell\textsuperscript{34} claim against him, and Ryan moved for summary judgment claiming he could not be liable in a supervisory capacity, as the officer he had trained was found not to have violated the decedent's constitutional rights.\textsuperscript{35}

\textbf{COMMENTARY}

Five weeks after Judge Smith issued the opinion denying all of the defendants' motions for summary judgment, a federal jury decided that the city of Providence and its officers were not liable for the violation of Cornell Young's constitutional rights as perpetrated by Officer Solitro.\textsuperscript{36} The plaintiff Leisa Young (the deceased officer's mother) had filed an appeal to this verdict in the First Circuit Court of Appeals on January 18, 2006, but later dropped her appeal on February 3, 2006.\textsuperscript{37} What began as a national news-making tragedy that once included legal counsel Johnnie Cochran, ended with little legal consolation for the deceased officer's family and loved ones.\textsuperscript{38}

\textsuperscript{31} Id. at 140.
\textsuperscript{32} Id. at 141.
\textsuperscript{33} Id.
\textsuperscript{34} Monell v. Dept of Soc. Serv., 436 U.S. 658 (1978).
\textsuperscript{35} Young, 396 F.Supp. 2d at 141-46 (D. R.I. 2005).
\textsuperscript{36} Fitzpatrick, supra note 3, at A3-A4.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
CONCLUSION

The Federal District Court for the District of Rhode Island denied all motions for summary judgment as put forth by supervisory officers of the City of Providence under the defense of qualified immunity.39

Esme Noelle DeVault

39. Young, 396 F. Supp. 2d at 146.
**Contract.** *D'Amico v. Johnston Partners*, 866 A.2d 1222 (R.I. 2005). A party seeking substitution of an insurer will not be required to meet additional conditions when those conditions are not clearly included in the pertinent statute. The language of Rhode Island General Law § 27-7-2.4 is clear and unambiguous. Therefore, a party seeking substitution of an insurer under § 27-7-2.4 is not statutorily required to assert a claim against the insurer prior to the confirmation and discharge of the debtor's Chapter 11 bankruptcy proceedings.

**FACTS AND TRAVEL**

In 1990, Mary D'Amico filed a civil action claiming that she had suffered damage to her real property, allegedly caused by a construction company, Johnston Partners (Johnston). D'Amico claimed that Johnston both wrongfully encroached upon her property and caused surface water to run onto her property during a construction project on Johnston's land, which was adjacent to D'Amico's own property.

In 1992, D'Amico amended her complaint, adding Garofalo & Associates, Inc. (Garofalo) as a defendant. Garofalo performed engineering design services for Johnston during the construction project. D'Amico claimed that Garofalo was negligent in its design and thereby proximately caused her damages.

Approximately four years later, and prior to the completion of D'Amico's case, Garofalo filed a voluntary petition for Chapter 11 bankruptcy. The United States Bankruptcy Court confirmed Garofalo's reorganization plan in June of 1997. The Bankruptcy Court entered a final decree closing the case on November 14,

---

2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
Almost six years later, Garofalo moved for summary judgment in the action brought by D'Amico. Garofalo claimed that approval of its reorganization plan discharged all debts incurred before June 1997 and therefore extinguished D'Amico's claim. In response, D'Amico filed a motion to substitute Garofalo's insurance carrier, Evanston Insurance Co. (Evanston), for Garofalo.

The trial court granted Garofalo's motion for summary judgment, but did not grant D'Amico's motion for substitution. The court focused on the fact that a claimant cannot simply sit on her rights and lose a claim in bankruptcy court, and then attempt to join the insurer after the fact. The trial court determined that having lost her claim in bankruptcy court, D'Amico no longer had a claim that would qualify under the relevant statute, and therefore could not proceed against the insurer. D'Amico subsequently appealed.

**ANALYSIS AND HOLDING**

On appeal, D'Amico contested only the denial of her motion to substitute the insurance carrier (Evanston) for the bankrupt tortfeasor (Garofalo) under § 27-7-2.4. This presented the Rhode Island Supreme Court with a question of first impression: Whether a party seeking substitution of an insurer under § 27-7-2.4 is required by statute to assert a claim against the insurer prior to the confirmation and discharge of the debtor's Chapter 11 reorganization plan. The court held that the "clear and unambiguous" language of the statute did not require such a
condition prior to substituting an insurer under § 27-7-2.4.\textsuperscript{18} The court recognized that the legislature, not the court, could properly add additional statutory requirements.\textsuperscript{19} This holding was consistent with the Rhode Island Supreme Court’s previous decisions on this and similar statutes.\textsuperscript{20}

First, the court rejected the defendant’s argument that the plaintiff’s appeal was moot.\textsuperscript{21} The court stated that, although summary judgment had been granted in favor of Garofalo, the plaintiff retained a continuing stake in the case.\textsuperscript{22} If the basis for summary judgment had been that Garofalo owed no duty of care to the plaintiff, then the plaintiff’s appeal might be moot due to Garofalo’s lack of liability toward the plaintiff.\textsuperscript{23} However, in this case, the motion justice based the summary judgment on the belief that Garofalo’s bankruptcy extinguished any claim the plaintiff could bring against the insurance company.\textsuperscript{24}

**Clear and Unambiguous Language – Substitution of Insurer Permitted**

The court then reviewed a series of prior cases addressing this and similar statutes.\textsuperscript{25} The first of these cases was *Giroux v. Purlington Building Systems, Inc.*,\textsuperscript{26} in which the court concluded that § 27-7-2.4 “clearly and unambiguously allows the injured party to substitute the tort-feasor’s liability insurer as defendant after the tort-feasor files for bankruptcy.”\textsuperscript{27} In *Giroux*, the plaintiff was injured when a piece of prefabricated roof decking struck him while he was working for a subcontractor.\textsuperscript{28} The plaintiff sued both the subcontractor and the manufacturer of the roof components for negligence.\textsuperscript{29} However, when the manufacturer was granted protection under Chapter 11 of the

\begin{itemize}
  \item \textsuperscript{18} *Id.*
  \item \textsuperscript{19} *Id.* at 1228-29.
  \item \textsuperscript{20} *Id.* at 1229.
  \item \textsuperscript{21} *Id.* at 1224.
  \item \textsuperscript{22} *Id.*
  \item \textsuperscript{23} *Id.* at 1224 n.2.
  \item \textsuperscript{24} *Id.*
  \item \textsuperscript{25} *Id.* at 1225-27.
  \item \textsuperscript{26} 670 A.2d 1227 (R.I. 1996).
  \item \textsuperscript{27} *Id.* at 1229.
  \item \textsuperscript{28} *Id.* at 1228.
  \item \textsuperscript{29} *Id.*
\end{itemize}
Bankruptcy Code, the plaintiff moved to substitute the manufacturer's insurer under § 27-7-2.4.\textsuperscript{30} The court rejected the insurer's argument that relief from the automatic stay was required as a condition precedent to substitution.\textsuperscript{31} The insurer also argued that the Superior Court had discretion under the statute to "protect Aetna from the substantial prejudice created by its substitution as defendant."\textsuperscript{32} The court rejected this argument stating that the clear and unambiguous language of the statute did not allow additional conditions to be imposed before an injured party could substitute an insurer as a defendant.\textsuperscript{33}

In \textit{Maczuga v. American Universal Insurance Co.},\textsuperscript{34} the court interpreted a similar statute, R.I. General Law § 27-7-2, which allows for substitution of the defendant's insurer when the process against the defendant is returned \textit{non est inventus} due to the fact that the defendant has not been located.\textsuperscript{35} In \textit{Maczuga}, a complaint was issued against the defendant's insurer because the complaint against the defendant was returned \textit{non est inventus}.\textsuperscript{36} However, several months later the defendant was located.\textsuperscript{37} At trial, the defendant's insurer argued that the plaintiff's direct action against the insurer should be dismissed because the defendant had been located.\textsuperscript{38} The court held that the clear and unambiguous language of the statute did not include this extra requirement after the direct action had begun against an insurer.\textsuperscript{39}

The \textit{Gnys}\textsuperscript{40} case also involved interpretation of R.I. General Law § 27-7-2.\textsuperscript{41} In \textit{Gnys}, the defendant could not be located, but the defendant's insurer entered an appearance on his behalf.\textsuperscript{42} The insurer argued that the general appearance on behalf of the defendant was the "functional equivalent of service," thus

\begin{itemize}
\item \textsuperscript{30} \textit{Id.}
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Id. at} 1228-29.
\item \textsuperscript{33} \textit{Id. at} 1229.
\item \textsuperscript{34} 166 A.2d 227 (R.I. 1960).
\item \textsuperscript{35} \textit{See id.}
\item \textsuperscript{36} \textit{Id. at} 228.
\item \textsuperscript{37} \textit{Id. at} 229.
\item \textsuperscript{38} \textit{Id.}
\item \textsuperscript{39} \textit{Id. at} 229-30.
\item \textsuperscript{40} \textit{Gnys v. Amica Mut. Ins. Co.}, 396 A.2d 107 (R.I. 1979).
\item \textsuperscript{41} \textit{See id.}
\item \textsuperscript{42} \textit{Id. at} 108.
\end{itemize}
rendering the *non est inventus* ineffective.\(^\text{43}\) The Rhode Island Supreme Court disagreed and reaffirmed that § 27-7-2 "unconditionally authorizes suit against an insurer upon a *non est inventus* return."\(^\text{44}\) Once the *non est inventus* return occurs, there are no additional requirements to be met under the statute.\(^\text{45}\)

Finally, the court discussed *Markham v. Allstate Insurance Co.*,\(^\text{46}\) in which the defendant died after service and the plaintiff moved to substitute the defendant's insurer.\(^\text{47}\) However, in that case, the defendant's wife was available as the personal representative of the defendant's estate.\(^\text{48}\) The insurer, therefore, argued that the plaintiff could not sue the insurer under § 27-7-2 unless the defendant died during the suit and there was no personal representative available to represent his estate.\(^\text{49}\) The court rejected this argument and stated that the "crystal clear and unambiguous language of the statute" adds no conditions beyond death or *non est inventus*.\(^\text{50}\)

**Application to Facts of D'Amico – Case of First Impression**

Here, the insurer (Evanston) argued that the plaintiff (D'Amico) could not assert a § 27-7-2.4 claim against Evanston because the conclusion of Garofalo's bankruptcy proceedings extinguished D'Amico's claim.\(^\text{51}\) The court rejected this claim by citing *Giroux*, where the court held that substitution of an insurer under § 27-7-2.4 may not frustrate the goals of federal bankruptcy law.\(^\text{52}\) In *Giroux*, the court found substitution in bankruptcy cases to be proper as long as the substitution works no harm to other creditors that would otherwise be entitled to proceeds from the defendant's insurance policy.\(^\text{53}\) Applying that holding to *D'Amico*, the court found no evidence that other claimants or creditors

---

43. *Id.*
44. 866 A.2d at 1226 (citing generally *Gnys*, 396 A.2d 107 (R.I. 1979)).
47. 866 A.2d at 1226-27 (discussing *Markham*, 362 A.2d 651 (R.I. 1976)).
49. *Id.* at 653.
50. *Id.* at 654.
51. 866 A.2d at 1227.
52. *Id.* (citing *Giroux* v. Purington Bldg. Sys., Inc., 670 A.2d 1227, 1231 (R.I. 1996)).
53. *Giroux*, 670 A.2d at 1231.
existed. Additionally, the court noted that Evanston had not met its burden in proving it would be unfairly prejudiced by the substitution, as evidenced in part by the fact that the insurer had provided a defense to Garofalo throughout the litigation process.

Next, the court addressed Evanston's argument that Garofalo's bankruptcy extinguished D'Amico's entire claim. The court noted that the Bankruptcy Code provides that discharge of a debt affects only the liability of the debtor. Thus, the court went on to find that bankruptcy proceedings do not affect the liability of any other entity regarding that debt. Consequently, the court held that, even if Garofalo's liability was extinguished by his bankruptcy, his insurer's liability for the debt was not.

Justice Goldberg’s Dissent – Resurrection of a Lifeless Claim

First, the dissent noted that this case should be remanded for a decision of whether, as an engineer doing work for a landowner, the defendant owed a duty of care to the adjacent landowner. Whether the defendant owed a duty to the plaintiff is a question of law, and, according to Justice Goldberg, the trial court should have already addressed the issue of duty.

Second, Justice Goldberg suggested that before bringing a claim against the defendant's insurer, the plaintiff must have a viable claim against the defendant. By way of comparison, the dissent analogizes the use of a statute of limitations requirement. Just as a litigant cannot be held liable after an applicable statute of limitations has run, the defendant (and his insurer) in this case should not have been held liable after the bankruptcy court extinguished the defendant's liability.

Third, the dissent focused on the timing of the plaintiff's

54. 866 A.2d at 1227.
55. Id.
56. Id.
57. Id. at 1228 (citing 11 U.S.C. § 524(e)(2000)).
58. Id.
59. Id. at 1229.
60. Id.
61. Id.
62. Id. at 1229-30.
63. Id. at 1230.
64. Id.
Justice Goldberg noted that while the text of § 27-7-2.4 does not include a time limit, the legislature chose to use present tense to describe who may bring a claim. Specifically, the statute states that "any person, having a claim because of damages . . . may file a compliant directly against the liability insurer of the alleged tortfeasor." Therefore, the dissent opined that the use of present tense created an implicit requirement that the suit must be timely when brought against the insurer. Justice Goldberg stressed that this condition precedent was found within the plain meaning of the statute and furthered its legislative purpose.

COMMENTARY

The Rhode Island Supreme Court was justified in its previous holdings when it asserted that additional conditions may not be imposed if those conditions were not expressly intended by the legislature. Otherwise, defendants would be able to add requirements incrementally that plaintiffs would then have to meet before qualifying for substitution under this and similar statutes. If the Rhode Island legislature wished (then or now) to attach additional requirements or conditions prior to a plaintiff being eligible to substitute under these statutes, the legislature could revise or supplement the statute accordingly.

The court appears to adhere to strict interpretation of statutes, placing much focus on the "clear and ambiguous language," as well as the intent of the legislature in creating the statute. However, Justice Goldberg's dissent points out the fact that the majority overlooks certain aspects of the legislative intent and the statute's language. Specifically, the majority glosses over the fact that the plaintiff did not assert her right to substitute the insurer until approximately six years after the bankruptcy proceedings were confirmed and closed.

By rejecting the fact that a claim must be timely, the majority ignores that the plaintiff in this case sat on her rights until well

65. Id.
66. Id.
68. 866 A.2d 1230.
69. Id.
after her claim was extinguished in bankruptcy court. While the court claimed that it kept the intent of the Rhode Island legislature in mind, this holding seems at odds with the legislature's true intent. Surely, the Rhode Island legislature meant only to empower persons with current claims against a party, not to create an entirely new method to revive previously extinguished claims.

CONCLUSION

The Rhode Island Supreme Court held that the clear and unambiguous language of § 27-7-2.4 does not support the addition of conditions on a plaintiff's right to proceed against an insurer. Therefore, the court held that "a party seeking substitution of an insurer under § 27-7-2.4 is not statutorily obligated to assert its claim against the insurer prior to the confirmation of the debtor's Chapter 11 reorganization plan." In coming to this conclusion, the court relied on the "clear and unambiguous" language of the statute and the legislative purpose behind § 27-7-2.4, in addition to the court's previous decisions regarding this and similar statutes. For these reasons, the Rhode Island Supreme Court reversed and remanded the case to the Superior Court.

Leah J. Donaldson

70. Id. at 1229.
71. Id. at 1228.
72. Id. at 1225-29.
73. Id. at 1229.
**Contract/Insurance Law.** Sanzi v. Shetty, 864 A.2d 614 (R.I. 2005). Medical malpractice liability insurer had no duty to defend or indemnify a pediatric neurologist for injuries arising from alleged sexual assaults of former child-patient because of the “inferred intent doctrine,” which provides that, as a matter of law, there is an inferred intent to harm in cases of sexual abuse of children. The intentional acts of sexual abuse were outside the scope of the insured’s policies, which provided coverage in the event of accidental “occurrences.” The liability insurer also had no duty to defend or indemnify because the alleged acts were not sufficiently connected to “professional services,” and thus fell outside the scope of policy coverage.

**FACTS AND TRAVEL**

In December 1999, Rebecca Caldarone, a former patient of pediatric neurologist Dr. Taranath M. Shetty, committed suicide. In 2000, Caldarone’s parents and husband (as parent and next friend of her minor children) brought a wrongful death action against Dr. Shetty and Taranath M. Shetty, M.D., Inc. The plaintiffs alleged that Shetty sexually abused and battered Mrs. Caldarone for eight years, from 1979 until 1987, beginning when she was his fourteen-year-old patient. They claimed that Shetty deceived Caldarone’s parents into believing that it would benefit their daughter’s health if she worked at his office on Saturdays, and that Dr. Shetty sexually abused her on those Saturday workdays and during her regular medical visits. The plaintiffs claimed that this alleged sexual abuse ultimately caused Rebecca Caldarone’s death by suicide.

Since 1978, Dr. Shetty was covered by malpractice liability insurance policies issued by The Medical Malpractice Joint

---

2. Id.
3. Id. at 617.
4. Id.
5. Id. at 615.

815
Underwriting Association of Rhode Island (JUA). The JUA policies provided that the company would provide liability coverage for "injury arising out of the rendering of or failure to render...professional services by the individual insured...performed in the practice of the individual's profession..." The policies provided for protection in the event of an "occurrence," with "occurrence" defined in the policy as "an accident...which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Beginning in 1980, Shetty's policies also contained a criminal-act exclusion: "This insurance does not apply... to injury arising out of the performance by the insured of a criminal act."

When Shetty was sued, he contacted JUA seeking defense and indemnification coverage. JUA denied coverage. They claimed that, under the insurance policies, neither Dr. Shetty, nor Shetty, Inc., was entitled to defense or indemnity for the claims asserted by the plaintiffs. Dr. Shetty filed a third-party complaint against JUA, seeking "a determination that JUA ha[d] a duty to defend and/or indemnify both himself and Shetty, Inc., and demanding judgment against JUA for all sums potentially adjudged against [him]."

JUA filed a motion for summary judgment; the hearing justice found that JUA was under no duty to defend or indemnify Dr. Shetty and that therefore JUA was entitled to summary judgment. The defendants appealed.

**ANALYSIS AND HOLDING**

On appeal the defendant argued that: (1) the plaintiff's complaint passed the pleadings test, thus obligating JUA to

---

6. Id. at 617.
7. Id. (quoting defendants' JUA policies JUA-7301 and 8809) (emphasis omitted).
8. Id.
9. Id. (quoting defendants' JUA policy issued on Form JUA-20).
10. Id. at 616.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
defend and indemnify the defendant; and (2) that there was a
genuine issue of material fact as to whether the policies in place
between 1978 and 1980 covered injuries arising out of sexual
misconduct. The central question presented to the court was
whether the JUA had any duty to defend and potentially
indemnify the defendant, based on the terms of the defendants’
liability insurance policies and the facts alleged in the complaint
against them.

The court's analysis began with the question of whether the
complaint against Shetty satisfied the pleadings test. The
pleadings test provides that "an insurer's duty to defend is a
function of the allegations in the complaint filed against the
insured, and that if the allegations bring the case within the scope
of the risks covered by the policy, the insurer must defend
regardless of whether the allegations are groundless, false, or
fraudulent." Whether the pleadings test was satisfied turned on
the question of whether sexual abuse was an injury that arose out
of the rendering of "professional services." This was because,
according to the defendant's insurance policy, JUA would provide
liability coverage for injuries "arising out of the rendering of or
failure to render ... professional services" by the individual
insured. Since Shetty's policies covered risks arising out of the
rendering of professional services, the pleadings test would be
satisfied if the sexual abuse arose out of the rendering of
professional services.

The court found that the pleadings test was not met because
sexual abuse was not a claim within the sphere of professional
services covered under the policy. The court observed that most
American courts follow the rule that "intentional sexual abuse
does not fall within the rendering of professional services for the
purposes of insurance coverage unless the acts are so inextricably
intertwined with medical treatment that coverage must be

16. Id.
17. Id. at 616-17.
18. Id. at 618.
20. See id. at 618-19.
21. Id. at 617 (emphasis added).
22. See id.
23. Id. at 618.
afforded." The Rhode Island Supreme Court had not previously considered "the issue of insurance coverage in a case involving a medical professional accused of sexual misconduct." The court decided to adopt the test for determining whether an act was "professional" in nature from the 1968 Nebraska case *Marx v. Hartford Accident and Indemnity Co.*, the leading case in this area. According to the *Marx* case, "[i]n determining whether a particular act is of a professional nature or a 'professional service' we must look not to the title or character of the party performing the act, but to the act itself." In addition, "something more than an act flowing from mere employment is essential. The act or service must be such as exacts the use or application of special learning or attainments of some kind."

In applying the *Marx* reasoning, the court focused on "the acts and circumstances surrounding the alleged assaults." In the court's view, the connections between Shetty's professional status and the alleged abuse were *de minimis*. The only connections between Shetty's professional activities and the alleged abuse were that his professional status allowed him access to the victim and that the alleged abuse occurred at his office. These minimal connections to Shetty's professional services as a pediatric neurologist were "remotely incidental" to the allegations of the complaint. Because the "alleged sexual abuse . . . was so distinct from [Shetty's] medical skills, training, and practice in pediatric neurology . . . the alleged abuse clearly [fell] outside the scope of 'professional services.'" Thus, the court held that the allegations of sexual abuse fell outside of the "professional services" coverage of JUA's liability insurance.

The court did not end the analysis with the finding that the

24. *Id.*
25. *Id.* at 619.
26. 157 N.W.2d 870 (Neb. 1968).
27. 864 A.2d at 619.
29. *Id.* at 871-72.
31. See *id*.
32. See *id*.
33. *Id.* at 619.
34. *Id.* at 619.
35. *Id.* at 619-20.
pleadings test had not been met. The opinion went on to explain
that, even if the distinction between the defendant's professional
services and the alleged sexual misconduct were less clear, the
outcome would be the same.36 This was because Rhode Island
Supreme Court precedent established "an exception to [the
pleadings test] in cases involving civil actions for damages flowing
from an alleged sexual molestation."37

In Peerless Insurance Co. v. Viegas,38 the Rhode Island
Supreme Court adopted the inferred intent doctrine.39 According
to that doctrine, "because injury always ensues [from the sexual
molestation of children], the offender is deemed to intend any
injury resulting from the act as a matter of law."40 The Peerless
court applied the inferred intent doctrine to reach the holding that
"in civil actions for damages that result from an act of child
molestation, an insurer will be relieved from its duty to defend
and to indemnify its insured if the perpetrator is insured under a
policy in which there is contained an intentional act provision."41

In a subsequent case, Craven v. Metropolitan Property &
Casualty Insurance Co.,42 the Rhode Island Supreme Court
extended the Peerless rationale to an insurance policy that did not
contain a specific intentional act exclusion provision.43 The policy
at issue in Craven would cover an injury arising out of an
"occurrence" with "occurrence" defined as an "accident... result-
ing in bodily injury."44 The Craven court held that when
allegations are made as to intentional acts, there is no accident,
and therefore can be no "occurrence" to fall inside of the policy's
coverage.45

In nearly identical terms as the policy at issue in Craven, the
happening of an accidental occurrence would trigger coverage

36. Id. at 620.
37. Id. (quoting Am. Commerce Ins. Co. v. Porto, 811 A.2d 1185, 1190
(R.I. 2002)).
39. See id.
40. Id. at 788.
41. Id.
(mem).
43. Id. at 1022.
44. Id.
45. Id.
under Shetty's policies. Following the principles set forth in Peerless and Craven, the court found that the inferred intent doctrine applied and relieved JUA from its duty to defend or indemnify the defendant for injuries arising from the alleged sexual assaults.

The defendant's final argument before the court was that there was an ambiguity in the insurance policies that were in effect during the period from 1978 to 1980 that was sufficient to create an issue of material fact. The defendant's argument was that there was no explicit criminal act exclusion clause in the policy during that period, and that it could be implied that coverage for injuries arising out of criminal acts was included in those policies. The court determined that this argument was without merit because there was nothing in the policies that would lead an "ordinary reader to conclude that criminal-acts or sexual-abuse coverage was included." The mere fact that an explicit criminal acts exclusion was included in policies after 1980 did not imply inclusion of criminal acts coverage in earlier policies.

Because the court found that the JUA had no duty to defend or indemnify the defendant Dr. Shetty, it concluded that summary judgment was appropriate and affirmed the judgment of the Superior Court.

COMMENTARY

This case is significant because it represents the first time that the Rhode Island Supreme Court has addressed the issue of liability insurance coverage of a medical professional accused of sexual misconduct. The test that the court has adopted for determining whether a particular act is a "professional service" or of a professional nature for the purposes of liability insurance makes sense. The court will focus on the circumstances

46. Shetty, 864 A.2d at 620.
47. Id.
48. Id.
49. Id.
50. Id. at 621.
51. Id.
52. Id.
53. Id. at 619.
surrounding the alleged act in order to determine whether it falls within the scope of “professional services” as that term is used in the relevant liability policies. It is reasonable to focus on the act itself, and not the defendant’s title or vocation, when determining whether the act was connected to the rendering of professional services. The holding that in these circumstances the intentional sexual abuse of a child was not sufficiently related to the rendering of professional services to come within the scope of a liability insurance policy seems correct.

Applying the inferred intent rule to reach the conclusion that, as a matter of law, sexual molestation of a child is not an accidental occurrence within the terms of a liability insurance policy also makes sense. Liability insurance is intended to offer protection in the event of alleged negligence on the part of the insured. When a policy protects against liability arising from accidental occurrences, it seems fair to deny coverage for intentional misconduct.

The significance of this case for medical professionals is that, in the event of allegations of sexual abuse, it is very unlikely that they will be covered under their liability insurance policies.

CONCLUSION

In this case of first impression, the Rhode Island Supreme Court held that sexual molestation falls outside the scope of coverage under a medical liability insurance policy that provides coverage for injuries arising out of the rendering of professional services. The court also held that, according to the inferred intent doctrine, sexual abuse of a child is not an accidental “occurrence” under a medical liability insurance policy, and therefore is not covered under an accident liability coverage policy in any event. The liability insurance company therefore had no duty to defend or indemnify the defendant pediatric neurologist against liability arising out of accidental occurrences that took place in the rendering of professional services.

Matthew J. Costa
Criminal Law. *State v. Luanglath*, 863 A.2d 631 (R.I. 2005). When a deadlocked jury reveals its numerical split to a trial justice, the trial justice must then convey the numerical split to counsel. Knowledge of a jury's numerical split allows counsel to adequately consider trial strategy. A trial justice's supplemental *Allen* instructions, which suggest to the deadlocked jury that the failure to reach a unanimous verdict will result in an imminent retrial, "at great expense to the State and great expense to the defendants," are unduly coercive, when the lone holdout knows that the trial justice and the remaining jurors share knowledge of the numerical split.

**FACTS AND TRAVEL**

On March 16, 1990, after 11:00 p.m., three men entered the Providence home of the Souvannaleuth family and robbed the family at gunpoint.¹ Six members of the family were present at the time of the robbery: the parents (Mr. and Mrs. Souvannaleuth); their three daughters (Malaythong, Southavong, and Kongseng); and one son (Somsamay).² The robbers took U.S. currency, gold, and jewelry valued at between $39,000 and $78,000.³

Soon after the robbery, the Souvannaleuths described their observations to the police.⁴ None of the family members could identify the robbers that evening, but Kongseng told police that she recognized two of the perpetrators as people she encountered within the Laotian community.⁵ Later that night, the family members discussed the possible identity of the robbers and mentioned the defendants, brothers Sythongsay and Soukky Luanglath.⁶ In the days following the robbery, family members

². *Id.*
³. *Id.*
⁴. *Id.*
⁵. *Id.*
⁶. *Id.*
reported seeing the perpetrators in the community.\textsuperscript{7} After Kongseng, Malaythong, and Southavong attended a party in Foxboro, Massachusetts, which featured a performance by the defendants' band, Kongseng reported the sighting to the police.\textsuperscript{8} The State of Rhode Island prosecuted the defendants for burglary and robbery.\textsuperscript{9}

During the defendants' April and May 1993 trial, the jury process was characterized by irregularities.\textsuperscript{10} Difficulties ensued when, after the jury retired for deliberations, one of the twelve jurors refused to vote based on his religious beliefs.\textsuperscript{11} At that point, the trial justice asked the defendants if they needed an English-language interpreter and then set forth four options available to the defendants: (1) she could call the dissident juror in and "read him the riot act;" (2) she could substitute the alternate juror; (3) the trial could proceed with eleven jurors; or (4) the court could declare a mistrial.\textsuperscript{12} The defendants considered their options and agreed to allow the eleven-person jury to proceed.\textsuperscript{13}

The eleven jurors then continued to deliberate, but after only a few hours, the jury notified the trial justice that it was unable to agree.\textsuperscript{14} The eleven jurors presented a note to the trial justice, informing her that "[a]t the moment it is 10 to 1 and it seems that neither are willing to change their opinion. Can you provide any insight as to how to deal with the decision?"\textsuperscript{15} The trial justice then met with the prosecution and defense counsel to discuss the supplemental jury instructions that she planned to issue, but she did not disclose her knowledge that the jury was deadlocked ten to one.\textsuperscript{16}

The trial justice then instructed the jury with essentially the same instructions she discussed with counsel, but went on to comment that "[i]f there is no decision by this jury, this case will

\begin{itemize}
\item \textsuperscript{7} Id.
\item \textsuperscript{8} Id.
\item \textsuperscript{9} Id. at 633 (citing State v. Luanglath (Luanglath I), 749 A.2d 1 (R.I. 2000)).
\item \textsuperscript{10} Id. at 634.
\item \textsuperscript{11} Id.
\item \textsuperscript{12} Id. at 640.
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id. at 634.
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id.
\end{itemize}
be tried all over again” and that “if it has to be retried, it will be retried at great expense to the state and great expense to the defendants.”

At the time that the trial justice issued the instructions, neither the prosecution nor the defense counsel knew of the jury’s numerical split. Neither party objected to the instructions; however, the defendants moved to pass the case due to the deadlock. After one more hour of deliberations, the jury returned a unanimous guilty verdict against both of the defendants on all counts.

17. *Id.* at 635 (emphasis omitted). The trial justice’s full instructions were as follows:

I’m somewhat surprised that with the jury deliberating such a short time, there is an apparent deadlock. ... You know, of course, that jurors have a duty, really, to consult with one another and to deliberate and to discuss with a view to reaching an agreement, if it can be done without violence to your individual judgment. Naturally, each of you must decide this case for yourselves, but you do that only after you have impartially considered the evidence in a discussion with all of the other jurors. Although the verdict, as I said, must be the verdict of each individual juror and not just acquiescence in the conclusion of others, the issues submitted to you in this case should be examined with proper regard and deference to the opinions of others. Jurors should not be obstinate for the sake of being obstinate. And a juror should consider it desirable that this case be decided. If there is no decision by this jury, this case will be tried all over again. It seems to me that no other jury is going to be more qualified than you are. It isn’t that on the next go-round better jurors are going to sit.

You are qualified. ... And I should tell you that there’s no reason for any juror to think that if this case is retried, more evidence or clearer evidence is going to be presented. And, if it has to be retried, it will be retried at great expense to the state and great expense to the defendants.

As I’ve told you, it is your duty to decide the case if you can conscientiously do so. And as I said before, don’t hesitate to re-examine your views and change your position if you are convinced it is erroneous. I will remind you, of course, that you should never surrender an honestly arrived at conviction as to the weight or effect of the evidence only because of the opinion of other jurors, or only for the sake of returning a verdict. I don’t want that to happen either. It appears to me that more time ought to be spent upstairs by this jury. And in an hour or so I will send a note asking if there has been any progress.

*Id.* at 634-35.

18. *Id.* at 634.

19. *Id.* at 635.

20. *Id.*
After the jury departed, the trial justice met with the prosecution and the defense counsel in her chambers.\textsuperscript{21} She questioned her decision not to reveal the deadlocked jury's numerical split, noting that the information "may have affected your strategy."\textsuperscript{22} She conceded that if the defense had known the full content of the jury's note, it might have pressed harder for a mistrial.\textsuperscript{23}

Following their 1993 conviction, the brothers appealed to the Rhode Island Supreme Court, arguing several issues, including that the trial justice had improperly denied their motion for a new trial based on the unreliability of the prosecution's witnesses.\textsuperscript{24} The case was remanded to the trial court with instructions to reexamine the witness reliability issue.\textsuperscript{25} Because the trial justice's first decision suggested that the witness reliability issue might be dispositive, the court declined to reach the remaining issues proffered by the defendants.\textsuperscript{26} In 2001, the trial justice issued a written opinion that resolved the witness reliability issue.\textsuperscript{27}

**ANALYSIS AND HOLDING**

On November 9, 2004, the defendants appealed to the Rhode Island Supreme Court again, rearguing the witness reliability issue, as well as the remaining two issues that the court did not
reach in the prior appeal.\textsuperscript{28} On the weight of the evidence issue, the court affirmed the trial justice's denial of the defendants' motion for a new trial.\textsuperscript{29} Next, the court affirmed the trial justice's ruling that the decision to proceed with eleven jurors followed knowing, intelligent, and voluntary waivers from both defendants.\textsuperscript{30} The court then reached the two remaining issues from \textit{Luanglath I}.\textsuperscript{31}

\textit{Supplemental Allen Instructions}

First, the defendants argued that the trial justice's supplemental \textit{Allen}\textsuperscript{32} instructions to the deadlocked jury were improper for three reasons: (1) the instructions placed too much emphasis on the possibility and cost of a retrial; (2) the nature of the instructions was too coercive given the fact that only one juror was dissenting from the majority; (3) the trial judge should have conveyed the numerical split of the deadlocked jury to counsel.\textsuperscript{33} The court held that the trial justice's failure to reveal the entire contents of the jury's note and her supplemental \textit{Allen} instruction, informing the jury that a retrial was imminent and costly, constituted reversible error.\textsuperscript{34} The court vacated the defendants' convictions and remanded the case to the Superior Court for a new trial.\textsuperscript{35}

In \textit{State v. Patriarca},\textsuperscript{36} the Rhode Island Supreme Court set forth guidelines for analyzing \textit{Allen} and instructing a deadlocked jury:

\begin{quote}
[B]efore deliberation the court may instruct the jury: (1) that in order to return a verdict, each juror must agree thereto; (2) that jurors have a duty to consult with one another and to deliberate with a view to reaching an
\end{quote}

\begin{itemize}
\item[28.] \textit{Id.}
\item[29.] \textit{Id.}
\item[30.] \textit{Id.} at 641.
\item[31.] See \textit{State v. Luanglath}, 749 A.2d 1 (R.I. 2000).
\item[32.] \textit{Allen v. United States}, 164 U.S. 492, 501 (1896) (upholding jury instructions delivered to a deadlocked jury, even though the instructions urged the jurors in the minority to think about the majority's views).
\item[33.] \textit{Luanglath II}, 863 A.2d at 641-42.
\item[34.] \textit{Id.} at 644.
\item[35.] \textit{Id.}
\end{itemize}
agreement, if that can be done without violence to the individual judgment; (3) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors; (4) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and (5) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.37

The Supreme Court reasoned that the trial justice’s instructions to the deadlocked jury covered, in almost the same words, the guidelines suggested by Patriarca, but then added the following additional instructions, upon which the defendants’ appeal is based:

It seems to me that no other jury is going to be more qualified than you are. It isn’t that on the next go-round better jurors are going to sit. You are qualified. . . . And, if it has to be retried, it will be retried at great expense to the state and defendants. As I’ve told you, it is your duty to decide the case if you can conscientiously do so.38

In considering a challenge to a trial justice’s Allen instructions, the Rhode Island Supreme Court applies a totality-of-the-circumstances test.39 The court distinguished the Luanglath I jury instructions from those upheld in a prior case, State v. Rodriguez,40 which were not found coercive, in part because “the instructions were not addressed to either the majority or minority; it still took the jury an hour after the instructions were issued to reach a verdict. . . and the trial justice did not tell the jury that the case would have to be retried if they failed to reach a unanimous conclusion.”41 By contrast, the trial justice’s instructions in Luanglath I emphasized the imminence and cost of a retrial when it was:

inescapable that the only holdout juror knew that the

37. Id. at 322.
38. Luanglath II, 863 A.2d at 642.
39. Id.
41. Luanglath II, 863 A.2d at 643 (citing Rodriguez, 822 A.2d at 902-04).
trial justice was aware of the numerical split, and that the remaining ten jurors knew of the split and knew that the trial justice was aware of the split . . . even if the trial justice did not specifically single out the only dissenter, her instructions, coupled with the knowledge of the single holdout, took on a new meaning.42

Considering both the statements regarding the cost and imminence of a retrial, as well as the likely effect of the circumstances on the lone dissenter, the court held that the trial justice's supplemental Allen instructions violated the boundaries set forth in Patriarca.43

**Trial Justice's Failure to Inform Counsel of the Entire Contents of the Jury's Note**

The defendants also presented the Rhode Island Supreme Court with a question of first impression: must a trial justice disclose to defense counsel the numerical split revealed to the justice in a jury note?44

The court looked to *State v. Sciarra*,45 in which it held that a trial justice erred when he responded to a jury's note outside of defense counsel's presence, because the defense counsel had a right to be heard "before a response was given to the note."46 The Supreme Court reasoned that the facts in the present case demonstrated the problems that can arise when defense counsel is unaware of the information available to the trial justice.47 The court reasoned that, as the trial justice conceded, had defense counsel been aware that the jury was deadlocked all-against-one in favor of a guilty verdict, the defendant would have objected to the court's supplemental Allen instructions and moved for a mistrial.48 Therefore, "it is imperative that the entire contents of a note be revealed."49

42. Id. at 644.
43. Id.
44. Id. at 643.
46. Id. at 1220.
47. Luanglath II, 863 A.2d at 643.
48. Id.
49. Id.
The Rhode Island Supreme Court's decision in *Luanglath II* affirms the value and sanctity of jury deliberation. Additionally, *Luanglath II* illustrates how a deviation from the *Patriarca* guidelines can lead to precisely the end that the trial justice sought to prevent: additional litigation "at great expense to the State and great expense to the defendants."50

A trial justice's *Allen* instructions urge jurors to persevere and to engage themselves in the type of vigorous debate that characterizes the American jury system. The *Patriarca* guidelines express high ideals for jurors, including the responsibility to impartially consider the evidence and to refuse to sacrifice an honest conviction solely for the purpose of reaching an agreement.51 While the *Patriarca* guidelines provide a means for trial justices to forestall *Allen* litigation, the Rhode Island Supreme Court noted in 2003 that the guidelines "were not intended to limit the trial justice's discretion in instructing jurors concerning their obligations and responsibilities."52

In *Luanglath II*, the trial justice's supplemental *Allen* instructions suggested the imminence and cost of a retrial when both the trial justice and the jurors, including the holdout, knew of the jury's numerical split.53 The court emphasized the importance of the fact that the trial justice was aware of the jury's numerical split when she issued the supplemental instructions, and held that the instructions were coercive considering the totality of the circumstances.54

A jury allows citizens to engage in thoughtful deliberation to determine whether the prosecution has satisfied its burden of proof against the defendants. The Sixth Amendment of the Constitution provides that a criminal defendant is entitled to a jury trial.55 Any insinuation that jurors should rush to agreement in order to save tax dollars represents a failure of the system. The Rhode Island Supreme Court established the *Patriarca* guidelines

50. *Id.* at 642.
51. *See Patriarca*, 308 A.2d at 322.
54. *Id.* at 643-44.
55. *See U.S. CONST. amend. VI.*
as a means for the court to guide a deadlocked jury without encouraging agreement for its own sake.\textsuperscript{56} While a trial justice has the discretion to give instructions beyond the Patriarca guidelines, supplemental instructions can be subject to challenge, as \textit{Luanglath II} illustrates. In \textit{Luanglath II}, the additional time and money that the defendants expended in challenging the trial justice's supplemental instructions were well spent.

\textbf{CONCLUSION}

The Rhode Island Supreme Court held that a trial justice must reveal the entire contents of a jury's note to counsel. In this case, knowledge of the jury's numerical split, which included a holdout juror, would have enabled defense counsel to better consider its trial strategy and to object to supplemental \textit{Allen} instructions that suggested that the failure to agree would result in an imminent retrial at great cost to the State and to the defendants.\textsuperscript{57} Under the totality of the circumstances, the court held that the trial justice's instructions were unduly coercive.\textsuperscript{58}

Jessica Bosworth

\textsuperscript{56} See generally Patriarca, 308 A.2d 300.
\textsuperscript{57} Luanglath II, 863 A.2d at 643.
\textsuperscript{58} Id. at 643-44.
Criminal Law. *State v. Perez*, 882 A.2d 574 (R.I. 2005). A trial court does not abuse its discretion when it denies a defendant's motion to sequester the State's essential expert psychiatric witness during the defendant's testimony. Further, the trial court has not abused its discretion when it allows the State's psychiatric witness to testify that the defendant suffered from a particular disorder, even though the State had failed to inform the defense of this diagnosis as required by Rhode Island's discovery rules, so long as the defense is familiar with the particular disorder, and any potential prejudice from the undisclosed information can be successfully mitigated. In the absence of overreaching, compulsion, or threats, a defendant who indicates his understanding of the circumstances and is found to be clear-headed when appraised of his *Miranda* rights, knowingly and voluntarily waives those rights when he subsequently makes a statement to police. However, even if an involuntary statement is erroneously admitted, if the statement merely constitutes cumulative evidence, the error is harmless. Finally, a delay of more than twelve months between a defendant's arrest and trial on a charge does not violate the defendant's right to a speedy trial when the defendant bears the primary responsibility for the delay, the defendant's actions are not consistent with "banging on the courthouse doors," and the defendant has not suffered prejudice.

FACTS AND TRAVEL

Victor Perez lived with his mother, Rosa Perez, and her friend, Lolo, in an apartment in Providence.¹ On August 13, 1998, Victor smoked a combination of crack and marijuana, continued to smoke marijuana throughout the day, and although it had been days since he had consumed any LSD, began to feel like he was "tripping."²

While smoking marijuana in the living room, Victor testified that he heard his mother and Lolo arguing in the

---

². *Id.*
bedroom, so he took a knife from the kitchen counter, hid it in his waistband, and proceeded to the bedroom to tell Lolo to leave his mother alone. Lolo continued to scream at Rosa even after she exited the bedroom and went into the kitchen.

Rosa soon realized that the knife was missing from the counter and insisted that Victor give it back, but Victor denied having the knife. Lolo came out of the bedroom and went to hug Rosa before leaving, but Victor believed Lolo was trying to physically harm his mother. Victor jumped up and rushed toward Lolo while grabbing for the knife in his waistband. However, Lolo exited the apartment before Victor reached the kitchen. In the struggle to free the knife from his waistband, the blade broke loose from the handle and fell to the floor. Rosa attempted to confiscate the knife before Victor regained control.

According to Victor, when Rosa reached for the knife, he believed she was trying to assault him and a struggle developed. Rosa successfully grabbed the blade, but in response, Victor swiped another knife and began slashing at Rosa. Victor claimed that he formed the belief that his mother was "the devil" and he had to protect himself. Rosa died as a result of the injuries she sustained.

A witness testified that he saw Victor run from the apartment and that Victor was "running like he was crazy, up and down, everywhere." Victor looked "all confused" and "[h]e didn't know where he wanted to go."

When police arrived on the scene they observed "dozens upon dozens of bloody footprints throughout the building, up and

3. Id.
4. Id.
5. Id. at 579.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id. at 580.
16. Id.
down various stairwells and various floors of the building.”17 The officers tracked the footprints to the apartment of Luis Rivera on the second floor.18 According to Rivera, Victor was acting crazy and he “had never seen [Victor] like that.”19 Rivera testified that Victor told him that he “had a problem downtown.”20 Unsatisfied with Victor’s explanation of his behavior, Rivera asked Victor whether he had killed his mother.21 In response, Victor went to the kitchen, got a knife, wrapped it in a towel and sat down on the bed next to Rivera when the police knocked on Rivera’s door.22

After receiving permission from Rivera to enter the apartment, officers began searching for Victor.23 They found him in the bathroom wielding a knife at “an attack point.”24 When ordered to drop the knife and exit the bathroom, Victor complied and surrendered to police.25 Officer Deschamps loudly read Miranda warnings from a preprinted card in both Spanish and English.26

When asked where his mother was and when he saw her last, Victor responded, that he “didn’t do anything.”27 In response to questions about the injuries to his leg and hand, Victor told police that he had been in “a fight in the downtown area.”28 Officer Deschamps also testified that Victor was acting “extremely angry” and “cocky” and that he had to tell Victor to calm down numerous times.29

At trial, Victor did not refute that he had killed his mother, but argued that he suffered from diminished capacity.30 To rebut the defense expert’s testimony supporting diminished capacity, the state presented its own expert witness, Dr. Kelly.31 The jury
found Victor guilty of first-degree murder for the killing of his mother, Rosa Perez, and sentenced him to life imprisonment.\textsuperscript{32} The defendant subsequently appealed to the Rhode Island Supreme Court.\textsuperscript{33}

**ANALYSIS AND HOLDING**

On appeal, the defendant argued that the trial justice had committed reversible error: (1) in allowing the state’s expert to be present in the courtroom to observe the defendant testify before he gave his expert testimony about the defendant;\textsuperscript{34} (2) in permitting the state’s expert to give a medical opinion in violation of discovery provisions of Rule 16 of the Superior Court Rules of Criminal Procedure;\textsuperscript{35} (3) in denying his motion to suppress statements made to police in violation of his *Miranda*\textsuperscript{36} rights;\textsuperscript{37} and, (4) denying his motion to dismiss on the grounds that the state violated his right to a speedy trial.\textsuperscript{38} The Rhode Island Supreme Court unanimously found no reversible error and affirmed the defendant’s conviction.\textsuperscript{39}

*Presence of the State’s Expert in the Courtroom*

The defendant contended that the trial justice’s denial of his motion to sequester Dr. Kelly, the state’s expert, was in error.\textsuperscript{40} He argued that this testimony constituted impermissible vouching or bolstering because of the jury’s knowledge of Dr. Kelly’s presence during Victor’s testimony.\textsuperscript{41}

In finding that the trial justice was acting within his inherent discretionary power\textsuperscript{42} when he chose not to sequester Dr. Kelly, the court focused on Dr. Kelly’s essential role in the state’s

\begin{itemize}
  \item 32. *Id.* at 578.
  \item 33. *Id.* at 582.
  \item 34. *Id.* at 578.
  \item 35. *Id.* (referencing R.I. SUP. R. CRIM. P. 16).
  \item 36. 422 U.S. 322 (1975).
  \item 37. *Id.*
  \item 38. *Id.*
  \item 39. *Id.*
  \item 40. *Id.* at 583.
  \item 41. See *id.*
  \item 42. *Id.* A trial justice retains the inherent power to sequester witnesses in order to prevent a witness from corresponding his testimony to that of other witnesses. See *id.* This decision is discretionary and should only be overturned in the face of a clear abuse of discretion. *Id.*
\end{itemize}
presentation of its rebuttal. The court reasoned that because the state carried the burden of proving murder beyond a reasonable doubt, it was essential for the state to invalidate Victor's defense by showing that he in fact was not suffering from diminished capacity when he killed his mother. Because Dr. Kelly's opportunity to examine the defendant before trial had been restricted, it was necessary to the presentation of the state's rebuttal that he be permitted to remain in the courtroom during Victor's testimony. The court further noted that in light of the finding of necessity, Rule 615 of the Rhode Island Rules of Evidence explicitly forbid the sequestration of "a person whose presence is shown . . . to be essential to the presentation of [the case]," and thus, they did not need to comment on the defendant's impermissible bolstering argument.

The State Expert's Medical Opinion and Compliance with Discovery Provisions of Rule 16

The defendant next asserted that the trial justice should have limited the scope of Dr. Kelly's testimony and that he erred when he allowed Dr. Kelly to testify that the defendant suffered from "antisocial personality disorder." The defendant based his assertion on the state's failure to act in accord with Rule 16 of the Superior Court Rules of Criminal Procedure and inform the defense of Dr. Kelly's intent to testify on this subject.

In holding that the trial justice did not abuse his discretion in allowing Dr. Kelly to testify about his belief that Victor suffered from "antisocial personality disorder," the court relied heavily on the fact that the defense's own documents made reference to the

43. Id. at 584.
44. Id.
45. See id. at 583.
46. Id. at 583-84 & n.14 (quoting R.I. R. EVID. 615(3)).
47. Id. at 584.
48. Id. at 584 n.16 (quoting R.I. SUP. R. CRIM. P. 16).
49. 882 A.2d at 584. A trial justice's ruling on noncompliance with Rule 16 should not be disturbed absent a clear abuse of discretion. Id. The trial justice should evaluate the following factors before deciding whether sanctions are appropriate under Rule 16: "(1) the reason for nondisclosure, (2) the extent of prejudice to the opposing party, (3) the feasibility of rectifying that prejudice by a continuance, and (4) any other relevant factors." Id. at 585.
disorder. In addition, there was no evidence that the state's nondisclosure was a "deliberate act of misconduct." Further, because it was obvious that defense counsel was familiar with the characteristics of the disorder, defense counsel was sufficiently able to cross-examine Dr. Kelly regarding "antisocial personality disorder." Thus, the extent of prejudice was, at the most, minimal. The court further noted that any potential prejudice was lessened by the trial justice's grant of a continuance.

Motion to Suppress the Defendant's Statements

The defendant also argued reversible error in the trial justice's denial of his pretrial motion to suppress two statements he made to police shortly after being taken into custody. The first statement challenged was the defendant's response to Officer Deschamp's inquiry into the last time the defendant had seen his mother. The second statement contested was the defendant's explanation about the injuries to his hand and leg. The defendant asserted that the confusing circumstances of his arrest interfered with his ability to understand his Miranda rights, and thus voluntarily waive those rights.

The trial justice focused on the fact that the defendant was not disoriented, his injuries were not serious, and his cocky behavior indicated that Victor understood the circumstances. In addition, the trial justice did not find any overreaching, compulsion, or threats. The court, giving due deference to the

50. Id. at 586-87.
51. Id. at 587.
52. Id.
53. Id.
54. Id.
55. Id. at 587-88. Review of a trial justice's decision on a motion to suppress a confession involves a two-step analysis: (1) review of the trial justice's finding of facts relevant to the voluntariness of the contested statement, and (2) application of those facts and review of the trial justice's conclusion as to the voluntariness of the contested statement. Id. at 588. (citing State v. Humphrey, 715 A.2d 1265, 1973 (R.I. 1998)).
56. Id. Victor replied that he had not done anything to her. Id. at 588. Victor indicated that he had been in an altercation in downtown Providence. Id.
58. Id.
59. Id. at 589.
60. Id. at 589 n.23.
trial justice, found that his findings of fact relevant to the voluntariness of the contested confession were not clearly erroneous.\textsuperscript{61} 

The court next conducted an independent review to determine whether the defendant's statement, taking into consideration the totality of the circumstances, was a product of his own free will.\textsuperscript{62} The court noted that waiver of an individual's \textit{Miranda} rights cannot be presumed from either silence or the fact that the accused actually makes a statement.\textsuperscript{63} However, the court concluded that Victor was informed of his \textit{Miranda} rights and that he knowingly and voluntarily made the challenged statements to the police after being informed of those rights.\textsuperscript{64} In addition, the court went on to conclude that, even if the challenged statements were erroneously admitted, because they merely constituted cumulative evidence, the error was harmless.\textsuperscript{65}

\textit{Right to a Speedy Trial}

The defendant's final contention was that he was denied his constitutionally protected right to a speedy trial and that the trial justice erred in his refusal to grant the defendant's pre-trial motion to dismiss on these grounds.\textsuperscript{66} The court conducted a \textit{de novo} review of the trial justice's determination that the defendant's right had not been violated.\textsuperscript{67} In conducting its review, the court considered the following factors: "[the] length of the delay; the reason for the delay; defendant's assertion of his right; and [the] prejudice to the defendant."\textsuperscript{68} Because a delay of more than twelve months is "presumptively prejudicial,"\textsuperscript{69} the court proceeded to examine the remaining factors and concluded that Victor's right to a speedy trial had not been violated and, therefore, the trial justice properly denied the defendant's motion

\begin{itemize}
\item \textsuperscript{61} \textit{Id.} at 589.
\item \textsuperscript{62} \textit{Id.}
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} \textit{Id.}
\item \textsuperscript{65} \textit{Id.} at 590.
\item \textsuperscript{66} \textit{Id.} (citing U.S. CONST. amend. VI; R.I. CONST. art. I, § 10).
\item \textsuperscript{67} \textit{Id.} at 590-91.
\item \textsuperscript{68} \textit{Id.} at 591 (quoting Barker v. Wingo, 407 U.S. 514, 530 (1972)).
\item \textsuperscript{69} \textit{Id.} (quoting State v. Crocker, 7667 A.2d 88, 91 (R.I. 2001)).
\end{itemize}
to dismiss.\textsuperscript{70}

The court based its rationale on a number of findings. First, the great bulk of the delay was due to defense counsel's need to prepare Victor's defense and, thus, the defendant bore the primary responsibility for the delay.\textsuperscript{71} Second, the defendant's assertion of his right to a speedy trial did not constitute the equivalent of "banging on the courthouse doors."\textsuperscript{72} Third, the sole fact that the defendant was held without bail prior to his trial did not, by itself, constitute prejudice.\textsuperscript{73} Rather, the court reasoned that "to the extent that incarceration disrupts one's freedom, employment, and familial associations, . . . this disruption merely constitutes a prejudice inherent in being held while awaiting trial."\textsuperscript{74}

**COMMENTARY**

\textit{Perez} was generally an application of existing law and did not significantly alter Rhode Island's legal landscape. In fact, the court did not seem to have any difficulty in reaching its conclusion. However, some of the court's comments are worth noting.

First, in finding Dr. Kelly's presence in the courtroom essential to the prosecution's rebuttal, the court declined to comment on the defendant's impermissible bolstering argument.\textsuperscript{75} This holding implies that in the absence of the express language of Rule 615(3), the court might have entertained such an argument. However, even without the prohibition on the sequestration of an essential person, it is likely that the court would have reached the same result, because, upon closer investigation of the language of Rule 615, one discovers that it is materially different from that of Rule 615 of the Federal Rules of Evidence. Unlike the Federal Rule, which imposes mandatory exclusion of witnesses at the request of a party and only forbids sequestration in a limited

\textsuperscript{70} Id. at 591-93. Victor Perez was arrested in the early morning of August 13, 1998, and did not go to trial until June of 2001. Id. at 591.

\textsuperscript{71} Id. at 592.

\textsuperscript{72} Id. (quoting State v. Powers, 643 A.2d 827, 833 (R.I. 1994) (stating the test for assessing the defendant's assertion of his right to speedy trial)).

\textsuperscript{73} Id.

\textsuperscript{74} Id. (quoting State v. Austin, 643 A.2d 798, 801 (R.I. 1994)).

\textsuperscript{75} Id. at 583 n.14.
number of circumstances, Rhode Island's Rule 615, by use of the word "may" in the first sentence, makes exclusion entirely discretionary. Thus, even if Dr. Kelly's presence in the courtroom was not essential, the trial justice's decision to allow Dr. Kelly to remain could only be disturbed if it was a clear abuse of discretion.

Second, in evaluating the trial justice's discretion to permit Dr. Kelly's testimony regarding his diagnosis of the defendant, the court did not address the reasons for the prosecution's nondisclosure. The purpose behind Rhode Island Rule 16 is "to eliminate surprise and procedural prejudice," through mandatory compliance with broad discovery rules. In the case of nondisclosure by either party, the reason for such nondisclosure is a key factor in considering whether the violating party should incur sanctions. Yet, in Perez, the prosecution gave no explanation for its failure to disclose Dr. Kelly's diagnosis of the defendant. In fact, in a supplemental discovery response, filed hours before Dr. Kelly's testimony, when it seemed apparent that the prosecution would have known the content of this testimony, the prosecution made no mention of Dr. Kelly's intent to testify that Victor suffered from "antisocial personality disorder." The prosecution's nondisclosure seems potentially suspect and should have been inspected more thoroughly.

Finally, the court disposed of the defendant's motion to suppress without much comment. While it is proper to give great deference to the trial justice's findings of historical fact, step two of the analysis requires a de novo review of the voluntariness issue. Yet, in Perez, the court appeared to rely entirely on the

76. FED. R. EVID. 615.
77. R.I. R. EVID. 615 (stating "At the request of a party the court may order witnesses excluded so that they may not hear the testimony of other witnesses") (emphasis added).
78. 882 A.2d at 582-84.
79. R.I. SUP. R. CRIM. P. 16 (comment); See also State v. Coelho, 454 A.2d 241, 244 (R.I. 1983).
80. R.I. SUP. R. CRIM. P. 16 (comment).
81. 882 A.2d at 585.
82. Id. at 585 n.17.
83. If nondisclosure is found to be a deliberate act of misconduct, a new trial should be granted "without inquiry into the degree of harm produced by the misconduct." Id. (quoting State v. Garcia, 643 A.2d 180, 187 (R.I. 1994)).
84. Id. at 589.
trial justice's examination of the totality of the circumstances in reaching its conclusion. In addition, the court noted that "[a] valid waiver of Miranda rights cannot be presumed from the... fact that the accused has actually made a confession or a statement." But, in Perez, the court seemed to make this forbidden presumption. However, as the court pointed out, because the defendant's statements were merely cumulative evidence, even if his Miranda rights had been violated, the decision to admit the statements amounted to harmless error.

CONCLUSION

Although Perez did not significantly depart from existing law, a close examination of the court's ruling reveals some interesting questions and leaves open the possibility that, had a few critical factors been absent, the outcome may have been quite different. For example, had Dr. Kelly's presence not been essential to the prosecution's case, would the substitution of the word "may" in Rule 615 of the Rhode Island Rules of Evidence in place of the word "shall" in the Federal Rules of Evidence have been significant? Further, had the trial justice and the court thoroughly investigated the prosecution's reasons for nondisclosure, would the scope of Dr. Kelly's testimony have been narrowed? If so, would this have materially altered the outcome of the case? Finally, what if Victor's statements were not merely cumulative evidence? Should those statements still have been admitted? The court declined to comment on these issues.

Christina Middleton Senno

85. See id.
86. Id. (citing State v. Amado, 424 A.2d 1057, 1062 (R.I. 1981)).
87. Id. at 590.
88. R.I. R. EVID. 615.
89. Fed. R. Evid. 615.
Criminal Law. *In re Tavares*, 885 A.2d 139 (R.I. 2005). The forensic commitment of a criminal defendant found incompetent to stand trial pursuant to Rhode Island General Laws §§ 40.1-5.3-1 to 40.1-5.3-18 (the forensic statutes) may be continued by the court even after competency has been restored. The court affirmed the lower court’s decision, which had continued the criminal defendant’s commitment throughout trial, despite the literal reading of the forensic statutes that the defendant “shall” be released once found competent.

**FACTS AND TRAVEL**

On November 10, 2001, twenty-one-year-old Anthony Tavares was arrested for the murder of his social worker and substance abuse counselor, Glen Hayes.¹ The court observed that Tavares’ entire life had been affected by mental illness.² His family history included an abusive sister, who suffered from mental illness herself, and a schizophrenic father, who was incarcerated for murdering a man with an ice pick.³ Tavares began to show signs of mental illness at the early age of four.⁴ By six, he was admitted into his first psychiatric treatment program, and by first grade he was expelled from mainstream education.⁵ During childhood he was continuously shuffled between special schools, residential care facilities, juvenile detention facilities, and hospitals.⁶ He was diagnosed with attention deficit hyperactivity disorder, but he did not take the prescribed medication, and by eleven he was suffering from paranoid and delusional symptoms.⁷ His teenage years included acts of assault, arson, suicide attempts, violent threats to kill, and several psychiatric hospitalizations.⁸ By nineteen, he

---

2. See id. at 143.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id.
was diagnosed with schizophrenia; in early 2000, he was involuntarily hospitalized due to audio and visual hallucinations. His condition improved with medication and he was released with a diagnosis of chronic paranoid schizophrenia. A year later, he was once again hospitalized for having hallucinations. Again medication improved his symptoms and he was discharged.

In the weeks preceding the murder of Glen Hayes, Tavares had stopped taking his medication and his mental health was notably declining. On November 9, 2001, Glen Hayes and Victor Moniz, two mental health professionals from Johnston Mental Health Services, visited Tavares at his mother's apartment in Cranston, where Tavares lived. Tavares took his medication from the two men and told them that he only took the pills when he felt he needed to. In the apartment the conversation became increasingly bizarre and Hayes and Moniz got up to leave. At this point Tavares jumped up, shouted "where do you think you're going?" and stabbed Hayes just above the eyebrow with an eight-inch serrated knife. The knife was lodged seven inches into Hayes skull, and he died from the wound.

Initially held without bail at the Adult Correctional Institution (ACI), Tavares was soon placed in a psychiatric cell for having religious and paranoid hallucinations. On November 14,
2001, Dr. Barry Wall evaluated Tavares and reported that he was incompetent to stand trial.\textsuperscript{20} Tavares was committed to the custody of the Department of Mental Health, Retardation and Hospitals (MHRH), and was immediately transferred to the forensic unit at Eleanor Slater Hospital (ESH).\textsuperscript{21} Upon arrival to ESH, Tavares assaulted a social worker and was subsequently put on a four-point physical restraint and chemical restraints.\textsuperscript{22} Tavares continued to refuse medication and on November 16, 2001, Dr. Mustafa Surti successfully petitioned the court for instructions to treat Tavares with psychotropic drugs without his consent.\textsuperscript{23} Under this treatment, Tavares' condition improved.\textsuperscript{24} Although he still saw hallucinations, he was no longer acting upon them.\textsuperscript{25} The lower court accepted a stipulation by the parties that Tavares was competent, on the condition that his commitment would continue throughout trial.\textsuperscript{26} MHRH objected to Tavares being continuously hospitalized at ESH, claiming the forensic statute demanded his release from commitment.\textsuperscript{27} A hearing justice later held that, although competent, Tavares needed to stay at ESH throughout the trial so as to maintain competency.\textsuperscript{28} MHRH appealed, claiming that once the hearing justice determined Tavares was competent to stand trial, he should have been statutorily released from ESH.\textsuperscript{29} Notably, Tavares was subsequently found not guilty by reason of insanity at his trial for the murder of Glen Hayes.\textsuperscript{30}

\textbf{ANALYSIS AND HOLDING}

On appeal to the Rhode Island Supreme Court, MHRH argued that section 40.1-5.3-3 (i)(3)(i) of the forensic statutes foreclosed discretion of the hearing justice to order Tavares, as a competent defendant, to remain committed during trial, especially in light of

\begin{itemize}
  \item 20. Id.
  \item 21. Id.
  \item 22. Id.
  \item 23. Id.
  \item 24. Id. at 145.
  \item 25. Id.
  \item 26. Id.
  \item 27. Id.
  \item 28. Id.
  \item 29. Id. at 145-46.
  \item 30. Id. at 146.
\end{itemize}
the legislature's use of the words "shall terminate." The court held that the legislative intent and purpose of the statute supported the interpretation that discretion was necessary on the part of the hearing justice to extend commitment.

**Mootness**

Because Tavares' murder proceeding had carried forward and he was found not guilty by reason of insanity by the time the Rhode Island Supreme Court reviewed the issue, and he was committed to the custody of MHRH under a different provision of the forensic statute, the statutory question became moot. Despite the normal rule that deciding moot questions is not the role of the court, the Rhode Island Supreme Court chose to review the issue because it was a question of "great public importance that, although technically moot, [was] capable of repetition yet evading [their] review."

**Holistic and Purposeful Statutory Construction**

The court emphasized that, in statutory construction, the court's ultimate goal was "to give effect to the purpose of the act as intended by the legislature." Furthermore, statutory construction was a "holistic enterprise" and when the language was clear and unambiguous, the court would adopt the plain and ordinary meaning. However, it would not interpret a statute literally if it led to an "absurd result" that was at odds with the legislative purpose.

The disputed provision, "Competency to Stand Trial" (§ 40.1-5.3-3), provides that a commitment shall terminate when the court determines that the committed defendant is competent. The court determined that the legislative scheme was remedial in

31. *Id.* at 145-46 (quoting R.I. GEN. LAWS § 40.1-5.3-3(i)(3)(i) (2005)).
32. *Id.* at 151.
33. *Id.* at 146.
34. *Id.* at 147.
35. *Id.* at 146 (quoting Oliviera v. Lombardi, 794 A.2d 453, 457 (R.I. 2002)).
36. *Id.* (quoting Park v. Ford Motor Co., 844 A.2d 687, 692 (R.I. 2004)).
38. *Id.* at 148 (quoting R.I. GEN. LAWS § 40.1-5.3-3(i)(3) (2005)).
nature and construed the statute liberally to effectuate that purpose.\textsuperscript{39}

\textit{Legislative Intent is to Try Competent Defendants}

Based on its holistic and purposeful approach, the court determined that the word “shall” did not prevent the court from exercising its discretion and extending commitment despite the occurrence of competency.\textsuperscript{40} Revisiting the whole scheme of forensic commitment, the court reasoned that generally the provisions sought to govern the relationship of individuals who were committed under the care of MHRH to ensure those individuals were provided “general rights,” including the right to necessary and appropriate treatment, based on their particular needs.\textsuperscript{41} MHRH argued that the statute also sought to prevent a drain on the department’s resources; however, the court found that was only an incidental benefit to the paramount goal of protecting the criminal defendant’s rights.\textsuperscript{42} The court reasoned that the statutes had a dual purpose in balancing the interests of a criminal defendant to be competent during trial (and not be indefinitely detained) with the public’s interest in prosecuting crimes.\textsuperscript{43} The court determined that the intent of the legislature was to restore defendant’s competency so that he could be tried.\textsuperscript{44}

\textit{Competency throughout Trial}

Despite the clear and unambiguous language of the statute, the court reasoned that competency is more than a momentary condition, and there is a judicial responsibility to ensure that the defendant is competent throughout trial.\textsuperscript{45} The court found this concept to be supported by §40.1-5.3-3(a)(2), which defines competency as a mental condition, that is, the ability of the criminal defendant to understand “the character and consequences of the proceedings against him or her” and an ability

\begin{itemize}
\item \textsuperscript{39} Id. at 146.
\item \textsuperscript{40} Id. at 151.
\item \textsuperscript{41} Id. at 149.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} See id. at 149.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id. at 149-50.
\end{itemize}
to properly assist in the defense.\textsuperscript{46} The court emphasized the importance of the judge's role in determining and ensuring a defendant's competency.\textsuperscript{47} The forensic statutes grant the court the authority to raise the issue of competency at any time throughout trial and give the judge the final determination about the defendant's condition.\textsuperscript{48} The court stated that competency is a legal condition, not a medical condition, and although the judge may rely heavily on the advice from medical health professionals, the final determination of competency belongs to the court.\textsuperscript{49} Furthermore, because the court can raise its own motion to question the defendant's competency at any point throughout the trial, judicial discretion is already a necessary and integral part of determining competency.\textsuperscript{50} Tavares' competency was fleeting and was dependent upon the special treatment he received at ESH.\textsuperscript{51} If he was remanded to the ACI, where he would no longer receive special treatment and would probably again refuse his medication, he could have begun to rapidly decompensate.\textsuperscript{52} Dr. Surti noted that Tavares' condition would not simply have declined to his prior state of incompetence, but Tavares could have suffered a worse decline and medication would likely have been unable to restore any competency at all.\textsuperscript{53} The court found that such a result would be unfair to all and possibly raise serious due process concerns for Tavares.\textsuperscript{54}

A literal reading would also prevent the court from being proactive, especially when competency was obviously fleeting, and would instead require the much more difficult task of determining when the defendant had actually lost competency again during the proceeding.\textsuperscript{55} Once competency had been lost, the court would either have had to grant a new trial, or allow the first trial to

\begin{itemize}
\item \textsuperscript{46} Id. at 149.
\item \textsuperscript{47} Id. at 150.
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Id.
\item \textsuperscript{50} Id.
\item \textsuperscript{51} Id. at 151.
\item \textsuperscript{52} Id. at 149.
\item \textsuperscript{53} Id.
\item \textsuperscript{54} Id. at 151.
\item \textsuperscript{55} Id.
\end{itemize}
simply pause until competency was restored.\textsuperscript{56} The court stated that either situation would threaten the "economy of justice and waste the resources of the parties, the courts, and ESH alike."\textsuperscript{57} Furthermore, allowing the court to ignore legitimate concerns regarding a defendant's competency would frustrate the remedial goals of the forensic statutes.\textsuperscript{58} Allowing Tavares to decompensate to such a degree that he would be unable to retain his competency at all would mean that the prosecution would be unable to proceed to trial.\textsuperscript{59} Such a result would have been absurd because the state, Tavares, and the family of Glen Hayes each had an interest in seeing Tavares tried.\textsuperscript{60} Preventing the hearing justice from taking steps to ensure the competency of a defendant throughout trial would be manifestly unfair to Tavares, the people of the state, and the victim's family.\textsuperscript{61}

\textbf{COMMENTARY}

The practical need for flexibility in situations dealing with a criminal defendant's fleeting competency mandate the rejection of the MHRH's formalistic and strict approach. A literal reading that would essentially terminate the special treatment Tavares was receiving under MHRH custody could potentially have caused more damage to the defendant, and therefore would have raised serious due process concerns. This is readily apparent because Tavares, a chronic paranoid schizophrenic who refused his medication, was competent solely by order of the court, which allowed his medication to be administered without consent. It was more than likely that he would not have taken his medication once removed from MHRH's custody and it was questionable whether his competency could be restored afterwards. MHRH's ability to terminate their custody of Tavares would have been short-lived, because if Tavares once again became incompetent, he would still have been committed to the care of MHRH; but then he might have been more difficult to manage because subsequent

\begin{itemize}
\item[56.] Id.
\item[57.] Id.
\item[58.] Id.
\item[59.] See id.
\item[60.] Id.
\item[61.] Id.
\end{itemize}
restoration might not have been possible.

The court's recognition that the strict language of the statute was intended to protect a criminal defendant from potentially indefinite detention without trial does little to actually provide guidelines for when this power should be properly exercised. A rule allowing courts to extend forensic commitment of a competent defendant may have far-reaching consequences if the rule is not narrowly applied to proper cases. The benefits of extending commitment for a defendant would be that he would continue to receive medical treatment during his trial proceeding; however, such commitment may also prevent him from being released on bail, and subject him to unwanted treatment and chemical restraints.

With proper guidelines to help lower courts determine when it is appropriate to exercise this discretion, the dual legislative purposes of concern for defendants' rights and the public's interest in prosecution would be realized. The court claims that the power to extend commitment is justified if a mentally fragile defendant is likely to decompensate during trial. This does not afford very much protection against the government to the newly competent criminal defendant. Although the court correctly states that competency is a legal condition to be decided by the judge at his discretion, the court overlooks the fact that the determination of whether such competency is "fleeting" and likely to decline during trial is not a traditional part of the province of a judicial determination of competency.

Here, Tavares had murdered his social worker, unprovoked and based entirely on his delusional thinking. Tavares' behavior prior to the act, apart from a few strange comments, indicated nothing to those around him, and as such, the murder was essentially an unpredictable act. Tavares continued to attack others while in custody and it was because of the fear of this violent and unpredictable behavior that the court ordered forced treatment. It would be overly risky, bordering on recklessness,

62. See id. at 151.
63. See id. at 150.
64. See id.
65. Id. at 142.
66. See id. at 141-42.
67. Id. at 144.
to allow an already unpredictable murderer the opportunity to fall deeper into delusion and wait until someone else is harmed. Therefore, the degree of dangerousness is an important factor in determining the need to extend the commitment of a criminal defendant after competency has been restored.

The court also noted Tavares' long history of mental illness and that his particular illness, chronic paranoid schizophrenia, required constant treatment. It was significant that Tavares could not live in society without treatment and medication, and he was wholly dependent upon this treatment to maintain competency. This is an important policy concern because as medical advancements improve, previously incompetent defendants are going to be afforded the opportunity to be competent through medication and treatment. Therefore, the severity of the defendant's illness and the ability of the defendant to live in society are also important factors in determining the need for court extension of commitment.

Additionally, the court focused on the circumstances surrounding Tavares' restored competency and the likelihood that he would decompensate during the trial. Because Tavares continually refused his medication, the court had ordered his treatment without his consent. It was only because of this treatment that he was deemed competent enough for the criminal proceedings to carry forward; the doctors admitted that once the medication stopped being administered, his competency would decline and once again he would be at the mercy of his delusions and paranoia. Tavares was incapable of being responsible enough to take his medicine. Therefore, the defendant's ability to maintain his own competency by taking medication and getting treatment outside of being in direct custody of MHRH, may also be a significant factor in determining whether extending commitment is necessary.

By emphasizing the duty on the hearing justice to ensure that the criminal defendant remains competent, the court protects the due process rights of defendants to be competent during trial, and

68. See id. at 143-46.
69. Id. at 144-46.
70. Id. at 144.
71. Id.
prevents having to re-commit them again at a later time. Allowing judicial discretion to extend forensic commitment prevented Tavares from becoming permanently incompetent, saved him from being inhumanely subjected to the mercy of his paranoid delusions and hallucinations, provided closure for the victim's family, and gave the state the opportunity to prosecute Hayes' murder. The literal construction of the statute would have caused so much damage that the court had no other choice but to permit flexibility, with the hope that the lower courts would not at a later time abuse their discretion.

CONCLUSION

The Rhode Island Supreme Court held that a hearing justice has discretion to extend the commitment of a criminal defendant under the forensic statutes, §§ 40.1-5.3-1 to 40.1-5.3-18, despite a finding that the criminal defendant is competent to stand trial.\textsuperscript{72} In this case, the hearing justice properly extended the commitment of the criminal defendant in the custody of MHRH, to ensure his competency would last throughout the entire trial proceeding.\textsuperscript{73}

Hinna Mirza Upal

\textsuperscript{72} \textit{Id.} at 151.
\textsuperscript{73} \textit{Id.}
Criminal Procedure. Raso v. Wall, 884 A.2d 391 (R.I. 2005). In a case of first impression, the Rhode Island Supreme Court held that the doctrine of laches (unreasonable delay in pursuing a claim) could apply as an affirmative state defense to an application for postconviction relief.

FACTS AND TRAVEL

On September 19, 1973, after three days of trial, Edward Raso pled guilty to kidnapping and as an accessory before the fact to rape, sodomy, and robbery, as related to an incident that involved the kidnapping and rape of a teenaged girl on August 15, 1972.1 During the subsequent sentencing hearing on November 28, 1973, Raso attempted to make an oral motion to withdraw his guilty plea.2 Raso claimed that “at the time he pleaded guilty ‘[he] didn’t get too much sleep and [he] didn’t understand it’ . . . [and] that he desired ‘another chance to have a trial by [j]ury.’”3 After hearing from Raso, the trial court instructed him that his attorney would need to file a motion and only then would he get a hearing on the issue of withdrawal; the court then proceeded, over counsel’s request for a continuance of the sentencing hearing, to sentence Raso to twenty-eight years for kidnapping and concurrent sentences of thirty-five years each for each of the other charges.4

Twenty-eight years later, Raso filed an appeal with the Rhode Island Superior Court for postconviction relief,5 requesting either

2. Id.
3. Id.
4. Id.
5. Id. at 393. Raso filed his application for post-conviction relief pursuant to Rhode Island General Law §§ 10-9.1-1 through 10-9.1-9, which allows for post-conviction relief for: convictions or sentences that are violative of the United States Constitution; convictions made by a court without jurisdiction to impose the sentence; convictions that exceed or are otherwise not in accordance with the maximum authorized sentence; convictions in instances when evidence of new material facts that require vacation of the prior conviction come to light; cases when the defendant’s sentence has expired or parole or probation been unlawfully revoked; and for
that his guilty plea be vacated, or, alternatively, that specific performance of the prosecution's original sentencing recommendation be ordered. Raso's argument that the trial justice had abused her discretion in not allowing him to withdraw his guilty plea was denied; the court chose "not to reach the issue of whether the state's assertion of the doctrine of laches" prevented Raso's application for relief altogether.

On appeal to the Rhode Island Supreme Court, Raso again argued that the trial justice erred in refusing to hear his motion to withdraw his guilty plea prior to sentencing him, basing his argument on Rule 32(d) of the Superior Court Rules of Criminal Procedure. Raso also argued that the Superior Court erred in denying his application for postconviction relief based entirely on the ground of laches.

ANALYSIS AND HOLDING

The Rhode Island Supreme Court held that the affirmative defense of laches may be properly invoked by the state against defendants praying for postconviction relief. The court held that although an application for postconviction relief may indeed be made at anytime, that "to read 'at anytime' as constituting a limitless 'Open Sesame'" would be absurd and that rather, the statutory term means "at any reasonable time." The court adopted the criteria from its prior application of laches in civil cases that require "a showing of 'negligence to assert a known right, seasonably coupled with prejudice to an adverse party,'" in light of the circumstances of the particular facts of the case at issue. The court then remanded the case to the Rhode Island Superior Court so that the necessary factual findings and conclusions of law could be made as to the laches issue.

convictions that are subject to collateral attack. Id. at 393 n.2 (quoting R.I. GEN. LAWS §§ 10-9.1-1 through 10-9.1-9 (2000)).

6. Id. at 393.
7. Id.
8. Id. at 394 (citing R.I. SUP. R. CRIM. P. 32 (D))
9. Id.
10. Id.
11. Id. at 395.
12. Id. (quoting Rodrigues v. Santos, 466 A.2d 306, 311 (R.I. 1983)).
13. Id. at 396.
14. Id.
In this case, the Rhode Island Supreme Court follows some other jurisdictions that allow for the application of laches in criminal cases.\textsuperscript{15} In cases such as this one, the trial court on remand will face a weighty balance of interests. It will have to choose between an individual defendant's right to seek potentially legitimate postconviction relief, of the utmost importance at any time to the individual, and the state's right not to be forced to retry such a stale case.

The Rhode Island Supreme Court held that the affirmative defense of laches, or unreasonable delay, may be used in cases involving application for postconviction relief.\textsuperscript{16}

Esme Noelle DeVault


\textsuperscript{16} 889 A.2d at 394-96.
**Disability/Insurance Law.** *Marques v. Harvard Pilgrim Healthcare of New England*, 883 A.2d 742 (R.I. 2005). An insurance company is considered a "place of public accommodation" under the meaning of the American with Disabilities Act (ADA), which the Rhode Island Supreme Court held was not limited to physical structures. Additionally, the court held that the ADA "specifically relates" to the business of insurance, which subsequently resulted in the McCarran-Ferguson Act being inapplicable to insurance coverage cases in Rhode Island. As such, insurance companies are subject to the restrictions of the ADA until it can be shown that a decision to deny coverage was based on either sound actuarial principles or reasonably anticipated experience, which would place the insurance company under the safe harbor provision of the ADA.

**FACTS AND TRAVEL**

In August, 1995, Thomas Seymour requested and received an application for health-care coverage from Harvard Pilgrim Healthcare of New England, Inc. (HPHC-NE), which he submitted to HPHC-NE later that same month.\(^1\) A determination was made by the HPHC-NE underwriting department that the application was incomplete; as a result, HPHC-NE promptly returned the application to Mr. Seymour requesting the missing information.\(^2\) On September 30, 1995, HPHC-NE notified Mr. Seymour that in order to proceed with the application process, Mr. Seymour would have to submit a completed application within two weeks.\(^3\) Due to Mr. Seymour's failure to comply with this deadline, HPHC-NE voided the partial application on October 15, 1995.\(^4\)

In December 1995, the Rhode Island Department of Human Services (DHS) issued a "Ten-Day Notice" to Mr. Seymour due to his failure to cooperate with the terms of his Medicaid benefits,

---

2. Id. at 744.
3. Id.
4. Id.
which required him to notify the DHS regarding any change in his financial status. The notice allowed him the opportunity to appeal the termination of his Medicaid benefits through a hearing; Mr. Seymour, however, did not request such a hearing. As a result of his noncompliance, Mr. Seymour's Medicaid benefits were terminated as of December 26, 1995.

On February 12, 1996, Mr. Seymour contacted HPHC-NE to inquire about his original application for insurance coverage from August, 1995. At this time, Mr. Seymour was informed that due to his failure to provide a complete application in 1995, he would now need to restart the application process, the first step of which would be to submit a completed application. Mr. Seymour complied with this process and resubmitted an application, which was denied because "he did not meet [HPHC-NE's] eligibility guidelines." HPHC-NE determined that, as a result of Mr. Seymour's Arthrogryposis and Crohn's Disease, he "presented an unacceptably high risk of loss." This denial prompted Mr. Seymour to file a complaint with the Department of Business Regulation (DBR), which subsequently contacted HPHC-NE and ultimately resulted in the DBR being appointed as rehabilitator of HPHC-NE under the "Insurers' Rehabilitation and Liquidation Act." Due to the imminent liquidation of HPHC-NE, the Superior Court enjoined further action regarding Mr. Seymour's discrimination claim. Mr. Seymour subsequently filed a petition with the Superior Court claiming the denial of his appeal violated not only his constitutional rights, but also his civil rights; the liquidator filed a cross-motion for summary judgment. The Superior Court granted summary judgment to the liquidator; Mr Seymour appealed to the Rhode Island Supreme Court.

5. Id. at 744-45 & n.6.
6. Id. at 744-45.
7. Id. at 745.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
14. 883 A.2d at 746.
15. Id.
16. Id.
ANALYSIS AND HOLDING

The Rhode Island Supreme Court held that: (1) with respect to the facts of this case, Rhode Island General Law § 27-41-42\textsuperscript{17} (subsequently repealed) was superseded by Title III of the American with Disabilities Act (ADA);\textsuperscript{18} (2) an insurance company is a "place of public accommodation" within the meaning of the ADA;\textsuperscript{19} and (3) Mr. Seymour had established a \textit{prima facie} case under the ADA.\textsuperscript{20}

\textit{Place of Public Accommodation}

The court begins the analysis of whether HPHC-NE is a "place of public accommodation" by pointing out that an "insurance office" is specifically listed in 42 U.S.C. § 12181(7) as a public accommodation under the meaning of Title III of the ADA.\textsuperscript{21} The court looked to precedent and pointed out that the term "public accommodation" need not be limited to physical places.\textsuperscript{22} Additionally, the First Circuit, in ruling that public accommodations should not be limited to physical structures, also noted that many service establishments which choose to conduct business by phone or mail are unlikely to maintain a building which the public may enter.\textsuperscript{23} The Rhode Island Supreme Court adopted the First Circuit ruling that "public accommodation" should not be limited physical structures.\textsuperscript{24}

\textit{Denial on Basis of Disability}

The court next looked to whether Mr. Seymour was in fact denied services by HPHC-NE on the basis of his disability.\textsuperscript{25} Due to HPHC-NE's concession that Mr. Seymour was denied insurance coverage because, as an individual who suffered from

\textsuperscript{17} R.I. GEN. LAWS § 27-41-42 (2003).
\textsuperscript{19} 883 A.2d at 748-49.
\textsuperscript{20} Id. at 749-50.
\textsuperscript{21} Id. at 748 (citing 42 U.S.C. §12181(7)(2000)).
\textsuperscript{22} Id. at 749 (citing Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 15, 19 (1st Cir. 1994)).
\textsuperscript{23} Id. (citing Carparts, 37 F.3d at 19).
\textsuperscript{24} Id.
\textsuperscript{25} Id.
Arthrogryposis and Crohn's Disease, his application created an unacceptably high risk, the court determined that it was in fact Mr. Seymour's disabilities which cost him the opportunity to obtain insurance coverage from HPHC-NE.\textsuperscript{26}

\textit{Applicability of the ADA}

The court then turned its analysis to whether HPHC-NE fell under the "safe harbor" provision found in § 501(c) of Title V of the ADA.\textsuperscript{27} If certain conditions are met, the "safe harbor" provision specifically excludes insurance underwriters from Title I through III of the ADA.\textsuperscript{28} The "safe harbor" provision also provides a "subterfuge clause," which prohibits the use of the safe harbor provision to purposefully evade Titles I through III of the ADA by insurance providers.\textsuperscript{29} If an insurance company can show that a decision was based on either "sound actuarial principles or reasonably anticipated experience," then it is subsequently sheltered from the reach of the ADA and can take pre-existing conditions and disabilities into consideration.\textsuperscript{30} The court then shifted the burden of proof to HPHC-NE, due to HPHC-NE's ability to access pertinent information regarding its own denial of coverage to Mr. Seymour, and the difficulty that Mr. Seymour would likely meet in attaining this information.\textsuperscript{31} HPHC-NE therefore had the burden of showing that it denied Mr. Seymour for either "sound actuarial principles or reasonably anticipated experience."\textsuperscript{32} If HPHC-NE was successful in this showing, then Mr. Seymour would bear the burden of proving that HPHC-NE's reasons for denial were "in fact a subterfuge to evade the purposes of Title III of the ADA."\textsuperscript{33}

The majority then turned its discussion to the "decision tree" used by HPHC-NE to make the ultimate eligibility determination

\textsuperscript{26} Id.
\textsuperscript{27} Id. at 750.
\textsuperscript{28} Id.
\textsuperscript{29} Id. at 750 n.17 (citing 42 U.S.C. § 12202(c)(2000)).
\textsuperscript{30} Id. at 750 (citing Doukas v. Metro. Life Ins. Co., 950 F.Supp. 422, 429 (D. N.H. 1996)).
\textsuperscript{31} Id. at 750-51.
\textsuperscript{32} Id. at 751 (citing Doukas, 750 F. Supp. at 429).
\textsuperscript{33} Id. at 751 n.7, 752 n.8 (citing Nicolae v. Miriam Hosp., 847 A.2d 856 (R.I. 2004)).
in Mr. Seymour's case. The decision tree, titled "Decision Tree for Rhode Island Pre-Existing Condition Legislation," is a flowchart which guides the underwriters in the decision-making process. Because Mr. Seymour suffered from a pre-existing condition and did not have continuous coverage for the twelve months preceding the application, HPHC-NE guidelines allowed the underwriter to deny or limit the coverage. Here, coverage was denied altogether; the court reasoned that because HPHC-NE failed to put forward specific evidence to justify the complete denial of coverage to Mr. Seymour, summary judgment should not have been granted in favor of HPHC-NE.

The court concluded that HPHC-NE had not satisfied the burden of proving that its decision to completely deny Mr. Seymour insurance coverage was based on either "sound actuarial principles or was related to HPHC-NE's actual or reasonably anticipated experience." Without having made the above showing, HPHC-NE had yet to establish that it fell under the "safe harbor" provision of the ADA and, thus, it could be subjected to Title III. The court ultimately held that unless HPHC-NE met the above burden, Mr. Seymour had established a prima facie case under the ADA. The court remanded to the Superior Court where HPHC-NE will be given the opportunity to show that its decision was based either on "sound actuarial principles or reasonably anticipated experience."

Dissent – Justice Robinson

Justice Robinson argued in his dissent that the McCarran-Ferguson Act rendered the ADA inapplicable to Mr. Seymour's case. He stated: "(1) that Congress has spoken quite definitively in the McCarran-Ferguson Act; (2) that said Act bars the application of the ADA to insurance coverage cases like this one;

34. Id. at 751-52.
35. Id. at 751.
36. Id. at 752.
37. Id.
38. See id. at 752.
39. Id. at 750-52.
40. Id. at 752.
41. Id.
42. Id. at 753.
and (3) that there is no legally defensible way to circumvent that clear congressional directive.” The McCarran-Ferguson Act reads in pertinent part: “No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance... unless such Act specifically relates to the business of insurance....”

Justice Robinson pointed to case law which set the precedent that “federal laws should not be construed to supersede state laws ‘regulating the business of insurance.’”

Justice Robinson argued that there was a presumption that Congress left the regulation of the business of insurance to the states and that the McCarran-Ferguson Act is a strong example of this presumption. Therefore, unless the federal law “specifically relates” to the business of insurance, regulation of such businesses is to be left to the state. Justice Robinson further contended that, due to the particularly wide scope of issues covered by the ADA, it cannot be said to “specifically relate” to the business of insurance. Therefore, he stated that the McCarran-Ferguson Act renders the ADA inapplicable to insurance coverage issues such as the one presented here. Although Justice Robinson conceded that there was some mention of insurance in the ADA, he stated that the law was in fact “general” and unlikely to be “read as relating specifically to the business of insurance.” Due to the reverse preemptive effect made possible by the McCarran-Ferguson Act, when a federal statute is “general in character,” the ADA is inapplicable to issues of insurance coverage.

Regarding the “safe harbor” language in the ADA, Justice Robinson argued that it in fact offers protection to the traditional practices of the insurance industry. This being said, the provision does not constitute an attempt to specifically regulate

---

45. Id.
46. Id.
47. Id. at 755.
48. Id.
49. Id.
50. See id.
51. Id.
the business of insurance.\textsuperscript{52} In fact, as Justice Robinson pointed out, the purpose of the safe harbor provision appeared to be to protect the insurance industry from the scope of the ADA, not to subject it to specific regulation.\textsuperscript{53} In his conclusion, Justice Robinson reiterated his belief that the McCarran-Ferguson Act was a clear congressional statute that plainly precluded application of the ADA to insurance coverage cases.\textsuperscript{54}

**COMMENTARY**

The major disagreement between the dissent and the majority was whether the ADA specifically related to the business of insurance. The majority opinion argued that the ADA does specifically relate to the business of insurance because it “contains two fundamental provisions that specifically relate to the business of insurance.”\textsuperscript{55} Conversely, Justice Robinson pointed out in his dissent that the ADA has a broad focus and thus cannot be considered to specifically relate to the business of insurance.\textsuperscript{56} The dissent went on to cite *Humana, Inc. v. Forsyth*,\textsuperscript{57} in which the United States Supreme Court pointed to Section 2(b) of the McCarran-Ferguson Act, noting that “federal legislation general in character shall not be 'construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance.'”\textsuperscript{58}

Although the ADA, as the majority points out, makes two references to insurance, Justice Robinson’s argument is not without merit. In fact, the ADA’s “safe harbor” provision provides the insurance industry with further insulation from claims under Title III. The ADA therefore does not appear to regulate the business of insurance; rather its language provides the industry a path to circumvent the ADA’s proscription of discrimination. In addition to the safe harbor provision, the ADA defines an insurance office as a place of public accommodation under the

\begin{itemize}
  \item[52.] Id.
  \item[53.] Id.
  \item[54.] Id. at 756.
  \item[55.] Id. at 747 n.13.
  \item[56.] Id. at 755.
\end{itemize}
meaning of the ADA. It is unlikely that Congress intended this list of private entities to specifically relate to the business of insurance. This provision merely points out that an insurance office is a place of public accommodation; it does not attempt to regulate the means by which the industry should determine eligibility for insurance coverage.

The McCarran-Ferguson Act was passed by Congress for the purpose of leaving the business of regulating the insurance industry to the states. A legislative directive as clear as the McCarran-Ferguson Act should only be circumvented where there is no question as to the specific regulation of insurance by the federal Act. Here, the majority found that the ADA specifically relates to the business of insurance. In so doing, it effectively took the control of the regulation of the Rhode Island insurance industry in determining its eligibility requirements away from the state. Instead, the insurance industry must now satisfy the safe harbor provision of the ADA in order to make an eligibility determination involving a pre-existing condition. This appears to be what Congress sought to avoid by the enactment of the McCarran-Ferguson Act.

The decision here had the effect of nullifying § 27-41-42 (since repealed) of the Rhode Island General Laws, which gave insurance providers the option to deny or limit the coverage offered to individuals with a pre-existing condition who had failed to maintain continuous coverage for the twelve months preceding their application. The majority argued that § 27-41-42 effectively denied equal access to health insurance because that provision had an adverse impact only on those individuals with a pre-existing condition. Ultimately, the majority determined that application of the ADA was appropriate and, as such, the insurance company retained the right to show that it made its denial decision for a valid reason under the safe harbor provision.

61. Id. at 747 n.13.
63. See 883 A.2d at 747 n.13.
64. See id. at 747-50.
Under the safe harbor provision, the insurance company must show that its decisions are based on "actuarial data or on the company's actual or reasonably anticipated experience relating to the risk involved." Given the likelihood that insurance companies have data and experience with the risks involved in providing coverage to clients with pre-existing conditions, they will likely satisfy these requirements with ease. As a result, it is likely that most insurance providers will meet this exception to the ADA and will continue with their normal course of eligibility determinations, an outcome which bears a striking resemblance to the now repealed § 27-41-42 of the Rhode Island General Laws.

CONCLUSION

The Rhode Island Supreme Court held that an insurance provider falls within the meaning of a public accommodation under the meaning of the ADA and that the ADA specifically relates to the business of insurance making it applicable to the present case.

Kimberly A. Tracey

---

65. Id. at 750 (citing Doukas v. Metro. Life Ins. Co., 950 F.Supp. 422, 429 (D. N.H. 1996)).
66. Id. at 749.
67. Id. at 747.
Employment Law. *DeCamp v. Dollar Tree Stores*, 875 A.2d 13 (R.I. 2005). A gender-based disparate treatment discrimination claim does not depend upon a *prima facie* showing of hostile work environment, and a gender-based hostile work environment claim does not involve a burden-shifting framework. Additionally, when the major life activity under consideration to establish a disability is working itself, the statutory requirement that the disability "substantially limits" the major life activity requires that the employee allege she is unable to work in a broad class of jobs. In the context of work-related depression or anxiety, if an employee's doctor states that the employee cannot return to work for that particular employer, then that fact supports the legal conclusion that the employee is no longer qualified to do the job and no accommodation exists to allow her to return to work, which precludes the employee from establishing a *prima facie* case of disability discrimination.

**FACTS AND TRAVEL**

Plaintiff Maria L. DeCamp was hired by Dollar Tree as a store manager in May of 2000, and the defendant, Mr. Braz, was her direct supervisor.¹ Braz was a Dollar Tree district manager and was investigated and counseled in 1999 regarding his treatment of women.² In December of 2000, DeCamp sought medical treatment and was diagnosed with major depression, which in the opinion of her psychiatrist, was "related to a demanding, abusive and deteriorating relationship with her immediate supervisor."³ DeCamp was treated with therapy and medication and was cleared to return to work for an employer other than Dollar Tree on June 14, 2001.⁴ While in treatment, DeCamp contacted human resources at Dollar Tree, who conducted an investigation of Braz, finding some negative

---

². Id. at 17.
³. Id. at 19.
⁴. Id.
comments regarding his treatment of associates, but nothing related to mistreatment of females. Although the investigation did not involve treatment of DeCamp specifically, following the investigation, Braz attended antidiscrimination training.

DeCamp was granted six weeks of medical leave by Dollar Tree, during which time her future employment was discussed. Plaintiff claimed in her deposition that she suggested different solutions that would have allowed her to return to work, but she was informed that her leave would expire on February 2, 2001, and she would have to return to work for Braz. DeCamp followed her doctor's instructions and did not return to work; subsequently, on February 6, 2001, Dollar Tree sent DeCamp a letter stating that her failure to return to work constituted a voluntary resignation. DeCamp then filed a discrimination claim with the Rhode Island Commission for Human Rights, and after waiting the requisite time, filed an employment discrimination suit against defendants in Superior Court. DeCamp alleged that Braz's treatment of her met the requirements of gender discrimination and that Dollar Tree's decision to terminate her while on medical leave constituted disability discrimination.

Defendants' motions for summary judgment were granted as to all claims and DeCamp subsequently appealed.

ANALYSIS AND HOLDING

On appeal, DeCamp argued that the trial justice erred in granting the defendants' motions for summary judgment. The Rhode Island Supreme Court reviewed the plaintiff's case based on two distinct theories of gender-based employment discrimination: gender-based disparate treatment and gender-based hostile work environment. The court found that the motion justice made a clear error by blending the tests for

5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id. at 19-20.
12. Id. at 20.
13. Id.
14. Id. at 21.
disparate treatment and hostile work environment. The court stated that the disparate treatment theory does not depend on a prima facie showing of hostile work environment, and that hostile work environment claims do not utilize a burden-shifting framework. As a result, the court held that the motion justice erred by failing to require defendants to offer a legitimate, nondiscriminatory reason for terminating the plaintiff as is required to overcome a prima facie showing of gender-based disparate treatment. The court also held that the summary judgment granted as to the hostile work environment claim was a reversible error as the plaintiff created a genuine issue of material fact as to each element of that claim.

The court next held that summary judgment was correct as to the disability discrimination claim, finding that if an employee's doctor states that the employee cannot return to work for that particular employer, then that fact alone supports a legal conclusion that the employee no longer is qualified to do the job and no accommodation exists to allow her to return to work, making it impossible to meet the second element of disability-based disparate treatment.

Employment Discrimination in Rhode Island

Employment discrimination in Rhode Island is prohibited by several statutes. The State Fair Employment Practices Act (FEPA) prohibits employer discrimination based on gender or disability with respect to "terms, conditions or privileges of employment." The Civil Rights Act of 1990 (RICRA) provides that all persons should have the equal benefit of the laws regardless of sex or disability and defers to FEPA for definitions of such. The Rhode Island Supreme Court has adopted a multitude of tests that are used to determine employment discrimination,

15. Id. at 21 n.6.
16. Id. (citing Lewis v. Forest Pharm., Inc., 217 F. Supp. 2d 638 (D. Md. 2002)).
17. Id. at 22.
18. Id. at 24.
19. Id. at 26.
20. Id. at 20.
several of which were addressed in by the court in *DeCamp*.

**Gender-Based Disparate Treatment**

Gender-based disparate treatment involves a three-step burden-shifting analysis as established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*. The plaintiff must establish a *prima facie* case by showing that: she is a member of the protected class; she was performing the job at a level sufficient to rule out inadequate job performance; she suffered adverse job action by the employer; and that the employer sought a replacement with equivalent qualifications. The second step requires the employer "offer a legitimate, nondiscriminatory reason for the adverse employment action," and the third step shifts the burden back to the plaintiff to show that the professed reason is pretext.

The court characterized the requirements for a *prima facie* case as "modest" and stated that the plaintiff, as a female, was a member of a protected class and was in good standing prior to the dismissal. The court also stated that the termination was an adverse event regardless of its characterization as a "voluntary resignation" by the employer, and that since there was no corporate downsizing, it could be assumed that the position would be filled with an individual with roughly equal qualifications.

More significantly, the court found that the motion justice, in combining the theories of disparate treatment and hostile work environment, failed to identify the defendants' legitimate, nondiscriminatory reason for the incident. In order to overcome a *prima facie* finding of disparate treatment, the defendants had to meet the second requirement of the burden-shifting framework, which they failed to do. The court held that summary judgment was reversible error and that the case had to be remanded to the trial court for proper application of the burden-shifting

---

24. *DeCamp*, 875 A.2d at 21 (citing Smith v. Stratus Computer, Inc., 40 F.3d 11, 15 (1st Cir. 1994)).
25. *Id.* at 22.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
framework, as a reviewing court cannot search the record for that reasoning.\(^{30}\)

**Gender-Based Hostile Work Environment**

A claim of gender-based hostile work environment mandates that the court look at the record as a whole, with regard to the totality of the circumstances.\(^{31}\) Looking at the record as a whole, the court stated that the following elements must be met:

1. the employee is a member of a protected class;
2. the employee was subjected to unwanted harassment;
3. that harassment was based upon his or her sex;
4. that the harassment was sufficiently severe and pervasive so as to alter the conditions of plaintiff's employment and create an abusive work environment;
5. that harassment was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and
6. that some basis for employer liability has been established.\(^{32}\)

The court found that in *DeCamp*, the first two elements were met, as the plaintiff was a member of a protected class and considered the conduct unwelcome.\(^{33}\) As to the third element, the court held that although none of the incidents involving Braz and plaintiff involved express references to gender, Braz's recorded past history of treating women poorly was the "nexus between Braz's treatment of plaintiff and [the] conclusion that he mistreated her because of her gender."\(^{34}\)

Next, the court stated that finding an abusive work environment under the fourth element requires that FEPA and RICRA are violated when "the workplace is permeated with discriminatory intimidation, ridicule, and insult... that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working

\(^{30}\) Id.

\(^{31}\) Id. at 22 (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65-67 (1986)).

\(^{32}\) Id. at 22-23 (quoting O'Rourke v. City of Providence, 235 F.3d 713, 728 (1st Cir. 2001) (internal citations and quotations omitted)).

\(^{33}\) Id. at 23.

\(^{34}\) Id.
environment." The court observed that at least seven incidents of direct mistreatment of the plaintiff occurred, ranging from violent actions to verbally abusive comments; thus a reasonable juror could find an abusive work environment given these facts.

Next, the court discussed the fifth element of a hostile work environment claim: subjective and objective offense. The court stated that this element is based upon all the surrounding discriminatory incidents including frequency, severity, physical threats, humiliation, offensive utterances, and whether or not it all unreasonably interferes with performance of work. Objectively, the court stated, conduct such as kicking over a register and screaming at workers could clearly be considered offensive by a reasonable person. The court also found subjective evidence in the plaintiff's tears and depression. Finally, the court reasoned that employer liability could be found through Dollar Tree's knowledge of Braz's mistreatment of employees in general, and of women in particular, thus satisfying the sixth and final element. The court held that given the factual variances involved in all of the elements, the plaintiff created a genuine issue of material fact and thus summary judgment was improper.

Disability Discrimination

The court stated that disability discrimination can be established through the use of the disparate treatment theory and its burden-shifting framework. The court stated that an employee must first prove a prima facie case of disability discrimination by showing that: he or she was disabled within the meaning of FEPA and RICRA; that the employee was qualified, or

35. Id. (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (internal quotations omitted)).
36. See id. at 23-24.
37. Id. at 24.
38. Id. (citing Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1998)).
39. Id.
40. Id.
41. Id.
42. Id.
43. Id. at 24-25 (citing Equal Employment Opportunity Comm'n v. Amego, Inc., 110 F.3d 135, 141 n.2 (1st Cir. 1997)).
stated differently, that with or without reasonable accommodation was able to perform the essential functions of the job; and that the discharge was in whole or in part a result of the disability.44 If a \textit{prima facie} case is established, the employer must rebut with a legitimate nondiscriminatory reason for discharge, at which time the employee must respond with proof that the reason offered by the employer is pretext.45 The court held that, in \textit{DeCamp}, the plaintiff failed to meet the elements required to establish a \textit{prima facie} case of disability discrimination.46

The court noted that disability is defined as "any physical or mental impairment which substantially limits one or more major life activities."47 As extrapolated from FEPA and RICRA, major life activities include "functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."48 The court held that, although depression qualifies as a mental impairment,49 the plaintiff’s injury did not substantially limit major life activities.50 The plaintiff had claimed that the major life activity in question was her ability to work, and the court held that, in such a case, the phrase "substantially limits" requires at minimum an inability to work a broad class of jobs.51 Thus, when the major life activity that is substantially limited is work, a conflict between an employee and a supervisor, "even one that triggers the employee’s depression[,] is not enough to establish that the employee is disabled, so long as the employee could still perform the job under a different supervisor."52 The court pointed out that much of the plaintiff’s testimony showed that her condition prevented her from working for Braz, but not from working in general; the plaintiff in

\begin{itemize}
\item[44.] \textit{Id.} at 25 (citing \textit{Equal Employment Opportunity Comm’n}, 110 F.3d at 141 n.2).
\item[45.] \textit{Id.} at 25 (citing Raytheon Co. v. Hernandez, 540 U.S. 44, 50 n.3 (2003)).
\item[46.] \textit{Id.} at 25-26.
\item[47.] \textit{Id.} at 25.
\item[48.] \textit{Id.}
\item[49.] \textit{Id.} at 25 (citing Calero-Cerezo v. U.S. Dep’t of Justice, 355 F.3d 6, 20 (1st Cir. 2004)).
\item[50.] \textit{Id.}
\item[51.] \textit{Id.} (citing Sutton v. United Air Lines, Inc. 527 U.S. 471, 491 (1999)).
\item[52.] \textit{Id.} (quoting Schneiker v. Fortis Ins. Co., 200 F.3d 1055, 1062 (7th Cir. 2000)).
\end{itemize}
fact stated that she would return to work for Dollar Tree if they fired Braz, and may have even returned if he apologized and acknowledged his mistreatment.\textsuperscript{53} As a result, the court held that even in the most favorable light, the plaintiff's depression did not substantially limit her ability to work a broad range of jobs.\textsuperscript{54}

The plaintiff challenged the lower court's finding that she was not disabled by stating that, despite her testimony regarding her ability to return to work, her psychiatrist's statement that she could not in fact return to work until June 14, 2001 created a genuine issue of fact regarding her ability to work a broad range of jobs.\textsuperscript{55} In addressing this argument, the court stated that given the plaintiff's burden of proving every element, a conflict existed between proving the first and second element as a result of the psychiatrist's statement.\textsuperscript{56} This conflict occurred as a result of the requirement that the employee be "qualified" or able to perform the essential job functions with or without reasonable accommodation and the requirement that the plaintiff must still possess the ability to function competently and productively in the employment situation with or without modification of that situation.\textsuperscript{57} With depression specifically, "if an employee's doctor states that the employee cannot return to work for that particular employer, then that fact supports a legal conclusion that the employee no longer is qualified to do the job and no accommodation exists to allow him or her to return to work."\textsuperscript{58} The doctor's statement thus created an insurmountable dilemma for the plaintiff; although the statement introduced a question of material fact as to the disability element, the very same evidence resulted in the plaintiff's inability to meet the "qualified" element.\textsuperscript{59} Thus the psychiatrist's claim that the plaintiff could never return to work for Dollar Tree established that no reasonable accommodation existed that would permit her to do her job.\textsuperscript{60} As a result, the court held that the plaintiff could not

\begin{itemize}
\item \textsuperscript{53} \textit{Id.} at 26.
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Id.}
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{Id.} (quoting Weiler v. Household Fin. Corp., 101 F.3d 519, 525 (7th Cir. 1996)).
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Id.}
\end{itemize}
establish a *prima facie* case of disability-based disparate treatment.61

**COMMENTARY**

The Rhode Island Supreme Court did an excellent job of clarifying the rules of law as to gender-based employment discrimination. Similarities in establishing a *prima facie* case for both disparate treatment and hostile work environment led the lower court to intertwine the rules. The court clarified the necessary steps for a disparate treatment claim and reinforced the use of the burden-shifting framework, separately laying out the elements for a hostile work environment claim. As to gender-based disparate treatment, the court had no choice but to remand for a determination based on the employer's legitimate non-discriminatory basis for dismissal, as the lower court never reached this issue, given their misinterpretation of the rule. As to gender-based hostile work environment, the lower court was too quick to dismiss the plaintiff's claim, as Braz had a clear history of poor treatment of women, as documented by Dollar Tree, and it would be an injustice if the plaintiff were denied a claim, given the factual leeway present in each element. The court was correct in looking to Braz's acknowledged history of poor treatment of women and establishing it as the nexus between his offensive treatment of the plaintiff and gender discrimination; to hold otherwise would be to reward Braz for treating women poorly so long as he did not reference gender.

The court's decision regarding disability discrimination, although technically sufficient, presents several alarming issues. By holding that the evidence that established a genuine issue of fact as to the plaintiff's disability also precluded satisfaction of the qualified element, the court failed to logically consider the complexity of the circumstances. The psychiatrist's findings showed that the depression caused by Braz prohibited the plaintiff from working a broad range of jobs. Although the statement of the psychiatrist concluded that the plaintiff could not work for Dollar Tree, this was clearly the result of the plaintiff's relationship with Braz and nothing else. This evidence, taken in conjunction with plaintiff's testimony that she could work at Dollar Tree if not for

---

61. *Id.* at 27.
Braz, showed that the plaintiff was qualified to do the job, but could not as a result of Braz. In other words, the plaintiff was qualified for the position of Dollar Tree manager. There was likely enough evidence to overcome summary judgment on the issue of disability discrimination, and as such, perhaps the court should have allowed the issue to go to a jury.

CONCLUSION

The Rhode Island Supreme Court made several important holdings in regard to employment discrimination based on gender and disability. The court reestablished the burden-shifting framework for gender-based disparate treatment claims. Also, the court allowed the use of an employer’s knowledge of past mistreatment of women to assist in satisfying the elements in a gender-based hostile work environment claim, even in the absence of specific gender references. Most significantly, in the context of work-related depression or anxiety, the court held that if an employee’s doctor stated that the employee could not return to work for that particular employer, then that fact alone supports a legal conclusion that the employee is no longer qualified to do the job. As a result, no accommodation exists to allow him or her to return to work, which paradoxically precludes that employee from establishing a prima facie case of disability discrimination.

Matthew Jill

62. *Id.* at 22.
63. *Id.* at 22-24.
64. *Id.* at 26.
Family Law. *Gorman v. Gorman*, 883 A.2d 732 (R.I. 2005). Family court judges are barred from exercising power to reform property settlement agreements that are incorporated by reference, but not included in, the final divorce judgment, unless the Family Court finds that the property settlement agreement is ambiguous or the product of mutual mistake. When a property settlement agreement is not ambiguous and not the product of mutual mistake, the Family Court can refuse to enforce the agreement to the extent that it is inequitable, but does not hold the power to modify the agreement to ameliorate the inequity. Therefore, the Family Court has the ability to direct the parties to negotiate a new property settlement agreement for its review and approval, or to order the parties to proceed to trial in the event the property settlement agreement does not reflect the division of property determined to be equitable by the Family Court.

FACTS AND TRAVEL

The plaintiff, Kathleen M. Gorman, filed for divorce from the defendant, Daniel W. Gorman, on February 12, 2002, after more than thirty-five years of marriage, claiming an irremediable breakdown of the marriage had occurred, due to irreconcilable differences. The defendant husband filed a counterclaim. On January 24, 2003, a hearing was held before the Family Court during which the lawyers for both parties stated they desired to make a written agreement regarding the division of property. An absolute divorce was granted on February 7, 2003. On that day, the Family Court also approved the written property settlement agreement which stated that the defendant's "Employee Stock Option Plan" (ESOP) was to be divided evenly between the parties.

On April 15, 2003, the plaintiff filed a motion seeking

---

2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
clarification of the written property settlement agreement and the intent of the parties in regard to the agreement, because she had learned that the defendant held an additional stock plan, the “Stock Bonus Plan,” (SBP) which was not mentioned in the original property settlement agreement. The defendant objected to this motion. Subsequently, on May 2, 2003, the plaintiff filed a Rule 60(b) motion for relief (under the Family Court Rules of Procedure for Domestic Relations) and a motion to modify the property settlement agreement, claiming that the terms were based on mistake of fact, misrepresentation, inadvertence, and/or fraud, to which the defendant objected. The plaintiff asserted that because the defendant was not only a participant in the ESOP, but also the SBP, then the property settlement agreement did not represent the even division agreed upon by the parties in the Family Court order. The defendant argued that the property settlement agreement should be read literally to exclude the SBP because the agreement implicitly excludes non-specified plans from inclusion.

After a hearing by the Family Court on July 15, 2003 to address the discrepancy, the court issued a bench decision on August 20, 2003. The court concluded that the property settlement agreement was ambiguous as to whether the SBP was to be divided among the parties, and, as a result, the property settlement agreement should be construed as dividing equally both the ESOP and the SBP, even though the SBP was not specified in the written agreement. To reach this decision, the court considered the negotiations between the parties and the testimony of the parties, which, the Family Court held, demonstrated intent that all stock plans be divided equally between the parties. The court also stated that it would be improper to reward the defendant for failing to clarify an apparent misunderstanding by the plaintiff regarding the existence of the

6. Id. at 735.
7. Id.
9. 883 A.2d 735.
10. Id.
11. Id.
12. Id.
13. Id. at 736.
14. Id.
SBP.\(^{15}\) The court entered an order directing the division of all stocks as of the date of the execution of the property settlement agreement.\(^{16}\) Following the entry of final judgment, the defendant appealed.\(^{17}\)

**ANALYSIS AND HOLDING**

On appeal, the defendant argued that the agreement was unambiguous because it specifically mentioned the ESOP and made no mention of the SBP.\(^{18}\) In addition, the defendant argued that the Family Court lacked the authority to reform the property settlement agreement.\(^{19}\)

*Finding of Ambiguity*

The court first addressed the defendant’s argument regarding the ambiguity of the agreement.\(^{20}\) The court stated that the Family Court has “broad power to review and to decide whether to approve proposed property settlement agreements, given the special status that the law accords to agreements between spouses.”\(^{21}\) Therefore, the Family Court was acting within its statutory power to oversee divorce proceedings, which includes the review of the division of marital assets.\(^{22}\) When the Family Court received the plaintiff’s motions after the divorce was granted, it treated the motions as Rule 60(b) motions, which allowed the court to review the property settlement agreement and to realize that the agreement did not embody the fifty-fifty division the Family Court had determined was equitable.\(^{23}\)

The Rhode Island Supreme Court stated that although it understood the equitable concerns that led the Family Court to determine that the agreement was ambiguous, it considered the agreement to be an “unambiguous contractual document” because it only mentioned the ESOP and did not even hint at the existence

---

15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 740.
20. *Id.* at 736-40.
21. *Id.* at 737.
22. *Id.*
23. *Id.*
of the SBP. The Supreme Court held, however, that even if the property settlement agreement was unambiguous, it was not self-executing, and was still subject to review and approval by the Family Court. Therefore, although the court held that the contract was unambiguous, it also held that the Family Court acted within its powers when it reviewed the property settlement agreement and determined that the agreement should not be enforced due to the agreement's inequity.

Modification of the Agreement

Next, the court addressed the defendant's argument that the Family Court lacked the authority to reform the agreement. The defendant argued that because the property settlement agreement was not merged into the final divorce decree, it could only be modified if both parties consented to the modification. The court started this portion of the analysis by stating that there must be an initial finding of mutual mistake in contract formation before that contract can be subject to judicial reformation. Since the Family Court stated that it did not find any evidence of mutual mistake during the negotiations and the execution of the property settlement agreement, that court is, therefore, bound by that holding and its limitations.

The Family Court does not have the authority to reform or modify a contract like the property settlement agreement that is merely incorporated by reference, but not merged, into the divorce decree, absent the consent of both parties. The Rhode Island Supreme Court found the property settlement agreement to be unambiguous and found no evidence of mutual mistake, which left reformation of the contract beyond the power of the Family Court justice. The court held that the Family Court has the power to either order the parties to negotiate a new property settlement agreement.

24. Id. at 738.
25. Id. at 738-39.
26. Id. at 740.
27. Id. at 740-41.
28. Id. at 740.
29. Id.
30. Id. at 741.
31. Id.
32. Id.
agreement for review of and approval by that court, or to direct the parties to proceed to trial.\textsuperscript{33}

**COMMENTARY**

The court used the holding in this case to speak about the limitations of the Family Court's powers. By articulating that the Family Court does not have the power to alter an inequitable property settlement agreement that is not part of the divorce decree, the court ensures that the Family Court does not overstep its statutory authority, which is admittedly broad when dealing with divorce property settlement agreements.\textsuperscript{34} Although the holding appears to be correct in regards to statutory and contract law, it has the effect of limiting the Family Court's ability to deal with divorce settlements in a fair and timely manner, and additionally the effect of making divorcing parties subject to deceit by the other party.

In the interest of remaining true to established contract law, the court has ensured that already long and difficult divorces are potentially made longer. The court carefully applies contract law to the property settlement agreement, even though it differs from a standard contract because it is not immediately self-executing. In addition, the property settlement agreement is clearly not a traditional contract made at "arms-length," as it arises out of a divorce proceeding, in which both sides can be hostile to the opposing party's interests. Requiring parties to redraft and resubmit their property settlement agreement each time a flaw is found within the agreement only prolongs the difficulty of getting divorced. The Family Court is charged with finding an equitable way to divide property among former spouses, but under this holding, can no longer use its discretion to achieve an equitable result in a timely manner for both parties. By not allowing the Family Court to repair a property settlement agreement so that it represents the actual understanding achieved by the parties during the divorce proceedings, this holding undermines the broad discretion of the Family Court to deal with divorce proceedings.

When the Family Court modifies a property settlement agreement for review of and approval by that court, or to direct the parties to proceed to trial.\textsuperscript{33}

33. *Id.*
34. *Id.* at 737.
agreement to represent the expressed intentions of the parties, it saves both the time and the attorneys' fees that would be required to draft a new agreement and have it approved by the court. The additional legal fees and time wasted when the court must order the parties to renegotiate a property settlement agreement can end up punishing the deceived party for the misdeeds of the deceiver. In addition, it gives one side an opportunity to temporarily withhold a divisible asset from the other side. Perhaps the best way to prevent such unfair advantage is to allow the court to reform the agreement upon a showing of inequity. Unfortunately, the Family Court no longer has that ability.

CONCLUSION

The Rhode Island Supreme Court held that the Family Court does not have the ability to reform an inequitable property settlement agreement unless there is a finding of mutual mistake between the parties. Standard contract law applies to the property settlement agreements that are not part of the divorce decree and, as a result, contract law, which demands an initial finding of mutual mistake, prior to reformation by the court, applies. In this case, the property settlement agreement was found to be inequitable, but due to a lack of mutual mistake, the revisions made by the Family Court were not valid and the parties need to either enter into a new property settlement agreement or proceed to trial.

Elizabeth A. Suever
Family Law. In re Mackenzie C., 877 A.2d 674 (R.I. 2005). In applying the Daubert standard for admission of scientific evidence, in which the court acts as a “gatekeeper” to insure that evidence is both relevant and reliable, the Rhode Island Supreme Court ruled that a Family Court justice did not err in reversing an earlier finding of abuse. The reversal was based on the admission of new expert testimony as to a child’s medical condition and its potential contribution to the child’s injuries, and as such, both the trial justice’s admission of the evidence and his subsequent dismissal of the original abuse petition were made without error.

FACTS AND TRAVEL

The case of Mackenzie C. came before the Rhode Island Supreme Court after what the court termed a “complex [and] Dickensian procedural history.” It all began when the Department of Children, Youth and Families (DCYF) filed an ex parte abuse and neglect petition against Mackenzie’s parents on December 28, 1998, after Mackenzie was brought to Hasbro Children’s Hospital at nine weeks old, crying uncontrollably, with something seemingly wrong with her right arm. A probable cause hearing began on January 8, 1999, but was discontinued at the parents’ request; subsequently, on April 12, 1999, DCYF filed a termination of parental rights (TPR) petition, which alleged “parental unfitness because of cruel or abusive conduct pursuant to G.L. 1956 § 15-7-7(a)(2)(ii),” based in part on the treating physician’s opinion that Mackenzie suffered from “battered child syndrome.”

The trial occurred over twenty days, commencing on June 11, 1999, and concluding on March 23, 2000. Mackenzie’s parents presented one expert, Dr. Colin Paterson, who testified that Mackenzie suffered from “temporary brittle bone disease,” a

2. Id. at 678.
4. 877 A.2d at 678.
5. Id. at 679.
condition that could explain the nineteen fractures evident upon her body at the time of the treating physician's examination.\(^6\)

The trial justice rejected the parents' expert's testimony, and found that the child "suffered from no abnormal bone disease . . . [or from] any metabolic or endocrinology conditions."\(^7\) Additionally, the trial justice went on to find that the "conduct of the parents to the child was of a cruel and abusive nature" and that they were unfit due to this finding of abuse.\(^8\) As such, Mackenzie was committed to DCYF's care, custody and control; however, the court deferred deciding on the TPR petition until an impartial psychiatric evaluation of both parents could be conducted.\(^9\) This evaluation was subsequently conducted by Dr. Bernard Katz, whose recommendation that a three-year case plan be developed by DCYF and completed by the parents prior to dismissal of the termination petition was adopted by the court.\(^10\) On January 12, 2001, DCYF filed for (and received) a stay of this reunification plan from the Rhode Island Supreme Court, which later additionally directed the Family Court to decide the TPR petition on the merits.\(^11\)

On November 1, 2001, after several days of testimony, the Family Court justice denied the TPR petition, finding that Mackenzie and her parents deeply loved each other, and that "there [w]as no evidence whatsoever that . . . the parents create[d] any risk or constitute[d] any risk to the child if there [w]as reunification."\(^12\) The trial justice ordered that DCYF immediately create a reunification plan, an order that DCYF filed an appeal to on November 8, 2001, as well as filing a motion for a stay of the order on November 20, 2001.\(^13\) The motion for stay was denied; DCYF did then submit a reunification plan, which the trial justice rejected, noting that it did not contain "any initial step[s] toward gradual reunification."\(^14\)

Mackenzie's parents eventually filed a motion for

---

6. Id.
7. Id.
8. Id.
9. Id.
10. Id. at 679-80.
11. Id. at 680.
12. Id.
13. Id.
14. Id.
reconsideration and/or new trial as to the abuse petition, which the Family Court justice had sustained.\textsuperscript{15} This motion was subsequently granted on October 23, 2003, when the case was reopened, with the admission of new expert testimony (by Dr. Cathleen Raggio) as to Mackenzie's medical condition, evidence that simply did not exist at the original time of trial.\textsuperscript{16} On November 5, 2004, the trial justice reversed his earlier finding of abuse and neglect, noting that there was no competent medical evidence at the time of trial to support the parents' position, but that such evidence had since come into existence.\textsuperscript{17} The trial justice considered two issues in reversing his earlier decision: Whether Dr. Raggio's expert testimony was admissible as "based on scientifically valid methodologies or principles" and sufficiently tied to the facts of the case, and if so, if DCYF sustained "its burden of proof with respect to the abuse" allegation with clear and convincing evidence.\textsuperscript{18}

The trial justice allowed the admission of Dr. Raggio's testimony and concluded that the court was convinced "by the medical testimony produced . . . [and t]hat there is absolutely no testimony with respect to any tendency of the parents to be abusive."\textsuperscript{19} The court then concluded that the state had failed to meet its burden of clear and convincing evidence and dismissed the prior finding of abuse.\textsuperscript{20} The trial justice later issued a follow-up order providing for visitation and gradual reunification; DCYF responded with an appeal and a motion to stay the order.\textsuperscript{21} On appeal, DCYF raised several issues; the only one that the court addressed was "whether the trial justice erred in dismissing the abuse petition after reconsidering the parents' new evidence."\textsuperscript{22}

\textbf{ANALYSIS AND HOLDING}

In addressing DCYF's appeal of the trial justice's final decision and order, the Rhode Island Supreme Court utilized a

\begin{itemize}
  \item \textsuperscript{15} Id. at 681.
  \item \textsuperscript{16} Id.
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} Id.
  \item \textsuperscript{19} Id. at 682.
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} Id.
\end{itemize}
two-step analysis: first, it addressed the admissibility of Dr. Raggio’s expert testimony to determine if the trial justice abused his discretion in allowing the evidence in; second, it analyzed whether the trial justice erred in dismissing the original abuse petition after considering the parents’ newly admitted evidence.23

Admissibility of Dr. Raggio’s Expert Testimony

In appealing the trial justice’s admission of Dr. Raggio’s testimony, DCYF claimed that this expert “fail[ed] to establish a valid methodology to test her theories, including her inability to test her theory, paucity of peer review, unknown rate of error, lack of general acceptance in the orthopedic community” and, as such, “her unique opinions . . . w[ere] created merely for purposes of testifying.”24 The trial justice allowed Dr. Raggio’s testimony in based on her “superb credentials in the field,” as well as his interpretation of her testimony as applying “known scientific principles of bone development” and not junk science.25

In analyzing the trial justice’s decision, the Rhode Island Supreme Court applied the now familiar Daubert26 analysis, as embodied in the language of Rule 702 of the Federal Rules of Evidence,27 in which the trial justice is viewed as a “gatekeeper” to “ensure that any and all scientific testimony or evidence admitted is not only relevant, but [also] reliable.”28 In such an analysis, when a party is introducing potentially “novel” expert testimony, the expert’s testimony may only be admitted if the testimony will be “scientific knowledge that . . . will assist the trier of fact.”29

23. Id. at 682-86.
24. Id. at 682-83.
25. Id. at 683.
27. FED. R. EVID. 702 (stating that: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of fact or opinion.”)
28. 877 A.2d at 683 (quoting Daubert, 509 U.S. 579, 597 (1993)).
29. Id. (quoting Dipetrillo v. Dow Chem. Co., 729 A.2d at 677, 687 (R.I. 1999)).
In reviewing the trial court’s analysis, the Rhode Island Supreme Court focused on the trial justice’s findings as to Dr. Raggio’s credentials and the methodology that Dr. Raggio utilized in forming her opinion as to Mackenzie’s condition. The court noted that a trial justice is not expected to become an expert himself or herself as to the substance of the scientific area being testified about, and need not focus on the expert’s conclusions, “but rather, whether the reasoning used in forming the expert conclusion was sound.” Additionally, in satisfying the Daubert standard, the court found that Dr. Raggio’s testimony would aid the trier of fact (in this case, the trial court justice) in its analysis and that the trial court justice did not abuse his discretion in admitting the testimony as relevant.

Dismissal of the Abuse Petition

In its appeal, DCYF also alleged that the trial justice erred in dismissing the prior abuse petition, in light of the parents’ newly admitted testimony by Dr. Raggio. DCYF claimed that Dr. Raggio’s diagnosis of Mackenzie as having Ehlers-Danlos Syndrome (and her feeling that this was the causation of Mackenzie’s many fractures, rather than parental abuse) was not supported by the evidence, and as such, the trial justice erred in reversing his prior determination of abuse.

In examining the trial court’s reversal and subsequent dismissal of the prior abuse petition, the Rhode Island Supreme Court focused on the lower court’s original finding that there was “no direct evidence of abuse on the part of the parents... [but that instead a permissible inference could be made that] the parents had inflicted or allowed to be inflicted upon the child, physical injury” and that “it is possible that in five years or so, any difficulties may be resolved to the satisfaction of the entire scientific-medical community.” Indeed, the Rhode Island Supreme Court noted, this appears to have been just the case, as

30. Id. at 684.
31. Id.
32. Id. at 685.
33. Id.
34. Id.
35. Id.
four years later, with the emergence of Dr. Raggio’s testimony, it appeared that the child was suffering from “Ehlers-Danlos type syndrome” and that this syndrome, rather than parental abuse, was the cause (with other medical conditions) of the child’s many fractures.\textsuperscript{36}

Consequently, due to both the newly admitted expert testimony and the lack of any direct physical evidence of abuse by the parents, the Rhode Island Supreme Court upheld the trial court’s reversal of the earlier finding of abuse, and the lower court’s subsequent dismissal of the abuse petition altogether, as DCYF failed to meet its evidentiary burden with clear and convincing evidence.\textsuperscript{37}

**COMMENTARY**

From the time of the original ex parte order of detention by the trial justice (December 25, 1998), until the time of the final issuance of the Rhode Island Supreme Court’s opinion (July 18, 2005), Mackenzie and her parents indeed embarked on what turned out to be “a complex, Dickensian, procedural journey”\textsuperscript{38} that can only have created tremendous stress, turmoil, and destruction to each of them as individuals and as a family unit. Understanding that newly acquired medical knowledge and technology are facts of life in an ever-changing information landscape, it nonetheless seems unacceptable that this family could not have found legal closure earlier (by one means or another) and been allowed to get back on the path to reunification and eventual healing. If nothing else, the history of Mackenzie’s case serves as a commentary on the entire child welfare and social services structure within the state. The fact that the original trial justice in this case did reconsider at all his own earlier finding of abuse with the newly admitted evidence, is evidence that even in the most difficult of cases, there is hope of progress.

**CONCLUSION**

The Rhode Island Supreme Court held that a trial justice’s admission of newly discovered expert testimony as to a child’s

\textsuperscript{36} Id. at 685-86.  
\textsuperscript{37} Id. at 686.  
\textsuperscript{38} Id. at 676.
medical condition was not in error and that the trial justice’s reconsideration and dismissal of the abuse petition was, based on this new evidence of the child’s Ehlers-Danlos Syndrome, proper.\textsuperscript{39}

\textit{Id.} at 685-86.
Property Law. Palazzolo v. State, No. 88-0297, 2005 WL 1645974 (R.I. Super. July 5, 2005). "Constitutional law does not require the state to guarantee a bad investment." Nor does a regulatory taking occur where the background principles of public nuisance or the public trust doctrine act to limit the plaintiff's property rights. Where the plaintiff's "bundle of rights" do not provide for the proposed use of the property, any regulation proscribing that use does not result in a taking under the Fifth Amendment.

FACTS AND TRAVEL

The plaintiff, Anthony Palazzolo, first acquired an interest in the subject property in 1959. The site consisted of eighteen acres of land south of Winnapaug Pond, "a tidal, salt water pond" in Westerly, Rhode Island. Immediately after having acquired an interest in the site, Palazzolo sold six lots located on the more upland portions of the site. Approximately one half of the remaining site lies below mean high water (MHW). Soil conditions make the majority of the site challenging for home construction. With the exception of an upland area, redevelopment of much of the site would require significant excavation of existing soils and "as much as six feet of fill." Although several homes in the area have been constructed on filled wetlands, filling has not generally occurred in any area of the salt marsh. In addition to a valuable habitat for wildlife, the salt marsh has an "amenity value" to the property owners in the

2. Id.
3. Id.
4. Id.
5. Id. The court accepted a survey filed with the court "as substantial scientific evidence as to the location of the mean high water (MHW) mark in 1986," the year of the alleged taking. Id. at *2 n.16.
6. Id. at *2.
7. Id.
8. Id.
area and the community. On several occasions since the 1960s Palazzolo has sought permission to fill his site for redevelopment. In 1985, Palazzolo applied to the Rhode Island Coastal Resources Management Council (CRMC) to fill his site for construction of a beach facility. Palazzolo claimed the date that application was denied, March 3, 1986, as the date his property was taken. Following a 1997 bench trial, the Superior Court held there was no taking on the grounds that the regulations prohibiting development of the site were in effect prior to Palazzolo's acquiring an interest in the land. Because the regulations had been in effect at the time, the court reasoned that Palazzolo "could not have had [any] reasonable investment-backed expectations." In addition, the court held that Palazzolo had not been denied all beneficial use of his property where the state would allow the development of one lot valued at approximately $200,000. The trial court also found that Palazzolo's development vision would constitute a public nuisance, thus barring any compensation.

The Rhode Island Supreme Court affirmed the lower court decision on the basis that the appeal was not ripe because Palazzolo had never properly submitted a development application to the CRMC. In 2001, the United States Supreme Court reversed that decision, holding the case was ripe and remanded the case for a Penn Central analysis. The U.S. Supreme Court also affirmed the conclusion that the regulations did not deprive Palazzolo of all economic use of his property because "the value of the upland portions [was] substantial." On June 24, 2002, the

---

9. Id. at *3.
10. Id. at *1 n.2. A 1960s application to fill his site with dredge materials from Winnapaug Pond was followed by another application to fill the site in 1983 and again in 1985. Id.
11. Id.
12. Id.
13. Id. at *1.
14. Id.
15. Id.
16. Id.
17. Id. (citing Palazzolo v. R.I., 746 A.2d 707 (R.I. 2000)).
Rhode Island Supreme Court remanded the case to the Superior Court.  

**ANALYSIS AND HOLDING**

On remand, the plaintiff disputed the precision of a survey establishing the high water mark and argued that he could economically develop his property. Palazzolo further disputed the classification of Winnapaug Pond as a tidal pond subject to the public trust doctrine. The state, citing law of the case, countered that, consistent with the court's conclusion at the first trial, the development constitutes a public nuisance and thus bars a takings claim. Furthermore, the state argued that the public trust doctrine precluded the economic development of Palazzolo's site because nearly one-half of the site sat below the mean high water mark and such portion did not belong to Palazzolo to develop.

**Public and Private Nuisance**

The Superior Court found Palazzolo's development plan constituted a public nuisance at the first trial in 1997. Thus it was within the court's discretion to let the prior ruling stand under the law of the case. However, because significant new evidence was introduced, the court reconsidered the state's claim of nuisance. Actionable nuisances fall into two classifications: public and private. A private nuisance involves an interference with the use and enjoyment of land. It involves a material interference with the ordinary physical comfort or the reasonable use of one's

---

21. *Id.* at *1.* “[A]dditional evidence was taken over eleven days to augment the 1997 trial record” and a tidal survey was filed with the court. *Id.*

22. *Id.* at *3.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* (citing *Palazzolo v. State*, 746 A.2d 707 (R.I. 2000) (affirming the lower court's decision)).

27. *Id.* at *3*-*4.* The law of the case provides “that ordinarily after a judge has decided an interlocutory matter in a pending suit, a second judge, confronted at a subsequent phase of the suit with the same question in the identical matter, should refrain from disturbing the first ruling.” *Id.* at *4* (quoting *State v. Infantolino*, 355 A.2d 722, 726 (R.I. 1976)).

28. *Id.*
property. A public nuisance is an unreasonable interference with a right common to the general public. It is behavior that unreasonably interferes with the health, safety, peace, comfort or convenience of the general community.29

The court found that the proposed development was “practically certain” to result in “substantial damage” to the ecology of Winnapaug Pond.30 Thus the court held that, because clear and convincing evidence demonstrated the development would constitute a public nuisance, Palazzolo had no right to develop his site as proposed.31 Without a right to develop the site as proposed, the state’s denial of the same development could not result in a taking.32

No neighboring property owner brought a claim of private nuisance.33 Even had Palazzolo’s development been built, the likely result would have been a non-actionable obstruction of the neighbor’s view.34 Thus, the court held Palazzolo’s development would not constitute a private nuisance.35

Public Trust Doctrine

Citing the United States Supreme Court’s decision in Lucas v. South Carolina Coastal Council,36 the court reiterated the point that a taking cannot result from a prohibited use that was not part of the land owner’s title and that one’s title is subject to certain background principles such as nuisance and the public trust doctrine.37 The public trust doctrine provides that land below the high water mark is held by the state for the benefit of the public.38 The court accepted the survey filed with the court as

29. Id. (quoting Citizens for Pres. of Waterman Lake v. Davis, 420 A.2d 53, 59 (R.I. 1980) (internal citations omitted)).
30. Id. at *5.
31. Id.
32. Id.
33. Id. at *6. “Historically the law of private nuisance has been applied to conflicts between neighboring, contemporaneous land uses.” Id. (quoting Hydro-Mfg., Inc. v. Kayser-Roth Corp., 640 A.2d 950, 957 (R.I. 1994)).
34. Id.
35. Id.
38. Id. at *7. The public trust doctrine is also incorporated into the Rhode Island Constitution. Id. (citing R.I. CONST. art 1, §17).
accurately establishing the mean high water line for 1986 and thus concluded that fifty percent of Palazzolo's site sat below that mark. 39 The court, also finding Winnapaug Pond a tidal body of water, concluded that half of Palazzolo's land was subject to the public trust doctrine. 40 Because the doctrine applied to only half of the site, it could not completely bar Palazzolo's taking claim. 41 However, the court reasoned that it had a direct relationship to his reasonable investment-backed expectations under a Penn Central analysis. 42

Penn Central Analysis

The remand instructed the court to analyze Palazzolo's claim under the Penn Central test. 43 Analysis under Penn Central includes the following three factors: "(1) the character of governmental action, (2) the economic impact of the action on the claimant, and (3) the extent to which the action interfered with the claimant's reasonable investment-backed expectations." 44 Before conducting its analysis, the court concluded that the relevant parcel under review did not include the six lots that Palazzolo had sold shortly after he acquired his interest. 45 The regulatory scheme charged with the taking never applied to those six lots. 46

The court quickly addressed the character of the government's action, along with the plaintiff's argument that he should not have to bear the burden of this regulation alone. 47 The court reasoned that the restrictions on coastal development have the same impact on all owners of tidal salt marsh. 48 Thus, the regulatory scheme did not particularly target the plaintiff. 49 In addition, the court reasoned it would be unreasonable to require the government to

39. Id. at *6.
40. Id.
41. Id. at *7.
42. See id.
43. Id. at *8. (citing Penn Central, 438 U.S. 124 (1978)).
44. Id.
45. Id.
46. Id.
47. Id. at *9.
48. Id.
49. Id.
compensate property owners for every change in the general law.\textsuperscript{50} Thus the character of the government's action here would not constitute a taking.\textsuperscript{51}

Likewise, the court found the circumstances failed to support a taking under the second prong of the test.\textsuperscript{52} Accounting for the unique costs required to develop this site and the amenity value of the marsh, the court found Palazzolo's alleged loss of a three-million dollar profit unreliable.\textsuperscript{53} A "battle of trial experts" ended with the court accepting the state's presentation of expected development costs and appraisal values.\textsuperscript{54} However, the court noted that neither side accounted for the amenity value of the existing landscape upon which any development would intrude.\textsuperscript{55} Thus the court found even the state's estimated profit might be "optimistic."\textsuperscript{56} The court then concluded that Palazzolo would benefit more financially by selling the property in its undeveloped state because of the greater value in the upland area of the site that allowed construction of a single home.\textsuperscript{57} Regardless of the effect of the public trust doctrine on curtailing the size of the parcel, the court found the potential costs for the development would result in a loss to the plaintiff.\textsuperscript{58} Thus the regulations prohibiting that development could not have an adverse economic impact on Palazzolo.\textsuperscript{59}

Pursuant to the remand, the court focused on the third factor of the \textit{Penn Central} analysis, Palazzolo's reasonable investment-backed expectations.\textsuperscript{60} Looking at Palazzolo's earliest interest in the land, the court concluded that whatever investment-backed expectations he held, they were not "realistically achievable."\textsuperscript{61} No similar developments had ever been proposed for the area.\textsuperscript{62} The immediate sale of the six "prime" buildable lots left Palazzolo with

\textsuperscript{50} Id. at *9 n.43 (citing Palazzolo v. Rhode Island, 533 U.S. at 627).
\textsuperscript{51} Id. at *9.
\textsuperscript{52} Id. at *11.
\textsuperscript{53} Id. at *9, *10.
\textsuperscript{54} Id. at *10.
\textsuperscript{55} Id. at *11.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at *12.
\textsuperscript{61} Id. (emphasis omitted).
\textsuperscript{62} Id.
land that was "not readily capable of development." The court pointed out that the original seller of the property had prior real estate experience, must have known of the challenges to developing the site, and presumed that these challenges "undoubtedly weighed heavily in [his] practical decision to sell out to Palazzolo." Furthermore, because the public nature of land below the mean high water mark "is an ancient doctrine," the court found that Palazzolo knew or should have known that any development would require filling the site which would require state permission. In fact, the court noted that, as early as 1962, Palazzolo's application for a filling permit included an acknowledgment that the filling was "within the public tide waters of the state." Likewise, the court noted the application forms gave notice of the state's regulation of tidewaters. "Rhode Island law regulated tidewaters and the filling of nearby flats as early as 1876."

The court then considered Greater Providence Chamber of Commerce v. Rhode Island where the Rhode Island Supreme Court issued guidance regarding parcels subject to the public trust doctrine. That guidance indicated that a coastal land owner could establish free and clear title to land that is partially below mean high water if the owner fills the land with the "acquiescence or the express or implied approval of the state and improves upon the land in justifiable reliance on the approval." Here, the numerous denials of Palazzolo's requests for permits to fill his land along with the fact the he had made no effort to improve the land in reliance on any state action or acquiescence, negated the possibility that he had established title to the land. In short, "[p]laintiff's title is clearly subject to the public trust doctrine."

63. Id. at *12 n.73.
64. Id. at *12.
65. Id.
66. Id. at *12 n.75.
67. Id. at *14 n.78.
68. Id.
69. 657 A.2d 1038 (R.I. 1995).
71. Id. (quoting Greater Providence Chamber of Commerce, 657 A.2d at 1044 (R.I. 1995)).
72. Id.
73. Id.
Given the state’s historical role in regulating the filling of tidal waters, the public trust doctrine, the transfer of the prime lots at the time of his investment, and the difficulties in developing the site, the court found that “Palazzolo’s reasonable investment-backed expectations were modest.”

COMMENTARY

The opinion’s conclusion is soundly rooted in the background principles of nuisance. Nevertheless, the takings analysis raises a few questions. For one, the court’s totality-of-the-circumstances analysis of Palazzolo’s investment-backed expectations includes evidence of his business associate’s decision to sell to Palazzolo. Is it reasonable to impute the business associate’s real estate experience and judgment to the plaintiff as an element in determining the plaintiff’s reasonable expectations? Is it also reasonable to assign knowledge of the public trust doctrine’s application to land below the high water mark, as determined in 1986, when the investment-backed expectations are measured at the time of his acquisition in 1959? Is an understanding of the effect of the “ancient doctrine” of public trust on the bundle of property rights, particularly the distinction between state regulations and sovereign title, a reasonable element of the average citizen’s investment-backed expectations?

Notwithstanding these questions, the court’s analysis reminds us of a clear and simple threshold in takings analysis that often gets overlooked by issues of compensation and, more recently, a renewed interest in defining public use. The Fifth Amendment’s bar against taking private property without just compensation applies to private property. The state cannot be charged with taking a property interest that it already owns. Given Rhode Island’s extensive coastline, the market interest in waterfront property and the state’s legitimate interests in managing its resources through coastal regulation will inevitably conflict. The strength of the background principles in nuisance and the public trust doctrine establish a solid foundation to resolve those conflicts by defining property rights at the outset.

74. Id. at *14.
75. See U.S. CONST., amend. V.
CONCLUSION

The Rhode Island Superior Court held that given the circumstances presented in this case, the proposed development would constitute a public nuisance and thus preclude any takings claim.\textsuperscript{76} Regardless of that finding, the public trust doctrine proscribed the plaintiff's development of one-half of the site.\textsuperscript{77} As to the remaining land available for development, the court found that the regulations did have an adverse economic impact where the unique costs made development unprofitable.\textsuperscript{78} Furthermore, a reasonable person would have recognized the problematic character of the site, thus the plaintiff could have little or no reasonable investment-backed expectations to develop the site as proposed.\textsuperscript{79} Most directly, the plaintiff's "title did not include a property right to develop the parcel as he proposed."\textsuperscript{80}

Colin M. McNiece

\textsuperscript{76} See Palazzolo, 2005 WL 1645974 at *4-*5.
\textsuperscript{77} Id. at *6-*7.
\textsuperscript{78} Id. at *9-*11.
\textsuperscript{79} Id. at *12.
\textsuperscript{80} Id. at *15.
State Affairs and Government. Tanner v. Town Council of East Greenwich, 880 A.2d 784 (R.I. 2005). Local citizens possess standing to bring actions against public bodies under the Open Meetings Act when a public notice hinders their right to be informed of agenda items at public meetings. Remedial public notice, in compliance with the Open Meetings Act, does not render a case moot; the issue of the first violation remains justiciable. Whether a violation of the Open Meetings Act has indeed occurred is judged according to a “totality of the circumstances” standard, taking into account how the public would perceive the notice as compared to what actually occurred at the meeting. Finally, attorney’s fees, a mandatory award for successful plaintiffs in Open Meetings Act suits, must be awarded according to a standard of “justice and fairness.”

FACTS AND TRAVEL

The Open Meetings Act (OMA), as enacted by the Rhode Island Legislature, requires that “public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of the public officials and the deliberations and decisions that go into the making of public policy,”¹ and that a “statement specifying the nature of the business to be discussed” be provided to the public.² The controversy in Tanner v. Town Council of East Greenwich³ arose from an alleged OMA violation which occurred, on October 19, 2001, when the East Greenwich town council posted a public notice which was intended to inform local citizens of an October 23, 2001, town council meeting.⁴ In an attempt to comply with the OMA, the public notice stated that, at the October 23, 2001 meeting, the agenda would include “Interviews for Potential Board and Commission Appointments” to the town zoning and

4. Id.
planning boards. At the meeting, however, the town council not only interviewed the potential appointees but also proceeded to vote on them, selecting three of the six. Later, Frederick S. Tanner decided to file a complaint against the town council, claiming that it had violated the OMA, because it had not provided proper notice in advance of the council's decision to vote. On November 14, 2001, Mr. Tanner informed the town council that he would bring suit against the town for failing to provide a sufficient "statement specifying the nature" of what was actually to occur at the October 23, 2001 meeting.

In the face of Mr. Tanner's challenge, the town council posted a second notice, regarding a November 19, 2001 meeting, which would have on its agenda "Boards and Commissions Appointments." During that second meeting, however, the council would refrain from the voting issue and instead schedule a third meeting for November 26, 2001, at which time the council would address the issue. The council again posted a notice which clearly indicated that a future vote would take place on the board appointments. On November 26, 2001, the board reaffirmed the three appointments previously made on October 23, 2001. Mr. Tanner did not challenge the November 26, 2001 appointments, but maintained that the violation of the OMA at the October 23, 2001 meeting must be remedied.

In his complaint, Mr. Tanner moved for summary judgment and an award of three possible remedies available under the OMA: a civil fine, attorney's fees, and an injunction. The hearing justice granted summary judgment to Mr. Tanner, finding that the notice led the public to believe that only interviews, and not a vote on the appointments, would take place at the October 23, 2001 meeting.

5. Id.
6. Id.
7. Id.
8. Id. at 789-90.
9. Id. at 789.
10. Id.
11. Id.
12. Id.
13. Id. at 789 n.3, 790.
14. Id. at 789-90.
15. Id. at 790.
A later, second phase of the trial would decide Mr. Tanner's remedy. At that later remedial hearing, the hearing justice determined that a civil fine could not be imposed on the town council because Mr. Tanner was unable to establish that the town council's OMA violation was done "willfully or knowingly." The hearing justice awarded Mr. Tanner attorney's fees and costs in the amount of $11,193.89. Unless such an award would be "unjust," the award of attorney's fees is mandatory in instances of OMA violations. The hearing justice found no special circumstance that would render such an award "unjust." The East Greenwich town council appealed the judgment to the Rhode Island Supreme Court, alleging four points of error.

**ANALYSIS AND HOLDING**

1. **Standing**

Mr. Tanner's standing to bring suit against the town council was the first issue addressed by the Rhode Island Supreme Court. The town council averred on appeal that Mr. Tanner's status as a resident of East Greenwich did not in itself give him standing to bring suit and that the alleged OMA violation had not caused him any harm. The court readily noted, however, that one has standing if a controversy causes "injury in fact" or if one is granted standing as the "beneficiary of express statutory authority." Mr. Tanner did not claim to suffer, nor did he attempt to prove, any economic "injury in fact," therefore, his standing needed to rest on statutory authority. The OMA does indeed grant standing to any "citizen or entity" who is "aggrieved as a result of violations" of the OMA. Provided Mr. Tanner had been "aggrieved" by the actions of the town council on October 23,
2001, he would possess the requisite standing.  

The term "aggrieved," however, is an ambiguous term; the court noted that the legislature did not provide the term a discernable definition. It would therefore be up to the court to assign the term an interpretation not at odds with the legislative purpose behind the statute. By the language of the statute, the court determined that the OMA served to protect a public right. The court stated that the OMA was not intended to protect the "property or contract rights" of local citizens, but rather serves to guarantee the right to be properly informed of the "performance, deliberations, and decisions of government entities." Thus, any act which hinders this right will cause a citizen to be "aggrieved."  

Importantly, the court, drawing on precedent, made it clear that one need not have had a "personal stake" in the agenda of a public meeting to acquire standing under the OMA; the court cited Solas v. Emergency Hiring Council, in which the court determined that a citizen did not require a "personal stake" in the "substance of the meeting to assert a right to attend a meeting of a public body." As a consequence of the rule laid down in Solas, the Tanner court determined that, in addition to a right to attend a public meeting, one does not need a "personal stake" in the business of a particular meeting to assert the right to properly be "advised of the business to be conducted" at such a meeting.  

Improper notice, however, need not cause a plaintiff to miss a public meeting to acquire standing; the court previously determined that if a citizen did attend a meeting, but improper

26. See id.
27. Id. at 792.
28. Id. at 792-93.
29. Id. at 793. Reference to protection of a public right is found in the statutory language of the OMA, which states that: "public business [is] to be performed in an open and public manner" so that citizens can be "advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy." R.I. GEN. LAWS § 42-46-1 (2000).
30. 880 A.2d 793.
31. See id.
33. 880 A.2d 793 (quoting Solas, 774 A.2d 820, 823 (R.I. 2001) (emphasis added)).
34. Id.
notice caused him to be "disadvantaged" or experience a "lack of preparation or inability to respond to an issue," that citizen would also be "aggrieved" under the OMA.\textsuperscript{35} Therefore, Mr. Tanner possessed the requisite standing to bring his action against the town council because, as a local citizen, he was able to allege that the notice left him unaware of any intention by the council to vote on the appointments and would leave him unprepared to respond to such action.\textsuperscript{35}

2. Mootness

The defendant town council's second point of error was the issue of mootness.\textsuperscript{37} Because the council had, on November 19, 2001, posted notice for another meeting where "Boards and Commission Appointments" would be on the agenda, they claimed that any controversy raised by the October 23, 2001 meeting was moot.\textsuperscript{38} In other words, concerned citizens would be able, at this second meeting, to voice opinions on the appointments to the zoning board, remedying any perceived inconvenience posed by the first meeting.\textsuperscript{39} The court, however, found Mr. Tanner's argument stronger.\textsuperscript{40}

Mr. Tanner argued that the case could not be dismissed for mootness because the matter was of "extreme public importance" and "capable of repetition."\textsuperscript{41} Moreover, because the town council had not, throughout the litigation, made any admission that its October 23, 2001, behavior was at all improper, he argued that the council intended to "engage in similar conduct in the future."\textsuperscript{42} Mr. Tanner also argued that, without a judgment in his favor, public bodies subject to the OMA could give improper notice of meetings, only to comply when challenged, thereby avoiding an "adverse judgment."\textsuperscript{43}

\textsuperscript{35. Id. (citing Graziano v. R.I. State Lottery Comm'n, 810 A.2d 215, 222 (R.I. 2002)).}
\textsuperscript{36. Id.}
\textsuperscript{37. Id. at 793-94.}
\textsuperscript{38. Id. at 789, 793-94.}
\textsuperscript{39. See id.}
\textsuperscript{40. See id. at 795.}
\textsuperscript{41. Id. at 794.}
\textsuperscript{42. Id.}
\textsuperscript{43. Id.}
The court also made clear that just because one statutory remedy has been rendered moot, the "viability of the case or the remaining remedies" will not be affected.\textsuperscript{44} The OMA provides for several possible remedies: injunctive relief, a civil fine of $5,000, attorney's fees, or any combination of the three.\textsuperscript{45} The November 26, 2001 meeting effectively rendered any claim to injunctive relief moot.\textsuperscript{46} However, the possibility of attorney's fees or a civil fine, in the event the court found the town council to have violated the OMA, were still issues to be resolved and therefore justiciable.\textsuperscript{47}

3. The Open Meetings Act Violation

Whether the town council had in fact violated the OMA required judicial interpretation of a certain portion of the statute itself.\textsuperscript{48} Both of the parties differed on what was required by the OMA mandate that notice of a public meeting necessitated a "statement specifying the nature of the business to be discussed."\textsuperscript{49} The town council, relying on the findings of the Attorney General, averred that the OMA should be strictly construed to require only the "nature" of any business conducted at a public meeting and not an explicit mention of any intention to vote.\textsuperscript{50} Thus, the notice posted prior to the October 23, 2001 meeting, which stated that "Interviews for Potential Board and Commission Appointments," was the agenda, should have constituted a sufficient "statement."\textsuperscript{51} Mr. Tanner, on the other hand, argued that the posting was insufficient because more than the agenda item it mentioned – interviews – took place.\textsuperscript{52} Therefore, the question of what, exactly, was required by the term "statement" became the central issue in determining the outcome of the case.\textsuperscript{53}

The court noted that ambiguous statutory language, such as the phrase "statement specifying the nature of the business to be discussed," requires that the court not simply insert its own

\textsuperscript{44} Id. at 794-95.
\textsuperscript{45} Id. at 794 (citing R.I. GEN. LAWS § 42-46-8(d) (2000)).
\textsuperscript{46} See id. at 795.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 795-96.
\textsuperscript{49} Id. at 795 (quoting R.I. GEN. LAWS § 42-46-6(b)).
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 789, 795.
\textsuperscript{52} Id. at 795.
\textsuperscript{53} Id. at 796.
interpretation; rather, the court must "glean the intent and purpose of the Legislature" and devise an interpretation "consistent" with the Legislature's "policies or obvious purposes." Therefore, the Tanner court first determined the overall purpose of the OMA before it attached any judicial interpretation to the Act's language. The "explicit purpose" the court found in the OMA was clear: "[P]ublic business [must] be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy." To the court, this section of the OMA was intended to give the public "greater opportunity" to gain access to "issues of public importance," so that the public can engage itself in "meaningful participation in the decision-making process."

With this central purpose of the OMA in mind, the court determined that the legislature intended to provide the courts with a "flexible standard" regarding what was required of the requisite "statement specifying the nature of the business to be discussed." The court consulted the jurisprudence of two sister states confronted with a similar problem. The Supreme Courts of both Colorado and Tennessee resolved the issue by establishing a "totality of the circumstances standard." So too would the Tanner Court. Understanding the balance between "safeguarding the public's interest" and the "realities of local government," the court declined to provide "magic words" or "specific guidelines" under the OMA requirement of public notice. Instead, the court held that to comply with the OMA,

54. Id. (quoting Motola v. Cirello, 789 A.2d 421, 423 (R.I. 2002)).
55. Id. (quoting Keystone Elevator Co. v. Johnson & Wales Univ., 850 A.2d 912, 923 (R.I. 2004)).
56. See id.
57. Id. (quoting R.I. GEN. LAWS § 42-46-1 (2000)).
58. Id.
59. Id.
60. Id.
61. Id. at 796-97 (citing Memphis Pub. Co. v. City of Memphis, 513 S.W.2d 511, 513 (Tenn. 1974); Benson v. McCormick, 578 P.2d 651,653 (Colo. 1978)).
62. Id. at 797-99.
63. Id. at 797.
public bodies must provide "fair notice" to the public in a manner that would, under the "totality of the circumstances," "fairly inform the public of the nature of the business to be discussed or acted upon." 64

Applying this "totality of the circumstances" standard to the present case, the court found that the town council had not met this standard. 65 The court stated that a notice which declares that a meeting's agenda is to conduct "Interviews for Potential Board and Commission Appointments" neither "states nor implies" that any voting on these potential board members would occur. 66 The court referred to the dictionary definition of the word "interview" and found the term to indicate only a "formal meeting . . . in which facts or statements are elicited from another." 67 Relying on the posted notice, a member of the public could not reasonably have foreseen that, after these interviews, the council would vote on the potential candidates. 68 Therefore, under the "totality of the circumstances," it could not be held that the town council had sufficiently provided a "statement specifying the nature of the business to be discussed," because the council proceeded to make decisions of importance beyond that included in the public notice. However, the court determined that because of the ambiguous statutory language, the town council's violation could not be construed as "willful." 69

To be sure, the court stopped short of requiring that all decisions to vote at public meetings must be signaled in the requisite public notice. 70 The town council's violation lay in the fact that its notice, describing interviews without mentioning an intention to vote, was "misleading." 71

4. Attorney's Fees

The town council's final point of error was the issue of

---

64. Id.
65. Id. at 798.
66. Id.
67. Id. at 798 n.17 (quoting THE AMERICAN HERITAGE DICTIONARY 916 (4th ed. 2000)).
68. Id. at 798.
69. Id. at 802.
70. Id.
71. See id.
The $11,193.89 awarded to the plaintiff by the hearing justice was, in the town council’s view, “unjust” due to “special circumstances.” The “special circumstances” argued by the town council on appeal was that it should not be penalized for acting in accordance with the findings of the Attorney General, which stated that the intention to vote was not required on the notice. However, even the Attorney General’s findings mentioned that the notice could not be “misleading.” Under the “totality of the circumstances,” the court had already determined that the town council’s notice was in fact “misleading.”

The Tanner court noted that attorney’s fees are mandatory when an OMA violation has occurred, but that the legislature granted the courts “a great deal of discretion” in determining the amount of these fees. The purpose of the award was to “provide an economic incentive to challenge violations of the OMA, deter future violations, and penalize public bodies for noncompliance with the act.” The court held, however, that the “great deal of discretion” the Legislature had provided the courts in determining such an award, requires that the courts consider “the myriad of circumstances” surrounding issues of public notice and the “tenets of justice and fairness.” Therefore, in addition to the burden placed on the defendant to show “special circumstances,” the court must make certain that the award is “proportional to the breach and the effect thereof.”

On the issue of attorney’s fees, the Tanner court diverged with the determinations of the hearing justice. Employing the “abuse of discretion standard,” the court concluded that the hearing justice had only considered the fact that the council relied on the opinions of the Attorney General as a “special circumstance” to warrant mitigation of attorney’s fees. The Tanner court agreed

72. Id. at 799.
73. Id.
74. Id.
75. Id.
76. See id.
77. Id. at 800.
78. Id. at 794 n.10 (citing N.A.S. Imp., Corp. v. Chenson Enter., Inc., 968 F.2d 250, 254 (2d Cir. 1992)).
79. Id. at 800 (citing Edwards v. State, 677 A.2d 1347, 1349 (R.I. 1996)).
80. Id.
81. Id. at 801.
with the hearing justice’s findings that such reliance on the Attorney General’s findings would not meet the standard of “special circumstances,” but that the greater issue of applying the “inherent tenets of justice and fairness” remained. According to the record, there was no indication that the hearing justice had attempted to employ such standards to ensure that the remedy was “proportional to the breach and effect thereof.”

Rather than remanding the case with instructions for the hearing justice to consider the “tenets of justice and fairness,” the Tanner court determined, according to the full record before it, that the award issue could be adjudicated on appeal. Adhering to the standard of “justice and fairness,” the court looked favorably upon the actions that the town council had taken when it later provided proper notice for the November 26, 2001, meeting. In the court’s view, the town council should not be “further penalized when it [has taken] appropriate corrective measures.” Establishing that the council’s October 23, 2001, actions were not willful, that the statutory language was, at the time, relatively unclear, and that the council acted to correct its initial violation, the court reduced the award of attorney’s fees to $1,500.

COMMENTARY

In a 1996 article, Professor B. Mitchell Simpson expressed concern that the Rhode Island Supreme Court had “yet to rule on many important points” regarding the OMA – points which had already been decided upon by “other state supreme courts and the United States Supreme Court.” Chief among Simpson’s concerns was that the lack of Rhode Island Supreme Court guidance left public bodies with only the advisory opinions of the Attorney General when attempting to understand the OMA. Such a state of affairs was exactly the root of the controversy in Tanner. As

82. Id.
83. Id.
84. Id.
85. Id. at 802.
86. Id.
87. Id.
89. Id.
mentioned above, the East Greenwich town council relied on the findings of the Attorney General. This finding supported an interpretation that public notice under the OMA did not require information about any vote that would take place at a public meeting, provided the notice was not misleading. Without a Rhode Island Supreme Court decision controlling the matter, it is understandable that different parties would have different interpretations of the OMA. Fortunately, Tanner provides greater guidance by lending a degree of clarification on certain key elements of the OMA.

On the issue of standing, the court's interpretation of the term "aggrieved" was effectively a decision for the people. The court's broad interpretation of the term enables a concerned citizen to readily challenge those who violate this public right. However, the court was careful to err on the side of political reality when it determined that the requirements of public notice shall be subject to a "totality of the circumstances" standard. Without such consideration, the broad grant of standing would cause public bodies to be liable for even the most questionable violations. This end is also served by the obligation that the court imposed on the lower courts to consider the "tenets of justice and fairness" when determining the mandatory award of attorney's fees. Rather than simply granting the maximum amount in all cases of OMA violations, the court ensured that the character of the violation itself and any corrective measures taken by the public body would be weighed against the harm done to the plaintiff.

Fortunately, Tanner provides greater guidance to the lower courts on several key provisions of the OMA. However, the court's response created a flexible standard and therefore may leave room for different understandings of related issues. The court's decision in Tanner was a much-needed step towards the clarification of key OMA provisions.

CONCLUSION

In all, Tanner established a broad interpretation as to who

90. Tanner, 880 A.2d at 795.
91. Id. at 784.
92. Id. at 797.
93. Id. at 801.
has standing to bring a claim alleging an OMA violation. However, due to a realistic understanding of the function of public bodies, the court refrained from providing an exact requirement for what actually constitutes an OMA violation. The “totality of the circumstances” standard sheds greater light on how a court should determine whether a violation has occurred; but, inevitably, this standard will ensure that differences of opinion will arise from time to time as to whether a public body has indeed violated the OMA.

Kevin Rolando
Tort Law. *Esposito v. O'Hair*, 886 A.2d 1197 (R.I. 2005). The common law collateral source rule is a well-established principle of Rhode Island law. Absent a statutory provision to the contrary, the collateral source rule prevents defendants in tort actions from reducing their liability by presenting evidence that the injured party received compensation for injuries from a source wholly independent of the tortfeasor. Rhode Island General Law § 9-19-34.1, which abrogates the common law collateral source rule, details a list of collateral sources, including payments from any "state income disability" act, that are admissible in malpractice actions to reduce a plaintiff's damages. Medicaid is not a "state income disability" act and thus is not an admissible collateral source payment under § 9-19-34.1.

FACTS AND TRAVEL

In March of 2001, the plaintiff, Marion Thomson, filed suit against Atmed Treatment Center, Inc., Hani Zaki, M.D., Inc., and three individual physicians: James P. O'Hair, Daniel Regan, and Hani Zaki.\(^1\) Thomson alleged that the defendants were negligent when they failed to diagnose her with Hodgkins Lymphoma; subsequently, on March 15, 2003, Thomson died from Hodgkins Lymphoma.\(^2\) After Thomson's death, her complaint was amended to substitute Maria Esposito, executrix of Thomson's estate, as plaintiff in the action.\(^3\) Additionally, Dr. Zaki's insurer, the Medical Malpractice Joint Underwriting Association of Rhode Island (MMJUA) was added as a defendant.\(^4\) In September of 2003, the parties reached a settlement agreement wherein $440,000.00 was paid to the decedent's estate, while an additional sum of $381,689.26, the cost of decedent's medical expenses, was

---

2. *Id.*
3. *Id.*
4. *Id.* at 1198 n.1 (citing R.I. GEN. LAWS § 27-7-2 (2002) (prohibiting a plaintiff from bringing a direct action against an insurer while the insured defendant is alive; Dr. Zaki passed away after the initial complaint was filed)).
The defendants filed a motion for judgment as a matter of law, contending that the plaintiff's estate was not entitled to recover medical expenses because they had been paid by Rhode Island's Medicaid program. The defendants contended that under Rhode Island General Law § 9-19-34.1, plaintiff's recovery of medical expenses must be reduced by collateral source payments made pursuant to a "state income disability" act.

Plaintiff filed a cross motion, contending that Medicaid benefits were not a "state income disability" act under § 9-19-34.1, and as such, defendants were liable to the plaintiff estate for Thomson's medical expenses. Furthermore, the plaintiff claimed that, even if Medicaid payments were an admissible collateral source under § 9-19-34.1, the statute would be preempted by federal law, and thus would be unconstitutional.

In April of 2004, the court entered judgment in favor of the plaintiff. The court reasoned that § 9-19-34.1 must be strictly construed, as it abrogates the common law collateral source rule in that it allows defendants to offset their liability by presenting evidence that a third party paid the plaintiff's medical expenses. The court found that Medicaid was not a state income disability act within the meaning of § 9-19-34.1 because it does not compensate individuals for lost income, and disability is not a prerequisite to establishing eligibility for Medicaid benefits. Because the court agreed with the plaintiff that Medicaid benefits were not an admissible collateral source under § 9-19-34.1, it declined to address the two constitutional arguments that were raised. The defendants subsequently appealed.

---

5. Id. at 1198.
6. Id.
7. Id. (citing R.I. GEN LAWS § 9-19-34.1 (2000)).
8. Id. Because there were no disputed issues of fact and the parties had agreed as to the amount of damages, the motion justice applied a summary judgment standard to the parties' motions. Id. at 1198 n.3.
9. Id. at 1198.
10. Id. at 1199.
11. Id.
12. Id.
13. Id.
14. Id.
BACKGROUND

In 1976, as a result of the increasing concerns over the limited availability and increasing cost of medical malpractice insurance premiums, the Rhode Island General Assembly enacted the Medical Malpractice Reform Act.\textsuperscript{15} During that same legislative session, the General Assembly also enacted Rhode Island General Law § 42-14.1-1, authorizing the creation of the MMJUA.\textsuperscript{16} The MMJUA provision was enacted to "stabilize the cost of medical malpractice insurance by pooling expenses and losses in insurance coverage."\textsuperscript{17} The enactment of the Medical Malpractice Reform Act also included the creation of a collateral source statute codified as Rhode Island General Law § 9-19-34.\textsuperscript{18} Prior to this legislation, if an injured party received compensation for injuries from a source wholly independent of the tortfeasor, such payment could not be deducted from the damages that the plaintiff would otherwise collect from the tortfeasor.\textsuperscript{19} Section 9-19-34 effectively abrogated the common law collateral source rule by making collateral source benefits received by a plaintiff admissible in medical malpractice actions against physicians.\textsuperscript{20} As originally enacted, the Rhode Island collateral source provision identified a list of admissible collateral sources.\textsuperscript{21} Among the list of admissible collateral source benefits were payments received from "any state or federal income disability or workers' compensation act."\textsuperscript{22}

However, by 1986, concerns over the rising cost of medical malpractice insurance had not subsided, and the MMJUA experienced an accelerated negative financial position resulting in a fund deficit; in response to these concerns, the legislature took further action, passing An Act Relating to Malpractice.\textsuperscript{23} Similar to the 1976 Act, the 1986 Act also included a collateral source statute, Rhode Island General Law § 9-19-34.1.\textsuperscript{24} The newly

\begin{footnotesize}
\begin{itemize}
  \item[15.] Id. (citing 1976 R.I. Pub. Laws ch. 244).
  \item[16.] Id. at 1200 (citing 1976 R.I. Pub. Laws ch.1).
  \item[17.] Id. (citing St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 537 n.6 (1978)).
  \item[18.] Id.
  \item[19.] Id.
  \item[20.] Id.
  \item[21.] Id. (quoting R.I GEN. LAWS § 9-19-34 (1983)).
  \item[22.] Id. (quoting R.I GEN. LAWS § 9-19-34 (1983)).
  \item[23.] Id. (citing 1986 R.I. Pub. Laws ch. 350)
  \item[24.] Id. at 1201.
\end{itemize}
\end{footnotesize}
enacted collateral source statute, which extended its coverage to include the professional malpractice of dentists and dental hygienists, applied only to medical malpractice actions occurring after January 1, 1987. The new statute was markedly similar to its predecessor; the only modification relevant to *Esposito* was that the General Assembly removed reference to payments made pursuant to "federal" income disability or workers' compensation acts. The relevant statutory language now reads: "[T]he defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to any state income disability or workers compensation act. . . ."

**ANALYSIS AND HOLDING**

On appeal, the defendants contended that § 9-19-34.1 was a "remedial statute that should have been construed liberally to include Medicaid payments." Defendants claimed that the proposed construction of the collateral source statute is most consistent with the legislature's goal of stabilizing the cost of medical malpractice insurance premiums. Furthermore, defendants contended that Medicaid is an "income disability act" within the meaning of § 9-19-34.1 because a person must become "income disabled" to be eligible for benefits.

Conversely, the plaintiff contended that the court should strictly construe § 9-19-34.1 because it effectively abrogates the common law collateral source rule. In support of this position, the plaintiff noted that other jurisdictions have strictly construed collateral source statutes that limit a plaintiff's recovery. "[Plaintiff] contend[ed] that these cases [were] consistent with this Court's well established rule that statutes that abrogate the common law must be strictly construed." The court agreed with

25. *Id.* (citing R.I GEN. LAWS § 9-19-34.1 (1986)).
26. *Id.*
28. 886 A.2d at 1199.
29. *Id.*
30. *Id.* at 1204.
31. *Id.* at 1202.
32. *Id.* at 1202-03 (citing Jones v. Kramer, A.2d 170, 177-78 (Conn. 2004); Allstate Ins. Co. v. Rudnick, 761 So.2d 289, 293 (Fla. 2000); Oden v. Chemung County Indus. Dev. Agency, N.E.2d 142, 144 (N.Y. 1995)).
33. *Id.* at 1203 (citing Gem Plumbing & Heating Co. v. Rossi, 867 A.2d
the plaintiff and held that Medicaid was not an admissible collateral source payment under section 9-19-34.1. In arriving at its decision, the Esposito court considered the defendant's two principal contentions: (1) that § 9-19-34.1 was a remedial statute that should have been construed liberally to include Medicaid payments; and (2), that Medicaid is an income disability act within the meaning of § 9-19-34.1.

The court rejected defendant's contention that § 9-19-34.1 was a remedial statute. The court noted that "it is our view, however, that a statute is not 'remedial' simply because its goal is to improve societal woes." The court reasoned that if this were the case, then all statutes would be considered remedial to some extent. The court noted that a remedial statute is "one which affords a remedy, or improves or facilitates remedies already existing for the enforcement or rights of redress of wrongs." The court reasoned that § 9-19-34.1 does not fit this definition because, unlike a remedial statute, §9-19-34.1 narrows the common law collateral source rule by reducing a plaintiff's recovery.

Moreover, the court noted "whether we apply a strict or liberal reading to § 9-19-34.1, we are not persuaded that the legislature intended the term 'income disability act' to describe this state's Medicaid program." The court reasoned that, although some Medicaid recipients are disabled, Medicaid could not be defined as an "income disability" act because many Medicaid recipients are not disabled, such as those who are aged sixty-five or older. Furthermore, the court noted that some individuals who are disabled might not qualify for Medicaid benefits if their incomes exceed a certain amount; thus "disability is not the lynchpin to the receipt of Medicaid." Moreover, the

796, 803 (R.I. 2005)).
34. Id. at 1204.
35. Id. at 1199.
36. Id. at 1204.
37. Id. at 1203.
38. Id. (citing Ayers-Shaffner v. Solomon, 461 A.2d 396, 399 (R.I. 1983)).
39. Id.
40. Id. (quoting Ayers-Shaffner, 461 A.2d at 399).
41. Id. at 1203.
42. Id.
43. Id. at 1203-04 (citing R.I. GEN LAWS § 40-8-3 (1997)).
44. Id. at 1204.
court found that individuals receiving Medicaid benefits do not actually receive income under the program; the court noted that payments are made directly to medical care providers. Ultimately, the court found that Medicaid is not a "state income disability" act under § 9-19-34.1 because, "even though some Medicaid recipients may be disabled, these individuals do not receive income under the program." Finally, the court noted that "our holding that Medicaid is not an admissible collateral source payment under § 9-19-34.1 renders it unnecessary for us to address whether the statute is preempted by federal law or is otherwise unconstitutional."

COMMENTARY

Some observers may find the Rhode Island Supreme Court's decision in Esposito as unjust in that it grants a windfall to the plaintiff's estate by allowing the estate to gain at the taxpayers' expense. An argument can be made that such a result is inequitable in that a plaintiff in a medical malpractice action who is ineligible to receive Medicaid benefits, and instead secures health coverage from a private insurer, will receive less compensation than a Medicaid beneficiary because benefits received from a private insurance company will be admissible to offset the defendant's liability, unlike benefits received pursuant to Medicaid. Even though the practical effect of the court's decision may appear inequitable, it would be even more unjust to relieve private tortfeasors and their insurers from liability at the taxpayers' expense. While it seems more just in this case that the plaintiff received the windfall rather than the defendants, neither result is equitable. Perhaps Rhode Island General Law § 9-19-34.1 should be amended so that all plaintiffs proceeding in a medical malpractice action will be entitled to the same amount of recovery regardless of whether the plaintiff's medical expenses were paid by Medicaid or a private insurer.

45. Id.
46. Id.
47. Id.
CONCLUSION

The Rhode Island Supreme Court held that Medicaid is not a "state income disability" act within the meaning of § 9-19-34.1 and, thus, Medicaid benefits were not an admissible collateral source to be deducted from an estate's damages.48

Jason Van Volkenburgh

48. Id. at 1204.
Tort Law. Perrotti v. Gonicberg, 877 A.2d 631 (R.I. 2005). A pregnant woman cannot recover under a theory of negligent infliction of emotional distress for mental anguish without physical symptomatology exceeding the "black cloud" that followed her around until the child was born. Similarly, a pregnant woman may not recover under an alternative theory of mental anguish stemming from her concern for the health of her unborn child, which was wholly unsupported by medical diagnostics and absent any physical suffering associated with the pregnancy.

FACTS AND TRAVEL

Jamie and Paul Perrotti were in an automobile accident involving the defendant, Paul Gonicberg, which took place on December 25, 1998.1 At the time of the accident, Mrs. Perrotti, a passenger in the vehicle, was approximately six months pregnant.2 Other occupants included the driver, Mr. Perrotti, and a backseat passenger, the couple's two-year-old daughter, Ashley.3 Mrs. Perrotti sustained injuries to both her head and knee, resulting from contact with the windshield and dashboard respectively.4 She received medical attention immediately following the accident.5 Emergency personnel performed an ultrasound and subsequently informed Mrs. Perrotti that everything was fine with the baby.6 In addition to her physical injuries, Mrs. Perrotti testified that she suffered emotional injuries including being shaken up, nervous, and scared due to concern regarding the well-being of her baby.7 Mrs. Perrotti testified that a "black cloud" loomed over her for the eighty-eight days from the day of the accident through the day that she

2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id. at 634.
delivered her baby, who was indeed healthy at delivery. Mrs. Perrotti received no additional medical consultation or treatment for any of the psychological symptoms contained in her testimony.

Mrs. Perrotti filed a negligence action against Mr. Paul Gonicberg seeking damages for physical and psychological injuries. Prior to trial, Gonicberg filed a motion in limine seeking to prevent introduction of Mrs. Perrotti's testimony regarding her psychological injuries, based on the lack of medical evidence to support that claim. Gonicberg also sought to preclude Mrs. Perrotti from introducing any evidence of physical injury to passenger Ashley and any loss in wages resulting therefrom. Mrs. Perrotti stipulated to the exclusion of evidence regarding lost wages, but contested the remaining two items. The trial justice granted Gonicberg's motion concerning Ashley's injuries, but denied the motion regarding the psychological injury testimony, in order to "see what plaintiff presents."

At trial, the parties stipulated to the issue of Gonicberg's liability, leaving damages as the only consideration for the jury. Prior to submitting the case to the jury, the trial justice involuntarily dismissed Mrs. Perrotti's claim for emotional injury resulting from the concern about the health of her unborn child. The jury subsequently awarded plaintiffs $750. Mrs. Perrotti filed a motion for a new trial, which was denied. It was from this
denial that the plaintiff appealed to the Rhode Island Supreme Court.  

ANALYSIS AND HOLDING

The plaintiff's appeal challenged the trial court's rulings, which had prevented the jury from considering the psychological injury claim and also from hearing evidence as to Ashley's injuries.  Mrs. Perrotti cited the case of Arlan v. Cervini in support of her claim that physical symptomatology is not required when the plaintiff suffers from mental anguish caused by physical bodily injury. Additionally, the plaintiff relied on Gagnon v. Rhode Island Co. to illustrate the court's willingness to allow a pregnant woman to recover damages for the mental anguish resulting from her apprehension of potential birth deformities after being physically injured.

Damages for Mental Suffering

The Rhode Island Supreme Court identified two potential theories under which the plaintiff was entitled to recover: 1) the theory of negligent infliction of emotional distress, as was utilized by the trial court and 2) the theory that a pregnant woman "is entitled to damages for mental suffering despite the absence of physical symptoms."

The court set forth the two elements necessary to prevail under a theory of negligent infliction of emotional distress: first, the plaintiff must be physically endangered by the defendant's negligent acts as a result of her presence in the zone of danger; second, the plaintiff's emotional injury must be accompanied by physical symptomatology.

19. Id.
20. Id. at 635.
22. 877 A.2d at 635.
23. 101 A. 104 (R.I. 1917).
24. 877 A.2d at 635-36.
25. Id. at 636.
26. Id. at 638.
28. Id. at 637. (citing Marchetti, 638 A.2d at 1052).
As to the element of physical symptomatology, the court recognized the "very fine line" which courts walk when determining this threshold, noting that in the past the court had adopted a "relaxed standard" as in Grieco v. Napolitano. However, the court distinguished that case on two grounds. First, the court emphasized that the plaintiff in Grieco suffered from physician-diagnosed post-traumatic stress disorder. In contrast, the court noted that Mrs. Perrotti lacked any medical support for her assertions of emotional injury. Second, and more importantly, the court pointed to the causal relationship between the defendant's negligent actions in Grieco and that plaintiff's symptoms. Conversely, the court noted the complete lack of connection between Mrs. Perrotti's physical injuries as caused by the defendant (her scraped chin and knee) and her claimed emotional injury (the looming "black cloud"). In addition, regardless of the causal connection between the negligent acts and the mental anguish, the court found the "black cloud" which plagued Mrs. Perrotti was not included in the symptomatology required to establish a prima facie case under a theory of negligent infliction of emotional distress. Consequently, the court upheld the trial court's decision to grant judgment as a matter of law for defendants under a theory of negligent infliction of emotional distress.

The court then addressed the plaintiff's second legal theory, that a pregnant woman is entitled to such damages even absent physical symptoms. The plaintiff relied on Arlan v. Cervini and Gagnon v. Rhode Island. The court briefly distinguished both cases. In Arlan, a plaintiff was able to recover damages for

29. Id. at 637-38.
30. 813 A.2d 994 (R.I. 2003). Grieco relied on cases that found symptoms such as severe nightmares, headaches, suicidal thoughts, sleep disorders, reduced libido, and fatigue to be sufficient physical manifestations of emotional injuries. See id.
31. 877 A.2d at 638 (citing Grieco, 813 A.2d at 996-98).
32. Id.
33. Id.
34. Id.
35. Id.
36. Id.
37. Id.
mental anguish for her symptoms including nervousness, grief, anxiety, and worry.\textsuperscript{40} However, the court easily distinguished Mrs. Perrotti's suffering from that of the plaintiff in Arlan, whose mental anguish sprung directly from extensive facial scarring, caused by the accident in that case.\textsuperscript{41} The court pointed to Mrs. Perrotti's comparatively minor injuries and the lack of any "direct relationship between the physical injuries suffered as a result of the accident and the mental suffering claimed."\textsuperscript{42}

The plaintiff in Gagnon was more analogous to Mrs. Perrotti, but was equally distinguishable. In that case, the plaintiff, a pregnant woman, was struck by a street car and immediately felt pain in her back and side and felt the baby pushing toward one side.\textsuperscript{43} That plaintiff was awarded mental damages for the apprehension and anxiety she suffered connected with her concern for her unborn baby's health.\textsuperscript{44} In that case, the woman's right to damages arose because she was "deprived of the right and the satisfaction of bearing a sound child."\textsuperscript{45} Mrs. Perrotti contended that Gagnon stood for the proposition that recovery for "apprehension that [a woman] would give birth to a deformed child" was allowable.\textsuperscript{46}

Mrs. Perrotti cited additional cases from other jurisdictions supporting her claim.\textsuperscript{47} The court found two important distinctions between Gagnon, the accompanying cases, and the case of Mrs. Perrotti.\textsuperscript{48} First, all of the cases cited were in a time period before reliable antenatal diagnosis.\textsuperscript{49} Second, the injuries suffered by the plaintiffs in those cases were either directly to the abdomen or consisted of symptoms related to the pregnancy itself.\textsuperscript{50} The court stated that it was not willing to "close off the

\textsuperscript{40} Perrotti, 877 A.2d at 638 (citing Arlan, 478 A.2d at 978).
\textsuperscript{41} Id. at 638-39 (citing Arlan, 478 A.2d at 978).
\textsuperscript{42} Id. at 639.
\textsuperscript{43} Gagnon v. R.I. Co., 101 A. 104, 105 (R.I. 1917).
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Perrotti, 877 A.2d at 640.
\textsuperscript{47} Id. (citing Prescott v. Robinson, 69 A. 522 (N.H. 1908); Fehely v. Senders, 135 P.2d 233 (Or. 1943); Rosen v. Yellow Cab Co., 56 A.2d 398 (Pa. 1948)).
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
avenue of recovery . . . for pregnant women who suffer mental anguish as a result of a defendant's wrongful conduct;" however, it contended that it was necessary to "reposition" the Gagnon holding in a "twenty-first century context."

The court listed the factors distinguishing those cases from Mrs. Perrotti's: she sustained no injury to her abdomen; she did not suffer from any pregnancy-related symptoms; she was explicitly informed by medical personnel that the baby was fine; she obtained an ultrasound which confirmed the health of the baby; and, she did not seek any medical or psychological treatment for her emotional symptoms. In none of the cases by Mrs. Perrotti were the plaintiffs assured of the health of the baby. Finding this list of facts detrimental to Mrs. Perrotti's case, the court held that "[Mrs. Perrotti] may not recover for mental anguish for a potential injury to her unborn child that is wholly unsupported by any physical suffering during and after the incident in question and that explicitly has been ruled out by routine medical diagnostics."

Evidence of the Minor Child's Injuries

Mrs. Perrotti also contended that Ashley's injuries were relevant evidence as to her own apprehension and as to her credibility as a plaintiff. The defendant pointed to the separate claim filed on behalf of Ashley, and argued that any claim of loss of consortium was relevant only to that separate claim. The court upheld the trial court's decision to prohibit the evidence of Ashley's injuries without any significant discussion, finding no indication of abuse of discretion on the part of the trial justice.

51. Id. at 641.
52. Id.
53. Id. at 640-41.
54. Id. at 640.
55. Id. at 641.
56. Id.
57. Id. at 641-42.
58. Id. at 642.
The court in this case emphatically limited its decision to the facts at hand. While the advent of antenatal diagnosis ensures that in most cases the mother can be assured of her child’s safety, the court did not take away the possibility that a pregnant woman in such circumstances as Mrs. Perrotti might be able to recover damages for mental anguish. Therefore, it is important to question which factors were essential to the court’s holding. The court’s analysis seems relatively effortless given this set of facts. However, the opinion’s implications for future cases remains unclear considering the court’s lack of guidance concerning which factors were essential to the holding. Based on the court’s analysis, it appears that injury directly to the abdomen would significantly advance a claim. But it remains unclear whether such injury would be sufficient if the mother was assured by medical personnel after an ultrasound or other similar testing that the baby was fine. Similarly, the court places some emphasis on the plaintiff’s lack of treatment for her psychological symptoms, but does not give any guidance as to whether such psychological treatment would suffice to overcome a lack of physical sympotmatology or injury to the abdomen.

The court also left open the question of whether the apprehension and anguish associated with the potential injury to an unborn child are to be analyzed using an objective or subjective standard. The court makes only a passing reference to the emotions suffered by Mrs. Perrotti as they compared to the average mother’s emotional symptoms during pregnancy. There is no guidance concerning whether an overly sensitive or apprehensive mother would be able to recover if additional factors were satisfied such as physical injury to the abdomen. This uncertainty has subtle implications for future cases. Plaintiffs could bring forward claims, unsure of which factors must be emphasized above others, and unsure of the proper standard to apply to each circumstance. However, this is similar to many situations in which the court applies a “totality of the circumstances” type standard. The court has chosen to make the

59. See id. at 640-42.
60. Id. at 641.
determination on a case-by-case basis as to which factors will be sufficient for recovery. Future litigants will have to analogize and distinguish the various facts of their own claim against the many considerations of the court in this case and those relied on by the parties.

CONCLUSION

The Rhode Island Supreme Court held that a plaintiff could not recover for mental damages associated with her concern for her unborn child’s health absent physical injury directly affecting the abdomen or symptoms directly related to such pregnancy. In this case, the plaintiff, a pregnant woman injured by defendant’s negligence, received no psychological treatment and her concerns were wholly unsupported by medical tests and personnel. Consequently, she could not recover for her claimed psychological injury.

Christine List
Tort Law. *Seide v. State*, 875 A.2d 1259 (R.I. 2005). The public duty doctrine, which restricts tort liability for certain governmental functions, is a judicially crafted exemption to the sovereign immunity waiver of the Rhode Island Tort Claims Act. However, the Rhode Island legislature has clearly and unambiguously required emergency vehicles to operate “with due regard for the safety of all persons,” and expressly waived protection for “the consequences of the driver’s reckless disregard for the safety of others,” making the public duty doctrine inapplicable to this case. The Rhode Island Supreme Court held that the questions of whether the driver’s conduct was reckless, and whether such conduct was the proximate cause of the plaintiff’s injury, are generally questions for the jury.

**FACTS AND TRAVEL**

Early on the morning of April 5, 1994, the plaintiff, Mary Seide, en route home after spending Easter weekend with her family, took a break to sleep in the passenger seat of her car; she stopped about 100 to 150 feet behind a state police roadblock in the northbound lane of interstate 95. She was jolted awake when a stolen flatbed tow truck, traveling the wrong direction down the interstate, swerved around the roadblock and slammed into her car, seriously injuring her so that she had to be taken to the hospital by ambulance.

The truck had been stolen in East Providence around midnight, prompting an alert to the East Providence Police Department. Soon thereafter, a detective saw a truck matching the description traveling west on interstate 195 and followed it, without activating his lights or siren, to confirm it was the stolen truck. As the detective followed the truck, it “traveled ‘[r]ight within the speed limit’ and was not driven in an unusual

---

2. *Id.* at 1265.
3. *Id.* at 1262.
4. *Id.* at 1262, 1264.
manner." After confirmation that the truck was stolen and the arrival of two other police cruisers, the three officers activated their lights and sirens and attempted to stop the truck, but the driver swerved toward the cruisers and refused to stop.6

For the next thirty minutes, the officers pursued the truck as it tried to evade them by exiting and re-entering the interstates and speeding through downtown Providence, not stopping for red lights or stop signs.7 The truck was traveling between sixty and seventy miles an hour, swerving at the pursuing police cruisers, driving over sidewalks, and running down "a small tree or sign" along the side of the road.8 The truck re-entered interstate 95, heading south in the northbound lane at speeds over ninety miles an hour, with at least three police cruisers in pursuit.9 Even though traffic was "light to non-existent," back at police headquarters the supervising officer, Lieutenant Barlow, realized that the situation had become unsafe and ordered his officers to end their pursuit.10 One officer left the highway, but two officers, while slowing and discontinuing efforts to stop the truck, stayed on the highway with emergency lights energized.11 The truck continued south in the northbound lane of the interstate, where it encountered the roadblock, swerved around, and slammed into the plaintiff's car.12

On March 27, 1997, Seide filed suit in Superior Court, seeking damages for injuries she alleged were sustained when the stolen truck slammed into her car.13 The Superior Court granted judgment as a matter of law to the remaining defendants,14

---

5. Id. at 1264.
6. Id.
7. Id. at 1262-64.
8. Id. at 1264.
9. Id.
10. Id. at 1264-65.
11. Id. at 1265.
12. Id. The driver of the truck later entered a plea of nolo contendere to five counts, for which he received one year in prison, with the remainder of the sentences suspended and with subsequent probation. Id. at 1263 n.1.
13. Id. at 1263-64.
14. Id. at 1265. The suit named the defendants as: "the State of Rhode Island; the Rhode Island State Police and state police officers Captain Gary Treml and Corporal Ernest Quarry; the City of East Providence and its treasurer; and East Providence police officers Detective Diogo Mello and Patrolman Robert Warzycha." Id. at 1263. While "the City of Providence and its treasurer, the City of Pawtucket and its treasurer, and Jerry's Chevron"
concluding that they were "immune from suit under the Public Duty Doctrine," and that the plaintiff had failed to produce any evidence that the police conduct was the proximate cause of the accident. The plaintiff subsequently appealed.

**ANALYSIS AND HOLDING**

On appeal, the plaintiff asserted that: (1) the defendants were not shielded by the public duty doctrine because their conduct during the high-speed chase was reckless; and (2) judgment as a matter of law was improperly granted on the issue of proximate cause. The Rhode Island Supreme Court considered this the "first occasion" to consider whether the legislature statutorily waived immunity under the public duty doctrine, and determined that "[t]he Public Duty Doctrine will not shield . . . defendants from liability for injuries proximately arising from their reckless conduct or in circumstances in which no real emergency exists." Therefore, the public duty doctrine was not a *per se* bar to the plaintiff's suit and judgment as a matter of law was improperly granted. Because the defendants had no sovereign immunity, it was for a jury to decide whether the officers' conduct was reckless and whether a real emergency existed. The issue of proximate cause was also inappropriate for judgment as a matter of law because the facts and reasonable inferences, when viewed in the light most favorable to the plaintiff, could have reasonably led the jury to conclude that the police should have terminated the pursuit before the plaintiff was injured, and that continuing the pursuit "was in reckless disregard for the safety of others." The court vacated the judgment and remanded the case for a new trial.

---

15. *Id.* at 1265.
16. *Id.*
17. *Id.*
18. *Id.* at 1267, 1269.
19. *Id.* at 1268.
20. See *id.* at 1269-71.
21. *Id.* at 1269.
22. *Id.* at 1272.

(the owner of the truck) were also named in the original suit, they were not parties to the appeal. *Id.* at 1264 n.2.
Public Duty Doctrine

Under the doctrine of sovereign immunity, governmental entities are immune from private suits unless such immunity is waived;\(^{23}\) the Rhode Island legislature has waived sovereign immunity statutorily through the Rhode Island Tort Claims Act (RITCA).\(^{24}\) The court stated that RITCA purports to provide a broad waiver of immunity and make all governmental entities "liable in all actions of tort in the same manner as a private individual or corporation,"\(^{25}\) but the presumption is that the "the Legislature did not intend to deprive the state of any sovereign power 'unless the intent to do so is clearly expressed or arises by necessary implication from the statutory language.'"\(^{26}\) Therefore, the court created the public duty doctrine to "restrict tort liability for the state and its municipalities for governmental functions, albeit with certain exceptions."\(^{27}\)

One of the exceptions to the public duty doctrine arises in the operation of emergency vehicles; the court discussed how one statute affords certain privileges to the drivers in the performance of their duties, but another statute limits the protection.\(^{28}\) Prior to the creation of the public duty doctrine, the court had concluded that, if the driver of an emergency vehicle exhibited a "reckless disregard for the safety of others," the privileges extended to him by law would be withheld.\(^{29}\) After the creation of the public duty doctrine, the court decided it must re-examine "whether § 31-12-9 continue[d] to constitute a legislative waiver of immunity under

\(^{23}\) See id. at 1266-68.


\(^{25}\) 875 A.2d 1267 n.9 (quoting R.I. GEN LAWS § 9-31-1 (1997 & Supp. 2005)).

\(^{26}\) Id. at 1268 (quoting Torres v. Damicis, 853 A.2d 1233, 1237 (R.I. 2004) (internal citation and brackets omitted)).

\(^{27}\) Id. at 1267 (citing Calhoun v. City of Providence, 390 A.2d 350 (R.I. 1978)).

\(^{28}\) Id. at 1266-68 (discussing R.I. GEN. LAWS § 31-12-9 (2002) and § 31-12-6(a) (2002)). In Rhode Island, drivers of emergency vehicles are privileged to disregard many traffic laws in the performance of their duties. See R.I. GEN. LAWS § 31-12-7 (2002). But drivers must also exercise "due care for the safety of all persons," and are not protected "from the consequences of [their] reckless disregard for the safety of others." R.I. GEN. LAWS § 31-12-9 (2002).

\(^{29}\) 875 A.2d at 1267 (citing Roberts v. Kettelle, 356 A.2d 207, 213-14 (R.I. 1976)).
the Public Duty Doctrine."\(^{30}\) The court stated that, as a matter of statutory construction, if the intent of the legislature is "clear and unambiguous,"\(^{31}\) even when the language is "closely parsed and strictly construed,"\(^{32}\) such intent supersedes any judicially crafted limitations.\(^{33}\) The court went on to say that the statutory language of § 31-12-9 was "clear and unambiguous," explicitly indicating the legislature's intent.\(^{34}\) Therefore, the court determined that the legislature expressly waived sovereign immunity when the conduct of emergency vehicle drivers is in "reckless disregard for the safety of others," and the judicially crafted public duty doctrine provides no shield.\(^{35}\)

### Proximate Cause

The plaintiff in *Seide* alleged that the defendants acted "in reckless disregard for the safety of others;" in order to survive a motion for judgment as a matter of law, the trial judge had to find that "sufficient evidence upon which reasonable persons could conclude that the officer was not confronted with a true emergency or that he or she conducted the pursuit in reckless disregard for the safety of others and, but for this reckless conduct, injury to plaintiff would not have occurred."\(^{36}\) The court then determined that the "existence and the extent of a duty of care are questions of law . . . [but] whether such duty has been breached and whether proximate cause [exists] are the questions for the factfinder."\(^{37}\)

The court looked to the record and determined that the plaintiff had "produced evidence that reasonably could [have] lead to the conclusion that the officers' decision to continue the pursuit and their failure to terminate the chase earlier, when they realized the danger it posed to themselves as well as innocent

\(^{30}\) *Id.*  
\(^{31}\) *Id.*  
\(^{32}\) See *id.* at 1268 (quoting Torres v. Damicis, 853 A.2d 1233, 1237 (R.I. 2004)).  
\(^{33}\) See *id.* at 1267-68.  
\(^{34}\) See *id.* at 1268 (citing R.I. GEN. LAWS § 31-12-9 (2002)).  
\(^{35}\) See *id.*  
\(^{36}\) *Id.*  
\(^{37}\) *Id.* (quoting Rodrigues v. Miriam Hosp., 623 A.2d 456, 461 (R.I. 1993)).
citizens, was in reckless disregard for the safety of others." The court further determined that the evidence "reasonably could lead to the inference that [the truck driver] drove onto Route 95 because the police continued to chase him and that they should have terminated the pursuit at a point before the plaintiff was injured." Because sufficient evidence was presented, the court held that "[t]he issue of proximate cause was a determination for the jury," and that judgment as a matter of law was improperly granted.40

The court then addressed the defendants' claim on appeal that the driver's actions were an independent intervening cause which warranted judgment as a matter of law.41 The court stated that "[i]ntervening cause exists when an independent and unforeseeable intervening or secondary act of negligence occurs, after the alleged tortfeasor's negligence, and that secondary act becomes the sole proximate cause of the plaintiff's injuries." However, if the intervening cause was reasonably foreseeable, then "the causal chain remains unbroken." The court discussed that if the evidence would allow a reasonable jury to conclude that the intervening cause was reasonably foreseeable, then foreseeability is a question for the jury, not the trial judge. Here, it was for the jury to decide whether the stolen truck would have continued to travel the wrong direction on the interstate if the police had not continued to follow.45

Duty of Care

The defendants claimed expert testimony was required so that the jury could understand the "proper manner of conducting a high-speed pursuit, and in particular when to break off... the pursuit." Expert testimony is required for matters not obvious to

38. Id. at 1269.
39. Id.
40. Id. at 1271.
41. Id. at 1270-71.
42. Id. at 1270 (quoting Contois v. Town of W. Warwick, 865 A.2d 1019, 1027 (R.I. 2004)) (emphasis added).
43. Id. (quoting Almeida v. Town of N. Providence, 468 A.2d 915, 917 (R.I. 1983)).
44. See id. at 1270-71.
45. See id.
46. Id. at 1271.
a lay person or beyond common knowledge. However, the court did not require expert testimony because “ordinary, intelligent lay juror[s]” understand traffic laws, and the jury could “draw upon its collective experience” to decide if the officers’ conduct was in reckless disregard for the safety of others.

**Police Pursuit Policy**

The court discussed how the East Providence Police Department, in accordance with state law, established a department-wide pursuit policy that stated that chases “should never be carried to the extent as to appreciably endanger the lives and property of either innocent users of the highway, the violator, or the officer . . . .” The court determined that this policy established the standard of care owed by the officers, and that “violation of th[is] polic[y] could serve as evidence of the defendants’ reckless disregard for the safety of others.”

**COMMENTARY**

This case illustrates the tragic results of what can go wrong in a high-speed police chase – an innocent bystander was severely injured. But, it is also illustrates the conflicts between various public policies and the issues of institutional competence and judicial restraint.

**Public Policy**

On one hand is a very sympathetic plaintiff – an innocent bystander who happened to be in the wrong place at the wrong time and had her life changed forever. Is it fair to deny her recovery when there was absolutely no fault on her part? Yet, on the other hand, there are the brave and loyal police officers that sacrifice for our community. They risk their lives to protect us from predation by those who refuse to live by society’s rules and

47. See id.
48. Id.
49. See R.I. GEN. LAWS § 31-12-6(b) (2002).
50. 875 A.2d at 1272.
51. Id.
52. Id. at 1265.
that ask only that we are as loyal to them as they are to us. Is it fair to hold them individually accountable for the acts of the criminals from whom they are trying to protect us in the first place?

It seems unlikely that someone who steals trucks would have the means to make reparations to the injured plaintiff, so the plaintiff looked to the city. But, in this instance, the city has carefully crafted a police pursuit policy that shifts the onus to the officer to make the decision whether a police chase will “appreciably endanger the lives and property of either innocent users of the highway, the violator, or the officer,” and directs that pursuits shall “never be carried to [such an] extent.” The only way to ensure the plaintiff receives reparations is to find that the individual officers failed in their duty to the public. But, finding for the plaintiff has its attendant consequences—a sense of disloyalty to those who protect and serve the public, the personal impact on the lives and careers of the officers involved, and the broader future implications of the decision. This opinion may make police more reluctant to pursue fleeing criminals, who will quickly learn that the more dangerous they are in the course of flight, the more likely the police will terminate the pursuit, and the more likely the criminal will evade capture. These are the types of questions that the Seide jury will face on remand. Perhaps the trial judge, recognizing that this was a no-win decision for the jury, took the issue from them and decided that, as a matter of law, the defendants were not liable. This segues to the next issue: who should decide what the public policy should be?

Institutional Competence / Judicial Restraint

Courts and legislatures have long operated in tension when it comes to deciding public policy. Legislatures speak with the collective voice of the people, but react slowly, and often only in response to past events where the outcome was unpopular,

53. Id. at 1272. Is there any high-speed chase which would not involve danger to the officer and/or the suspect involved? If not, there is no truly meaningful choice on the part of the officer, and the policy merely shifts the risk from the organization, which is better situated to bear that risk, to the individual officer.

54. Id. at 1265.
providing prospective relief for future occurrences, but no remedy for the individual circumstances that initiated the controversy. Courts can shape policy by their response to the individual circumstances of the case or controversy before them, and, by stare decisis, shape the response to similar future circumstances. Yet when judges intervene, particularly on politically divisive topics, there may be backlash allegations of judicial activism and legislating from the bench.

This is the challenge faced by the courts in this case. The Rhode Island Supreme Court had already crafted the public duty doctrine,55 which was used by the trial judge to shield the officers from liability.56 Or the doctrine of independent intervening cause could have vitiated the proximate cause requisite to liability.57 However, the Rhode Island Supreme Court precluded the trial judge from invoking the protection of these doctrines on remand.58 While the court could have shaped public policy directly by upholding either basis for the judgment as a matter of law, its decision to remand the case is a much more subtle strategic maneuver.

While government officials may empathize with the plight of the plaintiff, their duty is to preserve scarce public resources for the good of the many, even at the cost of a few individuals. As long as the public duty and independent intervening cause doctrines acted as potential shields to all liability for the defendants, meaningful settlement negotiation was unlikely. But, by remanding the case without the protection of the doctrines, the city has been given the incentive to settle the case, because minimizing liability is in the taxpayers' best interest. This allows the city to make reparations to the deserving plaintiff without necessarily finding that the individual officers were at fault.59

56. 875 A.2d at 1265.
57. See id. at 1270-71.
58. See id. at 1268, 1270-72.
59. This is not to say that officers should have blanket immunity to act recklessly, merely that internal police procedures, rather than the courts, can determine whether further action is required regarding the officers' actions,
If the issue is forced to trial, the jury will be faced with the unenviable choices outlined above. However, no matter which way the jury decides, the resulting public furor may move the legislature to clarify policy, thereby still achieving the strategic goal of shaping public policy.

CONCLUSION

The Rhode Island Supreme Court determined that "[t]he Public Duty Doctrine will not shield . . . defendants from liability for injuries proximately arising from their reckless conduct or in independent of any pressure to compensate the injured plaintiff.

One lingering concern involves the court's notion that a post facto analysis of the suspect's purported crime should be weighed as a factor in determining whether the pursuit was justified. See id. at 1269 (inferring that there may have been no "real emergency" because stealing the truck was merely a property crime, and that it was not until officers tried to stop the truck that the dangerous pursuit began). This minimizes the fact that a mere traffic violation may in reality be the reason that a violent felon is stopped by police. See e.g., Pam Belluck, Fugitive in Gay Bar Attacks Dies After Shootout With Arkansas Police, N.Y. TIMES, Feb. 6, 2006, at A14. In a recent incident, a fugitive suspect in the hatchet attack and shooting of several patrons of a New Bedford, Massachusetts bar shot and killed an Arkansas police officer during a routine traffic stop. A twenty-mile police pursuit ensued, with the chase ending only after police deployed spike strips to puncture the suspect's tires, causing a crash. During a subsequent shootout with police, the suspect shot and killed the passenger in his car before turning the gun on himself and committing suicide. Id.; see also Rampage Suspect's Death Called Suicide, L.A. TIMES, Feb. 8, 2006, at A12.

The presumption should be that a fleeing suspect is a danger to society and that the liability of the officer should not hang on a subsequent evaluation of whether the suspect committed a crime serious enough to warrant pursuit. Additionally, pursuit should rarely be terminated in response to a suspect's dangerous action; otherwise the policy teaches suspects to flee through criminal Darwinism – those who stop are arrested; those who flee escape and will flee again next time. While innocent bystanders injured in a police pursuit should not have to bear the burden of their own damages, the majority of pursuing police officers are no more at fault than the victims. The blame needs to lie where it belongs – on the criminals who choose to run from the police. That is why settlement, without simultaneously judging officer culpability, achieves the best possible outcome for both the injured plaintiff and the individual officers.

60. If the jury were to find for the plaintiff, the possible resulting rise in aborted police pursuits would likely lead to more incidents of criminals initiating pursuits in the first instance, creating public outcry that the police need to be tougher on crime. If the jury were to find for the defendants, the innocent and sympathetic plaintiff may suffer, which could be discordant with the public's sense of equity.
circumstances in which no real emergency exists;” as such, the public duty doctrine was not a per se bar to the plaintiff’s suit and judgment as a matter of law was improperly granted. The issue of proximate cause was also inappropriate for judgment as a matter of law because the facts and reasonable inferences, when viewed in the light most favorable to the plaintiff, could have reasonably led the jury to conclude that the police should have terminated the pursuit before the plaintiff was injured, and that continuing the pursuit “was in reckless disregard for the safety of others.” The Rhode Island Supreme Court vacated the judgment of the lower court and remanded the case for a new trial.

Brian K. Koshulsky

61. 875 A.2d. at 1267, 1269.
62. Id. at 1268.
63. Id. at 1269.
64. Id. at 1272.
**Tort Law.** *Tedesco v. Connors*, 871 A.2d 920 (R.I. 2005). The applicability of the egregious conduct exception to the public duty doctrine, which allows a plaintiff to “pierce the protective shell” afforded by the public duty doctrine, is a mixed question of law and fact. While the existence of a legal duty is purely a question of law to be determined by a judge, there still exist certain “predicate” or “duty-triggering” facts, the determination of which must be left to the jury. Specifically, the predicate facts inherent in the “egregious conduct exception” are: “whether the governmental entity created or allowed for the persistence of circumstances that forced a reasonably prudent person into a position of extreme peril, and then failed to remedy that peril in a reasonable time.” If no genuine factual dispute exists as to these two predicate facts, only then is judgment as a matter of law (JML) appropriate.

**FACTS AND TRAVEL**

Dawn Tedesco was injured when the front tire of her bicycle slipped into a sewer grate while she was riding on a public highway in the town of Johnston, Rhode Island.¹ The bars of the sewer grate ran parallel to the road, thus allowing the front tire of Tedesco’s bicycle to slip through.² Tedesco brought suit against both the town of Johnston and the Rhode Island Department of Transportation (DOT); the town decided to settle.³ Tedesco’s claim against DOT centered on one particular fact: Fifteen years earlier DOT had circulated a design policy memorandum discussing the hazards of parallel bar sewer grates to bicyclists.⁴ DOT subsequently adopted a policy of replacing parallel bar sewer grates with bicycle safe sewer grates, though it had not yet replaced the grate in this instance.⁵

At the end of Tedesco’s case, DOT moved for JML based, in

---

2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
part, on the public duty doctrine. The judge determined that the public duty doctrine shielded the DOT in this case and that the egregious conduct exception was inapplicable. DOT's motion for JML was therefore granted; Tedesco subsequently appealed.

ANALYSIS AND HOLDING

On appeal, Tedesco did not argue that the public duty doctrine was inapplicable to her case; rather, she argued that the DOT's conduct in this case was such that it should trigger the egregious conduct exception to that doctrine. After discussing the public duty doctrine and the egregious conduct exception generally, the court went on to frame the issues presented in terms of the standard for JML. In that context, this case offered a question of first impression: Whether applicability of the egregious conduct exception to the public duty doctrine is a question of law for the judge or a question of fact for the jury. If applicability of the egregious conduct exception is a question of fact for the jury, then a judge could only grant a motion for JML when the facts concerning the conduct of the otherwise immune government entity are not genuinely in dispute. The approach adopted by the court was to treat applicability of the egregious conduct exception as a mixed question of law and fact, with certain “duty-triggering” facts left for determination by the jury. If those “duty-triggering” facts are genuinely in dispute, determination of the applicability of the egregious conduct standard as a matter of law will amount to a judicial assumption of the fact-finding function. The court found in the case at hand that the existence of a fifteen-year-old memorandum concerning the dangers posed to bicyclists from parallel design sewer grates left room for a reasonable juror to find that the DOT's conduct was

6. Id. DOT also claimed that it had no legal duty to insure the safety of its roads for bicyclists. Id.
7. Id.
8. See id. at 924.
9. Id. at 924.
10. See id. at 924-26.
11. Id. at 924-25.
12. Id. at 925.
13. Id.
The court therefore reversed the trial court’s judgment as a matter of law and remanded the case for further proceedings.

The Egregious Conduct Exception Generally

The public duty doctrine itself requires a two-step analysis. First, a court determines whether the doctrine applies to the particular facts of the case. Second, the court must determine whether one of two exceptions to the public duty doctrine applies. Those two exceptions are: (1) the special duty exception, and (2) the egregious conduct exception. The plaintiff in this case did not challenge the application of the public duty doctrine; additionally, she waived any argument concerning the special duty exception. Thus, the only remaining issue was application of the egregious conduct exception.

The egregious conduct exception will allow a plaintiff to “pierce the protective shell” afforded a government entity under the public duty doctrine only if that entity’s conduct rises to the level of egregiousness. Whether a government entity’s conduct is in fact egregious will depend upon three factors: (1) the entity’s role in creating or allowing the persistence of “circumstances that forced a reasonably prudent person into a position of extreme peril;” (2) the entity’s actual or constructive knowledge of those circumstances; and (3) given a reasonable amount of time, failure to eliminate those circumstances. Unless a plaintiff satisfies all three of these elements, the government entity will be immune from liability.
Question of Fact versus Question of Law

Rhode Island case law before this case was somewhat ambiguous as to whether the application of the egregious conduct exception was a question of fact or a question of law. However, in an earlier case, Kuznair v. Keach, the court addressed this identical issue in the context of the special duty exception. The court in Tedesco found prior treatment of the egregious conduct exception "renders it indistinguishable from the special duty exception and [the] holding in Kuznair." The court therefore applied the analysis from Kuznair to the egregious conduct doctrine in Tedesco to arrive at its characterization of the egregious conduct exception as a question of both law and fact.

The ultimate holding of the court in Tedesco was that applicability of the egregious conduct exception is a question of both law and fact. It is a question of law because it involves the analysis of a legal duty, and "[t]he existence of a legal duty is purely a question of law ...." Additionally, it is a “fact-intensive” inquiry which involves the determination of certain duty-triggering facts. The trial justice will decide whether a legal duty ultimately exists under the egregious conduct exception, but she will often require the assistance of the jury if certain predicate facts are genuinely disputed.

In the case of the egregious conduct exception, the court “[s]pecifically” identified the predicate or duty-triggering facts. The court appeared to identify only two of the three elements of the egregious conduct exception as involving duty-triggering facts: the creation of or allowing of the persistence of circumstances that put a reasonably prudent person into extreme peril, and the failure to remedy that peril in a reasonable time. Digested further, it would appear that the question whether there was extreme peril...
or a reasonable time to rectify that peril are duty-triggering facts. Thus, the court found that it is the sole province of the jury to decide these duty-triggering facts in the face of any genuine dispute.

The *Tedesco* court stressed that its holding should not act as an absolute bar to JML. Rather, the decision only acts to bar JML in situations where duty-triggering facts are genuinely in dispute. In other words, if a plaintiff fails to offer legally sufficient evidence to allow a juror to find for her on each element of the egregious conduct standard, then JML dismissing the plaintiff’s case is appropriate. Conversely, in the rare case where a plaintiff offers sufficient evidence such that a reasonable juror could not fail to conclude that the government’s conduct was egregious, JML is likewise appropriate, and the jury can be instructed only as to the law of negligence.

*Jury Instructions*

The court also incorporated the guidance of the *Kuznair* court concerning proper form of jury instructions in cases involving an exception to the public duty doctrine. Jury instructions in a case involving the egregious conduct exception should “incorporate the elements of egregious conduct into the elements of negligence.” The court provided an example:

In order to find the defendant’s conduct is egregious, you must find (1) the defendant created or allowed for the persistence of circumstances that would force a reasonably prudent person into a position of extreme peril; (2) the defendant knew or should have known of the perilous circumstances; and (3) the defendant, after a reasonable amount of time to eliminate the dangerous condition, failed to do so. If the plaintiff fails to prove defendant’s conduct was egregious by a preponderance of

37. See id.
38. *Id.* at 926.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
the evidence, you must return a verdict in favor of the defendant. If you do find that the defendant's conduct is egregious by a preponderance of the evidence, then, and only then, may you proceed to determine whether the defendant's egregious conduct was the proximate cause of any damages suffered by the plaintiff, and the amount of those damages.45

Application of the Mixed Question Rule to the Facts of Tedesco

The Tedesco court reviewed the trial justice's decision "bound by the same rules and standards as the trial justice."46 Using this standard, according to the court, the trial justice's error was "clear."47 By producing the DOT memorandum, Tedesco offered sufficient evidentiary bases to allow a reasonable juror to conclude that the defendant's conduct in this instance was egregious.48 The error occurred when the trial justice decided certain duty-trIGGERING facts, mainly citing the fact that Rhode Island has 20,000 to 30,000 sewer grates, to arrive at the conclusion that the defendant's conduct was not egregious.49 In deciding these facts, the court invaded the jury's fact-finding responsibilities.50

COMMENTARY

As the Tedesco court itself noted, the public duty doctrine is "much maligned."51 Any unhappiness about the public duty doctrine almost certainly arises from its long and confused history, as the Tedesco court also noted.52 Unfortunately, the decision in Tedesco is likely to further confound the already confused doctrine and its two well-meaning exceptions.

First, the nature of a "duty-triggering" fact in relationship to the three well-established elements of the egregious conduct exception is not entirely clear. As already noted here, the court seems to quite specifically state that the duty-triggering facts

45. Id. at 926-27.
46. Id. at 927 (quoting Mills v. State Sales, Inc. 824 A.2d 461, 472 (R.I. 2003)).
47. Id. at 928.
48. Id.
49. See id. at 927-28.
50. See id. at 928.
51. Id. at 929.
52. See id. at 930.
relate only to whether there is extreme peril, and whether the defendant remedied that peril in reasonable time. Notice, actual or constructive, does not appear to require the determination of any duty-triggering facts. It is not clear why notice issues should not involve predicate duty-triggering facts, and this distinction is at odds with the notion of a "fact-intensive inquiry."

Second, the Tedesco decision takes great pains to analogize to the decision in Kuznair in reaching its conclusions. This does not necessarily seem like a wise course of action considering the confusion that already surrounds the special duty exception. If division of labor between the trial justice and the jury is desirable, it would make sense to avoid the murky waters of the special duty exception in establishing a system to accomplish that task.

Only time will tell whether the rule in Tedesco can be managed with a degree of efficiency by the trial justices of Rhode Island's Superior Courts; the somewhat confusing distinction between duty-triggering facts and the exception they establish will certainly require time to work out.

CONCLUSION

The Rhode Island Supreme Court in Tedesco held that the egregious conduct exception to the public duty doctrine is a mixed question of law and fact. Analogizing to the court's previous decision in Kuznair, the court held that while the existence of a legal duty is purely a question of law to be left to the court, certain duty-triggering facts, if any exist and are genuinely disputed, must be decided by a jury as the finder of fact.

Terrence P. Haas

53. Id. at 925.
54. See id.
55. Id. at 924-25.
57. Tedesco, 871 A.2d at 925.
58. Id.
Tort/Property Law. Lucier v. Impact Recreation, Ltd., 864 A.2d 635 (R.I. 2005). A commercial landlord is not liable for injuries that the guest of a tenant suffered on leased premises, unless the injury results from the landlord's breach of a covenant to repair in the lease, or from a latent defect known to the landlord but unknown to the tenant or guest, or because the landlord subsequently has assumed the duty to repair. Additionally, a lease that requires a commercial landlord's approval of any improvements that the tenant may make to the premises and provides that the landlord will maintain the structure of a building, allowing the landlord to enter the property at all reasonable times, does not equate to the landlord having control over the premises. Furthermore, negligent entrustment, that is, breach of the landlord's duty to ensure that the commercial tenant is not engaging in an activity that is inherently dangerous, is not a basis for liability. Regardless of negligent entrustment not being a basis for liability, the landlord's insistence on the tenant procuring liability insurance and having guests sign waivers and release of liability forms does not show that the activity engaged in by the tenant was inherently dangerous.

FACTS AND TRAVEL

Roland and Kerri Lucier are the parents of Timothy Lucier, who was injured at a skateboard facility operated by Impact Recreation, Ltd. (Impact) on premises it was leasing from Eugene Voll.\(^1\) When the injury occurred, Impact was leasing a portion of a larger building from Voll; the lease restricted the use of the premises to a bicycle, skateboarding, and in-line skating park.\(^2\) Under the lease, Voll was required to maintain the structure of the building as well as the building's exterior; Impact was required to maintain the interior of the building.\(^3\) The lease further provided that Impact obtain Voll's approval before making

\(^2\) Id. at 637.
\(^3\) Id.
any alterations or improvements to the property. Additionally, under the lease, Impact could install trade fixtures on the premises that would remain the property of Impact regardless of the manner of their installation. Finally, of note in the lease was a requirement that Impact obtain a general liability policy and require all participants to execute a waiver and release of liability before participating in activities on the premises.

On March 16, 2001, Timothy’s father brought him and several of his friends to the skateboard facility to celebrate Timothy’s birthday. At the skateboard facility, Timothy’s father signed the required waiver. Timothy put on protective gear and began to skateboard. After roughly an hour, Timothy went down a ramp and the front wheel of his skateboard caught inside a small hole in the ramp causing him to fall. In an attempt to execute a safety maneuver and shield his face, Timothy fell on his right leg causing it to snap. As a result of Timothy’s fall, he suffered a spiral fracture in a growth plate of his right leg.

The Luciers filed this premises liability action against Voll, Impact, and one of Impact’s principals, alleging failure to maintain safe conditions, failure by the landlord to ensure that the commercial tenant was not engaging in an inherently dangerous activity, and breach of duty due to negligently maintained, dangerous conditions on the property. Default judgment was entered against Impact; Voll moved for summary judgment. The motion justice granted Voll’s motion for summary judgment. Plaintiffs subsequently filed an appeal on May 17, 2004.
ANALYSIS AND HOLDING

On appeal, the plaintiffs argued that the motion justice erred in granting the defendant's motion for summary judgment. The Luciers claimed that the defendant, as landlord, had a duty to safely maintain the premises. Alternatively, the Luciers argued that the defendant never surrendered full possession of the premises. Lastly, the plaintiffs claimed that since the defendant let his premises for the purpose of carrying on an inherently dangerous activity, he had a nondelegable duty to ensure that the proper precautions were taken in connection with carrying out that activity. Upon de novo review, the Rhode Island Supreme Court affirmed the motion justice's order of summary judgment, stating that the general rule remains that a nonresidential landlord is not liable for injuries that the guest of a tenant suffers on the leased premises, with three exceptions. The court additionally held that the defendant did not have control over the property and that the skateboard park was not an "inherently dangerous" facility.

Premises Liability

The court principally focused its analysis on premises liability. Rhode Island premises liability law imposes an affirmative duty upon owners and possessors of property "to exercise reasonable care for the safety of persons reasonably expected to be on the premises... includ[ing] an obligation to protect against the risks of dangerous conditions existing on the premises," provided the landowner knows of, or reasonably should know of, the dangerous condition. However, the court stated that the general rule in Rhode Island concerning nonresidential property is that a landlord is not liable for injuries that the guest

---

17. Id. at 637.
18. Id. at 639.
19. Id. at 640.
20. Id. at 641.
21. Id. at 640.
22. Id. at 641-42.
23. See 639-41.
of a tenant suffers on the leased premises unless one of three exceptions are met.\footnote{25} These three exceptions require that the injury result from one of the following: (1) "the landlord's breach of a covenant to repair in the lease [or (2)] from a latent defect known to the landlord but not known to the tenant or guest [or (3)] because the landlord subsequently has assumed the duty to repair."\footnote{26} In this instance, the court held that the plaintiffs had failed to present evidence sufficient to support any of the three exceptions to the general rule, and as such, the defendant was not liable for the injuries to their son.\footnote{27}

Additionally, the court noted that when land is leased to a tenant, property law "regards the lease as equivalent to the sale of the premises for the term [of the lease]."\footnote{28} The court recognized that even if the defendant remained responsible for maintaining the exterior of the structure, required that Impact get approval first before making alterations to the premises, and retained the right to enter the property, he still did not retain control over the premises. Rather, these lease provisions were merely intended to protect the defendant's investment and reversionary interest in the property.\footnote{29}

**Negligent Entrustment**

As of the time of the *Lucier* decision, the Rhode Island Supreme Court had never recognized negligent entrustment as a basis for liability and it declined to do so in *Lucier* as well.\footnote{30} The plaintiffs argued that the defendant had leased his premises for the purpose of conducting an inherently dangerous activity and therefore had a duty to make sure that reasonable precautions were taken in connection with that activity.\footnote{31} The plaintiffs' argument continued to assert that the defendant acknowledged that skateboarding was a dangerous activity by requiring that

\begin{itemize}
  \item \footnote{25} Id. at 640.
  \item \footnote{26} Id. (quoting E. Coast Collision & Restoration, Inc., v. Allyn, 742 A.2d 273, 276 (R.I. 1999)).
  \item \footnote{27} Id.
  \item \footnote{28} Id. (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 63 at 434 (5th ed. 1984)).
  \item \footnote{29} Id. at 640.
  \item \footnote{30} Id. at 641 (citing Regan v. Nissan N. America, Inc., 810 A.2d 255, 257 (R.I. 2002)).
  \item \footnote{31} Id.
\end{itemize}
Impact maintain a liability insurance policy and have participants sign a waiver and release. The court did not address the plaintiffs' negligent entrustment claim because they failed to present any competent evidence that skateboarding was an inherently dangerous activity. Moreover, the fact that the defendant thought the activity to be sufficiently hazardous to merit the procurement of liability insurance and the signing of waivers did not indicate that the activity was inherently dangerous.

COMMENTARY

This decision reinforces the general rule in Rhode Island that insulates commercial landlords from liability for injuries to their tenants or their tenants' guests. Commercial landlords are encouraged to adopt a "hands-off" approach towards leased property or else be subject to liability. While this decision seems as though it may punish attentive landlords, in reality, it relieves commercial landlords of an especially burdensome responsibility of constant inspection of their leased property.

Were commercial landlords liable for the injuries of their tenants or guests, landlords would have to become full-time maintenance men for their tenants in order to avoid potential liability. Even absent a covenant to repair, if commercial landlords were to be held liable for tenants' and guests' injuries, landlords would be forced to watch their leased property under a microscope and repair defects in fixtures on the premises regardless of whether or not they were installed by the tenant. This duty would be inconvenient for commercial landlords who often lease numerous properties simultaneously, as well as for tenants whose business operations would be interrupted regularly by landlords' inspections of every small detail of their operation. Additionally, when a specialized business leases a landlord's premises, specialized fixtures may be installed by the tenant that the landlord would not be familiar with and would not be qualified to recognize defects in, let alone repair. Using the case at hand as an example, an average landlord would not even begin to know

32. Id.
33. Id.
34. Id.
35. See id. at 639-41.
36. See id.
the difference between a skateboarding ramp that was constructed safely and one that was not safe for normal use. A rule different from the one articulated in this case would require commercial landlords to become intimately acquainted with even the smallest details of their tenants' places of business.

Also of note is the court's decision that an activity is not inherently dangerous simply because the landlord insists that the tenant obtain liability insurance and has participants sign waivers. If, as the plaintiffs suggest, a landlord were to have a nondelegable duty to ensure precautions are taken in connection with carrying out inherently dangerous activities, and an activity is presumed to be inherently dangerous if the landlord requires the tenant to obtain liability insurance, then cautious landlords would be condemning themselves to a higher duty of care by seeking to protect their interests by requiring that their tenants obtain a liability policy. Alternatively, by not requiring the tenant to obtain liability insurance, the activity would not be presumed to be inherently dangerous, thus contributing to a lower duty of care, but potentially subjecting the landlord to liability that may have been otherwise covered by the tenant's liability policy. This paradoxically punishes landlords for seeking to insulate themselves from liability. In a parallel example, if an overly cautious landlord were to require a tenant who is operating a retail store to obtain liability insurance, then the landlord's insistence on the insurance would be evidence that retail sale is an inherently dangerous activity. Thus, the consequences of the court rendering a different decision would have been extremely unfair to landlords seeking to protect their own interests.

CONCLUSION

The Rhode Island Supreme Court held that commercial landlords are not liable for injuries to their tenants or guests, unless the injury results from the landlord's breach of a covenant to repair, from a latent defect known to the landlord but not the tenant, or because the landlord has assumed the duty to repair. Additionally, the court held that just because a landlord is required to maintain the exterior of a leased building, approve of

37. See id.
38. Id. at 640.
any alterations to the premises, and retain the right to enter the premises at any reasonable time, does not mean that the landlord retained control over the premises.\textsuperscript{39} Finally, a landlord's insistence on a tenant's procuring liability insurance and having guests sign waivers and release of liability forms does not show that the activity engaged in by the tenant was inherently dangerous for purposes of negligent entrustment.\textsuperscript{40} In this case, the defendant commercial landlord had no duty to the plaintiffs whose son was injured while skateboarding on the defendant tenant's defective ramp.\textsuperscript{41}

Mark H. Hudson

\textsuperscript{39} Id.
\textsuperscript{40} Id. at 641.
\textsuperscript{41} Id. at 642.
2005 Public Laws of Note

2005 R.I. Pub. Laws ch. 75. An Act Relating to Sexual Offender Registration and Community Notification. Amends prior sex offender registration and community notification statute to provide that local police departments shall now disclose to the general public information pertaining to registered offenders of a city or town that have been determined to be level 2 or level 3 offenders, consistent with parole board guidelines. Amends R.I. Gen. Laws §§ 11-37.1-11 and 11-37.1-12.

2005 R.I. Pub. Laws ch. 79. The Rhode Island Autism Spectrum Disorder Evaluation and Treatment Act. Authorizes the Rhode Island Department of Health (subject to appropriation and/or receipt of other resources) to provide appropriate testing and screening models to determine a proper diagnosis of Autism Spectrum Disorders (ASD) and create a case management system to properly catalogue such diagnoses, as well as authorizing outreach/education programs about ASD. Creates R.I. Gen. Laws § 23-79.


2005 R.I. Pub. Laws ch 153. An Act Relating to Domestic Relations – Domestic Abuse Prevention. Provides that upon notice and a hearing, domestic abuse protective orders issued by the Family Court may include an order that a defendant surrender physical possession of firearms in his or her care, possession, custody or control. Provides for an exemption for sworn peace officers and active members of the military service or others required by their employment to carry a firearm. Amends R.I. Gen. Laws § 15-15-3.
2005 R.I. Pub. Laws ch. 156. An Act Relating to Health and Safety – The Long-Term Care Reform Act of 2005 – Nursing Facility Quality Monitoring and Early Intervention for Resident Safety. Mandates that complaints regarding nursing facilities (that do not constitute abuse, neglect or mistreatment) be investigated within twenty-four hours of reporting, if the patient's health or safety is determined to be in "immediate jeopardy." Also allows the director to appoint independent quality monitors at the facility's expense for deficiencies that constitute "immediate jeopardy" for residents/patients. Creates R.I. Gen. Laws § 23-17-12.5.

2005 R.I. Pub. Laws ch. 225. An Act Relating to Identity Theft Protection. Mandates that businesses owning or licensing unencrypted computerized personal information shall implement and maintain reasonable security procedures and practices to protect the information from unauthorized access, use, or disclosure. Provides that state agencies and persons owning such data shall disclose any breach of the security system under which it is kept to Rhode Island residents. Requires notification of breaches be made promptly and reasonably following the determination of a breach, unless delay is warranted so as not to impede a criminal investigation. Imposes a civil penalty for violations of the act that shall be no more than $100 per occurrence, nor more than $25,000 total per defendant. Creates R.I. Gen. Laws §11-49.2.


2005 R.I. Pub. Laws ch. 244. An Act Relating to Education. Prohibits the sale or distribution of performance-enhancing dietary supplements by teachers, coaches, school officials and employees to students and requires that mandatory first aid
courses for athletic coaches include information relating to such supplements. Also, makes it a misdemeanor to sell such supplements to a minor. Creates R.I. Gen. Laws §§ 16-21.4-1 to 16-21.4-4 and 11-9-21.


2005 R.I. Pub. Laws ch. 360. An Act Relating to Military Affairs and Defense – National Security Infrastructure Support Act. Creates a “National Security Infrastructure Support Fund,” which shall be administered by the Economic Development Corporation, with funds being allocated to provide grants and loans to improve infrastructure (such as water, sewer, electric, gas, rail, and road systems), secure real estate and property to protect against encroachment around security installations, and to increase mission-related capabilities of national security infrastructure located within Rhode Island. Creates R.I. Gen. Laws § 30-32-1 to 30-32-7 and 42-64.7.13.

2005 R.I. Pub. Laws ch 377. An Act Relating to State Affairs and Government. Establishes within the office of the Attorney General a Civil Rights Advocate and allows the Attorney General to bring civil actions against those who intentionally interfere in the exercise or enjoyment by any other person of rights secured by the United States and Rhode Island Constitutions. Additionally, the act provides for a civil penalty of not more than $5,000 to be levied against those adjudged violators of the act. Creates R.I. Gen. Laws §§ 42-9.3-1 to 42-9.3-4.


Establishes procedures for interrogations of minor children by law enforcement in school or at school-sponsored activities, allowing pupils to request the presence of a parent, guardian, or adult family member during questioning and prohibiting questioning from taking place in a public classroom or hallway, except in exigent circumstances. Creates R.I. Gen. Laws §§ 16-21.5-1 to 16-21.5-5.