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2010 Survey of Rhode Island Law: Cases and 2010 Public Laws of Note

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2010 Survey of Rhode Island Law

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Administrative Law. Champlin's Realty Associates v. Tikoian, 989 A.2d 427 (R.I. 2010). Champlin's Realty Associates (Champlin's) operates a marina on Block Island; the Coastal Resources Management Council (CRMC) denied Champlin's application to expand its operation. After identifying several procedural irregularities in the CRMC's consideration of the matter, the Rhode Island Superior Court modified the agency's decision, handing Champlin's a short-lived victory. On appeal, the Supreme Court held that a remand to the CRMC was required so that certain *ex parte* communications could be placed in the record and the parties given the opportunity to respond.

FACTS AND TRAVEL

In 2003, Champlin's filed an application with the CRMC to expand its marina on Block Island.\(^1\) The town of New Shoreham and several intervenors opposed the application.\(^2\) Michael Tikoian, the chairman of the CRMC, appointed a five-member subcommittee to conduct a public hearing on the application.\(^3\) After holding twenty-three “rancorous and hotly disputed” public hearings on Champlin's application over the course of two years, the subcommittee issued a recommendation in favor of a scaled-down version of Champlin's proposal.\(^4\) At a hearing of the full

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1. Champlin's Realty Assocs. v. Tikoian, 989 A.2d 427, 431-32 (R.I. 2010). Block Island is situated about twelve miles off the Rhode Island coast. *Id.* at 431. Champlin's is a Rhode Island corporation. *Id.* In its application, Champlin's proposed to extend its existing marina 240 feet into the Great Salt Pond to accommodate more boats. *Id.* The CRMC is vested with the statutory duty to regulate the state's coastal resources. *Id.*

2. *Id.* at 431. New Shoreham is the sole municipal entity on Block Island. *Id.* at n.1. The Block Island Land Trust, the Conservation Law Foundation, the Committee for the Great Salt Pond, and the Block Island Conservancy all intervened in opposition. *Id.* at 431.

3. *Id.* One of the five members appointed to the subcommittee (a state legislator) did not participate in the subcommittee's hearings or recommendation on this matter. *Id.* at 432 n.3.

4. *Id.* at 432-33. The hearings were “reportedly the longest and most exhaustive in CRMC history.” *Id.* at 432. The tension arose from the conflict between the environmental implications of a marina expansion and the
CRMC in February 2006, five members voted to approve the subcommittee's recommendation and five members voted against adopting the recommendation. The tie vote operated as a rejection of the recommendation, and the CRMC later issued a written decision denying Champlin's application.

Pursuant to the Rhode Island Administrative Procedures Act (RIAPA), Champlin's appealed the CRMC's decision to Superior Court in March 2006, alleging that the decision suffered from various defects. Champlin's also moved under the RIAPA for an evidentiary hearing before the trial justice. The trial justice held sixteen evidentiary hearings to determine whether there were any irregularities in procedure during the course of the CRMC proceedings. The evidentiary hearings revealed that certain members of the CRMC had engaged in prohibited ex parte communications regarding Champlin's application. Since the Rhode Island Supreme Court had recently issued a decision that proscribed ex parte contacts at the agency level, the trial justice issued an order in January 2008 that directed the parties to show cause why Champlin's appeal should not be granted. After the show-cause hearing, the trial justice held a separate hearing at which the intervenors presented evidence to support their contention that one of the subcommittee members should have

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5. Id.
6. Id.
8. Id. at 433-34.
9. Id. at 434. The RIAPA allows a party who has appealed the decision of an administrative agency to the Superior Court to request an evidentiary hearing to determine the existence of any procedural irregularities during the course of the proceedings before the administrative agency. Id. at n.5 (citing R.I. Gen. Laws § 42-35-15(f) (2007).
10. Id. at 434.
11. Id. Ex parte contacts are those made in contravention of the RIAPA, which states that members or employees of an administrative agency generally shall not communicate with persons or parties in connection with a contested case except upon notice and opportunity for all parties to participate. Id. at 440 n.10 (quoting R.I. Gen. Laws § 42-35-13 (2007)).
12. Id. at 434.
been disqualified from participating in the matter.\textsuperscript{13}

Over the course of these eighteen hearings, the trial justice made extensive factual findings and credibility determinations.\textsuperscript{14} One salient finding was that three members of the CRMC should have been disqualified from taking part in the full council's decision.\textsuperscript{15} Another significant finding was that one of the CRMC members, in an \textit{ex parte} communication, had asked the executive director of the CRMC to produce a compromise plan for the marina's expansion.\textsuperscript{16} Based on these findings, the trial court held that the CRMC's decision was made upon unlawful procedure and in excess of the agency's statutory authority and that Champlin's substantial and constitutional rights were violated.\textsuperscript{17} As a remedy, the trial justice modified the vote of the full CRMC by subtracting the votes of the three disqualified members; the refigured vote constituted an adoption of the subcommittee's recommendation.\textsuperscript{18} The Superior Court upheld the modified decision adopting the subcommittee recommendation because it was "supported by the reliable, probative, and substantial evidence of record."\textsuperscript{19} In April 2009, the CRMC, Tikoian, the Town of New Shoreham, and the intervenors filed a petition for certiorari in the Supreme Court seeking review of the trial court's decision; the Supreme Court granted the petition.\textsuperscript{20}

\section*{Analysis and Holding}

The RIAPA provides that in reviewing the Superior Court's judgment in administrative proceedings, the Supreme Court shall consider questions of law \textit{de novo}.\textsuperscript{21} As for questions of fact, when review of the trial court's decision is conducted under a writ of certiorari, the Supreme Court simply "reviews the record to

\begin{footnotes}
\begin{enumerate}
\item \textit{Champlin's}, 989 A.2d at 434-35.
\item \textit{Id.} at 435.
\item \textit{Id.} The trial justice found that Michael Tikoian, Paul Lemont, and Gerald P. Zarrella should have been disqualified. \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 436.
\item \textit{Id.}
\item \textit{Id.} at 437.
\item \textit{Champlin's}, 989 A.2d at 436-37.
\item \textit{Id.} at 437.
\item \textit{Id.} (citing Rossi v. Employees' Ret. Sys. of R.I., 895 A.2d 106, 110 (R.I. 2006)).
\end{enumerate}
\end{footnotes}
determine whether legally competent evidence exists to support the findings." Initially, the Court addressed Champlin's claim that the CRMC, Tikoian, and the intervenors did not have standing to seek review of the Superior Court's decision because they had not alleged an environmental injury in fact.23 After considering the language of the RIAPA, the Court held that the petitioners were all aggrieved parties within the meaning of the statute and were therefore properly before the Court.24

The Court then considered the petitioners' claims of error regarding the evidentiary hearing.25 The Court rejected the claim that the trial justice erred in granting the evidentiary hearing, holding that the allegations of impropriety sufficed to support her decision to hold an evidentiary hearing on the alleged procedural irregularities.26 The Court agreed, however, with the petitioners' claim that the hearing improperly delved into the mental processes of the CRMC members.27 Because the CRMC is a quasi-judicial agency, its members are entitled to immunity from testifying about their mental process in decision-making.28 Although the Rhode Island Supreme Court had previously recognized quasi-judicial immunity only in the context of immunity from suit, it held here that "agency adjudicators also are cloaked with immunity from rendering testimony about their mental processes in reaching decisions . . ."29 This holding reflects the Court's desire to discourage litigants from compelling agency adjudicators to testify about their mental processes.30 The Court noted that it would not consider testimony regarding the mental processes of the CRMC members.31

Turning next to the trial justice's finding that certain members of the CRMC had engaged in prohibited ex parte
communications, the Court stated that “no litigious facts should reach the decision maker off the record in an administrative hearing.”32 The Court left undisturbed the trial justice’s finding that the “Goulet plan” constituted an *ex parte* contact;33 similarly, the Court declined to overturn the trial court’s finding that Tikoian’s contacts with Governor Carcieri and his staff were impermissible *ex parte* contacts.34 After affirming the trial justice’s finding of *ex parte* contacts, the Court next considered her finding of bias on the part of three members of the CRMC.35

The trial justice found that three members of the CRMC “were biased” with regard to Champlin’s application: Tikoian, Lemont, and Zarrella.36 While legally competent evidence existed to support her finding of bias on the part of Tikoian and Zarrella, the Court held that her finding of bias as to Lemont was not supported by legally competent evidence.37 In finding that Lemont was biased, the trial court impermissibly relied on Lemont’s testimony as to his mental process, and the remaining legally competent evidence was “far too flimsy” to support a finding of bias.38

Finally, the Court considered whether the trial justice’s remedy was appropriate, reviewing this issue *de novo*.39 While the trial court asserted broad authority to fashion an equitable remedy, the Court held that “a remand to the agency [was] necessary so that the *ex parte* contacts of the sort found by the trial justice may be placed in the record and the parties be offered the opportunity to respond.”40 The Court distinguished this case from others in which remand might not be the most appropriate remedy by noting that the record was not complete; accordingly, the impermissible *ex parte* information must be made available for

32. *Id.* at 440-41 (quoting *Arnold v. Lebel*, 941 A.2d 813, 821 (R.I. 2007)).
33. *Id.* at 441. The “Goulet plan” refers to the compromise plan that Lemont, one of the CRMC members, asked the CRMC’s executive director to produce. Fugate, the executive director, delegated this task to Dan Goulet, a staff engineer at the CRMC. *Id.* at 435.
34. *Id.* at 441.
35. *Id.* at 441, 443.
36. *Id.* at 443.
37. Champlin’s, 989 A.2d at 444, 447-48.
38. *Id.* at 447.
39. *Id.* at 448.
40. *Id.*
both parties to examine.\textsuperscript{41} Echoing the trial court's concern that a remand would result in further delay, the decision noted that "the Superior Court is to direct that the CRMC is to proceed forthwith in bringing this matter to a close."\textsuperscript{42}

In separate opinions, Justice Robinson and Chief Justice Williams concurred in part and dissented in part.\textsuperscript{43} Justice Robinson "concur[red] in virtually every aspect of [the decision] . . . except with respect to the Court's affirmance of the Superior Court's finding of disqualifying bias on the part of Michael Tikoian."\textsuperscript{44} Chief Justice Williams dissented from the Court's decision to reverse the trial justice and remand the matter to the CRMC; he also disagreed with the majority's suggestion that the Superior Court must remand a case to the administrative agency in every instance in which ex parte contacts are found to have occurred.\textsuperscript{45} Justice Goldberg did not participate in the Court's decision.\textsuperscript{46}

**COMMENTARY**

Although Chief Justice Williams took issue with the majority's suggestion that the Superior Court must remand a case to the administrative agency in every instance in which ex parte contacts are found to have occurred, the Court properly valued a party's right to examine off-the-record communications over the need for an expeditious decision. The trial justice's decision to fashion an equitable remedy rather than remand the matter to the CRMC was driven by her concern that remand would result in further delay.\textsuperscript{47} While the Court's decision characterized the drawn-out procedural history of this matter as "unfortunate," it wisely cautioned that any resolution on this issue "[could not] be made lightly," given the potential for major environmental consequences.\textsuperscript{48} The decision thus confirms for administrative

\textsuperscript{41} Id. at 449.
\textsuperscript{42} Id. at 436, 449.
\textsuperscript{43} See Champlin's, 989 A.2d at 450 (Robinson, J., concurring in part and dissenting in part); id. at 460 (Williams, C.J. (ret.), concurring in part and dissenting in part).
\textsuperscript{44} Id. at 450 (Robinson, J., concurring in part and dissenting in part).
\textsuperscript{45} Id. at 461 (Williams, C.J. (ret.), concurring in part and dissenting in part).
\textsuperscript{46} Id. at 466.
\textsuperscript{47} See id. at 436.
\textsuperscript{48} Id. at 442-43.
agencies the need to provide agency adjudicators proper guidance on the prohibition against ex parte communications. If agency adjudicators are unaware of the law regarding ex parte contacts, many administrative decisions will be remanded for further proceedings, resulting in costly delay for all parties involved.

The majority indirectly responds to Justice Robinson's opinion that the trial justice committed clear error when she found disqualifying bias on the part of Tikoian by pointing out that its holding on this issue is constrained by the standard of review. Because a finding of bias is a finding of fact to which a reviewing court must afford great deference, the Court properly affirmed the trial court's finding that Tikoian was biased. Whether or not the trial justice erred in giving insufficient weight to the presumption of regularity that attaches to public officials, as Justice Robinson opined, the Court was bound by law to affirm her finding so long as it was supported by legally competent evidence. In affirming the trial court on this issue, the Court notes that it was "mindful of our standard of review." The portion of the opinion that discusses the trial court's findings regarding Tikoian clearly shows that sufficient evidence existed to support her finding of bias.

CONCLUSION

The judgment of the Rhode Island Superior Court was affirmed in part, reversed in part, and remanded to the Superior Court with instructions that it remand the matter to the CRMC for further proceedings. After the Court's decision was issued, a subcommittee of the CRMC held three hearings over the course of two months, concluding its consideration of this issue in July 2010. On January 11, 2011, the full CRMC rejected Champlin's proposal for expansion. Soon after, Champlin's appealed this decision.

49. Champlin's, 989 A.2d at 444-45.
50. Id. at 443.
51. Id.
52. See id. at 444-45.
53. Id. at 450.
decision to Superior Court. Given the importance of the outcome in this matter to Champlin's, the Town of New Shoreham, and the intervenors, it seems likely that the losing side will once again appeal the decision of the CRMC to the Supreme Court. Now that a second round of appeals has begun, the Court's direction that the matter be remanded to the CRMC seems well-considered. The record was rightly supplemented by the *ex parte* contacts so that the parties could appropriately respond and cross-examine this additional evidence. Reviewing courts will surely benefit from a thorough vetting of the evidence in this case and in all other cases in which *ex parte* contacts occurred at the agency level.

Amy H. Goins

Arbitration/Excusable Neglect. *Boranian v. Richer*, 983 A.2d 834 (R.I. 2009). Where a party seeks permission to reject an arbitration award after the twenty-day deadline has passed, the correct standard to use to determine whether the Rhode Island Supreme Court may grant relief is one of “excusable neglect” under Rule 6(b) of the Rhode Island Superior Court Rules of Civil Procedure.

FACTS AND TRAVEL

Plaintiff Peter Boranian was injured in a rear-end automobile collision and the defendants, Elaine Richer and C. Real Richer, did not dispute liability. The parties entered court-annexed arbitration. After arbitration, defendants filed a motion to extend by one day, the twenty-day deadline to reject the arbitration award. The rejection of the arbitration award was late because defendants’ counsel’s secretary miscalculated the deadline for filing.

Defendants argued that the late filing should be extended under Rule 60(b), which provided that the Superior Court, in its discretion, could grant relief due to “mistake, inadvertence, surprise, or excusable neglect.” In particular, defendants asserted that the late filing was due to “inadvertence.” The Superior Court allowed the defendants to file their rejection based on the presence of “excusable neglect.”

ANALYSIS AND HOLDING

On appeal, the Rhode Island Supreme Court held that Rule 6(b) rather than Rule 60(b) applied to the facts of this case. Rule

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2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 838 n.3.
6. *Id.* at 838.
8. *Id.* at 837.
60(b) states that, "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect . . . ." The Court held that when the defendants attempted to reject the arbitration award there was no final judgment and Rule 60(b) did not apply. In contrast, Rule 6(b) states that

when . . . an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . . .

The Court held that the rejection of the arbitration award was "an act . . . required or allowed to be done at or within a specified time" and therefore the "excusable neglect" standard that the Superior Court used was the correct standard, albeit from the wrong rule.

"[F]or a party to establish excusable neglect, the party generally must show that the circumstances that caused the party to miss a deadline were out of that party or counsel's control." Where opposing counsel provided misleading information that resulted in a default judgment, this was held to be excusable neglect. A plaintiff missing an appellate court fees-payment deadline, but correcting it immediately, was also held to be excusable neglect. In the instant case, however, the Court held that defendants' counsel's secretary miscalculating a deadline was not "out of that party or counsel's control" and was consequently not excusable neglect.

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9. Id. at 838 n.3.
10. Id. at 838.
11. Id. at n.2.
12. Id.
14. Id. at 839 (citing Pleasant Mgmt., LLC v. Carrasco, 960 A.2d 216, 225 (R.I. 2008)).
15. Id. (citing Gardener v. Baird, 871 A.2d 949, 952-53 (R.I. 2005)).
16. Id. at 840.
COMMENTARY

The Court chose to construe “excusable neglect” narrowly when it explained that “[i]n the present situation, the error . . . was entirely under defendants’ attorney’s control.” In so doing, the Court takes a less deferential position than it otherwise could have, and diminishes the ability of trial justices to evaluate the facts of each case independently to arrive at a just result. Where counsel’s secretary’s miscalculation of a filing deadline causes an adverse effect on the defendant’s case, the Court could have found that it was within the trial court’s discretion to determine that this is not the type of neglect that should be shouldered by the defendants. As it stands, the Court’s decision has the potential to create additional litigation if a party’s only remedy, when faced with a relatively minor error made by Counsel’s employee that is nonetheless outcome determinative, is to file a legal malpractice claim.

CONCLUSION

The Court further defines the “excusable neglect” standard that appears in Rules 6(b) and 60(b) of the Rhode Island Superior Court Rules of Civil Procedure. “[T]he party generally must show that the circumstances that caused the party to miss a deadline were out of that party or counsel’s control.” According to the Court, the miscalculation of a deadline by the secretary of defendants’ counsel was not sufficiently “out of the party or counsel’s control” for a trial justice to determine that it was ‘excusable neglect,’ without it being an abuse of discretion.

Scott Ewing

17. Id. at 840.
18. Id. at 837-39.
20. Id.
Arbitration. *Buttie v. Norfolk & Dedham Mutual Fire Insurance Co.*, 995 A.2d 546 (R.I. 2010). The Rhode Island Supreme Court held that it was irrational to give preferential treatment to the passengers in an automobile accident under the driver/policyholder’s automobile insurance policy. In Rhode Island, when multiple individuals suffer damages in an accident and those individuals have equal rights under an insurance policy that does not provide sufficient coverage, a pro rata distribution should be accomplished in proportion to each claimant’s relative damages. An arbitration award that does not follow these guidelines may be considered irrational and modifiable by a court.

**FACTS AND TRAVEL**

On August 12, 1996, plaintiff Robert Buttie and passengers Raymond and Joan Cataldo suffered damages in an automobile accident with an underinsured motorist (UM).¹ Mr. Buttie owned the motor vehicle involved in the crash and was not at fault for the accident.² After exhausting the tortfeasor’s liability insurance, plaintiff and the Cataldos sought to recoup the remaining balance of their damages in UM benefits from the plaintiff’s insurance carrier, and the Cataldos also sought UM benefits from Raymond Cataldo’s insurance policy.³ Norfolk & Dedham Mutual Fire Insurance Company (Norfolk) insured Mr. Buttie’s vehicle with UM coverage up to $300,000, and Travelers Insurance Company (Travelers) insured Mr. Cataldo with UM coverage up to $100,000.⁴ Plaintiff and the Cataldos entered into binding arbitration to determine the amount each party was entitled to out of the $400,000 in combined UM benefits.⁵

The arbitrator concluded that the $400,000 in available coverage was inadequate to compensate the parties for their total

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². *Id.* at 550.
³. *Id.*
⁴. *Id.*
⁵. *Id.* at 548.
damage from the car accident, which totaled $636,838. The arbitrator prioritized the Cataldos in the distribution of the available funds from Mr. Buttie's Norfolk policy. The arbitrator first awarded the Cataldos the full amount of their damages under the Norfolk and Travelers policies leaving Mr. Buttie with the remaining $169,937 from the Norfolk policy, or approximately 37% of his total damages.

Mr. Buttie moved to vacate, modify, or correct the arbitrator's award in Superior Court, and the Cataldos filed an answer to affirm the arbitration award. Travelers also answered and opposed plaintiffs motion. A hearing on the motion concluded with entry of an order confirming the arbitration award. The Court dismissed plaintiff's original appeal on procedural grounds. Mr. Buttie then appealed this dismissal and the Court denied the second appeal without prejudice to allow the plaintiff to seek a writ of certiorari. Thereafter, Mr. Buttie filed a petition for writ of certiorari, which the Supreme Court granted.

ANALYSIS AND HOLDING

On appeal, plaintiff asserted that the arbitrator erred in the manner in which he apportioned the available UM benefits. Specifically, Mr. Buttie contended that it was "manifestly erroneous and plainly irrational" for the arbitrator to give the Cataldos preferential treatment under a policy for which he paid the premiums. As a threshold matter, the Court acknowledged that the authority to review an arbitral award is prescribed by

6. Id. The arbitrator also found that the plaintiff suffered $463,420 in damages, Mr. Cataldo suffered $93,272, and Mrs. Cataldo suffered $80,146 in damages. Id.

7. Buttie, 995 A.2d at 548.

8. Id. The arbitrator awarded Mr. Cataldo $69,954 from the Norfolk policy and $23,318 from the Travelers policy; Mrs. Cataldo was awarded $60,109 under the Norfolk policy and $20,037 from the Travelers policy. Id.

9. Id.

10. Id.

11. Id.

12. Id. at 548-49.


14. Id.

15. Id. at 550.

16. Id.
statute and is limited in nature.17 The Court can vacate an award of arbitration "if the arbitrator manifestly disregarded the law or if the award was irrational."18 Furthermore, the Court previously held that an arbitrator's decision to rewrite a contract may be overturned.19

In the instant case, there was no express provision in the Norfolk insurance policy that directed preferential treatment of passengers over the owner of the policy in the distribution of UM benefits.20 Therefore, the Court held that the arbitrator essentially rewrote the Norfolk contract by giving the Cataldos priority for their damages, and deemed it "irrational to subordinate the rights of the named insured under the policy to those of the other occupants of the automobile."21 The Court also announced that, "[l]ogic and fairness dictate that when multiple individuals suffer damages and those individuals have equal rights under a policy that does not provide sufficient coverage, a pro rata distribution should be accomplished in proportion to each claimant's relative damages."22 The Court applied this rule to Mr. Buttie's Norfolk policy, which yielded the following pro rata allocations: plaintiff incurred 73% of the total damages and was entitled to 73% of the $300,000 UM benefits ($219,000); Mr. Cataldo incurred 15% of the total damages and was entitled to $45,000 of the UM benefits; finally, Mrs. Cataldo incurred 12% of the total damages and was entitled to $36,000.23 The Court directed this distribution of the UM benefits under the Norfolk policy upon remand.24 The Court disagreed with Travelers' assertion that the arbiter's award concerning Travelers' liability should remain undisturbed even if the plaintiff was entitled to an additional recovery under the Norfolk policy.25 The Court asserted that the

17. Id. at 549.
18. Id. (citing Aponik v. Lauricella, 844 A.2d 698, 703 (R.I. 2004)).
20. Id.
21. Id.
22. Id.
23. Id. at 551.
24. Id.
25. Buttie, 995 A.2d at 551. In doing so, the Court agreed with the Cataldos' argument that if Mr. Buttie's award was increased under the
arbitrator's irrational method in the distribution of the Norfolk UM benefits "infected the entire award." Furthermore, the Court reasoned that it would lead to a "plainly unjust result" if Travelers denied the Cataldos the remaining amount of their damages when Mr. Cataldo's policy allowed recovery up to $100,000 in UM benefits. Therefore, the Court directed that Mr. and Mrs. Cataldo's awards under the Travelers policy be increased to satisfy their total damages amount.

COMMENTARY

In his dissent, Justice Flaherty vehemently disagrees with the majority's decision to disturb the arbitrator's award. He emphasizes the stringent standard of review that the court must abide by to review an arbitration award, and concludes that, in his opinion, the arbiter's award in this case cannot be considered "completely irrational." However, although passengers in a motor vehicle involved in an automobile accident are entitled to liability insurance benefits of the owner of the vehicle, common sense dictates that passengers should not take priority in the distribution of these benefits over the owner who pays premiums to own the policy. Any arbitration award that goes against this basic premise is inherently irrational. In this case, the arbitrator's award was especially unfair as Mr. Buttie was not at fault for the accident.

Additionally, the Court was correct to increase the Cataldos' awards under the Travelers policy. If it did not alter the award, then the Cataldos would have only received a combined $43,354.50 out of the possible $100,000 UM benefits in Mr. Cataldo's policy. This would have resulted in a $49,063.50 windfall for Travelers ($92,418 in total damages minus

Norfolk policy, the portion of their award under the Travelers policy must also be altered to achieve a just result. Id.

26. Id.
27. Id.
28. Id. Mr. Cataldo's award under the Travelers policy was increased to $48,272; Mrs. Cataldo's award was increased to $44,146. Id. at 552.
29. Id. at 553 (Flaherty, J. dissenting).
30. Id. (Flaherty, J. dissenting).
32. Id. at 552.
$43,354.50). Fairness directs that Mr. and Mrs. Cataldo should receive compensation for the remaining amount of their damages not covered by the Norfolk policy from the Travelers policy.

CONCLUSION

The Rhode Island Supreme Court held that it is irrational to give preferential treatment to the passengers in an automobile accident under the policyholder's liability insurance policy. The Court announced that when multiple individuals suffer damages in an accident and those individuals have equal rights under an insurance policy that does not provide sufficient coverage, a pro rata distribution should be accomplished in proportion to each claimant's relative damages.

Jolee Elyse Messier
Civil Procedure/New Trial. Manning v. Bellafiore, 991 A.2d 399 (R.I. 2010). Plaintiff, whose husband died after suffering a stroke, brought a negligence and wrongful death action against her husband's doctors and the hospital where he was treated. After the jury found in favor of the defendants, plaintiff moved for a new trial. The trial justice granted plaintiff's motion against one of the defendants due to the defendant's misconduct during discovery and because of a finding that the jury's verdict was against the fair preponderance of the evidence. The Rhode Island Supreme Court affirmed the trial justice's grant of a new trial.

FACTS AND TRAVEL

On March 4, 1998, Michael Manning, a forty-year-old father of four, lost consciousness and fell in his home after suffering a stroke.\(^1\) When his wife, Kathryn Manning (plaintiff) found him he was "unable to sit up or open his eyes" and had a "mild facial droop on his right side."\(^2\) Mr. Manning was taken to South County Hospital where Dr. Peter Bellafiore (defendant) took charge of Mr. Manning's care and made an initial diagnosis that the symptoms could be caused by "complex migraine, aneurysm, tumor, and stroke."\(^3\) Defendant determined that Mr. Manning should have magnetic resonance imaging (MRI) and magnetic resonance angiography (MRA) tests in order to determine if the symptoms were caused by a stroke.\(^4\)

The first attempt to perform the MRI/MRA test on Mr. Manning took place on the day he was admitted to the hospital; however, he had a "claustrophobic reaction and became nauseous" while inside the diagnostic machine and was "unable to complete the test."\(^5\) Mr. Manning was then given antianxiety and antinausea medication, but a second test also failed.\(^6\) After the

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2. Id. at 400.
3. Id. at 400-01.
4. Id. at 401.
5. Id.
6. Id.
unsuccessful attempts to diagnose the patient’s condition using the MRI/MRA test, defendant tried to arrange for an “open architecture MRI” which may have been able to perform the necessary tests without inducing the claustrophobic reaction. The open MRI test was not an option, however, after defendant learned that the machine at Rhode Island Hospital was being repaired.

On March 6, 1998, at 3 a.m., Mr. Manning began experiencing a severe headache and visual impairment. Defendant ordered a computerized tomography (CT) scan to determine the cause of these new symptoms and discovered “a new prominent segmental abnormality in the left occipital lobe,” which served as confirmation that Mr. Manning had, in fact, suffered from a stroke. The next day Mr. Manning “suffered a second, catastrophic stroke” and was airlifted to Massachusetts General Hospital where the clot that likely caused his stroke was discovered. After treatment to attempt to break up and dislodge the clot, Mr. Manning “steadily lost brain function” and died on March 9, 1998, after life support was withdrawn.

Plaintiff filed suit against Dr. Bellafiore, Dr. McNiece (Mr. Manning’s primary care physician), and South County Hospital “alleging negligence and wrongful death.” The main issue at trial was whether defendant breached the standard of care by failing to administer the MRI/MRA exam and promptly diagnose Mr. Manning’s condition. Three experts who testified on behalf of the plaintiff said that defendant breached the standard of care

7. Manning, 991 A.2d at 401. Expert testimony at trial indicated that the open MRI test may have been inadequate to diagnose the patient's condition because the images it produces are not of high enough quality. Id. at 405.
8. Id. at 401.
9. Id.
10. Id. “Dr. Bellafiore conceded at trial that had he ordered a CT scan a day earlier on March 5, it would have revealed the same information.” Id. at n.5.
11. Id. at 401-02.
12. Id. at 402.
13. Manning, 991 A.2d at 400, 402. A new trial was not granted against defendants Dr. McNiece or South County Hospital; thus, they are not parties to this appeal. Id. at 407 n.17.
14. Id. at 402.
by not promptly performing the imaging tests. The experts testified that if a closed MRI/MRA or another test called a cerebral angiogram had been performed soon after the first stroke had occurred then it is likely the second stroke could have been prevented and Mr. Manning's "long-term prognosis would have been good." Two of the experts indicated that the best option for treatment would have been to have an anesthesiologist put Mr. Manning into "conscious sedation" so that he could undergo the closed MRI/MRA diagnostic procedure without risk of a claustrophobic reaction.

At trial, defendant testified that he had offered "conscious sedation" as an option to Mr. Manning, but that Mr. Manning had refused the procedure. He also testified that he had discussed a cerebral angiogram procedure with Mr. Manning as an option for diagnosis, but this had been refused as well. This testimony, however, was "vigorously disputed" by the plaintiff because "in both his answers to interrogatories and his deposition testimony" defendant failed to mention that he had offered conscious sedation or a cerebral angiogram as options to Mr. Manning. Defendant also failed to document in his treatment notes any instance of Mr. Manning refusing to undergo the conscious sedation or cerebral angiogram procedures.

After the jury returned a verdict in favor of all three defendants, "plaintiff filed a timely motion for judgment as a matter of law or, in the alternative, a new trial," arguing that the new trial was justified because defendant "had withheld vital information during the discovery process and also because the jury's verdict was against the weight of the evidence." The trial justice agreed that a new trial was necessary because the defendant's discovery abuses misled the jury and caused them to

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15. Id. at 405-06.
16. Id.
17. Id.
18. Id. at 403.
19. Manning, 991 A.2d at 403-04.
20. Id. at 404. Additionally, the Court noted that "[s]ignificantly, Dr. McNiece [Mr. Manning's primary care physician] testified that he had no knowledge of Mr. Manning having refused conscious sedation." Id. at 403 n.12.
21. Id. at 403-04.
22. Id. at 407.
return a verdict that was against the “fair preponderance of the evidence.”

Defendant, on appeal, argued that the “trial justice abused his discretion” in granting a new trial to sanction discovery abuse and that the “trial justice’s determination that the jury’s verdict was against the weight of the evidence was clearly wrong.”

**ANALYSIS AND HOLDING**

**The Standard of Review**

The Rhode Island Supreme Court began its analysis by using precedent to explain the role of the trial justice in ruling on a motion for a new trial and the role that the Supreme Court plays in reviewing that decision on appeal. The Court said that “[w]hen ruling on a motion for a new trial, the trial justice acts as a ‘superjuror’ and ‘should review the evidence and exercise his or her independent judgment in passing upon the weight of the evidence and the credibility of the witnesses.’” The Court also presented a set of principles that the trial justice should apply when ruling on a motion for a new trial:

The trial justice may accept some or all of the evidence. [He or she] may reject evidence that is impeached or contradicted by other positive testimony or circumstantial evidence. Or [he or she] may disregard testimony that contains inherent improbabilities or contradictions or which is totally at variance with undisputed physical facts or laws. [He or she] may also add to the evidence by drawing proper inferences.

If the trial justice finds that the evidence is evenly balanced, or “is such that reasonable minds, in considering that same evidence, could come to different conclusions,” then he or she should deny the motion and let the verdict stand. However,

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23. *Id.*
24. *Id.*
25. See *Manning*, 991 A.2d at 407-08.
26. *Id.* at 408 (quoting *Seddon v. Duke*, 884 A.2d 413, 413 (R.I. 2005)) (internal quotations omitted).
27. *Id.* (quoting *Murray v. Bromley*, 945 A.2d 330, 333 (R.I. 2008)).
28. *Id.* (quoting *Seddon*, 884 A.2d at 413-14) (internal quotations omitted).
the motion should be granted when the trial justice finds that the verdict "is wrong because it fails to respond truly to the merits of the controversy and to administer substantial justice and is against the fair preponderance of the evidence."\textsuperscript{29}

When reviewing a trial justice's decision to grant a motion for a new trial, the Supreme Court will affirm the decision "as long as the trial justice conducts the appropriate analysis, does not overlook or misconceive material evidence, and is not otherwise clearly wrong."\textsuperscript{30} The decision of the trial justice is not overturned lightly and his or her ruling on the motion is given "great weight."\textsuperscript{31}

\textit{Application of the Standard of Review}

The Supreme Court first reviewed the trial justice's findings and decided that when ruling on the motion for a new trial, the trial justice thoroughly reviewed the evidence and testimony and made "specific credibility findings" for the expert witnesses and the defendant.\textsuperscript{32} The trial justice found the testimony of plaintiff's experts to be credible and that their testimony established a standard of care which required defendant to provide prompt MRI/MRA imaging tests to Mr. Manning.\textsuperscript{33} The testimony of the defendant's expert witnesses was found to be "unconvincing" and less credible.\textsuperscript{34} The defendant's testimony that he "offered Mr. Manning the option of conscious sedation" was also deemed by the trial justice not to be credible.\textsuperscript{35} A careful review of the evidence and testimony convinced the trial justice that defendant had breached the standard of care.\textsuperscript{36}

The Court then discussed defendant's argument that reversal and reinstatement of the jury verdict was necessary because "the trial justice relied on several material misconceptions of the

\textsuperscript{29} Id. (quoting Murray, 945 A.2d at 333) (internal quotations omitted).
\textsuperscript{30} Id. (quoting Murray, 945 A.2d at 334) (internal quotations omitted).
\textsuperscript{31} Manning, 991 A.2d at 408 (quoting Bajakian v. Erinakes, 880 A.2d 843, 851-52 (R.I. 2005)) (internal quotations omitted).
\textsuperscript{32} Id. at 408-09.
\textsuperscript{33} Id. at 408.
\textsuperscript{34} Id. at 409.
\textsuperscript{35} Id.
\textsuperscript{36} Id. at 408-09.
evidence” in making his ruling.37 Defendant argued that the trial justice erred by failing to make a “specific credibility determination” for one of the plaintiff’s experts, mischaracterizing the type of medicine that one of the experts practiced, and misspelling the name of one of the experts.38 Other errors alleged by the defense included a misunderstanding of a defense witness’ testimony concerning his role in Mr. Manning’s care and an acceptance of expert testimony that the standard of care was breached because defendant did not discuss treatment options with plaintiff during her husband’s treatment.39

The Court concluded that none of the arguments presented by the defense were “sufficient to require reversal” of the trial justice’s findings.40 It was unnecessary for the trial justice to make a specific finding of credibility for each witness, and the other alleged errors were immaterial to the Supreme Court’s decision to grant a new trial.41 Instead, the Court rationalized that the expert witnesses established a standard of care, which was breached by the defendant.42 Interestingly, the Supreme Court did not address the defendant’s contention that the trial justice wrongly ordered the new trial as a sanction for discovery abuse.43

The Court affirmed the trial justice’s decision to grant a new trial and held that the trial justice “conducted the appropriate analysis” when making his ruling, “did not overlook or misconceive material evidence,” and “was not otherwise clearly wrong.”44 The jury was presented with strong evidence of the defendant’s negligence but was misled by defendant’s failure to disclose crucial information in discovery that was later introduced through his testimony.45 Therefore, the trial justice was justified in finding that the verdict “was against the fair preponderance of the evidence and failed to do justice or respond to the merits of the

37. Manning, 991 A.2d at 409.
38. Id. at 409-10.
39. Id. at 410.
40. Id.
41. Id. at 409.
42. Id. at 409-10.
43. See Manning, 991 A.2d at 407.
44. Id. at 410-11 (emphasis added).
45. See id. at 407, 410.
COMMENTARY

The Rhode Island Supreme Court used the present case as an opportunity to demonstrate the deference given to the trial justice's findings when reviewing, on appeal, a motion for a new trial. The Court emphasized that the trial justice must fail to apply the correct test in reviewing the evidence or must come to a conclusion that is clearly wrong for a reversal to be warranted. The Court was able to easily overcome the defendant's arguments on appeal because they did not go to material issues that factored into the trial justice's findings. Instead, defendant's arguments were characterized by the Court as frivolous criticisms of the opinion written by the trial justice, seeking to point out issues as inconsequential as the misspelling of a witness's name.

This case also provides insight into the role of the trial justice when ruling on a motion for a new trial. It is not necessary for the trial justice to have any specialized medical knowledge in order to weigh the evidence and determine the credibility of expert witnesses in a complicated medical malpractice case. The defendant would argue that it was a crucial mistake for the trial justice to not know the difference between a "neuro-interventional radiologist" and an "interventional neuro-radiologist," but it is clear from the opinion that this type of information is not material to findings by the trial justice. Since the trial justice acts as a "superjuror" he or she should not be required to have expert knowledge and understanding of the medical field that the typical juror would not possess.

No weight was given to the defendant's argument that the new trial was granted improperly because it was being used as a sanction for discovery abuse. It is clear from the trial justice's analysis and the opinion of the Supreme Court that the new trial

46. Id. at 410.
47. See id. at 408.
48. See id. at 408, 410-11.
49. See Manning, 991 A.2d at 409-10.
50. See id. at 410.
51. Id. at 409-10.
52. See id. at 408.
53. See id. at 407.
was necessary not to punish the defendant's misconduct, but because his misconduct prevented the jury from making an informed decision based on the merits of the case. When the defendant testified about Mr. Manning's refusal to undergo the tests that were necessary to diagnose his condition without disclosing this information in discovery, defendant provided information to the jury that the plaintiff was unable to anticipate and the jury was unable to correctly weigh. A new trial was necessary to correct this mistake and was not intended to punish the offending party.

CONCLUSION

The Rhode Island Supreme Court affirmed the decision of the trial justice granting a new trial in this negligence and wrongful death case. The findings by the trial justice are given great deference and reversal is only warranted if he or she fails to conduct the correct analysis, misconceives material evidence, or is clearly wrong. Because the trial justice thoroughly reviewed all the evidence and testimony and found that the verdict was against the fair preponderance of the evidence, it was not an abuse of discretion to grant a new trial.

Stephen J. Sypole

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54. See id.
55. See Manning, 991 A.2d at 407.
Civil Procedure. *McNulty v. City of Providence*, 994 A.2d 1221 (R.I. 2010). The notice requirement section 45-15-9 of the Rhode Island General Laws must be strictly obeyed. In order to overcome this notice requirement through a claim of equitable estoppel a plaintiff must show (1) "an affirmative representation or equivalent conduct" on the part of one party "for the purpose of inducing the [plaintiff] to act or fail to act in reliance thereon"; and (2) "proof that such representation or conduct in fact did induce the [plaintiff] to act or fail to act to his or her injury."  

FACTS AND TRAVEL

On October 9, 2002, the plaintiff, Susan McNulty (McNulty), allegedly tripped and fell while walking on a sidewalk in Providence, Rhode Island (the City). McNulty alleged that her fall was due to "protrusions of conduit type material" that were jutting out of the sidewalk. As a result of her fall, McNulty allegedly suffered injuries and incurred medical expenses. Within a week of the incident, McNulty contacted the City's Department of the City Clerk and advised the clerk with whom she spoke of the circumstances surrounding her fall, her allegation that she had sustained injuries and incurred medical expenses as a result of the fall, and her intent to file a claim against the City. According to McNulty, the clerk with whom she spoke informed her that the documentation necessary to file a claim with the City and "instructions as to how to complete the documentation would be sent to her." McNulty maintained that at no time during this conversation did the clerk advise her that there was any time limitation required to file a claim with the City.

McNulty subsequently "received a letter, dated October 29,
2002, from City Clerk Michael Clement. Enclosed with the letter was a “blank petition form.” The letter advised McNulty that if it was her intention to file a claim against the City, she must fill out the petition form in detail and return it to the City with any documents pertaining to the claim, including medical bills. The letter further advised that if the petition form was not filled out in detail, McNulty's claim would be returned to her. Neither the letter nor the petition form indicated that, pursuant to sections 45-15-9 and 45-15-10 of the Rhode Island General Laws, a person alleging injury (in circumstances such as McNulty's) must give a city or town written notice within sixty days of the alleged injury as a prerequisite to seeking recovery from the city or town. McNulty contended that, based on her conversation with the clerk of the City Clerk's office and McNulty's understanding of the letter and petition form, she believed that if she submitted the petition form to the City upon her receipt of the letter, her claim would be returned to her as incomplete because her medical treatment had yet to be concluded at that point. McNulty's written notice was received by the City on April 4, 2003 — nearly six months after the October 9, 2002 fall.

On November 6, 2003, McNulty filed suit in Providence County Superior Court, alleging that she had suffered injuries as a proximate result of the City's failure to maintain the sidewalk in a “reasonably safe and secure condition” and “to warn those reasonably expected upon the [sidewalk] of any unsafe or dangerous conditions.” The City filed a motion for summary

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8. Id. at 1223.
9. Id.
10. Id. at n.2.
11. Id.
13. McNulty alleged that her injuries resulted from the City's negligent failure to maintain the sidewalk in a reasonably safe and secure condition. McNulty, 994 A.2d at 1223. Although section 45-15-9 of the Rhode Island General Laws directs that notice be given to “the town,” the Rhode Island Supreme Court has consistently understood that term in this statute as referring to cities as well as towns.” Id. at 1224 n.4.
14. Id. at 1223.
15. Id.
16. Id.
17. Id. McNulty also filed suit against “John Doe Corporation,” which was allegedly responsible for the condition of the sidewalk where her fall allegedly took place; however, the appeal before the Court only pertained to
judgment, which was granted by a motion justice of the Superior Court on the grounds that, under sections 45-15-9 and 45-15-10 of the Rhode Island General Laws, McNulty's claim was not timely filed. In response to McNulty's claim that summary judgment should not be granted because the doctrine of equitable estoppel applied to allow her claim to go forward notwithstanding her failure to comply with the statutory time limitations, the motion justice concluded that the elements of estoppel were not satisfied. Specifically, "the motion justice found that the City had not made any affirmative representations and that there was no evidence of ‘intentionally induced prejudicial reliance.’" Accordingly, the motion justice entered partial final judgment in favor of the City and McNulty subsequently filed a timely notice of appeal.

ANALYSIS AND HOLDING

On appeal, McNulty argued that the motion justice erred in granting the City's motion for summary judgment. Specifically, McNulty contended that "in spite of her failure to have given timely notice, she should be permitted to pursue her claim because the City should be equitably estopped from raising the statutory notice provision as a defense." McNulty argued that the doctrine of equitable estoppel applied to this case because the City, through its authorized representative (i.e., the city clerk with whom McNulty spoke) and the documents sent to McNulty by the City, affirmatively misled McNulty as to the steps necessary to file a claim with the City by not telling her about the statutorily imposed time limitations. Based on this omission, McNulty asserted, she was misled into not filing her petition with the City.

McNulty's allegation against the City. Id. at n.3.
20. Id. at 1223-24.
21. Id. at 1224.
22. Id. The case came before the “[Rhode Island] Supreme Court pursuant to an order directing the parties to appear and show cause why the issues raised in this appeal should not be summarily decided.” Id. at 1222. After consideration, the Court decided that the appeal would be resolved without further briefing or argument. Id.
23. Id. at 1224.
24. Id. at 1225.
25. McNulty, 994 A.2d at 1225.
in a timely manner. Upon a de novo review, the Rhode Island Supreme Court unanimously affirmed the motion justice’s grant of summary judgment to the City.

The Court first examined whether McNulty had complied with the statutory notice requirement. Relying on prior decisions interpreting the statutory provisions at issue, the Court explained that it has “repeatedly stated” that the notice requirement set forth in the “straightforward statutory language” of section 45-15-9 of the Rhode Island General Laws “must be strictly obeyed.” The Court further explained that “the notice requirement is a condition precedent to the plaintiff’s right of action” which is necessary “to afford the [city or] town with an opportunity to make just and due satisfaction before the commencement of litigation.” The Court then concluded that because it was “undisputed that [McNulty] failed to provide notice to the city within the statutorily required sixty days,” the motion justice’s grant of summary judgment for the City was proper.

Turning next to McNulty’s equitable estoppel argument, the Court set forth the two requisite elements of the doctrine: (1) “an affirmative representation or equivalent conduct on the part of the person against whom the estoppel is claimed which is directed to another for the purpose of inducing the other to act or fail to act in reliance thereon”; and (2) “[proof] that such representation or conduct in fact did induce the other to act or fail to act to his [or her] injury.” The Court found that “there were no explicit instructions or directives made on behalf of the city as to the time
within which [McNulty] would have to file a claim.”

Therefore, because the City did not make any “affirmative representation” or engage in “equivalent conduct,” either through its representative or through the documents sent to McNulty, the Court held that there was “no basis for applying the doctrine of equitable estoppel” in this case.

**COMMENTARY**

The Court tempered its strict interpretation of the notice requirement of section 45-15-9 of the Rhode Island General Laws with a footnote at the end of the opinion emphasizing that the Court’s decision should not be read as “dissuad[ing] municipalities from providing would-be claimants with information concerning the rigorous temporal requirements that are set forth in [section] 45-15-9.” The Court further stated that the “government may on occasion, for the good of the citizenry, exceed what strict duty requires.”

The Court should be commended for explicitly recognizing the desirability of municipalities voluntarily disclosing the notice requirement to injured individuals while at the same time not compromising sound statutory interpretation and legal analysis. The language of the notice requirement is indeed “straightforward” as the Court suggests, and such straightforward language should be interpreted literally. Moreover, as the Court pointed out, it was uncontested that no instructions as to the time within which McNulty was required to file her claim were given by the City. A court would be hard pressed to equate the absence of any information regarding the time limitations with an “affirmative representation or equivalent conduct” that time limitations did not exist, and the Court rightly held that the first element of equitable estoppel was not present in this case.

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34. Id. (emphasis in original).
35. Id.
37. Id. at 1225 n.6.
38. Id.
39. Id. at 1224; see R.I. GEN. LAWS § 45-15-9(a) (2009) ("A person so injured or damaged shall, within sixty (60) days, give to the town... notice of the time, place, and cause of the injury or damage.").
40. McNulty, 994 A.2d at 1225.
41. Id.
On the other hand, the ease with which a municipality could advise a potential claimant of the sixty day time limitation should not be ignored. In this case, if the facts alleged by McNulty are taken as true, as they must be at the summary judgment stage, this ease becomes quite apparent. The City knew that McNulty was considering filing a complaint against the City, and yet the clerk and the documents sent by the City failed to apprise her of the sixty day notice requirement. A simple statement by the clerk or an extra line or two in the letter sent by the Clerk's office could have easily alerted McNulty to the fact that she had only sixty days in which to give written notice to the City.

Nevertheless, the Court struck the appropriate balance in this decision by rejecting McNulty's equitable estoppel argument while encouraging, or at least explicitly not discouraging, municipalities from taking the simple step of informing a potential litigant of the sixty day statutory notice requirement. The Court wisely used judicial restraint in not imposing a duty on municipalities that clearly is not imposed by the "straightforward statutory language" of section 45-15-9 of the Rhode Island General Laws. Hopefully, in the future, municipalities will follow the Court's suggestion and, "for the good of the citizenry, exceed what strict duty requires" by voluntarily informing potential claimants of the notice requirement.

CONCLUSION

The Rhode Island Supreme Court affirmed the motion justice's grant of summary judgment for the City because McNulty failed to comply with the sixty day notice requirement of section 45-15-9 of the Rhode Island General Laws. The Court rejected McNulty's equitable estoppel argument because the record was devoid of any "affirmative representation or equivalent conduct" on the part of the City, a necessary element of the equitable estoppel doctrine.

Joshua Dunn
**Contract Law.** *Haffenreffer v. Haffenreffer*, 994 A.2d 1226 (R.I. 2010). The Rhode Island Supreme Court vacated the summary judgment granted below, rejecting the trial justice's finding that the Offer Document precluded the defendant, Karl Haffenreffer, from purchasing certain property with shares due to him from a trust agreement as coexecutor of his mother's estate. The Court held that the Offer Document was unambiguous on its face; however, the Court disagreed with the trial justice's finding that the interpretation supported the plaintiff, David Haffenreffer. Although holding that the Offer Document was unambiguous on its face, the Court further considered extrinsic evidence. Finding the extrinsic evidence to be consistent with its interpretation, the Court held that Karl was entitled to summary judgment in his favor.

**FACTS AND TRAVEL**

Carolyn B. Haffenreffer passed away in 2003 triggering the execution of her will by her two sons, David and Karl Haffenreffer, as coexecutors of her estate.1 Her will set forth an estate plan for the distribution of her probate estate, and further "provided that the residue and remainder of her estate should be transferred into her trust . . ."2 Thus, her Overall Estate was divided between her probate estate and her Trust Agreement.3

The probate estate "consisted mainly of various parcels of real property"; several parcels located in Little Compton were at issue in this case.4 Carolyn's will "directed the coexecutors to sell several . . . parcels of real estate located in Little Compton."5

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1. Haffenreffer v. Haffenreffer, 994 A.2d 1226, 1227-28 (R.I. 2010). The will also named a third coexecutor, Attorney Noel M. Field. Id. at 1228. Attorney Field "in his capacity as coexecutor" was "only a nominal defendant in this action." Id. at n.2.
2. Id. at 1228.
3. Id. "The Trust Agreement provided that, after accounting for taxes, debts, and expenses, Karl would receive one-third of the remainder of the estate and David would receive the balance." Id.
4. Id.
5. Id.
Section 10 of the will further required that "the coexecutors first offer to sell the parcels to a select group of family members"; if such family members refused the sale, then the parcels were to be offered for sale to the public. To "facilitate the sale of the . . . parcels as directed by [section 10 of the] will," the three coexecutors created an Offer Document. The Offer Document provided a credit provision "which [set] forth the terms of payment" for the purchase of the parcels.

On May 2, 2005, pursuant to section 10 of the will and to the terms as provided in the Offer Document, Karl "submitted his response to the Offer Document—accepting the offer by indicating that he wished to purchase three specific units [of the probate estate]." Karl further indicated that he would produce most of the purchase price "by using in the form of a credit, the approximately $4.1 million that was due to him from Carolyn's Overall Estate to be distributed in accordance with the Trust Agreement."

In response, David and Attorney Field provided Karl with a memorandum "assert[ing] that the credit provision set forth in the Offer Document did not permit Karl to purchase the . . . units by using a credit reflective of the amount due to him from the Overall Estate"; rather, the Offer Document mandated payment "in the form of cash, certified check, bank check, or wire transfer." Thus, David and Attorney Field denied Karl's acceptance to purchase the parcels because his form of payment did not conform to the payment provision set forth in the Offer Document. Karl objected to this interpretation of the Offer Document. Although the Offer Document provided "payment shall be made in the form of cash, certified check, bank check or wire transfer," Karl,

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6. Id.
8. Id. The Offer Document also required that family members who wished to purchase any of the parcels accept the offer no later than May 2, 2005. Id.
9. Id.
10. Id. The purchase price totaled $5,215,500. Id.
11. Id. An accounting of the Overall Estate found that "Karl could expect to receive approximately $4.1M and that David could expect to receive approximately $8.3M." Id. at 1229-30.
12. Id. at 1229.
14. Id.
through his attorney, asserted that the Offer Document also permitted “payment... subject to adjustment for credit for shares or amounts due to such offeree from the Estate of Carolyn B. Haffenreffer pursuant to the terms of the Will.”15 Because of the dispute regarding the interpretation of the Offer Document, “David and Attorney Field... refused to consummate the sale.”16

David then brought suit in the Rhode Island Superior Court “seeking (1) a declaratory judgment and (2) a temporary restraining order to prevent the sale of the properties.”17 David later amended his complaint to include “a declaration that Karl had breached the contract to purchase the... properties] because he had failed to close on the properties within the time set forth in the Will.”18 Karl answered the complaint and filed a counterclaim asserting that David and Attorney Field had breached the contract by refusing to sell him the property “when he accepted the offer set forth in the Offer Document.”19 Karl asserted “that, in drafting the Offer Document, the coexecutors intended that the credit provision... would allow him to use his intended distribution from Carolyn's Overall Estate as a credit for a portion of the purchase price.”20

The parties then filed cross-motions for summary judgment.21 The hearing justice ruled in David’s favor finding that Karl had breached the contract and that “the credit provision clearly and unambiguously permitted Karl to use a credit from his anticipated share of Carolyn's probate estate only—and not from the Overall Estate.”22 The hearing justice did not analyze any extrinsic evidence in reaching this decision, finding that extrinsic evidence would be both “unnecessary and impermissible” under the parol evidence rule.23

Karl filed a timely appeal from the Superior Court’s grant of summary judgment in David’s favor, which brought the action

15. Id. (emphasis added).
16. Id.
17. Id. at 1229-30.
18. Id. at 1230.
20. Id.
21. Id.
22. Id. (emphasis added).
23. Id.
before the Rhode Island Supreme Court.24

ANALYSIS AND HOLDING

On appeal Karl contended that the Superior Court erred in granting summary judgment in David’s favor rather than in his favor.25 Karl contended that although the credit provision in the Offer Document is ambiguous, the only “reasonable interpretation” of the provision is that the credit applies to the Overall Estate, and not just the probate estate.26 He further contended that the hearing justice erred in failing to look to extrinsic evidence in interpreting the credit provision, since the extrinsic evidence demonstrates that the credit provision “refer[ed] to the Overall Estate” at the time the three coexecutors drafted the Offer Document.27

The Rhode Island Supreme Court reviews a trial justice’s grant of summary judgment de novo.28 A grant of summary judgment will be “affirm[ed] . . . if there is no genuine issue of material fact and [the Court] concludes that the moving party is entitled to judgment as a matter of law.”29 The Court also employs a de novo review in contract interpretation.30 Finally, since “whether or not a contract is ambiguous is a question of law” the Court also conducts a de novo review on this issue.31

The parties did not dispute that Karl’s acceptance of the Offer Document created a valid contract.32 Thus, “the well-settled rules on the interpretation of contracts” governed the Court’s determination with respect to the disputed credit provision.33

24. Id. at 1230-31.
26. Id. at 1231.
27. Id.
28. Id. (citing Estate of Guiliano v. Guiliano, 949 A.2d 386, 391 (R.I. 2008)). Since “there was no dispute between the parties as to the material facts, but rather only as to the legal conclusion to be drawn,” summary judgment was an “entirely appropriate” option here. Id. at n.8.
29. Id. at 1231 (quoting O’Sullivan v. R.I. Hosp., 874 A.2d 179, 182 (R.I. 2005)).
30. Id. (citing Zarella v. Minnesota Mutual Life Ins. Co., 824 A.2d 1249, 1259 (R.I. 2003)).
32. Id. at 1231 n.9.
33. Id.
Because the credit provision in the Offer Document referred to the terms of Carolyn's will, the Court regarded the will "as incorporated by reference" and thus "considered [the will] in the construction of the contract." 34

The Court noted that the will contained a "pour-over provision" 35 that "transfer[ed] a large portion of [Carolyn's] estate to a trust," "inextricably link[ing]" these two documents. 36 Therefore, since the credit provision in the Offer Document "expressly allows . . . payment through an adjustment of credit for shares . . . due to [Karl] from [Carolyn's Estate] pursuant to the terms of the Will," the Court concluded that this provision referred to shares from both the probate estate and the trust. 37 Karl was thus entitled to use shares due to him from the trust to pay for the Little Compton parcels specified in the Offer Document. 38

Although the Court held that the language of the Offer Document unambiguously permitted Karl to use his shares of the Overall Estate to pay for the parcels, thus "resolv[ing] the instant controversy," the Court also "believe[d] it worthwhile to note" that its interpretation of the credit provision "[was] entirely consistent with the intentions of the parties in preparing the Offer Document, as reflected in the copious extrinsic evidence in the record." 39 Thus, even after holding that the contract was unambiguous on its face, the Court "nonetheless consider[ed] the situation of the parties and the accompanying circumstances at the time the contract was entered into . . . to aid in the interpretive process and to assist in determining its meaning." 40

Here, the parol evidence rule was inapplicable because the extrinsic evidence was not used to "modify or contradict" the terms of the Offer Document; rather, the extrinsic evidence "provide[d] insight into the parties' intent at the time of the drafting." 41 The depositions of David and Attorney Field revealed that the

34. Id. at 1232 (quoting Rotelli v. Catanzaro, 686 A.2d 91, 94 (R.I. 1996)).
35. Id. (citing Filippi v. Filippi, 818 A.2d 608, 615 (R.I. 2003)).
36. Id. (citing Merrill v. Boal, 132 A. 721, 725 (R.I. 1926)).
38. Id.
39. Id. at 1233.
40. Id. (quoting Hill v. M.S. Alper & Son, Inc., 256 A.2d 10, 15 (R.I. 1969)).
41. Id. at 1233 n.13.
coexecutors "understood the credit provision of the Offer Document as referring to the trust and the will put together." Additionally, an affidavit from the attorney who actually drafted the Offer Document stated that his objective was to carry out the intention of the executors "as he understood it." Moreover, this attorney "[could] not recall" the coexecutors ever precluding shares from the trust in the Offer Document's credit provision. Thus, the extrinsic evidence demonstrated that the parties intended to include the shares from the trust as part of the credit provision. The Court therefore held that the Superior Court improperly granted summary judgment in David's favor, noting that in its view, "Karl was entitled to summary judgment."45

COMMENTARY

"It is a fundamental principle of contract law, as well as being well settled in this state, that 'clear and unambiguous language set out in a contract is controlling in regard to the intent of the parties to such contract and governs the legal consequences of its provisions.' The majority held that an analysis of the Offer Document devoid of extrinsic evidence "suffice[d] to resolve the instant controversy." The Court then muddied this holding by considering extrinsic evidence. Here, the extrinsic evidence revealed that the parties intended the Offer Document to permit payment in the form of a credit from shares distributed in accordance with the trust agreement. Conversely, had the extrinsic evidence revealed the intent of the parties to preclude such an interpretation, it is unclear how the Court would have ultimately ruled. The dissent criticized the majority for engaging in "interpretative acrobatics" by concluding that the phrase "pursuant to the terms of the Will" actually meant "pursuant to

42. Id. at 1234 (quoting the Offer Document).
43. Haffenreffer, 994 A.2d at 1234.
44. Id.
45. Id. at 1234-35.
46. Id. at 1240 n.21 (Goldberg, J., dissenting) (quoting Elias v. Youngken, 493 A.2d 158, 163 (R.I. 1985)).
47. Id. at 1233.
48. Id. at 1235 (Goldberg, J. dissenting).
49. Haffenreffer, 994 A.2d at 1235 (quoting the Offer Document).
the terms of the Will and trust instrument." Further, the dissent characterized the majority's holding as both "confusing" and "foreign to our appellate jurisprudence." Since the majority's analysis required a review of extrinsic evidence, the Offer Document could not have been unambiguous and clear on its face, and therefore the Court should have vacated the summary judgment order and remanded the case for trial.

CONCLUSION

The Court determined that the Offer Document's incorporation of Carolyn's will by reference inextricably linked the credit provision in the Offer Document with the terms of the trust. Therefore, Karl's acceptance of the offer to purchase the parcels with credit due to him under the trust agreement created a valid contract. David breached this contract when he failed to consummate the sale. Further, extrinsic evidence revealed that the intent of the parties upon drafting the Offer Document was to include the shares due under the trust as part of the credit provision. Thus, the Superior Court erred in finding that the Offer Document disallowed Karl to use his distributed shares from the trust to pay for the parcels in the Offer Document. Accordingly, Karl was entitled to summary judgment in his favor.

Jamie R. Johnson

50. Id. at 1235 (emphasis in original).
51. Id.
52. Id. (Goldberg, J. dissenting).
Criminal Law/Sentencing. Curtis v. State, 996 A.2d 601 (R.I. 2010). A prisoner released on parole is not entitled to receive credit toward his full sentence of imprisonment for time served while on electronically monitored community confinement. The defendant, after having been released from incarceration pursuant to a parole permit for electronically monitored community confinement, was reincarcerated as a parole violator. The Rhode Island Supreme Court vacated a judgment by the Rhode Island Superior Court which awarded the defendant credit toward the completion of his full sentence for time served as a parolee on electronically monitored community confinement.

FACTS AND TRAVEL

On July 30, 2003, the defendant, Harold Curtis, was sentenced to ten years imprisonment, with five years to serve and five years suspended with probation, after pleading nolo contendere to breaking and entering a dwelling with felonious intent.1 In March 2006, Curtis was released on a parole permit, with the condition that he cooperate with the electronic monitoring program (EMP) for at least ninety days,2 which entailed wearing an electronic ankle bracelet and agreeing not to leave his residence except for work, education, training, court, medical services, approved counseling services, or religious services.3 The EMP agreement also included a clause which read, “in computing the period of my confinement [pursuant to a revocation of the parole permit], the time between my release upon said permit and my return to the place of my original confinement shall not be considered as any part of the term of my original sentence.”4 On July 1, 2007, Curtis was reincarcerated as a parole violator, and subsequently scheduled to be released on July 14, 2008.5 On April 7, 2008, Curtis filed an application

2. Id.
3. Id. at n.2.
4. Id. (emphasis omitted).
5. Id.
seeking immediate release from incarceration, asserting that the ninety days he spent on electronically monitored community confinement as a parolee beginning in March 2006 should be credited toward the time he had left to serve after his parole was revoked.\(^6\)

The Superior Court hearing justice issued an order granting Curtis's request to receive credit for time spent on electronically monitored community confinement toward the completion of his full sentence, reasoning that a parolee on community "confinement" could not be considered "at liberty" upon parole, as required by section 13-8-16 of the Rhode Island General Laws.\(^7\) The state timely appealed.\(^8\)

**ANALYSIS AND HOLDING**

On appeal, the state argued that: (1) the hearing justice was incorrect in her interpretation of the relevant statutes; (2) the EMP agreement signed by Curtis specifically excluded time spent on parole from being credited toward his full sentence; and (3) the General Assembly distinguishes between community confinement and time served.\(^9\) Curtis argued that: (1) the hearing justice did not err in her interpretation of the relevant statutes; (2) the EMP agreement signed by Curtis was void as a contract of adhesion; and (3) the EMP agreement, as a waiver of his liberty, constituted an "usurpation of legislative power by the parole board."\(^10\)

The Rhode Island Supreme Court noted that although the standard of review on a motion to correct a sentence is normally whether the hearing justice's sentence is "without justification," the standard of review in this case is *de novo* because statutory interpretation is required.\(^11\)

According to the Court, "the issue presented on appeal concern[ed] the interplay of three statutes, *viz.*, §§ 13-8-16(a), 13-
8-19(b), and 13-8-9. As summarized by the Court, section 13-8-19(b) of the Rhode Island General Laws "generally precludes a prisoner from receiving credit toward his or her full sentence for time spent on parole"; section 13-8-9 "grants the parole board the authority to issue a permit to a qualified prisoner 'to be at liberty upon parole' that 'entitle[s] the prisoner . . . to be at liberty during the remainder of his or her term of sentence upon any terms and conditions that the board may prescribe''; and section 13-8-16(a) states that "a parole permit entitles a parolee 'to be at liberty upon parole during the remainder of the term which he or she is under sentence to serve, upon any terms and conditions that the board may see fit in its discretion to prescribe . . . .''

The Court reasoned from the plain language of sections 13-8-9 and 13-8-16(a) that a permit "to be at liberty upon parole" is conditional in nature and "subject to whatever reasonable conditions the parole board may prescribe." Turning to section 13-8-19(b) the Court held, "[i]t is clear to us under the plain meaning of the statutory language, as well as by Mr. Curtis's assent to the terms of his permit, that the ninety days he spent on community confinement may not be credited against his original sentence." The Court noted that it "need not examine the contemporary notions of liberty and contrast them with the realities of community confinement," as the hearing justice did.

COMMENTARY

Whether electronically monitored community confinement constitutes a sufficient deprivation of liberty such that the law should allow for time thus served to be credited to the prisoner's original sentence appears to be a matter redressable only through the political process. The Court's holding in this case reflects a cogent analysis of the applicable statutory and case law. The hearing justice's reliance on the fundamental contradictoriness of

12. Id. at 605.
13. Curtis, 996 A.2d at 605 (internal quotation marks and ellipses in original).
14. Id.
15. Id. at 606.
16. The Court proceeded immediately to note that "[c]learly, the meaning of liberty within the parole context cannot be construed as an absolute liberty or an absolute freedom." Id.
the terms "at liberty" and "confinement" seems erroneous given
the parole context and the fact that the term "at liberty" is
modified by the term "upon parole" in the applicable statutes.\(^\text{17}\)
Further, section 13-8-19(b) clearly provides that community
confinement shall not be credited toward a prisoner's original
sentence.\(^\text{18}\)
Curtis's argument that the EMP agreement, as a
waiver of his liberty, constituted an "usurpation of legislative
power by the parole board" is also unpersuasive given that section
13-8-9 explicitly authorizes the parole board to issue parole
permits to qualified prisoners "upon any terms and conditions that
the board may prescribe."\(^\text{19}\)

CONCLUSION

The Rhode Island Supreme Court concluded that the
defendant was "at liberty upon parole" within the meaning of
sections 13-8-16(a) and 13-8-9 of the Rhode Island General Laws
during the time of his electronically monitored community
confinement, from which it followed that under section 13-8-19(b),
the defendant was not entitled to credit that time toward the
completion of his full sentence.\(^\text{20}\)

Jaime M. Rogers

\(^\text{17}\) Id. at 605; R.I. GEN. LAWS §§ 13-8-9, -16(a) (2010).
\(^\text{18}\) See R.I. GEN. LAWS § 13-8-19(b) (2010).
\(^\text{19}\) Curtis, 996 A.2d at 605; see R.I. GEN. LAWS § 13-8-9 (2010). The
Court did not reach Curtis's argument that the EMP agreement was void as a
contract of adhesion because the Court held that "parole is a privilege and not
a right of the prisoner." Curtis, 996 A.2d at 607. However, the applicable
statutes, which authorize the parole board to prescribe the conditions of
parole and which bar parole time from being credited to the original sentence,
seem to militate against a finding that the contract was void for adhesion.
See R.I. GEN. LAWS §§ 13-8-16(a), -19(b) (2010).
\(^\text{20}\) Curtis, 996 A.2d at 606.
Criminal Law and Procedure. *Page v. State*, 995 A.2d 934 (R.I. 2010). The Rhode Island Supreme Court upheld the denial of postconviction relief in relation to the assistance of trial counsel, but found appellate counsel’s representation was ineffective; appellate counsel failed to invoke the statutory right to a *de novo* review, pursuant to Rhode Island law, of a sentence of life without the possibility of parole. After finding the assistance of appellate counsel ineffective, the Court conducted its review of the sentence and found it to be appropriate given the violent circumstances of the crime, notwithstanding any mitigating characteristics of the applicant.

**FACTS AND TRAVEL**

Stemming from the “brutal killing of Sylvester Gardiner,” applicant William Page was convicted, after a jury-waived trial, of first-degree murder and commission of a crime of violence while armed with a firearm.\(^1\) Following the conviction and a sentencing proceeding, the trial justice sentenced Mr. Page to life imprisonment without the possibility of parole for what the trial justice called the “most atrocious, barbaric killing imaginable.”\(^2\) The trial justice “looked in vain for some mitigating factor” to avoid imposing such a sentence, but his efforts proved fruitless.\(^3\) In imposing the sentence, the trial justice described Mr. Page as “violently savage and vicious, unnaturally sadistic, and relentlessly inhumane and totally incorrigible,” and “beyond rehabilitation.”\(^4\)

Mr. Page appealed to the Rhode Island Supreme Court, making multiple contentions that were ultimately rejected by the

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2. *Id.* at 937. Mr. Page was also sentenced to a concurrent ten-year sentence for committing a crime of violence while armed with a firearm. *Id.*

3. *Id.* The trial justice stated that “[t]he only factor—if it [w]as a factor at all—[w]as [Mr. Page’s] age,” which was eighteen at the time of the crimes and twenty at the time of sentencing. *Id.* at 937 & n.3.

4. *Id.* at 937.
Court, including ineffective assistance of trial counsel. After the Supreme Court affirmed his conviction, Mr. Page filed an application for postconviction relief with the Superior Court based on ineffective assistance of both his trial counsel and his appellate counsel.

At the postconviction relief hearing, Mr. Page's trial counsel was the only witness and testified that he had thought about using an insanity or diminished capacity defense. However, after the evaluating psychiatrist described Mr. Page as "one of the most dangerous individuals [whom the psychiatrist had] ever met," trial counsel decided against either defense. Trial counsel likewise testified that he decided against using a defense of intoxication based on his evaluation that it would not be successful; after attempts to plea bargain were unsuccessful, trial counsel concluded that his best strategy was to focus on sentencing. Trial counsel testified that he advised Mr. Page to proceed with a nonjury trial with stipulated facts, hoping to secure some leniency from the trial justice at sentencing. The hearing justice rejected Mr. Page's claim of ineffective assistance of counsel at trial and found that trial counsel's decisions were "sound tactical decisions."

In his application for postconviction relief, Mr. Page also contended that he had ineffective assistance of counsel during the sentencing proceeding of his trial. Trial counsel testified as to

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5. *Id.* at 937-38. The Court did not substantively rule upon the allegations of ineffective assistance of trial counsel because the Court held that the ineffective assistance claim should have been raised in an application for postconviction relief. *Id.* at 937 & n.6.

6. *Id.* at 938.


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


10. *See id.* at 939.

11. *See id.*

12. *Id.* at 939-40. The hearing justice did not think that, had Mr. Page not waived a jury trial, he could have been convicted of second-degree murder as was the man with whom Mr. Page committed the crime. The hearing justice, who had also been the trial justice, stated that there was "no way on God's green earth that [the trial justice] could conceive of ever inviting ... anything but a first degree murder instruction to the jury based on the facts that would have been produced as [the trial justice] reviewed the file." *Id.* at 940, 941 n.15.

his decision to have Mr. Page's stepfather testify at the sentencing proceeding. The hearing justice was "satisfied in every respect that [Mr. Page] was effectively represented," and thus denied his application for postconviction relief based on ineffective assistance of counsel at sentencing.

Regarding Mr. Page's allegation that his appellate counsel provided ineffective assistance by failing to argue that "his client was entitled to a de novo review by th[e] Court of the appropriateness (vel non) of his sentence," the postconviction relief hearing justice declined to decide the matter because he felt that "the Superior Court was not the proper forum for the consideration of claims of ineffective assistance by appellate counsel." Mr. Page appealed the Superior Court's denial of his application for postconviction relief.

ANALYSIS AND HOLDING

The Rhode Island Supreme Court noted that it "will not disturb the findings of a hearing justice in the postconviction relief context 'absent clear error or a showing that the [hearing] justice overlooked or misconceived material evidence.'" However, for "questions of fact concerning whether a defendant's constitutional rights have been infringed, and mixed questions of law and fact with constitutional implications," the Court reviews de novo. The Court stated that it would "pattern its evaluations of the ineffective assistance of counsel claims," on the two-prongs of Strickland v. Washington, regardless of whether those claims are related to the trial, sentencing, or appeal. According to Strickland, an applicant must first show "that counsel's

14. Id.
15. Id. at 941 (alteration in original). The hearing justice stated that Mr. Page's sentence was "not because of [trial counsel], but in spite of [trial counsel's] efforts," and that, regarding his decision on the sentence, he doubted that anyone "would have changed [his] mind that day, or [the day of the postconviction relief hearing], for that matter." Id.
16. Id.
17. Id. at 936.
18. Id. at 942 (quoting State v. Thomas, 794 A.2d 990, 993 (R.I. 2002)).
20. See id. at 942-43 (quoting Brennan v. Vose, 764 A.2d 168, 171 (R.I. 2001)).
performance was deficient," that is, it falls below an "objective standard of reasonableness." 21 The applicant must then also show that the "deficient performance was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of the applicant's right to a fair trial." 22

The Court reviewed the record of the trial based on Mr. Page's contention that his counsel erred in: (1) failing to investigate and present defenses at trial; (2) advising Mr. Page to waive his right to a jury trial; and (3) stipulating to the facts of the case. 23 Based on the tactical decisions made by trial counsel, the Court concluded the postconviction relief hearing justice did not clearly err in holding that counsel's performance was reasonable. 24 Likewise, the Court considered Mr. Page's contention that trial counsel failed "to investigate and to highlight" for the sentencing justice items that Mr. Page "contend[ed] would have had a mitigating effect." 25 Noting that the presentence report available to the trial justice contained all of the information that Mr. Page thought trial counsel should have "highlighted" and that the trial justice reviewed the report before imposing the sentence, the Court found no error in the postconviction relief hearing justice's conclusion that trial counsel represented Mr. Page effectively at sentencing. 26

The Court found, however, that, in failing to argue that Mr. Page was entitled to a de novo review of his sentence, 27 the assistance of Mr. Page's appellate counsel 28 was ineffective in that

21. Id. at 942.
22. Id. at 942-43.
23. Id. at 944-45.
24. Id. at 945.
25. Page, 995 A.2d at 945. Specifically, Mr. Page argued that trial counsel should have emphasized his "learning disability," "behavioral disorder," "history of substance abuse," and "progress' while serving a sentence at the Rhode Island Training School" for an unrelated incident. Id. at 946.
27. See id. at 948-49. The statute gives the defendant a "right to appeal a sentence of life imprisonment without parole to the [S]upreme [C]ourt," which, "after review of the transcript . . . may, in its discretion, ratify [the sentence] or may reduce the sentence to life imprisonment"; although it does not use the term de novo, the Court has "consistently conducted [its] review of the life without parole issue in a de novo manner." Id. at 948 (quoting R.I. GEN. LAWS § 12-19.2-5 (2002)).
28. An attorney different from his trial counsel represented Mr. Page on
it was "deficient" and Mr. Page "was prejudiced" by the deficiency.\textsuperscript{29} As the Court has required in the past to establish ineffective assistance of appellate counsel, the issue "was not only meritorious, but 'clearly stronger' than those issues that actually were raised on appeal."\textsuperscript{30} In remedying the ineffective assistance of appellate counsel, the Court conducted a review of the sentence, noting that a sentence of life without the possibility of parole is permitted for first-degree murder when one of seven characteristics exists.\textsuperscript{31} One such characteristic is when the murder is "committed in a manner involving torture or an aggravated battery to the victim."\textsuperscript{32} The Court found this characteristic present in Mr. Page's case because the victim was "virtually unrecognizable" and because Mr. Page confessed that the victim was conscious and moving during much of the beating.\textsuperscript{33} After determining that a life sentence without the possibility of parole was possible, the Court weighed the only mitigating factor, Mr. Page's age,\textsuperscript{34} against the "heinousness of the crime and the blatant disregard for human life that Mr. Page exhibited."\textsuperscript{35} The Court found the sentence appropriate, pointing to the trial justice's conclusion that Mr. Page was "the one who, with a final Satanic flurry, drove an ax handle through the victim's head."\textsuperscript{36}

Justice Flaherty wrote separately, concurring with most of the majority's opinion, but dissenting from the majority's affirmation of the life sentence without the possibility of parole.\textsuperscript{37} While agreeing that Mr. Page had committed an act "with almost incomprehensible savagery" that justified a life sentence, Justice Flaherty found that mitigating factors, such as Mr. Page's difficult family history, attention deficit hyperactivity disorder, and low

\begin{itemize}
  \item his direct appeal. \textit{Id.} at 941 n.17.
  \item \textit{Id.} at 949.
  \item \textit{Id.} at 943-44, 949 (quoting Chalk v. State, 949 A.2d 395, 399 (R.I. 2008)).
  \item \textit{Page}, 995 A.2d at 949.
  \item \textit{Id.} (quoting R.I. GEN. LAWS § 11-23-2 (2002)).
  \item \textit{See id.} at 949-50.
  \item \textit{See id.} at 950. Mr. Page was eighteen years old when he committed the murder and twenty years old when he was sentenced. \textit{See id.} at 937 n.3.
  \item \textit{Id.} at 950.
  \item \textit{Id.} at 950-51.
  \item \textit{Page}, 995 A.2d at 951.
\end{itemize}
IQ, pointed to a fate other than “consign[ment] to the rubbish heap of life.” Mr. Page's age was of particular importance to Justice Flaherty's determination, as he acknowledged that, although Mr. Page was beyond the age of majority, there is “no question that few, if any, young people are imbued with the attributes of adulthood as soon as their eighteenth birthday is achieved.” Justice Flaherty also pointed out that a possibility of parole does not mean Mr. Page would ever be released on parole, and that, if he were released, he would need to have already served fifteen years. Thus, Mr. Page would be in his mid-thirties, which would give him the opportunity to show that he had “reformed, matured, and that he [wa]s no longer the angry, violent, and impulsive person that he was at age eighteen.” Calling it a “close case,” Justice Flaherty thought that Mr. Page should be allowed the “opportunity for reform and for a return to society for the remainder of his natural life.”

COMMENTARY

The particular facts of this case seem to have made the decision easier for the Court. Mr. Page's act was described in various instances by the Court or the record as “atrocious,” “barbaric,” “savage and vicious,” “unnaturally sadistic,” “relentlessly inhumane,” “horrendous,” and “heinous.” While the Court did find ineffective assistance of appellate counsel for failure to invoke Mr. Page's right to de novo review of his life sentence without the possibility of parole, the Court conducted that de novo review and found the sentence appropriate. At the same time, The Supreme Court also affirmed the Superior Court's denial of postconviction relief based on ineffective assistance of trial counsel. While notions of forgiveness and a second chance

38. Id.
39. Id. at 952.
40. See id. at 952-53 (citing R.I. GEN. LAWS § 11-23-2.2 (2002)).
41. Id. at 953.
42. Id.
43. See Page, 995 A.2d at 945, 947-48.
44. Id. at 937, 941, 950.
45. See id. at 948-49.
46. See id. at 951.
47. See id. at 945, 948.
weigh against sending someone so young to, as Justice Flaherty described, the “rubbish heap of life,” the sentence of life imprisonment without the possibility of parole does exist and must be applicable in some cases. In this case, which Justice Flaherty, even while favoring a reduction in sentence to include the possibility of parole, conceded was close, the facts suggest that the sentence was appropriate.

CONCLUSION

The Court affirmed the denial of postconviction relief regarding the representation of counsel at trial and at sentencing, but found that Mr. Page had ineffective assistance of appellate counsel. However, the Court’s de novo review of the life sentence without the possibility of parole found the imposition of the sentence to be appropriate.

Stephen Nelson

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48. *Id.* at 951.
49. *See Page, 995 A.2d* at 953.
Criminal Law and Procedure. *State v. Gonzalez*, 986 A.2d 235 (R.I. 2010). When a defendant appeals the denial of a motion to suppress statements that are allegedly involuntary, the Rhode Island Supreme Court accords great deference to the factual determinations and credibility assessments of the hearing justice and will only overturn those findings if clearly erroneous. When not found to be clearly erroneous, the Court applies the hearing justice’s findings of fact to the totality of the circumstances surrounding the statements and conducts a *de novo* review of whether the statements were involuntarily given. In *State v. Gonzalez*, the Rhode Island Supreme Court affirmed the defendant’s conviction of second-degree child molestation sexual assault. In considering defendant’s appeal of his denied motion to suppress, the Court determined that the hearing justice’s findings of fact and credibility adverse to the defendant were not clearly erroneous, and that the defendant’s self-incriminating statements were voluntary.

**FACTS AND TRAVEL**

On December 9, 2004, defendant, Victor H. Gonzalez, was arrested and charged with four counts of second-degree child molestation sexual assault stemming from alleged sexual contacts with his girlfriend’s daughter when she was between approximately ten and twelve years old.¹ The alleged offenses took place between October 1, 1998 and June 30, 2000, and came to the attention of police when the victim, Kaitlin,² disclosed them to a counselor in December of 2004.³ The counselor reported the allegations to the Department of Children, Youth and Families

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1. *State v. Gonzalez*, 986 A.2d 235, 237 (R.I. 2010). The four counts involved alleged violations of section 11-37-8.3 of the Rhode Island General Laws, which states that: “A person is guilty of a second degree child molestation sexual assault if he or she engages in sexual contact with another person fourteen (14) years of age or under.” *Id.* at 237 n.2 (quoting R.I. GEN. LAWS § 11-37-8.3 (2010)).

2. The Court refers to the victim and her mother pseudonymously in order to protect their privacy. *Id.* at n.4.

3. *Id.* at 237.
(DCYF), which began an investigation with Pawtucket police. At the time of the alleged offenses and up until his arrest over four years later, the defendant lived with his girlfriend, Caroline, two of Caroline's daughters, including Kaitlin, and a third daughter that he fathered with Caroline.

Before his trial, defendant moved to suppress certain incriminating statements he made to the Pawtucket police during their investigation prior to his arrest. At the suppression hearing in Superior Court, the court heard testimony from two witnesses—Pawtucket Police Detective John McIlmail and the defendant.

Detective McIlmail testified that, on December 9, 2004, Kaitlin, Caroline, and the defendant voluntarily reported to the Pawtucket police station and he interviewed each of them separately. Detective McIlmail brought defendant into an interview room and gave him a rights form, which set forth the Miranda rights. Detective McIlmail testified that defendant read the form and gave no indication that he did not understand it. According to the detective's testimony, defendant then signed the form and checked the word "YES" next to the statement: "I understand my rights."

Detective McIlmail testified that he then informed the defendant of Kaitlin's allegations against him. The detective testified that defendant acknowledged he had indeed touched Kaitlin inappropriately and the conduct had taken place "a few times" over the course of "a few months." The defendant then

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4. Id. at 238.
5. Id. at 239-40.
6. Id. In those statements he admitted to having inappropriately touched Kaitlin's breasts. Id. at 238.
7. Gonzalez, 986 A.2d at 238.
8. Id. Detective McIlmail testified that Kaitlin informed him that, several years earlier, defendant had "felt her breasts area underneath her clothing and rubbed her vagina." He also testified that Caroline informed him that during a discussion among family members a couple of years prior, defendant had admitted to having touched Kaitlin inappropriately. Id.
9. Id. at 238 n.8 (citing generally Miranda v. Arizona, 384 U.S. 436 (1966)).
10. Id. at 238-39.
11. Id. at 239.
12. Id.
13. Gonzalez, 986 A.2d at 239.
14. Id.
wrote and signed a statement describing the occurrences.\textsuperscript{15}

During defendant's testimony at the hearing, he indicated that he arrived home on December 9, 2004, and was informed by Caroline and Kaitlin that a DCYF investigator wanted to speak to him.\textsuperscript{16} He testified that he then spoke to the DCYF investigator and admitted that he had inappropriately touched Kaitlin.\textsuperscript{17} Defendant then proceeded with Caroline and Kaitlin to the Pawtucket police station, where he gave police a signed statement admitting to the allegations.\textsuperscript{18}

However, defendant also testified at the hearing that he "never did anything to [Kaitlin]";\textsuperscript{19} rather, he only confessed because the DCYF investigator had told him that if he did not go to the police station and report himself, she was going to take his daughter and Caroline's daughters from their home.\textsuperscript{20} Defendant testified that because he felt he had done nothing wrong to Kaitlin, he would not have gone to the police station but for the fact that he felt threatened by the DCYF investigator's comment.\textsuperscript{21} Therefore, defendant argued that his statements to the Pawtucket police should be suppressed because they were involuntarily given under the coercion of threats made by the DCYF investigator.\textsuperscript{22}

After considering the testimony of both witnesses, the hearing justice found that the prosecution had established by clear and convincing evidence that defendant's confession was voluntary.\textsuperscript{23} Most significant was the hearing justice's statement on the record that she did "not accept as fact that DCYF threatened to take defendant's children if he did not give a police statement."\textsuperscript{24} As a result, the hearing justice denied defendant's motion to suppress and he was subsequently convicted by a jury on two counts of

\begin{itemize}
  \item \textsuperscript{15} \textit{Id.} Detective McIlmail also testified that he did not recall defendant mentioning anything about threats made to him by DCYF. \textit{Id.}
  \item \textsuperscript{16} \textit{Id.} at 240.
  \item \textsuperscript{17} \textit{Id.}
  \item \textsuperscript{18} \textit{Id.} at 240-41.
  \item \textsuperscript{19} \textit{Gonzalez}, 986 A.2d at 241.
  \item \textsuperscript{20} \textit{Id.} at 240.
  \item \textsuperscript{21} \textit{Id.}
  \item \textsuperscript{22} \textit{Id.} at 241. The defendant did not allege any misconduct by the police, nor did the hearing justice find any such misconduct. See \textit{id.}
  \item \textsuperscript{23} \textit{Id.}
  \item \textsuperscript{24} \textit{Id.} at 243.
\end{itemize}
second-degree child molestation sexual assault.\textsuperscript{25}

**ANALYSIS AND HOLDING**

On appeal, defendant argued that the hearing justice committed reversible error in denying his motion to suppress the incriminating statements made to Pawtucket police in December of 2004.\textsuperscript{26} He asserted that the threat made by the DCYF investigator to take away the children from his home caused him to make an involuntary confession to police and amounted to state coercion in violation of his constitutional right against self-incrimination.\textsuperscript{27}

**Standard of Review**

A confession or other incriminating statement should be admitted only “if the state can first prove by clear and convincing evidence that the defendant knowingly, intelligently, and voluntarily waived his [or her] constitutional rights expressed in Miranda v. Arizona.”\textsuperscript{28} When reviewing a hearing justice’s decision with respect to a motion to suppress an alleged involuntary statement, the Rhode Island Supreme Court employs a two-step analysis.\textsuperscript{29} First, the Court reviews the hearing justice’s findings of facts relevant to the issue of voluntariness of the statement.\textsuperscript{30} The Court pays great deference to the factual determinations and credibility assessments of the hearing justice,\textsuperscript{31} and will not overturn the findings unless they are

\textsuperscript{25} Gonzalez, 986 A.2d at 241. Following his conviction, defendant’s motion for a new trial was denied and he was sentenced to twenty years of imprisonment, with four to serve and the remainder suspended with probation. \textit{Id.}

\textsuperscript{26} \textit{Id.} at 237.

\textsuperscript{27} \textit{Id.} at 242. Defendant cites the Fifth Amendment of the United States Constitution and Article 1, section 13 of the Rhode Island Constitution as authorities granting the constitutional privilege against self-incrimination. \textit{Id.} at n.14.

\textsuperscript{28} \textit{Id.} at 242 (quoting State v. Bido, 941 A.2d 822, 835 (R.I. 2008)).

\textsuperscript{29} \textit{Id.} (citing State v. Taoussi, 973 A.2d 1142, 1146 (R.I. 2009)).

\textsuperscript{30} \textit{Id.} (citing \textit{Taoussi}, 973 A.2d at 1146).

\textsuperscript{31} The Court’s reason for deferring to the factual findings of the trial justice is because she “has actually observed the human drama that is part and parcel of every trial” and “has had an opportunity to appraise witness demeanor and to take into account other realities that cannot be grasped from reading a cold record.” Gonzalez, 986 A.2d at 242 (quoting In the
“clearly erroneous.” Second, as long as they are not clearly erroneous, the Court applies those facts and reviews de novo the voluntariness of the statement. The Court examines the “totality of the circumstances” surrounding the incriminating statement and makes an independent determination of whether the facts establish a constitutional violation.

Review of Hearing Justice’s Findings of Fact

In the first step of the Court’s analysis, the Court reviewed the hearing justice’s findings of historical facts relevant to the voluntariness of the defendant’s confession to ensure those findings were not “clearly erroneous.”

At the conclusion of defendant’s suppression hearing, the hearing justice found that the defendant voluntarily waived his right against self-incrimination when he signed a waiver form and agreed to speak with Pawtucket police. She reasoned that the defendant had gone to the police station voluntarily and was not in custody when he made the incriminating statements, because his “freedom of movement was never curtailed” and defendant testified to having a subjective belief that he was free to leave.

Moreover, the Court emphasized that “of capital importance to the resolution of this case is the fact that the hearing justice expressly found that no threat was made to defendant by the

Matter of the Dissolution of Anderson, Zangari & Bossian, 888 A.2d 973, 975 (R.I. 2006)).
32. Id. (citing Taoussi, 973 A.2d at 1146). A finding is clearly erroneous “when, although there is evidence to support it, the reviewing court on the basis of the entire evidence is left with the definite and firm conviction that a mistake has been committed.” Id. (quoting State v. LaRosa, 313 A.2d 375, 377 (R.I. 1974)).
33. Id. at 242-43 (citing Bido, 941 A.2d at 836). This step is reviewed de novo because “the ultimate question of whether a confession was given voluntarily is legal in nature.” Id. at 243 n.15 (quoting State v. Dennis, 893 A.2d 250, 261 (R.I. 2006)).
34. Id. at 243 (citing State v. Humphrey, 715 A.2d 1265, 1274 (R.I. 1998)). A statement is voluntary if it is the “product of [the defendant’s] free and rational choice” and involuntary if it was “extracted from the defendant by coercion or improper inducement, including threats, violence, or any undue influence that overcomes the free will of the defendant.” Id. (quoting Humphrey, 715 A.2d at 1274).
35. See id. at 244.
36. Id.
37. Gonzalez, 986 A.2d at 243.
The hearing justice was “not at all convinced” by defendant’s claim that threats from a DCYF investigator caused him to go to the police station and confess to the allegations. She found it “totally illogical” that defendant would think that making incriminating statements to the police would help him and Caroline keep the children. In effect, the hearing justice made a credibility assessment with respect to the defendant’s testimony and determined it was not believable.

The Court held that there was no basis to find the hearing justice’s factual and credibility assessments to be erroneous. The Court reasoned that “it is a fundamental principle that credibility assessments are primarily the responsibility of hearing justices; they are deferred to by appellate courts except in instances where the trial court failed to touch all the right bases.” Consequently, the Court then proceeded to the second part of its analysis.

De Novo Review of Voluntariness of the Statement

Applying the hearing justice’s factual and credibility findings, the Court conducted a de novo review of whether the totality of those facts actually satisfied the State’s burden to prove that defendant’s statements were voluntary. The Court first noted that there was no indication, and no contention by the defendant, that the police had coerced the defendant in any manner that resulted in him making an involuntary statement. Instead, the
crucial factor in deciding the outcome of this case remained the hearing justice's decision to discredit defendant's testimony that a DCYF investigator threatened to take his children away if he did not confess to the police. Because the hearing justice determined that there was no misconduct by either the Pawtucket police or DCYF, the Court had no evidence to consider in regard to the voluntariness of defendant's statement. Therefore, the Court held, under a "totality of the circumstances" analysis, no factual circumstances existed to support a finding that defendant's confession was involuntary. Agreeing with the hearing justice's decision, the Court denied the appeal and affirmed the judgment of conviction.

COMMENTARY

Gonzalez illustrates the almost insurmountable burden on a defendant attempting to overturn the factual and credibility assessments of a lower court. Because there is always a presumption that the hearing justice was in the best position to make those determinations and prudently considered the evidence, it is very difficult for the defendant to demonstrate that the hearing justice's findings were "clearly erroneous." This challenge is particularly evident in the appeal of a failed motion to suppress incriminating statements that the defendant claims were involuntary. Markedly, in the fifteen published Rhode Island Supreme Court decisions since 1974 that have cited the "clearly erroneous" standard of LaRosa in voluntariness determinations, the trial justice's factual and credibility findings were never overturned on appeal.

While a defendant can still successfully appeal the erroneous admission of an involuntary statement if he satisfies only the second step of the analysis, doing so is likewise extremely difficult when applied to the hearing justice's findings of fact. Although the second step requires the more favorable de novo
standard to determine the legal question of whether a confession was voluntarily given, satisfying this prong has proven to be just as difficult for defendants as satisfying the first prong. Because there is no bright-line rule for when a statement becomes involuntary as a matter of law, the Court examines each on a case-by-case basis under the “totality of the circumstances.”\(^{51}\) However, since the “totality of the circumstances” on appellate review is derived from the hearing justice’s findings of fact, the appellate court virtually always comes to the same legal determination as the hearing justice.

*Gonzalez* displays exactly why success at the suppression hearing is so crucial. Had the hearing justice believed defendant’s testimony that he was threatened by a DCYF investigator, the outcome would have been the exact opposite and the confession would have been suppressed as coerced and involuntary within the “totality of the circumstances.”\(^{52}\) Instead, the defendant failed to convince the hearing justice that he was giving honest testimony. That adverse credibility determination turned out to be the single deciding factor in this case.\(^{53}\)

**CONCLUSION**

The Rhode Island Supreme Court affirmed the defendant’s conviction. The Court held that the hearing justice’s findings were not clearly erroneous and that, based on those findings, the defendant had voluntarily waived his right against self-incrimination when confessing to police.

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51. See id. at 243 (citing State v. Humphrey, 715 A.2d 1265, 1274 (R.I. 1998)).

52. See id. at 243, 246. Defendant had also supported his argument with a case from the Kansas Supreme Court, *State v. Brown*, which held that a defendant’s confession to child abuse was obtained involuntarily when a state social worker threatened to take his children away if he did not make a confession to police. The Court distinguished that case from the case at bar on the sole basis that in *Gonzalez* there was no threat made to defendant by a DCYF employee. *Id.* at 246 (discussing State v. Brown, 182 P.3d 1205, 1211-12 (Kan. 2008)).

53. See id. at 244.
Criminal Law and Procedure. *State v. Rivera*, 987 A.2d 887 (R.I. 2010). The Rhode Island Supreme Court held that in order to find a witness competent to testify, the trial justice must determine that the witness is able to observe, recollect, communicate, and appreciate the necessity of telling the truth. Additionally, severance of counts is not required where the evidence related to each count is straightforward, simple, and distinct. Finally, the Court held that the trial justice has discretion to allow leading questions of a witness of diminished understanding.

**FACTS AND TRAVEL**

Defendant, Jose Rivera, worked as a bus driver for the RIde division of the Rhode Island Public Transit Authority (RIPTA) which provides transportation to the developmentally disabled and the elderly.\(^1\) Defendant was accused of sexually assaulting three developmentally disabled women, Tracy, Elaine, and Deborah,\(^2\) who were passengers on his bus in June and July of 2005.\(^3\) Tracy testified that defendant sexually assaulted her on two occasions when they were alone on the bus, including touching her breasts and attempting to vaginally rape her.\(^4\) Tracy reported the assaults to her mother and was taken to physician’s assistant Josephine Barnes-Brown for an examination.\(^5\) Defendant denied the sexual assault and claimed that Tracy wanted to get him fired because he was transferring to a different bus route.\(^6\)

Elaine testified that defendant sexually assaulted her by touching her breast and vagina on the bus, and two other passengers corroborated Elaine’s testimony.\(^7\) Defendant claimed

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2. *Id.* at 893. The Court used pseudonyms to refer to the complaining witnesses. *Id.* at n.1.
3. *Id.* at 893.
4. *Id.*
5. *Id.* at 893-94.
6. *Id.* at 894.
that Elaine sought revenge against him for reprimanding her on the bus.\textsuperscript{8} He also claimed that Elaine colluded with the other two complaining witnesses and had a propensity to lie.\textsuperscript{9} The third complaining witness, Deborah, testified that defendant placed a finger on her upper body while they were alone on the bus.\textsuperscript{10}

On February 10, 2006, a grand jury issued an indictment charging defendant with second-degree sexual assault of Deborah, two counts of first-degree sexual assault of Tracy, two counts of second-degree sexual assault of Tracy, and two counts of second-degree sexual assault of Elaine.\textsuperscript{11} Before trial, the trial justice Stephen P. Nugent conducted a hearing to determine the competency of the three complaining witnesses,\textsuperscript{12} listening to their testimony and that of defense expert Ronald L. Steward, M.D.\textsuperscript{13} After the hearing, on May 22, 2007, the trial justice found all three complaining witnesses competent to testify and also denied defendant's motion to sever the counts.\textsuperscript{14} On May 23, 2007, the trial commenced and on June 4, 2007, the jury returned a verdict finding defendant guilty on two counts of first-degree sexual assault, four counts of second-degree sexual assault, and one count of simple assault or battery.\textsuperscript{15} Defendant's motion for a new trial was denied and the trial justice imposed a sentence amounting to life imprisonment plus sixteen years.\textsuperscript{16} Defendant appealed his conviction.\textsuperscript{17}

\textbf{ANALYSIS AND HOLDING}

On appeal, defendant asserted that the trial justice erred in finding Tracy and Deborah competent to testify, denying the motion to sever the counts, denying the motion for new trial, and on several rulings on evidentiary issues.\textsuperscript{18}

\begin{itemize}
\item \textsuperscript{8} Id. at 895.
\item \textsuperscript{9} Id.
\item \textsuperscript{10} Id.
\item \textsuperscript{11} Id. at 895-96.
\item \textsuperscript{12} Id. at 887, 896. Defendant only appealed the trial justice's rulings regarding Tracy and Deborah at the competency hearing. Id. at 896 n.3.
\item \textsuperscript{13} Rivera, 987 A.2d at 896.
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id. at 896-97.
\item \textsuperscript{16} Id. at 897.
\item \textsuperscript{17} Id. at 892.
\item \textsuperscript{18} Id. at 892, 897.
\end{itemize}
The Competency of the Complaining Witnesses to Testify

Defendant contended that Tracy was not competent to testify because of discrepancies in her testimony at the competency hearing as well as her statements that she would be unable to identify the defendant if she saw him, unable to explain the differences between a man and a woman, and unable to explain the word “promise.”\(^\text{19}\) Furthermore, defendant stressed the fact that Tracy admitted to rehearsing her testimony.\(^\text{20}\) Defendant also contended that Deborah was not competent to testify because of her inability to explain the difference between a man and woman or the meaning of the word “oath.”\(^\text{21}\)

The Rhode Island Supreme Court held that a trial justice is afforded considerable deference on competency rulings and will only be overturned for an abuse of discretion.\(^\text{22}\) To find a witness competent to testify, the trial justice must determine that the witness is able to “observe, recollect, communicate, and appreciate the necessity of telling the truth.”\(^\text{23}\) Tracy was able to demonstrate her ability to observe and communicate when identifying a pen and paper the prosecutor was holding.\(^\text{24}\) She demonstrated her ability to recollect and communicate by stating her address, the people that she lives with and her pets.\(^\text{25}\) Additionally, she showed her appreciation for the necessity of telling the truth by agreeing to say “I don’t remember” when she did not recall the answer to a question.\(^\text{26}\) Furthermore, the fact that Tracy admitted to rehearsing her testimony goes to show her honesty and credibility as a witness.\(^\text{27}\) A witness does not need to be able to explain abstract concepts like the definition of the word “promise,” and although Tracy said she would be unable to identify the defendant, she did so at trial.\(^\text{28}\) Thus, the trial justice

\(^{19}\) Rivera, 987 A.2d at 897.
\(^{20}\) Id.
\(^{21}\) Id. at 897-98.
\(^{22}\) Id. at 897.
\(^{23}\) Id. at 898 (quoting State v. Lynch, 854 A.2d 1022, 1029 (R.I. 2004)) (emphasis in original).
\(^{24}\) Id.
\(^{25}\) Rivera, 963 A.2d at 898.
\(^{26}\) Id.
\(^{27}\) Id.
\(^{28}\) Id.
did not abuse his discretion in declaring Tracy competent to testify.  

Deborah also demonstrated an appreciation for telling the truth by stating “you should tell the truth” and “a lie is bad.” Additionally, Deborah stated that she would testify that she did not understand a question if that was the case. Furthermore, her inability to state the difference between man and woman or define “oath” are insufficient grounds for finding her incompetent to testify. Accordingly, the Court decided that the trial justice did not err in ruling that Deborah was competent to testify.

**Motion to Sever**

Defendant contended that having three developmentally disabled witnesses testify against him confused the jury and, thus, a motion to sever the counts should have been granted. The Court held that a trial justice will only be overturned on a motion to sever where there is a clear abuse of discretion. Rule 14 of the Superior Court Rules of Criminal Procedure does not require severance where the evidence related to each count is “straightforward, simple, and distinct.” Furthermore, the defendant must show substantial prejudice in order to overturn a trial justice’s decision on a motion to sever.

The Court stated that the testimony of the allegations came only from the complaining witnesses and their mothers, and the remaining witnesses only gave testimony of background information. This testimony was presented in a manner that facilitated the jury’s understanding of the separate counts and

29. *Id.* at 899.
30. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* (citing State v. Pereira, 973 A.2d 19, 28 (R.I. 2009)).
37. *Rivera*, 987 A.2d at 900. The court uses a balancing test comparing judicial efficiency versus the defendant’s right to a fair trial when determining whether or not the trial justice’s ruling on a motion to sever resulted in substantial prejudice. *Id.*
38. *Id.* (citing Pereira, 973 A.2d at 28).
39. *Id.* at 901.
was, therefore, "straightforward, simple, and distinct."\textsuperscript{40}
Furthermore, the jury's finding of guilt on a lesser-included offense demonstrates that the jurors followed the trial justice's instructions to consider each charge separately and, thus, the defendant was not "substantially prejudiced."\textsuperscript{41}

\textit{Motion for New Trial}

In ruling on a motion for a new trial, "the trial justice acts as a thirteenth juror,"\textsuperscript{42} and will not be overturned unless he or she is "clearly wrong."\textsuperscript{43} Here, defendant argued that the testimony of the complaining witnesses "was neither competent, legally sufficient nor credible."\textsuperscript{44} However, the Court held that the trial justice did not abuse his discretion in concluding that the complaining witnesses were credible and the defendant was not, relying on the defendant's inaccurate description of the bus and contradictions about being alone with Tracy.\textsuperscript{45}

Defendant also argued that the trial justice should not have allowed the introduction of the May 2005 driver's manifest into evidence because it was outside the scope of the bill of particulars.\textsuperscript{46} However, since defendant had testified that he was never alone on the bus with Tracy, but the driver's manifest showed that they were alone on two occasions, the Court concluded that the trial justice did not err in determining that the manifest was admissible solely for the purpose of impeachment.\textsuperscript{47}

"[W]hen a bill of particulars is produced but extraneous evidence is nevertheless admitted," the trial justice must instruct the jury

\begin{itemize}
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id. at 900-01. On appeal, defendant also posited the argument that his Fifth and Fourteenth Amendment constitutional rights were violated by the denial of his motion to sever because "a defendant, not necessarily Mr. Rivera himself" would be confronted with a dilemma as to whether to testify about one victim and not another. Id. The court stated that this argument was undeveloped and difficult to decipher and refused to address it because it was not raised below. Id.
\item \textsuperscript{42} Id. at 902 (quoting State v. Cerda, 957 A.2d 382, 385 (R.I. 2008)).
\item \textsuperscript{43} Rivera, 987 A.2d at 902 (quoting State v. Flori, 963 A.2d 932, 937 (R.I. 2009)).
\item \textsuperscript{44} Id. at 902-03.
\item \textsuperscript{45} Id. at 903.
\item \textsuperscript{46} Id. at 903-04.
\item \textsuperscript{47} Id.
\end{itemize}
to convict the defendant only for the precise charges in the bill.\textsuperscript{48} Here, the trial justice clearly instructed the jury in this manner.\textsuperscript{49}

Additionally, the Court held that the trial justice did not commit error of law by excluding evidence of Elaine's promiscuity because defendant failed to notify the trial justice of his intention to elicit such testimony and failed to make a specific offer of proof as required by the rape-shield statute.\textsuperscript{50} Also, the trial justice did not err in preventing the defendant from questioning Elaine's mother about a previous false allegation of sexual assault because the defendant never proffered any evidence that the allegation had occurred or was false.\textsuperscript{51} Furthermore, the trial justice acted within his discretion when limiting the scope of defendant's cross-examination of witnesses to matters that were explored on direct examination and not allowing questioning that was overly broad or called for speculation.\textsuperscript{52}

\textit{Motion to Lead the Complaining Witnesses}

Instead of making a broad ruling, the trial justice ruled that he would consider each question separately to determine if, in context, leading questions were appropriate.\textsuperscript{53} The Court stated that the trial justice has discretion to allow leading questions of a juvenile or "other witness of diminished understanding."\textsuperscript{54} Accordingly, the trial justice did not abuse his discretion in allowing leading questions to be asked of Tracy because she was developmentally disabled.\textsuperscript{55}

\textsuperscript{48} \textit{Id.} at 904 (quoting State v. LaChapelle, 638 A.2d 525, 527 (R.I. 1994)).

\textsuperscript{49} \textit{Rivera}, 987 A.2d at 904.

\textsuperscript{50} \textit{Id.} at 905; see also R.I. GEN. LAWS § 11-37-13 (2002).

\textsuperscript{51} \textit{Rivera}, 987 A.2d at 905. Rule 608(b) of the Rhode Island Rules of Evidence gives the trial justice discretion in allowing extrinsic evidence of prior similar false accusations going to a witness's credibility. R.I. R. EVID. 608(b).

\textsuperscript{52} \textit{Rivera}, 963 A.2d at 906.

\textsuperscript{53} \textit{Id.} at 907.

\textsuperscript{54} \textit{Id.} at 907-08 (quoting State v. Vanasse, 593 A.2d 58, 68 (R.I. 1991)).

\textsuperscript{55} \textit{Id.} at 908.
COMMENTARY

This case is an excellent illustration of the clash between two major goals of the criminal justice system: protecting the public against criminals, and only depriving defendants of their liberties when they have, in fact, committed the crimes of which they are accused. These two objectives are strongly at odds with each other in this case considering the mental capacities of the complaining witnesses. On one hand, a man was sentenced to life in prison based primarily on the testimony of three severely developmentally disabled women who lacked the ability to understand certain basic details of life and, at times, contradicted themselves. On the other hand, the rights of the developmentally disabled must be protected like all citizens, regardless of how competent their testimony is.

In a situation like this, our trust in the jury's ability to make findings of fact based on testimony is truly tested. Given the amount of evidence against defendant and the lack of a convincing defense, it appears that the jury reached the correct verdict. The fact that the jury convicted Rivera only on the lesser-included offense of simple assault or battery of Deborah instead of second-degree sexual assault demonstrates that they considered the weight of evidence for each count and for each complaining witness separately. This fact bolsters trust in this jury and in the jury system in general, especially in their ability to decide difficult cases like this one. The Court's deference to the jury and trial justice here was correct because the people who heard all of the testimony first-hand were in the best place to weigh the evidence.

CONCLUSION

The Rhode Island Supreme Court held that in order to find a witness competent to testify, the trial justice must determine that the witness is able to "observe, recollect, communicate, and appreciate the necessity of telling the truth." Additionally, severance of counts is not required where the evidence related to

56. Id. at 893, 897-98.
57. Id. at 901.
each count is "straightforward, simple, and distinct." Finally, the Court held that the trial justice has discretion to allow leading questions of a witness of diminished understanding.

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59. Id. at 900 (quoting Day, 898 A.2d at 705).
60. Id. at 907-08 (citing Vanasse, 593 A.2d at 68).
Criminal Law and Procedure. State v. Scanlon, 982 A.2d 1268 (R.I. 2009). The Rhode Island Supreme Court affirmed the trial justice’s denial of defendant’s motion for a new trial, thereby affirming the defendant’s jury conviction of three counts of first degree sexual assault, two counts of felony assault, and one count of first degree robbery. The Court held that the trial justice properly excluded the testimony of the victim’s boyfriend as inadmissible collateral evidence pursuant to Rule 608(b) of the Rhode Island Rules of Evidence. The Court further determined that defendant failed to preserve his right to appeal the denial of his motion for judgment of acquittal on one of the felony assault charges. Rejecting defendant’s argument, the Court determined that the felony assault convictions did not violate double jeopardy because the acts underlying the two convictions were distinct acts and not one continuous incident.

FACTS AND TRAVEL

On March 2, 2003, the victim, Janet S., left a bar in Woonsocket sometime after midnight to meet up with one of her drug suppliers to purchase $70 worth of cocaine. At that time, Janet was heavily intoxicated to the extent that she was having difficulty walking. As she walked down Arnold Street, the defendant, Timothy Scanlon, pulled up to her in a truck and asked if she “wanted to party.” Janet got into the truck with the understanding that she would either have sex with defendant for money or use drugs with him. Shortly after she got into the car, defendant drove to a Sovereign Bank and withdrew $100 from the

1. Court uses alias to protect the victim’s privacy.
3. Id.
4. Id.
5. Id. Janet recognized the driver from two months prior and noted that the truck he drove was the same as before, but the color was different. Id. Later, investigation proved that defendant had repainted his truck. Id. However, the investigation completed by the police could not definitely prove that defendant repainted the truck before or after his assault against Janet. Id.
automatic teller machine (ATM).\textsuperscript{6} After leaving the bank, Janet asked the defendant to take her home since she was feeling "weird."\textsuperscript{7} As she directed him to take a left, defendant took a sharp right instead and instantly became infuriated with her.\textsuperscript{8} All of a sudden, defendant started stabbing Janet in the head, face, and neck with a screwdriver.\textsuperscript{9} As he assaulted Janet, he also yelled obscenities at her.\textsuperscript{10}

Soon after, defendant stopped the car among some abandoned mills in northwestern Woonsocket.\textsuperscript{11} As he continued to jab the screwdriver into Janet's face, head, and neck, he commanded that she take out her money.\textsuperscript{12} After she complied, defendant then ordered Janet to take her clothes off, which she did.\textsuperscript{13} Defendant then "penetrated Janet digitally, all the while berating and threatening her."\textsuperscript{14} Following all of this, he kicked her out of the car and sexually assaulted her once again.\textsuperscript{15} He eventually yanked her by the arm until her shoulder snapped.\textsuperscript{16} Before defendant left her out in the cold, he threatened to kill her if she reported him to the police.\textsuperscript{17} Later in the evening, Janet was found by a passing motorist who called the police.\textsuperscript{18} Immediately, she was taken to the hospital and was examined by a doctor.\textsuperscript{19} With great reluctance, Janet made a statement to the police regarding what had transpired earlier that evening.\textsuperscript{20} About a month after the incident, Janet was able to remember that while she was in the vehicle her attacker stopped at the Sovereign Bank earlier in the evening.\textsuperscript{21} The police used this information to identify the defendant and arrested him on April 15, 2003.\textsuperscript{22}
Investigation revealed that the sample of DNA defendant voluntarily offered matched the DNA extracted from Janet by the doctor.\textsuperscript{23}

The jury convicted defendant on three counts of first degree sexual assault, in addition to assault with a dangerous weapon, first degree robbery, and assault and battery resulting in serious injury.\textsuperscript{24} The trial court denied defendant’s motion for a new trial and sentenced him to fifty years concurrently for the counts of sexual assault and robbery, and a consecutive sentence of twenty years suspended with twenty years probation for the other counts.\textsuperscript{25} Subsequently, defendant appealed the convictions.\textsuperscript{26}

\textbf{ANALYSIS AND HOLDING}

\textit{Exclusion of Testimony}

On appeal, defendant first argued that the trial judge erred in granting the State’s motion \emph{in limine} because Janet’s boyfriend’s, Richard Miles, testimony was material, not collateral, and therefore, Rule 608(b) was not a basis for excluding his testimony.\textsuperscript{27} The Rhode Island Supreme Court will “consider only whether the challenged evidence was proper and admissible and, if not, whether there was sufficient prejudice to constitute reversible error” when reviewing the grant or denial of a motion \emph{in limine}.\textsuperscript{28} Evidence is material “if the evidence is admissible for a

\begin{itemize}
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} \textit{Id.} at 1272-73.
\item \textsuperscript{25} \textit{Id.} at 1273.
\item \textsuperscript{26} \textit{Scanlon}, 982 A.2d at 1273.
\item \textsuperscript{27} \textit{Id.} Rule 608(b) of the Rhode Island Rules of Evidence provides:
  Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, or, in the discretion of the trial judge, evidence of prior similar false accusations, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
  R.I. R. Evid. 608(b).
\item \textsuperscript{28} \textit{Scanlon}, 982 A.2d at 1274 (quoting State v. Gomes, 881 A.2d 97, 111 (R.I. 2005)).
\end{itemize}
reason other than to contradict the witness’s testimony.”

The defendant has the duty to make some “reasonably specific offer of proof as to who the perpetrator might be” when the defendant has accused someone else of committing the crime that the defendant is currently charged with. In the absence of such proof, the evidence could potentially be “an impermissible invitation to the jury to speculate on a collateral matter.” In the instant case, the testimony of Janet’s boyfriend could only have been used to impeach Janet’s credibility on a collateral issue, which would have been inadmissible. The Court was not persuaded by defendant’s argument that the person who Janet used drugs with had any implication of defendant’s guilt or innocence. In its ruling, the Court held that Rule 608(b) barred defendant’s use of Richard Miles’s testimony to impeach the victim’s recollection.

**Felony Assault Conviction**

In regard to defendant’s conviction for felony assault resulting from the dislocation of Janet’s shoulder, defendant raised two challenges. He first argued that as a matter of law, the severity of the injury to Janet’s shoulder failed to rise to the level necessary to support a conviction, and therefore, his motion for judgment on acquittal should have been granted. Defendant then argued that the Double Jeopardy Clause of the United States Constitution and the Rhode Island Constitution barred his convictions for both counts five and six. Before addressing both arguments advanced by defendant, the Court noted that defendant failed to preserve his right to make these challenges on appeal. Even if preserved, the first challenge would have failed because the dislocation of Janet’s shoulder was adequate to allow

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29. *Id.* at 1275 (quoting State v. Martinez, 824 A.2d 443, 449 (R.I. 2003)).
30. *Id.* (citing *Gomes*, 881 A.2d at 112).
31. *Id.* (quoting *Gomes*, 881 A.2d at 112).
32. *Id.* at 1275.
33. *Id.*
34. *Scanlon*, 982 A.2d at 1275.
35. *Id.*
36. *Id.*
37. *Id.* at 1276. Count five includes the charge of assault with a dangerous weapon and count six is for the assault or battery resulting in serious bodily injury. *Id.*
38. *Id.*
the jury to find that Janet suffered a protracted loss or impairment of the function of a bodily part, thus satisfying the requisite standard of the statute.\textsuperscript{39}

Addressing defendant's second challenge, the Court applied the "same evidence" test to determine whether defendant's constitutional protection against being placed in double jeopardy was violated.\textsuperscript{40} The test states that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."\textsuperscript{41} Defendant's charges of assault with a dangerous weapon, and assault and battery did not merge, as defendant adamantly claimed.\textsuperscript{42} The Court reasoned that the acts that led to the two convictions were two separate acts supported by different evidence.\textsuperscript{43} Count five alleged that defendant assaulted the victim with a dangerous weapon, the screwdriver.\textsuperscript{44} Count six alleged that defendant was guilty of a felony assault because he grabbed and dislocated Janet's arm.\textsuperscript{45} The Court further noted that there was no evidence within the record that suggested that the use of the screwdriver was the cause of Janet's arm being dislocated.\textsuperscript{46} Therefore, counts five and six did not merge and defendant was not deprived of his constitutional protections against double jeopardy.\textsuperscript{47}

\textit{Motion for New Trial}

Defendant raised two arguments in support of his motion for a new trial on appeal.\textsuperscript{48} First, he contended that there was an insufficient amount of evidence introduced at trial to support a conviction.\textsuperscript{49} Second, defendant argued that the State waited until the night before trial to disclose information pertinent to his
defense, thereby violating the State's discovery responsibilities and, thus, warranting grant of a new trial.50

A motion for a new trial is reviewed by the Court with deference to the trial justice's decision.51 "Unless the trial justice was clearly wrong . . . or overlooked or misconceived material and relevant evidence that related to a critical issue in the case" the Court will not overturn the trial justice's ruling.52 To address defendant's first argument, the Court noted that the trial justice took into account all of the evidence presented at trial in making his determination to deny defendant's motion for a new trial.53 Therefore, the trial justice's decision on the motion was not clearly wrong, nor did he overlook material evidence. 54

In regard to defendant's second argument, the Court noted that defendant failed to object to the introduction of the evidence when presented at trial.55 Defendant also failed to move for a continuance in order to review the evidence that was provided by the State at the last minute.56 The Court cited Cronan ex rel. State v. Cronan,57 which held that a "defendant may not press . . . objections [on appeal] when they were available for him to raise before or at the trial, yet he neglected to do so."58 Since defendant failed to object to the introduction of the late discovery items at the time they were disclosed, the Court held that he was precluded from raising this argument on appeal.59

COMMENTARY

Throughout State v. Scanlon, the Rhode Island Supreme Court decided to address a number of issues raised by defendant despite defendant's failure to properly preserve the challenges.

50. Id. Pertinent information included the victim's delayed memory of sexual intercourse with her attacker and the delayed notice on the results from the forensic examination of the truck used by defendant. Id.

51. Id.

52. Scanlon, 982 A.2d at 1279 (quoting State v. Flori, 963 A.2d 932, 937 (R.I. 2009)).

53. Id.

54. Id.

55. Id. at 1280. The evidence introduced was the late discovery of Janet's recovered memory and the examination of defendant's truck. Id.

56. Id.


58. Scanlon, 982 A.2d at 1280 (quoting Cronan, 774 A.2d at 879).

59. Id.
The decision by the Court to address these issues indicates the importance of clarification on this matter. The magnitude of the offense committed by defendant also provides weight to the Court's ultimate determination to decide the case as they did. As illustrated by the facts, this was a heinous crime committed by defendant and it seems as though the court strategically addressed each issue in-depth even though defendant failed to properly preserve the issues. Another reason for the Court's thorough review was due to the fact that defendant raised State and Federal Constitutional arguments. This shows the Court's concern for ensuring that Constitutional rights are not violated.

The procedure that is required to preserve the defense of double jeopardy was not clarified until two years after defendant's trial took place. Prior to this, the case law in this area remained unclear. The decision of this case will provide guidance to future defendants who seek to raise potentially valid arguments on appeal. The importance of properly preserving the party's argument is great since this could conceivably result in the Court refusing to address issues that could potentially lead to reversal. In order to avoid such injustice, the Rhode Island Supreme Court made a point to fully discuss the issues and indicate to future litigants the seriousness of this procedure. From here on, parties do not have a valid excuse for failure to adequately secure challenges given that this case has explicitly indicated the proper procedure.

CONCLUSION

The Rhode Island Supreme Court held that a defendant is precluded from raising a claim for a motion on a new trial when the defendant failed to object at the time the evidence was introduced at trial. Denial of a new trial is appropriate when the trial justice finds evidence pointing to the defendant's guilt beyond a reasonable doubt. The Court affirmed the judgment of convictions.

Basannya Babumba

60. See Scanlon, 982 A.2d at 1276.
61. Id. at 1277 (citing State v. Day, 925 A.2d 962, 977 (R.I. 2007)).
62. Id. at 1280.
63. Id. at 1279.
64. Id. at 1280.
Environmental Law. Lynch v. Rhode Island Department of Environmental Management et al., 994 A.2d 64 (R.I. 2010). The Rhode Island Department of Environmental Management (DEM) requires refuse facilities in Rhode Island to apply for a permit, pursuant to section 23-18.9-9 of the Rhode Island General Laws, in order to operate at a particular capacity. Section 23-18.9-9 also governs the subsequent expiration, renewal, and transfer of refuse facility licenses. Any individual who provides substantive comment at any time during the public comment period before DEM issues or denies a particular license may appeal the decision of the DEM director. The Rhode Island Supreme Court found that the legitimacy of the subsequent renewal and transfer license issued to TLA-Providence LLC (TLA) hinged on the validity of the original license; thus, it was proper on appeal for Rhode Island Attorney General, Patrick C. Lynch, to challenge the validity of the original license, regardless of whether there had been a renewal or transfer since the original issuance.

FACTS AND TRAVEL

This case involves an extensive procedural history that began almost a decade ago and that ended temporarily with the Rhode Island Supreme Court decision on May 5, 2010.1 Rhode Island Attorney General, Patrick C. Lynch, originally challenged a license application filed between August of 2000 and July of 2002 by Pond View Recycling, Inc.2 Pond View applied for a new license to expand from operating at a limit of 150 tons per day of construction and demolition debris to operating at a capacity of 500 tons per day.3 In accordance with section 23-18.9-9(a)(4) through (6) of the Rhode Island General Laws, the Attorney General provided “substantive comment” at public hearings on September 10 and 11, 2002 contesting the issuance of Pond View’s

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2. Id.
3. Id.
license on two grounds: (1) the company was not currently in compliance with state environmental laws; and (2) the company neglected to obtain the licenses required to operate. 4

Nevertheless, Pond View’s license was issued on January 10, 2003 and, again in accordance with section 23-18.9-9(c) of the Rhode Island General Laws, was set to expire three years later on January 10, 2006. 5 In April 2003, the Attorney General filed an administrative appeal to be heard before the Administrative Adjudication Division for Environmental Matters of the Department of Environmental Management (AAD), and the hearings were subsequently held. 6 Unfortunately, in May 2004, the hearings were stayed when the hearing officer determined that she did not have authority to compel a DEM witness to testify when the witness refused to answer one of the Attorney General’s questions. 7 While the hearings were stayed, the Attorney General

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4. Id. at 66 (quoting R.I. GEN. LAWS § 23-18.9-9(a)(6) (2008)). Attorney General Lynch also insisted that Pond View’s license application was deficient in numerous ways. Id. at 66. Section 23-18.9-9(a) provides in relevant part:

(4) No earlier than sixty (60) days nor later than seventy-five (75) days following the initial public notice of the issuance of the draft license or tentative denial, a hearing shall be held for public comment. Comments from the applicant and/or any interested persons shall be recorded at the public hearing. Written comments, which shall be considered part of the record, may be submitted for thirty (30) days following the close of the public comment hearing.

(6) The applicant and/or any person who provided substantive comment at any time during the public comment period may appeal the decision of the director; provided, however, any person who shall demonstrate good cause for failure to so participate and demonstrate that his or her interests shall be substantially impacted if prohibited from appearance in the appeal, may in the discretion of the hearing officer be permitted to participate in the appeal process.


5. Lynch, 994 A.2d at 66 (citing R.I. GEN. LAWS § 23-18.9-9(c) (2008)).

6. Id. at 66. The Attorney General and Pond View attempted to resolve the issue through voluntary mediation after the Attorney General’s appeal was filed; however, no resolution materialized and the administrative process continued. Id. at n.4.

7. Id. at 66-67. The Attorney General asked the chief of DEM’s Office of Waste Management about information contained in DEM’s regulations and DEM counsel objected that the question required expert testimony. The hearing officer ruled that the question did not require expert testimony, but DEM counsel refused to allow the DEM witness to answer the question. Id. at 67 & n.5.
filed for a declaratory judgment with the Rhode Island Superior Court seeking to enforce the witness's subpoena, and to compel the witness to testify.\textsuperscript{8} The Attorney General also filed a petition with the director of DEM for a declaratory ruling that would determine the type of questions DEM employees were required to answer.\textsuperscript{9} Though DEM issued an order requiring DEM witnesses to answer only fact-specific and non-opinion inquiries, the Superior Court on December 31, 2007, ordered the DEM witness to "comply with the Hearing Officer's directive to answer questions calling for factual or opinion evidence."\textsuperscript{10}

At this point, about five years had passed since the public hearings were held in which the Attorney General provided substantive comment in opposition to the issuance of Pond View's license application.\textsuperscript{11} The stay of proceedings was lifted after the Superior Court's order on December 31, 2007, and the AAD hearings continued; however, they continued only with respect to Pond View's motion to dismiss, which had been filed while the proceedings were stayed.\textsuperscript{12} The gravamen of Pond View's argument was that the controversy was now moot because its 2003 license had since expired and the Attorney General had not preserved his right to challenge the renewed license issued on January 10, 2006.\textsuperscript{13} In response, the Attorney General argued that the controversy was not moot because the 2006 license was a renewal of the original 2003 license and its validity was therefore dependent upon the validity of the original license.\textsuperscript{14} On January 4, 2008, the AAD hearing officer issued an order dismissing the Attorney General's appeal as moot, despite the Superior Court's order that the DEM witness be compelled to testify at further

\textsuperscript{8} \textit{Id.} at 67.
\textsuperscript{9} \textit{Id.} at n.6.
\textsuperscript{10} \textit{Id.} at 67 (emphasis omitted).
\textsuperscript{11} \textit{Lynch}, 994 A.2d at 66-67.
\textsuperscript{12} \textit{Id.} at 67.
\textsuperscript{13} \textit{Id.} Pond View also argued in support of its motion to dismiss the case for mootness that the doctrine of laches applied because the Attorney General exercised unreasonable delay in prosecuting the case. \textit{Id.}
\textsuperscript{14} \textit{Id.} at 67-68. The Attorney General also argued the following: there were unresolved constitutional and due process issues regarding DEM's administrative proceedings; the appeal involved issues of "extreme public importance"; the appeal was not time-barred by the doctrine of laches; and Pond View offered no evidence of unreasonable delay or prejudice. \textit{Id.}
AAD hearings.\textsuperscript{15}

In February 2008, the Attorney General filed a complaint with the Superior Court seeking review of the AAD's mootness decision and declaratory judgment regarding the validity of Pond View's 2006 license.\textsuperscript{16} However, before the Superior Court issued its ruling on the appeal, another company, TLA-Providence LLC (TLA), bought out Pond View and had Pond View's license transferred.\textsuperscript{17} At that point, TLA was issued a three-year renewal license, which would expire February 28, 2011.\textsuperscript{18} On May 29, 2008, the Superior Court affirmed the AAD hearing officer's judgment that the issue of the validity of the 2003 license was moot, reasoning that the Attorney General should have done something to stop the issuance of the 2006 license, which rendered the 2003 license moot.\textsuperscript{19} The Superior Court dismissed the declaratory judgment count.\textsuperscript{20} Notwithstanding the court's holding, the trial justice expressed disapproval regarding the non-compliance of the parties with the Superior Court's first order of December 31, 2007 that the DEM witness respond to questions and with the fact that no further evidence was taken during the proceedings.\textsuperscript{21}

After entry of judgment, the Attorney General filed a notice of appeal regarding the dismissal of the declaratory judgment claim and filed a petition for writ of certiori seeking review of the Superior Court's mootness decision.\textsuperscript{22} The Rhode Island Supreme Court granted the petition for writ of certiori and consolidated both the certiori petition and the appeal, addressing specifically whether or not the appeal of the 2003 license was moot.\textsuperscript{23}

\textsuperscript{15} See id. at 68.
\textsuperscript{16} Id. Pond View counterclaimed on numerous counts, including compensation for litigation expenses, abuse of process, and malicious prosecution. Id.
\textsuperscript{17} Lynch, 994 A.2d at 68-69.
\textsuperscript{18} Id. at 69 & n.9 (citing 12-030-021 R.I. Code R. § 1.6.03(a)(3) (2010)). TLA was also substituted as a defendant in the action. Id. at 69.
\textsuperscript{19} Id. at 69-70.
\textsuperscript{20} Id. at 70.
\textsuperscript{21} Id. at 69-70. The trial justice also stated that the "internal friction within the executive department of government" was "unseemly." Id. at 69.
\textsuperscript{22} Id. at 70.
\textsuperscript{23} Lynch, 994 A.2d at 70.
ANALYSIS AND HOLDING

The Rhode Island Supreme Court began its analysis with an examination of section 23-18.9-9 of the Rhode Island General Laws.\textsuperscript{24} The crux of the Court’s analysis hinged specifically on section 23-18.9-9(c), which concerns the expiration and renewal of licenses.\textsuperscript{25} The Court focused on the portion of section 23-18.9-9(c) that provides:

\begin{quote}
[t]he provisions in this section for issuance of a license shall not apply to the renewal of a license and any facility shall be relicensed if it meets the criteria in effect when the facility was licensed; provided, however, that any renewal application which substantially deviates from the use or purpose of the license shall be subject to the provisions of this chapter . . . \textsuperscript{26}
\end{quote}

The Court interpreted the statute to mean that the provisions of section 23-18.9-9 of the Rhode Island General Laws do not apply to the renewal of a license and that a renewal license follows from, and is directly dependent upon, the validity of the original license; essentially, renewal and transfer licenses are not “truly new licenses.”

\textsuperscript{24} Id. at 71.
\textsuperscript{25} Id. Section 23-18.9-9(c) provides in relevant part:
\begin{quote}
(c) Licenses shall expire three (3) years from the date of issuance unless sooner suspended or revoked. The provisions in this section for issuance of a license shall not apply to the renewal of a license and any facility shall be relicensed if it meets the criteria in effect when the facility was licensed; provided, however, that any renewal application which substantially deviates from the use or purpose of the license shall be subject to the provisions of this chapter and further provided that any facility shall be relicensed if it meets the criteria in effect when the facility was licensed. The director is authorized to promulgate by regulation procedures for license renewals. The director shall publish a schedule of fees to be paid to renew a license. These fees shall be reasonable and shall account for the size and complexity of the project, and costs incurred to monitor the project, and any other criteria that the director may determine; provided, however, that no renewal license fees shall exceed one hundred thousand dollars ($100,000). All licensed solid waste disposal facilities shall be deemed to comply with all local ordinances.
\end{quote}
\textsuperscript{26} Lynch, 994 A.2d at 71 (citing R.I. GEN. LAWS § 23-18.9-9(c) (2008)) (emphasis omitted).
licenses." It follows from that interpretation of the statute, the Court reasoned, that the validity of the original license is not moot and that its validity can still be challenged, "even though it survives only in the form of the [subsequent] permutations." Additionally, the process for a renewal and transfer license is basically a formality that does not require: (1) a certificate from the municipality stating that the facility conforms with local land use and control ordinances; (2) a certificate of approval from the state planning council for the proposed site; or (3) a renewal or transfer license subject to the public notice and comment requirements. In contrast, an application for a new license is subject to all of these requirements. Thus, the Court agreed with the Attorney General that TLA's renewal and transfer licenses were dependent upon the validity of the original license and that the issue of the validity of the original license was not moot.

The Court disagreed with DEM and the trial justice that the Attorney General had not preserved his right to appeal the issue of the validity of the 2003 license, as the Court found that the limited statutory requirements for a renewal and transfer license did not provide recourse for a challenge to either type of license, and that the Attorney General's only option was to continue his challenge to the original 2003 license. The Court also disagreed with DEM's argument that the issue of the validity of the original license was moot because the 2006 and 2008 licenses contained different conditions from the 2003 license and were thus not the same as the original. The Court found that, based on DEM's own reasoning, licenses are frequently modified and renewal

27. Id. at 71.
28. Id. at 71-72.
29. Id. at 72.
30. Id.
31. Id. at 72. The Court also found persuasive the Attorney General's alternative argument that if TLA's renewal and transfer licenses were in fact new licenses, then they were not in compliance with the statutory requirements for a new license. Id. at 72 & n.14.
32. Lynch, 994 A.2d at 73. The Court also noted that the DEM regulations only provide for an appeal process for the applicant who has been denied a license, but not an appeal process for interested parties to object to or appeal an issuance of a renewal or transfer license. Id. at 73 & n.16.
33. Id. at 73.
licenses are revised according to subsequent modifications. Only when there is a “substantial deviation” from the original license is there an issuance of an entirely new license; the modifications on licenses are simply a reflection of changes that facilities experience over time. Thus, the Court concluded, “absent such substantial deviations, the renewed licenses are in fact a product of the issuance of the original license,” which in this case was the 2003 license.

Finally, the Court rejected DEM's argument that the Court’s decision in *Hallsmith-Sysco Food Services v. Marques* supports the conclusion that the 2003 license is moot. The Court held in *Hallsmith-Sysco Food Services* that the elimination of a liquor license rendered moot an objection to the license’s future transfer. The Court distinguished the 2003 license in this case from the license in *Hallsmith-Sysco Food Services* because the 2003 license expired on its own terms and was subsequently renewed and transferred, unlike the *Hallsmith-Sysco Food Services* license, which was completely eliminated by the town. The Court further indicated that its analysis was similar to that of the Supreme Court of Texas in *Harris County Bail Bond Board v. Blackwood*, where the court recognized that the expiration and renewal of licenses do not moot the issue of the validity of the original license.

**COMMENTARY**

This case involves a number of instances where the parties were encouraged to reach a settlement and were subsequently admonished for their behavior in dragging out a dispute beyond

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34. *Id.*
35. *Id.* (citing R.I. GEN. LAWS § 23-18.9-9(c) (2008)). The Court noted that with regard to a transfer license, a new license is only issued when the transfer involves “significant amendments and/or revisions to the operating plan or facility.” *Id.* at 73 & n.17 (citing 12-030-021 R.I. CODE R. § 1.6.03(a)(2) (2010)).
36. *Id.* at 73.
37. *Id.* at 72; *Hallsmith-Sysco Food Services v. Marques*, 970 A.2d 1211 (R.I. 2009).
39. *Id.*
40. *Id.* at n.15; *Harris County Bail Bond Board v. Blackwood*, 41 S.W.3d 123 (Tex. 2001).
the orders of the Superior Court. The Rhode Island Supreme Court noted that the Superior Court justice admonished the parties when he wrote in his opinion, "[When the Superior Court] issues orders, they are not to be ignored. In the event that end runs are going to be attempted around them, the Court through appropriate motion practice ought to be made aware of it before it happens." Agreeing with the Superior Court's admonition, the Supreme Court declared, "[i]t should go without saying that we unequivocally share in the displeasure voiced by the Superior Court justice." Also, the Superior Court justice reprovingly stated that the "internal friction within the executive department of government" was "unseemly." Similarly, the Rhode Island Supreme Court observed that "[t]he parties were repeatedly encouraged by [the Superior Court justices] to pursue settlement."

This case raises a number of issues, including the function of the executive department of government in Rhode Island, the appropriate use of taxpayer funds, and, in particular, whether the exhaustion of administrative remedies is an appropriate use of government time and money. Though these issues are speculative, it is a reasonable expectation that the executive branch of the Rhode Island government should be able to resolve or settle disputes with other in-state government agencies through negotiation and arbitration. That the executive branch cannot come to a resolution with other state agencies is unsettling at a time when Rhode Island citizens need their government to function as quickly and efficiently as possible in order to properly allocate funds and stimulate job growth. Moreover, it is not inconceivable to believe that had the parties settled their issues in 2003 and not dragged out the dispute into 2010 and beyond, taxpayer funds could have been saved or spent elsewhere. Lastly, exhaustion of administrative remedies ought to be a tool used primarily by individual citizens or non-governmental organizations to challenge or appeal governmental or state agency decisions. In the majority of situations, the executive branch of

41. See Lynch, 994 A.2d at 67 n.6, 69, 70 n.11.
42. See id. at 70 n.11 (alteration in original).
43. See id.
44. See id. at 69.
45. See id. at 67 n.6.
the Rhode Island government and other state agencies should be able to resolve disputes in a timely manner through negotiation and arbitration.

CONCLUSION

Despite close to a decade of litigation over the license at issue in this case, the Rhode Island Supreme Court quashed the judgment of the Superior Court and remanded the case back to the Superior Court with further instructions that it remand the case back to the Administrative Adjudication Division for Environmental Matters of the Department of Environmental Management for further proceedings “to commence expeditiously in a manner consistent with this opinion and the December 31, 2007 order of the Superior Court.”

Lindsay M. Vick

46. Id. at 74.
Excusable Neglect. UAG West Bay AM, LLC v. Cambio, 987 A.2d 873 (R.I. 2010). A Superior Court clerk's failure to mail an entry of judgment to the parties in the case does not invalidate the judgment where the parties were both present when the judgment was signed by the trial judge. Nor does a Superior Court clerk's erroneous recording of the date of entry of judgment on the civil docket invalidate the judgment when both parties were present at the signing of the judgment and the deadline for appeal is the same day whether calculated from the actual date of judgment or the erroneous date. A busy legal practice is not excusable neglect which warrants an extension of time to file a notice of appeal under Rule 4(a) of the Rhode Island Supreme Court Rules of Appellate Procedure.

FACTS AND TRAVEL

The plaintiff, UAG West Bay AM, LLC, manages the Inskip Auto Mall car dealership in Warwick Rhode Island. Car War LLC, also a plaintiff, owns the property and a remote parking area near the dealership which Inskip uses as employee parking and long term parking for inventory. The defendant, Bald Hill Condominiums, owns a commercial shopping center which abuts the Inskip Auto Mall. For the last ten years the Inskip dealership had maintained a curb cut which connected the main Inskip property to the remote parking area through an access drive, which was within Bald Hill Condominium’s property.

In June 2004, Nicholas Cambio, the original developer of Bald Hill Condominiums, contacted the plaintiff, claiming that he had the exclusive right to grant access through the Bald Hill property and demanding a one-time access fee. The plaintiff refused to

2. Id. at 875. Plaintiff UAG West Bay AM, LLC, the company that manages the Inskip dealership, leased the property from plaintiff Car War LLC through another company, plaintiff UAG Realty, LLC. Id. at 874-75.
3. Id.
4. Id.
5. Id.
make the payment and when, in January 2005, Cambio threatened to block the dealership's curbs with concrete blocks, the plaintiff filed the instant action.\(^6\) The plaintiff sought injunctive relief in the Superior Court of Rhode Island to prevent its easement right of entry to the access road from being blocked and requested a declaratory judgment stating its easement rights.\(^7\) In addition, the plaintiff requested a judgment stating that it had no responsibility to pay an access fee to Cambio or Bald Hill Condominiums.\(^8\)

The plaintiff alleged it held certain declarant rights in Bald Hill Condominiums which allowed it access to an easement over the property.\(^9\) After the suit was filed, it was discovered that there was an issue with the declarant rights in the original deed, which the plaintiff attempted to correct.\(^10\) However, the defendant used the issue with the deed to argue that any easement interest the plaintiff may have had was defeated.\(^11\) In November 2006, the Superior Court granted partial summary judgment to the plaintiff, holding that the plaintiff held valid declarant rights.\(^12\) The parties negotiated to solve the remaining issues.\(^13\) On December 10, 2007 the plaintiff's attorney, defendant's attorney, and the hearing justice signed a document entitled "Final Judgment", which contained the partial summary judgment and negotiation results.\(^14\) The defendant's attorney asked plaintiff to file the judgment "and to provide him with a fully executed copy."\(^15\) The plaintiff's attorney filed with the clerk's office the same day and mailed a copy to the defendant.\(^16\) The judgment that was mailed had a clerk's office time stamp of December 10, 2007 but was not signed by the clerk;\(^17\) rather, the clerk signed the judgment on December 11, 2007.\(^18\) In addition,
"[t]he clerk's office never sent any party a notice of entry of judgment."¹⁹

The period within which the defendant could have filed an appeal of the partial summary judgment ended on December 31, 2007.²⁰ "On January 4, 2008, [the] defendant filed an emergency motion for a brief extension of time to file notice of appeal."²¹ The defendant, in its motion, asserted that there was excusable neglect which justified an extension because the attorney of record had delegated the job to an associate and the associate had failed to file the notice of appeal by the deadline because of serious illness.²²

An evidentiary hearing was held on January 23 and 24, 2008.²³ At the hearing, the defendant raised an additional argument that the judgment was defective because the judgment had not actually been signed by the clerk until December 11, 2007 and the clerk had failed to mail notice of final judgment to the attorneys.²⁴ The defendant's attorney testified that he had not "huddle[d] over" the associate and had trusted her to get the notice of appeal in on time because he was very busy.²⁵ He had only asked her once, in passing, if it was done and when she said it was not, he never checked with her again.²⁶ On January 3, 2008, he emailed the associate to check that the notice of appeal had been filed and then learned that she had failed to file it.²⁷ The defendant's attorney further testified that he was unaware of what the filing deadline was and that the associate had been ill at the time.²⁸

On February 6, 2008, the hearing justice denied the defendant's motion for extension of time to file,²⁹ Finding that the appeal period had begun to run on December 11, 2007.³⁰ The

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¹⁹. *UAG West Bay AM*, 987 A.2d at 876.
²⁰. *Id.* at 877.
²¹. *Id.* at 876.
²². *Id.*
²³. *Id.*
²⁴. *Id.* at 876, 877.
²⁵. *UAG West Bay AM*, 987 A.2d at 876.
²⁶. *Id.*
²⁷. *Id.* at 877.
²⁸. *Id.*
²⁹. *Id.*
³⁰. *Id.*
clerk's failure to mail notice did not alter the appeal period since both attorneys were present at the signing of the judgment, and thus, were on notice that the appeal period had begun.\textsuperscript{31} In addition, the hearing justice held that a "busy legal practice does not meet the standard of excusable neglect."\textsuperscript{32} The associate was not the attorney on record and therefore her illness had no bearing on the case.\textsuperscript{33} In response, the defendant timely filed this appeal.\textsuperscript{34}

**Analysis and Holding**

The Rhode Island Supreme Court reviewed the question of the entry of judgment \textit{de novo} since it was a question of law.\textsuperscript{35} The Court reviewed the issue of excusable neglect under the abuse of discretion standard.\textsuperscript{36}

**Entry of Judgment**

The defendant claimed that the clerk's office failed to follow Rule 79(a) of the Superior Court Rules of Civil Procedure, which requires the clerk to enter each civil action onto the civil docket, because the docket does not reflect the December 11, 2007 entry of the judgment.\textsuperscript{37} The defendant additionally claimed that the clerk's office failed to follow Rule 77(d) when the office failed to mail notice of entry of judgment to the parties.\textsuperscript{38}

However, Rule 58(a) of the Superior Court Rules of Civil Procedure states that a "judgment is effective and shall be deemed entered when so set forth and signed by the Clerk."\textsuperscript{39} Rule 4(a) of the Rhode Island Supreme Court Rules of Appellate Procedure says that a judgment is entered when it is set forth and signed by the clerk in the trial court in accordance with the rules

\begin{itemize}
  \item \textsuperscript{31} \textit{UAG West Bay AM}, 987 A.2d at 877.
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.} (citing Carnevale v. Dupee, 783 A.2d 404, 408 (R.I. 2001)).
  \item \textit{Id.} at 878 (citing Friedman v. Lee Pare Assoc., Inc., 593 A.2d 1354, 1356 (R.I. 1991)).
  \item \textit{UAG West Bay AM}, 987 A.2d at 878. n.6 (citing R.I. SUPER. CT. R. CIV. P. 79(a)).
  \item \textit{Id.} n.7 (citing R.I. SUPER. CT. R. CIV. P. 77(d)).
  \item \textit{Id.} (quoting R.I. SUPER. CT. R. CIV. P. 58(a)).
\end{itemize}
of the trial court. Rule 4(a) provides for twenty days from the entry of judgment to file an appeal.

The Court held that although Rule 77(d) requires the clerk to mail notice of judgment, failure to do so "does not void the judgment." Rule 77(d) also authorizes a party to give notice of the entry of judgment by sending a copy to the other party, which is exactly what occurred in the instant case. In addition, the defendant's attorney believed that the appeal period had begun to run after December 10, 2007. The defendant cited, Kay v. Menard, "in support of its contention." However, in Kay, the judge signed the order outside of the presence of the attorneys and nothing on the order indicated when it was prepared or signed by the court clerk. Another order was prepared and signed at a later date in Kay, thus the Court held the original order invalid because the parties lacked notice and knowledge of its entry. In the instant case, however, both parties had notice and knowledge of the entry of judgment because their attorneys were present at the signing of the judgment. Furthermore, the plaintiff's attorney notified the defendant's attorney that the judgment had been filed with the clerk on December 10, 2007.

In the present case, the Court further held that the clerk's erroneous recording of the date of entry of judgment on the docket, under Rule 79(a), did not invalidate the judgment because the "ministerial act is not essential to the effectiveness of the judgment. It is deemed entered and is effective when the clerk signs it." The Court also noted that the twenty day appeal period, if started on December 10, 2007, would end on a Sunday.

40. Id. (quoting R.I. SUP. CT. R., ART. I, Rule 4(a)).
41. Id. (citing R.I. SUP. CT. R., ART. I, Rule 4(a)).
42. Id. at 878-79 (citing McClellan v. Thompson, 333 A.2d 424, 428 (R.I. 1975)).
43. UAG West Bay AM, 987 A.2d at 879 (quoting R.I. SUPER. CT. R. CIV. P. 77(d)).
44. Id.
45. Id. (citing Kay v. Menard, 727 A.2d 665 (R.I. 1999)).
46. Id. (citing Kay, 727 A.2d at 666).
47. Id. (citing Kay, 727 A.2d at 666-67).
48. Id.
49. UAG West Bay AM, 987 A.2d at 879.
50. Id. (quoting Robert B. Kent, et al., Rhode Island Civil Procedure and Appellate Procedure § 58:2 at 41 (2006)).
and thus be extended to the following Monday. Therefore, the end of the appeal period was the same regardless of whether it was calculated from December 10 or 11, 2007.

Excusable Neglect

The Court held that a busy law practice is insufficient to establish the excusable neglect required under Rule 4(a) of the Rhode Island Supreme Court Rules of Appellate Procedure to obtain an extension of the time to file a notice of appeal. Such relief will only be granted if it is established that the counsel's neglect was the result of some extenuating circumstances that are sufficiently significant to make it excusable. These circumstances are those that are out of the party's control. The Court previously held in Astors' Beechwood v. People Coal Co., that overlooking a filing deadline because of "duties attendant" to an attorney's practice did not establish excusable neglect; it must be more than failure to remember a deadline. In the instant case, the associate who had been ill never entered an appearance in the case and the defendant's attorney, who was the attorney of record, claimed that he was extremely busy and did not know the date of the filing deadline. The Court held that this did not constitute excusable neglect. "A reasonably prudent attorney would have confirmed that his or her associate had actually filed the notice of appeal within the time period, or, discovering that he or she was incapable of doing so, would have assumed responsibility himself or herself."

COMMENTARY

In holding that a clerk's failure to mail notice of entry of

51. Id. at 879-80.
52. Id.
53. Id. at 880-81.
54. Id. at 880 (quoting King v. Brown, 235 A.2d 874, 875 (R.I. 1967)).
55. UAG West Bay AM, 987 A.2d at 880 (quoting Boranian v. Richer, 983 A.2d 834, 840 (R.I. 2009)).
56. Id. (citing Astors' Beechwood v. People Coal Co., 659 A.2d 1109, 1115 (R.I. 1995)).
57. Id. at 881.
58. Id.
59. Id.
judgment did not void the judgment in the instant case, the Court essentially adopted an ad-hoc analysis for situations like the one presented. The Court compared the facts of the instant case to a previous case, cited by the defendant, where it held a judgment void due to a failure by the clerk to mail notice of judgment. 60 By distinguishing these two cases, the Court made clear that it is still possible for a judgment to be found void for failure to mail notice. However, the Court failed to lay out a definitive test for when a judgment may be void. It was suggested that the fact that the attorneys had actual notice of the date of final judgment barred an invalidation of the judgment under Rule 77(d). 61 Thus, in future cases, attorney knowledge would be an important, but not necessarily determinative, factor.

The issue of the clerk’s erroneous recording of the date of entry of judgment on the docket under Rule 79(a) was very quickly disposed of by the Court, suggesting that it would be a rare situation where such a failure by the clerk would invalidate a judgment. 62 In addition, the Court made a point of calculating the appeal period for the actual and erroneous date of final judgment, pointing out that they were the same. 63 The analysis of the defendant attorney’s claim of excusable neglect seems to have been an easy one for the Court. This may have been due, in part, to the abuse of discretion standard of review, but also reflects the Court’s firm stance that a busy law practice is not excusable neglect. The Court made a point of laying out the failures made by the defendant’s attorney and claiming that a reasonably prudent attorney would not have acted in a similar manner. 64

CONCLUSION

The Rhode Island Supreme Court held that a failure by the Superior Court clerk to mail notice of judgment to both parties in a civil suit, where both attorneys were present at the signing of the judgment and the plaintiff’s attorney mailed the time stamped judgment to the defendant’s attorney, was not a voidable error.

60. UAG West Bay AM, 987 A.2d at 879.
61. Id.
62. Id.
63. Id. at 879-80.
64. Id. at 881.
The erroneous recording of the date of final judgment on the civil docket by the clerk was also not a voidable error. In addition, the Court affirmed previous decisions by holding, in the instant case, that a busy law practice is not excusable neglect sufficient to warrant an extension of the time to file a notice of appeal.

Erin Paquette
Family Law. Fravala v. City of Cranston, 996 A.2d 696 (R.I. 2010). A claimant proved by clear and convincing evidence that she was the common-law spouse of a deceased firefighter, thereby enabling her to collect his pension benefits. Evidence of claimant’s relationship with firefighter prior to the death of his estranged wife was admissible. Envelopes addressed to claimant as if she had taken firefighter’s last name were not considered hearsay and were thus admissible. The claimant was not entitled to prejudgment interest.

FACTS AND TRAVEL

Constance Fravala met Wilbur Phillips while both were married to other people. Ms. Fravala divorced her husband in 1968; Mr. Phillips was granted a divorce from “bed, board, and future cohabitation” from his wife (Lillian Cantone) in 1967, though his legal separation was never converted into a final decree of divorce. Ms. Fravala testified that Mr. Phillips told her he was divorced. Ms. Fravala and her five young children began living with Mr. Phillips in 1969. Ms. Fravala’s grandson also lived with them from the time of his birth in 1978. The couple cohabited continuously until Mr. Phillips’ death in 2004. Mr. Phillips worked as a firefighter for the City of Cranston for approximately twenty years and at the time of his death, in 2004, he was duly collecting a pension. When she was denied a widow’s pension upon Mr. Phillips’ death, Ms. Fravala brought an action against the City of Cranston seeking a judgment declaring

2. Id. at 704.
3. Id. at 707.
4. Id. at 698.
5. Id.
6. Id. at 699.
7. Fravala, 996 A.2d at 698.
8. Id.
9. Id.
10. Id.
that she was the common-law wife of Mr. Phillips.\textsuperscript{11}

Before the trial began, the city filed a motion in \textit{limine} seeking to exclude any evidence of the relationship of Ms. Fravala and Mr. Phillips prior to Ms. Cantone's death in 1999.\textsuperscript{12} The city argued that the evidence should be excluded as irrelevant under Rule 402 of the Rhode Island Rules of Evidence.\textsuperscript{13} The trial judge denied the motion.\textsuperscript{14}

Ms. Fravala provided extensive testimony concerning her relationship with Mr. Phillips.\textsuperscript{15} She spoke to the intimacy and commitment of their relationship, testifying that for thirty-five years the couple lived together continuously, never dated other people, were intimate and shared a bed.\textsuperscript{16} According to Ms. Fravala, the couple “attended family functions, birthday parties and weddings as a couple, and they went on vacations together...”\textsuperscript{17}

As to finances, Ms. Fravala testified that the couple pooled their income and jointly paid bills until their retirement in 2000, at which point they began to split living expenses.\textsuperscript{18} Bank statements were introduced showing that the couple had a joint bank account in September 2001 and in March 2004.\textsuperscript{19} Ms. Fravala testified that she had not known whether common-law-married couples were allowed to file joint tax returns, so the couple filed separately.\textsuperscript{20} Mr. Phillips named Ms. Fravala as the beneficiary of his life insurance policy and also listed her as his emergency contact on his Medicare enrollment form.\textsuperscript{21}

According to Ms. Fravala, the couple “discussed getting married ‘just for a ceremony,’” but never followed through with

\textsuperscript{11} \textit{Id.} at 698-99. Ms. Fravala originally filed an action seeking a writ of mandamus and a mandatory injunction and only later incorporated a petition for declaratory relief. The petition for a writ of mandamus and mandatory injunction were dismissed, and the case went forward solely on the petition for declaratory judgment. \textit{Id.}

\textsuperscript{12} \textit{Id.} at 699.

\textsuperscript{13} \textit{Fravala, 996 A.2d at 699.}

\textsuperscript{14} \textit{Id.}

\textsuperscript{15} \textit{Id.}

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{Id.}

\textsuperscript{18} \textit{Id.}

\textsuperscript{19} \textit{Fravala, 996 A.2d at 699.}

\textsuperscript{20} \textit{Id.}

\textsuperscript{21} \textit{Id.}
Mr. Phillips gave Ms. Fravala two rings over the course of their relationship, one of which Ms. Fravala testified was meant as an engagement ring. Though they never were formally married, Ms. Fravala testified that, for "some things," she signed her name "Constance Fravala Phillips," and for others "Constance Fravala." She testified that a lease from 2000 was signed "Wilbur Phillips" and "Constance Fravala Phillips." There was also a membership application for health insurance admitted into evidence which bore Mr. Phillips' signature and indicated that the couple was married in 1988.

Regarding Mr. Phillips' funeral arrangement, Ms. Fravala testified that she paid all of the expenses and provided information for the obituary to the newspaper. The obituary noted that Mr. Phillips was the husband of "Constance 'Connie' (Davidson) Fravala and the late Lillian (Cantone) Phillips." Ms. Cantone was listed as Mr. Phillips' spouse on his death certificate, and Ms. Fravala testified that she was informed that one of Mr. Phillips' daughters changed the listing from Ms. Fravala to Ms. Cantone.

Admitted into evidence were photocopies of envelopes variously addressed to "Mrs. Constance Phillips" and "Mr. and Mrs. Buddy Phillips." Additionally, Ms. Fravala was permitted to admit the affidavit of a deceased firefighter, someone Fravala testified was a long time friend. The affidavit asserted that Ms. Fravala and Mr. Phillips "lived together as a married couple until

22. Id.
23. Id.
24. Id. at 700. For instance, Ms. Fravala used only the surname Fravala on documents pertaining to her children, who bore the same name. She also testified that she used only Fravala on her credit union account, Mr. Phillips' funeral bill, and her driver's license. Id.
25. Fravala, 996 A.2d at 700.
26. Id. at 699. Ms. Fravala testified that the date was of no importance to her. Id.
27. Id. at 700.
28. Id.
29. Id.
30. Id. The trial justice admitted the envelopes over the city's objection on the grounds of hearsay. Id.
31. Fravala, 996 A.2d at 700.
[Mr. Phillips] passed away."\textsuperscript{32}

At least ten witnesses testified on behalf of Ms. Fravala.\textsuperscript{33} Among other things, these witnesses testified that the couple: shared a bedroom, held themselves out as a couple, socialized as a couple, appeared to be monogamous, and appeared to cohabit continuously.\textsuperscript{34} Three of Ms. Fravala's children each testified that Mr. Phillips was a father figure to them, was actively involved in their lives, and that they referred to Mr. Phillips as their father.\textsuperscript{35} Ms. Fravala's grandson, who lived with the couple, testified that Mr. Phillips brought him to "the fire station, fishing, and to bowling tournaments," that he introduced Mr. Phillips to people as his grandfather, and that Mr. Phillips called him his grandson.\textsuperscript{36} One retired firefighter testified that he believed the couple to be married.\textsuperscript{37}

The trial justice rendered the decision, stating that she was "clearly convinced that [Ms. Fravala] and [Mr. Phillips] intended to live together as husband and wife for over thirty-five years" and that Ms. Fravala had "met her burden to prove by clear and convincing evidence that a common-law marriage existed between the parties at the time of [Mr. Phillips'] death."\textsuperscript{38} The trial justice declared that Ms. Fravala was entitled to a widow's pension as of the date of Mr. Phillips' death in 2004 through January 2009 and to future monthly payments during her lifetime, but denied Ms.

\begin{footnotesize}
\textsuperscript{32} Id. A friend of the deceased firefighter testified as to the authenticity of the affidavit. "He ... testified that he recognized the affidavit, had knowledge of [the affiant] preparing the affidavit, and had witnessed him sign it in the absence of coercion." Id. at 701.

\textsuperscript{33} Id. at 700-01. While many witnesses testified on behalf of Ms. Fravala, the city called only one witness: an account clerk in the city's finance office. The clerk testified that it was her responsibility to send bereavement letters and affidavits to deceased city pension recipients' surviving spouses. To apply for a survivor's pension, a spouse would have to provide a death certificate and a marriage certificate. The account clerk also testified that, if Ms. Fravala qualified to collect the pension, "she would be entitled to receive $2,486.29 per month as of February 2009, and a lump sum of $199,308.22 for benefits accrued from the time of [Mr. Phillips'] death through January 2009." Id. at 701.

\textsuperscript{34} Id. at 700-01.

\textsuperscript{35} Id. at 701.

\textsuperscript{36} Id. at 700.

\textsuperscript{37} Fravala, 996 A.2d at 700.

\textsuperscript{38} Id.
\end{footnotesize}
Fravala’s request for prejudgment interest.\textsuperscript{39}

The city moved for an order staying enforcement of the judgment, and the motion was granted conditionally.\textsuperscript{40} Both parties filed timely cross-appeals.\textsuperscript{41}

\textbf{ANALYSIS AND HOLDING}

The city argued on appeal that the trial court erred by: (1) denying its motion \textit{in limine} to exclude evidence of the couple’s relationship prior to the death of Mr. Phillips’ wife, Ms. Cantone; (2) allowing the introduction of five envelopes addressed to variations of “Mrs. Constance Phillips” and the affidavit by the deceased firefighter; and (3) wrongly concluding that a common-law marriage existed by misconstruing the evidence.\textsuperscript{42} Ms. Fravala argued on appeal that the city breached its contract with the local unit of the International Association of Fire Fighters and breached its contract with her as a beneficiary of Mr. Phillips’ pension; she also argued that the trial court erred by not awarding her prejudgment interest.\textsuperscript{43}

The city argued that evidence of Ms. Fravala’s relationship with Mr. Phillips prior to the death of Ms. Cantone should not have been admitted.\textsuperscript{44} Its contention rested on the fact that, as a matter of law, Ms. Fravala and Mr. Phillips could not have been married under the common law until the death of Mr. Phillips’

\textsuperscript{39} Id. at 702. An order and judgment was entered on April 2, 2009, consistent with the bench decision, (1) declaring [Ms. Fravala] the common-law wife of [Mr. Phillips] at the time of his death; (2) granting her widow’s pension benefits of $199,308.22 from October 25, 2004 through January 31, 2009; (3) granting future monthly widow’s pension benefits of $2,486.29 during her lifetime for the months February 2009 through June 2009, and thereafter in an amount to be determined by the terms of the pension agreement; and (4) denying [Ms. Fravala’s] request for prejudgment interest.

\textsuperscript{40} Id.

\textsuperscript{41} Id.

\textsuperscript{42} Id.

\textsuperscript{43} Fravala, 996 A.2d at 707.

\textsuperscript{44} Id. at 702.
wife, Ms. Cantone.⁴⁵ According to the city’s argument, any
evidence of the couple’s relationship prior to Ms. Cantone’s death
was irrelevant.⁴⁶ The Supreme Court found that the trial court
did not abuse its discretion in allowing this evidence to be
admitted⁴⁷ because the “intent of the parties is crucial in
determining whether a common-law marriage exist[ed].”⁴⁸ Thus,
“the conduct of the parties, even at a time when an impediment
preclude[d] the lawful existence of a common-law marriage, could
be probative of the parties’ intent after the impediment [was]
removed.”⁴⁹

As to the admission of the five envelopes and the affidavit of
the deceased firefighter, the city argued that the evidence
constituted inadmissible hearsay.⁵⁰ The Supreme Court applied a
deferential standard of review, and held that neither the
envelopes nor the affidavit were inadmissible hearsay under Rule
801 of the Rhode Island Rules of Evidence.⁵¹ Under Rule 801(c),
hearsay is defined as “a statement, other than one made by the
declarant while testifying at the trial or hearing, offered in
evidence to prove the truth of the matter asserted.”⁵² The
envelopes were not offered to prove that Ms. Fravala was, in fact,
“Mrs. Phillips,” which would have gone to the truth of the matter
asserted.⁵³ Instead, the envelopes were offered to prove that some
members of the community addressed Ms. Fravala as “Mrs.
Phillips” or a variation thereof.⁵⁴ Likewise, the affidavit of the
deceased firefighter was offered to prove that “members of their
community viewed [Ms. Fravala and Mr. Phillips] as a married

⁴⁵. Id.
⁴⁶. Id.
⁴⁷. Id. at 703.
⁴⁸. A common-law marriage “can be established by clear and convincing
evidence that the parties seriously intended to enter into the husband-wife
relationship and that their conduct was of such a character as to lead to a
belief in the community that they were married.” Id. (quoting Sardonis v.
Sardonis, 261 A.2d 22, 24 (R.I. 1970)). The required intent of the couple and
belief of the community may be demonstrated by “inference from
cohabitation, declarations, reputation among kindred and friends, and other
competent circumstantial evidence.” Id. (quoting Sardonis, 261 A.2d at 24).
⁴⁹. Fravala, 996 A.2d at 703.
⁵⁰. Id.
⁵¹. Id. at 703, 704.
⁵². Id. at 703 (emphasis added).
⁵³. Id.
⁵⁴. Id.
couple,” not to prove that Ms. Fravala’s name was a variation of “Mrs. Constance Phillips.”

The city also argued that the trial justice misconstrued the evidence in concluding Ms. Fravala and Mr. Phillips were married under the common-law at the time of Mr. Phillips’ death. The Court concluded “that, given the deference that this Court accords to the trial justice’s inferences and conclusions drawn from the evidence and the trial justice’s extensive findings of fact, we are satisfied that the trial justice did not overlook or misconceive material evidence or otherwise commit clear error.” The Court noted that the trial justice rightly attributed great weight to Ms. Fravala’s testimony concerning the nature of her relationship with Mr. Phillips, specifically finding that the couple intended to enter a husband-wife relationship from the beginning of their cohabitation in 1969 with such intent continuing beyond Ms. Cantone’s death. The trial justice made specific findings concerning the couple’s continuous cohabitation, monogamy, intimacy, marriage-like commitment, joint finances, and intent to be husband and wife.

Furthermore, the trial justice found that there existed “overwhelming evidence supporting the fact that the community

55. Fravala, 996 A.2d at 704.
56. Id. The city’s specific arguments were:
   (1) the trial justice over-looked the evidentiary weaknesses in [Ms. Fravala’s] case; (2) the trial justice found a ‘family relationship’ when she should have made a finding of a ‘husband-wife relationship’ and was inappropriately ‘moved by the length of cohabitation and Mr. Phillips’ relationship with Ms. Fravala’s children and grandchildren’; (3) the trial justice erroneously stated in her bench decision that [Ms. Fravala] testified that people referred to [Ms. Fravala and Mr. Phillips] as husband and wife; (4) [Mr. Phillips’] 2001 insurance membership application suggests that [Mr. Phillips] did not believe that he and [Ms. Fravala] were in a common-law marriage because he ‘was very careful to identify a year for the marriage and a maiden name.’

57. Id. at 706.
58. Id. at 705.
59. Id. at 705-06. The documentary evidence relied upon to prove marital intention included a cosigned lease, Mr. Phillips’ life insurance policy naming Ms. Fravala as sole beneficiary, an insurance application in which Mr. Phillips’ named Ms. Fravala as his spouse, various documents in which the couple listed each other’s names as emergency contacts, and a loan application in which Mr. Phillips and Ms. Fravala were co-borrowers. Id.
recognized the parties to be in a husband-wife relationship for over thirty-five years." The Court acknowledged that the trial justice gave some weight to Mr. Phillips' relationship with Ms. Fravala's children and grandchildren, finding the familial nature of those relationships to be persuasive evidence that the community perceived the couple as husband and wife. The trial justice recognized the weaknesses of Ms. Fravala's case, noting the absence of evidence that the couple referred to themselves as husband and wife, filed joint tax returns, listed themselves as married on major documents, paid bills jointly, or pooled finances. The Court held that the trial justice properly conducted what is "intrinsically a fact-intensive inquiry" to determine that the couple's common-law marriage existed.

Finally, Ms. Fravala argued that the city breached its contract with the local unit of the International Association of Fire Fighters and breached its contract with her as a beneficiary of Mr. Phillips' pension, and also that the court should have awarded her prejudgment interest pursuant to section 9-21-10(a) of the Rhode Island General Laws. The Court found that Ms. Fravala's underlying action did not contain a breach-of-contract claim, and that she requested only declaratory relief. The Court also found that, under section 9-21-10, a plaintiff is only entitled to prejudgment interest when "a decision is made for pecuniary damages." Here, the trial justice determined that Ms. Fravala was entitled to benefits, not damages, so the Court found that section 9-21-10 did not apply.

COMMENTARY

Rhode Island is one of only a handful of states that continue to recognize common-law marriage. Trial Justice Savage, after

60. Id. at 706.
61. Fravala, 996 A.2d at 706.
62. Id. The trial justice also noted that it was Ms. Cantone who was listed as Mr. Phillips' wife on his death certificate. Id.
63. Id.
64. Id. at 707.
65. Id.
66. Id. (emphasis added).
67. Fravala, 996 A.2d at 707.
68. Id. at 703. The Court cited a 2007 article which stated that Rhode Island was one of only nine states that recognize common law marriage. Id.
rendering her decision, commented that "the outdated doctrine of common-law marriage should be abrogated judicially with the rule being given prospective application only." 69 One well-accepted understanding of the doctrine is that it was necessary to frontier settlements of the early United States, in which access to officiants was limited, communities were sparse, and life was dangerous. 70 Urbanization eliminated this rationale. 71 Courts have also based abolition of the doctrine on "fears of fraud in the transmission of property; a desire to protect marriage and the family against alternative forms of sexual unions; racism and eugenics; the movement to maintain vital statistics and enforce various health-related requirements for marriage through the licensing process; and administrative and judicial efficiency." 72

Professor Cynthia Grant Bowman argues that states should retain or reinstate the doctrine of common law marriage, pointing to the disparate adverse impact on women when courts do not recognize the doctrine. 73 Cases alleging common law marriage are almost always brought by women, and nonrecognition limits a woman's rights to alimony, property distribution, inheritance, Social Security and workers' compensation benefits. 74 Professor Bowman argues that the most vulnerable women, minorities and those in lower income groups, are most likely to be affected by nonrecognition since informal unions are more frequent among these groups. 75

CONCLUSION

The Court affirmed the Superior Court's judgment and remanded the record to the Superior Court. 76 The Court declined to consider, in the context of this case, whether the common-law

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69. Id. at 706 n.3. The Court declined to address the continued vitality of the doctrine and added that a decision to abrogate would be better suited to the General Assembly. Id.
71. Id. at 750.
72. Id.
73. Id. at 755.
74. Id. at 754-55.
75. Id. at 765-67.
76. Fravala, 996 A.2d at 708.
marriage doctrine should be abrogated. Instead, the Court suggested that the continued vitality of the doctrine would be more appropriately addressed by the General Assembly.

Sheila Vennell O'Rourke

77. Id. at 707 n. 3.
78. Id.
Family Law. *In re Paul Harrison*, 992 A.2d 990 (R.I. 2010). A Rhode Island Family Court justice has the authority to transfer a juvenile to a Temporary Community Placement once the juvenile has been charged with a serious crime, certified as an adult for trial, and thereafter sentenced to serve the period of the child’s minority at the Rhode Island Training School. Transfer to a TCP does not constitute a modification of the certified minor’s sentence and is consistent with state statutes governing the certification process and the governing principles of the juvenile justice system.

FACTS AND TRAVEL

In December 2007, Paul Harrison, then sixteen years old, sexually assaulted a female of the same age, “whom he described as a friend.”¹ Due to the nature of the allegations, the state initially sought to try Harrison as an adult and requested a waiver of jurisdiction from the Rhode Island Family Court.² After an apparent agreement had been reached by the parties on June 16, 2008, the state requested a certification hearing in lieu of the waiver hearing so that Harrison could be tried as an adult in Family Court.³ Following certification by a Family Court justice, Harrison pleaded *nolo contendere* to first-degree sexual assault.⁴ Harrison was thereafter sentenced to a total of fifteen years imprisonment at the Adult Correctional Institutions, ten years of which would be suspended, with five years to be served at the Rhode Island Training School.⁵

On January 12, 2009, six months after sentencing, Harrison was brought before the Family Court for a routine progress review.⁶ At this hearing both the state and the Public Defender

¹ *In re Paul Harrison*, 992 A.2d 990, 991, 999 (R.I. 2010).
² *Id.* at 991 & n.2 (citing in relevant part R.I. GEN. LAWS §14-1-7.1 (1990) concerning waiver requirements).
³ *Id.* at 992; see also R.I. GEN. LAWS §14-1-7.2 (1990) (identifying statutory requirements of certification process).
⁴ *Id.* at 991-92.
⁵ *Id.* at 992.
⁶ *Id.*
acknowledged that Harrison “was doing well at the Training School.” As a result, the Public Defender suggested that the court take into account Harrison’s notable progress and consider placing Harrison in a “step-down program,” such as a group-home, when the court next reviewed his case a few months later. After briefly inquiring as to which program might be suitable, the Family Court justice instructed that Harrison be immediately transferred to Ocean Tides, a Temporary Community Placement (TCP) facility that treats adolescent males.

On January 16, 2009, the state filed a motion requesting that the Family Court justice reconsider the order, which was subsequently denied. As a result, the state filed a motion to stay the Family Court order and a petition for certiorari with the Rhode Island Supreme Court. On February 9, 2009 the Supreme Court stayed the Family Court’s order and granted the state’s petition for writ of certiorari. The Supreme Court then remanded the case for an evidentiary hearing to determine whether a TCP was an appropriate placement for Harrison, requiring “the Family Court justice to issue a decision that contained ‘the necessary findings of fact and rulings on pertinent legal issues raised by the parties’ counsel.’”

On remand, the Family Court justice heard from the director of social services at Ocean Tides, who testified that the facility had accepted certified youths as TCPs in the past and that “Harrison was a good candidate for the facility’s sex-offender program.” In contrast, the state sought to establish solely through cross-examination of the director that “Ocean Tides was not a locked facility and that it had less rigorous supervision than the Training School.”

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7. Harrison “had received a GED, had made progress in his sex-offender treatment, and he was free of serious disciplinary citations” during his time served at the Training School. Harrison, 992 A.2d at 992.
8. Id.
9. Id.
10. The state also requested a stay in Family Court, which the justice reserved judgment on. Id. at 992 & n.5.
11. Id. at 992.
12. The Supreme Court granted the state’s motions, “noting that the [Family Court] justice ‘neither considered any testimony or other evidence nor offered any legal rationale in rendering his decision.’” Id.
13. Harrison, 992 A.2d at 992-93.
14. Id. at 993.
School." After reviewing the testimony presented and the parties’ legal arguments, the Family Court justice determined that transferring a certified minor to a TCP did not constitute a modification of the minor’s sentence, and “that the ‘juvenile is still under sentence at the Rhode Island Training School,’” according to section 14-1-42 of the Rhode Island General Laws. The Family Court justice further concluded that Harrison was an ideal candidate for the sex-offender program at Ocean Tides and ordered that Harrison be transferred to the facility as a TCP. The Supreme Court initially stayed this order, but soon after vacated the stay and ordered that Harrison be placed at Ocean Tides.

ANALYSIS AND HOLDING

Upon review of the Family Court order, the Supreme Court initially sought to determine whether the transfer of a certified minor to a TCP amounted to a modification of that minor’s sentence in relation to section 14-1-7.3(a) of the Rhode Island General Laws. Conducting a de novo review of the statutory language, the Court focused on the parties’ conflicting interpretations of the provision: “to be served in the training school for youth in a facility to be designated by the court.” Finding the language of the provision “susceptible to more than one reasonable interpretation,” the Court then sought to interpret the ambiguous statutory language “in the context of the entire juvenile justice statutory framework.” Although the state urged the Court to focus on section 14-1-42 for guidance in interpreting the language of section 14-1-7.3, the Court found the

15. Id.
16. Id. at 993 & n.6 (citing in relevant part R.I. GEN. LAWS §14-1-42 (2009) as applicable to the Family Court’s decision).
17. Id.
18. Id. at 993-94. The Supreme Court “further ordered that Harrison be confined to the Ocean Tides premises, and that he be ineligible for weekend passes, pending [the] decision in this case.” Id. at 994 n.7.
19. See Harrison, 992 A.2d at 996.
20. Id. at 994, 995.
21. Id. at 996. “Although the Training School is made up of three nominal facilities, a juvenile’s long-term placement is determined by gender, leaving no discretion to the Family Court justice.” Id.
22. Id.
state's reliance on section 14-1-42 misplaced. The Court instead determined that Harrison's placement at Ocean Tides as a TCP did not amount to a modification of his sentence according to the statute, reasoning that Harrison's sentence was neither suspended nor vacated.

The Court instead declared the amended statutory language contained in section 14-1-36.1, entitled "Release from training school," as essential to resolving the dispute. The Court confirmed that subsection (a) enables a Family Court justice, following a proper hearing, to release a delinquent or wayward youth sentenced to the Training School. Even so, the Court determined that the subsequent language within subsection (b) allowing "[a] child so sentenced . . . to be placed temporarily in a community program outside of the training school," referred not only to minors adjudicated as delinquent or wayward, but also to those minors certified and subsequently convicted. Finding such, the Court held that this particular language adopted by the General Assembly was intended to provide a Family Court justice with the ability to place a certified juvenile in a TCP, even though that juvenile had originally been sentenced to the Training School.

Finally, the Court addressed the state's concern that interpreting the statute in such a manner undermines the basic foundation of the certification process, which was created to protect society from those juveniles charged with the most serious crimes. While acknowledging and appreciating "the state's obligation to protect the public from dangerous juveniles," the opinion made clear that the Court "ha[s] long recognized the need

23. Id. at 996. The Court pointed out that section 14-1-42 outlines "strict limitations on the modification of a sentence" in respect to a certified minor, noting that this section "applies to the limited circumstances in which 'the court may suspend, but shall not vacate, the balance of the [juvenile's] sentence.'" Id. at 996 (quoting In re Nicholas V., 662 A.2d 447, 449 (R.I. 1993)).

24. Id. at 996.

25. Harrison, 992 A.2d at 996, 997 & n.11 (citing in relevant part R.I. GEN. LAWS § 14-1-36 (2009)).

26. Id. at 997-98.

27. Id.

28. Id. at 998.

29. Id.

30. Id.


32. *Id.* at 998-99.
33. *Id.* at 999.
34. *Id.* at 994 (quoting *State v. Day*, 911 A.2d 1042, 1048 (R.I. 2008)).
   “The philosophy underlying the movement to create juvenile justice systems, separate from the adult criminal system, stemmed from the belief that people under a certain age inherently were less culpable than were adults.” *Id.*
35. *Id.* at 995.
36. *Id.*; see also R.I. GEN. LAWS § 14-1-7.2 (2009).
37. *Harrison*, 992 A.2d at 995 & n.10; see also R.I. GEN. LAWS § 14-1-7.3(a) (2009) (detailing sentencing options for certified minors).
to achieve an appropriate balance between protecting society from dangerous minors and promoting the aims of the juvenile justice system, by following the statutory scheme which governs it. However, the facts of this case reveal that the balancing of these principles may be easily lost among competing interests in the juvenile justice arena. While the certification process for juveniles is undoubtedly a necessary and invaluable tool for ensuring justice in appropriate cases, the cases of children so adjudicated must be continually evaluated with rehabilitation as its goal, with adherence to the core principles of the Family Court. Only in doing so will those children who are deemed dangerous to our society be afforded the opportunity to eventually become productive members of the community.

Similarly, although the Supreme Court ultimately ruled that a Family Court justice has the authority to order a TCP for a certified juvenile, the concurring opinion points out that this authority is not wholly discretionary and must be subject to the same careful balancing act. While it is evident that the Family Court justice was acting in accordance with the rehabilitative ideology of the juvenile system, both regard for the victim's right to due process and society's interest in protection from violent juvenile offenders was seriously lacking. By requiring the Family Court justice to hold an evidentiary hearing and put forth a decision based on the pertinent facts and legal issues raised by the parties, the Supreme Court assumed a paternalistic role over the case by compelling adherence to statutory constraints, thus ensuring an outcome conforming to due process requirements.

CONCLUSION

The Rhode Island Supreme Court held that a Family Court justice is vested with the authority to transfer a juvenile who has been certified for trial, adjudicated, and thereafter sentenced to serve time at the Rhode Island Training School to a Temporary Community Placement (TCP) without constituting a modification of that minor's sentence. The Court determined this to be the intent of the legislature, gleaned from the statutory language governing the certification process and the primary objective of

38. Harrison, 992 A.2d at 1002.
the juvenile justice system to rehabilitate young offenders.

Mariana Ormonde
Land Use. *Karousos v. Pardee*, 992 A.2d 263 (R.I. 2010). The immunity provision of section 9-33-2 of the Rhode Island General Laws, the anti-SLAPP statute, requires that a lawsuit is not a mere sham, meaning that a lawsuit is neither objectively baseless nor subjectively baseless. If immunity is granted under this provision, it is mandatory to award reasonable attorney fees and costs to the prevailing party.

FACTS AND TRAVEL

In 1991, George and Anna Karousos (collectively Karousos) leased Fairlawn, an estate located at 518 Bellevue Avenue, in Newport, Rhode Island, expecting that the building could be used as a culinary school. "In the 1950s, 1960s, and 1970s, Fairlawn was used as a preparatory school and, for part of that time, as Vernon Court Junior College." After this time, the building was used primarily as a residence reflecting the City's zoning ordinance, which "permits the use of the building for residential purposes, but considers its use for educational purposes to be nonconforming." Karousos's expectation was based upon a "1989 letter from Newport Zoning Enforcement Officer Guy Weston (Weston)" to Fairlawn's previous owners, stating that the building's use as a school had never been abandoned and thus "the use of the property as a school remained a legal nonconforming use." When Karousos began making improvements to the property in preparation to open a culinary school, the City of Newport initiated a zoning enforcement action. In September 1994, Weston corresponded with Karousos "detail[ing] the actions that were necessary before the City of Newport would approve the

4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
use of Fairlawn as a culinary school" but later informed Karousos that the City approved such use when they took the necessary actions.8

However, when Jonathan Pardee purchased the property adjacent to Fairlawn, he appealed the City's ruling that Fairlawn’s use as a culinary school was permissible under the zoning ordinance.9 Through multiple hearings, the Newport Zoning Board (the board) decided that the use “as a culinary school was an illegal nonconforming use” and Karousos appealed.10 While the hearing and appeal11 were ongoing, "Karousos filed an abuse-of-process complaint in the Rhode Island Superior Court” alleging that the defendants12 had waived their right to object to the proposed use of Fairlawn.13 In response, the defendants based their defense upon section 9-33-2 of the Rhode Island General Laws,14 the “anti-SLAPP statute,”15 which, in pertinent part, provides that a “petition or free speech constitutes a sham only if it is both objectively and subjectively baseless.”16 Thus, the defendants claimed that the anti-SLAPP statute provided them immunity because the appeal was neither objectively baseless in light of the favorable decision of the board, nor subjectively baseless because the appeal was initiated without an ulterior motive.17

Accordingly the hearing justice entered summary judgment in favor of the defendants since “Karousos had failed to offer any ulterior motives for Pardee pursuing the zoning appeal, and thus could not satisfy the elements of the claim.”18 Further, a second

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8. Id.
9. Karousos, 992 A.2d at 266.
10. Id.
11. On appeal the Superior Court justice reversed the “ruling that the board had erred when it determined that Pardee's appeal was timely . . . concluding] that the only appealable action was Weston's 1989 letter, and that the time to appeal from that letter had long passed.” Id.
12. The complaint named twelve defendants in all, but herein this survey will refer only to Pardee and the four others who answered the complaint (collectively Pardee). Id.
13. Id.
14. R.I. GEN. LAWS § 9-33-2 (2009); Karousos, 992 A.2d at 266.
15. Karousos, 992 A.2d at 266.
16. Id. at 269; see R.I. GEN. LAWS § 9-33-2 (2009).
18. Id. at 267.
motion justice awarded fees and attorney's costs in favor of the defendants since such an award is mandatory under the anti-SLAPP statute, however these awards were limited only to the defendants' successful motions. Following the Superior Court justices' rulings, "Karousos timely appealed the grant of summary judgment and the award of costs and attorney's fees . . . [while] Pardee timely filed a cross-appeal on the amount of attorney's fees and costs."  

**ANALYSIS AND HOLDING**

On appeal, Karousos argued that the motion justice erred in granting summary judgment in favor of the defendants because Pardee's motion was a sham, and thus, not entitled to immunity under the anti-SLAPP statute. When considering whether an action is a sham and thus not entitled to immunity under the anti-SLAPP statute, the court must determine whether the "petition or free speech . . . is both objectively and subjectively baseless." Upon a *de novo* review, the Rhode Island Supreme Court affirmed the motion justice's grant of summary judgment in favor of the defendants.

The Court first examined whether Pardee's appeal was "objectively baseless . . . meaning that 'no reasonable person exercising the right of speech or petition could realistically expect success in procuring the government action, result, or outcome.'" The Superior Court motion justice determined the actions to be objectively baseless, ruling that there was no right to appeal the letters from Weston as the "letters were purely informational and nonbinding." However, because the Court found the second prong satisfied, as discussed below, it did not rule on "the issue of

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19. *Id.*
20. *Id.* at 268.
21. *See id.; see R.I. GEN. LAWS § 9-33-2 (2009).*
22. *Karousos, 992 A.2d at 269; see R.I. GEN. LAWS § 9-33-2 (2009).*
23. *Karousos, 992 A.2d at 268, 273.* Justice Flaherty authored the opinion for the court joined by Chief Justice Suttell and Justice Goldberg. *Id.* at 264. Justice Robinson concurred in part and dissented in part while Justice Indeglia took no part in the consideration or decision of the appeal. *Id.* at 264, 273.
24. *Id.* at 269 (quoting R.I. GEN. LAWS § 9-33-2 (2009)).
25. *Id.* at 270.
whether [Pardee's] efforts were objectively baseless.”

Therefore, the Court hinged its ruling on whether Pardee's efforts were subjectively baseless, meaning that the activity was “actually an attempt to use the governmental process itself for its own direct effects.” The burden of proof is initially borne by the party claiming immunity under the anti-SLAPP statute, and the motion justice was satisfied by Pardee's testimony claiming that his motivation to appeal was based solely upon preventing “commercial activity next to [his] planned home.” Thereafter, “the burden shifted to Karousos to offer some evidence to establish that Pardee sought the appeal for its direct effects and not for its outcome.” Subsequently, Karousos repeated his earlier allegations that given the long delay, “Pardee could have been motivated only by an interest in causing further burdens and delays to the opening of Karousos's culinary school.” However, “a party opposing a summary judgment motion may not simply rest on the allegations and denials in his or her pleadings” and in so holding, the Supreme Court affirmed the granting of Pardee’s motion.

The Court then examined whether the awarding of attorney's costs and fees to Pardee for all of his successful motions was consistent with the applicable provision in the anti-SLAPP statute and Rhode Island case law. Section 9-33-2(d) of Rhode Island General Laws provides that if a party is granted immunity under the anti-SLAPP statute, the prevailing party shall be awarded “costs and reasonable attorney’s fees, including those incurred for the motion and any related discovery matters.” However, the statute’s provision does not provide “what costs are mandatory or a specific measure of reasonable attorney’s fees” and on appeal, the Court gives great deference to the trial court’s

26. Id.
27. Id. (quoting R.I. GEN. LAWS § 9-33-2 (2009)).
28. Id. at 271.
29. Karousos, 992 A.2d at 271.
30. Id.
31. Id.
32. Id.
33. Id.
34. Id. at 272.
35. Karousos, 992 A.2d at 272 (quoting R.I. GEN. LAWS § 9-33-2 (2009)).
determinations. Therefore, the Court affirmed the trial court’s ruling that Pardee was entitled to the costs and fees incurred in his successful immunity assertion, but denied any award for his unsuccessful motions. In its last act, the Court determined that Pardee was entitled to reasonable attorney’s fees and costs for his appeal in defense of the granting of immunity and remanded the case “for a determination of what those fees and costs should be.”

COMMENTARY

Although the Rhode Island Supreme Court operated under the correct standard of review, it is unfortunate that the Court was unable to more fully address whether Pardee’s claims were objectively baseless. Immunity, under the anti-SLAPP statute, is awarded if neither of the party’s claims is subjectively baseless nor objectively baseless. However, the “Court has had several occasions to address” the definition of whether a claim is objectively baseless and has never held that a party’s actions were such. In so doing, the Court has created a very tough standard in blocking immunity for the claiming party.

However, in the lower court, the motion justice “determined that Pardee’s actions were objectively baseless because she ruled that Pardee had no right to appeal Weston’s letters.” These letters, the motion justice reasoned, could not be viewed as binding, and thus Pardee could not have been aggrieved by these correspondences. In so finding, the trial court recognized a situation where the first prong of the test, to determine whether a defendant was entitled to immunity, was satisfied. Since the trial justice still ruled that Pardee’s actions were not subjectively baseless, the Supreme Court could completely ignore the significance of a finding that Pardee’s actions were objectively baseless.

It is regrettable that the Court could not have further examined this issue as Justice Robinson’s dissent greatly calls into

36. Id.
37. Id. at 273.
38. Id. at 269.
39. Id.
40. Id. at 270.
41. Karousos, 992 A.2d at 270.
question the granting of immunity to Pardee on his claims. In his dissent, Justice Robinson was “convinced that summary judgment is not an appropriate mechanism for resolving controversies that turn on an assessment of the subjective intent of a party.” He stated that “[i]t is self-evident . . . that the determination of the presence of subjective baselessness vel non requires the scrutiny of the human heart and mind.” If the majority could have rejected the granting of summary judgment in favor of allowing the issue to be “grist for the mill of a fact-finder,” it is very likely that the importance of the motion justice’s holding that Pardee’s motion was objectively baseless could have served to set excellent precedent on the applicability of the immunity provision’s objectively baseless prong for future cases falling under the anti-SLAPP statute.

CONCLUSION

The Rhode Island Supreme Court affirmed the motion justice’s grant of summary judgment in favor of Jonathan Pardee because he was entitled to immunity under section 9-33-2 of the Rhode Island General Laws. The court further deferred to the motion justice’s determination of reasonable attorney’s costs and fees to be awarded to Pardee for his successful claim for immunity, since such an award is mandatory under the anti-SLAPP statute. Finally, the Court remanded the case to the Superior Court to determine the reasonable attorney’s fees and costs for his appeal to the Supreme Court.

Timothy J. Grimes

42. Id. at 273-75 (Robinson, J., dissenting).
43. Karousos, 992 A.2d at 273 (Robinson, J., dissenting).
44. Id. at 275 (Robinson, J., dissenting).
45. Id. at 274.
46. Id at 271-72; see R.I. GEN. LAWS § 9-33-2 (2009).
47. Karousos, 992 A.2d at 273.
Professional Responsibility. *In re Law Offices of James Sokolove, LLC*, 986 A.2d 997 (R.I. 2010). Several Rhode Island law firms objected to James Sokolove’s application for a limited liability company (LLC) license under the name “Sokolove Law, LLC.” The Court approved the application, holding that a potential violation of the Supreme Court Rules of Professional Conduct did not warrant denying a license as a LLC.

**FACTS AND TRAVEL**

In 2006, James Sokolove (Sokolove) organized a Delaware LLC under the name “The Law Offices of James Sokolove, LLC” and began the process of applying for a Rhode Island license as a LLC.1 The process for applying in Rhode Island as a LLC has two parts: (1) filing a limited liability entity charter with the Secretary of State, and (2) within thirty days of filing with the Secretary of State, filing a copy of the charter and an application for license with the clerk of the Supreme Court.2

Sokolove completed part one of this process by filing his application for registration with the Rhode Island Secretary of State on November 21, 2007.3 He then completed part two of the registration process, under the firm name “The Law Offices of James Sokolove,” by applying for a license with the Rhode Island Supreme Court on January 23, 2008.4 Sokolove later filed an

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2. *Id.* This process is governed by the Rhode Island Supreme Court Rules for the Admission to Practice Law which state in relevant part that:

   Within thirty (30) days after filing its limited liability entity charter with the Secretary of State, each limited liability entity formed to engage in the practice of law shall file with the clerk of the Supreme Court a copy of its limited liability entity charter together with an application for license on a form to be prescribed by the clerk . . . .

R.I. SUP. CT. ART. II, R. 10(d).
4. *Id.* It is important to note that this application for a LLC license did not comply with the Supreme Court Rules because the application was filed with the Court outside of the allotted thirty-day timeframe and was also not on the form prescribed by the clerk. *Id.*
amended application with the Secretary of State and the Court which changed the entity's name to "Sokolove Law, LLC." 

Sokolove Law, LLC, is a law firm that operates with a complex, national referral system. According to Sokolove, the firm practices law in every jurisdiction except South Dakota and Rhode Island. In Rhode Island, the law firm was to be operated by Brian J. Farrell (Farrell). Farrell filed an amicus curiae memorandum in support of the license application. It was asserted in this memorandum that Farrell is a member of Sokolove Law, LLC, and that he would run the Rhode Island office from his existing practice location. It was also asserted that the Rhode Island office of Sokolove Law, LLC, would have "office signage, letterhead [stationery] and business cards identifying the name of the firm and its Rhode Island address and telephone number."

This case arrived before the Court by a petition objecting to Sokolove's LLC license application. The petitioners opposed Sokolove's establishment in Rhode Island in two other manners. First, the petitioners filed a complaint with the Supreme Court Disciplinary Counsel, alleging that Sokolove's television advertisements violated the Rules of Professional Conduct because Sokolove is not licensed to practice in Rhode Island. That complaint was dismissed for failing to present evidence that met the clear and convincing standard. Then, petitioners filed a complaint with the Unauthorized Practice of Law Committee.

5. Id. The Court assumed that Sokolove Law, LLC, complied with the requirements of the Rhode Island Limited Liability Company Act which states that the Secretary of State "may not accept for filing any document . . . which does not conform with law." R.I. GEN. LAWS § 7-16-8(a) (1999).

6. Sokolove, 986 A.2d at 998.

7. Id. at 999. In most states, Sokolove Law operates as a limited liability company. However, in California, Virginia, Michigan, and Tennessee the firm operates as a limited liability partnership. Id.

8. Id.

9. Id.

10. Id. at 1000.

11. Id.


13. Id. at 1000.

14. Id.
(UPLC) which made the same allegations as the first complaint.\textsuperscript{15} Sokolove reached an informal resolution agreement with the UPLC which was to remain in place until the Court decided whether the application to practice law as a LLC complied with the Supreme Court rules and should be approved.\textsuperscript{16}

\textbf{ANALYSIS AND HOLDING}

The objection to an application for license as a limited liability entity was a case of first impression for the Court.\textsuperscript{17} The issue was whether Sokolove's application for a license as a LLC complied with the rules of the Court.\textsuperscript{18} In its per curiam decision, the Court held that petitioners failed to show sufficient cause for denying Sokolove's application and, therefore, approved the application.\textsuperscript{19}

\textit{Supreme Court Rules: Article II, Rule 10}

The application process for limited liability entities seeking a professional license in Rhode Island is governed by Article II, Rule 10 of the Rhode Island Supreme Court Rules for the Admission to Practice Law.\textsuperscript{20} Petitioners contended that, rather than working for the new law firm, members of Sokolove Law, LLC would continue to operate their individual law firms and have cases referred to them based on their affiliation with Sokolove Law,

\begin{itemize}
\item \textsuperscript{15} \textit{Id}.
\item \textsuperscript{16} \textit{Id}.
\item \textsuperscript{17} \textit{Id}.
\item \textsuperscript{18} Sokolove, 986 A.2d at 1000.
\item \textsuperscript{19} \textit{Id} at 998.
\item \textsuperscript{20} \textit{Id}. at 1000-01. Rhode Island Supreme Court Rule 10(d) provides in pertinent part that the license application filed with the clerk of the Supreme Court must set forth:
\begin{itemize}
\item (1) The name and address of the limited liability entity;
\item (2) The names and addresses of all shareholders, directors and officers, if the applicant is a professional service corporation; partners if the applicant is a registered limited liability partnership; and managers and members if the applicant is a limited liability company, each of whom must be an attorney authorized to practice law.
\item (3) The names and addresses of all of its attorneys who will practice law in Rhode Island.
\end{itemize}
\end{itemize}

LLC, in contravention of Rule 10(f). Petitioners further contended that it was improper for Sokolove to begin advertising in Rhode Island prior to the approval of the LLC application and that Sokolove Law, LLC, should not be recognized as a legitimate law firm because it was merely a referral network.

The Court found that the text of Rule 10(b) was clear and unambiguous and must, therefore, be enforced as written by giving the words their plain meaning. Rule 10(b) states, in relevant part, that the term "limited liability entity" includes limited liability companies "organized to practice law pursuant to the laws of any state or other jurisdiction of the United States and which practices in Rhode Island." The Court determined that this language made it acceptable for legal entities to exist outside of Rhode Island but have offices in the state staffed by members of the Rhode Island Bar.

In support of this conclusion, the Court also looked to Rule 10(d)(2)(3) of the Rhode Island Supreme Court Rules for the Admission to Practice Law, which requires companies applying to be licensed for the practice of law as a LLC to set forth in the application two separate classes of attorneys: 1) the principle attorneys who must all be licensed to practice law, and 2) the attorneys who will practice law in Rhode Island. The Court decided that no requirement existed that each member of the LLC be licensed to practice in Rhode Island. Furthermore, Sokolove safeguarded himself against any presumption that he was attempting to engage in the unauthorized practice of law by stating in his advertisements that he was licensed to practice in

21. Sokolove, 986 A.2d at 1002. Rule 10(f) states, in relevant part:
   The limited liability entity shall comply with and be subject to all rules governing the practice of law by attorneys and it shall do nothing which, if done by an individual attorney, would violate the standard of professional conduct applicable to attorneys licensed to practice law in this state.
R.I. SUP. CT. ART. II, R. 10(f).
22. Sokolove, 986 A.2d at 1001.
23. Id. at 1002 (citing Park v. Rizzo Ford, Inc., 893 A.2d 216, 221 (R.I. 2006)).
24. Id. (emphasis added).
25. Id.
26. Id. at 1003.
27. Id.
Massachusetts and New York.28

Fee-Sharing and Referrals

Article V, Rules 1.5 and 7.2 of the Rhode Island Supreme Court Rules of Professional Conduct govern referral and fee-sharing between lawyers.29 Petitioners argued that Sokolove’s application amounted to nothing more than a fee-sharing arrangement based on client-referrals.30 The Court found that Rule 7.2 permitted attorney-to-attorney referrals, so long as attorneys did not pay anyone “for funneling business or ‘channeling professional work.’”31 Sokolove also safeguarded himself by including in his advertisements the disclaimer required by Rule 7.2(f).32

The Court's finding that Sokolove Law, LLC, would be more than merely a referral service lessened the importance of discussing fee-sharing.33 Furthermore, the Court agreed with

28. Sokolove, 986 A.2d at 1003.
29. Id. Rule 7.2(c) states in relevant part:
   (c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may ... (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
      (i) the reciprocal referral agreement is not exclusive, and
      (ii) the client is informed of the existence and nature of the agreement.
R.I. Sup. Ct. Art V, R. 7.2(c). Rule 1.5 states in relevant part:
   (e) A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable.
30. Sokolove, 986 A.2d at 1003.
31. Id. at 1004 (quoting R.I. Sup. Ct. Art. V, R. 7.2, comment [6]).
32. Id. Rule 7.2(f) requires firms referring a majority of cases they receive in a particular area to include a disclaimer stating that most cases are referred to other attorneys. R.I. Sup. Ct. Art. V, R. 7.2(f).
33. Sokolove, 986 A.2d at 1004. However, the Court took the opportunity to point out that fee-sharing is more stringently regulated than referrals. Fee-sharing is only allowed between attorneys from different firms when each attorney personally assumes joint responsibility for the case. Also, it is
Sokolove's argument that a potential violation of Article V of the Rhode Island Supreme Court Rules of Professional Conduct was an insufficient reason to deny Sokolove's application.\textsuperscript{34} Any such violations by those practicing law in Rhode Island should be investigated by the Disciplinary Counsel in accordance with Article III of the Rhode Island Supreme Court Rules of Disciplinary Procedure.\textsuperscript{35}

\textbf{COMMENTARY}

The Court makes a point in this case to discuss the practice of law as something special that must be reserved to only those who are appropriately licensed by the Court.\textsuperscript{36} The practice of law may be difficult to define because the law is constantly changing.\textsuperscript{37} However, it is the responsibility of all members of the bar to stay informed of these changes because they are obligated to abide by all rules of professional conduct in order to assure "the most effective guaranty of equal justice to all" under the law.\textsuperscript{38}

\textbf{CONCLUSION}

The Court approved Sokolove's application for a license as a limited liability company under the name "Sokolove Law, LLC."\textsuperscript{39} In making this decision, the Court agreed with Sokolove's argument that a potential violation of Article V of the Rhode Island Supreme Court Rules of Professional Conduct was an insufficient basis to deny an application for a LLC license.\textsuperscript{40}

Adam D. Riser

\footnotesize{assumed that fees must be split in proportion with the share of services rendered. \textit{Id.}
\textsuperscript{34} \textit{Id.} at 1001.
\textsuperscript{35} \textit{Id.}
\textsuperscript{36} \textit{Id.} at 1005 (citing R.I. Bar Ass'n v. Automobile Serv. Ass'n, 179 A. 139, 140 (1935)).
\textsuperscript{37} \textit{Id.} (quoting \textit{R.I. Bar Ass'n}, 179 A. at 146).
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Sokolove}, 986 A.2d at 1006.
\textsuperscript{40} \textit{Id.} at 1001.}
Statutory Interpretation. Foster Glocester Regional School Building Committee v. Steven A. Sette, 996 A.2d 1120 (R.I. 2010). The Rhode Island Supreme Court addressed whether a town council had the authority, express or implied, to remove a member of a regional school building committee (RBC) after that member had been appointed. The Court determined the RBC was not a town office and therefore, neither the town charter nor chapter 109, section 4 of the Rhode Island Public Laws granted the town council the authority to remove a RBC member it had appointed.

FACTS AND TRAVEL

In 2004, the Foster-Glocester Regional School District Committee voted to create the RBC to supervise the construction of a new middle school and the renovation of the existing middle school. In 2005, the Glocester Town Council (Council), in compliance with chapter 109, section 4 of the Rhode Island Public Laws, appointed three members to the RBC, including plaintiff Gregory Laramie who became chairman of the RBC. Following his appointment, a majority of the Council became dissatisfied with Laramie, and on November 1, 2007, the Council “voted to remove him from his position by declaring his seat on the RBC vacant.” Plaintiffs, the RBC and its eight individual members, initiated this action on November 13, 2007, seeking “declaratory and injunctive relief to prevent Laramie’s removal...”

2. Chapter 109, section 4 of the Rhode Island Public Laws authorized the formation of a regional school district for the towns of Glocester and Foster and provided for the formation of a RBC consisting of four members from each town. Foster Glocester, 996 A.2d at 1122 (quoting 1958 R.I. Pub. Laws 675). The primary function of the RBC “is to oversee the construction of new schools or the improvement of existing schools within the regional school district.” Id. at 1122.
3. Id. at 1123.
4. Id.
5. Id. at 1122.
from the RBC.”

The plaintiffs asserted that the Council was not vested with the power to remove Laramie, but if the court found that such authority did exist, it could not be freely exercised without affording Laramie the right to a hearing. Plaintiffs sought to “enjoin defendants from taking further action to remove Laramie or from ‘otherwise interfering with the duties of the [RBC].’” Conversely, defendants argued “that the Glocester Town Charter expressly empowers the [Council] to remove those members” appointed by the Council, and that even if the “charter does not expressly grant the [Council such] authority,” the Council has removal authority by implication.

On January 16, 2008, a Rhode Island Superior Court hearing justice decided “it [was] appropriate . . . to rule simultaneously on the request for declaratory judgment . . . and on the request for an injunction.” The hearing justice then concluded that “the RBC is ‘an agent of the State,’” and accordingly, the Council could only have “removal authority” over its members if there is “explicit legislation” granting such authority. On January 25, 2008, the justice “ordered that Laramie be reinstated as a member of the RBC, and he enjoined the [Council] from further attempts to remove him.” The defendants filed a timely appeal to the Rhode Island Supreme Court after final judgment was entered.

ANALYSIS AND HOLDING

On appeal, the Rhode Island Supreme Court affirmed the Superior Court’s judgment in part, holding “that plaintiff Laramie’s seat on the RBC was not vacated when the new [Council] took office in 2007[,] and that the [Council] lacks authority to remove Laramie from the RBC.” The Court vacated the injunction entered by the Superior Court on the basis “that the

6. Id. at 1123.
7. Id.
8. Foster Glocester, 996 A.2d at 1123.
9. Id. at 1122.
10. Id. at 1123.
11. Id.
12. Id. at 1124.
13. Id.
need for injunctive relief no longer exist[ed].”

 Defendants contended that the Superior Court hearing justice erred when he declared the Council lacked the authority to remove Laramie from the RBC. Defendants based this contention on Article XIV, section C 14-2 of the Glocester Town Charter, which "provides that the term of members of the RBC extends only until the next town council is elected, at which time the RBC members' offices are deemed to be vacant and the new town council is free to appoint new members.” Defendants alternatively contended that even if their interpretation of the charter is rejected by the Court, "common sense and Rhode Island case law recognize an implied power in the [Council] to remove members of committees that it has appointed." Plaintiffs maintained that the hearing justice ruled appropriately and that the charter neither expressly nor implicitly provides the Council with removal authority. Furthermore, plaintiffs contended that even were the charter interpreted to provide Council with removal authority, "Laramie would nonetheless be entitled to notice and a hearing."

 The Court disposed of defendants' second argument by distinguishing Laramie's position as a member of the RBC from defendants' reliance on cases involving the removal authority granted to other governmental bodies, with respect to their own

15. Id.
16. Id. at 1124.
17. Id.

Article XIV, section C 14-2 of the Glocester Town Charter reads in relevant part as follows: 'The term of office of all Offices, members of Boards, Commission or committees appointed with the approval of the Council, or appointed or elected by the Council, shall be concurrent with the term of the Council, unless otherwise provided in the Charter or by State Law. Every elected or appointed officer of the Town who is elected or appointed for a specific term shall continue to hold such office until a successor is elected or appointed and qualified. Any appointed Officer of a Board or Commission may be removed from the office by the Town Council for due cause following a public hearing.'

18. Id. at 1124.
19. Id. at 1125.
20. Foster Glocester, 996 A.2d at 1125.
21. Id.
employees, when there were no pertinent statutory provisions.\textsuperscript{22} In considering defendants’ first argument, that the charter expressly provided the requisite removal authority to the Council, the Court applied “the same \textit{de novo} standard of review” used for “questions of statutory construction.”\textsuperscript{23} In reviewing the language of the charter, the Court noted it would interpret it literally if the language was clear and unambiguous.\textsuperscript{24} Alternatively, if the language was susceptible to multiple interpretations, the Court would look to the intent of the legislature.\textsuperscript{25}

While defendants purport that the plain meaning of the charter both authorizes the Council to remove RBC members and allows a newly elected Council to fill a vacancy on the RBC, the Court disagreed;\textsuperscript{26} defendants’ analysis of the charter was based on a fundamental assumption, that the RBC was a \textit{town} board, commission, committee, or office within the meaning of the charter.\textsuperscript{27} The Court noted that “the RBC is not a town office, and even though state law cloaks the [Council] with the authority to appoint members to the RBC, neither the charter nor state law empower the [Council] to remove a member of the RBC once he or she has been appointed.”\textsuperscript{28} Furthermore, the Court did not find the term of the RBC “concurrent with the term of the [Council] because the RBC is not an ‘office’ within the Town of Glocester.”\textsuperscript{29}

Absent from either the town charter or chapter 109, section 4 of the Rhode Island Public Laws is any provision granting the Council the authority to remove a member of the RBC after his or her appointment.\textsuperscript{30} As mentioned above, the charter refers only to

\begin{itemize}
\item \textsuperscript{22} \textit{Id.} at n.4.
\item \textsuperscript{23} \textit{Id.} at 1126 (quoting Town of Johnston v. Santilli, 892 A.2d 123, 127 (R.I. 2006)).
\item \textsuperscript{24} \textit{Id.} at 1126 (quoting Stewart v. Sheppard, 885 A.2d 715, 720 (R.I. 2005)).
\item \textsuperscript{25} \textit{Id.} (quoting Town of Burrillville v. Pascoag Apartment Assoc., LLC, 950 A.2d 435, 445 (R.I. 2008)).
\item \textsuperscript{26} Defendants interpret the charter to denote the term of the RBC to run concurrently with the term of the elected council, thereby expiring “by operation of law” with a newly elected town council. Following this reasoning the RBC positions would become vacant after the term of the town council that appointed them ended. \textit{See Foster Glocester}, 996 A.2d at 1123.
\item \textsuperscript{27} \textit{See id.} at 1127.
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} \textit{Id.} at 1127-28.
\end{itemize}
those municipal entities of Glocester, and though chapter 109, section 4 of the Rhode Island Public Laws provides that in the event of a vacancy among the three Glocester positions in the RBC the Council may appoint a new member, it does not mention whether a member of the RBC may be removed.\(^3\) The Court concluded that the language of both the Glocester Town Charter and chapter 109, section 4 of the Rhode Island Public Laws are clear and unambiguous, and contain no provisions providing removal authority.\(^3\) Unwilling to assume the Council has such authority without an express provision, the Court held that the Council lacked the authority to remove Laramie from his position on the RBC.\(^3\)

Finally, with respect to the injunction ordered, the Court noted “that the [Superior Court] hearing justice did not abuse his discretion when he granted a preliminary injunction that enjoined the defendants from engaging in further attempts to remove Laramie from the RBC.”\(^3\) The Court, applying a deferential review, assessed the four necessary factors\(^3\) for reviewing a trial court’s grant of a preliminary injunction.\(^3\) Finding these factors satisfied by the plaintiffs, the Court, nevertheless, vacated the grant of a preliminary injunction because after declaring the Council lacked the authority to remove members of the RBC, injunctive relief was no longer necessary.\(^3\)

**COMMENTARY**

The Court’s majority opinion turned on its interpretation of

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31. *Id.* at 1128.
33. *Id.*
34. *Id.* at 1128.
35. ‘[I]n deciding whether to issue a preliminary injunction, the hearing justice should determine whether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo.’ *Id.* at 1124 (quoting *Iggy’s Doughboys, Inc.* v. *Giroux*, 729 A.2d 701, 705 (R.I. 1999)).
36. *Id.* at 1124, 1128.
37. *See id.* at 1128.
the Glocester Town Charter and ultimately, its determination that because the RBC is not a town office, the powers provided by the town charter in regard to town boards, commissions, committees, and offices are inapplicable to the RBC. This is a sensible interpretation of the charter because any given town should not have powers that extend beyond its town limits.

However, Justice Robinson disagreed with this interpretation, albeit with some reticence, in his dissent. Recognizing it was "an extremely close case," Justice Robinson interpreted the charter less restrictively, concluding that it allowed the Council to remove any appointed official from office so long as it is for due cause following a public hearing. He found it significant that State law gave the responsibility to the "elected officials of the towns of Foster and Glocester" to appoint or elect the necessary representatives. Justice Robinson noted little difference when comparing those appointed by the Council to the RBC and those appointed by the Council to other boards or commissions within Glocester.

While the majority's restrictive statutory interpretation may be technically correct, Justice Robinson's dissenting opinion provides a more useful, practical interpretation of the Glocester Town Charter. The majority's interpretation begs the question, who has the authority to remove a problematic appointee if the charter does not grant removal authority to the Council? Chapter 109, section 4 of the Rhode Island Public Laws affords the Council the right to appoint three members to the RBC and the right to appoint a new member should a vacancy arise; however, it provides no express removal authority to the Council. If neither the charter nor the statute make removal provisions then the Council, and the town of Glocester by extension, could potentially be in the untenable position of having no recourse for ousting an unsatisfactory appointee.

Moreover, why should the Council not have the right to

38. See Foster Glocester, 996 A.2d at 1127.
39. Id. at 1129 (Robinson, J., dissenting).
40. See id. at 1129-30.
41. Id. at 1129 (emphasis in original); see also 1958 R.I. Pub. Laws 675-76.
42. Foster Glocester, 996 A.2d at 1129.
43. Id. at 1127.
remove a member? After all, it is their town that the Council
governs, and their town that the member of the RBC represents
on the regional board. Why should the elected officials of the town
not have the authority to look out for their town's best interests?
Perhaps it is because the RBC is a regional board and not a town
board, and thus, another town is relying on the consistency of
appointments. Perhaps it is to ensure that local political decisions
do not waylay school construction and renovation projects. Most
likely, it is because the Court is unwilling to overstep its judicial
boundary. If the Court were to infer the power to remove a board
member absent an explicit provision, it would undermine the
traditional legislative process and enter the arena of judicial
legislation.

Nevertheless, a town council must have the ability to look out
for the interests of its citizens, especially in the arena of
education. In fact the Rhode Island "state constitution provides
that it is the responsibility of the General Assembly 'to promote
public schools [ . . . ] and to adopt all means which it may deem
necessary and proper to secure to the people the advantages and
opportunities of education.'"44 "Municipali[ties] may adopt
charter provisions [affecting] education, as long as [they] are
ratified by" the general assembly,45 but it is irrational to conclude
that a town charter would deny its council recourse for dealing
with inadequate appointees to the detriment of its citizens.
Therefore, Justice Robinson's broader interpretation of the town
charter granting the Council removal authority for due cause and
following a public hearing is a well-justified interpretation.

CONCLUSION

The Rhode Island Supreme Court held that neither the
Glocester Town Charter nor chapter 109, section 4 of the Rhode
Island Public Laws authorizes the Glocester Town Council to
remove an appointee of a regional school building committee. The
Court also held that the term of an appointee to a regional school
building committee does not run concurrently with the term of the
town council.

Nicholas Obolensky

44. Id. at 1125 (quoting R.I. CONST. art. XII, § 1).
45. Id.
Tort Law. Berman v. Sitrin, 991 A.2d 1038 (R.I. 2010). The City of Newport owed a duty to visitors of the Cliff Walk, a municipally maintained attraction, to refrain from willfully or maliciously failing to warn or guard against a known danger. Although the statutory immunity provided by the Rhode Island Recreational Use Statute would normally apply, here, several similar accidents had taken place in the past, putting the City on actual notice that visitors were imperiled by the attraction's latent structural defects.

FACTS AND TRAVEL

While on their belated honeymoon in Newport, Rhode Island, twenty-three year old Simcha Berman, and his wife, Sarah (the plaintiffs in this action), toured The Breakers, one of Newport's historic mansions. Their tour guide pointed out the Cliff Walk, a pathway that runs for miles along Newport's rocky coastline and attracts hundreds of thousands of visitors annually, and suggested that the visitors “experience” the Cliff Walk after the tour. After exiting The Breakers' grounds, the Bermans decided to follow their tour guide's suggestion, and took an adjoining street to the Ochre Point entrance of the Cliff Walk. According to the plaintiffs, there were no warning signs posted at the entrance indicating the dangers of the pathway. The plaintiffs allege that they discovered what appeared to be a “beaten path” leading away from the Cliff Walk's paved portion, and down towards the water’s edge. Looks were deceiving, however, and shortly after stepping onto what the couple believed to be the unpaved path, the ground gave away beneath Simcha's feet, and he tumbled nearly thirty feet to the rocks below. Simcha suffered “catastrophic” injuries

1. Berman v. Sitrin, 991 A.2d 1038, 1042 (R.I. 2010). Since the time of the accident, the couple has divorced. Id. at 1042 n.5.
2. Id. at 1041, 1042.
3. Id. at 1042.
4. Id.
5. Id.
6. Id.
as a result of the fall, including a severe spinal cord injury that rendered him a quadriplegic.\textsuperscript{7}

Simcha and Sarah Berman subsequently filed an action in Rhode Island Superior Court alleging that the City of Newport (City), The Preservation Society of Newport (Society), and the State of Rhode Island (State) “negligently caused Simcha’s injuries by failing to properly inspect, maintain, and repair the Cliff Walk and, further, that they knew of its defects and failed to guard or warn against them.”\textsuperscript{8} All three defendants moved for summary judgment, arguing that the Rhode Island Recreational Use Statute (RUS) afforded them immunity from liability.\textsuperscript{9} Summary judgment was denied by the original hearing justice; however, when the plaintiffs subsequently moved for partial summary judgment to prevent the defendants from asserting the RUS as a defense, the defendants cross-moved on the issue, and the City and the Society successfully argued to a second hearing justice that the RUS entitled them to immunity.\textsuperscript{10} Concluding that neither the Society nor the City charged the plaintiffs an admission fee to use the Cliff Walk, or discovered the plaintiffs in an imperiled position prior to the Simcha’s fall, the lower court held that the RUS shielded both defendants from liability.\textsuperscript{11}

\textsuperscript{7} Berman, 991 A.2d at 1042.
\textsuperscript{8} Id.
\textsuperscript{9} Id. Rhode Island’s Recreational Use Statute was enacted “to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability to persons entering thereon for those purposes.” R.I. GEN. LAWS § 32-6-1 (2008). To accomplish this goal, the statute provides, in pertinent part, that

[An owner of land who either directly or indirectly invites or permits without charge any person to use that property for recreational purposes does not thereby:

(1) Extend any assurance that the premises are safe for any purpose;
(2) Confer upon that person the legal status of an invitee or licensee to whom a duty of care is owed; nor
(3) Assume responsibility for or incur liability for any injury to any person or property caused by an act of omission of that person.

Id. § 32-6-3 (2008). In 1996, the General Assembly amended the RUS, expanding its coverage to municipal and state landowners as well as private landowners. \textit{See id.} § 32-6-2 (Supp. 2009); Berman, 991 A.2d at 1044.
\textsuperscript{10} Berman, 991 A.2d at 1042.
\textsuperscript{11} Berman v. Sitrin, C.A. No. NC/2003-0402, slip op. at 11-12 (R.I.)
Superior Court granted summary judgment as to those defendants accordingly. The plaintiffs' appeal followed.

ANALYSIS AND HOLDING

On appeal, the Rhode Island Supreme Court embarked on a de novo review of the lower court's grant of summary judgment for the Society and the City. In describing the current state of Rhode Island premises liability law, the Court noted that by explicitly restricting visitors to qualifying recreational areas from being afforded invitee or licensee status, the RUS limits the liability of landowners. This includes municipal and state landowners, who open up their land for free public use, reflecting the General Assembly's intent "to treat those who use private property for recreational purposes as though they were trespassers." Landowners do not enjoy absolute freedom from liability, however, as the RUS does impose limitations on landowner immunity. Of particular relevance to this case was...
the limitation placed on landowner immunity by the statute “[f]or the willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity after discovering the user’s peril.”18

**Potential Liability of the Preservation Society of Newport**

The plaintiffs contended on appeal that the trial court erroneously granted summary judgment for the Society.19 First, the plaintiffs argued that because the Society charged an admission fee for The Breakers, and the Cliff Walk “experience” was part and parcel with the mansion tour, the RUS does not apply.20 The Court quickly rejected this argument, however, pointing out that while the Society charged an admission fee to tour The Breakers and its grounds, Simcha’s injury occurred not within the mansion’s ground, but rather on a public easement that was accessible from a number of points.21 Thus, the Court concluded, the fee charged by the Society was not for access to the Cliff Walk, but rather for access to and a tour of the mansion.22

The plaintiffs next asseverated that they were not merely members of the public utilizing the Cliff Walk, but rather were invited guests of the Society by virtue of the tour guide’s invitation to experience the Cliff Walk after the tour.23 The Court rejected this argument as well, noting that because the Cliff Walk “is free and open to the public,” “an invitation to visit is not necessary.”24

The plaintiffs’ third argument – that the Society was engaged in a joint enterprise with the City to maintain the Cliff Walk, and thus should be liable to the same extent as the City – similarly fell flat.25 The Court noted that “there [wa]s not a scintilla of evidence in this record suggesting that the Society and the city were involved in a joint enterprise.”26 In fact, a municipal resolution assuring that the City “will maintain the public

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18. *Id.*; Berman, 991 A.2d at 1044.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. Berman, 991 A.2d at 1046.
26. *Id.*
easement of passage along the Cliff Walk," militated in favor of a conclusion that the adjoining landowners never “agreed or even contemplated acting in such a close relationship with the city (or state) that a joint enterprise is a plausible construction of their relationship.”

Having disposed of the plaintiffs’ contentions with regard to the Society’s liability under the RUS, the Court next turned to the question of whether the Society might be liable to the plaintiffs on some other basis. For the plaintiffs to prevail on a negligence claim against the society, they would need to demonstrate that the Society owed them a legal duty. However, the record clearly demonstrated that the Cliff Walk was a public easement, and “[i]t is a well established legal principle in this jurisdiction, as well as others, that a landowner whose property abuts a public way has no duty to repair or maintain it.” Therefore, courts “[t]ypically, courts will not impose liability for injuries that occur on land over which the owner has no control, and significantly, no duty to repair.” Analogizing this case to the factual situation in Ferreira v. Strack, where a church was not liable for injuries sustained by exiting parishioners who were hit by a drunk driver while crossing an adjoining public street over which the church had no control, the Court here concluded that because the Society did not control the Cliff Walk, a public way, it had no duty to prevent injuries that might occur there, even if they were foreseeable. Instead, public easements are the responsibility of the government, and adjoining landowners owe “no duty to warn, construct fences, or take any other precautions” to prevent injury. Thus, because the Society owed no legal duty to the plaintiffs, the Court affirmed summary judgment for that defendant.

27. Id. (citation omitted).
28. Id. at 1046-47.
29. Id. at 1047.
30. Id.
31. Berman, 991 A.2d at 1047.
32. Id. at 1047-48 (citing Ferreira v. Strack, 636 A.2d 682, 684, 686 (R.I. 1994)). The Court further noted that this position is in accord with decisions in other jurisdictions. Id.
33. Id. at 1048.
34. Id. The Superior Court had granted summary judgment upon a finding that the RUS precluded the Society’s liability because it neither charged admission to the Cliff Walk, nor “discovered plaintiffs in a position of
Potential Liability of the City of Newport

On the issue of the City's duty to the plaintiffs, the Court reached a different conclusion. The RUS provides a two-pronged test under which a landowner who would otherwise be afforded immunity by the statute will become liable to an ill-fated visitor upon his land when the landowner (1) discovers the user's peril, and (2) willfully or maliciously fails "to warn or guard against a known danger." The City maintained that it owes no duty to Cliff Walk visitors under the RUS unless and until a City employee actually discovers a specific visitor approaching danger thereon. However, the Court observed that such a literal reading of this exception "would lead to an absurd and blatantly unjust result" by "render[ing] the exception meaningless in the context of this case." The Court therefore declined to take such a rigid approach to its construction of the RUS, instead "striv[ing] to adopt a construction of a statute that avoids an absurd or unjust result." The Court noted that in this case, the record clearly demonstrated that the City had actual knowledge of the Cliff peril. The Supreme Court affirmed, but on other grounds, pointing to the Society's lack of control over the Cliff Walk, and corollary lack of duty to any of the Cliff Walk's visitors. Id. at 1048.  

Id. at 1045. The Supreme Court affirmed, but on other grounds, pointing to the Society's lack of control over the Cliff Walk, and corollary lack of duty to any of the Cliff Walk's visitors. Id. at 1048.

Id. at 1053.

Id. at 1049; see also, R.I. GEN. LAWS § 32-6-5 (2008). The second prong of this test – whether there was a willful or malicious failure to warn or guard against a known danger – is a question of fact and could not be resolved on appeal and would instead need to be considered by the fact-finder on remand. See Berman, 991 A.2d at 1049, 1053.

Berman, 991 A.2d at 1048; see also R.I. GEN. LAWS § 32-6-5 (2008).

Berman, 991 A.2d at 1049-50.

Id. Writing in concurrence, Justice Flaherty emphasized that the City's reading of the statute would allow a landowner, "saturated with the knowledge that some feature of his land presents a clear and present danger to completely innocent users, simply [to] adopt a 'see no evil, hear no evil, speak no evil' attitude and use the statute as a shield from liability." Id. at 1054 (Flaherty, J., concurring). This, Justice Flaherty reasoned, could not possibly have been the intent of the General Assembly in enacting the RUS, as it "would provide an incentive to landowners to be callous and altogether irresponsible with respect to the safety of people entering upon their land for simple recreational pleasure, in the face of danger known to the owner, but of which the recreational user is totally unaware." Id.
Walk's hidden hazards. In particular, the Cliff Walk Commission's Annual Report warned that drainage defects cause rain runoff to create erosion trails, like the one the plaintiffs had ventured down, which would appear to unsuspecting visitors to be a foot path. Similarly, reports prepared during the past four decades by the National Park Service, the United States Army Corps of Engineers, and the United States Department of Agriculture Soil Conservation Service described the latent defects of the Cliff Walk that put its pedestrian visitors at great risk. Additionally, the City was aware of at least two other tragic accidents that had occurred on the Cliff Walk that were strikingly similar to Simcha's. Thus, although an employee or representative of the City did not literally discover the Bermans as they approached imminent danger, "[i]t [wa]s beyond dispute that for many years, the city has had actual notice of the dangerous instability of the ground underneath the Cliff Walk and its eroding edge." In effect, the Court concluded that when the City became aware of the Cliff Walk's hidden defects and the risk they posed to unsuspecting visitors, there arose "an affirmative duty to take reasonable steps to warn and shield unsuspecting visitors, such as the Bermans, against these known and grave dangers in some reasonable manner." Rejecting the notion that the legislature "intended to relieve the city from any responsibility whatsoever to the many tourists who visit the Cliff Walk," the Court held that the plaintiffs had satisfied the first prong of the

40. Id. at 1049-50.
41. Id. at 1049 & n.12.
42. Id. at 1050.
43. Id. at 1049-50. The first of these accidents occurred in 1987 when a Salve Regina student fell to his death as a result of the Cliff Walk's weak structure. See id. at 1050. Salve Regina's president repeatedly implored the City to install fencing around a structurally defective portion of the Cliff Walk to delineate for visitors the point at which it is unsafe to pass. Id. In 1991, another Cliff Walk visitor, Michael Cain, also fell to his death when he stepped onto a "well-worn spot"and the "ground beneath his feet gave way." Id. at 1049 (quoting Cain v. Johnson, 755 A.2d 156, 158, 168 (R.I. 2000) (Goldberg, J., concurring in part and dissenting in part)). In fact, Cain's fall occurred nine years, almost to the day, before Simcha Berman's fall, and the Supreme Court's ruling in Cain came down only twenty-three days before Simcha tumbled from the Cliff Walk to the rocks below. See id. at 1041 n.1, 1049.
44. Id. at 1050.
45. Berman, 991 A.2d at 1051.
exception's two-part test, and the City thus owed a duty to recreational users of the attraction notwithstanding the immunity typically afforded by the RUS.46

In elucidating the second prong of this test—"the willful or malicious failure to guard or warn against a dangerous condition"47—the Court relied on the plain meaning of the statute's terms, defining "willful" as "[v]oluntary and intentional,"48 and malicious as "[s]ubstantially certain to cause injury."49 Additionally, the Court defined "guard" to mean "[t]o protect from harm or danger, esp[ecially] by careful watching; ... [t]o take precautions,"50 and "warning" to be "[t]he pointing out of a danger, esp[ecially] to one who would not otherwise be aware of it."51 The Court then concluded that based on these definitions, "a fact-finder reasonably could find that after learning about the Cliff Walk's instability, particularly along the area of Ochre Point, the city voluntarily and intentionally failed to guard against the dangerous condition."52 Furthermore, given that the City "jealously guards and promotes the Cliff Walk as a cornerstone of its tourism industry," and had received millions of dollars from federal, state, and municipal sources for upkeep, the Court was simply "not persuaded that the Legislature intended the RUS to serve as an invitation to ignore known hazards while profiting from this major tourist attraction where such danger is present."53

46. Id.
48. Berman, 991 A.2d at 1052 (quoting BLACK'S LAW DICTIONARY 1737 (9th ed. 2009)).
49. Id. (quoting BLACK'S LAW DICTIONARY 1043 (9th ed. 2009)).
50. Id. (quoting AMERICAN HERITAGE DICTIONARY 580 (2d ed. 1985)).
51. Id. (quoting BLACK'S LAW DICTIONARY 1722 (9th ed. 2009)).
52. Id. at 1052. The Court also noted that this construction was in accord with interpretations of courts in other jurisdictions applying equivalent statutes. Id. In particular, the Court noted that under Georgia law, a landowner may be liable, despite the state's immunity provision, after discovering a hidden condition that poses an unreasonable risk of harm to visitors, and failing to warn about or guard against that defect. Id. (citing Quick v. Stone Mountain Mem'l Ass'n, 420 S.E.2d 36, 38 (Ga. Ct. App. 1992)). Similarly, under Illinois law, an otherwise immune landowner may incur liability after becoming informed of prior injuries caused by a dangerous condition on the land, if the landowner does not attempt to remedy the hazard. Id. at 1052-53 (citing Cacia v. Norfolk & Western Ry. Co., 290 F.3d 914, 920 (7th Cir. 2002)).
53. Id. at 1053.
Thus, the Court vacated judgment and remanded the case for a
determination by the trial court as to whether the City acted
willfully or maliciously in failing to post warnings or otherwise
guard against the known danger. 54

In dissent, Chief Justice Suttell, joined by Justice Robinson,
argued that the plain meaning of the statute and settled
jurisprudence militated in favor of the opposite result as to the
City. 55 In particular, the dissent emphasized that according to the
holdings of prior cases, the RUS merely codified the common law,
insulating landowners by classifying visitors as trespassers for
purposes of liability. 56 Furthermore, the Court had previously
held that under common law principles “a landowner owes a
trespasser no duty until he or she is actually discovered in a
position of peril.” 57 Thus, the dissent argued, although the City
was aware of the dangerous condition generally, but not of Simcha
Berman’s peril specifically, under the plain meaning of the statute
as well as the Court’s prior interpretations of the underlying
common law principles, the City owed no duty the plaintiffs. 58
Finally, the dissent emphasized that while Simcha’s catastrophic
injuries may well have been prevented by a simple warning posted
at the entrance to the Cliff Walk, it is the purview of the
legislature, and not the Court, to alter the liability scheme that
dictates the duty owed by landowners to users of recreational
lands. 59

COMMENTARY

Two interesting points may be drawn from this case. First,
this case signifies an apparent departure from earlier
jurisprudence construing the RUS. In prior cases holding that
government-landowners owed no duty to injured users of
recreational areas, the Court “on several occasions exhorted the
General Assembly to revisit the provisions of the RUS, ‘especially
where public parks and similar public recreational areas are

54. Berman, 991 A.2d at 1053.
55. Id. at 1054 (Suttell, C.J., dissenting).
56. Id. at 1054-55.
57. Id. at 1055 (quoting Cain, 755 A.2d at 161) (emphasis added).
58. Id.
59. Id. at 1055-56 (Suttell, C.J., dissenting).
concerned,” finding it “troubling (to say the least) to be confronted with a legal regime’ in which no duty of care exists for users of state and municipal recreational sites.”

By contrast, here, after inaction by the legislature in the intervening years, the Court discontinued its prior policy of merely imploring the General Assembly to revisit the statute in light of the injustice worked upon innocent visitors. Instead, the Court asserted its own authority, ameliorating for the plaintiffs at bar “the unfortunately harsh consequences that flow from classifying those who use public recreational facilities as trespassers.”

While the majority premised its markedly different approach in this case on its distinguishing characteristics — similar accidents had previously occurred on the Cliff Walk, making the City aware of the attraction’s structural inadequacies — the majority’s departure from its position in prior cases may also reflect the Court’s building frustration with the Legislature’s unresponsiveness to its pleas.

Second, through this decision, the Court has substantially lowered the hurdle that injured plaintiffs must clear in order to make out a claim against the owner of the recreational land where an injury occurred. Rather than being required to demonstrate actual knowledge on the part of the landowner of the particular user’s individualized peril, an injured litigant need now show only that the landowner had either actual or constructive knowledge of the condition that caused the injury, and thereafter willfully or maliciously failed to warn or guard against it.

Thus, the Court’s

60. Berman, 991 A.2d at 1055-56. (quoting Lacey v. Reistma, 899 A.2d 455, 458 (R.I. 2006)).
61. Id.
62. Id. at 1044 n.8.
63. Id. at 1051.
64. See, e.g., Smiler v. Napolitano, 911 A.2d 1035, 1037, 1041 (R.I. 2006) (holding that when a visitor to a city-owned park tripped, fell, and was injured while trying to evade a swarm of attacking bees, the city was immune from liability under the RUS, as “the city’s duty would arise [only] at the point when a city employee discovered that [the visitor] was approaching an area where there was a known risk of bees”); Lacey, 899 A.2d at 456, 458 (holding that when a young boy sustained serious injuries after riding his bicycle off of a cliff at a state park, summary judgment was properly granted because the plaintiffs failed to demonstrate that the defendants had discovered the boy’s immediate peril).
65. See Berman, 991 A.2d at 1050.
holding in *Berman* will likely allow more plaintiffs to recover, notwithstanding the apparent immunity afforded to landowners by the RUS, by expanding the statutory exception to that immunity.\textsuperscript{66}

\textbf{CONCLUSION}

The Rhode Island Supreme Court, emphasizing the need to construe Rhode Island's Recreational Use Statute in a manner that would not produce an absurd or unjust result, held that when the City of Newport had actual and constructive knowledge about a latent defect of a popular municipal tourist attraction, which had caused deaths in the past, it had "discovered" the visitor's peril, such that the City was not statutorily immunized from suit. Because the second part of the liability inquiry – whether there was a willful or malicious failure to guard against or warn about the danger – required a finding of fact, the Supreme Court reversed and remanded to the Superior Court for further proceedings.

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\textsuperscript{66} Although it would appear that the *Berman* Court's holding would apply equally to government landowners as it would to private landowners, the Court did emphasize the Cliff Walk's status as a municipally maintained attraction, for which the City has received considerable funds to maintain. See *Berman*, 991 A.2d at 1053. Similarly, in *Lacey*, the court emphasized the injustice worked by the RUS as to injuries that occur at public recreation areas, reflecting a concern as to the injustice created by the immunity of governmental landowners under the statute. See *Lacey*, 899 A.2d at 458.
2010 R.I. Pub. Laws ch. 021, 022. An Act Relating to Education – School and Youth Programs Concussion Act. Directs the Department of Education and the Department of Health to jointly develop guidelines to inform and educate coaches and participants in youth sports programs of the risk of concussion and head injury. The Act requires coaches, trainers, and volunteers involved in youth sports programs to complete a training course in concussions and traumatic brain injuries. Youth athletes who are suspected of sustaining a concussion or head injury in a practice or game must be removed from competition and must not return to play until they receive written clearance from a licensed physician.

2010 R.I. Pub. Laws ch. 025, 028. An Act Relating to Criminal Offenses – Explosives and Fireworks; Health and Safety – Fireworks and Pyrotechnics. Legalizes low-level fireworks including, but not limited to, ground-based and hand-held sparkling devices (non-aerial fireworks). Among the types of fireworks now permitted to be stored, possessed, sold, transported, and used by persons in the state of Rhode Island who are at least sixteen years of age are: fountains, illuminating torches, wheels, ground spinners, flitter sparklers, sparkers, party poppers, snappers, toy smoke devices, snakes, glow worms, wire sparklers, dipped sticks, and paper caps containing not more than 0.025 grains of explosive mixture ammunition. Permits must be obtained for display and aerial consumer fireworks.

2010 R.I. Pub. Laws ch. 030. An Act Relating to Criminal Procedure – Sentence and Execution. Provides that where a defendant has contested a violation of his or her probation or suspended sentence, upon the defendant’s motion, the sentence of violation shall be quashed; any imprisonment shall be terminated when any of the following occur on the charge, which was specifically alleged to have constituted the violation: (1) a not
guilty verdict or a motion for judgment of acquittal or dismissal is made and granted pursuant to Superior or District Court Rule of Criminal Procedure, Rule 29; (2) a “no true bill” is returned by the grand jury; (3) a “no information” based upon a lack of probable cause is returned by the attorney general; (4) a motion to dismiss is made and granted pursuant to section 12-12-1.7 of the Rhode Island General Laws and/or Rule 9.1 of the Superior Court Rules of Criminal Procedure; or (5) the charge fails to proceed in District or Superior Court due to a lack of probable cause or where the state believes there is reason to doubt the culpability of the accused.

2010 R.I. Pub. Laws ch. 082, 085. An Act Relating to Businesses and Professions – Confidentiality of Health Care Communications and Information Act – Health Care Communications and Information. Expands upon the “Confidentiality of Health Care Communications and Information Act.” A health care provider may release confidential health care information to a legal parent or guardian of a minor child if the health care provider believes the child is, or has been, physically, psychologically, or sexually abused and/or neglected.

2010 R.I. Pub. Laws ch. 092, 132. An Act Relating to Motor Vehicles and Other Vehicles – Passing, Use of Lanes, and Rules of the Road. “Franks Act” creates the offense of “Unsafe Passing of a Person Operating a Bicycle.” This legislation sets forth: (1) procedures that a driver of a motor vehicle must follow when passing a bicycle on the road; and (2) certain exemptions. The fine for violating this statute according to section 31-41.1-4 of the Rhode Island General Laws is $85.

2010 R.I. Pub. Laws ch. 100, 106. An Act Relating to Education – Military Children: Interstate Compact on Educational Opportunity for Military Children. This compact is designed to remove barriers to educational success imposed on children of military families due to frequent moves. The law applies broadly to children from a wide range of military families including active duty, severely injured veterans, and members who die during active duty. The law attempts to streamline the way these students are treated when transferring between schools. A
student is to be admitted to a school with only unofficial education records and without the required immunizations in order to limit delays which are harmful to the student's progress. Schools are to recognize the course placement authorized by the student's previous school and waive specific course requirements if similar course work has been taken at a previous school. The law requires cooperation among governmental agencies, local education agencies, and military installations to ensure participation and compliance with the compact. Additionally, the law creates the "Interstate Commission on Educational Opportunity for Military Children," which will contain one voting representative from each member state. This commission will, among other things, provide dispute resolution between member states, promulgate rules to further the purpose of the compact, and create uniform standards for collecting and exchanging data among the states.

2010 R.I. Pub. Laws ch. 102. An Act Relating to Motor and Other Vehicles – Suspension or Revocation of Licenses. Enhances sanctions by making it a felony to operate any vehicle while under the influence of "intoxicating liquor, drugs, toluene, or any controlled substance," where the defendant's license is suspended, revoked, or cancelled for an underlying conviction of operating under the influence. Punishment may be imprisonment for up to three years and a fine of up to $3000. Additionally, alcohol and/or drug treatment is mandatory and cannot be suspended.


2010 R.I. Pub. Laws ch. 110, 229. An Act Relating to Food and Drugs – Medical Marijuana Act. Amends the "Medical Marijuana Act" to provide that applications and supporting information submitted by qualifying patients, their primary caregivers, and their practitioners are not only confidential, but are also exempt from the provisions of section 38-2 of the Rhode Island General
Laws, the Rhode Island Access to Public Information, and are not subject to disclosure.

2010 R.I. Pub. Laws ch. 124, 125. An Act Relating to Education – The Education Adequacy Act. Establishes a permanent statewide school-financing formula, which goes into effect for the 2011-2012 school year. The Act ties state aid to the number of students a school district serves and the proportion of low-income students within that district. The formula takes into account a municipality's ability to meet the costs of education by including the equalized property value and the median family income of each city and town. The Act requires the state to pay an increased share of the costs of regional transportation, school construction, and teaching high-need special-education students. Also, the Act reduces and eventually eliminates bonuses for regionalized school districts.

2010 R.I. Pub. Laws ch. 128, 256. An Act Relating to Criminal Procedure – Sentence and Execution. Provides that upon successful completion of a deferred sentence the defendant's case shall be dismissed, shall be deemed "exonerated," and therefore shall have recourse to section 12-1-12 of the Rhode Island General Laws (Sealing of Records). This legislation attempts to implement the corrections that the Rhode Island Supreme Court set forth with section 12-19-19 of the Rhode Island General Laws in State v. Briggs, 934 A.2d 811 (R.I. 2007). (Superior Court does not have the statutory authority to dismiss a defendant's deferred sentence as statute is written). The Superior Court recently held that this statute is unconstitutional as it presents a separation of powers issue. Cases are currently pending on appeal in the Rhode Island Supreme Court to determine the constitutionality of the statute and whether the statute applies retroactively.

2010 R.I. Pub. Laws ch. 163, 167. An Act Relating to State Affairs and Government – Criminal Procedure Sentence and Execution – Hate Crimes. Expands the definition of hate crimes to include any crime motivated by prejudice against a person who is homeless or is perceived to be homeless.

Procedure – Identification and Apprehension of Criminals. Provides for the creation of a Task Force of criminal justice stakeholders empowered to: (1) identify and recommend policies and procedures to prevent the injustice of a wrongful conviction caused by mistaken eyewitness identification; and (2) improve lineup procedures during criminal investigations. The Task Force was required to submit a report of its findings, which is currently pending a hearing before the House Judiciary Committee.

2010 R.I. Pub. Laws ch. 166, 175. An Act Relating to Health and Safety – Expedited Partner Safety. Allows a licensed physician, licensed physician assistant, or certified registered nurse practitioner to prescribe and dispense prescription drugs for the treatment of sexually transmitted chlamydia or gonorrhea to a patient’s sexual partner(s) without first examining the partner(s). The Act immunizes any authorized prescriber under such circumstances, as well as the healthcare facility or group where the prescriber works, from civil and criminal liability.

2010 R.I. Pub. Laws ch. 180, 197. An Act Relating to Insurance – Extended Medical Leave. Allows employers to offer medical benefits for up to eighteen months to an employee who: (1) provides written documentation explaining that the employee or a member of the employee’s immediate family is unable to work full-time for medical reasons; (2) anticipates eventual return to full-time employment; and (3) has been placed on extended medical leave by his/her employer. The decision as to whether an employee is eligible for extended medical leave rests entirely with the employer, and the employer may require the employee to pay for all or part of the cost of the extended medical benefits during the eighteen month extended medical leave period. After eighteen months have elapsed, the employee is eligible for extended medical benefits as though he or she had been involuntarily terminated, pursuant to section 27-19.1-1 of the Rhode Island General Laws.

to provide on-demand wheelchair accessible taxicab service throughout the state, especially at train stations and T.F. Green Airport. The federally funded program is intended to reduce barriers to transportation services and expand the transportation mobility options available to disabled individuals needing wheelchair accessible transportation beyond the requirements of the Americans with Disabilities Act of 1990. Certificates to operate wheelchair accessible taxicab services will be issued to qualified applicants approved by the Division of Public Utilities and Carriers. Purchase of the taxicabs is fully funded by federal grants and the taxicab operators, such that the vehicle purchases and maintenance shall have no negative impact on the transit authority's budget. Implementation of the initiative was directed to begin on or before January 1, 2011.

2010 R.I. Pub. Laws ch. 232, 240. An Act Relating to Courts and Civil Procedure – Procedure in Particular Actions – Death By Wrongful Act. Amends the current “Death By Wrongful Act” to allow for the son or daughter, regardless of the son’s or daughter’s age, to recover damages for the loss of parental society and companionship, where the parent’s death was caused by the wrongful act, neglect, or default of another person. This amendment also provides that a parent may recover damages for the loss of a son’s or daughter’s society and companionship, regardless of the son’s or daughter’s age, where the son’s or daughter’s death was caused by the wrongful act, neglect, or default of another person.

2010 R.I. Pub. Laws ch. 242, 253. An Act Relating to Motor and Other Vehicles – Motor Vehicle Offenses – License Suspensions (“The Colin B. Foote Act”). Requires that any person convicted of moving violations on four separate and distinct occasions, within an eighteen month period, attend sixty hours of driver training and perform sixty hours of community service. Additionally, if the court determines that the person’s continued operation of a motor vehicle “would pose a substantial traffic safety hazard,” the person may be subject to a fine of up to $1000, drivers’ license suspension for up to one year, or court-ordered drivers’ license revocation for up to two years. Any person whose license has been revoked under this provision may petition the court for restoration of the
privilege at the expiration of the time of revocation, and must present proof of financial responsibility as well as evidence that "establishes that no grounds exist which would authorize refusal to issue a license."

2010 R.I. Pub. Laws ch. 308, 313. An Act Relating to Food and Drugs – Uniform Controlled Substances Act. Amends the "Uniformed Controlled Substances Act" by adding that anyone who distributes a controlled substance or a controlled substance analogue to an individual without that individual's knowledge, while having the intent to commit a crime of violence, shall be punished by up to ten years imprisonment.