2006 Survey of Rhode Island Law: Cases and 2006 Public Law 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/vol12/iss2/6

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.
2006 Survey of Rhode Island Law

CASES

Alternative Dispute Resolution
Radiation Oncology Associates v. Roger Williams Hospital,
899 A.2d 511 (R.I. 2006) ................................................ 465

Bankruptcy Law/Worker’s Compensation Law
Department of Labor and Training v. Michael A. Derderian,

Civil Procedure
Crowe Countryside Realty Associates, Co., LLC v.
East Providence School Committee v. Smith,
896 A.2d 49 (R.I. 2006) ................................................ 486
Lennon v. Dacomed Corp., 901 A.2d 582 (R.I. 2006) ....... 493

Constitutional Law
In re Matthew A. Brown, 903 A.2d 147 (R.I. 2006) ......... 506
Parella v. Montalbano, 899 A.2d 1226 (R.I. 2006) ........... 511

Criminal Law
State v. Andujar, 899 A.2d 1209 (R.I. 2006) ................. 533
State v. Feliciano, 901 A.2d 631 (R.I. 2006) ................. 541
State v. Lough, 899 A.2d 468 (R.I. 2006) .................... 551

Criminal Procedure
State v. Motyka, 893 A.2d 267 (R.I. 2006) .................... 575

463
Employment Law
Neri v. Ross-Simmons, Inc., 897 A.2d 42 (R.I. 2006)........583
Trant v. Lucent Technologies, 896 A.2d 710 (R.I. 2006)......589

Evidence
State v. Silvia, 898 A.2d 707 (R.I. 2006).......................597

Family Law
Cote-Whitacre v. Dep’t of Public Health, No. 04-2656,
In re Kayla N., 900 A.2d 1202 (R.I. 2006)....................610

Insurance Law
Metropolitan Property and Casualty Insurance
Company v. Barry, 892 A.2d 915 (R.I. 2006)..................618

Property Law
East Bay Community Development Corporation v.
Zoning Board of Review of the Town of Barrington,
901 A.2d 1136 (R.I. 2006)........................................625
Haydon v. Stamas, 900 A.2d 1104 (R.I. 2006)...............636
Rhode Island Economic Development Corp. v.
Parking Co., 892 A.2d 87 (R.I. 2006)..........................645
Ruffel v. Ruffel, 900 A.2d 1178 (R.I. 2006)..................655

Statutory Interpretation
Park v. Rizzo Ford, Inc. and Mendoza et al. v.
Midland Hyundai, Inc., 893 A.2d 216 (R.I. 2006).........661

LEGISLATION

2006 Public Laws of Note......................................667
Alternative Dispute Resolution. Radiation Oncology Associates v. Roger Williams Hospital, 899 A.2d 511 (R.I. 2006). Plaintiff medical company provided oncology services to the defendant hospital under a services agreement containing an arbitration clause and an expiration date of December 31, 2004. The parties were unable to agree on a renewal of the contract, and plaintiff sought to submit the dispute to arbitration. The hospital argued that the arbitration clause did not apply to the duration dispute because the contract specified the date of expiration. The Rhode Island Supreme Court held that the parties did not intend to submit duration disputes to arbitration because the terms of the agreement included a specific date upon which the contract would expire, and thus the issue was for a court to determine.

FACTS AND TRAVEL

This case arose from a contract dispute between Radiation Oncology Associates, Inc. (ROA), and Roger Williams Hospital. Radiation Oncology Associates (ROA) and Roger Williams Hospital entered into an agreement on October 1, 2001 by which ROA agreed to provide oncology services to the hospital in return for set rates of compensation.1 The agreement includes the following provision:

The term of the Agreement shall commence October 1, 2001 and shall terminate on December 31, 2004, and notwithstanding in the Agreement to the contrary, shall be subject to termination for the breach of the provisions hereof. If either party shall decide not to renew this Agreement at the expiration of the term hereof, it shall, not later than September 30, 2004, so advise the other party in writing. If an extension or substitute contract is not signed by the parties prior to December 31, 2004, this Agreement shall be null and void and of no further


465
effect.\textsuperscript{2}

When neither party sent notice of non-renewal by September 30, 2004 as required by the agreement, they entered into negotiations regarding a replacement agreement.\textsuperscript{3} Although the parties entered into several standstill agreements, the rights and remedies under the services agreement were not disturbed.\textsuperscript{4} On December 23, 2004, ROA filed suit in superior court requesting that an arbitrator be appointed according to the Rhode Island Arbitration Act.\textsuperscript{5} In its complaint, ROA alternatively requested a declaratory judgment that the services agreement was automatically renewed on December 31, 2004 when neither party submitted notice of non-renewal by September 30, 2004.\textsuperscript{6} ROA further sought from the court an order enjoining Roger Williams Hospital from interfering with ROA's performance of services under the agreement while the dispute was in arbitration or until declaratory judgment was entered in the plaintiff's favor.\textsuperscript{7} The hospital objected to ROA's petition for an arbitrator and filed a motion to enjoin arbitration on January 26, 2005.\textsuperscript{8} ROA argued that automatic renewal of the services agreement resulted on December 31, 2004 when neither party submitted a notice of non-renewal by September 30, 2004.\textsuperscript{9} The hospital based its primary argument on the plain language of the services agreement.\textsuperscript{10} The hospital claimed that because both parties failed to reach a decision through their negotiations on either an extension or a substitute contract by December 31, 2004, the October 1, 2001 agreement, as well as the requirement to arbitrate expired on its own terms.\textsuperscript{11} In response, ROA argued that an arbitrator should be appointed due to the broad language of the October 1, 2001 agreement's arbitration clause, which states that "[s]hould any dispute arise under this Agreement . . . all

\begin{enumerate}
\item \textit{Id.} at 512-13.
\item \textit{Id.} at 513.
\item \textit{Id.} at n.1.
\item \textit{Id.} (citing R.I. GEN. LAWS § 10-3-4 (1956)).
\item \textit{Id.} at n.2.
\item \textit{Id.} at 513.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
disputes shall be settled by arbitration."12 The hospital argued that the scope of the arbitration clause did not extend to the duration of the contract because the parties had previously bargained for an express termination provision that included a fixed expiration date of December 31, 2004.13

The superior court justice heard arguments and the matter was taken under advisement.14 On February 2, 2005, the justice issued a bench decision that rejected ROA's argument that the broad language of the arbitration clause demanded arbitration with respect to the parties' duration dispute.15 The justice also rejected the hospital's argument that the arbitration clause was "null and void and of no further effect" after December 31, 2004.16 Relying in part on Virginia Carolina Tools, Inc. v. International Tool Supply, Inc.,17 the superior court determined that the intent to arbitrate a dispute over the duration of the contract could not be inferred from the nonspecific arbitration clause coupled with the expiration of the services agreement on a specific date.18 Thus, the motion justice left the matter of whether the October 1, 2001 agreement renewed automatically or expired on December 31, 2004 for a court to decide in due course.19 On February 17, 2005 an order was entered, denying ROA's motion to appoint an arbitrator and granting the defendant's motion to enjoin arbitration.20 ROA appealed this decision to the Rhode Island Supreme Court.21

ANALYSIS AND HOLDING

ROA alleged on appeal that the court erred by failing to apply the principle of law that ROA perceived as imposing a presumption in favor of arbitration when presented with a

12. Id.
13. Id.
14. Id.
15. Id.
16. Id. at 513-14.
17. 984 F.2d 113, 118 (4th Cir. 1993).
18. Radiation Oncology, 899 A.2d at 514.
19. Id.
20. Id.
21. Id.
contract containing a broadly worded arbitration clause. ROA further alleged that the court adopted the “circular” analysis the motion judge criticized in her decision. The hospital maintained that the motion justice correctly reserved the dispute over the duration of the contract for judicial resolution because the services agreement did not demonstrate an intent on behalf of the parties to submit a dispute over the duration of the contract to arbitration. The hospital further contended that the arbitration clause was ineffectual because the contract expired on December 31, 2004 rendering the arbitration clause inoperable.

The court relied on the fundamental rule that in disputes over arbitration and adjudication, “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit.” Citing Stanley-Bostitch, Inc. v. Regenerative Environmental Equipment Co., the court asserted that in determining whether the parties agreed to submit a dispute to arbitration depends upon the intention of the parties when they entered into the contract. The court stated that the issue of whether a dispute is arbitrable is a question of law that is reviewed de novo.

**Intention of the Parties**

The court held the parties did not intend to submit disputes over the duration of the contract to arbitration because the terms of the agreement included a certain date upon which the contract would expire. Relying on the language of the contract itself, which stated that if an extension or substitute contract had not been signed before December 31, 2004, the agreement would be “null and void and of no further effect,” the court concluded that the strong and specific language of the expiration clause limited

---

22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* (quoting Sch. Comm. of North Kingstown v. Crouch, 808 A.2d 1074, 1078 (R.I. 2002)).
27. *Id.*
28. *Id.*
29. *Id.*
the nonspecific language of the arbitration clause.\textsuperscript{30}

While the court acknowledged that it has generally voiced a preference in favor of arbitration as a means of dispute resolution, the court did not view their holding in this case in conflict with this preference.\textsuperscript{31} The court pointed to federal circuit cases as a basis for their holding that have similarly discounted a presumption in favor of arbitration in cases where the courts have been called upon to decide whether a contract dispute over duration should be arbitrated when the contract contains a set date of expiration.\textsuperscript{32}

\textit{Validity of the Arbitration Clause}

The court did not address the alternative argument presented by the hospital that the arbitration clause became unenforceable upon the expiration of the contract because the court held that no intent to submit this type of dispute can be inferred from the language of the contract itself.\textsuperscript{33} The court stressed that their approach was consistent with the United States Supreme court's previous holding that "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims."\textsuperscript{34}

The court affirmed the judgment of the superior court in favor of the defendant and remanded the case back to the lower court for decision on the merits of the parties dispute over the duration of the contract.\textsuperscript{35}

\textbf{COMMENTARY}

There are two ways to approach the question of whether a dispute over the duration of an agreement is for a court or arbitrator. First, the issue could be thought to turn on whether the agreement itself has expired.\textsuperscript{36} Under this approach, if the agreement itself has expired, the obligation to arbitrate any

\begin{itemize}
  \item \textsuperscript{30} \textit{Id.} at 514-15.
  \item \textsuperscript{31} \textit{Id.} at 515.
  \item \textsuperscript{32} \textit{Id.}
  \item \textsuperscript{33} \textit{Id.}
  \item \textsuperscript{34} \textit{Id.} (quoting AT&T Tech., Inc. v. Communications Workers of America, 475 U.S. 643, 649 (1986)).
  \item \textsuperscript{35} \textit{Id.} at 516.
  \item \textsuperscript{36} \textit{Id.} at 515 (citing Virginia Carolina Tools, Inc. v. Int'l Tool Supply, Inc., 984 F.2d 113, 118 (4th Cir. 1993)).
\end{itemize}
dispute arising from the agreement has also expired because the source of the obligation is the agreement’s arbitration clause.\textsuperscript{37} The United States Supreme Court has, however, rejected this approach in \textit{AT & T Technologies v. Communications Workers of America}, holding that this approach compromises the decision on the very matter in dispute in the course of deciding who shall decide it.\textsuperscript{38}

The second approach, and the technique employed by the Rhode Island Supreme Court in the case at hand, considers the question as one of contract interpretation. This approach has been held as the proper method, as it avoids determining the question of the merits of the underlying dispute over the agreement’s duration.\textsuperscript{39} Considering the question as one simply of contract interpretation gets to the heart of the matter, applying a fundamental principle that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit.”\textsuperscript{40}

Relying on fundamental and well-established precepts of contractual law, the court properly held that when interpreting a contract that contains contradictory clauses, the specific clause trumps the more general one. The opinion of the court also rested on the well-settled principle that if an arbitration clause provides that “all” disputes between the parties shall be arbitrated, but also provides a specific date of expiration, any disputes over whether a contract expired or was extended by the parties must be decided by the courts, and not an arbitrator.

While the court correctly applied the law to the facts of this case, the court could have further relied on the well-settled legal principle that where two clauses of a contract conflict, “[t]he clause contributing most essentially to the contract is entitled to greater consideration.”\textsuperscript{41} In this case, the expiration date clause was an essential term to the contract, and therefore contributed more essentially to the contract itself than the arbitration clause did. While this further analysis was unnecessary, it may have

\begin{itemize}
  \item \textsuperscript{37} Id.
  \item \textsuperscript{38} \textit{Id.} (citing \textit{AT&T Tech.}, 475 U.S. at 649).
  \item \textsuperscript{39} \textit{Id.} (citing \textit{Virginia Carolina Tools}, 984 F.2d at 118).
  \item \textsuperscript{40} \textit{United Steelworkers of America v. Warrior & Gulf Navigation Co.}, 363 U.S. 574, 582 (1960).
  \item \textsuperscript{41} 17A AM. JUR. 2d \textit{Contracts} § 384 (2006).
\end{itemize}
further supported the court’s decision.

The court noted that while it has expressed a preference in favor of arbitration as an especially effective method of dispute resolution, it did not view its holding in this case to offend that principle.\textsuperscript{42} The court’s holding is in accord with federal court decisions in similar cases where there was a challenge to the duration of a contract containing a specific date of expiration.\textsuperscript{43} Similar federal circuit court cases have held than an intent to arbitrate a dispute over duration may not be inferred from an agreement containing a nonspecific arbitration clause and a specific expiration date.\textsuperscript{44}

**CONCLUSION**

The Rhode Island Supreme Court held that the more specific clause containing the expiration date took precedence over the broad arbitration clause to arbitrate all disputes and thus the issue was for the courts to resolve. The decision of the Rhode Island Supreme Court in this case correctly applied the facts of this case to well-established principles of contract law. This decision is also in line with case law from federal circuit court decisions and the United States Supreme Court decisions.

Hadley Perry

\textsuperscript{42} Radiation Oncology, 899 A.2d at 515.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
Bankruptcy Law/Workers’ Compensation Law. *Department of Labor and Training v. Michael A. Derderian*, Case No. 1:06-ap-1004 (Bankr. D.R.I. 2006). On November 30, 2006, the United States Bankruptcy Court for the District of Rhode Island\(^1\) conducted a hearing\(^2\) in connection with two adversary proceedings commenced by the Rhode Island Department of Labor and Training\(^3\) against Michael A. Derderian and his brother Jeffrey A. Derderian.\(^4\) Specifically at issue before the Bankruptcy Court in each of the adversary proceedings involving the Derderians\(^5\) was whether penalties assessed by the Department against, among others, the Derderians totaling $1,066,000.00, would be deemed non-dischargeable as to each of the Derderians’ respective bankruptcy cases.\(^6\) The Bankruptcy Court, following spirited argument, ultimately upheld the penalties as non-dischargeable.\(^7\)

**FACTS AND TRAVEL**

On February 20, 2003, one of the most horrific events in the history of Rhode Island occurred in West Warwick, Rhode Island. During a rock concert in a night club owned and managed by Derco, LLC,\(^8\) a fire spontaneously erupted from a pyrotechnic

\(^1\) Hereinafter, the “Bankruptcy Court.”
\(^2\) Hereinafter, the “Hearing.”
\(^3\) Hereinafter, the “Department.”
\(^5\) Hereinafter, sometimes collectively referred to as the “Adversary Proceedings.”
\(^6\) Hereinafter collectively referred to as the “Derderian Bankruptcy Cases.”
\(^7\) The Bankruptcy Court did not issue a formal opinion following the Hearing; a transcript of the Hearing was filed with the Bankruptcy Court on December 22, 2006. Hereinafter, all findings/rulings of the Bankruptcy Court arising from the Hearing shall be referred to collectively as, the “Decision.”
\(^8\) Hereinafter, “Derco.” Derco is a Rhode Island limited liability company with two managers – the Derderians.
The flames and smoke from the pyrotechnic display immediately consumed the premises; a mad rush by the concert patrons to the club's emergency exit was rebuffed by a security guard, resulting in a mass stampede of frantic people to the front door.\footnote{This incident has been forever scarred in Rhode Island annals as, and shall be referred to herein as the "Station Fire." Extensive reporting concerning the Station Fire was and remains reported in \textit{The Providence Journal} and/or its website. \textit{See PROVIDENCE J., The Station Fire, available at \url{http://www.projo.com/extra/2003/stationfire/} (last visited Mar. 29, 2007).}}

The consequences of the pyrotechnics was staggering: all tolled, one hundred people perished from the fire.\footnote{\textit{Id.}} Over two hundred suffered injuries.\footnote{\textit{Id.}} The building, or what remained of it when the embers were wetted, was ultimately razed.\footnote{\textit{Id.}}

Subsequent to the events of that fateful night, the Department filed a complaint against Derco and the Derderian to seek the assessment of penalties to their collective failure to maintain workers' compensation insurance.\footnote{Section 28-36-15 of the Rhode Island General Laws, as amended, sets forth the penalty for any employer who knowingly fails to obtain such insurance.} The case was heard within the Department and the designated hearing officer assigned to the case assessed a penalty against Derco in the amount of $1,066,000.00\footnote{Hereinafter, the "Penalty."} but found that the Derderians could not be found personally liable for the Penalty assessed against Derco. On appeal by the Department, Derco and the Derderians, the Rhode Island Workers' Compensation Court affirmed the assessment of the Penalty against Derco but reversed the finding against the Derderians and found each of them personally liable for the Penalty.\footnote{Hereinafter, the "Order."} The ruling was appealed to the Appellate Division of the Rhode Island Workers' Compensation Court; on appeal, that decision was affirmed and the Order stood.

Derco and the Derderians then petitioned the Rhode Island Supreme Court for review by writ of certiorari. The Rode Island Supreme Court granted the writ of certiorari and issued a stay on behalf of Derco as to the collection of the Penalty and remanded the proceeding for a determination on the personal liability of the
Derderians as to the Penalty assessed by the Department.

On remand, the series of rulings/findings presented in the preceding paragraph unfurled again. However, during this period, the Derderians filed their Voluntary Chapter 7 Petitions16 with the Bankruptcy Court on September 23, 2005, which filings operated to stay the proceedings on remand in the Rhode Island state courts. On the schedules in each of their Petitions, the Derderians listed the Penalty as claims against their respective bankruptcy estates, seeking to have the Penalty discharged against each of them.

Subsequent to the filing of the Derderians' Bankruptcy Cases, the Department filed the Adversary Proceedings against each of the Derderians on January 3, 2006.17 The basis of the Adversary Proceedings lie in the Department's assertion that the Order should be deemed non-dischargeable against each of the Derderians because the nature of the assessment of the Penalty was consistent with United States Bankruptcy Code as to non-dischargeable debts.18 In response to the Adversary Proceedings, the Derderian each denied the allegations as set forth therein on the issue in determining the dischargeability of the Penalty. Thereafter, a discovery plan for each of the Adversary Proceedings was entered by the Bankruptcy Court and on September 5, 2006, the Department filed its Motions and Memoranda for Summary Judgment in each of the Adversary Proceedings.19 On October 20, 2006, each of the Derderians filed Objections to the Department's MSJ and Cross-Motions and Memoranda for Summary Judgment.20 Following a continuance of the hearing on the Department's MSJ and the Derderians MSJ, the Bankruptcy Court conducted the Hearing.

16. Hereinafter, sometimes collectively referred to as, the “Petitions.”
17. The Adversary Proceedings were not consolidated by either motions to consolidate or an order of the Bankruptcy Court, save the comment in note 1, infra, relating to the Hearing.
19. Hereinafter, sometimes collectively referred to as the “Department’s MSJ.”
20. Hereinafter, sometimes collectively referred to as the “Derderians’ MSJ.”
ARGUMENTS OF THE PARTIES

The Argument by the Department

The Department contended that the Penalty was a "fine" properly assessed against each of the Derderians by a governmental entity and pursuant to those pertinent provisions of the Bankruptcy Code, such fine(s) would be non-dischargeable.

The Department relied upon those pertinent provisions of Section 523(A)(7) of the Code in support of its argument. That section provides: "(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty."

The Department asserted that the Penalty assessed by its hearing officer pursuant to those pertinent provisions of Section 28-36-15 of the Rhode Island General Laws, as amended, directing that a minimum penalty of $500.00 per day be assessed for every day an employer is found to have been without workers' compensation insurance was the proper calculation to assess the Penalty against Derco.21 The Department's hearing officer found that Derco did not maintain insurance covered the period from March 22, 2000 through February 20, 2003; hence, the computation of the Penalty in the amount of $1,066,000.00.22

Based upon the foregoing, it was clear from the Department's tone, not only within its memoranda, but at oral argument that the Department's method of determining the amount of the Penalty contained in the Order was consistent with Rhode Island law in assessing a Penalty against Derco for its egregious conduct; the Department argued that the Penalty assessed by the Department was purely penal in nature.23

At the Hearing and in response to an inquiry from the Honorable Arthur N. Votolato, Jr., the Judge of the Bankruptcy Court, counsel for the Department reiterated that the fine was a penalty and was in fact an assessment to assure that the provisions of the Rhode Island Workers' Compensation Act would

21. The statute provides a maximum daily penalty of $1,000.00. See Department's MSJ at 3; see also R.I. GEN. LAWS § 28-36-15 (2003).
22. Id. at 4.
23. Id.
be met. Given Derco's complete failure to take any affirmative action in reference to likely claims or to present evidence regarding its response to employee injuries, the Department believed the assessment of the largest possible penalty was proper. Therefore, the Order reflected the agreement with the Department's position through the lower court proceedings.

The Argument by the Derderians

The Derderians argued that the Penalty incorporated into the Order was intended to be used by the Department for compensation for actual pecuniary loss to the State of Rhode Island. Specifically, the Derderians cited Section 28-37-1 of the Rhode Island General Laws, as amended, as authority for reimbursing the Department for actual pecuniary losses incurred in it operations.

That section states, in pertinent part:

(a) There is established in the department of labor and training a special account to be known as the workers' compensation administrative account, an account within the general fund. This account, referred to as the "workers compensation administrative account," shall consist of payments made to it as provided in this chapter, or penalties paid pursuant to this chapter, and of all other moneys paid into and received by the fund, of property and securities acquired by and through the use of moneys belonging to the fund, and of interest earned upon the moneys belonging to the fund. All moneys in the fund shall be mingled and undivided. The fund shall be administered by the director of labor and training or his or her designee.

The Derderians asserted that if the director of the Department was able to turn over any of the fines collected by it for the benefit of the victim(s) of an uninsured employer, the fine could not constitute a Penalty under Section 523(a)(7) of the Code.

25. Id.
26. Derderians' MSJ, at 5.
but would be categorized as compensation, thereby rendering the fine dischargeable under the Code. In addition, the Derderians also argued that certain representations made by the Department's counsel at a hearing of the Rhode Island Workers' Compensation Court on the determination (and calculation) of the Penalty where he stated that there was nothing to prevent the director of the Department to use those funds collected from the assessment of the Penalty for the benefit of the victims could not then be used in Bankruptcy Court as conclusive that the Penalty was non-dischargeable.

In response, the Department argued that the Penalty assessed by the Department could not be deemed compensation and would never be used as compensation for the benefit of any victims in the employ of Derco. Historically, counsel to the Department represented that the Department has never used funds collected to directly compensate victims. Upon examination by the Bankruptcy Court, counsel for the Department indicated that from the records of the Department, none of the fines collected on behalf of the Department in 2005 were applied to the benefit of any uninsured employee. Upon further inquiry by the Bankruptcy Court, counsel to the Department represented that the Department had never used or applied fines and penalties collected pursuant to Section 28-36-15 of the Rhode Island General Laws, as amended, for the benefit of uninsured employees.

29. Decision, at 11-12. A considerable colloquially between counsel and the Bankruptcy Court on the Derderians' position that the Department was judicially estopped from asserting that a possibly compensable fine could, in a different forum, be deemed "non-compensable" for actual pecuniary loss. See 11 U.S.C. §523(A)(7).
30. Decision, at 6, 7. ("[T]he State of Rhode Island has, for better or worse, no uninsured employee's fund and the State has never compensated uninsured employees.").
31. Following that representation, counsel to the Department represented to the Bankruptcy Court that if employees could be benefited, the Department would suspend the fine. Id. at 8. Specifically counsel indicated that what the Department had done on occasion, it will no doubt continue to do, and that would be to suspend significant portions of any fine assessed if that would assure – that employees be compensated through a form of offer of compromise. Id. at 9. However, counsel to the Department represented to the Bankruptcy Court that the negotiations between the Department and the Derderians failed to reach such offer of compromise.
HOLDING

Subsequent to spirited oral argument by counsel, the Bankruptcy Court Ruled that the claim of the Department had all the earmarks of a fine or a penalty under Section 523 (a) (7) of the Code.\(^{32}\) It further ruled that the Department, pursuant to the General Laws of Rhode Island, could not provide compensation to injured employees from the proceeds of the collection of fines assessed by the Department.\(^{33}\) In addition, the Bankruptcy Court held there was no discretion vested in the director of the Department to use fines paid from assessments by the Department against any employer.\(^{34}\)

As to the issue of judicial estoppel, Judge Votolato held for the Department and specifically found that the representations from the counsel to the Department at the hearing at the lower court could not bind the State.\(^{35}\)

The Bankruptcy Court granted the Department’s MSJ and held that the Penalty was non-dischargeable to each of the Derderians; a judgment order to that effect was entered by the Bankruptcy Court in each of the Adversary Proceedings on January 3, 2007.\(^{36}\) There was no appeal and each of the Adversary Proceedings were closed on January 24, 2007.

COMMENTARY

The magnitude of the horror surrounding the events on February 20, 2003 are indelibly carved in Rhode Island’s history and of those able to comprehend such magnitude from that night. The innocent victims of the Station Fire were deprived either of their lives or have endured unimaginable and excruciating physical and psychological injuries. Litigation on issues of causation (and ultimate liability) of the conflagration of the flames continues on behalf of the victims before the United States

---

32. Id. at 25.
33. Id. at 21.
34. Id. at 8.
35. Id. at 38; see also Mark J. Plumer, Note, Judicial Estoppel: The Refurbishing of a Judicial Shield, 55 GEO. WASH. L. REV. 409, 411 n.11 (1987).
36. Decision, at 38.
District Court for the District of Rhode Island. Each of the Derderians have been sentenced in proceedings in the Kent County Superior Court litigation; Michael A. Derderian is currently serving his prison sentence at the Adult Correctional Institution.

Each of the Derderians will carry with them for the remainder of their lives the stigma associated from their various actions (and inactions) which resulted in the carnage of the Station Fire. For the victims and their families, accountability on the part of the Derderians is what has driven most over these past four years. Some of them saw such accountability slipping away by the filing of the Derderians' Bankruptcy Cases.

It is unique (in fact, eerie) that the Bankruptcy Court, of all forums, would be the final arbiter of accountability holding that Derco’s failure to possess workers' compensation insurance for the period of practically three years prior to the carnage could result in the assessment of the Penalty. It is likely that the Derderians will never be able to pay the Penalty; however, the victims from the Station Fire may take solace in its reaffirmation by the Bankruptcy Court.

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; LL.M. American Banking Law Studies, Morin Center for Banking and Financial Law, Boston University School of Law, 1991. The author would like to acknowledge his sincere appreciation to the entire Board and Members of the Roger Williams University Law Review for the opportunity and honor to participate in this Survey of Rhode Island Law, and Kevin N. Rolando, in particular, on this very poignant case arising on that fateful February evening in 2003.
Civil Procedure. Crowe Countryside Realty Associates, Co., LLC v. Novare Engineers, Inc., 891 A.2d 838 (R.I. 2006). In this case of first impression, the Rhode Island Supreme Court analyzed the relationship and tension between Rule 26(b)(3) and Rule 26(b)(4) to determine the extent to which a party may obtain discovery of written communications between an opposing party’s attorney and its testifying expert witnesses. The court held that “core” or “opinion” work product of an attorney, whether or not shared with an expert witness, must always be protected, while “factual” or “ordinary” work product is always fully discoverable. The court quashed the Superior Court’s order compelling all of an attorney’s correspondence with expert witnesses expected to testify at trial, and remanded the case with instructions that the court conduct an in camera review of the documents sought by the defendant to determine whether entire documents or parts of the documents are thus discoverable.

FACTS AND TRAVEL

This case arises from an engineering malpractice case, in which the plaintiff, Crowe Countryside Realty Associates, Co., LLC (“Crowe”), alleged that the defendant, Novare Engineers, Inc. (“Novare”), negligently advised the plaintiff about a fire alarm system. Novare served Crowe with subpoenas duces tecum commanding that Crowe’s three experts who were expected to testify at trial bring “[a]ny and all records relating in any way to [their] review, evaluation and formation of opinions in connection with the . . . litigation” to their depositions. Crowe filed motions for protective orders, alleging that the documents sought were protected from discovery by the work-product privilege. The

2. Id. at 847.
3. Id. at 848.
4. Id. at 839.
5. Id.
6. Id.
Superior Court justice who heard the motion ruled that when an expert witness is designated as a testifying expert, “any and all documents which were exchanged, which in any way relate to the opinion that [the expert has] given in the case or is prepared to give in the case are discoverable,” and “subject to scrutiny.” Thus, the justice denied Crowe’s motions for protective orders and Crowe thereafter filed a petition for writ of certiorari, which was granted by the Supreme Court.

**ANALYSIS AND HOLDING**

On certiorari, Crowe argued that the Superior Court justice should have taken measures to protect its counsel’s work product on the basis of the work-product privilege as embodied in Rule 26(b)(3) of the Superior Court Rules of Civil Procedure. Novare argued that any correspondence between an attorney and a testifying expert that the expert considers or relies on is discoverable under Rule 26(b)(4). The Supreme Court’s task was thus to determine “whether and to what extent under Rule 26, subdivisions (b)(3) and (b)(4), the work product doctrine applies to documents and other materials reviewed by [testifying expert witnesses].” After examining the scope of the work-product privilege and approaches by federal courts in similar cases, the Supreme Court determined that “core” or “opinion” work product, regardless of whether it is shared with an expert witness, is always protected, whereas “factual” or “ordinary” work product is fully discoverable.

**Scope of the Work-Product Privilege**

The court first looked at the landmark *Hickman* case to determine the scope of the work-product privilege. In *Hickman*, the United States Supreme Court held that “most written materials ‘obtained or prepared . . . with an eye toward litigation’
are protected from discovery” because the “policy against invading
the privacy of an attorney’s course of preparation was both well
recognized and essential to an orderly working of the adversarial
system.” The Hickman Court stressed that “it would be a ‘rare
situation’ that would justify disclosure of attorney work product,
and that ‘[n]ot even the most liberal of discovery theories can
justify unwarranted inquiries into o the files and mental
impressions of an attorney.” The Supreme Court of Rhode Island
noted that it has applied the Hickman work-product doctrine and
further noted that the doctrine is embodied in Rhode Island’s Rule
26(b)(3) which in pertinent part states that:

(3) Trial Preparation: Materials. Subject to the provisions
of subdivision (b)(4) of this rule, a party may obtain
discovery of documents and tangible things otherwise
discoverable under subdivisions (b)(1) of this rule and
prepared in anticipation of litigation or for trial by or for
another party or by or for that other party’s
representative . . . only upon a showing that the party
seeking discovery has need of the materials in the
preparation of the party’s case and that the party is
unable without undue hardship to obtain the substantial
equivalent of the materials by other means.

The Rule further states that “[i]n ordering discovery of such
materials when the required showing has been made, the court
shall protect against disclosure of the mental impressions,
conclusions, opinions, or legal theories of an attorney or other
representative of a party concerning the litigation.” The court
concluded that the Rule recognizes two types of work product that
warrant different level of protection: (1) “opinion” or “core” work
product, such as an attorney’s mental impressions; and (2)
“factual” or “ordinary” work product which requires lesser
protection.

14. Id.
15. Id. (quoting Hickman v. Taylor, 329 U.S. 495, 511 (1947)).
16. Id. at 842. (quoting R.I. R. Civ. P. 26(b)(3)).
17. Id.
18. Id.
Federal Court Approaches

Since Rule 26 is based on the 1970 version of the corresponding Federal Rule of Civil Procedure and the court has previously stated that "where the federal rule and [the] state rule are substantially similar, [it] will look to the federal courts for guidance or interpretation of our own rule," the court looked to approaches used by federal courts. The court determined that there are generally two approaches, with some variation, used by federal courts in dealing with the tension between the language of Rule 26(b)(3) and Rule 26(b)(4): (1) a discovery-oriented approach; and a (2) protection-oriented approach.

Federal courts that used a discovery-oriented approach generally allow broad discovery of information reviewed by testifying experts, emphasizing the liberal ideals of discovery. The United States District Court for the District of Colorado in Boring concluded that the purpose of Rule 26(b)(4) is to help parties prepare for cross-examination and impeachment and that this purpose would be frustrated if discovery was limited.

Other courts apply a protection-oriented approach. The court noted that the Third Circuit has held that "opinion" work product was to "absolutely be protected" while "factual" work product was mostly discoverable only upon a showing of substantial need. The Third Circuit concluded that the provision of (b)(3), which makes it subject to (b)(4), only applies to the portion of (b)(3) pertaining to factual work product, and that "the marginal value in the revelation of cross-examination that the expert's view may have originated with an attorney's opinion or theory does not warrant overriding the strong policy against disclosure of documents consisting of core attorney's work product." The District of Rhode Island had also followed this line of reasoning, noting that an expert's opinion can always be tested

20. Id. at 843.
21. Id. at 843-44.
22. Id. at 844 (quoting Boring v. Keller, 97 F.R.D. 404, 407 (D. Colo. 1983)).
23. Id. at 845.
24. Id.
25. Id. at 845 (quoting Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3rd Cir. 1984)).
by and judged against other experts in the same field.26

In this case, the Supreme Court of Rhode Island found the above-mentioned protection-oriented reasoning persuasive.27 The court added that full disclosure of work product “might hamper the trial preparation process because attorneys would be reluctant to reveal their mental impressions, legal theories, trial tactics, and strategies to testifying experts . . . [and that] it is the disclosure of just such information that Rule 26(b)(3)’s dictation of the work product privilege was intended to prevent.”28 The court noted that the Advisory Committee’s Notes to Rule 26 confirm that the first paragraph of 26(b)(3) governs the “qualified immunity of trial preparation materials and the absolute immunity of ‘the mental impressions, conclusions, opinions, or legal theories of an attorney.’”29 Accordingly, the court held that the “clear language” of 26(b)(3) that commands courts that they “shall protect’ opinion work product . . . appl[ies] to all discovery requests of materials prepared in anticipation of litigation because of the admonition’s location in the general portion of Rule 26 applying to all discovery.”30 However, the court held that since the first sentence of Rule 26(b)(3) is made “[s]ubject to the provisions of subdivision (b)(4)[,]’ factual work product exchanged between a testifying expert and an attorney does not have to meet the substantial need/undue hardship standard [that would govern in circumstances in which (b)(4) does not apply], and is instead fully discoverable in accordance with subdivision (b)(4).”31

COMMENTARY

This case is significant because it is the Rhode Island Supreme Court’s first opportunity to establish the scope of the work product doctrine with respect to discovery related to testifying experts as set forth in Rule 26(b)(4). While the court adopts a protection-oriented approach, it still preserves the ideals of discovery by providing that all factual work product underlying an expert’s opinion is fully discoverable.32 The Court thus strikes a

26. Id. at 846.
27. Id.
28. Id. at 847.
29. Id.
30. Id.
31. Id. at 847.
32. Id. at 848.
balance between protecting an attorney's opinion work product, as intended by the United States Supreme Court in *Hickman* and codified in Rule 26(b)(3), and promoting discovery of factual work product underlying an expert's testimony, as contemplated by Rule 26(b)(4). This means that an attorney's opinion is always protected regardless of whether it has been disclosed to an expert, and is thus never discoverable under Rule 26(b)(4).

**CONCLUSION**

The court held that "core" or "opinion" work product of an attorney, whether or not shared with an expert witness, must always be protected under the work product privilege, while "factual" or "ordinary" work product is always fully discoverable. Accordingly, the court vacated the Superior Court's order compelling all of the correspondence between Crowe's counsel and the three testifying experts and remanded the case with instructions that the court conduct an in camera review of the documents sought by the defendant to determine whether entire documents or parts of the documents are thus discoverable.

Kathleen J. Andresen

---

33. *Id.*
34. *Id.* at 847.
35. *Id.* at 848.
Civil Procedure. *East Providence School Committee v. Smith*, 896 A.2d 49 (R.I. 2006). Public school committee sued parents of nonresident children who were wrongfully enrolled in East Providence school. The school committee sought the reasonable value of tuition costs incurred for educating the defendants' children. As a matter of first impression, the Rhode Island Supreme Court held that the school committee lacked standing to sue for money damages. Because the school committee was merely a department of a municipality, the court advised that the appropriate litigant, as the real party in interest to such a civil action, was the town of East Providence.

FACTS AND TRAVEL

It was the best of schemes, and it was the worst of schemes. From 1997 to 1998, defendants Charles M. Smith III and Maria Casimiro, both residents of the city of Providence, enrolled their children in East Providence schools.1 To achieve this end, the defendants provided the school district with the address of their East Providence rental property as the children's residence.2 The children actually lived in Providence with their parents.3

The defendants' efforts were subsequently spoiled by a 1999 investigation by the East Providence school department, which revealed that the children were not residents of East Providence but rather residents of Providence.4 Alleging dual residency, the defendants appealed the investigation's findings to the commissioner of education, as mandated by the administrative procedures outlined in G.L.1956 § 16-64-6,5 the pertinent statutory provision governing disputes over residency.6

The commissioner rejected the defendants claim in a written

2. Id.
3. Id.
4. Id. at 50-51.
5. R.I. GEN. LAWS § 16-64-6 (1956).
decision dated February 2, 2000, finding that the children were in fact, residents of Providence.\(^7\) The commissioner further directed that “[t]he children . . . be disenrolled from the East Providence school system and enrolled in the public schools of Providence, which they reside.”\(^8\) This decision was later affirmed by the Superior Court.\(^9\) Although the defendants sought review by the Rhode Island Supreme Court, their appeal was dismissed; the court advising that the commissioner’s decision would be reviewed upon certiorari only.\(^10\) Shortly thereafter, in 2001, the East Providence school committee filed a fresh action in Superior Court against the defendants, seeking to recover tuition expenses incurred by the school district for educating the defendants’ two children, and moved for summary judgment on the matter.\(^11\) The defendants retaliated by attacking the school committee’s standing to bring suit.\(^12\) The Superior Court rejected the defendants’ contention, and awarded summary judgment in favor of the school committee.\(^13\) Additionally, after considering testimony from the East Providence school district’s superintendent relating to per capita public education expenditures within the city of East Providence, the court entered damages against the defendants in the amount of $40,538, basing the award on “book account and unjust enrichment.”\(^14\)

The defendants appealed the Superior Court’s ruling on two grounds.\(^15\) First, the defendants challenged the Superior Court’s affirmation of the school committee’s standing to sue for the recovery of tuition expenses.\(^16\) Second, the defendants alleged that even if the school committee had standing, the Superior Court’s method in arriving at its damage award was in error because East Providence’s per capita expenditures may have greatly exceeded the actual cost of educating the defendants’ two children.\(^17\)

\(^7\) Id.
\(^8\) Id.
\(^9\) Id.
\(^10\) Id. at 51 n.1.
\(^11\) Id. at 51.
\(^12\) Id.
\(^13\) Id.
\(^14\) Id.
\(^15\) Id.
\(^16\) Id.
\(^17\) Id. at 52.
Despite losing the battles which consumed the initial administrative proceeding and the latter Superior Court adjudication, in the end the defendants won the war. Following review of legal memoranda and hearing of oral argument, the Supreme Court summarily decided the issues raised by the defendants on appeal and reversed the order and judgment of the Superior Court.\textsuperscript{18}

\textbf{ANALYSIS AND HOLDING}

Because the Rhode Island Supreme Court ultimately held that the school committee lacked standing to recover tuition expenses against the defendants, the court avoided determining whether the per capita expenditure calculation used by the Superior Court was erroneous.\textsuperscript{19} Rather, the court focused entirely upon the defendants’ primary argument relating to the school committee’s standing to bring suit. Applying a \textit{de novo} standard of review to the summary judgment order, the court consulted the pertinent statutory authority concerning matters of school residency and concluded that no right to recovery of tuition expenses had been explicitly created by the General Assembly.\textsuperscript{20}

In response, the school committee insisted that “its authority to sue [was] implied because of its status as a party in interest to the administrative proceedings [outlined in § 16-64-6]\textsuperscript{21}; and padded this position by relying on provisions encompassed within the statute encompassing the general powers and duties of school committees, which appointed the “entire care, control, and management”\textsuperscript{22} of the district’s schools with the school committee.

Although the defendants conceded that the school committee was an appropriate party to the first administrative proceeding, they maintained that the committee’s capacity to initiate a civil action for the recovery of tuition expenses was effectively disabled by § 45-15-2, which requires “[e]very civil action brought by a town shall be brought in the name of the town unless otherwise specified by law.”\textsuperscript{23} Hence, because the school committee was no

\begin{itemize}
\item \textsuperscript{18} \textit{Id.} at 51.
\item \textsuperscript{19} \textit{Id.} at 54.
\item \textsuperscript{20} \textit{Id.} at 51-52.
\item \textsuperscript{21} \textit{Id.} at 52.
\item \textsuperscript{22} R.I. GEN. LAWS § 16-2-9(a) (1956).
\item \textsuperscript{23} \textit{Smith}, 896 A.2d at 52 (quoting R.I. GEN. LAWS § 45-15-2 (1956)).
\end{itemize}
more than a department of a municipality, the statutory mandate expressed in § 45-15-2 denied such departments standing, notwithstanding any law stating otherwise. Accordingly, the proper party to initiate a lawsuit against the defendants was the city of East Providence.25

Agreeing with the defendants, the court swiftly rejected the school committee's urging that it follow the analysis and holding announced in Irish v. Collins.26 In that case, the Rhode Island Supreme Court held that the Middletown School Committee had standing to petition for a writ of certiorari in response to a lawsuit initiated by the school district's superintendent.27 The superintendent had previously successfully challenged his termination to the State Board of Education.28 According to the East Providence school committee, Irish acknowledged that the right of school authorities to sue was implied from "broad powers" expressed by G.L.138, ch, 178, § 22; the "precursor to G.L. 1956 § 16-2-9, which, like the current version of the statute, vested school committees with 'the entire care, control, and management' of schools."29

The court distinguished the case at bar from Irish on several grounds.30 First, in the instant action, the East Providence school committee sued for damages representing tuition reimbursement, whereas in Irish the Middletown school committee merely sought judicial review of the Board of Education's administrative decision.31 Next, unlike the Middletown school committee in Irish who was forced to respond to the superintendent's lawsuit, the present action before the court was initiated by the East Providence school committee itself.32 Lastly, subsequent cases decided after Irish "clarified the legal status of school committees by noting that they are departments of their respective municipalities."33

24. Id.
25. Id.
26. Id. (citing Irish v. Collins, 107 A.2d 455 (R.I. 1954)).
27. Id.
28. Id.
29. Id. (quoting Irish, 107 A.2d at 459).
30. Id. at 53.
31. Id.
32. Id.
33. Id.
On this last point, the court relied chiefly on Peters v. Jim Walter Door Sales of Tampa, Inc., a 1987 case where the parents of a student killed on the school's premises sued the school committee directly for the student's death. In Peters, the court held that the city was the appropriate the defendant "[b]ecause the school committee is a department of the city." Although the court recognized that the school committee in Peters was a defendant in the litigation, it nonetheless found Peters instructive to the extent that the opinion clearly expressed "that the municipality, rather than the school committee, is the real party in interest when money damages are at stake." Consequently, the court declined the school committee's invitation to imply a right to file suit under G.L.1956 § 16-2-9, commenting, "if the Legislature intended to vest local school committees with the authority to sue for damages in cases such as this, it would have done so." Thus, in the absence of an express legislative mandate explicitly creating a right to recovery of tuition expenses, the court concluded that the East Providence school committee simply did not have the requisite standing to sue the defendants for money damages since the school committee was merely a department of the larger East Providence municipality.38

Justice Robinson's Concurring Opinion

In his brief concurrence, Justice Robinson reiterated his position in Johnston v. Santilli, observing: "elected school committees have responsibilities and powers that differ radically from those of the ordinary departments of municipal government." However, the Justice nevertheless agreed that the East Providence school committee lacked standing to sue for money damages in the instant action, reasoning that since the money received in a civil suit would be forwarded by the school committee to the municipal's treasurer, "the decision as to whether or not to sue a particular person or entity should be

34. Id. (citing Peters v. Jim Walter Door Sales of Tampa, Inc., 525 A.2d 46 (R.I. 1987)).
35. Id. (quoting Peters, 525 A.2d at 47).
36. Id.
37. Id. at 54.
38. Id. at 53-54.
39. Id. at 54 (citing Johnston v. Santilli, 892 A.2d 123, 133 (R.I. 2006)).
vested in the municipal body to which the treasurer reports."  

COMMENTARY

Characterizing the events of this controversy "as a tale of two cities," the Rhode Island Supreme Court's decision in *Smith* emphasizes the notable authority vested in Rhode Island's municipalities to oversee the general financing of civil litigation. Assuming that the costs of litigation will be financed by a municipality's general fund, the court's holding is satisfactory to the extent that it implies greater administrative oversight in seeing how lawsuits involving municipal interests are funded. Yet, on the same token, by announcing that the real party in interest – at least when money damages are involved – is the municipality, the court effectively grants cities and towns the significant responsibility of making well-informed decisions relating to the prospective merits (and drawbacks) of litigation. This responsibility may be one that, in the interest of promoting bureaucratic efficiency, a municipality would prefer to delegate to an internal department. Certainly, municipal departments, by virtue of their very nature, purpose, and expertise, would be in a better position to evaluate the particular facts and circumstances of a controversy arising within the scope of their administrative functions so as to make qualified decisions concerning the wisdom of litigation. Furthermore, the department's presumed familiarity with the issues giving rise to the lawsuit would put it in the best position to respond the various demands litigation imposes on the parties involved (such as decisions to implead a third parties or engage in settlement negotiations).

And while the court's opinion does not foreclose the opportunity of departments to involve themselves in litigation process, it does place greater pressure on Rhode Island's local governments to make, so far as their respective constituencies are concerned, politically sound decisions. Hence, in the future, decisions involving lawsuits against parents suspected of engaging in school residency infractions are bound to be shaped by the lively political processes which influence Rhode Island's thirty-nine municipalities.

40. *Id.*
41. *Id.*
CONCLUSION

In this case of first impression, the Rhode Island Supreme Court denied the plaintiff school committee's claim to tuition reimbursement from parents who surreptitiously enrolled their nonresident children in the district's school on grounds that the committee did not have standing to sue for monetary damages, pursuant to the statutory mandate expressed in G.L. § 45-15-2.

Alexandria E. Baez
Civil Procedure. Lennon v. Dacomed Corp., 901 A.2d 582 (R.I. 2006). Using the term “et al” to refer to unnamed parties fails to satisfy the notice requirement set in Rule 3(c) of the Rhode Island Rules of Appellate Procedure. Furthermore, the Superior Court properly grants a plaintiff the choice between accepting a remittitur or a new trial on damages when a jury award “shocks the conscience.” Finally, res judicata and collateral estoppel preclude a plaintiff from pursuing an action against a product manufacturer in state court after first commencing suit against its parent company in federal court. The court held a subsidiary in privity with its parent company and the claims substantially similar in both courts. Moreover, a stipulated voluntary dismissal from federal court “with prejudice” constitutes a final judgment on the merits.

FACTS AND TRAVEL

In 1995, after suffering with impotence for years, Charles Lennon decided to implant the Dacomed Dura-II brand semirigid penile prosthesis. Lennon received the implant at the Miriam Hospital on February 23, 1996. Not long after, he began to feel great pain from the prosthesis, which remained in the upright position. Lennon complained he could no longer leave his home or interact with his family without great embarrassment. Although an operation could have removed the prosthesis, Lennon refused to undergo the procedure because his otherwise poor health put him at great risk for complications during surgery. Therefore, Lennon will continually suffer from the Dura-II prosthesis.

Lennon brought a diversity suit in the United States District Court for the District of Rhode Island against Urohealth System’s,

2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
the company who acquired Dacomed as a wholly owned subsidiary in 1995.\textsuperscript{7} He alleged negligence, breach of warranty, strict liability, failure to warn, and res ipsa loquitur.\textsuperscript{8} When Lennon commenced the suit, it was unknown whether Dacomed manufactured Lennon's Dura-II before or after Urohealth acquired the company.\textsuperscript{9} For the next sixteen months, contentious discovery ensued resulting in the District Court admonishing Lennon's counsel for numerous process abuses.\textsuperscript{10} Without a plaintiff's expert at the close of discovery, Urohealth moved for summary judgment on June 23, 1998.\textsuperscript{11} The District Court, however, refused to grant the summary judgment and extended pretrial deadlines.\textsuperscript{12} Lennon complied with the extended deadlines by obtaining an expert.\textsuperscript{13} Nevertheless, Urohealth resubmitted their motion for summary judgment and challenged the expert's qualifications.\textsuperscript{14} Soon thereafter in January of 1999, Lennon brought a substantially similar suit in Rhode Island Superior Court.\textsuperscript{15} The suit named not only Urohealth, but also Dacomed and National Union Fire Insurance (Urohealth and Dacomed's policyholder).\textsuperscript{16} According to Lennon, discovery revealed it had been Dacomed and not Urohealth that manufactured the Dura-II.\textsuperscript{17}

Meanwhile, less than a month later and with the summary judgment motion still pending, Lennon moved in Federal Court to dismiss the case without prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure.\textsuperscript{18} Urohealth opposed the motion, arguing it would be legally prejudiced by having to re-litigate the same case in state court.\textsuperscript{19} Furthermore, Urohealth argued granting summary judgment would have preclusive effect on the

\begin{itemize}
\item \textsuperscript{7} Id. at 585.
\item \textsuperscript{8} Id.
\item \textsuperscript{9} Id. at 585 n.4.
\item \textsuperscript{10} Id.
\item \textsuperscript{11} Id.
\item \textsuperscript{12} Id.
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id. Both Urohealth and Dacomed filed for Chapter 11 Bankruptcy protection.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Id.
\end{itemize}
state claim. The court disagreed and granted the plaintiff's motion to dismiss without prejudice. In its decision, the District Court reasoned Urohealth and Dacomed were not in privity, so res judicata and collateral estoppel would not apply.

The United States Court of Appeals for the First Circuit reversed the District Court decision. In Doe v. Urohealth Systems, the Court held Dacomed and Urohealth in privity and as a result, res judicata would be available in Rhode Island Superior Court. The court also held the case ripe for a summary judgment ruling and remanded the case to the District Court. However, the District Court declined to rule on the summary judgment motion and chose to stay the proceedings until the state case reached its conclusion. The court reasoned the Superior Court proceeding was more comprehensive and might render the federal court case moot. Moreover, it was in the interest of judicial economy to stay the federal proceedings until the state case reached its conclusion.

For the second time, the United States Court of Appeals for the First Circuit reversed the District Court's decision. The First Circuit held that by staying the proceedings, the District Court effectively reinstated the ruling it reversed in the previous case — Lennon’s motion to dismiss without prejudice. In response, the First Circuit explicitly held the District Court must deny Lennon's motion to dismiss without prejudice and hear all Urohealth motions. At this point, Lennon’s counsel decided not to move forward. The parties stipulated to a voluntary dismissal "with prejudice."

Consequently, now back in state court, Urohealth, Dacomed,
and National Union moved for summary judgment based on res judicata and collateral estoppel.\textsuperscript{34} The defendants argued that because the federal court dismissal was "with prejudice," the proceedings there constituted a judgment on the merits.\textsuperscript{35} However, the Rhode Island Superior Court only granted Urohealth's motion.\textsuperscript{36} The court held that although Dacomed and Urohealth were in privity, the preclusive effect only applied to Urohealth.\textsuperscript{37} In its opinion, the court reasoned: (1) Dacomed was not a party in the federal court; (2) the parties never adjudicated the substantive issues in federal court; (3) Urohealth and Dacomed were "separate and distinct" entities; and (4) Lennon brought in Urohealth through vicarious liability in Superior Court, while he charged Dacomed and National Union with primary liability.\textsuperscript{38} Considering all these factors, the court rejected a summary judgment applying to all three defendants.\textsuperscript{39}

On March 22, 2004, a jury awarded Charles Lennon $750,000 for the damage inflicted by the Dura-II.\textsuperscript{40} Following trial, Dacomed and National Union brought a renewed motion for a judgment as a matter of law, a motion for a new trial, or in the alternative, a remittitur.\textsuperscript{41} The Superior Court rejected the renewed motion for all the product liability counts, but entered judgment as a matter of law on a claim for implied warranty.\textsuperscript{42} More importantly, the court held the jury award shocked the conscience and modified the award to $400,000.\textsuperscript{43} If Lennon rejected the remittitur, he could opt for a new trial on damages.\textsuperscript{44} In particular, the court concluded the verdict "was a stealth punitive damage award that was unrelated to the damage proven by Mr. Lennon as a result of the malfunctioning penile prosthesis."\textsuperscript{45} The plaintiff responded by attempting to cut a deal with the defendants – acceptance of the reduced damages in

\textsuperscript{34} \textit{Id.}
\textsuperscript{35} \textit{Id.}
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id. at 587.}
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.}
return for defendants dropping any appeals. When the defendants refused, the plaintiff rejected the remittitur. The Superior Court soon ordered a new trial on damages.

Both parties appealed the Superior Court's decision. Specifically, Lennon argued the court improperly granted a new trial because the trial justice applied "an erroneous rule of law" and "overlooked or misconceived evidence in granting the remittitur." The defendants appealed the court's decision to deny their motion for judgment as a matter of law and the motion for a new trial. Additionally, the defendants argued res judicata and collateral estoppel precluded this action, the trial justice improperly permitted an expert witness to testify and provided improper jury instructions, and finally, Lennon failed to state any causes of action.

ANALYSIS AND HOLDING

First, the Rhode Island Supreme Court held defendant National Union Fire Insurance ("National Union") failed to perfect its appeal under Rule 3(c) of the Supreme Court Rules of Procedure because in its notice of appeal, defense counsel referred to the company as "et al" instead of specifically naming the company. Second, the court affirmed the trial court's decision to grant either a remittitur or a new trial on damages because the jury award "shocked the conscience." Third, res judicata and collateral estoppel precluded Lennon from pursuing an action against Dacomed after first commencing suit against its parent company, Urohealth, in federal court. The court estopped Lennon because: (1) Dacomed, a wholly owned subsidiary of Urohealth, was in privity with its parent company due to a sufficient commonality of interest; (2) the claims in both courts were substantially similar claims; and (3) the stipulated voluntary dismissal from federal court "with prejudice" constituted a final judgment on the merits.

46. Id. at 589.
47. Id. at 587.
48. Id.
49. Id.
50. Id.
51. Id.
52. Id.
Rule 3(c) shall be strictly interpreted

The Rhode Island Supreme Court held Dacomed's insurer, National Union, failed to perfect its appeal because the notice of appeal did not specifically name the company. Lennon argued that by referring to “Dacomed Corp., et al” in its notice of appeal, defense counsel failed to preserve National Union's appellate rights. Rule 3(c) of the Supreme Court Rules of Appellate Procedure, adopted from the original Federal Rules of Appellate Procedure, requires in relevant part: “The notice of appeal shall specify the party or parties taking the appeal and shall designate the judgment, order or decree or part thereof appealed from.” Although the federal court liberalized its rule in 1994 to relieve parties from strictly naming every party, the Rhode Island rule remained substantially similar to the original – and stricter – rule. Accordingly, the Supreme Court relied on federal cases prior to the amendment for its own opinion.

In Torres v. Oakland Scavenger Company, the United States Supreme Court strictly applied the original Rule 3(c) to require every party's name in the appeal notice. The court held that “et al” failed to comply “with the specificity requirement of Rule 3(c), even when liberally construed.” Here, the Rhode Island Supreme Court reasoned the failure to name National Union in the appeal notice could be coupled with the fact that only one filing fee was initially paid to the court (two defendants – Dacomed and National Union, appealed to the Supreme Court). In fact, only after Lennon’s brief argued against National Union's appellate participation, did defendants motion to pay a second filing fee. While the court initially reserved judgment on whether the defendant's late filing fee effected its case, this opinion provided an answer.

According to the Supreme Court, all rules of appellate procedure have “technical aspects.” Rule 3(c)’s technical

53. Id.
54. Id., R.I. SUP. CT. R. 3(c).
55. Id. at 587.
57. Lennon, 901 A.2d at 588; Torres, 487 U.S. at 317.
58. Id.
59. Id.
60. Id.
61. Id.
requirement demands each notice of appeal specifically name all parties to the appeal.\textsuperscript{62} Although admittedly strict, the court "ha[s] been similarly exigent in the past with respect to the clear requirements of the Rules of Appellate Procedure."\textsuperscript{63} Additionally, while "et al" might be appropriate in Superior Court, a different standard applies in the Supreme Court.\textsuperscript{64} The court refused the defendant's call for leniency and reaffirmed its commitment to the Rule's strict application.\textsuperscript{65} Rhode Island's rule, unlike its federal counterpart, had never been amended to a more liberal standard. Accordingly, National Union's appeal was not "appropriately before this Court" and its appeal would not be heard.\textsuperscript{66}

\textit{The Superior Court retains discretion when a jury award "shocks the conscience"}

The Superior Court properly grants either a remittitur or a new trial on damages when the jury award clearly appears to be "excessive," resulting from "the jury's passion or prejudice."\textsuperscript{67} Lennon argued the Superior Court erred in granting the remittitur or new trial on damages because the trial justice either overlooked or misconceived evidence of pain and suffering.\textsuperscript{68} Alternatively, Lennon argued the court should affirm the remittitur he originally declined.\textsuperscript{69} The Supreme Court reasoned trial justices retain the discretion to modify awards thought to be excessive through the remittitur device.\textsuperscript{70} Remittiturs are only available when "the jury award clearly appears to be excessive or is found to be the result of the jury's passion and prejudice."\textsuperscript{71} Here, the Supreme Court found no evidence the trial justice overlooked or misconceived evidence and refused to set aside the

\begin{thebibliography}{99}
\bibitem{62} Id. at 589.
\bibitem{63} Id.
\bibitem{64} Id.
\bibitem{65} Id.
\bibitem{66} Id.
\bibitem{67} Id. at 590.
\bibitem{68} Id. at 589-90.
\bibitem{69} Id. at 590.
\bibitem{70} See id. ("a trial justice can 'conditionally correct and modify a jury award that is found to be excessive' through the use of remitter ... remittitur and additur are designed to avoid the costs and delays that arise from relitigation of the same issues, while providing a just result for the litigants.")
\bibitem{71} Id.
\end{thebibliography}
remittitur.\textsuperscript{72} Instead, the court provided Lennon with a twenty-day window to accept the remittitur or face a new trial on damages.\textsuperscript{73} It then remanded Lennon and National Union to Superior Court subject to the twenty-day opportunity to accept the remittitur.

\textit{Res Judicata and collateral estoppel can preclude plaintiffs from jumping between federal and state court}

In Rhode Island, res judicata and collateral estoppel preclude plaintiffs from commencing actions in state court if three requirements are fulfilled: (1) the parties in the current action are the same or in privity with parties of a previous proceeding; (2) an identity of issues exist in both proceedings; and (3) a valid final judgment on the merits has been entered in the previous proceeding.\textsuperscript{74} Dacomed argued that it was in privity with its parent company Urohealth, who was sued in federal court. Therefore, res judicata and collateral estoppel should stop Lennon from relitigating the same issues.\textsuperscript{75} Res judicata, or claim preclusion, relates to “the effect of a final judgment between the parties to an action and those in privity with those parties...claim preclusion prohibits the relitigation of all the issues that were tried or might have been tried in the original suit.”\textsuperscript{76} Collateral estoppel, or issue preclusion, “makes conclusive in a later action on a different claim the determination of issues that were actually litigated in a prior action.”\textsuperscript{77} With this background, the issue then before the court was the preclusive effect in Rhode Island state court of a voluntarily dismissal, with prejudice, from a federal court sitting in diversity.\textsuperscript{78}

According to the United States Supreme Court in \textit{Semtek Int'l v. Lockheed Martin Corp.}, judgments from federal courts sitting in diversity “are to be accorded the same preclusive effect that would be applied by state courts in the state in which the federal

\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 591.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 590 (citing E.W. Audet & Sons, Inc. v. Fireman's Fund Insurance Co. of Newark, New Jersey, 635 A.2d 1181, 116 (R.I. 1994)).
\textsuperscript{77} Id.
\textsuperscript{78} Id.
diversity courts sits.” Given the federal court litigation occurred in Rhode Island, the state’s res judicata law controls. Rule 41(a) of the Superior Court Rules of Civil Procedure deems voluntary dismissals to be without prejudice unless the parties stipulate otherwise. Here, the parties agreed the federal court dismissal was “with prejudice.” As a result, preclusive effect would be applied if Dacomed satisfied the res judicata requirements highlighted above.

The Rhode Island Supreme Court held Dacomed and its parent company, Urohealth, were in privity because the companies shared a commonality of interests in that Urohealth wholly owned Dacomed, and the company manufactured, marketed, and sold the Dura-II as its own product. Furthermore, National Union financed both company’s defenses in the litigation. These facts taken together sufficiently satisfied the Court that a commonality of interests existed between Dacomed and Urohealth.

The Court then determined Urohealth and Dacomed shared a sufficient identity of issues for purposes of res judicata because Lennon pled substantially similar claims in both courts that arose from the same series of transactions. In fact, the only difference in the state court complaint was that Lennon named more parties. Res judicata protects from “the re-litigation of ‘all or any part of the transaction, or series of connected transaction, out of which the [first] action arose’” Here, the court concluded a sufficient identity of issues existed because the product liability claims were virtually the same – arising from the same transaction and with the same amount of alleged damages. Therefore, if a valid judgment on the merits existed in federal court, res judicata would preclude Lennon from bringing a claim against Dacomed.

---

79. Id. at 591 (citing Semtek Int’l Inc., v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001)).
80. Id.
81. Id., R.I. SUP. CT. R. 41(a).
82. Id. at 591.
83. Id. at 592; see also Doe, 216 F.3d at 162.
84. Lennon, 901 A.2d at 592.
85. Id.
86. Id.
87. Id. (citing Waters v. Magee, 877 A.2d 658, 666 (R.I. 2005)).
Finally, the voluntary dismissal constituted a judgment on the merits because a dismissal, voluntary or not, "with prejudice," is always considered a judgment on the merits.\textsuperscript{88} In \textit{DiPinto v. Sperling}, The United States Court of Appeals for the First Circuit reaffirmed this per se rule in Rhode Island.\textsuperscript{89} Lennon argued for a more expansive reading of \textit{Semtek}, arguing the court should review each case to determine if a judgment exists on the merits.\textsuperscript{90} The Rhode Island Supreme Court, however, rejected a more expansive reading of \textit{Semtek}.\textsuperscript{91} The court held "although the [United States Supreme Court] observed that 'it is no longer true that a judgment 'on the merits' is necessarily a judgment entitled to claim-preclusive effect, its statement was limited to that particular context and has no application here."\textsuperscript{92} Accordingly, the voluntary dismissal constituted a final judgment on the merits because dismissals "with prejudice" are per se final judgments subject to res judicata.\textsuperscript{93} The court saw no reason to "retreat from our utterly clear statement . . . concerning the effect of a dismissal with prejudice."\textsuperscript{94}

\textbf{COMMENTARY}

\textit{The Notice Requirement}

The Rhode Island Supreme Court strictly applied Rule3(c) of the Supreme Court Rules of Procedure. By doing so, defendant National Union lost any opportunity to appeal the denial of their motion for a judgment as a matter of law and motion for a new trial.\textsuperscript{95} In its analysis, the court cites \textit{Torres v. Oakland Scavenger Company}, a United States Supreme Court case tackling whether "et al" sufficiently names all parties.\textsuperscript{96} Although \textit{Torres} is

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.;} see, e.g., Sch. Comm. of N. Providence v. N. Providence Fed'n. of Teachers (AFL-CIO), 404 A.2d 493, 495 (R.I. 1979), ("dismissal with prejudice...constitutes a full adjudication of the merits as if the order had been entered subsequently to trial").
\item \textit{Id.;} see DiPinto v. Sperling, 9 F.3d 2, 4 (1st Cir. 1993).
\item \textit{Lennon,} 901 A.2d at 592.
\item \textit{Id.}
\item \textit{Id. at 592-93.}
\item \textit{Id. at 593.}
\item \textit{Id.}
\item \textit{Id. at 588.}
\end{enumerate}
\end{footnotesize}
no longer good law in the federal system, it remains so in Rhode Island because unlike its federal counterpart, the state never liberalized Rule 3(c). Therefore, Rhode Island retains a stricter rule than its counterpart in the federal system. Unless the rule changes, the Rhode Island Supreme Court will not accept “et al” as an alternative to naming each party because the term fails to provide notice to the opposing parties, and to the court, of each party involved in the litigation.

**Standard of Review for Damages**

The court impliedly proffers a lower standard of scrutiny when examining a trial justice’s determination a remittitur or a new trial on damages is necessary. The Supreme Court never explicitly addresses the standard of review, but by its reasoning, it is clear that only an abuse of discretion will vacate a trial justice’s decision to modify a jury award. In examining the record, the court noted the trial justice found the verdict a “stealth punitive damage award” and that no sufficient evidence existed to support an award that “shocked the conscience.” The court refused to set aside the remittitur because the trial justice “carefully considered the evidence” and did not “overlook or misconceive” evidence as the plaintiff charged. Therefore, in the absence of clear error by the trial court, the Supreme Court will reaffirm the trial justices’s decision to grant a remittitur or a new trial on damages.

**Res Judicata & Collateral Estoppel**

Additionally, the court never addressed collateral estoppel because res judicata precluded any claim against Dacomed. It is

97. See id. at 589 (“Although Federal Rule 3(c) was amended as a result of the Supreme Court’s holding in Torres, Rhode Island Rule 3(c) has not been amended.”).

98. See id. at 589 (the amended Rule 3(c) liberalizes the naming requirements: “specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as ‘all plaintiffs,’ ‘the defendants,’ the plaintiff A, B, et al’...”).

99. See id. at 590 (“[A] trial justice can ‘conditionally correct and modify a jury award that is found to be excessive’ through the use of remittitur.”).

100. Id. at 589.
unclear whether res judicata or collateral estoppel would have affected the claim against National Union because the company failed to perfect its appeal. Otherwise, the court reached the conclusion res judicata barred the claim against Dacomed. While the case serves as notice that counsel should always specifically name each party in its notice of appeal, it also warns that dismissals, voluntary or not, “with prejudice” are valid final judgments subject to res judicata.\textsuperscript{101} The court refused to examine the record to determine if the parties actually adjudicated on the merits.\textsuperscript{102} Therefore, the court’s strict application of procedural rules affected not only the defendants on Rule 3(c), but also the plaintiff’s voluntary stipulation to remove the case from federal court.

Finally, although the defendants won their appeal affirming the Superior Court’s decision to grant a remittitur or a new trial on damages, and the court bared the claim against Dacomed, ultimately the holding proved a victory for the plaintiff. Both Urohealth and Dacomed filed for Chapter 11 bankruptcy protection.\textsuperscript{103} Although this left National Union as the only remaining defendant, the insurance company was the only entity that had the ability to fully compensate Lennon for his injuries. Moreover, permitting National Union to appeal could have left Lennon without anyone to sue because the court may have found National Union in privity with Urohealth and Dacomed.

\textsuperscript{101} Id. at 591.
\textsuperscript{102} Id. at 590-91.
\textsuperscript{103} Id. at 585.
CONCLUSION

First, the Rhode Island Supreme Court held that using the term “et al” for a remaining party fails to satisfy Rule 3(c)’s requirement for specificity in naming parties. Second, the court reaffirmed the trial court’s discretion in modifying jury awards thought to “shock the conscience.” Finally, the court held all three requirements of res judicata had been satisfied because Urohealth and its subsidiary Dacommed shared substantially similar interests in both cases, faced virtually the same claim, and the court always considers a voluntary dismissal “with prejudice” to be a valid final judgment subject to res judicata.

Ronald LaRocca
Constitutional Law. *In re Matthew A. Brown*, 903 A.2d 147 (R.I. 2006). Repeal of a statute giving Rhode Island's Governor the authority to place nonbinding questions on the general election ballot applied to two questions submitted by the Governor to the Secretary of State three weeks prior to the effective date of repeal. Additionally, the hearing justice erred in raising, without briefing or argument by the parties, the constitutional aspects of the Governor's inherent power to direct questions to the electors.

FACTS AND TRAVEL

Over the past several decades Rhode Island's governors have enjoyed the authority, pursuant to Rhode Island General Laws § 17-5-2, to order nonbinding referendum questions onto the general election ballot. On May 3, 2006, while 2006-H 6874 ("the Act") was pending in the General Assembly to strip the governor of this authority, Governor Donald L. Carcieri sent a letter to Secretary of State Matthew A. Brown ordering him to place two questions on the ballot for the November 2006 general election. The first question asked whether voters should have the right to enact laws and amend the Constitution through the process of direct voter initiative. The second question asked whether the Constitution should be amended to place caps on state spending and local property taxes.

Three weeks after the Governor ordered the Secretary to place these two questions on the ballot, both the House and Senate

---

1. R.I. GEN. LAWS § 17-5-2 (Supp. 2005) (Questions Ordered by Governor) provided that “[t]he governor shall have the power to order the secretary of state to submit any question or questions that he or she shall deem necessary to the electors at any election.” *Id.*


3. *Id.* at 148 n.2 (“Should the voters have the right to vote to enact laws and to amend the Constitution directly through a process called direct voter initiative?”)

4. *Id.* (“Should the Rhode Island Constitution be amended to limit the growth of state spending to the rate of inflation plus 1.5% and to limit annual increases in local property taxes to 4%?”)
passed the Act repealing § 17-5-2. Governor Carcieri vetoed it, but the General Assembly overrode his veto and on June 13, 2006, the Act became effective: Rhode Island's governor could no longer order nonbinding referendum questions onto the general election ballot. Faced with the situation of having received the Governor's orders to place questions on the ballot before his authority to do so was effectively repealed, the Secretary filed a petition for declaratory judgment in the Superior Court seeking a determination of whether or not he was required to execute the order. A Superior Court judge heard arguments and issued a bench decision containing two principal findings. First, the repeal of § 17-5-2 applied to the Governor's most recent ballot questions and the Secretary could not, therefore, lawfully place those questions on the ballot. Second, the Governor has an inherent constitutional authority to put such questions on the ballot regardless of the statute or its repeal. Both parties appealed from the judgment, and the appeal was expedited.

ANALYSIS AND HOLDING

A. Statutory Authority

The parties submitted briefs on the law regarding the repeal of a statute and the effect of such repeal on any pending case or controversy. The Rhode Island Supreme Court affirmed the hearing justice's finding that the repeal of §17-5-2 applied to the ballot questions transmitted by the Governor before the effective date of repeal. In analyzing the issue, the Supreme Court determined that it would be "foolish and myopic literalism" to focus narrowly on §17-5-2 without considering the broader statutory scheme concerning ballot issues. The Governor's authority to put questions on the ballot, the court reasoned,

\[\text{\textit{Id. at 148.}}\]
\[\text{\textit{Id. at 149.}}\]
\[\text{\textit{Id.}}\]
\[\text{\textit{Id.}}\]
\[\text{\textit{Id.}}\]
\[\text{\textit{Id.}}\]
\[\text{\textit{Id.}}\]
\[\text{\textit{Id.}}\]
\[\text{\textit{Id.}}\]
\[\text{\textit{Id. at 151.}}\]
\[\text{\textit{Id. at 150.}}\]
cannot be considered in isolation, but only "in tandem" with the statutory duties of the Secretary.\textsuperscript{15} And the Secretary's duty to place questions on the ballot is in turn limited by the General Assembly's "authorizing the submission of the question."\textsuperscript{16} Therefore, the court concluded that while the Governor exercised his authority "in its waning days" to submit questions to the Secretary, when the time came for the Secretary to perform his statutory duty of preparing the ballot, the Governor no longer had the authority to compel the Secretary to comply with the order and the Secretary did not have the authority to comply.\textsuperscript{17}

B. Inherent Constitutional Authority

Although neither party briefed nor argued the issue, the hearing judge held that the Governor has inherent constitutional authority to place nonbinding questions on the ballot regardless of the statute or its repeal.\textsuperscript{18} The Rhode Island Supreme Court reversed this finding, indicating that the hearing judge should not have raised the constitutional issue \textit{sua sponte}: "[for] reason known only to [the hearing judge] . . . he also entered a declaration respecting what he considered to be the inherent constitutional powers of the Governor - an issue that was not before him."\textsuperscript{19} The court concluded that "the hearing justice should not have reached a perceived constitutional ground that was not raised or argued by the parties. Neither this Court nor the Superior Court should decide constitutional issues unless it is absolutely necessary to do so."\textsuperscript{20}

\textbf{COMMENTARY}

The most obvious effect of this decision is that the two nonbinding referendum questions proposed by the Governor did not appear on the November 2006 ballot. As it turns out, the

\begin{itemize}
  \item 15. \textit{Id.}
  \item 16. R.I. GEN. LAWS § 17-5-1.1(1) (Supp. 2005)
  \item 17. \textit{In re Brown}, 903 A.2d at 151.
  \item 18. \textit{Id.} at 149.
  \item 19. \textit{Id.} at 151.
  \item 20. \textit{Id.} (noting "the 'deeply rooted' commitment 'not to pass on questions of questions of constitutionality' unless adjudication of the constitutional issue is necessary") (citation omitted).
\end{itemize}
question about limiting increases in taxes and spending was partially moot at the time of the lawsuit because the General Assembly had already passed a bill to tighten caps on property tax increases by municipalities.\textsuperscript{21} The elephant in the courtroom, then, must have been the second question, which would have asked Rhode Islanders how they feel about the idea of direct voter initiative, a process which enables voters to enact laws and amend the state constitution by placing proposals on the ballot after gathering a certain number of signatures.

The battle to keep the direct voter initiative question off the ballot raises its own question of why members of the General Assembly were so opposed to its inclusion in the first place, given its nonbinding nature. It appears that the state’s long-standing conflict over separation of powers is lurking behind this lawsuit. Members of the General Assembly argued that Rhode Island is the only state whose Governor had the power to order nonbinding questions on the ballot, so the repeal of his authority puts this state back in line with the rest of the country.\textsuperscript{22} The Governor countered that nearly half the states currently allow some form of voter initiative, so a ballot question seeking to determine how Rhode Islanders feel about the issue is appropriate.\textsuperscript{23}

Perhaps the General Assembly was concerned that in the waning days of his power to place questions on the ballot, the Governor would open the door to a more direct form of democracy in Rhode Island. Members of the General Assembly maintained that when Rhode Islanders approved the state Constitution they chose a republican form of government based on representative democracy.\textsuperscript{24} Suspicion of direct democracy is nothing new. James Madison, who had little faith in direct democracy, believed it meant the tyranny of the majority and the rule of passion over reason.\textsuperscript{25} The advantage of representative democracy, he argued,

\begin{thebibliography}{9}
\bibitem{22} Elizabeth Gudrais, \textit{Governor Vetoes Bill Revoking His Power to Submit Referenda}, PROVIDENCE J., May 31, 2006, at B3.
\bibitem{23} \textit{Id.}
\bibitem{25} \textit{The Federalist} No. 10, at 48-54 (James Madison) (J. R. Pole ed., 2005).
\end{thebibliography}
is that it provides a mechanism “to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.” But Madison was of two minds about representative democracy: he also understood that the system could produce its own problems when the representatives themselves become a faction and work against the public good. Not only are Madison’s ideas still relevant to politics in Rhode Island well over two hundred years later, but they are likely to continue to be played out for years to come.

CONCLUSION

The Rhode Island Supreme Court affirmed the decision of the Superior Court that the June 13, 2006 enactment of legislation repealing the Governor’s authority to order non-binding referendum questions onto the general ballot applied to two questions submitted by the Governor three weeks prior to the effective repeal date. The court, however, reversed the Superior Court’s finding that the Governor has an inherent constitutional authority to submit ballot questions irrespective of a statute to the contrary.

Kenneth Rampino

26. Id. at 52.
27. Id. at 52-54.
Constitutional Law. *Parella v. Montalbano*, 899 A.2d 1226 (R.I. 2006). In ruling on the constitutionality of a redistricting plan with respect to the Compactness Clause of the Rhode Island Constitution, the Rhode Island Supreme Court found that the court’s role in deciding such a case is to ensure that the redistricting is done with a rational basis. The clause is violated only when the redistricting is done purely for political considerations, when there has been no effort to make the districts as compact and contiguous as possible. In the context of Rhode Island, the concept of shore-to-shore contiguity may be used to form the representative districts so long as there is rational basis for doing so.

FACTS AND TRAVEL

In November 1994, the people of Rhode Island voted to adopt amendments to articles 7 and 8 of the state constitution.\(^1\) The amendments, which would take effect in January 2003, required that roughly a quarter of the seats in the Rhode Island General Assembly be eliminated.\(^2\) This “downsizing” of the General Assembly consequently entailed the reapportionment of districts for the Senate and House of Representatives.\(^3\) In order to formulate a plan to meet the constitutional mandate, the General Assembly established a Special Commission on Reapportionment (Commission), which was comprised of members from the House and Senate, as well as members of the public.\(^4\) After conducting public hearings, the Commission recommended a reapportionment plan to the House and Senate.\(^5\) On February 20, 2002, after minor adjustments, the Rhode Island General Assembly adopted the reapportionment plan as Rhode Island General Law section 22-1-

---

2. *Id.* (The seats for members of Senate was reduced from fifty to thirty-eight, and the seats for representatives was reduced from one-hundred to seventy-five). *Id.* at n.2.
3. *Id.* at 1230.

511
2. The redistricting plan reduced the number of senatorial districts in Rhode Island’s “East Bay” from seven to five districts and numbered the districts 9, 10, 11, 12 and 13. The plan reconfigured the districts based on contiguity, geographic features (such as barrier beaches), the district’s relationship with bodies of water, past districting in the area and historic links to other cities. Some of the districts were structured in such a way that it

6. Id. at 1234.
7. Id. at 1231.
8. Id. at 1248-49. The trial judge’s findings of facts on the districts were as follows:

District 9 consists of all of the Town of Barrington and a portion of Bristol. Driving from Poppasquash to Rumstick Point requires crossing through District 10 and over the bridge, which is a distance of 8.8 miles and takes about 20 minutes. It contains the portions of the East Bay region that are oriented towards the upper Narragansett Bay; the areas of the Providence, Warren, and Bristol railroad, the subsequent trolley service and Route 114 corridor; and the estate areas of Nyatt Point and Rumstick Point in Barrington, and Poppasquash Point in Bristol. According to the 2000 U.S. Census, the population in District 9 is 64.1% Barrington and 35.9% Bristol.

District 10 consists of all of Warren, the northeast portion of Bristol, and a sliver of land about two blocks wide that connects Warren and Bristol. In order to drive from one end of District 10 to the other, one must drive through District 11 and cross two bridges that do not link the district, the Mount Hope Bridge and the Sakonnet Bridge. It contains the shared interest of the Kickemuit River and Mount Hope Bay; and the manufacturing areas of Warren and Tiverton—the portions of the East Bay that have strong historic links to Fall River. According to the 2000 U.S. Census, the population in District 10 is 14.9% Bristol, 42.9% Warren, and 42.2% Tiverton.

District 11 consists of the southern portion of Bristol and all of Portsmouth, including the islands to the west of Aquidneck Island, Prudence Island, Hog Island, Patience and Hope. Given the natural makeup of the area, with the islands and the peninsulas, District 11 is as compact as possible. It is oriented to the East passage and contains the region’s ferry connections to Prudence Island; the historic town center of Bristol (those portions of the Town have ties to Portsmouth and Aquidneck Island); and the Town of Portsmouth in its entirety. According to the 2000 U.S. Census, the population in District 11 is 34.7% Bristol and 65.3% Portsmouth.

District 12 includes all of Little Compton, the southern portion of Tiverton up to Bulgamash Road. In order to drive across the district, one must drive through District 10, cross a bridge not used as a link and then drive through the northern part of Portsmouth,
would be necessary to cross through other districts or over bridges in order to travel to different points within a single district. 9

On August 22, 2002, a collection of residents and registered voters from Barrington, Warren, Bristol, Tiverton, and Little Compton filed suit in Superior Court, seeking a declaratory judgment that the redistricting violated article VIII section I of the Rhode Island Constitution. 10 Specifically, the plaintiffs argued that the redistricting did not follow natural, historic, geographic, or political lines 11 and therefore violated the Compactness Clause, which requires districts to be "as compact and contiguous in territory as possible." 12

On May 5, 2003, the case went to trial before Rhode Island Superior Court Judge McGuirl. 13 At trial, the plaintiffs relied primarily upon witnesses who concluded that there were better plans then the one selected for redistricting the "East Bay." 14 The witnesses testified that the districts were irrational and that the districts would encumber the effective representation of the Rhode Island electorate. 15 The defendants, on the other hand, relied upon witnesses who determined that the General Assembly had a rational basis for districting the communities as they did. 16

The trial justice opined that in questions of statutory constitutionality, the party bringing the challenge maintained the

which is in District 11. It is an hour and a half trip, round trip. District 12 shares two sides of the Sakonnet River and the region's significant barrier beaches; the water supply resources of the Newport Water System; and two wineries, one in Little Compton and one in Middletown. According to the 2000 U.S. Census, the population in District 12 is 12.7% Little Compton, 61.3% Middletown, 11.5% Newport and 14.4% Tiverton.

District 13 contains the lower portion of the east passage in Newport Harbor with the spillover of boating activity into Jamestown Harbor; the City of Newport almost in its entirety; and the Town of Jamestown, which has historic ties to Newport through ferry and bridge connections and social services, especially including those pertaining to health and housing. Id.

9. Id. at 1248-49.
10. Id. at 1234.
11. Id. at 1231.
12. Id.
13. Id. at 1233.
14. Id. at 1235-38.
15. Id.
16. Id. at 1238-39.
burden of proof in invalidating the legislative act. Further, the lower court found that reapportionment plans violate the Compactness Clause only when the new plan is drawn solely for political reasons and makes no attempt to draw the districts as compact and contiguous as possible. Based upon the evidence presented, the trial justice concluded that the plaintiffs had not adequately demonstrated that the plan was drawn solely for political reasons and therefore failed to meet their burden of proof. Accordingly, the trial justice determined that the redistricting did not violate the Rhode Island Constitution.

ANALYSIS AND HOLDING

Three of the plaintiffs appealed the superior court’s ruling to the Rhode Island Supreme Court, arguing that: (1) the trial justice erred in assigning the plaintiffs the burden of proof in establishing, beyond a reasonable doubt, that the redistricting lacked a rational basis, (2) the trial court erred by not giving sufficient weight to “territorial restraints” in determining whether the districts met the compactness requirements, and (3) the trial court erred by overlooking evidence of gerrymandering. The central issue before the court was whether the redistricting plan adopted by the General Assembly violated the Compactness Clause of the Rhode Island Constitution. The Supreme Court affirmed the trial justice’s decision and noted that because the supreme court could not improve upon the Superior Court’s opinion, it adopted as the lower court’s opinion as its own.

The lower court’s analysis began by analyzing who maintained the burden of proof in cases involving a challenge to a statute’s constitutionality. First, the court recognized precedent, noting that “all laws regularly enacted by the legislature are presumed to be constitutional and valid.” The court stated that

17. Id. at 1240.
18. Id. at 1231.
19. Id.
20. Id.
21. Id. at 1231-32.
22. Id. at 1230.
23. Id. at 1232.
24. Id. at 1240. (quoting City of Pawtucket v. Sundlun, 662 A.2d 40, 45 (R.I. 1995)).
it would "make every reasonable intendment in favor of the constitutionality of a legislative act, and so far as any presumption exists it is in favor of so holding."\textsuperscript{25} With the presumption that a statute is constitutional until proven otherwise, the court noted that the plaintiffs carried a heavy burden in establishing not only that the redistricting was repugnant to the Rhode Island Constitution, but also that it was enacted without a rational basis.\textsuperscript{26}

The court next analyzed the constitutional and statutory mandates that controlled redistricting law. Article VIII, section 1 of the Rhode Island Constitution promulgates: "[t]he senate shall be constituted on the basis of population and the senatorial districts shall be as nearly equal in population and as compact in territory as possible."\textsuperscript{27} The court noted that Rhode Island Public Law 315, the law that created the planning commission, stated that not only must districts be as compact as possible but also "to the extent practicable, shall reflect natural, historical, geographical and municipal and other political lines, as well as the right of all Rhode Islanders to fair representation and equal access to the political process"\textsuperscript{28} and to the extent possible should be comprised of contiguous territory.\textsuperscript{29}

The court next studied the applicable redistricting case law. The court first examined the seminal opinion on the issue in Rhode Island, \textit{Opinion to the Governor}\textsuperscript{30} where the court similarly examined the constitutionality of a redistricting plan.\textsuperscript{31} In \textit{Opinion to the Governor}, the court noted that "[t]he framers of the constitution, in requiring territorial compactness, clearly intended to leave the legislature with a wide discretion as to the territorial structuring of the electoral districts."\textsuperscript{32} The court further stated that the discretion given to the General Assembly in drawing compact districts was especially applicable to the Rhode Island because "our state with its irregular boundaries, its bays and its inlets, its islands, its rivers and lakes and its many other

\begin{itemize}
  \item \textsuperscript{25} \textit{Id}.
  \item \textsuperscript{26} \textit{Id.} (citing Holmes v. Farmer, 475 A.2d 976, 978 (R.I. 1984)).
  \item \textsuperscript{27} \textit{Id.} (quoting R.I. CONST. art VIII, § 1).
  \item \textsuperscript{28} \textit{Id.} at 1240-41 (quoting 2001 R.I. Pub. Laws 315, § 2(d)).
  \item \textsuperscript{29} \textit{Id.} at 1241 (quoting 2001 R.I. Pub. Laws 315, § 2(e)).
  \item \textsuperscript{30} 101 A.2d 799 (R.I. 1966).
  \item \textsuperscript{31} \textit{Parella} 899 A.2d at 1242.
  \item \textsuperscript{32} \textit{Id.} at 1242 (quoting \textit{Opinion to the Governor}, 101 A.2d at 803).
\end{itemize}
The court continued by noting the mandate of compactness was established to provide the citizenry with effective representation and to prevent gerrymandering, but not to ensure “an orderly and symmetrical geometric pattern of electoral districts.” Finally, Opinion to the Governor established that when a redistricting challenge is brought the defendants must show that the redistricting is rational, done in good faith, and is “free from any taint of arbitrariness or discrimination.”

The court continued its precedential analysis by examining Holmes v. Farmer, where the Rhode Island Supreme Court examined whether placing Jamestown in the same district as Newport, as opposed to North Kingstown, violated the Compactness Clause. Applying the precedent set forth in Opinion to the Governor, the Supreme Court held that the compactness clause was violated only “when a reapportionment plan creates districts solely for political considerations, without reference to other policies, in such a manner that the plan demonstrates a complete abandonment of any attempt to draw equal, compact and contiguous districts.” Examining the legislature’s decision to link Jamestown and Newport in a single district, the court held that there were legitimate factors in the decision, citing historic ties, and therefore, the clause was not violated.

Finally, the lower court analyzed Licht v. Quattrochi and Farnum v. Burns. In Licht, the Rhode Island Supreme Court found a violation to the Compactness Clause when the plaintiffs in the case satisfied their burden of proof, showing that districts had been crafted to achieve political purposes, improperly crossed natural boundaries, and “were either not compact, not contiguous,
or both." In *Farnum*, the federal district court for Rhode Island ruled upon a redistricting that violated population requirements. The district judge noted that not only must there be a deviation from "natural, historical, geographical and political lines," but there also must be evidence of political gerrymandering.

In applying the standard in *Holmes* to *Parella*, the lower court concluded that the plaintiffs had not successfully met their burden of proof in showing that the redistricting lacked a rational basis and lacked "any attempt to draw equal, compact and contiguous districts." The court then studied the element of compactness, noting the goal of which was to provide effective representation.

In a state like Rhode Island, with its irregular boundaries and geographic features, districts could not rely purely on geometric boundaries. Next, the court addressed the contiguity element, focusing specifically on the concept of shore-to-shore contiguity. The court analyzed *Opinion to the Governor* and noted that the challenged districts there, which linked Tiverton to Warren, lacked land-based contiguity. The lower court then concluded that land-based contiguity was not mandatory but merely one of the factors considered in reapportionment.

The Superior Court next evaluated the communities affected by the division and determined that, of the existing plans, either Bristol or Portsmouth would have to be divided. The court then found that the division of Bristol instead of Portsmouth was based on rational principles. The court further concluded that the population deviations in the contested districts fell within the acceptable range of less then 10%. Finally, the court dismissed the plaintiffs’ concerns about gerrymandering, noting that the only evidence presented on the matter was completely

---

42. *Id.* at 1245.
43. *Id.*
44. *Id.* 1251-52.
45. *Id.* at 1252.
46. *Id.*
47. *Id.* 1251-52.
48. *Id.* at 1254.
49. *Id.*
50. *Id.* at 1255-56.
51. *Id.*
52. *Id.* at 1256.
unsubstantiated by any other testimony.\textsuperscript{53}

In her summary, superior court Judge McGuirl stated that although redistricting necessarily required difficult decisions to be made, it was not the place of the judiciary to second-guess the legislature.\textsuperscript{54} In finding that the Compactness Clause had not been violated, she noted that the plaintiffs had failed to meet the very high burden of proof in establishing that the redistricting lacked a rational basis.\textsuperscript{55}

\textbf{COMMENTARY}

The Rhode Island Supreme Court’s decision enforces the fact that the threat of gerrymandering is one that strikes at the very heart of the American representative system. Allowing representative districts to be redrawn for purely political reasons disenfranchises the American electorate of having their voice properly heard through their representative. The court rightfully recognized that the concepts of compactness and contiguity were there to protect the electorate from this very threat and ensure proper representation.

The decision also strengthens, however, the existing precedent that the burden in successfully challenging a redistricting statute is a heavy one. Due to the fact that the legislature is given such great deference in establishing redistricting plans and may consider a multitude of factors (historic, geometric, geographic, natural) to draw said boundaries, nearly every redistricting is bound to incite parties who believe that there was a more appropriate way to divide the districts. Without requiring the plaintiff show that the redistricting lacked a rational basis and demonstrated signs of gerrymandering, the process of redistricting would be nearly impossible to accomplish without a successful challenge.

It seems evident that the court also wanted to elaborate upon the concept of shore-to-shore contiguity as it applied to Rhode Island. The inevitable consequence of districting in Rhode Island requires that any plan will have to address the state’s relationship to bays, rivers and islands. By adopting the concept of shore-to-

\textsuperscript{53} \textit{Id.} at 1257.
\textsuperscript{54} \textit{Id.} at 1257-58.
\textsuperscript{55} \textit{Id.} at 1258.
shore contiguity, the court has expressed its belief that districts may be established without having direct or bridge established contiguity so long as the districts are formed on a rational basis and not fueled by gerrymandering motivations.

CONCLUSION

The Rhode Island Supreme Court held that a party challenging the validity of a redistricting statute, on the grounds that it violates the Compactness Clause of the Rhode Island Constitution, maintains the burden of proof in establishing that the statute was not adopted on rational basis and is instead based on political considerations. Here, the plaintiffs failed to establish that a redistricting plan, which established districts lacking land-based contiguity, but displayed no evidence of gerrymandering, lacked rational basis and therefore did not violate the Compactness Clause.

J. Timothy Lebsock
Constitutional Law. *State v. Russell*, 890 A.2d 453 (R.I. 2006). Disorderly conduct charged under Rhode Island General Laws section 11-45-1(a)(1) need not occur in a public place to satisfy the enumerated elements of the crime, and this case of first impression explicitly extends the reach of the statute to conduct that occurs in a private residence. Here, the language of the statute was held facially constitutional and withstood a vagueness challenge as applied to the facts of the case. The court declined formally to engage a substantive due process argument because the defendant waived any such claim by failing to present it at trial. In dicta, however, the court declared that the proposed privacy interests of a defendant charged with disorderly conduct within the home must yield to the state's codified policy interest in protecting its citizens from domestic violence.

FACTS AND TRAVEL

On September 3, 2002, Linda Russell called the Warwick police department to report a domestic disturbance at the home she shared with her husband, defendant David Russell. The defendant had fled the scene by the time officers arrived, but Mrs. Russell recounted a heated argument during which her husband had threatened to destroy the house if it was not sold in compliance with his demands. During the altercation, the defendant had upended the dinner table, leaving a visible stain on the dining room wall, and he had hurled a chair and other debris through a screened porch window and into the yard. However, there was no suggestion that the defendant had either struck or threatened to strike his wife. A warrant was issued for the defendant's arrest, and he surrendered on October 23, 2002.

2. *Id.*
3. *Id.*
The defendant was prosecuted before the Superior Court on one criminal charge of disorderly conduct under Rhode Island General Laws section 11-45-1, which provides in part:

A person commits disorderly conduct if he or she intentionally, knowingly, or recklessly:

Engages in fighting or threatening, or in violent or tumultuous behavior;

In a public place or near a private residence that he or she has no right to occupy, disturbs another person by making loud and unreasonable noise which under the circumstances would disturb a person of average sensibilities.\(^7\)

Moving to dismiss the complaint, the defendant argued that subsections (a)(1) and (a)(2) of the statute should be read in conjunction with each other, and the statute construed to require that, to meet the definition of “disorderly conduct,” offending behavior must occur “in a public place or near a private residence that [the perpetrator] has no right to occupy.”\(^8\) In the alternative, the defendant alleged that the statute was unconstitutionally vague as applied to conduct that occurred in his home rather than in a public place.\(^9\)

The trial court rejected the defendant’s first argument, holding that because section 11-45-1(a) enumerates a total of seven mutually exclusive categories of prohibited behavior, “an absurd result” would transpire if conjunctive fulfillment of all seven statutory conditions were required to support a disorderly conduct charge.\(^10\)

The trial court also rejected the defendant’s assertion that section 11-45-1(a)(1) was so facially “vague or indefinite as to violate the federal and state guaranties of due process.”\(^11\) To defeat a facial vagueness challenge, the plain language of a statute must provide notice that “reasonably inform[s] an individual of the criminality of his or her conduct,” and must also

\(^{6}\) Id. at 456.
\(^{8}\) See id.; Russell, 2003 WL 21297136 at *1.
\(^{9}\) Russell, 890 A.2d at 457.
\(^{10}\) Russell, 2003 WL 21297136, at *2.
\(^{11}\) Id. at *3.
“guide law enforcement officers and the court to avoid the threat of arbitrary and discriminatory enforcement and to avoid inhibiting the exercise of basic freedoms.”12 The court found at the threshold that the words “fighting,” “threatening,” “violent” and “tumultuous,” as used in section 11-45-1(a)(1), were “sufficiently clear to provide a person with notice that such conduct will subject him or her to criminal prosecution.”13

However, the trial court accepted the defendant’s alternative contention that the statute was unconstitutionally vague as applied to a disturbance occurring in a private residence.14 Despite its conclusion that the statutory language was facially constitutional in its provision of adequate notice, the trial court nevertheless found that, as applied to “the context of private behavior within one’s own home, the warning [was] less than adequate.”15 Citing the risk of undue state intrusion into domestic matters,16 and holding that “private annoyances” that “occur at

12. Id. at *2.
13. Id. at *2-*3. The ruling of the trial court did not rest on the “arbitrary enforcement” prong of the facial vagueness analysis. However, the judge thought it “conceivable that some behavior will be charged as criminal [under the statute] while similar conduct will be excused as the result of a bad day at work or at school,” and concluded generally that section 11-45-1(a)(1) “fail[ed] to set forth sufficient standards to guide law enforcement officers and the court to avoid arbitrary and discriminatory enforcement.” See id. at *4.
14. Russell, 890 A.2d at 458. On appeal, the Rhode Island Supreme Court also noted the trial judge’s erroneous invocation of an overbreadth analysis. Id. at 458-59. At trial, the defendant had confined his constitutional argument to an allegation of vagueness, and the appellate court doubted that a “separate and distinct” overbreadth challenge had been properly preserved for review. Id. at 459. Nevertheless, the appellate court briefly addressed the doctrine of constitutional overbreadth, deeming it inapplicable to the defendant’s case. Id. In the absence of the kind of threat to First Amendment freedoms that hallmarks an impermissibly overbroad statute, a law that purports to restrict conduct, rather than speech, will not be invalidated under the doctrine unless the law’s overbreadth is not only apparent, but also substantial in relation to the universe of conduct that is properly subject to state regulation. Id.
16. On appeal, the amici adopted this argument, contending that the facts of the case implicated a married couple’s fundamental interest in freedom from “unwarranted state interference, through the harsh vehicle of the criminal laws, in matters relating to very private aspects of their interpersonal relationships.” Brief for the Office of the Public Defender et al. as Amici Curiae Supporting the Petitioner, State v. Russell, 890 A.2d 453 (2006) (No. 2003-353-C.A.) (on file with author). Upon examination of the
home and do not injure or threaten the safety of family members ought not to be prosecuted criminally as breaches of the peace,” the Superior Court granted the defendant’s motion to dismiss. The state appealed, and the case came before the Rhode Island Supreme Court on October 24, 2005.

**ANALYSIS AND HOLDING**

On appeal, the state argued that the trial court had erred in construing section 11-45-1(a)(1) as unconstitutionally void for vagueness as applied to conduct occurring within a private residence. The court conducted a *de novo* review of the trial court’s statutory interpretation, and confirmed that an “as applied” vagueness analysis requires consideration of the questioned regulation in light of the particular facts of the case. The court determined that, as applied to acts committed within the defendant’s private residence, section 11-45-1(a)(1) provided both sufficient notice regarding the conduct it sought to prohibit and adequate safeguards against arbitrary enforcement. Concluding that Rhode Island public policy interests weighed in favor of the statute’s constitutionality, the Supreme Court vacated the trial judgment, and remanded the case to the Superior Court to reinstate the complaint.

**Notice and Arbitrary Enforcement**

The test for evaluating the notice requirement of a vagueness record, the appellate court declined to consider this substantive due process argument, concluding that – notwithstanding the appearance of related language in the trial court’s opinion – the defendant had not presented a substantive due process claim at trial, and therefore such a claim could not be addressed when raised on appeal. *Russell*, 890 A.2d at 462.

18. The defendant did not participate in the appeal. *Russell*, 890 A.2d at 456. However, “in light of the importance of the issues raised in this case,” the Rhode Island Supreme Court invited *amicus curiae* briefs from the Rhode Island Office of the Public Defender and other interested parties. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 458. The court further cautioned that it would not “indulge in hypothetical situations that would lead to absurd results.” *Id.*
22. *Id.* at 459-62.
23. *Id.* at 461-62, 463.
challenge is "whether a person of ordinary intelligence has a reasonable opportunity to know what is prohibited" by the statute.²⁴ Noting that "[a] mens rea requirement often defeats a vagueness challenge because the state of mind element is used to signify the defendant's guilty knowledge," the Supreme Court faulted the trial judge for overlooking the mens rea language — "intentionally, knowingly, or recklessly" — incorporated into section 11-45-1(a) of the Rhode Island disorderly conduct statute.²⁵ Turning to the facts of the case, the court inferred that "the fact that [the defendant] fled the scene before the police arrived [was] evidence of actual knowledge" that "his conduct could lead to arrest and prosecution."²⁶

Furthermore, the court concluded that the plain language of the statute provided satisfactory safeguards against arbitrary enforcement.²⁷ The court noted that "responding police officers are not confronted with the difficult task of differentiating between a public or private place," determining the relationship between the complainant and the offender, or considering geographical or temporal statutory components.²⁸ Indeed, a charge of disorderly conduct does not require the identification, or even the existence, of an individual victim.²⁹

On the grounds that section 11-45-1(a) met both the notice requirement and the arbitrary enforcement test, the court held that the statute withstood the vagueness challenge.³⁰

Disorderly Conduct in a Private Home

The amici also argued on appeal that, despite the absence of a public/private distinction in the language of section 11-45-1(a)(1), "when considered collectively, the words 'fighting, threatening, violent, and tumultuous,' indicate a legislative intent to prevent a public disturbance or breach of the public peace."³¹ The court refused to ascribe such an intent to the Legislature, noting that the subsequent section, 11-45-1(a)(2), specifies both public and

²⁴ Id. at 460.
²⁵ Id.
²⁶ Id.
²⁷ Id. at 460-61.
²⁸ Id. at 461.
²⁹ Id.
³⁰ Id.
³¹ Id. (emphasis added).
private locations where disruptive behavior constitutes actionable disorderly conduct, and reasoning that the Legislature could have similarly defined the reach of section 11-45-1-(a)(1), had such a proscription been intended.\footnote{32. \textit{Id.}}

In ruling that section 11-45-1(a)(1) was applicable to private as well as public disturbances, the court emphasized its belief that “Mrs. Russell was entitled to be free from the defendant's violent and threatening behavior.”\footnote{33. \textit{Id.}} Wishing to avoid an “absurd result” where “the defendant’s activities would be immune from police involvement simply by virtue of the[ir] location,” the court rejected the notion that “violent conduct occurring in the home is insulated from arrest and prosecution” as a matter of statutory policy. Rather, the court reasoned that Rhode Island’s Domestic Violence Prevention Act explicitly enumerates disorderly conduct as one of eleven crimes that constitute domestic violence if perpetrated by one family or household member against another.\footnote{34. \textit{Id.}}

The court declined to consider the amici’s substantive due process claim because that argument had first been raised on appeal.\footnote{35. \textit{Id.}} However, emphatic dicta revealed the court’s disagreement with “the suggestion that a fundamental liberty interest was infringed in this case.”\footnote{36. \textit{Russell}, 890 A.2d at 462.} Dismissing as irrelevant the amici’s citation of landmark United States Supreme Court opinions establishing the constitutional right to privacy in marital and intimate relations, the court observed that, here, “the defendant was arrested for disorderly conduct based on his wife’s telephone call to the police.”\footnote{37. \textit{Id.} at 463.} Thus no marital privacy right had been assailed by the state, and the court declared that “neither the state nor federal Constitution guarantees the right to throw furniture against the wall or through the window.”\footnote{38. \textit{Id.} (emphasis in original).}

The court vacated the grant of summary judgment for the defendant, and remanded the record to the trial court with

\begin{itemize}
\item \footnote{32. \textit{Id.}}
\item \footnote{33. \textit{Id.}}
\item \footnote{34. \textit{Id.}}
\item \footnote{35. \textit{Id.}}
\item \footnote{36. \textit{See Brief for Petitioner, supra note 15.}}
\item \footnote{37. \textit{Russell}, 890 A.2d at 462.}
\item \footnote{38. \textit{Id.} at 463.}
\item \footnote{39. \textit{Id.} (emphasis in original).}
\item \footnote{40. \textit{Id.}}
\end{itemize}
instructions to reinstate the complaint.\textsuperscript{41}

\textbf{COMMENTARY}

This case presented the Rhode Island courts with an issue of first impression as to whether criminal disorderly conduct could be charged based on actions occurring in a private home.\textsuperscript{42} The trial and appellate judges agreed that the unambiguous language of section 11-45-1(a)(1) does not incorporate a publicness element.\textsuperscript{43} However, the defendant's alternative contention that "when considered collectively, the words 'fighting, threatening, violent, and tumultuous,' indicate a legislative intent to prevent a \textit{public} disturbance or breach of the \textit{public} peace"\textsuperscript{44} is not without support in the case law of other jurisdictions.\textsuperscript{45} The notion that disorderly conduct, by definition, can occur \textit{only} in public can be understood as the product of two factors: the statutory history of the offense, and the constitutionally enshrined idea of the home as a private space impervious to government interference. In any jurisdiction, these factors may operate in concert or in tension with other important state policy objectives to determine whether the reach of a disorderly conduct statute extends to a private residence.

\textit{The Statutory History of Disorderly Conduct}

Because the offense of disorderly conduct was unknown by that name under common law, its definition in any jurisdiction depends entirely on the precise wording of the statute providing

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 457, 463.
\item \textit{Russell}, 2003 WL 21297136, at *4.
\item \textit{Russell}, 890 A.2d at 461 (emphasis added).
\item \textit{See, e.g., State v. Robinson}, 184 A.2d 188, 189 (Conn. Cir. Ct. 1962) (citing "a long line of [New York state] decisions [in which] guilt of disorderly conduct [was] predicated on the fact that the defendant's misconduct occurred in a private dwelling or in a locale where no members of the public were present," and in which the courts held it to be "statutorily impossible to commit disorderly conduct in private"). The \textit{Robinson} court also cited collected cases from Illinois, Georgia, Louisiana, and New Jersey holding "that acts charged as disorderly conduct must be public in character and such as actually tend to disturb the public peace and quiet." \textit{Id.}
\end{enumerate}
\end{footnotesize}
for its criminalization. Although "the types of conduct that may be disorderly almost defy definition . . . [disorderly conduct] tends to cause or provoke a disturbance, and to disrupt or destroy public order, or to endanger the morals, safety, or health of the community or of a class of persons or a family."

Thus, in the many jurisdictions where the "dominant purpose" of a disorderly conduct regulation is understood to be the "preserv[ation] of peace and good order" in public spaces, disorderly conduct statutes include elements specifically requiring that the action in question be committed in a public place, or that it bear a defined relationship to the public order. In jurisdictions where a publicness element is written into the disorderly conduct statute, the court's primary task is often to decide whether a particular location is "sufficiently public" to support the charged crime. As the Rhode Island Supreme Court approvingly noted, this potentially difficult differentiation between public and private spaces is avoided by the generalized language of section 11-45-1(a)(1).

However, the exclusion of a publicness element from section 11-45-1(a)(1) makes the Rhode Island disorderly conduct statute unusual enough to invite interpretive confusion of a different nature. Despite the section's explicit silence on the public/private distinction — a silence that the Rhode Island Supreme Court supposed to be intentionally crafted by the Legislature — Russell illustrates that it may be difficult to overcome a tacit, majoritarian presumption that disruption of the public peace is required to sustain a disorderly conduct charge.

Other minority rule jurisdictions have encountered the same

46. 12 AM. JUR. 2D Breach of Peace and Disorderly Conduct § 26 (1964).
47. Id.
49. 12 AM. JUR. 2D Breach of Peace and Disorderly Conduct § 29 (1964).
50. See id. (comparing the public character of locations including a public road, a retail establishment, a public restroom, the hallway of an apartment building, and a hospital emergency room).
51. See Russell, 890 A.2d at 461.
52. Cf. Town of Springdale v. Butler, 384 S.E.2d 697, 698 (S.C. 1989) (upholding defendant's conviction for disorderly conduct and noting that, "unlike most municipal ordinances, the Springdale [South Carolina] ordinance does not require that the incident occur in a public area") (emphasis added).
53. Russell, 890 A.2d at 461.
interpretive tension, with varying results. For example, in *State v. Richards*, the Utah Court of Appeals reversed a disorderly conduct conviction under a statute worded similarly to Rhode Island's; the *Richards* majority held that a boisterous, angry confrontation that occurred within a private residence could not be charged as disorderly conduct because it did not produce "unreasonable noise" so as to disturb anybody outside of the home. Conversely, in *Town of Springdale v. Butler* a unanimous South Carolina Supreme Court upheld a disorderly conduct conviction under a minority rule statute, holding that "the place where the conduct is committed [was] not an element of the offense, and therefore, the fact that [the defendant] was on his private property does not defeat the charge."

In reaching its conclusion, the South Carolina Supreme Court emphasized that "the wording of the particular [disorderly conduct] ordinance controls the definition of the offense." In *Russell*, the Rhode Island Supreme Court made no such explicit statement referencing the history of disorderly conduct as a purely statutory creation; however, the Supreme Court nevertheless overruled the Superior Court's presumption of a public/private distinction where no such element appeared in the language of the regulation. Particularly in minority rule jurisdictions like Rhode Island, it would seem that disorderly conduct statutes should be strictly construed - as the state Supreme Court did in *Russell* - to avoid the potentially inconsistent interpretations that arise when a publicness element is presumed.

**The Home as Private Space**

The amici appellants in *Russell* further argued that the Rhode Island disorderly conduct statute impermissibly infringed on the defendant's exercise of freedoms protected by the federal Constitution. The Rhode Island Supreme Court declined to

---

54. 779 P.2d 689, 691-92 (Utah Ct. App. 1989). The dissent, however, believed that the boisterous, angry confrontation entailed "tumultuous or threatening behavior" sufficient to support the offense charged under the language of the Utah statute, regardless of the fact that it occurred in a private residence. *Id.* at 692.
55. 384 S.E.2d at 698.
56. *Id.*
57. *See Russell*, 890 A.2d at 462.
engage this substantive due process argument, finding that the defendant had not raised it properly at trial. Nevertheless, the Supreme Court answered the trial judge’s observation — that “[t]o the extent that the disorderly conduct statute criminalizes noisy and boisterous behavior in the home, it invites the state to intrude into domestic matters beyond that which may be necessary for the protection of the safety of family members” — by noting that section 11-45-1(a) is not directed at “noisy and boisterous behavior in the home,” and that it is only when “disputes escalate into fighting or violent or threatening behavior that the criminal law becomes operable.”

In practice, however, the distinction between “noisy and boisterous behavior” and “fighting” in a private residence may sometimes prove to be less than clear. For two reasons, the Russell court was not required to grapple with that potentially troublesome distinction: first, the Supreme Court’s analysis of the issue was relegated to dicta because of the defendant’s procedural failure to raise the substantive due process issue at trial. Second, the specific facts in Russell rendered superfluous any judicial consideration of a privacy-based claim because any constitutional protection afforded to the privacy of the home was ceded by the defendant’s wife when she invited the police to enter the marital residence.

Because the Supreme Court was conducting an as-applied, and therefore fact-sensitive, vagueness analysis, it quite properly refused to speculate as to the statute’s constitutionality in application to hypothetical situations. However, it is not difficult to imagine a case in which neither a raise-or-waive violation nor a narrow factual peculiarity would exist to defeat a charge of disorderly conduct arising in a private residence. In such a case, the Supreme Court’s rather light conclusion in Russell — that “neither the state nor federal Constitution guarantees the right to throw furniture against the wall or through the window” — might

58. Id.
60. Russell, 890 A.2d at 462 (quoting R.I. GEN. LAWS § 11-45-1 (2002)).
61. See id.
62. Id. at 463.
63. Id. at 458.
64. Id. at 463.
require further substantiation before it could appease the constitutional concerns presented by the amici on appeal. 65

Other State Policy Objectives

The amici suggested that “[d]espite the fact that society might condemn or disapprove of certain conduct, when such behavior occurs in one’s home, does not result in harm to anyone inside, and is not exposed to the public, it is constitutionally protected.” 66 Similarly, the trial judge held that “some domestic disputes fall outside the realm of criminal conduct. Those acts which occur at home and do not injure or threaten the safety of family members ought not to be prosecuted criminally as breaches of the peace.” 67 Both statements reflect an esteem for the notion of the home as a “quintessentially private space” into which criminal law ought not intrude. 68

The Supreme Court, however, embraced a different policy priority. Citing the Domestic Violence Prevention Act (DVPA), and noting that that Rhode Island statute enumerates disorderly conduct as a constituent crime, the court declared that “the protection of family members from violent and threatening behavior by one household member is the statutory policy of this state.” 69 However, the court’s conclusion that “[o]bviously, the [DVPA] applies to crimes occurring within the home” 70 does not necessarily mean that disorderly conduct, which is only one of eleven constituent crimes within the DVPA, 71 is itself criminally

65. Indeed, the amici complained that the quoted language, presented by the state and adopted by the Supreme Court, “trivializes the [privacy] right necessarily implicated by [the court’s] interpretation of the statute,” and claimed that,

[i]n fact, the liberty interest at issue is far broader, far more substantial, and far more important, because what is at stake here is the right of a married couple (or family members living under the same roof) to be free from unwarranted state interference, through the harsh vehicle of the criminal laws, in matters relating to very private aspects of their interpersonal relationships.

Brief for Petitioner, supra note 15.

66. Id.


69. Russell, 890 A.2d at 461.

70. Id. at 462.

punishable when it occurs within a private residence. The meaning of disorderly conduct within the DVPA is defined only by reference to its construction under section 11-45-1(a).

Those who seek to stop domestic violence face the problem of longstanding cultural “confusion around whether this type of violence should be treated as a public or a private issue.”72 Despite the criminalization of wife beating in all the states by 1920, it was not until the 1970s that the women's rights movement began to succeed in recasting domestic violence as a public concern.73 Even in light of this “reform effort [that] has met with remarkable and transformative success,”74 jurisdictions that refuse to extend disorderly conduct statutes to capture conduct within the home may be guided by pre-1970s case law,75 resulting in a potential inconsistency between the traditional construction of disorderly conduct statutes and more contemporary policy priorities that seek to eradicate domestic violence through criminalization.

If Rhode Island truly wants to promulgate a cohesive “statutory policy”76 against violent and threatening behavior within the home, a small change to the statutory language of section 11-45-1(a)(1) would achieve that end. The Rhode Island law takes a minority approach, but it is not alone in excluding a publicness requirement from some constituent behaviors of disorderly conduct. Instead of remaining silent on the public/private distinction otherwise incorporated into the offense, the Legislature could easily provide language specifying that a charge under section 11-45-1(a)(1) may be grounded upon events transpiring in public or in private spaces. Such a revision to the statute would make explicit Rhode Island's commitment to the liberalization of its definition of disorderly conduct,77 if indeed the

---

73. Suk, supra note 68, at 12.
74. Id. at 6.
75. See, e.g., Robinson, 184 A.2d at 189 (citing the “long line” of New York decisions holding that it is “statutorily impossible to commit disorderly conduct in private”).
76. Russell, 890 A.2d at 461.
77. Even absent a revision to the statute, it is likely that subsequent case law will further entrench the approach enunciated in Russell. Within six months of its decision in Russell, the Rhode Island Supreme Court had already reaffirmed that “the state did not have to prove that the defendant's
state intends such a result, and would bring section 11-45-1(a)(1) into harmony with the policy priorities embodied in the DVPA.

CONCLUSION

By expanding the scope of section 11-45-1(a)(1) to reach actions occurring in a private home, the Rhode Island Supreme Court adopted a minority approach to the construction of a disorderly conduct statute. However, the minority approach is justified both by the great extent to which the definition of the offense is controlled by the precise language of the statute, and by contemporary policy objectives to which Rhode Island is committed, but which historically have not informed the statutory construction of disorderly conduct in other jurisdictions.

Debra L. Conry

behavior occurred in a public place or disturbed another member of the public to prove disorderly conduct under section 11-45-1(a)(1) beyond a reasonable doubt." State v. Hesford, 900 A.2d 1194, 1201 (R.I. 2006).
Criminal Law. State v. Andujar, 899 A.2d 1209 (R.I. 2006). Criminal solicitation requires that the soliciting message actually be received by the intended recipient. A defendant should be allowed to introduce the fact of his acquittal after the state made references to the previous charges during trial. A pre-trial detainee does not retain any legitimate expectation of privacy in his or her jail cell.

FACTS AND TRAVEL

In October 2001, the defendant, Jose A. Andujar, was arrested and charged with one count of burglary and three counts of first degree sexual assault perpetrated against a woman referred to as Donna, for which he was later acquitted.1 The facts giving rise to State v. Andujar occurred in August 2002, while the Defendant was awaiting trial at the Adult Correctional Institute ("ACI").2 New York City Detective Enrico Viola discovered an opened letter in his own mailbox, addressed to the defendant's brother, Miguel Henriquez.3 At trial, it was undisputed that Henriquez never actually received the letter,4 which contained various references to Donna including detailed instructions on how Henriquez should kill her in Westerly, Rhode Island.5 For instance, the letter said, "she can be lured into a remote area and you could just throw her up into a headlock until she crokes [sic] then bounce."6 After reading the letter, Viola contacted Detective Edward St. Clair of the Westerly Police Department because he was concerned about the numerous references to Westerly, Rhode Island.7 St. Clair suspected the letter was written by the defendant because he was

1. State v. Andujar, 889 A.2d 1209, 1211 (R.I. 2006). To identify the victim in this case, the court referred to a fictitious name, Donna. Id. n.1.
2. Id. at 1211.
3. Id.
4. Id. at 1211-12.
5. Id. n2.
6. Id.
7. Id. at 1211. "This b--- lives in a town called Westerly." Id. at 1212 n2.
currently working on a case involving the defendant and Donna.\textsuperscript{8}

St. Clair proceeded to call Special Investigator Stephen Mokler at the ACI to alert him of his suspicions that the defendant was trying to have Donna murdered.\textsuperscript{9} Based on this information, Mokler searched the defendant's cell and seized a yellow legal pad and other papers.\textsuperscript{10} Mokler never obtained a warrant to search or seize anything from the cell.\textsuperscript{11} Next, St. Clair obtained a court order to gather handwriting samples from the defendant, which were then analyzed by a certified document examiner.\textsuperscript{12} St. Clair did not obtain a warrant to conduct a writing sample analysis.\textsuperscript{13} Nevertheless, after conducting the analysis, the examiner concluded that the defendant wrote the solicitation letter and that the letter could have come only from the yellow legal pad that was found in the defendant's cell block.\textsuperscript{14}

The defendant was charged with one count of criminal solicitation of murder in violation of G.L.1956 §11-1-9.\textsuperscript{15} Prior to trial, the state filed a motion \textit{in limine} to exclude evidence of the defendant's acquittal of the previous assault charges.\textsuperscript{16} The defendant objected and argued that the trial justice should not allow the state to present evidence of his prior charges without also allowing him to inform the jury that he was acquitted of those crimes.\textsuperscript{17} Additionally, the defendant filed a motion \textit{in limine} to exclude evidence of the prior charges all together.\textsuperscript{18} The motion justice held that the evidence would be allowed at trial with a

\begin{itemize}
  \item \textsuperscript{8} Id. at 1212.
  \item \textsuperscript{9} Id.
  \item \textsuperscript{10} Id. at 1213.
  \item \textsuperscript{11} Id.
  \item \textsuperscript{12} Id.
  \item \textsuperscript{13} Id.
  \item \textsuperscript{14} Id.
  \item \textsuperscript{15} Id.
  \item \textsuperscript{16} Andujar, 899 A.2d at 1213.
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} Id.
\end{itemize}

\textbf{R.I. GEN. LAWS} §11-1-9 (1956).
limiting instruction to the jury. Next, the defendant filed a second motion in limine hoping to suppress the evidence acquired from the search of his cell block. The motion justice denied this motion as well. The defendant then filed a motion pro se to dismiss the charge against him for lack of probable cause under Rule 9.1 of the Superior Court Rules of Criminal Procedure. The defendant argued that because Henriquez never received the letter, the solicitation was never completed. The motion justice denied the motion, but admitted that it was a close call.

At trial, the state mentioned the defendant's prior sexual assault charges in both the opening and closing arguments. After the state rested, the defendant posed substantially the same argument as his pre-trial motion to dismiss and filed a motion for judgment of acquittal according to Rule 29, which was ultimately denied. The defendant rested without presenting a case.

---

19. Id.
20. Id. at 1214.
21. Id.
22. Id.

A defendant who has been charged by information may, within thirty (30) days after he or she has been served with a copy of the information, or at such later time as the court may permit, move to dismiss on the ground that the information and exhibits appended thereto do not demonstrate the existence of probable cause to believe that the offense charged has been committed or that the defendant committed it. The motion shall be scheduled to be heard within a reasonable time.

23. Andujar, 899 A.2d at 1214.
24. Id. ("Despite noting the state's concession that Henriquez never did, in fact, receive the letter, the motion justice denied the motion, but admitted it was a close question").
25. Id.
26. Id.

Motions for a directed verdict are abolished and motions for a judgment of acquittal shall be used in their place. The court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the State is not granted, the defendant may offer evidence without having reserved the right.

27. Andujar, 899 A.2d at 1214.
the jury instructions, the judge informed the jury that the statements made in opening and closing arguments were not to be considered as evidence.\textsuperscript{28} Even so, the jury found the defendant guilty of criminal solicitation.\textsuperscript{29} After trial, the defendant argued a motion for a new trial under Rule 33 again on the basis that solicitation requires that the intended solicitee actually receive the communication to constitute a completed crime.\textsuperscript{30} The trial justice denied the motion for a new trial, but was hesitant in doing so.\textsuperscript{31} The defendant appealed.\textsuperscript{32}

\noindent \textbf{Holding and Analysis}

Andujar raised three issues on appeal to the Rhode Island Supreme Court, however, this survey will address only the most significant issue with respect to Rhode Island law.\textsuperscript{33} The

\begin{itemize}
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id.
\item On motion of the defendant the court may grant a new trial to the defendant if required in the interest of justice. If trial was by the court without a jury, the court on motion of a defendant for a new trial may vacate the judgment, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on newly discovered evidence may be made only within three (3) years after the entry of judgment by the court, but if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within ten (10) days after the verdict or finding of guilty or within such further time as the court may fix during the ten-day period. A copy of the motion for a new trial shall be filed with the trial justice contemporaneously with its filing with the clerk of the court.
\end{itemize}

R.I. SUP. CT. R. CRIM. P. 33.

\textsuperscript{31} Andujar, 899 A.2d at 1214 ("Despite the state’s again conceding that Henriquez was never in receipt of the letter, the trial justice eventually, although hesitantly, issued an order denying the motion for a new trial").

\textsuperscript{32} Id.

\textsuperscript{33} Id. at 1214-15. In addition to challenging his conviction for solicitation, the defendant also asserted that the trial court violated his due process rights by not permitting him to present evidence of his acquittal for the sexual assault charges after the state introduced evidence of those allegations. The Rhode Island Supreme Court held that the acquittal evidence was relevant and material evidence that should have gone to the jury. \textit{Id.} at 1222. Because it was impossible to speculate whether the acquittal evidence would have had a different effect on the jurors, the trial justice’s error was not harmless and thus the exclusion of the evidence denied the defendant due process. \textit{Id.} The defendant also argued that the trial court violated his Rhode Island and Federal Constitutional rights when it
defendant asserted that the court erred in denying his pretrial motion to dismiss, motion for judgment of acquittal, and motion for a new trial. His primary argument was that he could not be convicted for criminal solicitation under §11-1-9 when the solicitation was never actually communicated to the solicitee and thus never complete. The court stated that when a statute's language is clear and unambiguous, it will look only to the words in the statute and apply their plain meaning. With that said, the court held that "the plain language of §11-1-9 clearly indicates that actual receipt of a criminal solicitation by an intended solicitee is required for liability to attach."

To reach this conclusion, the court examined the language in the Rhode Island statute, and considered People v. Saephanh, a court of appeals case from California. In Saephanh, the defendant wrote a letter requesting that the recipient assault his pregnant friend; however, the intended recipient never received the letter. The court in Saephanh held that there was insufficient evidence of solicitation since it was uncontested that the intended solicitee never received the communication. With the California appellate court's holding in mind, the Rhode Island Supreme Court concluded that the words, "solicits another" in the Rhode Island statute, like the words "solicits another" used in the California statute in Saephanh, indicated that another person must actually receive the communication for a solicitation to transpire and be complete. In Andujar, it was undisputed that Henriquez, the intended solicitee, never received the letter and thus the solicitation was incomplete. The court agreed with the

refused to suppress the evidence seized from his cell block. Id. at 1222-23. The court held that the defendant was not entitled to a legitimate expectation of privacy in his cell, and thus the search and seizure of the defendant's cell was lawful. Id. at 1226.

34. Id. at 1215.
35. Id.
36. Id.
37. Id. at 1217.
38. Id. at 1216; 94 Cal. Rptr. 2d 910, 915 (Cal. App. Dep't Super. Ct.) ("The plain language of [the California statute], in particular the phrase 'solicits another,' demonstrates that proof the defendant's soliciting message was received by an intended recipient is required for liability to attach").
39. Andujar, 899 A.2d at 1216.
40. Id. at 1217
41. Id.
42. Id. at 1219.
state's argument that the defendant's act of trying to solicit another is criminal on its own. The court, however, distinguished attempting to solicit another from actually completing criminal solicitation. The court also noted that criminal solicitation statutes are designed to protect citizens from being induced to commit a crime and preventing solicitations from resulting in completed crimes. In the defendant's case, however, there was never such a threat that Henriquez would be induced to commit the crime because he never even received the letter.

Furthermore, the court concluded that while the defendant's conduct may not amount to a criminal solicitation, the existence of §12-17-14 indicated that the defendant could be convicted of attempted solicitation. The court concluded that when the defendant put the solicitation letter in the mail, he committed the last proximate act in the attempt to communicate the solicitation.

**COMMENTARY**

The essence of criminal solicitation is to punish a defendant for taking steps to induce another to commit a crime. The policy behind punishing solicitation, as described in Andujar, is to prevent citizens from being induced to commit crimes, and to prevent substantive crimes from being committed. With that in

43. Id.
44. Id.
45. Id.
46. Id.
47. Id.
48. Andujar, 899 A.2d at 1219.
49. Id. at 1218.
50. Id. whenever any person is tried upon an indictment, information, or complaint and the court or jury, as the case may be, shall not be satisfied that he or she is guilty of the whole offense, but shall be satisfied that he or she is guilty of so much of the offense as shall substantially amount to an offense of a lower nature, or that the defendant did not complete the offense charged, but that he or she was guilty only of an attempt to commit the same offense, the court or jury may find him or her guilty of the lower offense or guilty of an attempt to commit the offense, as the case may be, and the court shall proceed to sentence the person for the offense of which he or she shall be so found guilty, notwithstanding that the court had not otherwise jurisdiction of the offense.

R.I. GEN. LAWS §12-17-14 (1956).
48. Andujar, 899 A.2d at 1219.
49. Id. at 1218.
50. Id.
mind, it seems odd that the court in *Andujar* concluded that because there was no possible way the defendant's brother was actually induced to commit the crime, given that he never received the letter, the policy behind the statute is no longer relevant. If the defendant's culpable state of mind and his action in mailing the letter qualifies as an act to further his intent to solicit murder, solicitation seems to be the proper charge, whether it is completed or not. The Rhode Island Supreme Court's analysis of the words in the Rhode Island statute appears to be somewhat questionable. It is logical that the words "solicits another" mean that another person has to be solicited. Yet if the word 'another' was not in the statute, who or what would be solicited? It is only possible to solicit another *person*, so the word 'another' appears to be merely descriptive. The court uses the plain meaning rule to interpret the statute, but it is not *clear and plain* that the words 'solicits another' must mean that the solicitation has to actually be received to be a crime under § 11-1-9.

The future implications for this change in Rhode Island law is that defendants now have three charges to be concerned about: attempted solicitation, solicitation, or the substantive crime. The new interpretation of §11-1-9 gives prosecutors another way to charge defendants, depending on how far they get in executing the intended crime. With the underlying policy and rationale of the Rhode Island statute in mind, defendants probably would be deterred from inducing others to commit crimes more so if they knew that they would be subject to prosecution for the completed solicitation charge, regardless of whether the solicitation was successful or not. Thus, the policy of preventing citizens from being induced to commit crimes and of preventing substantive crimes from being completed is better reached when defendants fear being responsible for the *entire* solicitation charge rather than the possibility of only being charged with the lesser crime of attempt.
CONCLUSION

The Rhode Island Supreme Court concluded that the criminal solicitation conviction should be vacated after considering the plain meaning of §11-1-9. The court entered judgment of acquittal for the solicitation charge and remanded the case to superior court for a new trial for attempted solicitation.

Allyson Picard
Criminal Law. *State v. Feliciano*, 901 A.2d 631 (R.I. 2006). The admission of a decedent’s statement to a friend days before his death, that is not testimonial in nature and possesses characteristics of reliability, does not violate the Confrontation Clause. A medical examiner may answer hypothetical questions when there are essential facts to base an opinion. A general objection to testimony regarding prior identification through an interpreter is insufficient to properly preserve the issue for appeal. Finally, failure to file the requisite motion constitutes waiver of the double jeopardy defense.

**FACTS AND TRAVEL**

On the morning of June 16, 2001, Anthony Feliciano (Feliciano) was in the back yard of a Bergen Street home “smoking a blunt” with a friend, Jesse Simas (Simas), when both were approached by two males, one of whom was Angel Rivera (Rivera).¹ Rivera asked Feliciano and Simas how much it would cost to “cap a Guatemalan.”² Rivera was told that it would cost One Thousand Dollars.³ Rivera left and later returned with cash.⁴ Feliciano and Simas counted the cash and Rivera handed each of the men a handgun.⁵

That same evening, Walter Sol (Sol) and Juan Palomo (Palomo) were socializing at a park on Valley Street in Providence along with their friends, Marvin Torres (Torres) and Jorge Benitez (Benitez).⁶ The men drank “until the point of dizziness,”⁷ At about 11:30 p.m., the men decided to drive to a friend’s house.⁸ As they drove down Bergen Street, Simas walked into the middle of the street and pointed a gun at the vehicles.⁹ Torres put his foot

---

². Id.
³. Id.
⁴. Id.
⁵. Id.
⁶. Id. at 634.
⁷. Id.
⁸. Id.
⁹. Id.
on the gas pedal, barely missing Simas, who shot at the windshield of the Camry. The bullet struck Palomo, who was a passenger, in the left arm. Torres continued driving and fled the scene with an injured Palomo in tow.

At this point, Simas turned his anger towards the Honda that Benitez was driving and shot at it. Benitez ran Simas over, crashing into another vehicle. The crash rendered Benitez temporarily unconscious and Sol was stuck in the windshield of the Honda. When Benitez regained consciousness, he fled. Simas, having been exacted from the windshield, ran toward 59 Bergen Street. Feliciano then appeared from between 61 and 59 Bergen Street with two other men, peered into the Honda, and walked back between the houses. An injured Sol extricated himself from the Honda, fell to the ground, then got up and ran north on Bergen Street. A short time after, Feliciano left Bergen Street in a gray station wagon.

Sol was found by a police officer lying unconscious behind 48 Bergen Street. After ensuring that an ambulance had arrived to assist Sol, police officers followed a trail of blood to 59 Bergen Street where they found a wounded Simas in his sister's apartment. Police also found a jammed 9mm semiautomatic handgun and used bullet casings at the crime scene.

At trial, Feliciano alleged that he was at 61 Bergen Street at the time of the shooting, incidental to refurbishing his illegal drug supply. Feliciano testified that he did not witness the shooting incident and only went outside after hearing the ensuing commotion. However, relatives and friends of Feliciano testified

10. Id.
11. Id.
12. Id.
13. Id.
14. Id. at 635.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id. at 636.
21. Id. at 635.
22. Id.
23. Id.
24. Id. at 637.
25. Id.
that a friend of Feliciano, known by the name of “Nuts” was responsible for the shooting.\textsuperscript{26} A jury convicted Feliciano of five counts as follows: conspiracy to commit murder, first-degree murder, assault with intent to commit murder, discharging a firearm while committing a crime of violence resulting in death, and discharging a firearm while committing a crime of violence causing injury.\textsuperscript{27} Feliciano received two mandatory consecutive life sentences on the counts of first-degree murder and discharging a firearm while committing a crime of violence resulting in death.\textsuperscript{28}

\textbf{ANALYSIS AND HOLDING}

On appeal, the defendant argued that the trial justice committed reversible error: (1) in admitting a statement decedent made to a friend days before his death;\textsuperscript{29} (2) by allowing the medical examiner to respond to the prosecution’s hypothetical questions even though the record lacked facts to support the questions and the medical examiner’s responses were misleading to the jury;\textsuperscript{30} and, (3) by allowing a detective to testify to Palomo’s written assertion regarding photo identification of Simas, as translated by a Spanish-speaking officer.\textsuperscript{31} Further, the defendant argued that the court should set aside its holding in \textit{State v. Rodriguez}\textsuperscript{32} and conclude that defendant’s convictions for murder and discharging a firearm in connection with the murder violate the double jeopardy doctrine.\textsuperscript{33}

\textit{Admissibility of Hearsay Evidence}

The defendant contested admission of Sol’s statement to Benitez, prior to the shooting, that Rivera had been one of the people that had jumped him.\textsuperscript{34} The defendant argued that, in

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 633.
\item Id.
\item Id. at 634.
\item Id.
\item Id.
\item Id.
\item 822 A.2d 894, 906-08 (R.I. 2003).
\item \textit{Feliciano}, 901 A.2d at 634.
\item Id. at 637. A week or two before the shooting, there was an incident wherein numerous people attacked Palomo and Sol. Id. Sol’s statement arose while he and Benitez were standing on a porch on Bergen Street. Id. at 637-38. Sol made the remark as a couple walked by, identifying the male as
\end{enumerate}
\end{footnotesize}
light of the recent United States Supreme Court ruling in *Crawford v. Washington*, admitting Sol's statement under Rule 804(c) violated his right to confrontation of the witness under the Sixth Amendment to the United States Constitution.

The court first rejected the defendant's contention that Rule 804(c) was not applicable to criminal proceedings, and based its determination on two facts. First, the Rhode Island Supreme Court noted that the language of the Advisory Committee's Notes clearly stated that the rule applied to criminal cases. Second, the court validated its holding in *State v. Burke* by making a distinction between *Ohio v. Roberts* and *Crawford*. The court noted that the *Crawford* decision specifically addressed only the admissibility of testimonial statements. Thus, the *Roberts* test requiring that an out-of-court statement contain an "adequate indicia of reliability" was still a sound analytical tool for out of court statements that were not testimonial. Consequently, the *Burke* decision, wherein Rule 804(c) was invoked in a criminal matter to admit a decedent's out of court statement of a non-testimonial nature, was still valid.

Although the court concluded that *Crawford* did not
invalidate the application of Rule 804(c) in criminal cases, it did change the analysis. Thus, the court developed a tripartite approach to analyzing the admissibility of out of court statements in criminal proceedings under the Confrontation Clause: (1) the statement must fulfill the requirements of Rule 804(c); (2) using an objective standard, the statement must be non-testimonial in nature; and (3) the statement must bear the "indicia of reliability."

Under this three-step analysis, the court ascertained that allowing Sol's out of court statement did not violate the Confrontation Clause. First, the court noted that the statement satisfied the requirements of Rule 804(c). The court found that because Sol made the statement to a friend, the good faith requirement was met. The personal knowledge element of Rule 804(c) was satisfied because the statement was about a fight.

---

44. Id.
45. Id. To satisfy Rule 804(c), a statement must be "made in good faith before the commencement of the action and upon the personal knowledge of the declarant." R.I. R. Evid. 804(c).
46. Feliciano, 901 A.2d at 641.
47. Id.
48. Id. at 642.
49. Id. at 641-42.
50. Id. at 642. The Feliciano court neither defined "good faith" nor enumerated specific factors that establish "good faith." See id. The court did, however, refer to Burke and Rule 804(c). Id. at 642. The Burke court focused on two factors: (1) the time lapse between the statement made and the incident that evoked the statement; and (2) the fact that the statement was made between family members. See 574 A.2d at 1223. While the Feliciano court also focused on the timing of the statement and the relationship between the parties who were privy to the statement, see 901 A.2d at 641-42, the Feliciano court used a very broad approach in determining these factors have been met. The statement in Burke was made within hours of the incident, see 574 A.2d at 1223, while the statement in Feliciano was made "a week or two" after the incident. See 901 A.2d at 637. Furthermore, unlike the family member who was the recipient of the information in Burke, see 574 A.2d at 1223, the recipient of the statement in Feliciano was merely a friend. See 901A.2d at 641. Thus, timeliness and the nature of the relationship are two factors that can be used to determine whether a statement was made in good faith. It should be noted, however, that the court did not indicate that these are the only two factors that are determinative of good faith. See Feliciano, 901 A.2d at 641-42; Burke, 574 A.2d at 1220-23.
51. Feliciano, 901 A.2d at 642. It can be inferred that personal knowledge requires first-hand observation. See id. (declarant was the victim); Burke, 574 A.2d at 1223 (declarant was the victim).
Sol was personally involved in. Finally, the statement was uttered days before the shooting incident occurred satisfying the requirement under Rule 804(c) that the statement be made “before commencement of the action.”

The court further concluded that the statement was not testimonial in nature. The court reasoned that the statement was an off-hand remark made between two friends. The statement was not made to prove a fact. In addition, the court deduced that the defendant could not have believed the remark would be used later at trial.

Finally, the court determined that the statement exhibited adequate indications of reliability. To support this conclusion, the court relied on the friendly relationship between Sol and Benitez. Further, the court noted that the seriousness and severity of the attack to which Sol referred to in his statement supported its reliability.

Testimony of Medical Examiner

The defendant also argued that the trial justice abused his discretion by allowing Dr. Swartz, the state’s medical examiner, to answer a sequence of hypothetical questions regarding the position of the gun at the time of the shooting because the doctor’s responses were speculative, misleading and substantially prejudicial.

In finding that the trial justice did not abuse his discretion, the court focused on the fact that hypothetical questions have traditionally been acceptable as long as the record provides facts sufficient to base an opinion on. The court was persuaded that Dr. Swartz’s examination of the body during autopsy provided essential facts on which to opine about the

52. Feliciano, 901 A.2d at 642.
53. Id.
54. R.I. R. EVID. 804(c).
55. Feliciano, 901 A.2d at 642.
56. Id.
57. Id.
58. Id.
59. Id.
60. Id.
61. Id. at 642-43.
62. Id. at 643.
possible positions of the gun.\textsuperscript{63} Further, the court noted briefly that the hypothetical questions were appropriately framed.\textsuperscript{64} Thus, there was no abuse of discretion on the part of the trial justice and, accordingly, no need to visit the defendant's allegation of prejudicial error.\textsuperscript{65}

\textit{Detective's Testimony as to Witnesses Prior Identification of Co-Conspirator}

The defendant next asserted that the trial justice erred in allowing the testimony of Detective Hartnett concerning Palomo's written statement identifying Simas in the photo lineup.\textsuperscript{66} The defendant argued that the statement, written in Spanish, was inadmissible hearsay because it had to be translated to Detective Hartnett and, therefore, the detective was testifying as to what the interpreter said Palomo wrote.\textsuperscript{67}

The court focused on the fact that the defendant's general objection to the testimony in question was not sufficient to preserve the issue for appellate review.\textsuperscript{68} The court reasoned that the context of the questioning and objections thereto would not alert a trial judge as to the issue being raised.\textsuperscript{69} Furthermore, the court held that while it had the discretion to hear even unpreserved assignments of error, in this case, review was not warranted because if there was any error, it was harmless.\textsuperscript{70} In reaching this conclusion, the court noted that Palomo testified at trial that he had identified Simas from the photo lineup the day after the shooting and that the writing in question was his.\textsuperscript{71}

\textit{Double Jeopardy}

The defendant's final contention was that the court should

\begin{itemize}
\item \textsuperscript{63} See id. at 645.
\item \textsuperscript{64} Id.
\item \textsuperscript{65} Id.
\item \textsuperscript{66} Id.
\item \textsuperscript{67} Id.
\item \textsuperscript{68} Id. at 646.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Id. at 647.
\item \textsuperscript{71} Id.
\end{itemize}
reevaluate its holding in State v. Rodriguez, that a crime requiring proof of even one differing element than the other crime cannot merge for purposes of double jeopardy. The court rejected the defendant's plea for reconsideration. The court reasoned that the defendant failed to preserve his right to claim double jeopardy by neglecting to file the appropriate motion before trial. The court, however, suggested that even if it were to address the defendant's argument, the Rodriguez holding would remain intact because of the fundamental principle that "[l]egislatures, not courts, prescribe the scope of punishments."

**COMMENTARY**

The admissibility of hearsay statements in criminal trials continues to be a divisive issue around the country as the courts struggle to find a balance between justice and a defendant's right to a fair trial. To add to the dispute, Rhode Island is the only state with the unique distinction of affirming the use of hearsay statements by deceased declarants as evidence in criminal proceedings. While the Feliciano court attempts to develop a three-prong rule that appropriately addresses Confrontation Clause issues, the rule actually illustrates the difficulties inherent in admitting hearsay evidence. Specifically, although the court determines that the good faith requirement and reliability requirement are separate and distinct elements of the rule, the court employs good faith factors to resolve the issue of reliability. The end result appears to be that, in fact, the court is applying a

---

73. Feliciano, 901 A.2d at 647-48 (citing Rodriguez, 822 A.2d at 906-08).
74. Id. at 647.
75. Id. at 648 (quoting Missouri v. Hunter, 459 U.S. 359, 368 (1983)).
76. The Roberts reliability test created a pattern of inconsistent rulings on the admissibility of hearsay evidence throughout the United States. See Crawford v. Washington, 541 U.S. 36, 63 (2004) (discussing various cases that exemplify the vacillating application of the rule to hearsay statements). Two cases have reached the Supreme Court in the last three years as a result of the unpredictability of the rule in an effort to discern what type of hearsay statements are in opposition to the Confrontation Clause. See Davis v. Washington, 126 S. Ct. 2266 (2006); Crawford, 541 U.S. 36.
78. Id. at 641.
two-prong rule.

The court points to the fact that Benitez and Sol were friends and the seriousness of the attack on Sol as factors which led the court to determine the statements were reliable.79 While these factors might indicate that Sol meant what he said to Benitez, fulfilling the good faith requirement, do they necessarily signify that the hearsay statement was accurate? In this case, the fact that Sol was jumped by six or seven people might affect the reliability of his identification of Rivera. Furthermore, the length of time between the actual assault and the day the statement was made could make Sol's identification of Rivera less reliable. It is further interesting to note that the parties in this case were all involved in an ongoing turf war which might have arguably predisposed Sol to inadvertently identify Rivera. However, these factors were not addressed in assessing the reliability of Sol's statement. Thus, it appears that those factors which determined good faith, were also determinative of reliability.

If the court, in fact, is applying the same factors to the good faith and reliability requirements of hearsay admissibility, the question becomes whether the rule as developed in Feliciano appropriately addresses a defendant's Confrontation Clause rights. The primary function of the Confrontation Clause is to assure the reliability of evidence against a defendant. A mere finding that statements are made in good faith is not sufficient to sustain a finding of reliability. However, because the reliability prong of the test is so broad, the result of the test is completely dependent on what factors a judge takes into consideration in making the determination. As the Crawford court noted, the reliability test that evolved from Roberts “vindicates the Framers' wisdom in rejecting a general reliability exception. The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.” Thus, it will be interesting to observe how the rule will be applied in the future and what types of factors the courts will use to assess the reliability of hearsay statements.

79. Id. at 642.
80. Fitzpatrick, supra note 77.
CONCLUSION

The Rhode Island Supreme Court held that the Confrontation Clause was not violated by the admission of the victim's nontestimonial hearsay statement. In addition, the court held that permitting a medical examiner to answer hypothetical questions was not an abuse of discretion.

Wendy Andre
Criminal Law. State v. Lough, 899 A.2d 468, 469 (R.I. 2006). A conviction of embezzlement does not require proof that the defendant charged with the crime acquired any benefit from the property. Also, to satisfy the element that the defendant intended to appropriate and convert the property for his own use, it is enough to establish that the defendant treated the property as his own. Discarding, or throwing away property is one manner that the defendant could treat the property as his own.

FACTS AND TRAVEL

Late at night on July 14, 2003, John Lough, a patrolman in the Providence Police department, stopped to aid a fellow officer, Thomas Teft who was dealing with an individual with a possibly stolen minibike. Lough’s arrival allowed Teft to defer to the more experienced officer for the correct protocol for confiscating the minibike. Teft was a new officer, on probationary status, so when Lough offered to take care of the confiscation and the necessary paperwork, Teft accepted. Lough put the minibike in his car and drove away from the scene.

A short time later, when responding to a report of a stolen vehicle, Lough’s apparently faulty brakes did not stop his car, and he struck the back of another patrol car. He returned to the police station to fill out the paperwork for the accident, and then went to drop off his damaged cruiser to be repaired.

Lough claimed that he was aggravated by the night’s events and wanted to go home, so he decided to rid himself of the annoyance of dealing with the minibike and left it behind a dumpster. He assumed that the young man the bike had been confiscated from would never show up to claim the bike; which

---

2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
was a harmful mistake, as it turned out.\textsuperscript{8}

When the young man did show up to claim the bike, it was nowhere to be found.\textsuperscript{9} Internal Affairs searched for the bike, and questioned Teft who directed them to Lough.\textsuperscript{10} When Lough was informed by Teft that Internal Affairs was looking for the minibike, he apparently retrieved the minibike from the dumpster and arranged a meet to put the minibike into the trunk of Officer Petrella's cruiser.\textsuperscript{11}

Lough told a little white lie when asked about the minibike: he said that after the accident he transferred the minibike to Petrella's vehicle.\textsuperscript{12} Officer Petrella supported Lough and told another inspector that the minibike had been in his trunk at the start of the shift.\textsuperscript{13} Internal Affairs did not believe the story however; Petrella's vehicle had been searched earlier that day and the minibike was not in it.\textsuperscript{14} Caught in this lie, Lough came clean with the story of leaving the bike behind the dumpster.\textsuperscript{15}

In August 2003 Lough was indicted on one count of embezzlement and fraudulent conversion in violation of Rhode Island General Laws \S\ 11-41-3.\textsuperscript{16} This led to a four-day trial were Lough testified that he "made a wrong decision" and told the story about leaving the minibike behind the dumpster.\textsuperscript{17} A jury returned a verdict of guilty; Lough was fined $1,000 and received

\textsuperscript{8} Id.  
\textsuperscript{9} Id.  
\textsuperscript{10} Id.  
\textsuperscript{11} Id. at 470.  
\textsuperscript{12} Id.  
\textsuperscript{13} Id.  
\textsuperscript{14} Id.  
\textsuperscript{15} Id.  
\textsuperscript{16} Id. The pertinent part of the statute is as follows:

\begin{quote}
Every officer ... or other person to whom any money or other property shall be entrusted for any specific purpose,... who shall embezzle or fraudulently convert to his or her own use, or who shall take or secrete, with intent to embezzle or fraudulently convert to his or her own use, any money or other property which shall have come into his or her possession or shall be under his or her care or charge by virtue of his or her employment ... shall be deemed guilty of larceny and shall be fined not more than fifty thousand dollars ($50,000) or three (3) times the value of the money or property thus embezzled or converted, whichever is greater, or imprisoned not more than twenty (20) years, or both.
\end{quote}

RI GEN. LAWS \S\ 11-41-3.  
\textsuperscript{17} Id. at 469.
a one-year suspended sentence.  

ANALYSIS AND HOLDING

Lough's appeal contends that the trial judge incorrectly instructed the jury that a person could violate the Rhode Island embezzlement statute when they disposed of the property of another. This improper interpretation of the law, he contends, was also the reason that the judge inappropriately denied Lough’s motions for judgment of acquittal and for a new trial. Essentially, Lough's appeal turns on the question of whether a charge of embezzlement can be sustained absent any evidence that he “derived a benefit” from using the property. The Rhode Island Supreme Court unanimously found that the trial judge correctly instructed the jury on the elements necessary to sustain a conviction under Rhode Island General Laws §11-41-3. Also, because the judge correctly interpreted the statute, Lough’s other claims of error were also rejected.

Elements Necessary to Sustain an Embezzlement Conviction

The Rhode Island Supreme Court established in State v. Oliveira that the state must establish the following: “(1) that the defendant was entrusted with the property for a specific use, (2) that he came into possession of the property in a lawful manner, . . .and (3) that defendant intended to appropriate and convert property to his own use and permanently deprive that person of the use.” Lough had lawful reasons to take possession of the minibike and deliver it to the police station. Therefore, there is no quarrel that the state had met their burden in the first two elements necessary to sustain a conviction. Lough tactically admitted during the trial that when he threw the minibike away,
he was intending to permanently deprive the owner of the use of the minibike. However, Lough claims that the state’s case was deficient of proof necessary to show that he “converted the property to his own use.”

Conversion of Property to One’s Own Use and the Derivation of a Benefit

To support Lough’s contention that the state failed to meet it’s evidentiary burden, he relies on the Rhode Island Supreme Court’s holding in State v. Powers, where the court explained that “an element of the crime charged is that defendant put the property to ‘his own use’ or used the property for his own benefit.” Lough argues that “by instructing the jury that a person converts property to his own use by disposing of it, the trial justice permitted the jury to return a guilty verdict in the absence of evidence that he derived a benefit from his use of the minibike.” Otherwise, Lough’s testimony that he threw the minibike away would essentially be an admission of guilt.

The Rhode Island Supreme Court squarely addressed what it means to convert the property to one’s “own use” under Rhode Island General Laws §11-41-3. The court rejected Lough’s interpretation of Powers. Although in Powers the court had noted that the defendant didn’t receive a benefit, the court held that the observation only underscored that defendant in that case did not in fact convert the property to his own use. Therefore, the court held that “the relevant inquiry is not whether Lough
derived a benefit from throwing the minibike away, but rather whether he put the property to ‘his own use.’”34

Disposal of Property as Conversion

The Supreme Court of Rhode Island noted that the court had never directly addressed whether one converts property to his own use when he disposes it, and therefore, looked to other jurisdictions that had addressed the subject and found disposal was a manner of conversion.35 Because the court held that *Powers* did not require a benefit, they reasoned that neither did it foreclose the possibility that disposing of the item could be conversion.36 The court then looked to the plain language of the statute, Rhode Island General Laws §11-43-3, and found that converting property to one’s own use by disposing of it to be a consistent interpretation.37 The court held that “when Lough decided to dispose of the minibike . . . he made a decision that was properly vested in its lawful owner.”38 Therefore, when you treat property as if it were your own, including throwing out the property, you are converting that property to your own use.39

COMMENTARY

*Lough* essentially interpreted the existing statutory law. The Rhode Island Supreme Court cleared up the statutory language, and clearly held that you can embezzle something by tossing it in the trash.40 Some controversy has been engendered by opinion because it had to do with a policeman in the performance of his duties.

There has been some reaction that calls this result “bizarre”.41

34. *Id.* (citing *Powers*, 644 A.2d at 831).
35. *Id.* The Rhode Island Supreme Court used the same sources that the trial judge cited for support of his instruction, rejecting Lough’s argument that the trial court had improperly looked outside Rhode Island when *Powers* addressed the matter at hand. *Id.*
36. *Id.* at 473.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
It was stated, “to charge a police officer who improperly disposed of property with embezzlement is absolutely ridiculous. There was clearly no criminal intent. The officer was flustered or lazy and didn’t properly dispose of a minibike. Yes, a violation of (probably) several rules and regulations but certainly not a crime.”

However, the Rhode Island Supreme Court did not look at this problem of being a problem of a policeman improperly submitting evidence, but treating the minibike as his own; that supplied the requisite criminal intent. Given the court’s tendency to give police officers wide discretion in the performance of their duties, it is unclear whether this decision is holding police officers to a higher standard than the national judicial body is willing to do.

However, the court in *Lough* has emphasized the importance of officers and other bodies in Rhode Island to correctly treat other people’s property. With the low standard of disposal being an example of one manner to treat another’s property entrusted to the officer as his own, it would seem almost any failure to properly evidence possessions could subject an officer to embezzlement charges under Rhode Island General Laws §11-43-3.

The court in *Lough* also neglected to address the purported dicta of *Powers*; although the defendant in that case did not convert the property to its own use, there still remains the question of why the absence of a benefit would “underscore” that holding unless a benefit was of some import to establishing the necessary element of conversion to one’s own use. In *Lough* the court looked to other jurisdictions to help them fill the hole of whether disposal could be considered treating another’s property as one’s own. The inconsistency of this holding with any necessity of finding that the embezzler had received some benefit may have necessitated the departure from any past indications of the necessity of a benefit, which the court could justify because it
was not what Powers had not essentially been decided upon.

CONCLUSION

This case has uncluttered the landscape of what must be proven to establish the conversion element of an embezzlement charge. The Rhode Island Supreme Court held that one does not need to derive a benefit from the use of an item to have embezzled the item.\textsuperscript{46} Even more clearly, the court expressly held that even throwing an item out, or disposing of it, is treating the item as if it were your own.\textsuperscript{47} These actions satisfy the necessary element of conversion that the State must prove in Rhode Island for an embezzlement conviction.\textsuperscript{48}

Michelle Gobin

\textsuperscript{46} Id.
\textsuperscript{47} Id. at 473.
\textsuperscript{48} Id.
Criminal Law. *State v. Snell*, 892 A.2d 108 (R.I. 2006). A criminal defendant cannot argue that he was compelled to wear prison attire and be handcuffed if a timely objection was not made during trial. Further, there may be times when handcuffing a defendant is necessary to the safety and order of the courtroom.

**FACTS AND TRAVEL**

On January 12, 2001, Tanny Eisom was leaving her home to attend a birthday party with her sister and a friend, when she encountered her ex-boyfriend, Curley Snell, dropping off their infant son.\(^1\) An argument ensued over Eisom’s plan to go out for the evening, even though Eisom’s brother Slade Edmonds was there to watch the baby.\(^2\) Snell was enraged over Eisom’s plans to go out, and told her, “I’m gonna get you.”\(^3\) Eisom returned home later that evening, but when she arrived Snell was waiting for her.\(^4\) Snell chased Eisom outside, where the icy conditions prevented Eisom from getting away; Snell proceeded to hit her several times in the head with a closed fist.\(^5\) The violence escalated and Snell stabbed Eisom in the back of the neck with a three-inch pocket-knife.\(^6\) At this point, Eisom’s brother, Edmonds, who was awakened by the screaming, came outside to protect his sister.\(^7\) Edmonds attempted to pull Snell off of his sister, but Snell used the pocket-knife to stab Edmonds in the neck and slice his stomach.\(^8\) After the stabbing, Snell then proceeded to kick Edmond’s head and face while he was on the ground.\(^9\)

Snell was charged with felony domestic assault, two counts of assault with a dangerous weapon, and simple domestic assault

---

2. *Id.*
3. *Id.* at 113.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
after previously having been convicted twice of domestic assault.\textsuperscript{10} The jury returned a guilty verdict on all counts; Snell then made a motion for a new trial under Rule 33 of the Superior Court Rules of Criminal Procedure, arguing “not only that the verdict was against the weight of the evidence, but also that he was entitled to a new trial because he had been in handcuffs and shackles during the trial.”\textsuperscript{11} The trial court denied Snell’s motion for a new trial stating that “the evidence was absolutely overwhelming of this defendant’s guilt on each of these counts.”\textsuperscript{12} Snell subsequently filed a petition for writ of habeas corpus and a motion to stay his sentencing, both of which were denied.\textsuperscript{13} Snell was sentenced to “a total of forty-five years at the Adult Correctional Institutions (ACI), with thirty years to serve and the rest suspended, with probation.”\textsuperscript{14} After sentencing, the defendant filed a timely motion of appeal to the Rhode Island Supreme Court.\textsuperscript{15}

\textbf{ANALYSIS AND HOLDING}

On appeal, the defendant argued that “the trial justice erred in compelling him to stand trial in prison clothing and handcuffs.”\textsuperscript{16} The court also addressed additional issues on appeal; however, this survey focuses on the matter of first impression before the court, regarding defendant’s clothing and restraint.\textsuperscript{17} The Rhode Island Supreme Court found no error and affirmed the defendant’s convictions.\textsuperscript{18}

\textsuperscript{10.} \textit{Id.} at 112.
\textsuperscript{11.} \textit{Id.} at 114. (referencing R.I. SUP. CT. R. CRIM. P. 33).
\textsuperscript{12.} \textit{Id.}
\textsuperscript{13.} \textit{Id.}
\textsuperscript{14.} \textit{Id.} at 112.
\textsuperscript{15.} \textit{Id.}
\textsuperscript{16.} \textit{Id.}
\textsuperscript{17.} \textit{Id.} at 119-23. The defendant also argued that the trial justice committed reversible error, “by not permitting him to select his own attorney, in allowing the jury to hear that he had two previous convictions for domestic assault, and in excluding certain medical records.” \textit{Id.} at 112. The Supreme Court of Rhode Island found no errors on appeal, and confirmed defendants’ conviction. \textit{Id.}
\textsuperscript{18.} \textit{Id.} at 112.
Defendant’s Appearance in Prison Attire

The defendant contended that the trial court’s ruling compelling him to stand trial in prison garb was in error. At trial, “[a]fter the jury was selected and sworn, but before opening statements, the trial justice gave preliminary instructions to the jury,” advising them:

You may have observed that the defendant in this case is in the custody of the State marshal. I specifically caution you that this fact is not at all germane or important to your task in determining the defendant’s guilt or innocence. Also in no way does this defendant’s detention diminish or effect his guaranteed presumption of innocence. The mere fact that the defendant is being detained must not prejudice you against him in any way nor should it generate any sympathy for him. It should be regarded by you as a neutral fact and you should give it no weight whatsoever.

At trial, the defendant argued that this instruction was not sufficient, and “moved to pass the case because the clothing he was wearing, prison attire with his name being emblazoned on a tag on a T-shirt and jeans, was inherently prejudicial.” The trial justice denied the motion because the defendant could have made arrangements to acquire civilian clothes, and his family had ample opportunity to provide non-prison clothing for him.

A defendant’s right to a “fair trial by an impartial jury is guaranteed by the Sixth Amendment to the United States Constitution, applicable to the states through the Due Process Clause of the Fourteenth Amendment, and by article 1, section 10, of the Rhode Island Constitution.” The court acknowledged the widely held notion that “the presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.” The Rhode Island Supreme Court has held that “knowledge of a defendant’s

19. Id.
20. Id. at 114.
21. Id.
22. Id. (internal quotations omitted).
23. Id. at 114-15.
24. Id. at 115.
25. Id. (quoting Estelle v. Williams, 425 U.S. 501, 503 (1976)).
incarceration may have a serious prejudicial effect on the presumption of innocence." 26 This prejudicial effect "results from the likelihood that the jury will infer that the defendant is incarcerated as a result of previous criminal activity and is thus possessed of a general criminal disposition." 27 To prevent the possibility of prejudice, "the state may not compel an accused to stand trial before a jury while dressed in identifiable prison clothing." 28 To determine whether the defendant's attire during trial was a constitutional violation, the court focused on "whether the defendant was truly compelled to wear the prison clothing." 29 The United States Supreme Court has held that "the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." 30

The Rhode Island Supreme Court had "not had the occasion to address the precise issue of prison clothing," however the court had "addressed claims of error when trial justices verbally informed the jury of the defendant's incarceration." 31 Analyzing these cases, the court determined that "an objection is timely if made before any prejudice can emanate from a defendant's appearance in prison garb." 32 This conclusion also concurs with the United States Supreme Court, which held that a defendant's "silence precludes any suggestion of compulsion." 33

Consequently, the court found that the defendant's objection to his prison attire was untimely because defense counsel did not raise the objection "until after the jury was selected and sworn, and after the trial justice gave preliminary instructions." 34 When the objection was finally made, the jury "already had observed defendant in his so-called prison garb for quite some time." 35 If the defendant had any real concerns about the jury seeing him in his prison attire, he should have presented the concerns before the

---

26. Id.
27. Id. (quoting State v. Burke, 529 A.2d 621, 628 (R.I. 1987).
28. Id. (citing Estelle, 425 U.S. at 512).
29. Id. (emphasis in original).
30. Id. (quoting Estelle, 425 U.S. at 512-13).
31. Id.
32. Id. at 116.
33. Id. (quoting Estelle, 425 U.S. at 512 n.9).
34. Id.
35. Id.
jury panel was brought into the courtroom.\footnote{36} Given this situation, the court could not "say that defendant was compelled to be tried in prison clothes," and the trial justice's cautionary instruction to the jury was "sufficient to negate any potential prejudice."\footnote{37}

**Defendant's Appearance in Handcuffs**

The defendant next asserted that compelling him to stand trial while in handcuffs was in error.\footnote{38} During the trial the defendant did not specifically object to the handcuffs; the defendant maintained, however, that "his objection to prison clothing was sufficient to encompass any prejudice caused by being forced to stand trial while branded with an unmistakable mark of guilt."\footnote{39} The court determined that "[h]andcuffing a defendant is treated differently from prison attire because the former provides security and the latter does not."\footnote{40} The court recognized that there are times when restraining a defendant is justified "by essential state interests such as physical security, escape prevention, or courtroom decorum."\footnote{41} In situations similar to the defendant's, the Rhode Island Supreme Court has upheld trial justice's decisions to handcuff defendants to "minimize danger or maintain order in the courtroom."\footnote{42}

Akin to its holding regarding prison clothing, the court ruled that the defendant failed to make a timely objection to the handcuffs during trial, and the cautionary instructions from the judge were sufficient to negate any possible prejudice.\footnote{43} Perhaps more importantly, the court acknowledged that the trial justice gave adequate reasons for restraining the defendant: "he was disruptive during his trial, speaking out-of-turn, making sarcastic faces, snickering, and laughing out loud while witnesses were testifying," and he was on trial for a serious criminal charge, with

\footnotesize
\begin{itemize}
  \item \footnote{36}{See id. at 117.}
  \item \footnote{37}{Id.}
  \item \footnote{38}{Id. at 112.}
  \item \footnote{39}{Id. at 117 (internal quotations omitted).}
  \item \footnote{40}{Id. (quoting State v. Correra, 430 A.2d 1251, 1256 (R.I. 1981) (internal quotations omitted)).}
  \item \footnote{41}{Id. (quoting Deck v. Missouri, 125 S. Ct. 2007, 2012 (2004)).}
  \item \footnote{42}{Id. at 118.}
  \item \footnote{43}{Id. at 118-19.}
\end{itemize}
a violent past. The court declined to overturn the defendant's conviction on the grounds that he was in restrained during trial.

**COMMENTARY**

This case is significant because it represents the first time that the Rhode Island Supreme Court has addressed the issue of a defendant's appearance in prison clothing at trial. Presenting a defendant before the jury in prison clothing and handcuffs strongly insinuates, in the mind of the jury, that the defendant is guilty. This suggestion could easily tempt a juror to overlook the evidence presented at trial and prompt them to convict based on preconceived notions.

The threat that the jury might use a defendant's appearance at trial against him is bona fide. Lawyers often tell their clients to dress a certain way for a court appearance, in attempt to win good favor from the judge and jury. Compelling a defendant to stand trial in prison clothing is clearly a violation of a defendant's right to trial by an impartial jury, as guaranteed by the Sixth Amendment to the United States Constitution. True compulsion is marked by lack of choice over objection. The Supreme Court has acknowledged that there are times when a defendant might choose as a "defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury," however if a defendant makes a timely objection to the court, then he should be allowed to obtain a change of clothes for trial. Unlike handcuff restraints, a prisoner's attire adds nothing to the court proceedings in the way of safety or order, and thus should be decided upon by the defendant. That said, a defendant cannot present himself to the jury in prison clothing, allowing for prejudices to take hold, and then object to the fact that he is in prison clothing. To avoid possible unfair prejudice, a defendant must object to his appearance before the jury is present, or else the damage is already done. In Snell, the Rhode Island Supreme Court acknowledged the threat of prejudice from a defendant's attire, but cautioned defendants who have genuine concerns about

---

44. *Id.*
45. *Id.* at 119.
46. See *id.* at 115.
47. *Id.* (referencing U.S. CONST. amend. VI).
the jury seeing them in prison attire to present a motion to the court before they are in the presence of the jury. If this does not occur, then the defendant is left with the judge’s cautionary instructions, and the jury’s obligation to adhere to them.

Unfortunately, society constantly categorizes people based on appearance, and a defendant in a criminal trial cannot escape this discrimination. While a person on the street may simply be labeled, the stakes are infinitely higher for a defendant in a criminal proceeding. The impartiality of the jury is crucial if the defendant hopes to stand trial on the facts, and not on perception based on what he is wearing. If the defendant does not object to his attire in a timely fashion, the jury is liable, even with limiting instructions, to forget the old adage that you cannot judge a book by its cover.

CONCLUSION

The Rhode Island Supreme Court held that the defendant’s appeal on the subject of prison attire and handcuffs was waived because it was made after the jury had already observed him in the courtroom. Further, the court held that there may be times when handcuffing a defendant is necessary to the safety and order of the courtroom, as in the instant case where the defendant had a criminal past, and was very disruptive during trial.

Mary Kibble

49. See Snell, 892 A.2d at 117.
50. Id. at 116.
51. Id. at 119.
Criminal Procedure. State v. Day, 911 A.2d 1042 (R.I. 2006). In an issue of first impression the Rhode Island Supreme Court held that “once a Family Court justice determines that a child should be waived from the jurisdiction of the Family Court, there is no limitation to the charges that may be lodged against the child in the adult court, as long as those charges spring from the nucleus of operative facts upon which the Family Court waiver of jurisdiction was based.”

FACTS AND TRAVEL

Police arrested defendant Corey Day and accused him of breaking and entering into the Ocean Tides Residential Treatment Program (“Ocean Tides”), as well as binding, gagging, and imprisoning one of its employees in the facility’s walk-in freezer.1 Because the defendant was a juvenile at the time of the arrest, the family court had exclusive jurisdiction over him.2 In order to try Day as an adult, the attorney general moved to have the family court waive over Day under sections 14-1-7 and 14-1-7.1 of the Rhode Island General Laws.3 At the time of the waiver motion, the attorney general indicated a desire to charge day with four offenses arising out of his conduct at Ocean Tides.4 The family court granted the waiver motion on November 8th, 2004.5

When Day was indicted in the superior court, the grand jury indictment included five charges.6 Day then moved to dismiss, for lack of jurisdiction, under the Rhode Island Superior Court Rules of Criminal Procedure, Rule 12(b)(2), asserting that the indictment “impermissibly charged him with crimes that were

---

2. Id.
3. Id.
4. The anticipated charges were: breaking and entering, second-degree robbery, kidnapping, and assault with intent to commit robbery and kidnapping. Id.
5. Id.
6. Id. The indictments were for: burglary, first-degree robbery, felony assault, kidnapping, and larceny of goods valued at greater than $500. Id.
different from, greater than, and in addition to, the offenses for which he was waived by the family court." Day argued that section 14-1-7.1 limited the state to filing charges for which the family court found probable cause as a basis for the waiver. The Judge Clifton of the superior court agreed with Day and granted the motion to dismiss. The state appealed.

BACKGROUND

Rhode Island's family court is a court of limited jurisdiction without the power to hear criminal cases against children but with the power to hear delinquency petitions. Section 14-1-40(a) provides that no juvenile can be "charged with or convicted of a crime in any court, except as provided in [that] chapter." Rather than defend criminal charges, the usual course of prosecution for a juvenile offender is based on delinquency petitions heard in the family courts, which exercise exclusive jurisdiction over "delinquent and wayward children." Thus "although the Family Court has exclusive personal jurisdiction over juveniles appearing before it on delinquency petitions, it lacks the subject matter jurisdiction needed to adjudge a juvenile's behavior criminal in the traditional sense." In contrast to the limited jurisdiction of the family court, the superior court exercises general subject matter jurisdiction but is generally barred from exercising personal jurisdiction over juveniles. In order to allow the criminal trial of juvenile defendants in certain limited circumstances, sections 14-1-7 and 14-1-7.1 "serve as a jurisdictional bridge between the two courts."

Section 14-1-7 permits a motion for the family court to waive personal jurisdiction by the attorney general if the child under consideration "is charged with an offense which would be

7. Id. at 1044-45.
8. Id. at 1045.
9. Id.
10. Id.
11. Id. at 1049.
12. Id. (quoting R.I. GEN. LAWS §14-1-40(a) (2006)) (emphasis in original).
13. Id. at 1049 n.8.
14. Id. at 1049.
15. Id.
16. Id. at 1050.
punishable by life imprisonment if committed by an adult" or if
the child is over the age of sixteen and "charged with an offense
which would constitute a felony if committed by an adult." In
considering the motion, the court must consider whether "probable
cause exists to believe that the offense charged has been
committed and that the child charged has committed it." The
court must also consider "the child's past history of offenses,
history of treatment, or the heinous or premeditated nature of the
offense is such that the court finds that the interests of society or
the protection of the public necessitate the waiver of jurisdiction.

Under section 14-1-7.1(b), "[i]f the court finds that [the above
standards] have been proven by a preponderance of evidence, it
may waive jurisdiction over the child and refer the child to the
appropriate adult court to be tried for the offense as an adult." The
section concludes by ensuring that "in the event that the child
is acquitted of the offense for which the waiver has been sought,
the waiver shall be vacated."

This case presented the issue of first impression of "whether
[sections] 14-1-7 and 14-1-7.1 require that, after a waiver has been
granted, the charges brought against a child in the Superior Court
must be precisely aligned with the charges set forth in the Family

17. R.I. GEN. LAWS § 14-1-7(a) (2006).
18. Id. at § 14-1-7(b).
19. Id. at § 14-1-7.1(a)(1).
20. Id. at § 14-1-7.1(a)(2).
21. Id. at § 14-1-7.1(c).
22. Id.
Court's waiver order."23 Justice Flaherty, writing for the court, first set out the standard of review. Because the question was one of statutory interpretation, the court reviewed *de novo* the lower court's holding.24 The court recognized the "well settled"25 rule of statutory construction, that "when the language of a statute is clear and unambiguous [the] [c]ourt must interpret the statute literally and must give the words of the statute their plain and ordinary meanings."26 First, the court assessed whether the statute was clear and unambiguous.27 Each side argued that the statute was clear, but after considering the arguments, the court concluded that the statute was "neither clear nor unambiguous."28

In reaching this conclusion the court focused on the language of the statute, which seemed to alternate between effecting a total transfer of personal jurisdiction ("[a] waiver of jurisdiction over a child pursuant to this section shall constitute a waiver of jurisdiction over the child for the offense upon which the motion is based as well as for all pending and subsequent offenses of whatever nature")29 and that which seemed to indicate a waiver of personal jurisdiction only over the specified conduct (". . . it may waive jurisdiction over the child and refer the child to the appropriate adult court to be tried for the offense as an adult").30 To resolve this ambiguity, the court had to consider whether "the [l]egislature intended for a waiver of jurisdiction under [sections] 14-1-7 and 14-1-7.1 to constitute a complete waiver of personal jurisdiction over the child, or merely a waiver of jurisdiction for the particular offense for which the child is waived."31

To help answer this question, the court turned first to an examination of the history of the family court and the underlying rational behind the juvenile court system. The court noted that the separate juvenile justice systems "stemmed from the belief that people under a certain age inherently were less culpable than

24. Id. at 1045.
25. Id.
26. Id.
27. Id.
28. Id. at 1047.
30. Id. at § 14-1-7.1(b) (emphasis added).
were adults" 32 and that "[s]ociety's goal for juveniles, it was believed, should be to rehabilitate through treatment and supervision." 33 With this in mind, the court next turned to the courts of sister states for guidance.

The court observed that "the great majority of courts faced with this question have held that prosecutors may charge a child who is waived from jurisdiction with any crime that arises from the conduct for which the waiver was sought." 34 Though recognizing that each state may have different waiver statutes, the court emphasized that the value in examining the other court's decisions was "showing their approach to the problem and not the result." 35 The court also took pains to note that waiver statutes in America "share a common thread of consistency," 36 based upon the United States Supreme Court's holding in Kent v. United States. 37 Premised on this notion, the court found that examination of other courts' decisions provide "both persuasive authority and valuable insight into the philosophy and legislative intent of juvenile waiver in general." 38 In particular, the court found persuasive the other court's holdings that the purpose of the waiver proceedings is "to make a judicial determination of whether a juvenile should remain within the province of the juvenile court and not [to] determine what charges the State can file." 39

Returning to the actual language of section 14-1-7.1, the court concluded that the words "for the offense" in section 14-1-7.1(b) could not refer to a particular crime but instead had to refer to "the actions of the accused child." 40 This reading was compelled because children, while still subject to the personal jurisdiction of the family court, cannot be criminally charged but must be dealt with through the delinquency process. 41 Accordingly, to read the

32. Id. at 1048.
33. Id.
34. Id. at 1051.
35. Id. at 1052 (quoting State v. Randolph, 876 P.2d 177, 180 (Kan. App. Ct. 1994)).
36. Id. at 1052.
37. 383 U.S. 541 (1966) (setting forth factors a juvenile court should consider in waiving jurisdiction).
38. Day, 911 A.2d at 1052.
39. Id. at 1052 (quoting Randolph, 876 P.2d at 180-81).
40. Id. at 1053.
41. Id.
term offense “to mean a particular crime defined by the laws of this state” would be to “completely ignore the statutory limitations of the Family Court, which does not have subject matter jurisdiction over violations of the criminal code.”

Continuing its analysis, the court noted that requiring the prosecutor to return to the family court to secure a new waiver each time new evidence was found which supported a greater charge would produce the “absurd result” of returning to a court which by the plain terms of section 14-1-7.1(c) would no longer have any jurisdiction over the child. Therefore the court concluded that “once a Family Court justice determines that a child should be waived from the jurisdiction of the Family Court, there is no limitation to the charges that may be lodged against the child in the adult court, as long as those charges spring from the nucleus of operative facts upon which the Family Court waiver of jurisdiction was based.”

**COMMENTARY**

The Rhode Island Supreme Court’s holding in this case puts it in line with the majority of state courts that have considered the issue. In so deciding, however, the court failed to adhere to the plain meaning of the statute. Certainly, the central holding that once a family court waives jurisdiction “there is no limitation to the charges that may be lodged against the child in the adult court” is a faithful interpretation of section 14-1-7.1, but the court does not stop there. Rather the court inexplicably limits the scope of its holding to charges that “spring from the nucleus of operative facts upon which the Family Court waiver of jurisdiction was based.” This arbitrary limitation is supported neither by the plain text meaning of section 14-1-7.1 nor by the public policy behind the waiver process.

The court’s first error occurs when it concludes that the statute is ambiguous. In fact, the state offers a compelling

42. *Id.*
43. *Id.*
44. *Id.* at 1054.
45. *Id.*
46. *Id.* at 1051.
47. *Id.* at 1054.
48. *Id.*
reading of the statute that resolves the "ambiguity" by recognizing that any waiver of jurisdiction accomplished under section 14-1-7 must necessarily be a waiver that "extends to the child personally"\textsuperscript{49} rather than subject matter jurisdiction extending only to the offense.\textsuperscript{50} Such a reading is buttressed by the additional language at the end of §14-1-7.1(c) which provides that “[a] waiver of jurisdiction over a child pursuant to this section shall constitute a waiver of jurisdiction over that child for the offense upon which the motion is based as well as for all pending and subsequent offenses of whatever nature.”\textsuperscript{51} When read in combination, it is clear that section 14-1-7.1 was intended to affect not only a complete, but also a permanent waiver of the family court’s personal jurisdiction over a juvenile tried and convicted in the adult courts. Rather than accept this reasonable reconciliation of the apparent ambiguity, the court focused on the language of section 14-1-7.1(b), thus allowing for the family court to make a referral to the appropriate adult court so that the juvenile may be tried “for the offense.”\textsuperscript{52} The court thereby concluded that the statute contained ambiguity.

Given the court’s failure to comprehend section 14-1-7.1 as intended to effect a complete and permanent transfer of the family court’s personal jurisdiction over a juvenile, the court’s insistence on the limitation that the criminal charges arise out of the same operative nucleus of facts also fails to adhere to the public policy behind the jurisdictional bridge is, though inexplicable, not entirely surprising. After arbitrarily concluding that “the waiver of jurisdiction is limited by the language of section 14-1-7.1(b) to the actions which spawned the waiver,”\textsuperscript{53} the court relegated to a footnote the final portion of section 14-1-7.1(c), which provides that “[i]n the event that the child is acquitted of the offense for which the waiver has been sought, the waiver shall be vacated.”\textsuperscript{54} The court emphasized that the language in section 14-1-7.1(c),

\begin{itemize}
\item \textsuperscript{49} Id. at 1047
\item \textsuperscript{50} Id. This is the only reasonable reading because, as the court notes, the family court lacks the subject matter jurisdiction to try criminal cases. Id. at 1049.
\item \textsuperscript{51} Id. at 1046 (quoting R.I. GEN. LAWS § 14-1-7(c) (2006)) (emphasis added).
\item \textsuperscript{52} Id. at 1046.
\item \textsuperscript{53} Id. at 1053 (emphasis omitted).
\item \textsuperscript{54} Id. at 1053 n.13.
\end{itemize}
referring specifically to the "the offense for which the waiver has been sought,"\textsuperscript{55} compelled the conclusion that the additional charges must be based on the same nucleus of operative facts. The court, however, while choosing to focus on limited language at the end of section 14-1-7.1(c), conveniently ignored the first part of section 14-1-7.1(c), which clearly states that "[a] waiver of jurisdiction over a child pursuant to this section shall constitute a waiver of jurisdiction over that child for the offense upon which the motion is based \textit{as well as for all pending and subsequent offenses of whatever nature} . . . ."\textsuperscript{56} An elementary understanding of the public policy behind the waiver process clearly illuminates the court's mistaken emphasis.

When faced with a petition for waiver of jurisdiction, the family court judge presiding over a juvenile must undertake a careful balancing to protect the interests of the child, and of society. On the one hand, family courts exist to "guard children against the stigma attaching to criminal proceedings."\textsuperscript{57} On the other hand society has a compelling interest in its own protection. Accordingly, while addressing a waiver motion, a court, in addition to finding probable cause to "to believe that the child in question has committed the act upon which the motion to waive is based,"\textsuperscript{58} must also find that "either the heinous nature of the juvenile's alleged conduct by itself, or the nature of the juvenile's act in conjunction with his or her past behavior and treatment in the juvenile system, indicates that the child is not amendable to rehabilitation."\textsuperscript{59} When such a finding is made, "waiver is appropriate because the state's interest in protecting the child from the stigma of conviction is outweighed both by the public's need for safety from the possible future misconduct of the accused child and its need for redress for the wrong allegedly committed."\textsuperscript{60}

When these policy and procedural considerations are taken into account, it is clear that rather than intending for section 14-1-7.1(c) to serve as a limitation on the scope of the additional

\begin{itemize}
\item \textsuperscript{55} \textit{Id.} (emphasis in original).
\item \textsuperscript{56} \textit{Id.} at 1046 (emphasis added).
\item \textsuperscript{57} \textit{Id.} at 1049.
\item \textsuperscript{58} \textit{Id.} at 1050.
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Id.}
\end{itemize}
charges to be brought against the juvenile defendant, section 14-1-7.1(c) was intended to serve as a check on the initial determination that waiver was appropriate. If the child is convicted in the adult court, then the balancing performed by the family court was correct and society's interests outlined above do not cease to outweigh the child defendant's interest (or whatever is left of it) in protection from the stigma of adult criminal prosecution. In contrast, an acquittal results in the vacating of the jurisdictional waiver because, in the absence of a criminal conviction, the child is again entitled to the presumption of protection from the stigma of adult criminal prosecution. Therefore, it is quite clear that rather than support the court's interpretation that the scope of additional charges are limited by the defendant's action that served as a basis for the waiver, section 14-1-7.1(c) actually supports the conclusion that, where the court secures a conviction of a juvenile, the family court's waiver of jurisdiction is intended by the legislature to be complete and permanent.
CONCLUSION

The Rhode Island Supreme Court held that a juvenile offender, waived from the jurisdiction of the family courts to stand trial in the adult courts, could be charged with any crime arising from the nucleus of operative facts that supported the waiver. The court thereby aligned Rhode Island law with that of the majority of other states. Yet this alignment comes at the cost of fidelity to the legislature's clear expression that waiver of jurisdiction under section 14-1-7 "shall constitute a waiver of jurisdiction over that child for the offense upon which the motion is based as well as for all pending and subsequent offenses of whatever nature." On its face, the court appears to have decided that the rule in the other jurisdictions that permits additional charges to be filed, but only if they arise out of the same nucleus of operative facts was desirable and set about to change Rhode island law regardless of what the prior statute indicated. We have a word for such an institution and it is legislature.

Matthew Fabisch

61. Id. at 1051.
Criminal Procedure. *State v. Motyka*, 893 A.2d 267 (R.I. 2006). A criminal defendant is not entitled to documentation regarding computer software used by a third party laboratory employed by the State in its DNA analysis, “including any user’s manuals, package inserts, protocols, revised protocols, technical manuals, manufacturer revisions, and updates to protocols, calibrations standards, and service contract agreements,” as that information is not within the possession, custody, or control of the State and is therefore not discoverable under Rule 16 of the Superior Court Rules of Criminal Procedure.¹

FACTS AND TRAVEL

On March 21, 2006, defendant Jeremy Motyka’s conviction for first-degree murder and first-degree sexual assault in the death of sixty-six-year-old Angela Spence-Shaw was affirmed by the Supreme Court of Rhode Island.² Ms. Spence-Shaw’s savagely beaten body was found in her Little Compton home by a friend of hers after she failed to show up for work on May 30, 1999.³ Aside from the scene of the brutal attack, which apparently began in the victim’s bedroom and ended in the bathroom where her body was found,⁴ the victim’s home otherwise appeared remarkably intact. There were no signs of forced entry, her wallet and cash (in excess of $500) were still in a ceramic box on her dresser, and all her jewelry was untouched.⁵

At the time of her murder, Ms. Spence-Shaw was in the process of renovating her home.⁶ Two days before her murder, a construction crew performing renovations on her home, broke through a wall of her house in order to connect an addition to the existing house.⁷ This opening left her home unsecured, and

³. *Id.* at 271.  
⁴. *Id.*  
⁵. *Id.*  
⁶. *Id.* at 272.  
⁷. *Id.*
anybody who knew about the opening could gain entry. The defendant was part of the crew that broke through the wall two days before the murder.

A number of people who had done work on Ms. Spence-Shaw's home were asked by the police to give blood samples to the police so that DNA testing could be conducted. Twenty three people, including the defendant, voluntarily gave blood samples to the Rhode Island State Police.

The supervisor in the Rhode Island Department of Health's Division of Forensic Biology, conducted DNA testing on the vaginal and rectal swabs collected from the victim. The supervisor then compared the results of that testing with the blood samples provided by the State Police. Incidental to the testing, twenty-two of the twenty-three people who provided blood samples were excluded as the possible assailant; the defendant was the only one that could not be excluded. As a result of this DNA testing, the defendant was arrested.

On July 6, a second blood sample was taken from the defendant while he was being held at the Adult Correctional Institutions. This sample, the vaginal and rectal swabs obtained from the Ms. Spence-Shaw's body, and the known sample of her blood, were sent to the Bode Technology Group ("Bode"). Bode was not able to exclude defendant from being a possible donor of the sperm fraction on the vaginal swab at any of the eight locations that they analyzed on the DNA molecules, because he was a match at every location tested. A statistical analysis was then performed to determine the probability of randomly selecting an unrelated individual with the same DNA profile as the

---

8. Id.
9. Id.
10. Id. at 274.
11. Id.
12. Id. at 275.
13. Id.
14. Id.
15. Id.
16. Id. at 277.
17. Id. Bode is a private biotechnology laboratory in Springfield, Virginia that specializes in DNA testing and identification. Bode also has the ability to conduct STR/PCR/DNA analysis, which is more discriminating and allows more genetic locations to be analyzed than the system employed by Rhode Island Department of Health.
18. Id.
defendant's; the results determined that the probability in the Caucasian population was “one in 1.77 \times 10^{18}”\(^{19}\); “one in 4.25 \times 10^{19}\) in the African-American population; and “one in 2.15 \times 10^{20}\) in the Hispanic population.\(^{19}\) Based on the test results and these statistics, Bode concluded it was scientifically logical and reasonable that the DNA from the vaginal swab, sperm fraction, and DNA from the defendant, all came from the same person.\(^{20}\)

On April 27, 2000, the defendant filed a discovery motion requesting that the Superior Court order the state to produce certain information and materials related to the DNA testing performed by Bode in this case.\(^{21}\) While parts of the motion were granted, the trial justice denied defendant's request for all documentation regarding the computer software used by Bode in its DNA analysis, “including any user's manual, package inserts, protocols, revised protocols, technical manuals, manufacturer revisions and updates to protocols, calibration standards, and service contract agreements.”\(^{22}\) The trial justice based his decision on the information not being “within the possession, custody, or control of the State” and therefore not discoverable by the defendant; furthermore, the trial justice determined that such documentation was outside the scope of Rule 16(a)(5).\(^{23}\)

The defendant then filed a petition for a writ of certiorari with the Rhode Island Supreme Court seeking review of the trial justice's discovery ruling, but the petition was denied.\(^{24}\) Subsequently, the defendant filed a motion in limine which was also denied.\(^{25}\) At the commencement of the trial the defendant was found guilty of the first-degree murder and first-degree sexual assault upon Ms. Spence-Shaw.\(^{26}\)

---

19. Id.  
20. Id.  
21. Id. at 277-78.  
22. Id. at 278.  
23. Id.  
24. Id.  
25. Id. at 278-79. The defendant had filed the motion requesting that a pretrial evidentiary hearing be held to determine the reliability, relevancy, and admissibility of the DNA evidence and seeking an order prohibiting the state from making any reference to the DNA evidence in this case; the trial justice denied the motion in limine and held that the DNA evidence at issue in the case was admissible.  
26. Id. at 280.
On appeal, the defendant challenged two rulings made by the trial justice. The first challenged ruling precluded the defendant from obtaining the software package that the Bode laboratory used for performing the DNA testing and analyzing the results. This ruling had been conditional, if the prosecution produced the users manuals to the defendant, the defendant would then have a reciprocal duty to disclose the identity of the DNA expert with whom they were consulting. On appeal, the defendant argued that the software package and the user manuals for the fluorescent scanner and thermocycler that he sought from this case was discoverable under Rule 16(a)(5).

The Supreme Court held that the defendant was not entitled to discovery of the software or user manuals under Rule 16(a)(5); therefore the trial justice’s pretrial discovery ruling was not clearly erroneous. The court held that Rule 16(a)(5) applies only to “items within the possession, custody, or control of the State,” and that this does not entitled defendants to discovery of materials that are controlled by third parties. The software package and the user manual for the fluorescent scanner that defendant sought were not within the “possession, custody, or control of the State” as required by Rule 16(a) and instead were in the sole possession, custody, and control of a third party, Bode, a private laboratory, and therefore not discoverable by the defendant. Given that the defendant was not entitled to discovery of these materials, the court declined to make a ruling regarding the trial justice’s decision to condition the discovery of the user manuals upon the disclosure by the defense of the

27. Id. at 281.
28. Id.
29. Id. at 270.
30. Id. at 281; R.I. SUPER. CT. R. CRIM. P. 16(a)(5). Rule 16(a)(5) permits discovery by a defendant of “all results of reports in writing or copies thereof of physical or mental examinations made in connection with the particular case ***, any tangible objects still in existence that were the subject of such tests or experiments.”
31. Motyka, 893 A.2d at 282. The standard of review applicable to a trial justice’s determination regarding discovery of certain evidence pursuant to Rule 16 is a narrow one, overturned on appeal only if it was clearly erroneous.
32. Id.; R.I. SUPER. CT. R. CRIM. P. 16(a).
33. Motyka, 893 A.2d at 282.
identity of DNA expert they were consulting.\footnote{Id.}

In the second challenged ruling, the defendant contended that it was an abuse of discretion for the trial justice to refuse to allow the defendant to explore certain areas on cross examination of a particular witness (on the grounds that it would exceed the scope of direct examination of the witness).\footnote{Id. at 283.} Reviewing this decision for a clear showing of abuse of discretion, the court upheld this limitation.\footnote{Id. at 284.} The court held that although in some instances questions which go beyond the scope of direct examination are permissible on cross examination, the decision is well within a trial justice’s discretion.\footnote{Id.}

In the third challenged ruling, the defendant contended that the trial justice erred in refusing to instruct the jury on the lesser-included offense of voluntary manslaughter due to diminished capacity.\footnote{Id.} To warrant a voluntary manslaughter charge, the evidence must show an actual and adequate dispute about the presence of a mitigating factor that would negate the malice element of first-degree murder.\footnote{Id. at 287.} Reviewing this decision de novo, the court held that defendant’s intoxication was not of such a degree as to negate the specific intent necessary for murder and therefore, the defendant was not entitled to an instruction on the lesser-included offense of voluntary manslaughter due to diminished capacity.\footnote{Id. at 287.}

Lastly, the defendant argued that a sentence of life imprisonment without parole was not warranted in this case.\footnote{Id.} In determining whether a sentence of life imprisonment without the possibility of parole was proper, the court must examine the record, the findings of the trial justice, and the personal character,
Also reviewing this decision de novo, the court held that evidence was sufficient to support findings that the defendant committed the victim's murder intentionally while engaged in the commission of first-degree sexual assault and committed the murder in a manner involving both torture and an aggravated battery, thus justifying his sentence of life imprisonment without the possibility of parole. The Supreme Court affirmed the judgment of conviction and the sentence.

**COMMENTARY**

The Rhode Island Supreme Court's decision in Motyka, as far as it relates to the DNA discovery issue, is contrary to past Rhode Island decisions, a majority of other states, National Research Council Reports, the American Bar Association, and the United States Constitution.

In Rhode Island, a defendant has consistently been able to discover an expansive array of information. These liberal pre-trial mechanisms in Rhode Island are evident through the Superior Court Rules of Criminal Procedure; the Rhode Island Rules of Evidence; and prior case law.

42. Id. at 290.
43. Id. at 291.
44. Rule 16 has consistently been construed broadly but was amended to be even more liberal in 2002 when Rule 16(a)(6) was added, which included "a written summary of testimony that the State intends to use under Rules 702, 703, or 705 of the Rhode Island Rules of Evidence during its case-in-chief at trial, which describes the witness's opinions, the bases and reasons for those opinions, and the witnesses qualifications."
45. RIRE 705 states that before testifying in terms of opinion, an expert witness shall be first examined concerning the facts or data upon which the opinion is based (unless the court directs otherwise) in order to protect the accused's right to effective cross examination.
46. In 1980, the Rhode Island Supreme Court declared that in promulgating Rule 16 of the Rules of Criminal Procedure of the Superior Court, Rhode Island had in place one of the most liberal discovery mechanisms in the United States. The rule itself was liberal, and remains so to this day, furthermore, the Rhode Island Supreme Court has continuously interpreted it liberally. See State v. McParlin, 422 A.2d 742, 744 (R.I. 1980); State v. Faraone, 425 A.2d 523, 525 (R.I. 1981) (holding that Rule 16 provides for extensive discovery on the part of a defendant in a criminal case going far beyond the requirements of due process); State v. Adams, 481 A.2d 718, 724 (R.I. 1984) (holding that the state's non-disclosure was in violation of Rule 16.
Other jurisdictions have consistently ordered liberal discovery of all information and material relating to DNA analysis. This view has cemented itself as the better and more progressive view which is preferred by the courts and forensic science community alike.

The National Research Council stated in their 1992 report that “all data and laboratory records generated by analysis of DNA samples should be freely available to all parties” and that all relevant information should include “original materials, data sheets, software protocols, and information about unpublished databanks.” They re-emphasize that point in explicitly stating that “there are no strict scientific justifications for withholding information in the discovery process.”

Because of the nature of the complex scientific information regarding DNA, defendants will need comprehensive and detailed reports to adequately prepare for trial. The Council recommends that “all aspects of DNA testing be fully documented.” The need for this is enhanced further when it is to be discovered in advance of trial.

Likewise, the American Bar Association updated their rules handling pre-trial discovery to include a more liberal view on pre-trial discovery.

because the rule requires that when requested, the prosecution must disclose to the defense specific information relating to physical examinations, or to scientific tests or experiments, and does not give the prosecutor the authority to interpret the rule and decide what constitutes substantial compliance.)

48. See United States v. Yee, 129 F.R.D. 629, 629 (N.D. Ohio 1990) (holding that experts who testify in support of admission of novel scientific evidence to be used by the government as evidence in chief, must disclose all underlying predicate materials relating to DNA analysis); People v. Davis, 601 N.Y.S.2d 174, 174 (N.Y.A.D. 2 Dept. 1993) (holding that failure to disclose something material either to guilt or punishment constitutes a due process deprivation to the defendant. “The rule is plain that where the prosecution is permitted to call a witness, expert or not, who testifies to a fact in issue or a conclusion to be drawn, the defendant is entitled to examine the underlying data, the basis for the testimony, or else the defendant suffers undue prejudice.”); State v. Schwartz, 447 N.W.2d 422, 427 (Minn. 1989) (holding that access to the data, methodology, and actual results pertaining to DNA analysis is crucial so a defendant has at least an opportunity for independent expert review).


50. Id.. Allowing such disclosure facilitates technical review of the laboratory work, both within the laboratory and by outside experts.

51. Id. at 168-169.
Lastly, the Due Process Clause of the United States Constitution guarantees that no person will be deprived of life, liberty, or property, without due process of law.\textsuperscript{52} If the state is not required to disclose to the defense all materials used, generated, relied upon, or otherwise utilized in connection with the DNA analysis, this fundamental liberty has been violated.

If the \textit{Motyka} rule is allowed to stand, a custody issue would be created. It would allow plaintiffs, namely the state, and any third parties that it contracts with (here, Bode), to perform forensic analysis to evade Rule 16. In light of the danger that this presents, and the positions stated above to the contrary, the Rhode Island Supreme Court's decision on this issue is clearly erroneous.

\textbf{CONCLUSION}

The Rhode Island Supreme Court affirmed the lower court's decision and held that a defendant is not entitled to discovery of the software package and the user manual for the fluorescent scanner used by the laboratory as it performed DNA testing.\textsuperscript{53} The court also held that the record supported finding that defendant's failure to obtain certain materials used by laboratory in conducting DNA testing did not prevent defendant from adequately challenging the State's DNA evidence; the trial justice did not abuse her discretion by refusing to allow defense counsel to question detective about his participation in the interrogation of defendant; defendant was not entitled to instruction on lesser-included offense of voluntary manslaughter due to diminished capacity; and evidence was sufficient to support finding that defendant committed victim's murder intentionally while engaged in the commission of first-degree sexual assault, thus justifying defendant's sentence of life imprisonment without possibility of parole.\textsuperscript{54}

Christina Paradise

\textsuperscript{52.} U.S. Const. amend. XIV, § 1.
\textsuperscript{53.} \textit{Motyka}, 893 A.2d at 282.
\textsuperscript{54.} \textit{Id.} at 291.
Employment Law. *Neri v. Ross-Simmons, Inc.*, 897 A.2d 42 (R.I. 2006). An employee handbook that is expressly subject to unilateral change by an employer at any time does not create a legitimate expectation that a particular provision will remain in effect. As such, provisions contained therein do not have the force of an implied contract on which a plaintiff-employee may bring suit. Additionally, evidence that an employer may have failed to adhere to a handbook provision, without other evidence of impropriety, is insufficient to cast any meaningful doubt on an employer's otherwise legitimate and nondiscriminatory reason for terminating the plaintiff.

FACTS AND TRAVEL

Plaintiff Dorothy Neri was employed by defendant Ross-Simmons from 1992 until her termination in April 2001.1 At the time of her discharge, plaintiff was fifty-three years old, and held a salaried position as a call center manager.2

Neri alleged that her termination was in violation of staff reduction protocol contained within the company's employee handbook, which she had read and signed, thereby indicating her acknowledgment of its terms. The handbook stated that "[i]n the event positions in the same Job [sic] classifications are equal in value and each individual's performance of the assigned duties are relatively the same, the least senior employee within the department will be identified for staff reduction."3 Both parties refer to this provision as "bumping" rights.4 Neri asserted that this bumping provision granted her the right to displace a less senior employee in the event of staff reduction, and thereby effectively circumvented her otherwise "at-will" employment providing a breach of contract cause of action.5 Ross-Simons

2. *Id.* at 45-46.
3. *Id.* at 46.
4. *Id.*
5. *Id.* at 47.
contended that this provision was inapplicable to salaried employees, which Neri disputed. Neri, however, was unable to give an example of such “bumping” rights ever having been utilized by a salaried employee.

The employee handbook included disclaimers stating that policies contained therein were subject to change by Ross-Simons at any time, and that the relationship between Ross-Simons and employees remained one of “employment at-will.” The portion of the handbook that employees were required to sign and return to Ross-Simons indicating they had read the handbook also stated that the handbook was intended as a “guideline.”

Neri claimed, and Ross-Simons did not dispute, that she filed a charge of discrimination with the Rhode Island Commission for Human Rights and waited 120 days before filing a complaint in Superior Court. Neri’s amended complaint alleged age and gender discrimination based on the State Fair Employment Practices Act (FEPA), and breach of an employment contract. On Ross-Simons’ motion for summary judgment, the motion justice found that the employee handbook did not create a contract under Rhode Island law, and that there was insufficient evidence to permit a claim of age or gender discrimination. The motion justice entered summary judgment for Ross-Simons, and Neri appealed.

**ANALYSIS AND HOLDING**

On appeal, Neri argued that the motion justice erred in granting Ross-Simons’ motion for summary judgment. The Rhode Island Supreme Court reviewed Neri’s case de novo first as to whether the employee handbook constituted an employment contract, and then as to whether there existed grounds for a claim of age or gender discrimination.

The court found that there was no error below, and

---

6. Id. at 46.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id. at 46-47.
12. Id. at 47.
13. Id.
14. Id.
determined that summary judgment was appropriate for all claims. First the court ruled on the alleged breach of contract, holding that an employee handbook subject to unilateral change by the employer does not create a legitimate expectation that a particular policy will remain in effect. Neri should not have relied on language that may have granted "bumping" rights, as such a provision could be amended or deleted at any time and for any reason. Furthermore, the terms of the handbook unambiguously stated that the handbook was intended only as a "guideline," and that it did nothing to affect the at-will employment relationship.

The court then found that Neri, a fifty-three year old woman, could show a prima facie case as a member of the classes protected from age and gender discrimination. This was overcome, however, when Ross-Simons produced a legitimate, nondiscriminatory reason for plaintiff's termination as part of a company-wide staff reduction. Neri was unable to refute Ross-Simons' justification as merely pretext for a discriminatory animus, and cited only the handbook "bumping" provision as tending to show defendant contravened its staff reduction policy. Although Neri offered the affidavit of another employee who supports that the handbook "bumping" policy applied to salaried employees, she was unable to provide the motion justice with a single instance where a salaried employee was offered to displace a less senior salaried employee. At the time Neri was discharged, several other employees, including other salaried employees, were also terminated, lending credibility to defendant's assertion of pervasive staff reduction. Neri failed to cast any meaningful doubt on Ross-Simons' justification of staff reduction for terminating the plaintiff. The court concluded that a jury could not reasonably infer age or gender based discrimination based on the plaintiff's prima facie case and the possibility that

15. Id. at 52.
16. Id. at 48.
17. Id.
18. Id. at 49.
19. Id. at 50.
20. Id. at 50-51.
21. Id. at 51.
22. Id.
Ross-Simons may have contravened its staff reduction policy.\footnote{Id. at 51-52.}

**Employment Contracts in Rhode Island**

In Rhode Island, there is a strong presumption in favor of at-will employment, and "when the duration of a contract is uncertain, the contract is to be considered terminable at will."\footnote{Id. at 47 (citing Payne v. K-D Mfg. Co., 520 A.2d 569, 573 (R.I. 1987)).} Prior to \textit{Neri}, the court had stated, in dictum, that "if an employer notifies its employees that its policies are subject to unilateral change, the employees can have no legitimate expectation that any particular policy will remain in force."\footnote{Id. (citing Roy v. Woonsocket Inst. for Sav., 525 A.2d 915, 918 (R.I. 1987)).} \textit{Neri} reaffirmed this principle, denying any contractual implications resulting from a provision in an employee handbook that is subject to change at any time.

**Employment Discrimination in Rhode Island**

FEPA prevents an employer from discharging an employee on the basis of age or sex.\footnote{Id. at 48 (citing R.I. GEN. LAWS § 28-5-7(1)(i)-(ii) (1956)).} Both age and gender based disparate treatment claims involve a three-step burden shifting framework as established by the United States Supreme Court in \textit{McDonnell Douglas Corp. v. Green.}\footnote{Id. (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).}

For both age and gender discrimination claims, the plaintiff must first establish a \textit{prima facie} case for discrimination. When alleging age discrimination, the plaintiff must show: (1) he or she was at least forty years of age; (2) his or her job performance met the employer's legitimate expectations; (3) the employer subjected the plaintiff to adverse employment action; and (4) the employer had a continuing need for the services provided by the position from which the plaintiff was discharged.\footnote{Id. at 49 (citing Rodriguez v. Boehringer Ingelheim Pharmaceuticals, Inc., 425 F.3d 67, 78 n.1 (1st Cir. 2005)).}

Similarly, to present a \textit{prima facie} case for gender discrimination, the plaintiff must establish that: (1) he or she is a member of a protected class; (2) his or her job performance met
the employer's legitimate expectations; (3) he or she suffered an adverse job action by her employer; and (4) the plaintiff's employers sought a replacement for her with roughly equivalent qualifications.29

For both age and gender discrimination claims, the second step of the analysis shifts the burden to the employer to offer a legitimate, nondiscriminatory reason for the plaintiff's termination.30 The third and final step shifts the burden back to the plaintiff to prove that the defendant's reason for termination was merely pretext for a discriminatory animus.31

COMMENTARY

In the two years before this case, the Rhode Island Supreme Court had previously analyzed the proper framework for age and gender discrimination claims. The novel consideration here was that the court directly ruled on whether an implied contract may exist based on a handbook that the employer does not bind itself to follow. The court quickly dispensed with this breach of contract claim "because defendant unilaterally could change its policy concerning staff reduction, plaintiff did not have a contractual right to displace less senior employees."32

Although not specifically addressed, the "bumping" rights provision addressed here probably was not reasonably relied upon by the plaintiff as a reason for either beginning or maintaining employment with the defendant. The ruling seems to nonetheless preclude recovery under a promissory estoppel theory even when the plaintiff reasonably relied upon a handbook provision, changed her position, and suffered harm as a result. In instances of handbooks with boilerplate disclaimers, such disclaimer language apparently operates as a per se bar to a claim on the basis of handbook provisions without regard to surrounding circumstances.

This ruling is valuable to Rhode Island workers who should know better than to place too much reliance on the terms of the company handbook.

29. Id. (citing DeCamp v. Dollar Tree Stores, Inc., 875 A.2d 13, 21 (R.I. 2005)).
30. Id.
31. Id. at 50.
32. Id. at 48.
CONCLUSION

The Rhode Island Supreme Court held that an employee handbook that is subject to change by the employer at any time does not create a contractual relationship between an employer and employee whose relationship is otherwise at-will.\textsuperscript{33} The court applied the framework for age and gender based discrimination, finding that a possible violation of handbook termination protocol is insufficient to overcome a defendant's legitimate nondiscriminatory reason for terminating an employee.\textsuperscript{34}

Adam Noska

\textsuperscript{33} Id.
\textsuperscript{34} Id. at 51.
Employment Law. Trant v. Lucent Technologies, 896 A.2d 710 (R.I. 2006). Under the Workers’ Compensation Act, an employee who is totally incapacitated for more than fifty-two cumulative weeks is eligible for a cost-of-living adjustment (COLA) provided by Rhode Island General Laws § 28-33-17(f)(1) regardless of whether or not those weeks of total incapacity are consecutive. The court found requiring more than fifty-two consecutive weeks of total incapacity as both inconsistent with the remedial purpose of the Workers’ Compensation Act and contrary to the canons of statutory construction.

FACTS AND TRAVEL

The petitioner-employee, John Trant was injured on July 26, 2000, causing harm to his neck, right ear, right arm, right hand, and post-traumatic stress syndrome. As a result of his injury, Trant became totally incapacitated on July 27, 2000 and remained totally incapacitated through May 10, 2002. However, during that period, between August 23, 2000 and May 25, 2001, Trant was placed on partially disability. Trant claimed workers’ compensation but later filed a petition against the respondent-employer, Lucent Technologies (Lucent), alleging that the employer had failed to pay the cost-of-living adjustment (COLA) provided by R.I. Gen. Laws § 28-33-17(f)(1), as amended by P.L. 2000, ch. 491, § 4. Lucent contended that because the employee’s period of total incapacity as of May 10, 2002 – the statutorily prescribed date on which COLAs are to be considered – did not exceed fifty-two consecutive weeks, he was not entitled to a

2. Id. The petitioner was totally incapacitated until at least May 10, 2003. Id.
3. Id.
4. Id. The COLA provision is part of the Workers’ Compensation Act, chapters 29-38 of title 28 of the Rhode Island General Laws. See R.I. GEN. LAWS § 28-29-1 et seq.

589
The only issue before the Workers’ Compensation Court was one of statutory interpretation: whether or not the employee was eligible for a COLA in the year 2002. The COLA statute provides in relevant part:

Where any employee’s incapacity is total and has extended beyond fifty-two (52) weeks, regardless of the date of injury, payments made to all totally incapacitated employees shall be increased as of May 10, 1991, and annually on the tenth of May after that as long as the employee remains totally incapacitated.

The trial justice agreed with Lucent, concluding that Trant was not entitled to a COLA under the Workers’ Compensation Act because, although his period of total incapacity exceeded fifty-two weeks as of May 10, 2002, this period was not consecutive. The Appellate Division of the Workers’ Compensation Court (Appellate Division) affirmed. It gleaned two conditions from the “plain language of the statute.” First, the statute’s first phrase, “[w]here any employee’s incapacity is total,” requires an eligible employee to be currently suffering from total incapacity on May 10 of a given year. Second, the statute’s use of the word “extended” requires that current period of incapacity to be continuous. In addition, the Appellate Division found that allowing an injured worker to tack together periods of incapacity would “impose an almost impossible administrative burden.”

ANALYSIS AND HOLDING

On appeal to the Rhode Island Supreme Court, Trant argued that, to be eligible for a COLA, a worker’s total incapacity need not be consecutive as long as it lasts longer than fifty-two

6. Trant, 896 A.2d at 711.
7. R.I. GEN. LAWS § 28-33-17(f)(1), as amended by P.L. 2000, CH. 491, § 4. This statute has been amended since the date of the petitioner’s injury; however, the substantive language remains the same. Trant, 896 A.2d at 711 n.1.
8. Id.
9. Id. at 712.
11. Id. (emphasis in original).
12. Id. at *4-5.
13. Id. at *5.
cumulative weeks, pointing to the remedial purpose of the Workers’ Compensation Act.\textsuperscript{14} Trant contended that the Appellate Division erred as a matter of law by reading a restrictive provision into the Act.\textsuperscript{15} The Supreme Court held in favor of the petitioner.

The court pointed out that the plain language of the COLA provision of the Workers’ Compensation Act does not explicitly require an excess of fifty-two consecutive weeks of total incapacity.\textsuperscript{16} Nonetheless, the court found the statute to be ambiguous “about whether periods of incapacity may or may not be combined for COLA purposes.”\textsuperscript{17} The court stated that, as a matter of statutory construction, when a statute is unclear or ambiguous, the court “shall examine the entire statute to ascertain the intent and purpose of the Legislature”\textsuperscript{18} and “attribute to the enactment the meaning most consistent with its policies.”\textsuperscript{19} The Workers’ Compensation Act, as a remedial statute, “should be liberally construed to effectuate [its] salutary purpose.”\textsuperscript{20} More particularly, “ambiguities in the Workers’ Compensation Act generally must be construed liberally in favor of the employee.”\textsuperscript{21}

According to the court, the Appellate Division did not construe the COLA provision in conformity with these canons of statutory construction.\textsuperscript{22} The court emphasized the fact that the petitioner, between July 27, 2000 and May 10, 2002, had been totally incapacitated in excess of fifty-two weeks with only a short interval of partial incapacity in that time period.\textsuperscript{23} Throughout that time period, Trant’s disability was attributable to the same injury. Additionally, throughout that time period, Trant did not recover, nor did he hold another job.\textsuperscript{24} As such, denying the petitioner a COLA, by “insert[ing] into the statute language that

\begin{itemize}
\item \textsuperscript{14} Trant, 896 A.2d at 712.
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id. (quoting Jeff Anthony Props. v. Zoning Bd. of Review of N. Providence, 853 A.2d 1226, 1230 (R.I. 2004)).
\item \textsuperscript{19} Id. (quoting Oliveira v. Lombardi, 794 A.2d 453, 457 (R.I. 2002)).
\item \textsuperscript{20} Id. at 712-13 (quoting McCarthy v. Envtl. Transp. Servs, Inc., 865 A.2d 1056, 1063 (R.I. 2005)).
\item \textsuperscript{21} Id. at 713 (emphasis in original) (internal quotations omitted).
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id. In fact, petitioner was on partial disability for thirty-nine weeks.
\item \textsuperscript{24} Id.
\end{itemize}
has significant independent meaning” was not a method of construing the statute “liberally in favor of the employee.”\textsuperscript{25} Furthermore, because the General Assembly presumably knows the meaning of its enactments and used the word “consecutive” numerous other times in the Workers’ Compensation Act, the word’s absence “was both purposeful and meaningful.”\textsuperscript{26} The General Assembly could have included “consecutive” in the COLA provision if that had been its intention. Finally, the court disagreed with the Appellate Division’s concern that construing the provision otherwise would impose an “almost impossible administrative burden,” finding instead that piecing together periods of total incapacity is “a matter of simple arithmetic.”\textsuperscript{27} 

\textbf{COMMENTARY}

At first glance, it appears that the Rhode Island Supreme Court reached a legitimate conclusion. The decision assured that an injured worker who had been disabled and unable to work for over a year would receive a cost-of-living adjustment on his workers’ compensation rate. Perhaps more importantly, the court rejected a judicially-imposed restriction on what the legislature intended to be a remedial provision of the Workers’ Compensation Act. Surely the lower court’s decision to insert an additional word into what the legislature had carefully written implicated the separation of powers. The problem lies, however, in the application of this decision. While the Supreme Court accurately noted that determining whether an injured worker has suffered from total disability for more than fifty-two weeks is a matter of mere arithmetic,\textsuperscript{28} the burden created here is not one of simple math. Rather, determining the scope of this decision will likely breed litigation, making attorneys the real benefactors of this case.

It is no coincidence that the COLA provision requires an excess of fifty-two weeks of total incapacity and there are fifty-two weeks in a year. Consider the rationale of the Appellate Division:

\begin{quote}
To allow an employee to piece together periods of total
\end{quote}

\begin{itemize}
\item \textsuperscript{25} \textit{Id.} (emphasis omitted).
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} \textit{Id.} at 713.
\end{itemize}
incapacity which may be accumulated over any number of years would lead to an absurd result. An employee who is totally disabled is unable to work and earn any wages at all. When such an employee is entirely unable to work for a period of a year or more and is locked [into] a weekly compensation rate set at the time of his injury, he begins to lose ground against a rising cost of living and misses out on increases in wages. The implementation of a COLA for injured workers who have been continuously disabled for at least a year reflects an effort to assist those employees in keeping up with rising costs. Such a rationale would not apply to an employee who is only totally disabled for brief periods and is otherwise capable of some type of restricted work if he or she chooses to find work.\textsuperscript{29}

There was a sound basis, therefore, for the Appellate Division's decision and the one-year requirement set out in the COLA provision. The Supreme Court's decision might still be considered the "right" one in this case, however, because of the statute's arbitrary date for the determination of COLA benefits and its assumptions about incapacity.

The statute provides that payments to totally incapacitated employees will be increased on May 10th of each year. Read quite literally, this means an employee who is seriously injured in June and remains totally incapacitated until the second following April, for example, will never benefit from a cost-of-living adjustment.\textsuperscript{30} The following May 10th, he will not have accumulated fifty-two weeks of disability. A year after that, he no longer has total incapacity status. This, of course, may have been what the legislature intended and was not directly addressed in this case. Nonetheless, the provision's arbitrary date did play a role in this case. While the decision did not say for how long Trant continued to suffer from total incapacity, it did mention that he was granted a COLA in 2003 and, thus, was still completely disabled over a


\textsuperscript{30} A period of total incapacity from June until the second following April (for example, June 2007 until April 2009) would last for at least twenty-two months – far exceeding, if not almost doubling, fifty-two weeks.
year later.\textsuperscript{31} Trant did not qualify for the 2002 COLA under the "consecutive" reading of the statute because he relapsed into total incapacity on May 25, 2001, making him just fifteen days short of qualifying, even though he did not hold a job from July 26, 2000 until, as far as the court tells us, May 10, 2003.\textsuperscript{32} It seems likely that the court considered this in determining that requiring an excess of fifty-two consecutive weeks simply did not work "in favor of the employee."\textsuperscript{33}

The statute also arbitrarily assumes that injured workers who fluctuate between periods of partial and complete disability will be "otherwise capable of some type of restricted work."\textsuperscript{34} The realities of our economy and human health instead make it unlikely such an employee will be able to go back to work, find a new job, or make a substantive amount of money during those healthier periods. While this assumption may be a political matter left better to the legislature, it makes sense that the Supreme Court did not want to limit the benefits to those workers whose illness or injury varies in severity.

The problem created by this seemingly appropriate decision, then, is the fact that the Supreme Court did not attempt to draw a line. Of course, the court did not need to go beyond answering the simple question in this case: whether the COLA provision requires more than fifty-two consecutive weeks of total incapacity.\textsuperscript{35} But the court did not articulate a holding in its decision. It simply "disagree[d] with the Appellate Division."\textsuperscript{36} As such, the Appellate Division's concern, that an employee may try to tack together periods of total incapacity accumulated over any number of years, may be the actual result. The bottom line is that more injured workers will feel that they are eligible for a COLA benefit, and more claims against employers will be filed. Reporting on this decision, the Beacon Mutual Insurance Company website observed,

Employers can [now] expect inquiry from injured workers and their attorneys about the duration of benefit receipt.

\textsuperscript{31} Trant, 896 A.2d at 711.
\textsuperscript{32} Id.
\textsuperscript{33} Id. at 712 (emphasis omitted).
\textsuperscript{34} Trant, W.C.C. 04-01981, *5.
\textsuperscript{35} See Trant, 896 A.2d at 710.
\textsuperscript{36} Id. at 713.
Detail is the watchword, as the potential impact will be more related to interest, penalties, and attorney's fees, as distinguished from the actual COLA benefit, if any.\textsuperscript{37}

Then again, this may be a cost that the Supreme Court deemed worthwhile in order that injured workers have adequate compensation.

The facts of the decision will likely provide some guidance in determining future COLA claims. The Supreme Court noted that the employee's accumulation of over fifty-two weeks of total incapacity was attributable to the same injury, he did not recover from the original injury, he did not hold a job since the date of his injury, and he was placed on partial disability for only a short interval (thirty-nine weeks). These four simple facts may be considered factors in the subsequent cases that are likely to follow. Nonetheless, the Workers' Compensation Court will need to address other questions: Is there a cap on the number of years from which fifty-two cumulative weeks of total disability can be combined? Does the length of the relative periods of total and partial incapacity matter? What is the dividing line between partial disability and recovery? How will it be determined that the injured worker could have held a job in the interim? Does an employee have to be totally incapacitated on May 10 of each year, as the Appellate Division held? Regardless of these open-ended questions and their potential ability to create a flood of COLA litigation, it seems that the Supreme Court made a rationale, equitable, and legally-sound decision in quashing the "consecutive" requirement – at least in this case.

CONCLUSION

The Rhode Island Supreme Court held that the Workers' Compensation Act does not require that an injured worker be totally incapacitated in excess of fifty-two consecutive weeks in order to qualify for a cost-of-living adjustment under Rhode Island General Laws § 28-33-17(f)(1). As long as an injured worker suffers from total disability for longer than fifty-two cumulative weeks, the injured worker may be eligible.

Megan Maciasz
Evidence. State v. Silvia, 898 A.2d 707 (R.I. 2006). The Rhode Island Supreme Court affirmed the defendant’s conviction of second-degree murder. The defendant argued, inter alia, that the lower court erred in denying his motion in limine to exclude his prior convictions from being used as impeachment evidence against him should he choose to take the stand. The Rhode Island Supreme Court adopted the United States Supreme Court’s holding in Luce v. United States, which stated that “in order to preserve for appeal a claim of improper impeachment with a prior conviction under Rule 609, the defendant must testify at trial.”

FACTS AND TRAVEL

On November 30, 2001, Joseph Lima (the victim) and Robert Silvia (the defendant) were drinking at the Somewhere Else Bar, located at 22 Earle Street in Central Falls.\(^1\) According to the testimony of Margaret White, the bartender on the evening in question, Santos, Silvia’s roommate, “started to ‘get loud’ and began waving his arms in the air,” almost burning Warren Dolan with a cigarette and knocking over his drink.\(^2\) White told Santos to calm down.\(^3\) Santos called Silvia over to tell him what had happened, and Silvia approached the bar and began screaming and swearing at White.\(^4\) Lima then stood up and told Silvia that he should not disrespect White.\(^5\) The two men yelled back and forth at each other, and White told Silvia to leave the bar, which he did.\(^6\)

White further testified that ten minutes later, Silvia called the bar and told White that he was “coming back that night to burn the bar down with her inside of it . . . .”\(^7\) Sensing that she

---

2. Id.
3. Id.
4. Id.
5. Id.
6. Id. at 710-11.
7. Id. at 711.
was in real danger, White immediately called Kathleen Ash, the owner of the bar who lived upstairs.\(^8\) Ash went out to find Santos because she wanted to ask him about Silvia’s behavior.\(^9\) Without an invitation, Lima decided to follow Ash to another bar where she suspected Santos would be.\(^10\) Soon after, Ash was notified that Silvia was riding his bicycle back and forth in front of her bar and she returned to the bar.\(^11\) There are multiple accounts of what occurred next.

According to Ash, she approached Sylvia and “asked him what his problem was.”\(^12\) She further testified that Lima “suddenly appeared, and the next thing she remembered was seeing Lima stumbling near a van . . . .”\(^13\) According to Dolan’s account of the same events, Ash approached and “started screaming at defendant and asking him why he had threatened to burn her bar down.”\(^14\) Dolan then described that “hands reached over me . . . [and] the defendant jumped of his bike.”\(^15\) Then Silvia punched Lima in the stomach, and Lima “went down on one knee.”\(^16\) A man, Victor Estrada, who lived diagonally across the street from the bar also claims that he saw what happened that night.\(^17\) Estrada explains that Lima approached Silvia and told him not to talk to the owner disrespectfully.\(^18\) According to Estrada’s testimony, Silvia then got off his bicycle and attacked Lima.\(^19\) Although there are differing accounts of what exactly happened outside the bar, no one, including Silvia, denies that Sylvia stabbed Lima.

A jury found Silvia guilty of second degree murder.\(^20\) After denying the defendant’s motion for a new trial, Judge Ragosta sentenced Silvia to a term of sixty years — forty to serve at the Adult Correctional Institutions and twenty years suspended, with

---

8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id. at 712.
15. Id.
16. Id. at 713.
17. Id.
18. Id.
19. Id.
20. Id. at 714.
probation.\textsuperscript{21} Silvia appealed, arguing that the lower court "erred in (1) limiting defense counsel's cross-examination of Victor Estrada; (2) admitting into evidence Lima's bloody and cut clothing and also admitting testimony by Michael Bessette (a rescue worker) about efforts to resuscitate Lima while he was being transported the Rhode Island Hospital; and (3) denying defendant's motion \textit{in limine} to exclude evidence of his prior convictions."\textsuperscript{22}

\textbf{ANALYSIS AND HOLDING}

The Supreme Court of Rhode Island, in an opinion written by Justice Robinson, addressed each of Silvia's arguments seriatim. While this survey will touch briefly on Silvia's first two arguments, more focus will be given to the third argument.

\textit{The Cross-Examination of Victor Estrada}

The issue was whether the trial court erred in restricting the cross-examination of Estrada by defense counsel.\textsuperscript{23} A trial justice has discretion to determine the permissible scope and extent of cross-examination and only a clear showing of abuse of discretion and prejudice to the moving party will cause the lower court's decision to be overturned.\textsuperscript{24} Here, the court found that the trial justice did not abuse his discretion and that Silvia had an opportunity to cross-examine Estrada's testimony.\textsuperscript{25} Therefore, the court held that "there was no reversible error in the trial justice's rulings limiting the cross-examination of Estrada."\textsuperscript{26}

\textit{The Admission of Certain Items of Clothing and Admission of Michael Bessette's Testimony}

Silvia argued that the trial court erred when it allowed the prosecution to show the jury the bloody and cut clothes of Lima

\footnotesize{\textsuperscript{21} \textit{Id.}}
\footnotesize{\textsuperscript{22} \textit{Id.}}
\footnotesize{\textsuperscript{23} \textit{Id.}}
\footnotesize{\textsuperscript{24} \textit{Id.} at 715.}
\footnotesize{\textsuperscript{25} \textit{Id.}}
\footnotesize{\textsuperscript{26} \textit{Id.} at 715-16.}
and also admitted Michael Bessette's testimony. Because he did not dispute the fact that he had stabbed Lima, Silvia argued that the above mentioned evidence was "more prejudicial than probative" and should, therefore, have been kept out under Rule 403 of the Rhode Island Rules of Evidence. The court emphasized that it would only reverse if the trial justice abused his discretion. Unable to find that abuse of discretion, the court refused to disturb the lower court's determination.

The Denial of Silvia's Motion to Exclude Evidence of his Prior Convictions

Silvia contends that the trial justice erred when he denied his motion in limine to bar the prosecution from using his prior convictions to impeach him under Rule 609, if Silvia decided to take the witness stand. Understandably, Silvia did not want the jury to know that he had been convicted of first-degree sexual assault in 1994, possession of cocaine in 1992, breaking and entering with intent to commit larceny in 1990, and assault in 1989. The most damning evidence, though, was that the 1994 sexual assault involved the use of a knife — the same type of weapon involved in the present case. Under the Rhode Island Rules of Evidence, Rule 609 allows evidence of a witness's prior conviction for impeachment purposes unless "its prejudicial effect substantially outweighs the probative value of the conviction." Determining that a trial justice has "broad discretion in deciding whether or not to admit evidence of prior convictions under Rule 609," the court refused to overturn the lower courts ruling.

After disposing of the third issue on the merits, the court then announced that it would "adopt a new policy with respect to appeals that challenge Rule 609 rulings by the trial court." The

27. Id. at 716.
28. Id.
29. Id.
30. Id.
31. Id. at 717-18.
32. Id. at 718.
33. Id.
34. Id. (quoting R.I. RULES OF EVID. 609(b)).
35. Id.
36. Id.
court decided to follow the practice established in the United States Supreme Court decision in *Luce v. United States* which provided that “in order ‘to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify.”' The Supreme Court reasoned that a reviewing court would have no way of determining (or if it did, any such determination would be purely speculative) the impact of erroneous impeachment, unless the defendant testifies. If the defendant testifies at trial and is impeached with evidence of his prior convictions, then the reviewing court will at least have the full record to assist it in weighing the probative value of the impeachment evidence against its prejudicial effect. Furthermore, there was concern that if *in limine* rulings were reviewable even when the defendant did not testify, “almost any error would result in the windfall of automatic reversal [because] the appellate court could not logically term ‘harmless’ an error that presumptively kept the defendant from testifying.” In sum, the Rhode Island Supreme Court adopted the United States Supreme Court ruling in *Luce*, and held that “[i]n order to preserve for appeal a claim of improper impeachment with a prior conviction under Rule 609, the defendant must testify at trial.”

While recognizing that in this situation criminal defendants face “a serious dilemma,” the court responded that “serious dilemmas are part and parcel of the life of every person.”

**COMMENTARY**

The Supreme Court of the United States decided *Luce* in 1984. Twenty-two years later, in 2006, the Rhode Island Supreme Court decided to adopt the policy established in *Luce*. One might ask, if the policy established in *Luce* is correct, why did the Rhode Island Supreme Court wait so many years to adopt this “new” policy? While this question may never be answered, or if it is, the answer may be entirely unsatisfying, there are other troubling

---

37. *Id.* at 718-19 (quoting *Luce v. United States*, 469 U.S. 38 (1984)).
38. *Id.* at 719.
39. *Id.*
40. *Id.* (quoting *Luce*, 469 U.S. at 42).
41. *Id.* at 720.
42. *Id.*
43. For example, the reason could simply be that a case that presented the right set of facts to address the issue never arose until the present case.
aspects of this case. First, Rule 609 of the Rhode Island Rules of Evidence is "substantially broader than its federal counterpart."44 Here, the Rhode Island Supreme Court adopted the same policy regarding defendants taking the stand that the Federal Courts had adopted with respect to Rule 609 of the Federal Rules of Evidence. However, Rhode Island continues to use a broad Rule 609, without adopting the narrower federal version. Do the same rationales for adopting the "defendant-must-testify-standard" apply when Rule 609 is different under the Rhode Island and Federal Rules of Evidence? The Court focused primarily on how the reasoning of the Supreme Court in *Luce* was sound.45

In this case, on each of Silvia’s arguments, the court found that the trial justice did not abuse his discretion.46 However, it is hard to see how evidence of a prior conviction of first-degree sexual assault with a knife, would not have an unfairly prejudicial effect that will substantially outweigh its probative value. Does evidence of a person being convicted of sexually assaulting another with a knife in the past really make that person any more likely to be telling the truth or not at trial? If the answer is yes, then the prior conviction is probative. However, it is hard to see why a violent person would be any more likely than a non-violent person to lie under oath. As for the unfairly prejudicial aspect of the weighing test, when the jury hears that Silvia was convicted of sexual assault with a knife, they will likely say to themselves that Silvia probably did stab Lima; not because the evidence of Silvia’s conviction makes it more likely that he is lying, but rather because of the similarity of the two crimes — both involving a knife. Furthermore, the jury may not be able to use the evidence exclusively for its permitted purpose, but will simply decide to convict the defendant because he is a bad man — after all, he did sexually assault a woman at knife point. For the above reasons, the trial justice should have found that on the merits the unfair prejudice of allowing the prior convictions to be used as impeachment substantially outweighed the marginal probative value of the prior convictions.

44. *Silvia*, 898 A.2d at 718 n.9.
45. *Id.* at 718.
46. *Id.*
CONCLUSION

The Rhode Island Supreme Court, adopting the policy of *Luce v. United States*, held that a criminal defendant, in order to preserve for appeal a claim of improper impeachment with a prior conviction under Rule 609, must testify at trial.\(^{47}\) The court rejected each of Silvia's arguments finding that the trial justice did not abuse his discretion.\(^{48}\)

J. David Freel

\(^{47}\) *Id.* at 720.

\(^{48}\) *Id.*
Family Law. Cote-Whitacre v. Department of Public Health, No. 04-2656, 2006 WL 3208758 (Mass. Super. Sept. 29, 2006). The Superior Court of Suffolk County, on remand from the Supreme Judicial Court of Massachusetts, interpreted Massachusetts General Law ch. 207 §11 to preclude same-sex marriage in Rhode Island only to the extent that an express prohibition by positive law of Rhode Island precludes such unions. The court interpreted positive law to include constitutional amendments, statutes, and controlling appellate decisions. At the time of the decision, there was no evidence of any positive law in Rhode Island prohibiting same-sex marriages. Therefore the court held that same-sex marriage was not prohibited in Rhode Island and couples married in Massachusetts and residing in Rhode Island shall have their marriages processed.

FACTS AND TRAVEL

After the decision in Goodridge v. Department of Public Health,¹ which provided that persons of the same sex were legally allowed to marry in the Commonwealth of Massachusetts, eight same-sex couples from states outside of the Commonwealth wished to marry in Massachusetts. These couples resided in Connecticut, Maine, New Hampshire, New York, Vermont, and Rhode Island, and intended to continue to reside within those states following their union. Three of the couples were refused marriage licenses, and five who received licenses were prevented from being registered in the Commonwealth.² In June of 2004, the couples filed suit in Suffolk County, Massachusetts seeking declaratory judgment that Massachusetts General Law 207 §11 was unconstitutionally applied to the plaintiffs.³

The statute in question provides that:

No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in

¹ 798 N.E.2d 941 (Mass. 2003)
³ Id.
another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation thereof shall be null and void.\textsuperscript{4}

The plaintiffs also sought a preliminary order enjoining the application of the statute and an order requiring the processing of the marriage licenses.\textsuperscript{5} The Superior Court of Suffolk County denied the motions after determining that the couples failed to demonstrate a likelihood of success on the merits.\textsuperscript{6}

The Supreme Judicial Court of Massachusetts granted direct appellate review of the Superior Court decision and affirmed the denial of the motion by the lower court.\textsuperscript{7} The court, however, ordered the cases of Rhode Island and New York to proceed in Superior Court "for a determination whether same-sex marriage is prohibited in those States."\textsuperscript{8} The Rhode Island plaintiffs and defendants submitted memoranda to the Superior Court of Suffolk County on whether same-sex marriage is prohibited in Rhode Island and oral arguments were heard in June of 2006.\textsuperscript{9}

\textbf{ANALYSIS AND HOLDING}

The Superior Court quickly dispensed with the question of whether same-sex marriage in New York is prohibited, noting that the Court of Appeals of New York decided in July of 2006 that same-sex marriage was unconstitutional in New York.\textsuperscript{10} The resolution of the question of prohibition in Rhode Island, required much closer scrutiny.

The Supreme Judicial Court's decision in the previous \textit{Cote-Whitacre} provided a majority only in that the Superior Court was directed to consider whether same-sex marriage was prohibited in Rhode Island. The three concurrences authored by the Justices on the issue of statutory construction of Massachusetts General Laws

\textsuperscript{4} MASS. GEN. LAWS ANN. ch. 207 §11 (West 1998)
\textsuperscript{5} \textit{Cote-Whitacre}, 2006 WL 3208758, at *1.
\textsuperscript{6} \textit{Id.}
\textsuperscript{7} \textit{Id.}
\textsuperscript{8} \textit{See Cote-Whitacre v. Dep't of Public Health}, 844 N.E.2d 623 (Mass. 2006).
\textsuperscript{9} \textit{Id.}
\textsuperscript{10} \textit{Id.}
ch. 207 §§11 and 12\textsuperscript{11} did not produce a majority, and thus there was “some difficulty in determining a binding rule of law.”\textsuperscript{12} Justice Spina’s concurrence construed the statutes broadly to prohibit same-sex unions if the state of domicile of the residents prohibits same-sex marriage expressly, through constitutional amendment, common law, or by statutory language.\textsuperscript{13} Furthermore, Justice Spina urged that in absence of appellate decisions on the matter, to look at the general common law for to see if marriage is interpreted to mean between one man and one woman.\textsuperscript{14} On the other hand, Chief Justice Marshall construed the statutes more narrowly, stating that same-sex marriage is only precluded by explicit positive law (constitutional amendment, statute, or controlling appellate decision) that these particular marriages are void.\textsuperscript{15}

Because the Supreme Judicial Court was unable to produce a majority as to the proper construction of the pertinent statutes, the Superior Court turned to the rule laid down by the U.S. Supreme Court in \textit{Marks v. United States}, that states that “when a divided court provides no majority rationale for its decision, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’”\textsuperscript{16} With this foundation, the Superior Court reasoned that Chief Justice Marshall’s construction of the statutes was narrowest and therefore represented the holding of the court on the issue on how the statutes are to be constructed.\textsuperscript{17} The court also noted that Justice Spina also agreed that express statutory language would preclude same-sex marriage as part of his broader reading of the statute, and therefore Marshall’s construction represented a “common denominator” of the court’s reasoning.\textsuperscript{18}

\textsuperscript{11} \textit{Mass. Gen. Laws. Ann.} ch. 207 §12 provides:

Before issuing a license to marry a person who resides and intends to continue to reside in another state, the officer having authority to issue the license shall satisfy himself, by requiring affidavits or otherwise, that such person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides.

\textsuperscript{12} \textit{Cote-Whitacre}, 2006 WL 3208758, at *2.

\textsuperscript{13} \textit{Id.}

\textsuperscript{14} \textit{Id.}

\textsuperscript{15} \textit{Id.}


\textsuperscript{17} \textit{Cote-Whitacre}, 2006 WL 3208758, at *3.

\textsuperscript{18} \textit{Id.}
The court also found support for this reading of the statute within the rules of statutory construction; namely that a statute in derogation of the common law should be strictly construed.\textsuperscript{19} The courts of Massachusetts have long held that a marriage that is valid where it is contracted is valid everywhere,\textsuperscript{20} therefore the rules of construction require General Laws ch.207 §§11, 12 to be construed strictly, as long as the construction is consistent with the statutory purpose.\textsuperscript{21} The statutes were enacted based on the Uniform Marriage Evasion Act, for the purpose to make uniform the law of the states that enact the legislation. Here, as the construction by the Chief Justice is in line with that of Illinois, Louisiana, Vermont, and Wisconsin, the construction is consistent with the statutory purposes.\textsuperscript{22}

Applying the construction that same-sex marriage will only be prohibited if it is expressly deemed void by positive law, the court finds no evidence of any positive Rhode Island law on the matter.\textsuperscript{23} Therefore, with no positive law prohibiting same-sex marriage, the court held that same-sex marriage is not prohibited in Rhode Island, and declaratory judgment in favor of the plaintiffs was entered as such.

\textbf{COMMENTARY}

The Superior Court of Suffolk County's construction and application of the laws of Massachusetts as narrowly as possible was the most legally sound manner in which to deal with the controversial issue of same-sex marriages, especially when considering that the court was, in essence, interpreting the laws of another sovereign state. Chief Justice Marshall's interpretation of General Laws ch.207 §11, 12 complied most strictly with the rules of statutory construction as was painstakingly pointed out by the Superior Court. It is important to note the distinction between Justice Spiro's and the Chief Justice's concurrences in the original \textit{Cote-Whitacre} decision.\textsuperscript{24} The Justices agreed on the use of

\begin{itemize}
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} Commonwealth v. Lane, 113 Mass. 458, 463 (1873).
\item \textsuperscript{21} \textit{Cote-Whitacre}, 2006 WL 3208758, at *3.
\item \textsuperscript{22} \textit{Id.} at *4.
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} Cote-Whitacre v. Dep't of Public Health, 844 N.E.2d 623 (Mass. 2006).
\end{itemize}
positively enacted law as a means to decipher whether same-sex marriage is precluded, however, Spiro went further to include the general common law of the state as to its interpretation of the institution of marriage, something the Chief Justice felt was too broad an interpretation.\(^{25}\) The distinction is important from a political, as well as legal, standpoint it seems. Delving into another state's body of common law on an issue as controversial as same-sex marriage would seem to be too large of an intrusion of sovereignty for another state's trial court to do. By complying with established rules of construction and interpretation, the Superior Court presents a sound legal rationale for the non-prohibition of same-sex marriage without departing into the political arena of the state of Rhode Island. The court merely commented on what Rhode Island has not positively done in its laws, not on what possible interpretations exist within the state's body of common law.

Where this decision becomes most interesting is what happens next. As it stands, without an express prohibition in law by Rhode Island, Rhode Islanders are free to marry in Massachusetts as they please, and then return to Rhode Island to live as married partners. Without express prohibition, this opinion presents a persuasive interpretation of law in Rhode Island that could be advantageous to gay rights activists in future confrontations in the courts of Rhode Island over the validity of same-sex marriage within Rhode Island's borders. However, on the other side of the coin, this decision could prove to be a catalyst for enacting positive law in Rhode Island to establish same-sex marriage as illegal, and therefore render the decision by the Superior Court void under the terms of the Massachusetts statute.

CONCLUSION

The Superior Court of Suffolk County of Massachusetts held that Massachusetts General Laws ch. 207 §§11, 12 are to be interpreted on the most narrow of grounds and therefore finding that same-sex marriage is only prohibited in Rhode Island by an act of positive law in the form of constitutional amendment, statute, or controlling appellate decision. As there was no

\(^{25}\) Cote-Whitacre, 2006 WL 3208758, at *2.
evidence presented to the court of the existence of any positive law prohibiting same-sex marriage in Rhode Island, a declaratory judgment was entered that same-sex marriage is not prohibited in Rhode Island.\textsuperscript{26}

Kevin Lewis

\textsuperscript{26} Id. at *4.
Family Law. *In re Kayla N.*, 900 A.2d 1202 (R.I. 2006). The Americans with Disabilities Act (ADA) does not apply to proceedings to terminate the parental rights of cognitively limited parents. Further, the court held that the lower court did not abuse its discretion by (a) refusing to consider a direct consent adoption petition before the Department of Children, Youth, and Families (DCYF) petition to terminate parental rights, (b) finding that DCYF made reasonable efforts to reunify by presenting, but refusing to fund, multiple caseplans, (c) finding the parents unfit, despite their compliance with DCYF, primarily due to their cognitive limitations, and (d) finding that the termination of parental rights was in the best interests of the child despite the parents' demonstrated love for and efforts to parent their child, who had been in non-relative foster care from birth.

FACTS AND TRAVEL

Kayla N. was born to Dawn and Irving N. on April 13, 2000.1 Dawn had previously signed an open adoption agreement as to her older daughter, Michelle, in response to DCYF's petition for involuntary termination of parental rights.2 The petition had alleged that Dawn was unfit because she was homeless and cognitively limited.3 As a result of its previous involvement with Dawn, DCYF removed Kayla from her parents and, failing to find a suitable relative placement,4 placed Kayla into non-relative foster care.5 DCYF developed several case plans for Dawn and Irving, each

---

2. *Id.* at 1203. Open adoptions are common responses to involuntary termination of parental rights petitions because they permit the parents to preserve visitation rights with their children; termination petitions are also common because DCYF is required by statute to bring them under certain conditions of timing. *See* R. I. GEN. LAWS § 40-11-12.1.
3. *Id.*
4. *Id.* at 1204. Irving's sister Sandra N. was caring for two terminally ill relatives at the time and therefore deemed unsuitable. *Id.*
5. *Id.* Kayla was placed with the same family as her half-sister Michelle. *Id.*
of which claimed a goal of reunifying them with Kayla.\textsuperscript{6} The case plans also required DCYF to provide certain services to Dawn and Irving, most importantly a parent-aide program, provided by Spurwink of Rhode Island, specializing in parents and children with cognitive limitations.\textsuperscript{7} Spurwink oversaw weekly visits between Kayla and her parents until December, 2000, when Dawn and Irving admitted to dependency\textsuperscript{8} conditioned on their receiving Spurwink-supervised home visits with Kayla, which the court duly ordered.\textsuperscript{9} Spurwink, however, refused to supervise home visits, citing to an alleged threat made by Dawn, and as a result DCYF withdrew funding for Spurwink.\textsuperscript{10}

DCYF next referred Dawn and Irving to a second program at John Hope Settlement House.\textsuperscript{11} After a supervisor there provided DCYF with a favorable progress report on Dawn and Irving, the DCYF caseworker failed to disclose this report and DCYF withdrew funding from the program.\textsuperscript{12}

Following that caseworker's reassignment on order of the court, Dawn's and Irving's visitation with Kayla increased to twice per week. They received three new referrals to programs with which they substantially complied, and by August, 2001 the court had granted weekly overnight visits between Kayla and her parents under the supervision of Irving's sister Sandra.\textsuperscript{13} In January, 2002, Irving sought to have Kayla placed with Sandra; less than a week later, DCYF filed a petition to terminate Dawn's

\textsuperscript{6} Id.
\textsuperscript{7} Id.
\textsuperscript{8} Id.; see R. I. GEN. LAWS § 14-1-3(6):

"Dependent" means any child who requires the protection and assistance of the court when his or her physical or mental health or welfare is harmed or threatened with harm due to the inability of the parent or guardian, through no fault of the parent or guardian, to provide the child with a minimum degree of care or proper supervision because of:

(i) The death or illness of a parent; or

(ii) The special medical, educational, or social service needs of the child which the parent is unable to provide.

\textsuperscript{9} Id.
\textsuperscript{10} Id. at 1204-05.
\textsuperscript{11} Id. at 1205.
\textsuperscript{12} Id. at 1205, 1205 n.4.
\textsuperscript{13} Id. at 1205.
and Irving's parental rights. In February, Dawn and Irving independently moved to have Kayla permanently placed with Sandra; in April, Sandra filed an adoption petition. From May to December, 2002, the court held consolidated hearings on the adoption and termination petitions.

As a result of the hearings, Dawn and Irving were found unfit to parent Kayla. Their parental rights were terminated, and the adoption petition denied because (a) it had been filed in response to DCYF's petition to terminate Dawn's and Irving's parental rights and (b) Kayla and her half-sister Michelle had bonded over the course of Kayla's time in foster care. Dawn, Irving, and Sandra all filed appeals before judgment was entered.

ANALYSIS AND HOLDING

On appeal before the Rhode Island Supreme Court, Dawn, Irving, and Sandra contended that the hearing justice had incorrectly found (a) that DCYF had made reasonable efforts to reunify Kayla with her parents, (b) that Dawn and Irving were unfit, and (c) that Kayla's best interests were served by terminating Dawn's and Irving's parental rights. They also argued that the hearing justice had erred in refusing to consider the adoption petition before the termination of parental rights petition. Finally, the Rhode Island Disability Law Center, Inc. argued as an amicus curiae that the ADA applies to termination of parental rights proceedings, precluding the court from discriminating against parents on the basis of cognitive

14. Id. DCYF's petition relied on R. I. GEN. LAWS § 15-7-7(a)(2)(vii): "The parent has exhibited behavior or conduct that is seriously detrimental to the child, for a duration as to render it improbable for the parent to care for the child for an extended period of time," and R. I. GEN. LAWS § 15-7-7(a)(3):

The child has been placed in the legal custody or care of the department for children, youth, and families for at least twelve (12) months, and the parents were offered or received services to correct the situation which led to the child being placed; provided, that there is not a substantial probability that the child will be able to return safely to the parents' care within a reasonable period of time considering the child's age and the need for a permanent home.

15. Id. at 1206.
16. Id.
17. Id.
18. Id. at 1206 and n.6.
19. Id. at 1207.
20. Id.
The Rhode Island Supreme Court held that the hearing justice’s findings of fact were not clearly erroneous, the adoption petition was properly excluded from consideration because DCYF had not agreed to the adoption, and the ADA does not apply to termination of parental rights proceedings.

Findings of Fact

Because reasonable efforts to reunify, parental unfitness, and the best interests of the child are broadly-defined standards which afford great discretion to the hearing justice, the court ceded to and upheld the hearing justice’s findings on these issues. Rhode Island General Laws § 15-7-7(b)(1) requires that DCYF make reasonable efforts to reunify a child and her parents before the court may grant a petition to terminate the parental rights of the parents. The court held that the numerous case plans DCYF developed were sufficiently demonstrative of reasonable efforts to pass statutory muster. Rhode Island General Laws § 15-7-7(a)(2) requires a showing of parental unfitness by clear and convincing evidence as grounds for an order to terminate parental rights. The court held that testimony from various witnesses who had examined Dawn and Irving both individually and interacting with Kayla was sufficient basis for a finding of unfitness regardless of both conflicting testimony and abundant evidence of Dawn’s and Irving’s compliance with DCYF and love for their child. Rhode Island General Laws § 15-7-7(c)(1) requires the hearing justice to find that a child’s best interests would be served by the termination of her parents’ rights as to her as grounds for such an order. The court held that the combination of a finding that Dawn and Irving were unfit and evidence of Kayla’s establishment in the home of her foster family,

21. Id.
22. Id. at 1209-1211.
23. Id. at 1211-1212.
24. Id. at 1208.
25. Id. at 1209-1212.
26. Id. at 1209.
27. R.I. GEN. LAWS § 15-7-7(a)(2).
29. R.I. GEN. LAWS § 15-7-7(c)(1).
including bonding with her half-sister, provided sufficient grounds to demonstrate that a termination of parental rights was in Kayla’s best interests despite Dawn’s and Irving’s persistent efforts to create a normal family setting for Kayla, whom they very evidently loved.30

Adoption Petition

Because Rhode Island General Laws § 15-7-14.1(b)(4), the statute authorizing open adoptions, expressly requires the consent of DCYF, and that consent was lacking here, the hearing justice properly considered DCYF’s petition for termination of parental rights and was in fact required by statute to reject the adoption petition.31

Americans with Disabilities Act

Because termination of parental rights proceedings are held for the benefit of the child and not the parents, the ADA does not protect disabled parents from discrimination in such proceedings.32 The ADA33 prohibits any public entity from discriminating against disabled persons with regard by denying such persons the benefits of any services, programs, or activities.34 The court relied on cases from other jurisdictions35 in holding that discrimination against disabled parents is permissible in termination of parental rights proceedings because such discrimination does not deny the parents of any benefit as contemplated by the statute.36 This holding has been appealed to the Supreme Court of the United States; the certiorari petition is still pending as of the time of writing.

30. In re Kayla N., 900 A.2d. at 1211.
31. Id. at 1211-12.
32. Id. at 1208.
34. Id. at § 12132.
36. In re Kayla N., 900 A.2d at 1208.
This case stands as a testament to some of the deep flaws within and the child welfare system in general and specifically those laws which led to its result. At the federal level, the Adoptions and Safe Families Act ("ASFA") constrains state child welfare proceedings by mandating termination of parental rights as a function of time rather than unfitness per se. At the state level, the vast discretionary authority vested in the hearing justices, designed to permit flexibility in child welfare proceedings for the greatest benefit to the child, instead places in the justices' hands the extremely difficult task of sifting truth from an overly adversarial proceeding in which the state reaps most of the procedural benefits. The combination of federal and state child welfare laws effectively shifts the state's presumption from parental fitness to parental unfitness. This shift is clearly reflected in Dawn's and Irving's struggles to demonstrate their fitness to a state which never gave them a valid chance.

The rigid structure imposed by the ASFA precluded Dawn and Irving from overcoming the hurdles laid in their path by a caseworker who undercut efforts toward reunification. How is it possible to reconcile the caseworker's conduct, which required her dismissal from the case, with a finding that DCYF made reasonable efforts to reunify? Only the time crunch mandated by the ASFA provides any explanation: Kayla had spent two years in uncertainty while her parents fought for her. That one year of that time was wasted under the supervision of a contrarian caseworker is no matter for concern under the ASFA, under which quantity of time is considered more important than quality of time.

The child welfare system places the best interests of the child as its highest priority, but the best interests standard is nebulous and at times intertwined with issues of parental fitness.

38. Id. at § 103.  
39. See, e.g., R. I. GEN. LAWS § 15-7-14.1(b)(4), requiring DCYF to agree to parents' petition for open adoption despite the department's stance adverse to the parents in termination of parental rights proceedings.  
40. In re Kayla N., 900 A.2d at 1204-05 n.4.  
41. Id. at 1204-07.  
42. See, e.g., R. I. GEN. LAWS § 15-7-7(c)(1).
Here, Dawn's and Irving's success even under the supervision of the above mentioned caseworker calls into question not only the court's ultimate finding of unfitness, but the very root of this case: Kayla's removal at her birth, which was founded primarily on Dawn's struggles with her older daughter Michelle. One parent's struggles with a previous child present only flimsy ground on which to find that a second child's removal from both parents is in her best interests—perhaps this removal was in Kayla's best interests, but perhaps it was not. Where the best interests of the child are not clear-cut, the question becomes whether to err on the side of the state or the natural parents; this case is a clear example of erring on the side of the state. The legality and utility of this presumption of parental unfitness have recently been called into question and are surely worthy of further research.

Justice Robinson's pithy declaration that "John Lennon was not entirely correct when he famously declared: 'Love is all you need.'" may be correct, but the current system underestimates the connection between children and their parents and incorrectly seeks to interpose the state as a surrogate where there is any question of fitness. The result here was, to use Justice Robinson's own word, "tragic."

The ADA has the potential, however, to alleviate for some parents the problems inherent in the child welfare system. Application of the ADA to this case would have at least raised questions regarding Kayla's removal on grounds of Dawn's cognitive limitations and DCYF's failure to provide adequate services tailored to Dawn's and Irving's particular needs. Furthermore, the court has previously held that the ADA applies to the prison context. This holding seems to completely undercut

---

43. In re Kayla N., 900 A.2d at 1203-04.


45. In re Kayla N., 900 A.2d at n.10.

46. Id.

47. Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 210 (1998) ("Petitioners contend that the phrase 'benefits of the services, programs, or activities of a public entity,' creates an ambiguity, because state prisons do
the court's argument here that a "termination-of-parental-rights proceeding does not constitute the sort of service, program, or activity that would be governed by the dictates of the ADA."\textsuperscript{48}

Just as a prison provides "many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners,"\textsuperscript{49} so does involvement in the child welfare system provide such services as parent education and sometimes even first month's rent payments.\textsuperscript{50} Just as the prison system generally exist for the benefit of society, so does the child welfare system generally exists for the benefit of children. Nevertheless, the ADA applies to incidental benefits offered to prisoners, while Rhode Island would deprive parents of that basic level of accommodation.

**CONCLUSION**

In a termination of parental rights proceeding, the hearing justice is afforded considerable discretion in determining the issues of reasonable efforts to reunify, parental fitness, and best interests of the child, and in this case did not abuse such discretion.\textsuperscript{51} DCYF must approve a petition for open adoption before the hearing justice may grant such a petition; the absence of such approval here required the hearing justice to deny the adoption petition.\textsuperscript{52} The Americans with Disabilities Act (ADA) does not apply to proceedings to terminate the parental rights of cognitively limited parents.\textsuperscript{53}

John Maxwell Greene

---

\textsuperscript{48} In re Kayla N., 900 A.2d at 1208.

\textsuperscript{49} Yeskey, 524 U.S. at 210.

\textsuperscript{50} See, e.g., In re Nicole C., 760 A.2d 940, 942 (2000).

\textsuperscript{51} In re Kayla N., 900 A.2d at 1209-12.

\textsuperscript{52} Id. at 1211-12.

\textsuperscript{53} Id. at 1208.
Insurance Law. Metropolitan Property and Casualty Insurance Company v. Barry, 892 A.2d 915 (R.I. 2006). Under Rhode Island General Laws § 27-7-2.1, the state of Rhode Island (with limited exceptions) requires that the issuers of motor vehicle insurance policies provide uninsured motorist coverage meeting or exceeding a prescribed statutory minimum. In the context of arbitration proceedings concerning underinsured/uninsured motorist (UM) claims, prejudgment interest is to be calculated from the date of the injury of the insured to the date of any partial payment, at which point any such partial payment is to be deducted from the total award and prejudgment interest is to accrue on this reduced figure from the date of the partial payment to the date that the judgment is satisfied. This formula, mandated for use in all UM arbitration proceedings involving prejudgment interest, is designed to harmonize into a uniform rule, the means by which prejudgment interest is to be calculated, effectuate the policy goals underlying Rhode Island General Laws § 9-21-10(a), and facilitate the ministerial computation of prejudgment interest without judicial interference.

FACTS AND TRAVEL

On November 8, 1998, the defendant, insured claimant, Collin Barry, was involved in a motor vehicle accident with an underinsured driver. The underinsured driver was covered under a limited liability insurance policy issued by Liberty Mutual Insurance Company. On February 7, 2001, after consulting with his insurer, plaintiff Metropolitan Property and Casualty Insurance Company ("Metropolitan"), the defendant accepted a settlement offer from Liberty Mutual for the underinsured driver's $50,000 policy limit. When the defendant's remaining UM claim was subsequently denied by Metropolitan on April 25, 2001, the parties stipulated to arbitration for the determination of damages

2. Id.
3. Id. at 916-17.
on the defendant's outstanding claim.\textsuperscript{4}

The arbitration panel issued two separate awards: the first award, for $49,125, reflected total damages less the payment made by Liberty Mutual,\textsuperscript{5} while the second award, for $8,351, constituted the prejudgment interest on this modified award for the period between April 25, 2001, (the agreed upon date that Metropolitan denied the defendant's UM claim) and October 15, 2002 (the date the arbitration panel issued its award).\textsuperscript{6} When Metropolitan sought confirmation of both awards in Rhode Island Superior Court, the defendant filed a cross-petition seeking modification of the prejudgment interest award on the ground that the arbitration panel had incorrectly calculated the prejudgment interest award.\textsuperscript{7} The Superior Court confirmed both of the awards and denied the defendant's cross-petition.\textsuperscript{8} The defendant appealed.\textsuperscript{9} The case was brought before the Rhode Island Supreme Court via the court's summary calendar where an order was issued directing the case to proceed to full briefing and argument.\textsuperscript{10}

\textsuperscript{4} Id. at 917.

\textsuperscript{5} Id. The arbitration panel initially set total damages at $99,125. Id. However, this award was downwardly adjusted to $49,123 to reflect the $50,000 settlement payment made by Liberty Mutual. Id.

\textsuperscript{6} Id. The arbitration panel's prejudgment interest calculation utilized the formula that the Supreme Court had previously mandated for use in all UM arbitration cases following its decision in \textit{Geremia v. Allstate Insurance Co.} See 798 A.2d 939 (R.I. 2002). This formula, while paralleling the basic computational structure of the calculation method that had previously been adopted by the Court in \textit{Merrill v. Trenn}, 706 A.2d 1305 (R.I. 1998), departed from this model in one substantive respect. Rather than starting the interest clock running at the time of the claimant's injury (as was the case in \textit{Trenn}), the \textit{Geremia} formula required that prejudgment interest "accrue on the date that the UM carrier [denied] the claim or [failed] to pay the same within a reasonable period . . . until settlement [was] made or until a valid and final award or judgment in favor of the claimant [was] satisfied." See \textit{Geremia}, 798 A.2d at 941. Thus, application of the \textit{Geremia} formula by the arbitration panel, rather than the \textit{Trenn} formula, naturally produced a quantitatively different result.

\textsuperscript{7} \textit{Barry}, 892 A.2d at 917.

\textsuperscript{8} Id.

\textsuperscript{9} Id.

ANALYSIS AND HOLDING

Due to the "Byzantine nature"\textsuperscript{11} of Rhode Island's past UM claims jurisprudence and the meandering development of the case law,\textsuperscript{12} the issues presented in this case were numerous and complex.\textsuperscript{13} However, the basic issue to be determined, from a practical standpoint, was relatively straightforward: "when and how prejudgment interest should be added to an arbitration award."\textsuperscript{14} In seeking a solution that would "best [harmonize] the policy goals of (1) promoting swift settlement and (2) compensating the insured for any delay in benefits that the insured, who purchased the UM policy, is legally entitled to collect,"\textsuperscript{15} the court settled on a method of prejudgment interest computation that it had previously adopted several years earlier in \textit{Trenn}, yet had curiously abandoned in subsequent decisions. Taking these policy objectives into consideration, the court held that:

In all pending and future UM arbitration cases, prejudgment interest shall accrue on the total damages fixed by the arbitrator(s), computed from the date of the injury to the date of any partial payment; at which point the partial payment shall be deducted from the first calculation and prejudgment interest shall accrue on the reduced amount from the date of the partial payment to the date that the judgment is satisfied.\textsuperscript{16}

Because the court's holding was incapable of being reconciled with the prejudgment interest award the arbitration panel had issued,\textsuperscript{17} and the Superior Court had confirmed,\textsuperscript{18} the judgment of the Superior Court was vacated and an order was issued to have prejudgment interest recalculated in accordance with the

\begin{itemize}
  \item[11.] See Barry, 892 A.2d at 918.
  \item[13.] See Barry, 857 A.2d at 761-62.
  \item[14.] \textit{Barry}, 892 A.2d at 918.
  \item[15.] See id. at 924.
  \item[16.] Id.
  \item[17.] See supra note 6.
  \item[18.] \textit{Barry}, 892 A.2d at 917.
\end{itemize}
Interest in Civil Actions as Governed by Rhode Island General Law § 9-21-10

Prejudgment interest in civil actions in Rhode Island is governed by statute. Rhode Island General Laws § 9-21-10 provides that:

In any civil action in which a verdict is rendered or a decision made for pecuniary damages, there shall be added by the clerk of the court to the amount of damages interest at the rate of twelve percent (12%) per annum thereon from the date the cause of action accrued, which shall be included in the judgment therein.

Prejudgment interest "is not an element of damages but is purely statutory, peremptorily added to the award by the clerk." Thus, rather than being a "function of the Superior Court to add interest to an arbitration award," arbitrators should add prejudgment interest to their awards unless the parties specifically provide otherwise by agreement. Because the requirement that prejudgment interest be added to arbitration awards is statutory in nature, the underlying issue for the court in this case was not whether interest should be added at all, but rather when prejudgment interest should begin to accrue in the UM arbitration context.

In establishing the date of the injury as the initial starting point, the court based its decision on its reading of Rhode Island General Laws § 9-21-10 in conjunction with § 27-7-2.1. The court first noted that § 27-7-2.1(a) "requires that a UM policy provide for the protection of persons insured under the policy who are legally entitled to recover damages from owners or operators of

19. Id. at 926.
21. Id.
23. See id.
uninsured motor vehicles . . . ." 25 The court next pointed out that in Rhode Island, "an injured plaintiff who recovers damages in any civil action, is legally entitled to collect, both pecuniary damages, and 'interest . . . from the date the cause of action accrued[.]" 26 Keying in on this language, the court reasoned that because the defendant insured was legally entitled to collect under the terms of his policy, 27 prejudgment interest should naturally have begun "from the date the cause of action accrued[d], which . . . [was] the date of the injury." 28 Because the Trenn formula best modeled this approach, the court mandated its use for prejudgment interest computation in all future UM arbitration proceedings. 29

The Trenn Formula: Uniformity, Fairness, and Administrability

In re-establishing the Trenn formula as the "new" standard by which to compute prejudgment interest in UM arbitration cases, the court based its decision on a number of policy considerations. First, the court noted that the implementation of different methods of computation in the past, had led to "inconsistent results" in the "numerous UM arbitration cases that [had] come before [the] Court . . . ." 30 Thus, one of the principal rationales behind the establishment of a singular standard was to "provide fairness to all interested parties" through the enunciation of a "mandatory, clear and uniform" rule. 31 In addition to providing for a uniform method of interest computation, the court also concluded that the Trenn formula provided the "fairest and best way to calculate prejudgment interest in UM arbitration claims." 32

---

25. See id. at 923 (quoting R.I. GEN LAWS § 27-2-2.1(a) (1956)).
26. See id. at 923-24 (quoting R.I. GEN LAWS § 9-21-10(a) (1956)).
27. See id. at 923.
28. See id. at 924. The court noted that under Rhode Island law, a "cause of action accrues on the first date an injured has a right to seek judicial relief." Id. at n.5 (citing Cardi Corp. v. State, 561 A.2d 384, 387 (R.I. 1989)).
29. See id. at 924.
30. Id. at 918.
31. Id. at 922.
32. Id. at 925-26. In Merrill v. Trenn, the court considered, but ultimately rejected, another more actuarially sophisticated method of calculating prejudgment interest in favor of the approach it adopted. See 706 A.2d 1305, 1310-13 (R.I. 1998). In that case, the court noted that its formula was "preferable to [this] commendable but perhaps more-difficult-to-administer" method because it provided "a simpler and relatively more
In arriving at this determination, the court pointed out that the formula "[protected] the injured insured by encouraging early settlement or providing for prejudgment interest in the event of delay, while at the same time [recognized] the contractual rights of the UM carrier." Finally, the court articulated the need to adopt a rule that would streamline the administration of prejudgment interest in UM arbitration cases. The court noted that because the inconsistent application of different interest formulas in the past had "given rise to numerous appeals" and "[had] become anything but simple and straightforward in the arbitration context," a uniform rule was necessary so as to facilitate the court's "oft-cited holding that the award of prejudgment interest is a ministerial act to be performed by the clerk without judicial intervention." In settling on the \textit{Trenn} formula as the means to calculate prejudgment interest, the court concluded that it sufficiently met all three criteria: uniformity, fairness, and administrability.

\textbf{COMMENTARY}

This case represents the culmination of a rather circuitous journey that began nearly a decade ago with the court's decision in \textit{Trenn}. The \textit{Trenn} formula, adopted as the now uniform standard for prejudgment interest computation in all UM arbitration claims, does an effective job at facilitating the several policy objectives laid out by the court. First, by providing a uniform method of prejudgment interest calculation for all UM arbitration claims, the formula contributes to the efficiency of the claims settlement process while at the same time helping to avoid protracted, costly and unnecessary litigation. Additionally, the formula also strikes a balance by recognizing and enforcing the legal obligations of both insurance carriers and policy holders. As the court explained, "because . . . a UM carrier is liable in contract

\begin{itemize}
  \item workable calculation while still meeting the policy goals of [Rhode Island's] prejudgment-interest statute . . . " \textit{See id.} at 1313.
  \item \textit{Barry}, 892 A.2 at 924. The court also expressed agreement with the Rhode Island Trial Lawyers Association's \textit{amicus} brief that the formula "best approximated the compensation due an injured plaintiff had [an underinsured tortfeasor] been adequately insured." \textit{See id.} at 923
  \item \textit{See id.} at 919.
  \item \textit{See id.}
  \item \textit{See id.} at 918.
\end{itemize}
to pay UM benefits pursuant to the terms of its contract, a mandatory rule that the prejudgment interest clock starts at the time of the incident, is fair to both sides."37 Finally, the Trenn formula spares arbitrators and courts from the perplexing and unenviable task of applying different interest formulas depending on the specific facts of a particular case. While a more nuanced approach in this regard might have been preferential to insurance carriers,38 the court nevertheless concluded that "a simpler and relatively more workable calculation"39 was preferable so long as it still met the policy goals of Rhode Island's prejudgment interest statute.40

CONCLUSION

The court's opinion in this case was issued largely in response to the need for a uniform prejudgment interest formula that would facilitate the policy objectives underlying Rhode Island General Laws § 9-21-10 while at the same time lend itself to straightforward judicial administration. This end was accomplished through the re-adoption of a rule that takes into account the attendant legal obligations of both insurance carriers and policy holders in the UM arbitration context. By resolving the issue of how prejudgment interest is to be calculated once and for all, the court's opinion in this case will undoubtedly assist in streamlining the process of UM claims settlement in Rhode Island.

Micah J. Penn

37. See id. at 924.  
38. See id. at 924-25.  
39. See id. at 920 (quoting Merrill v. Trenn, 706 A.2d 1305, 1313 (R.I. 1998)).  
40. See id. at 920, 925.
Property Law. East Bay Community Development Corporation v. Zoning Board of Review of the Town of Barrington, 901 A.2d 1136 (R.I. 2006). The State Housing Appeals Board (SHAB) will normally give deference to decisions rendered by a municipal zoning board, given their superior knowledge of the municipality's local requirements and needs. However, Rhode Island's Low and Moderate Income Housing Act mandates that all municipalities have a ten percent affordable housing quota. Thus, zoning decisions of municipalities that do not meet the statutorily proscribed quota will be held to a level of higher scrutiny by the SHAB. If a municipal zoning board is unable to persuade SHAB that its local requirements and needs are reasonable in light of the State's need for affordable housing, its decisions will be reversed. So long as the SHAB does not act in excess of its authority under the Act, the Supreme Court is compelled to affirm such judgments.

FACTS AND TRAVEL

East Bay Community Development Corporation (East Bay), a private non-profit organization, applied for a comprehensive permit to develop low or moderate income housing in the Town of Barrington, Rhode Island (Town).1 “Sweetbriar,” the project's proposed name, called for the development of 8.64 acres of land for the construction of twenty-three duplexes which created forty-seven units available for households earning at or below sixty percent of the area's median income.2 In addition, three single family homes would be constructed. One would be available for a family earning at or below eighty percent of the area's median income and the remaining two would be available for families earning at or below 120 percent of the area's median income.3 All together “Sweetbriar” would include fifty housing units.4

2. Id.
3. Id.
4. Id.
The Zoning Board of Review for the Town of Barrington (zoning board) unanimously denied East Bay's application because the application did not conform to the Comprehensive Plan for the Town of Barrington which called for the site to be used for business or elderly housing. Furthermore, the application was inconsistent with the Town's local needs including safety concerns such as traffic, fire, and density. East Bay subsequently appealed to the SHAB which vacated the decision of the zoning board denying East Bay's permit. The Town appealed to the Supreme Court of Rhode Island which affirmed the decision of the SHAB.

ANALYSIS AND HOLDING

SHAB's Standard of Review

The SHAB must determine whether a municipal zoning board's decision is "reasonable and consistent with local needs." However, SHAB's "threshold inquiry" is whether or not the Town has met the ten percent quota for low income housing mandated by Rhode Island's Low and Moderate Income Housing Act (Act). The purpose of the Act, passed by the General Assembly in 1991, was to address the "acute shortage of affordable, accessible, safe, and sanitary housing for . . . citizens of low and moderate income." Thus, a determination of whether a municipal zoning board decision is "consistent with local needs" depends upon the municipality's compliance with the statutorily mandated quota. "[I]t is incumbent upon SHAB to examine the decision and the [local requirement] on which it rests and determine whether the [local requirement] is reasonable in light of the state's need for low income housing." Furthermore, SHAB is authorized to apply "a higher level of scrutiny" and give less deference to the decisions of

5. Id. at 1141-42.
6. Id. at 1142.
7. Id. at 1143.
8. Id. at 1163.
10. Id.; see generally R.I. GEN. LAWS § 45-53 (1956).
11. Id. at 1144 (quoting R.I. GEN. LAWS § 45-53-2).
12. Id. at 1146-47 (quoting Omni Dev. Corp., 814 A.2d at 899).
13. Id. at 1147 (quoting Omni Dev. Corp., 814 A.2d at 899).
municipalities that have failed to meet this quota.\textsuperscript{14}

\textit{Decision of SHAB}

SHAB found that the Town of Barrington "had only 1.48% affordable housing units of the town's total units ascertained in the last decennial census."\textsuperscript{15} Similarly the town had no existing strategy to meet the ten percent quota mandated by the Act.\textsuperscript{16} Next, SHAB determined the Town's Comprehensive Plan, argued in denial of East Bay's application, was indeed a local requirement under the Act.\textsuperscript{17} These findings were sufficient "for SHAB to assess the reasonableness of the obstacles to affordable housing that the plan contains," given that the "[A]ct essentially delegates to SHAB the authority to override unreasonable local requirements, the overtly strict application of which frustrate the development of affordable housing in municipalities that need it most."\textsuperscript{18}

The Town's Comprehensive Plan reserved the "Sweetbriar" site for elderly housing and a business district to expand the Town's economic base.\textsuperscript{19} The SHAB found these arguments unpersuasive when "measured against the town's failure to have satisfied its statutory quota of affordable housing."\textsuperscript{20} SHAB noted that certain lots had been vacant for thirty years and that highway access was "extremely limited" for the area to be used effectively as a business district.\textsuperscript{21} In terms of the elderly housing argument posed by the Town, SHAB "failed to uncover a rational explanation for why the parcels were suitable for elderly housing . . . but not affordable \textit{non-elderly} housing."\textsuperscript{22} Thus, SHAB concluded "the local requirement was an unreasonable restraint on affordable housing."\textsuperscript{23}

SHAB next determined whether the zoning board's decision

\textsuperscript{14} \textit{Id.}
\textsuperscript{15} \textit{Id.} at 1152.
\textsuperscript{16} \textit{Id.}
\textsuperscript{17} \textit{Id.} at 1155.
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.}
\textsuperscript{23} \textit{Id.} at 1156.
"was consistent with local needs." 24 The zoning board based their denial of East Bay's application on four safety issues: traffic levels, fire safety, the desire to maintain current density levels, and the need for granite curbing. 25 The final issue was not brought up in appeal, but the former three were addressed by SHAB. 26 In regards to the zoning board's concern with traffic levels, SHAB found that the evidence presented by the Town was insufficient. This evidence included the personal observations of municipal council members and the comments of a single spectator. 27 In regards to the zoning board's concern with fire safety, SHAB found "fire risks could not be adequately addressed at the building permit stage." 28 Finally, the density argument posed by the Town was rejected by SHAB because the contention lacked specificity. 29

Supreme Court's Standard of Review

The Supreme Court will "reverse a SHAB decision [only] if it violates constitutional or statutory provisions, was made in excess of statutory authority or upon error of law, or was otherwise clearly erroneous in view of the evidence or was otherwise arbitrary or capricious." 30

Supreme Court's Decision

SHAB's finding that "the town, lacking fulfillment of its statutory quota, unreasonably relied upon a local requirement that frustrated the development of much-needed affordable housing" was affirmed by the Rhode Island Supreme Court. 31 The court found SHAB "adequately evaluated the arguments presented by the parties and sufficiently searched the voluminous record for facts to support its conclusion" and was "satisfied that SHAB did not make its determination in excess of statutory

24. Id. at 1157.
25. Id.
26. Id. at 1157 n.20.
27. Id. at 1157-58.
28. Id. at 1161.
29. Id.
31. Id. at 1156.
authority, nor was it clearly erroneous or otherwise arbitrary or capricious."32 Using this same standard of review, the court likewise affirmed SHAB's conclusion "that the development would not have a negative impact on traffic safety, did not exhibit fire risks . . . was not excessively dense, and that the zoning board unreasonably found otherwise."33 The court noted, however, that the zoning board is not prohibited by the Act to "impos[e] conditions and requirements" upon East Bay's project provided that they do not "make the building or operation of the housing infeasible."34

**COMMENTARY**

The Rhode Island Supreme Court gives great deference to the findings of SHAB noting that "the zoning board is constrained, as are we, by the [Low and Moderate Income Housing Act]."35 Given that the Town of Barrington was gravely non-compliant with the ten percent affordable housing quota mandated by the Act, the SHAB was able to assess the local requirement and needs argued by the zoning board with a "higher level of scrutiny."36 In the absence of a showing that SHAB acted in "excess of statutory authority" or in a manner that was "arbitrary or capricious," the court was compelled to affirm its judgment.37

The Town of Barrington has only 1.48% affordable housing.38 Furthermore, its arguments in denying East Bay's permit were futile at best. The Town relied upon poorly conceived economic and housing arguments, and based its traffic, fire, and density concerns on evidence that was both incompetent and unreliable.39 An often quoted remark in property controversies dealing with racial or economic discrimination states, "clever men may conceal their motivations."40 The decisions of the zoning board surely cannot be classified as "clever" given the nature of their

---

32. *Id.*
33. *Id.* at 1161.
34. *Id.* at 1162.
35. *Id.* at 1161.
36. *Id.* at 1147.
37. *Id.* at 1161.
38. *Id.* at 1152.
39. See generally *id.* at 1155, 1157-61.
40. See United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974).
arguments in support of local requirement and needs, but their "motivations" are clear. A municipality that seeks to maintain an affluent population while excluding those with low to moderate incomes from its boundaries should not be given such freedom. Given Rhode Island's "acute shortage of affordable, accessible, safe, and sanitary housing for . . . citizens of low and moderate income" the court accurately concluded that the decision of the SHAB, reversing the zoning board's denial of East Bay's application, was within its authority under the Act.41 Likewise, and although not explicitly mentioned in the opinion, the Court's disposition is consistent with ideals of justice and equality.

CONCLUSION

The Rhode Island Supreme Court held SHAB did not act in excess of its statutory authority under the Low and Moderate Income Housing Act in reversing the decision of the zoning board denying East Bay's application.42 In doing so, it affirmed SHAB's finding that Barrington's local requirements and needs were unpersuasive in light of the Town's failure to meet the ten percent affordable housing quota mandated by the Act.43

Monica Rose Fanesi

42. Id. at 1156, 1161.
43. Id. at 1161.
Property Law/Constitutional Law/Debtor Creditor/ Mechanics' Lien Law. F.C.C., Inc. v. Reuter, et al., 867 A.2d 819 (R.I. 2005). The Mechanics' Lien Law, as amended through the enactment of section 34-28-17.1 (the “Statute”), that provides owners of real estate the opportunity for an immediate hearing on the validity of a lien to be filed against the real estate, is constitutional; it does not violate the owners' due process rights under the Fourteenth Amendment of the U.S. Constitution and article 1, section 2, of the Rhode Island Constitution. Further, the retroactive provision of section 34-28-17.1, as provided for by the Rhode Island General Assembly, permits the Rhode Island Supreme Court to examine all pending mechanics' liens as of the date of the enactment of section 34-28-17.1.

FACTS AND TRAVEL

In October, 1998, Richard and Rhonda Reuter (the “Reuters”), the owners of real estate located in Barrington, Rhode Island (the “Property”), contracted with F.C.C., Inc. (“FCC”) to construct a single-family dwelling thereon. A dispute arose between them prior to the completion of the construction project on the Property. The Reuters alleged that FCC failed to perform the contract as agreed, and that the work actually completed was done negligently, in an unworkmanlike manner, in violation of state and local law and ordinances. As a result, the Reuters denied FCC further access to the Property to continue the planned construction.

On May 17, 1999, FCC filed in the land evidence records, Barrington, Rhode Island, a “notice of intention” under the Statute. Pursuant to those pertinent provisions under the

2. Id. at 820.
3. Id.
4. Id.
5. Id. (citing R.I. GEN. LAWS § 34-28-4 (1995)).
Statute, FCC then filed with the Providence County Superior Court a petition to enforce mechanics' lien on August 31, 1999\(^6\) (the "Petition"), and two days later, recorded a notice of lis pendens against the Property.\(^7\)

In response to the Petition, the Reuters moved for summary judgment (the "Motion") and also counterclaimed, asserting, among other things, breach of contract, unworkmanlike and unlawful performance, negligence, slander of title, abuse of process, fraudulent and negligent misrepresentation, deceptive trade practices, intentional interference with contractual relations, and breach of implied warranty of habitability.\(^8\) They further alleged in the Motion that the Statute was unconstitutional and the FCC failed to comply with the mandatory directives thereunder, arguing that the lien was invalid both as a matter of law and because of FCC’s failure to comply with the stringent statutory requirements of the Statute.\(^9\)

Following the hearing, the Motion was granted before the trial justice on September 23, 2003.\(^10\) The trial justice based his decision upon his holding in another case seeking a determination of the constitutionality of the Statute,\(^11\) in which case he held the Statute unconstitutional.\(^12\)

Prior to its 2003 amendment, the Statute did not provide for a hearing either before or immediately after the perfection of the lien.\(^13\) Instead, the property owner's only immediate means of

---

6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
12. F.C.C., 867 A.2d at 820.
13. Id. at 821 (quoting Gem Plumbing, 2003 WL 21018168, at *3).
removing the lien would be to provide a bond or deposit cash equal to the amount claimed by the lienholder. Based upon the Statute at the time of the hearing on the Motion, the trial justice, citing *Gem Plumbing*, determined that the Statute implicated a significant property interest, and that it failed to provide the necessary procedural due process safeguards required by the Constitutions of both the United States and the State of Rhode Island.

The Trial Justice entered an order on October 10, 2003, granting the Motion based solely upon the unconstitutionality of the Mechanics' Lien Statute. FCC appealed.

**HOLDING AND ANALYSIS**

The court took notice that in July, 2003, the Rhode Island legislature enacted section 34-28-17.1, providing an opportunity for an immediate hearing before the Superior Court to show cause why the lien is invalid. Although the events giving rise to the matter before the court took place in 1999, well before the enactment of section 34-28-17.1, the amendment became effective two months before the hearing which summary judgment was granted. Although the trial justice made no reference to the newly amended law, its enactment is important, Justice Flaherty concluded:

As we have just articulated in our *Gem Plumbing* opinion, when the law changes while a case is pending appeal, we will apply the law in effect at the time of the appeal, particularly when the Legislature has indicated that the statutory provision is to have retroactive effect . . .

Having noted that the amendment to the Statute applied to all pending mechanics' lien, Justice Flaherty deemed that for

---

16. *Id.* at 821-22.
19. *Id.*
purposes of appeal, the constitutionality of the amended Statute, specifically section 34-28-17.1 would be considered.\textsuperscript{21}

The court concluded that the Statute, as amended, did not violate the constitution; it reversed the decision of the Superior Court and remanded the matter for further proceedings not inconsistent with the court’s opinion.\textsuperscript{22}

**COMMENTARY**

Justice Flaherty affirmed the decision of the court earlier in the day\textsuperscript{23} remedying what the court deemed a prior unconstitutional deprivation of one’s property rights by affirming legislation which established the statutory right to a hearing by a homeowner either before or immediately after the perfection of a mechanic’s lien against the homeowner’s property. The decision also upheld the retroactive provisions of the amendment to the Statute to extend the due process procedural safeguards to any lien in existence on the effective date of the amendment. But technicalities aside, this case, along with *Gem Plumbing*, further extends procedural due process safeguards traditionally reserved to “fundamental” rights, including, but not limited to race, the right to travel and to vote, among others, to the right to own property.

The question arising from the court’s decision will be the court’s determination of the extreme at which one’s property rights will be afforded the same procedural due process safeguards provided for in the Statute. This decision, *Gem Plumbing* and a recent holding from the United States District Court for the District of Rhode Island (involving the constitutionality of the Rhode Island Tax Sale statute)\textsuperscript{24} all provide for property rights to enjoy expanded due process safeguards. What this case and the others present to commercial, real estate and creditors’ rights practitioners is that they need to “dust off” their bar review notes on procedural due process to ensure they may competently counsel

\begin{itemize}
\item \textsuperscript{21} *F.C.C.*, 867 A.2d at 822. ("Because we articulated a great length at process by which we reached this conclusion in our *Gem Plumbing* decision, we shall not repeat that reasoning here, but refer the reader to it for it’s applicability to the instant manner.")
\item \textsuperscript{22} *Id.* at 823.
\item \textsuperscript{23} *See* Gem Plumbing & Heating Co. v. Rossi, et al., 867 A.2d 796 (R.I. 2005).
\item \textsuperscript{24} *See In re Pontes*, 310 F. Supp. 2d 447 (D.R.I. 2004).
\end{itemize}
their respective clients on the pratfalls facing the creation (and perfection) of mechanics’ liens consistent with the Statute.

CONCLUSION

In the second of two cases issued on February 22, 2005 concerning the constitutionality of the Mechanics’ Lien Statute, the court once again upheld that law’s validity as it pertains to constitutional due process procedural safeguards established for the benefit of homeowners to deal with encroachments/liens perfected (or pending perfection) against their properties.\textsuperscript{25}

William J. Delaney*
Property Law. Haydon v. Stamas, 900 A.2d 1104 (R.I. 2006). A seller who gives a buyer the option to purchase his property within a specified time, can by his words, acts, or conduct orally waive the requirement of exercising the option within the stipulated time.

FACTS AND TRAVEL

This dispute revolves around the viability of an oral modification to an option contract which purportedly extended the time in which the defendant, Mr. Leon G. Stamas, could exercise the option to purchase a tract of land in Warwick, Rhode Island from the plaintiff owner, Ms. Barbara B. Haydon (seller).1 The relationship between the parties began when Mr. Stamas first expressed an interest in purchasing the property from Ms. Haydon.2 Ms. Haydon arranged for a real estate agent to negotiate a sales price with Mr. Stamas, and shortly thereafter Mr. Stamas made an offer to buy the property for $179,000.3 Ms. Haydon found the amount acceptable and on February 8, 2004, with the assistance of the real estate agent, an agreement was prepared and signed the following day.4 The February 9 agreement provided in full:

The document confirms receipt of $2000[] from Leon Stama [sic], as a good faith deposit for purchase of Lot #_242_, Plat # _235_currently owned by: Purchase Price for Lot 242 = $179,000. Barbara Haydon, of 81 Crestwood Road [ ] (property has had ground water analysis by R.I. DEM, dated 4.10.00, copy attached.)[.] Deposit is valid to hold property off the for sale market, contingent on a ‘purchase & sales’ agreement signed by both parties by Feb. 23, 2004. Deposit will be returned and property will be put back on the [p]ublic market if said ‘purchase & sales’ agreement is not executed by

2. Id.
3. Id.
4. Id at 1107.
2.23.04.5

The contract was signed, and on February 17, 2004 Mr. Stamas contacted seller and informed her that his lawyer, Kathleen DiMuro, was currently vacationing out of state but would return on Monday, February 23, 2004, the day the contract required the completed purchase-and-sales agreement to be received by the seller.6 When Ms. DiMuro arrived in town on the morning of February 23, 2004 she telephoned the seller who was unavailable, and she left a detailed message requesting a return phone call.7 Having yet received a return phone call, Ms. DiMuro called Ms. Haydon again at 4 p.m. the same day.8 This time Ms. Haydon answered and Ms. DiMuro informed her that she had prepared the purchase-and-sales agreement, and she was going to send it via overnight mail to Mr. Stamas that afternoon and would forward it to seller's attorney, John Comery as soon as she received it.9 Seller informed Ms. DiMuro that her attorney would examine the proposed agreement before it was signed and would prepare the deed of sale.10 Ms. DiMuro then asked whether she could fax Mr. Comery a copy of the purchase-and-sales agreement, and Ms. Haydon responded in the affirmative.11

Shortly after speaking with seller, Ms. DiMuro faxed a copy of the purchase-and-sales agreement to Mr. Comery and sent two copies to Mr. Stamas by over-night mail.12 Once Ms. DiMuro received the signed copies, she forwarded the sign copies via regular mail on February 25; however, they were not post-marked

5. Id. (alteration in original).
6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id. Ms. Haydon’s deposition reads as follows:
' Q. * * * I think you said Ms. DiMuro said that she would prepare the purchase and sales agreement; she would overnight it to Mr. Stamas, who was in Florida, and would fax a copy of it to Mr. Comery, is that correct?
That’s correct.
Q. Okay. And what did you say to her?
A. ‘Okay.’
Id.
12. Id. at 1107.
until February 26, and seller's attorney did not receive them until March 1, 2005. In the mean time, on February 27, while the agreement was in the process of being delivered, Ms. Haydon signed a purchase-and-sales agreement with another buyer, Centerville Builders, for $200,000.

Mr. Stamas then filed a notice of *lis pendens* in the records of land evidence for the city of Warwick notifying prospective purchasers of the February 9 agreement. In response, on March 17, 2004, seller filed the instant action in superior court seeking: "(1) a temporary restraining order preventing Mr. Stamas from interfering in the sale of the property to a third party; (2) a preliminary and permanent injunction to remove the cloud of [title of plaintiff's property; and (3) damages costs, and attorney's fees.]" Mr. Stamas answered and counterclaimed for specific performance of Ms. Haydon's obligations under the February 9 agreement and for breach of contract for her failure to fulfill those obligations.

On April 26, 2004, a justice entered an order denying Ms. Haydon's request for a temporary restraining order. On October 14, 2004, at the hearing on the motions for preliminary and permanent injunctions and on Mr. Stamas’s counterclaims, the parties agreed to have the trial justice decide the matter based on the depositions and documents submitted, and they stipulated to certain facts not at issue.

On December 1, 2004 the trial judge issued a written decision striking the notice of *lis pendens* and rejecting the defendant’s counterclaims. The trial justice determined that the February 9 agreement was an option contract, not an agreement for the conveyance of land, and that time was of the essence. After making this determination, the trial judge went on to determine the primary issue: 'whether an oral extension of an option

---

13. *Id.* at 1107-08. The year 2004 was a leap year. *Id.* at n.2.
14. *Id.*
15. *Id.*
17. *Id.* at 1109.
18. *Id.*
19. *Id.*
20. *Id.*
agreement to purchase real property is enforceable.\textsuperscript{22} The justice found that Ms. Haydon did not expressly state that she would extend the deadline, and even if she did, an oral extension of an option deadline in a written option to purchase real estate was not enforceable.\textsuperscript{23} It found seller's response was an affirmative response to review the proposed purchase-and-sales agreement and not an affirmative response to extend the deadline.\textsuperscript{24} It also found that 'because timeliness of an option contact is its ventral component, the expiration date of an option cannot be modified orally.'\textsuperscript{25}

Judgment was entered on December 29, 2004, striking the \textit{lis pendens}, denying Mr. Stamas' request for specific performance, and ordering Mr. Stamas to remove the cloud on seller's title.\textsuperscript{26} Mr. Stamas filed a notice of appeal on December 21, 2004 and this appeal ensued.\textsuperscript{27}

\textbf{ANALYSIS AND HOLDING}

The Rhode Island Supreme Court determined that it was proper to review the case \textit{de novo} because the interpretation of the agreement is a question of law.\textsuperscript{28} The court determined there was no ambiguity, and it was clear that in consideration of a refundable $2,000, Mr. Stamas purchased an option to buy Ms. Haydon's property, and the option had to be exercised by February 23, 2004.\textsuperscript{29} Ms. Haydon, the optionor, was not allowed to sell the property to any person other than Mr. Stamas, the optionee, during the option period, and Mr. Stamas retained the exclusive power, although not an obligation, to purchase during the specified period.\textsuperscript{30} However, Mr. Stamas was able to exercise his power or option only after fulfilling the condition precedent which was the complete execution and subsequent delivery of a

\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id. at 1109-10.
\textsuperscript{27} Id. at 1110 and n.3. Although the defendant filed a notice of appeal several days before judgment was entered, it was nevertheless valid. \textit{Id.} at n.3.
\textsuperscript{28} Id. (citing Lajayi v. Fafiyebi, 860 A.2d 680, 686 (R.I. 2004)).
\textsuperscript{29} Id. at 1111.
\textsuperscript{30} Id.
purchase-and-sales agreement to seller.\textsuperscript{31} Accordingly, the court agreed that the February 9 agreement was an option contract and not a contract for the sale of land.\textsuperscript{32} The judgment is affirmed to the extent it denied defendant's request for specific performance.\textsuperscript{33}

However, the Supreme Court did not agree that the February 9 agreement fell within the strictures of the statute of frauds.\textsuperscript{34} To come to this conclusion the court relied on precedent which previously held that an option contemplating the purchase of land, like a contract for the sale thereof, was enforceable if there was a sufficient memorandum in writing.\textsuperscript{35} The court found that:

[A] note or memorandum satisfies the statute if it provides the "[identity] of the seller and the buyer, their respective intention to sell and to purchase, such a description of the subject matter of sale as may be applied to a particular piece of land, the purchase price, and the terms of payments if the sale is not for cash."\textsuperscript{36}

Relying on this, it determined that Ms. Haydon wrote the terms of the option contract, and held that because she chose to leave out the purchase price, she could not now claim invalidity of the contract because of the lack of such term.\textsuperscript{37}

The court agreed with the trial court's finding that time is generally of the essence in option contracts;\textsuperscript{38} however, it held that an expiration date could be modified orally.\textsuperscript{39} The court looked to a 1983 Rhode Island case which held that once an agreement satisfied the statute of frauds, other elements may be supplied by oral agreement; however, there were some portions of an

\begin{itemize}
  \item \textsuperscript{31} Id.
  \item \textsuperscript{32} Id.
  \item \textsuperscript{33} Id.
  \item \textsuperscript{34} Id. The Rhode Island Statute of Frauds is governed by Rhode Island General Law §9-1-4. R.I. GEN. LAWS §9-1-4 (1956).
  \item \textsuperscript{35} \textit{Haydon}, 900 A.2d at 1111 (quoting Durepo v. May, 54 A.2d 15, 18 (R.I. 1947)).
  \item \textsuperscript{36} Id. (alteration in original) (quoting Vigneaux v. Carriere, 845 A.2d 304, 306 (R.I. 2004)).
  \item \textsuperscript{37} Id. (citing Vigneaux, 845 A.2d at 307). "We refuse to allow plaintiff to assail the viability of that agreement based on the absence of terms she and Mr. Bard shoes, for whatever reason, chose not to include in the option contract." Id.
  \item \textsuperscript{38} Id. at 1111-12 (citing Moulson v. Iannuccilli, 121 A.2d 662, 664 (R.I. 1956); Hicks v. Aylsworth, 13 R.I. 562, 566 (1882)).
  \item \textsuperscript{39} Id at 1112.
\end{itemize}
agreement which may be so essential to the heart of the transaction that they cannot be modified orally. Based on the fact that the plaintiff supplied no support for the supposition that an explicit time requirement was so essential, the court concluded that the expiration date was an element that could be modified orally.

To lend further support to its conclusion, the court cited cases in other jurisdictions that held time is generally of the essence in option contracts, but excused a delay in the exercise of an option if the delay was attributable to the optionor's oral representations.

The court then found that option contracts should be treated like contracts for the sale of real estate in which the expiry date, or time is of the essence provision, is susceptible to waiver, either expressly or impliedly. The court found no reason why timeliness of an option contract is any less susceptible to waiver than the performance date of a contract for the sale of land in which time is of the essence. Applying its conclusion to the fact at hand, the court held that the oral modification lengthened the time in which Mr. Stamas could exercise his option to purchase Ms. Haydon's property beyond February 23, 2004; however, it remanded the case to the Superior Court for a factual determination of the length of the extension, and whether Mr. Stamas exercised the option within the extended period.

The court noted that it would not disturb the findings of a trial justice unless the findings are clearly erroneous or unless the

40. Id. (citing Berube v. Montgomery, 463 A.2d 158, 159-60 (R.I. 1983)).
41. Id.
42. Id. “Optionor's statement, disclosed to the optionee through a third party, that a 'few more days would not make a difference,' excused optionee's delay.” Id. (citing Wilson v. Bidwell, 199 P.2d 439, 441-42 (Cal. Dist. Ct. App. 1948)). “Disclosure to the optionee that the optionor was about to enter upon the observance of sacred religious holiday that would extend beyond the option term excused the optionee's delay.” Id. (citing Unatin 7-Up Co. v. Solomon, 39 A.2d 835, 836-47 (Pa. 1944)). “Notwithstanding that time is of the essence, the optionor, by his words, acts or conduct may waive the requirement of acceptance or exercise of the option within the time stipulated.” Id. (quoting Lusco v. Tavitian, 296 S.W.2d 14, 17 (Mo. 1956)).
43. Id. Waiver applies to contracts for the sale of land that have otherwise satisfied the statute of frauds. Id. (citing Fracassa v. Doris, 814 A.2d 432, 437 (R.I. 2003)).
44. Id.
45. Id. at 1113.
trial justice misconceived or overlooked material evidence,\textsuperscript{46} however, the court found that the trial justice misconceived material evidence.\textsuperscript{47}

The court found that on February 23, 2004, Ms. Haydon intended to extend the deadline when she said 'okay' to Ms. DiMuro's statement that she would 'overnight' the purchase-and-sales agreement to defendant, who, at the time was in Florida.\textsuperscript{48} In addition, during the conversation, Ms. Haydon informed Ms. DiMuro that her attorney would review the proposed agreement before it was signed, and she permitted Ms. DiMuro to transmit a copy to her attorney for such a purpose.\textsuperscript{49}

Accordingly, the court affirmed the judgment denying the defendant's request for specific performance, vacated the judgment striking the \textit{lis pendens}, ordered the defendant to execute all documents necessary to remove the cloud on seller's title, and remanded the case for further proceedings.\textsuperscript{50}

\textbf{COMMENTARY}

The Rhode Island Supreme Court held that notwithstanding the fact that time is of the essence in an option contract, an optionor, by his words, acts, or conduct may orally waive the requirement of exercising the option within the stipulated time.\textsuperscript{51} The court relies on a Rhode Island case which held that although a contract for the sale of land falls within the statute of frauds, oral modification of the time for performance is permissible; however, it notes that some elements "are so essential to the heart of the transaction as to be not susceptible to modification by parol."\textsuperscript{52} Similarly, in the present case the court found that the date of performance in an option contract was not such an essential element, and therefore oral modification was permissible.\textsuperscript{53} Although, the holding could have been reached by

\textsuperscript{46} \textit{Id.} (citing 1800 Smith Street Assoc., L.P. v. Gencarelli, 888 A.2d 46, 54-55, 55 n.4).
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.}
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.} at 1111-12.
\textsuperscript{52} \textit{Id.} at 1112. (quoting \textit{Berube}, 463 A.2d 158, 159-60 (R.I. 1983)).
\textsuperscript{53} \textit{Id.} In contrast to a contract for the sale of land, in which the statute of frauds is satisfied even if there is no performance date in the contract, an
relying solely on this case, the court goes on to point to other jurisdictions which have “excused an optionee’s delay in exercising his or her option, if attributable to, *inter alia*, an optionor’s oral representations.”

However, the cases relied upon contain facts that are distinguishable from the case at hand. Each case involved option contracts, but in each one the optionee, or the buyer of the property, was ready and willing to perform by the expiration date and made affirmative actions in an attempt to perform before the expiration date, but due to the optionor’s oral statements, the optionees were either prevented from performing or were encouraged not to perform in time. The cases cited held that equity does not allow an optionor to take advantage of the optionee’s failure to exercise the option within the stipulated time when the optionor acted in a way duly calculated to cause the optionee’s delay in exercising his privilege.

The issue is each case cited was not whether there was an oral modification of the expiration date, but was whether or not the optionors, through their words or actions, caused the optionees’ delay in exercising the option. In the present case, the fact that the buyer was not going to be able to perform in time was not caused by Ms. Haydon saying “okay” when she was informed of the fact that the agreement was going to be sent to Mr. Stamas.

---

option contract necessarily presumes the inclusion of a performance date. *See e.g.*, *Berube*, 463 A.2d at 159.

54. *Id.*

55. In the first case the optionee went to the optionor with the purpose of accepting the option and completely the transaction but the optionor’s agent told him that the optionor had gone home to observe a religious holiday that would extend past the expiration date and informed him to come back on a date, which was beyond the expiration date, to settle the transaction. *Unatin 7-Up Co. v. Solomon*, 39 A.2d 835, 836 (Pa. 1944). In the second case the optionee tried multiple times to exercise the option by paying the purchase price but due to a mistaken belief that the option could not be exercised until a future time, the optionor told him he could not exercise the option yet, and eventually optionee failed to exercise the option in time. *Lusco v. Tavitian*, 296 S.W.2d 14, 19 (Mo. 1956).

56. *Lusco*, 296 S.W.2d at 17; *Unatin 7-Up Co.*, 39 A.2d at 836 are cited as support for the following proposition: “If an optionor who has been given the right to purchase property within a specified time does any act, or fails to perform any duty, so as to cause the optionee to delay in exercising the right, the optionee may be excused from exercising the option within the stated time.” *See 17 AM. JUR. 2D Contracts §80.*

57. *See Lusco*, 296 S.W.2d at 17; *Unatin 7-Up Co.*, 39 A.2d at 836.
It was caused by the fact that the optionee was unable, given the time restraints involved when sending items through the mail, to fulfill the condition in time.\textsuperscript{58} Although the cases relied upon from other jurisdictions are distinguishable, the same outcome could have been reached by relying solely on \textit{Berube}.\textsuperscript{59}

\textbf{CONCLUSION}

The Rhode Island Supreme Court held that in an option contract, an optionor, by his words, acts, or conduct may orally waive the requirement of exercising the option within the stipulated time even in a situation where the optionee is technically unable to exercise the option within the specified period.

Ashley Taylor

\textsuperscript{58} Mr. Stamas's attorney did not contact Ms. Haydon until the final day the option could be exercised, and in order to exercise the option the condition of completing the purchase-and-sales agreement was necessary, which at this point was impossible because Mr. Stamas was in Florida. \textit{Haydon}, 900 A.2d at 1107.

\textsuperscript{59} 463 A2d 158 (R.I. 1983).
Property Law. Rhode Island Economic Development Corp. v. Parking Co., 892 A.2d 87 (R.I. 2006). Superior court orders granting condemnation of real property pursuant to Rhode Island General Law § 42-64-9 are immediately appealable to the Rhode Island Supreme Court. Additionally, § 42-64-9 is not facially unconstitutional because it does not grant the Rhode Island Economic Development Corporation unreviewable power to determine the public purpose of takings executed in accordance with the statute. Indeed, the judiciary has the power to review whether takings pursuant to § 42-64-9 were for a public purpose. Moreover, § 42-64-9 is not unconstitutional for failing to provide a pre-deprivation hearing and notice to landowners before their property is seized. Finally, a taking is not for a public purpose if it is only to acquire property at a discounted price.

FACTS AND TRAVEL

In December 1986, the Rhode Island Department of Transportation ("RIDOT") entered into a concession and lease agreement ("CLA") with Downing Airport Associates, L.P. ("Downing"). The CLA provided RIDOT with an option to purchase Garage B before the end of the twenty year term, but in the event that RIDOT declined to exercise its option, Downing was to convey Garage B to RIDOT for no consideration after the CLA expired. Several years after the agreement was executed, the parties to the CLA changed: RIDOT transferred its management authority of the airport to the Rhode Island Airport Corporation ("RIAC"), and The Parking Company, L.P. ("TPC"), purchased Downing’s interest.

2. Id. at 92.
3. Id.
As a result of rapid growth and prosperity in the late 1990's, the parties formed new agreements to capitalize on the market. One such agreement, the valet amendment, granted TPC the exclusive right to use the first four levels of Garage B for valet parking throughout the CLA's term. Unfortunately, the terrorist attacks of September 11, 2001 stunted the prosperous times. Concerned with the decline in parking revenues and unused parking spaces, RIAC sought to remove valet parking from Garage B and turn it into a daily parking garage.

When negotiations with TPC concerning RIAC's plan stalled, RIAC asked its parent, the Rhode Island Economic Development Corporation ("EDC"), to condemn the valet amendment. The EDC ultimately voted to condemn a "temporary easement" in Garage B, giving EDC exclusive use of the garage for the rest of the CLA. Pursuant to Rhode Island General Law § 42-64-9 ("condemnation statute"), EDC filed an ex parte petition in Superior Court to condemn the property. The Superior Court approved EDC's proposal for just compensation to TPC and ordered the condemnation. TPC, Fleet National Bank, and Fleet Real Estate, Inc., subsequently received notice of the condemnation. The parties appealed to the Rhode Island Supreme Court, claiming that both § 42-64-9 and EDC's taking was unconstitutional.

---

4. Id.
5. Id. at 92-93.
6. Id. at 93.
7. Id.
8. Id. R.I. GEN. LAWS § 42-64-9 (1998) grants EDC the authority to take real property.
10. Id. at 94. Before its petition to the superior court, EDC made filings in the Warwick land evidence records in accordance with § 42-64-9(d). Id. The EDC filed its petition to superior court in 2004. Thus, approximately two years were left under the CLA.
11. Id.
12. Fleet National Bank financed TPC's operation and held a mortgage interest in Garage B. Id. at 92 n.4.
13. Id. at 95.
14. Id.
The EDC initially attempted to avoid any decision on the merits by averring that the Rhode Island Supreme Court did not have jurisdiction to hear the case. It argued that a final judgment on the issue of just compensation was not rendered by the Superior Court. The Rhode Island Supreme Court rejected EDC's contention and held that it had jurisdiction. Overcoming the jurisdictional hurdle, TPC attacked the constitutional muster of the condemnation statute. First, TPC argued that the statute was unconstitutional because it violated the Takings Clause by failing to provide a procedure to challenge EDC's public use determination, and it violated the separation of powers doctrine by depriving courts of judicial review. Second, TPC claimed that the condemnation statute lacked due process by failing to provide a pre-deprivation hearing on the public use issue. The court disagreed with TPC and held that § 42-64-9 was constitutional.

On its final leg, TPC argued that the taking was not for a public use. The court, in a thorough analysis, held that EDC's taking was not for a public purpose, and thus violated the Takings Clause.

Jurisdiction

In cases involving eminent domain there are two potential issues: "(1) whether a taking is for public use; and (2) whether just compensation has been paid to the property owner." The court agreed with EDC that "in the strict sense a final judgment of just compensation has not been rendered in this case." However, §

15. Id. at 95.
16. Id. at 95-96.
18. Parking Co., 892 A.2d at 100.
19. Id.
20. Id. at 101.
21. Id. at 100-02.
22. Id. at 104-08.
23. Id. at 95.
24. Id. at 95; see also R.I. GEN. LAWS § 42-64-9(j) (1998) (giving the owner of real property that has been condemned by EDC the right to petition to superior court if the owner disagrees with the amount of compensation). TPC had the statutory right to petition to the superior court to receive more
42-64-9 does not mention any litigation concerning the public use issue in conjunction with just compensation. Furthermore, while it provides a post-condemnation proceeding to challenge the just compensation issue, it does not for the public use requirement.\(^2\)

Additionally, EDC dispossessed TPC of Garage B without an adequate remedy, and the condemnation order contained a sufficient element of finality concerning the public use issue.\(^2\)

Accordingly, the court found that the public use issue was immediately appealable.\(^2\)

*Whether § 42-64-9 unconstitutionally grants EDC the exclusive right to determine the issue of public use*

A statute is presumed to be constitutional and valid unless it is contrary beyond a reasonable doubt to the express or implied provisions of the state constitution.\(^2\)

The pertinent provision of the condemnation statute provides:

> If, for any of the purposes of this chapter, [EDC] shall find it necessary to acquire any real property, whether for immediate or future use, [EDC] may find and determine that the property, whether a fee simple absolute or a lesser interest, is required for the acquisition, construction, or operation of a project, and upon that determination, *the property shall be deemed to be required for public use until otherwise determined by [EDC]...* \(^2\)

The court found that the provision did not make EDC's public use determination conclusive and unreviewable.\(^3\)

Indeed, "a legislative declaration of public use is instructive, and entitled to deference, but not conclusive."\(^3\)

Therefore, when a property owner challenges EDC's public use determination, courts have the power to review it.\(^3\)

---

\(^2\) See id.

\(^2\) Parking Co., 892 A.2d at 95.

\(^2\) Id.

\(^2\) Id.

\(^2\) Id. at 100.

\(^2\) Id. (quoting R.I. GEN. LAWS §4 2-64-9(a)) (emphasis in original).

\(^2\) Id. at 101.

\(^3\) Id.

\(^3\) Id.
Procedural Due Process Challenge to § 42-64-9

The court noted that "[t]he Due Process Clause does not guarantee a property owner any particular form or method of state procedure. . . . Rather, the procedural protections due a landowner . . . are met if the condemnee is afforded an opportunity to challenge the public use aspect of the taking."33 In this case, TPC had two options to obtain judicial review of the public use determination. First, TPC could have – and in fact did – appealed the Superior Court's condemnation order.34 Because the condemnation proceeding was initiated ex parte, TPC may raise objections on appeal that could have been raised in Superior Court.35 Second, TPC could have initiated a collateral action to attain declaratory or injunctive relief from the condemnation.36 Therefore, § 42-64-9 is not unconstitutional just because it does not provide a pre-deprivation proceeding for the public use issue because TPC's procedural due process rights were properly afforded.37

Public use

The determination of "what constitutes a public use is a judicial question."38 A taking that is exercised arbitrarily, capriciously, or in bad faith violates the substantive due process component of the Fourteenth Amendment.39 Although courts are to give deference to EDC's findings in condemnation actions pursuant to § 42-64-9, such "findings are far from dispositive."40 Public use issues are to be determined in light of the facts and

33. Id. at 102 (citing 27 AM. JUR. 2D Eminent Domain § 416 (2004)).
34. Id.
35. Id.
36. Id.
37. Id. The court distinguished procedural due process afforded to creditors from a sovereign's power of eminent domain. Id. at 99. TPC attempted to support its procedural due process argument with creditors' rights cases, but the court noted that such cases were not material in deciding this case. Id. at 99 n.13.
38. Id. at 103 (quoting Romeo v. Cranston Redevelopment Agency, 254 A.2d 426, 434 (R.I. 1969)).
39. Id. at 103-04.
40. Id. at 104.
circumstances of each case, and the "principal purpose and objective in a given enactment [must be] public in nature" and "designed to protect the public health, safety and welfare." If these conditions are met, the public use requirement is satisfied even if the taking benefits some incidental private interests.

Much of the court's analysis of the public use issue revolved around RIAC's option to purchase Garage B. Under the terms of the CLA, RIAC reserved the right to purchase Garage B before the CLA expired in accordance with an agreed upon fee schedule. Alternatively, RIAC could have waited until the CLA expired and then have acquired the property for no consideration. However, through EDC's condemnation proceeding, RIAC was able to gain control over Garage B before the CLA expired at a price considerably less than what it would have been required to pay under the agreement. The option to purchase required a price adjustment, and because the parties were unsuccessful in negotiating it, EDC cut corners and condemned Garage B. Moreover, EDC conveniently failed to inform the Superior Court of the option to purchase the property.

EDC unsuccessfully argued that the taking served the public purpose of increased parking. However, the court noted that no additional parking spaces were created. Instead, the valet parking spaces were converted into daily parking, which EDC initially told TPC would result in increased revenue. Furthermore, "there was no finding that [prior to the taking] there was a shortage of parking spaces at RIAC's garages, or that the motoring public was unable to park at the airport or was inconvenienced in any way." Accordingly, the court rejected

41. Id. at 104 (quoting In re Advisory Opinion to the Governor, 324 A.2d 641, 646-47 (R.I. 1974)).
42. Id.
43. Id.
44. Id.
45. Id. at 105. When EDC exercised its eminent domain power, the purchase price under the CLA was $2,751,300. Id. However, the superior court agreed with EDC that only $685,000 was just compensation. Id.
46. Id.
47. Id.
48. Id.
49. Id.
50. Id.
51. Id.
EDC's contention “that the public interest was better served by a loss of valet parking instead of self-parking.”

Moreover, the court determined that EDC's only goal in taking the property was to increase revenue without having to meet TPC's demands. Indeed, during the condemnation proceeding in Superior Court, EDC's counsel admitted that after condemning Garage B, EDC would gladly negotiate a solution with TPC. The EDC's goal was merely to swing the bargaining power in their favor. Thus, EDC's taking of Garage B was deemed to be arbitrary, in bad faith, and not for a public purpose.

Finally, the court discussed the alleged “temporary easement” that EDC obtained through its eminent domain powers. The court defined an easement as:

An interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road). Unlike a lease or license, an easement may last forever, but it does not give the holder the right to possess, take from, improve, or sell the land.

Contrary to the above definition, EDC's “temporary easement” in Garage B effectively granted it complete control of the property

52. Id.
53. Id. at 106.
54. Id. When asked by the trial judge what would happen after the garage is taken, EDC's counsel replied:

[We will] ask [TPC] to vacate [the premises] so that the garage can be reconfigured so that it could be used more extensively. Now, at that point, if you will, the ball is in their court. We would love if they negotiated with us at that point and all were resolved. We are happy to negotiate with them.

Id. (emphasis in original).
55. Id.
56. Id. The court also distinguished EDC's actions from the facts of Kelo v. City of New London, 545 U.S. 469 (2005), in which the United States Supreme Court upheld New Haven's taking of private property in part because it was pursuant to a comprehensive and thorough economic development plan. Id.
57. Id. at 107 (quoting BLACK'S LAW DICTIONARY 548 (8th ed. 2004)) (emphasis in original).
by forcing TPC to vacate the premises. This further supported the court's conclusion that EDC failed to take Garage B for a valid public purpose.

COMMENTARY

In *Parking Co.*, the Rhode Island Supreme Court acted as a guardian to the rights of private landowners. It is clear that EDC exceeded its eminent domain authority in obtaining Garage B for its own interest of increased revenue. Unable to reach an agreement with TPC, RIAC and EDC avoided the costs of further negotiations and the purchase option—which would have cost RIAC over two million dollars—by exercising EDC's eminent domain power. This case demonstrates that although EDC has substantial authority under § 42-64-9 in exercising its eminent domain power, the Rhode Island judiciary will protect private landowners from takings that violate the Constitution.

The *Parking Co.* court strictly adhered to precedent on the question of whether the condemnation statute complies with procedural protections under the Takings Clause. As already discussed, § 42-64-9 does not grant property owners a right to a deprivation hearing and notice before their property is taken by EDC. The court reiterated its holding in *Golden Gate Corp. v. Sullivan*, in which it held that "the right to a hearing before the taking of private property by eminent domain is not a right encompassed within the [F]ourteenth [A]mendment." The court further held that "[t]he necessity and expediency of taking private property for public use is a legislative question, and a hearing thereon is not essential to the due process guaranteed in the

58. *Id.* "Generally, an easement does not grant its holder the right to exclusive possession of the servient estate or the right to deprive the owner of his or her beneficial interest in the land that is subject to the easement." *Id.*

59. *See* R.I. GEN. LAWS § 42-64-9

60. 314 A.2d 152 (R.I. 1974).

61. *Id.* at 154; *see also* Paiva v. Providence Redevelopment Agency, 356 A.2d 203, 206 (R.I. 1976) (to claim a denial of due process, "one must show that he had been illegally deprived of a 'legally protected right.' This court has held that the right to a hearing attaches only to the deprivation of an interest encompassed within the [F]ourteenth [A]mendment and that the right to a hearing prior to the taking of property by eminent domain is not such a right").
[F]ourteenth [A]mendment." Therefore, landowners who lose their property to EDC's eminent domain power cannot bring constitutional claims for lack of due process just because they were not afforded a hearing before their property was taken. Rather, their constitutional rights to due process are violated if they are not afforded any opportunity to challenge the taking. Although § 42-64-9 does not specify any procedures in which landowners could challenge the public purpose of a taking, the court found that they are afforded their constitutional rights by appeal or by instituting a collateral action.

Although landowners can appeal the public use issue after EDC condemns their property, the question remains whether a takings victim can immediately appeal both issues of public use and just compensation, or only the just compensation issue. Because § 42-64-9(j) expressly permits property owners to petition to the Superior Court to assert their rights to adequate compensation, the Rhode Island Supreme Court may lack jurisdiction before such petitions are implemented.

---

CONCLUSION

The Parking Co. court held that the public use issue of condemnation orders pursuant to § 42-64-9 is immediately appealable to the Rhode Island Supreme Court. The court also held that the condemnation statute is constitutional on its face because there is no right under the Fourteenth Amendment to a pre-deprivation hearing to a state's eminent domain power, and because the statute does not clash with the court's power of judicial review. Moreover, the court concluded that EDC unconstitutionally exercised its eminent domain authority by failing to "meet the legitimate public purposes in the EDC Act" and to satisfy the public use requirement under the Takings Clause. Accordingly, TPC's ownership of Garage B and its contractual rights under the CLA were restored.

Aaron L. Shapira

---

64. Parking Co., 892 A.2d at 108; see R.I. GEN LAWS § 42-64-2(1998) (listing problems that the state wishes to correct, such as unemployment and underemployment); see also R.I. GEN LAWS § 42-64-5 (1998) (stating EDC's purposes and goals).
Property Law. *Ruffel v. Ruffel*, 900 A.2d 1178 (R.I. 2006). The Rhode Island Supreme Court resolved a matter of first impression as to whether joint tenancy real estate purchased before a marriage is part of the marital estate and thereby subject to equitable distribution. In determining that such assets are included as marital property, the court received guidance from the common law property rules governing joint tenancy interests.

**FACTS AND TRAVEL**

Rosemarie and Lance were married on July 26, 1997. Their short-lived marriage was filled with arguments, failed attempts at counseling, and alleged physical and emotional abuse by the plaintiff, Rosemarie. Prior to the marriage Lance gave Rosemarie several items of jewelry and a royalty interest in Alliance, an oil well. A few months before the marriage, the couple purchased a home and placed title in both of their names as joint tenants.

As a separate investment before the marriage, Lance obtained interests in Lance Ruffel Oil & Gas Corporation and Rolling Rock, LLC, the earnings of which served as the couple's primary source of income throughout the marriage. Although Lance had increased Rosemarie's earning power by paying for her schooling, she did not work outside of the home, though she did contribute to the marriage in other non-economic ways. After a bifurcated trial, the marital dissolution was settled on December 16, 2002, and the financial dissolution was settled a year later on December 29, 2003. In determining the equitable distribution, the family court awarded Rosemarie twenty percent and Lance eighty percent.

2. *Id.*
3. *Id.* at 1182.
4. *Id.*
5. *Id.* at 1190.
6. *Id.* at 1182.
7. *Id.*
8. *Id.* at 1182-83.
9. *Id.* at 1183-84.
10. *Id.* at 1182.
percent of the marital estate, which was valued at $1,220,310.07. After granting Rosemarie her interest in Alliance, jewelry, and fur coats, the magistrate determined that she owed Lance $27,530 in cash for the amount in excess of her allotted twenty percent.

ANALYSIS AND HOLDING

Vacating the family court’s holding, the Rhode Island Supreme Court ultimately concluded that the valuation of the marital estate and the assets contained therein must be reassessed upon remand. In a divorce proceeding determining the equitable-distribution of marital property, the judge must first set the “terminal date” upon which the marital estate valuation is based; second, the court must separate the marital property from the non marital property; third, the court must evaluate the equitable factors set forth in G.L.1956 § 15-5-16.1(a); and lastly the court may distribute the marital property accordingly. On appeal Rosemarie challenges: the family court’s rulings on the proper terminal date, the assets included as part of the divisible marital estate, the exclusion of certain evidence, and the court’s failure to award her alimony or council fees.

The first issue is the proper terminal date upon which the value of the marital assets will be determined. The general rule is that a couple will legally remain husband and wife until the entry of the final divorce decree. The parties to a divorce may, however, agree upon an alternative terminal date if said agreement is either (a) in writing or (b) an oral statement made in the presence of the court and reduced to a written record. Here, the magistrate relied on the defendant’s attorney’s assertion of an orally agreed upon terminal date, December 31, 2001. The record presents no evidence of a written agreement and therefore,

11. Id. at 1184.
12. Id.
13. Id. at 1193.
14. Id. at 1184.
15. Id. at 1182.
16. Id. at 1184.
17. Id. at 1185 (citing Vanni v. Vanni, 535 A.2d 1268, 1270 (R.I. 1998)).
18. Id.
19. Id. at 1185-86.
the court held that this oral terminal date agreement was void. Following *Cardinale v. Cardinale*, which also had a bifurcated divorce proceeding, the court held that a divorce is not truly final until both the dissolution of marriage and the equitable distribution of the marital finances are complete. As a result, December 29, 2003, the date the magistrate issued the final order of equitable-distribution, is the proper termination of marriage date.

As a matter of first impression, the Rhode Island Supreme Court determined that joint tenant property purchased before the marriage must be included as part of the marital estate. It is well established that the family court is prohibited from including in the divisible marital estate "property or an interest in property held in the name of one of the parties if the property was held by the party prior to marriage." Here, the court received guidance from the common law definition of joint tenancy, which clearly defines such ownership as conferring an equal and undivided interest in the property. The court reasoned that such undivided property does not fall within the statutory exception for premarital property held in only one name. The court's decision to include the real estate as marital property is also supported by the fact that the purchase was made shortly before the marriage, both parties made improvements to the home during the marriage, and the property was used as the marital home. In affirming the family court holding on this matter, however, the court noted that the magistrate may still allocate the 80/20 equitable-division of the estate differently upon a revaluation of the marital assets.

Rosemarie also contested the inclusion of specific property as part of the equitably divisible marital estate. The court held that

---

20. *Id.* at 1186.
21. *Id.* at 1186-87 (citing *Cardinale v. Cardinale*, 889 A.2d 210 (R.I. 2006)).
22. *Id.* at 1187.
23. *Id.* at 1188.
24. *Id.* at 1187 (quoting R.I. GEN. LAWS §15-5-16.1(b) (1956) (emphasis added)).
26. *Id.* at 1188.
27. *Id.*
28. *Id.*
jewelry given to Rosemarie before the marriage is pre-marital property and thus exempt from the marital estate. The engagement ring, on the other hand, which was lost and subsequently replaced during the marriage with insurance proceeds, must be included because it was purchased with marital funds. Next the court concluded that Rosemarie's interest in Alliance oil is not part of the marital estate because it was given to her as a pre-marital gift. Lastly, Rosemarie contested the appreciation value of Lance's separately owned oil and gas holdings, but the court determined that because the value of the marital estate must be recalculated on remand, they need not decide on this matter.

Rosemarie asserted that the magistrate abused its discretion by excluding certain evidence. The court held that because the rebuttal evidence she wished to introduce did not relate to a new matter raised by the defendant, its exclusion was properly within the family court's discretion. The magistrate also properly excluded evidence of the couple's relationship problems that existed before the marriage because such pre-marital issues are irrelevant in determining the assignment of property. Next the court refused to reassess the 80/20 split of the marital estate because the value of which must already be recalculated on remand. Finally, the court deferred to the family court on the issues of alimony and awarding counsel fees, because both issues must be determined after the distribution of the marital property is decided on remand.

COMMENTARY

The Rhode Island Supreme Court decision marks the first time the court has been called upon to decide how premarital joint tenancy property is divided as a result of divorce. As a general

29. Id. at 1189.
30. Id.
31. Id.
32. Id. at 1189-90.
33. Id. at 1191.
34. Id. at 1192.
35. Id. at 1193.
36. Id.
rule, family courts may exercise their discretion in dissolving a marital estate under the principals of equitable distribution. The question here is whether the real estate falls under the statutory exception, which prohibits the family court from dividing property if both the ownership predates the marriage and the title of such property is held in the name of one party.

In determining whether the property fell under this statutory exemption, the court received guidance from the common law "four unities" of joint tenancy which are: equal interests, acquired by the same conveyance, at the same time, with the same undivided possession. The court first compared the plain meaning of the of joint tenancy element, "undivided possession," against the statutory exception language, "property held in the name of one of the parties." The logical deduction that follows is that undivided property does not fall within the definition of property held in one party name, and thus the exception does not apply.

In addition, the court made clear that it is important to not only look to the title of the property, but to also look to the underlying substance of how the property is treated. As support of the holding, the court recognized that the couple treated the property as a marital home because they jointly made improvements to the home and it was purchased only a few months before their wedding.

Like the majority of states, Rhode Island follows the equitable distribution theory, which is designed to ensure that the parties to the marriage receive what is fair and just based on the totality of the circumstances in the event of divorce. Had the court determined that the premarital joint tenancy property was excluded from the marital estate, the couple could evenly split the property in the event of a sale, the result of which aligns itself more with the community property principals of equal division. Not only is the court's holding supported in the plain meaning of the statute and by the substantive treatment of its property, but more importantly this holding aligns itself with the principals of the equitable distribution theory.

37. Id. at 1187.
38. Id. at 1188.
39. Id. at 1187-88.
40. Id. at 1188.
CONCLUSION

As a matter of first impression, the Rhode Island Supreme Court held that even though real estate property is purchased before a marriage, it shall be included as part of the marital estate if the parties to the marriage place the title as joint tenants. The court looked both to the substance of the real estate, that the property was treated as the marital home, and to the elements of the joint tenancy relationship, specifically the undivided equal ownership.

Allison Conboy
Statutory Interpretation. Park v. Rizzo Ford, Inc. and Mendoza et al. v. Midland Hyundai, Inc., 893 A.2d 216 (R.I. 2006). Two civil suits challenging a Department of Transportation regulation which placed a twenty-dollar limit on all "title preparation fees" charged by licensed motor vehicle dealers, were held to be properly dismissed by the Supreme Court of Rhode Island. Although the court recognized the "ineptitude exhibited by the state agencies in this case," the clear language of Rhode Island General Law § 42-35-3(b) and the rules of statutory construction, dictate that the regulation had been enacted as an emergency regulation, even though it was not explicitly stated as such, and therefore expired by operation of law after 120 days.

FACTS AND TRAVEL

In 1992, the Rhode Island Department of Transportation ("RIDOT") adopted a Department of Transportation ("DOT") regulation, which included the following language:

‘Preparation Fee’ or ‘Documentary Fee’: a motor vehicle dealer licensed by the Department may, in connection with the sale of a motor vehicle, impose a fee for the service of registering and titling said vehicle with the Division of Motor Vehicles. Said fee shall be separately itemized on the bill of sale and designed ‘Title Preparation Fee’ and shall not exceed twenty dollars ($20.00).

A motor vehicle dealer who, in connection with the sale of a motor vehicle imposes a ‘Title Preparation Fee’ shall provide to the purchaser a written statement which fully discloses the services to be rendered pursuant to the payment of the ‘Title Preparation Fee.’ . . .1

On January 23, 1992, the RIDOT filed the DOT regulation with the Secretary of the State.2 The cover letter attached to the regulation and dated January 15, 1992 outlined the reasons for

---

2. Id. at 218.

661
the DOT regulation, stating that "the Department of Transportation finds that their [sic] is imminent peril to the public, health, safety, and welfare in that it is the duty of the Department to license, regulate and enforce all of the Sections of Chapter 31-5, 31-5.1." Although, language evidencing that it was an emergency regulation was not contained in the regulation itself, the cover letter was written, " pursuant to Chapter 31-5, 31-5.1, 42-35-3(b) and 42-35-4(B)(2) of the Rhode Island General Law." The public was not notified nor given an opportunity to comment on this regulation. To be given the force of law, all applicable regulations must be enacted pursuant to either the formal adoption procedure or the emergency adoption procedure outlined in the statute.

The plaintiffs separately purchased motor vehicles from the respective defendants and alleged that defendants charged them various fees in contravention of the DOT regulation. The plaintiffs sought actual damages, attorneys' fees, litigation expenses, declaratory and injunctive relief. Lastly, they moved to certify a class of individuals who were charged any prohibited fees while purchasing a vehicle from either of the defendants within four years on the filing of the action.

The motion justice, after finding that the DOT regulation was an emergency regulation that had expired 120 days after being enacted, granted defendants' motion to dismiss. The plaintiffs appealed that judgment.

ANALYSIS AND HOLDING

The Rhode Island Supreme Court reviews the granting of summary judgment de novo and applies the same standard that the motion justice applies. The defendants had originally filed a motion pursuant to Rule 12(b)(6) of the Superior Court Rules of

3. Id.
4. Id. (42-35-3 is the Emergency Regulation).
5. Id.
7. Rizzo, 893 A.2d at 218.
8. Id.
9. Id.
10. Id.
11. Id. (citing DeCamp v. Dollar Tree Stores, Inc. 875 A.2d 13, 20 (R.I. 2005)).
Civil Procedure, but the motion justice had properly treated it as one for summary judgment based on the defendants’ reliance on evidence outside the pleadings.\textsuperscript{12}

\textit{Emergency Regulation}

The plaintiffs argued on appeal that because the language evidencing that it was an emergency regulation was not contained in the regulation itself, that the trial justice committed reversible error.\textsuperscript{13} Part (a) of the General Laws § 42-35-3 sets out the procedure for “the adoption, amendment, or repeal of any rule.”\textsuperscript{14} This includes, at least thirty days notice, afford all interested persons reasonable opportunity to submit data, views, or arguments, demonstrate the need for adoption, and ensure that any proposed changes to other amendments be clearly marked.\textsuperscript{15} Part (b) it the emergency procedure, which states “if an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon less than thirty (30) days notice, and states in writing its reasons for that finding, it may proceed without prior notice or hearing . . . to adopt an emergency rule,” that rule “may be effective for a period of not longer than one hundred twenty days.”\textsuperscript{16} A regulation has to be enacted either through the procedure of part (a) or part (b).

In reviewing the cover letter and the regulation \textit{de novo}, the court found that the DOT regulation was clearly enacted as an emergency regulation, based on three reasons.\textsuperscript{17} First, the cover letter and the regulation both states that the DOT regulation was enacted pursuant to the statutes that created the emergency regulation procedure.\textsuperscript{18} Second, the cover letter used the language “imminent peril to the public health, safety, and welfare,” which is the same language as used in the emergency regulation § 42-35-3(b).\textsuperscript{19} Third, the cover letter made the finding of imminent peril, that, the public would be without a forum to redress infractions

\begin{thebibliography}{9}
\bibitem{12} Rizzo, 893 A.2d at 219.
\bibitem{13} \textit{Id}.
\bibitem{14} R.I. GEN. LAWS § 42-35-3 (1956).
\bibitem{15} See \textit{id}.
\bibitem{16} R.I. GEN. LAWS § 42-35-3 (1956).
\bibitem{17} Rizzo, 893 A.2d at 220.
\bibitem{18} \textit{Id}.
\bibitem{19} \textit{Id}.
\end{thebibliography}
and the industry would be unregulated.20

Expiration of an Emergency Regulation

When the motion justice found that the DOT regulation was an emergency regulation, he then found that it expired after 120 days of its filing, and had been invalid for a long period of time before the defendants allegedly charged the fee to the plaintiffs.21 On appeal the plaintiffs challenged this, that if the DOT regulation was enacted as emergency regulation, then § 42-35-3(c) prohibits defendants from challenging the enactment of the DOT regulation two years from its effective date.22 The court then began a statutory construction analysis, namely that “when the language of a statute is clear and unambiguous, we must enforce the statute as written by giving the words of the statute their plan and ordinary meaning.”23 The rules of statutory construction are applied only if the language is ambiguous and the statute will never be construed to reach an absurd or unintended result.24

The court held that § 42-35-3(c) was not applicable based on a literal reading because the defendants did not contest the validity of the DOT regulation; they were in fact arguing that it was enacted in precise accordance.25 If the court was to follow the plaintiffs' interpretation of the statute it would lead to an absurd or unintended result, which the court has always refused to do.26 A motion to dismiss based on a duly enacted regulations expiration could not be construed to be a challenge on the “ground of noncompliance” and therefore the two year window of subsection (c) is not applicable.27

20. Id.
21. Id. at 221.
22. Id. 42-35-3(c) limits the time frame in which one may challenge the validity of a regulation of procedural grounds, which pertinent part states “no contest of any rule on the ground of noncompliance with the procedural requirements of this section may be commenced after two (2) years from its effective date.” Id.
23. Id. (quoting Gem Plumbing & Heating Co. v. Rossi, 867 A.2d 796, 811 (R.I. 2005)).
24. Id.
25. Id.
26. Id.
27. Id.
The Rhode Island Supreme Court was justified in interpreting the DOT regulation in the manner they did based on statutory construction and the plain language of the statute; however, in an opinion by Chief Justice Williams, a tone of unfairness permeates throughout. "Justice" is defined as, "the administering of deserved punishment or reward." If "justice" had been administered here, then the "disgraceful ineptitude of certain state administrative agencies" should have felt some backlash, which aside from that statement, they did not. However, because the statute at issue was clear and unambiguous, the court could ultimately only reach one conclusion, the one that they reached here, leaving many suffering in its wake.

For example, a car dealership that believed the twenty dollar limit on all "title preparation fees" was still in existence, would have been adhering to that regulation since 1992. Another dealership, who knew that the regulation was only in force for 120 days, may have been charged in excess of twenty dollars for each title preparation fee, since 1992 as well. That difference, for each car, sold each day, for over fourteen years, amounts to a huge amount of revenue discrepancy. Neither dealership was wrong, they were acting in good faith on what they believed to be the law, but the end result is unfair.

Had the RIDOT or the Department of Administration followed up and enacted he same regulation or a permanent regulation, this all could have been avoided. Instead, the public suffered, especially the plaintiffs here who brought the suit seeking justice, not only for themselves, but for all the citizens of Rhode Island. The wrong was not redressed here.

CONCLUSION

The Rhode Island Supreme Court held that the DOT regulation had been enacted as an emergency regulation, even though it was not explicitly stated as such, therefore expiring by operation of law after 120 days. The court also held that the dealers were not prohibited from challenging the regulation on

29. Rizzo, 893 A.2d at 222.
30. Id. at 216.
ground that it had expired, even though regulation was not challenged within two years of the effective date, and that a challenge to a regulation on the ground that it is an expired emergency regulation need not be made within the two year window usually applied when challenging the validity of a regulation on procedural grounds.\textsuperscript{31} Here, although expressing sympathy towards the plaintiffs, the court held that the motion justice properly dismissed their suit based on the expiration of the duly enacted emergency regulation.

Christina Paradise

\textsuperscript{31} Id.
2006 R.I. Pub. Law ch. 547. An Act Relating to Abused and Neglected Children. Legislation establishing a statewide initiative to reduce death and disability resulting from shaken baby syndrome. The legislation directs the department of health, department of children, youth and families, as well as other state agencies including law enforcement, child advocacy organizations, and human service providers to collaborate to establish a patient education program, surveillance, data collection on the incidence of shaken baby syndrome, and rules and regulations to implement these programs. Creates R.I. Gen. Laws § 40-11-17.


2006 R.I. Pub. Laws ch. 382. An Act Relating to Criminal Procedure – Search Warrants. In 2004, R.I. Public Law Ch. 441, Sec. 2, and Ch. 493, Sec. 2 permitted a search warrant be issued for the collection of various forms of DNA evidence. However, the 2004 legislation was only applicable to investigations initiated subsequent to the passage of the law. The 2006 legislation amended this portion of the 2004 Act by removing the limiting language making the law applicable to all criminal investigations and prosecutions.

2006 R.I. Pub. Laws ch. 119 and ch. 331. An Act Relating to Alcoholic Beverages – Regulation of Sales. The legislation permits restaurant patrons to remove and transport the remains of any bottle of wine the patron purchased in conjunction with a full course meal. The Act requires the seller re-cork or seal the bottle in such a way that it would be obvious if the seal was removed or broken. Patrons are required to place the container in the trunk or behind an upright seat in the vehicle and the seal
must remain unbroken while in the vehicle. Creates R.I. Gen. Laws §3-8-16.


2006 R.I. Pub. Laws ch. 164 and ch. 195. An Act Relating to Domestic Relations — Adoption of Children. Under RI Gen Law Section 15-7-17 of the General Laws adopted children retain the right to inherit from or through his or her natural parents. This legislation gives administrators, executors, and trustees immunity from suit by adopted children for damages incurred as a result of the lawful administration of the estate if done without knowledge of the adopted child. Amends R.I. Gen. Laws §15-7-17.

2006 R.I. Pub. Laws ch. 578. An Act Relating to Criminal Offenses — Law Practice. Prior to this legislation, any receipt of fee for the services performed by an attorney at law was deemed the “practice of law.” This legislation added an exception that allows a lawyer or law firm to agree to share a statutory or tribunal approved fee award with a non-profit, tax-exempt organization that referred the matter. The fee award or settlement must be made in connection with a proceeding designed to advance the purpose of the organization which makes it tax-exempt. The client must also consent in writing to the division. Amends R.I. Gen. Laws §§11-27-3, 11-27-6, 11-27-8 and 11-27-10.

2006 R.I. Pub. Laws ch. 316 and ch. 189. An Act Relating to Labor and Labor Relations — Rhode Island Parental and Family Medical Leave Act — Insurance Benefits — Personal Income Tax. This legislation adds domestic partners to three independent laws. First, the “Rhode Island Parental and Family Medical Leave Act” is amended to include “domestic partners” as family members. Second, COBRA Insurance Benefits are amended to include “domestic partners” as dependents of an employee. Finally, any amount taxable to a tax payer as a result of payment of insurance
benefits for a domestic partner (or other dependent) can be deducted from the taxpayer's federal gross income. Amends R.I. Gen Laws §28-48-1.

2006 R.I. Pub. Laws ch. 423 and ch. 577. An Act Relating to Courts and Civil Procedure – Causes of Action – Firefighter's Immunity. Establishes additional immunity for firefighters and other emergency personnel when rendering voluntary assistance. Police, firefighters, and other rescuers are immune from civil damages for any personal injuries resulting from his or her rendering emergency assistance. This legislation extends this liability to protect these individuals from civil damages for any property damage as well. The Act continues to apply only to actions constituting ordinary negligence and does not extend to acts or omissions constituting gross, willful, or wanton negligence.